Cite as Det. No. 00-057, 19 WTD 986 (2000)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Correction of Assessment and Refund of	)	D E T E R M I N A T I O N
	)	No. 00-057
. . .	)	Registration No. . . .
	)	FY. . ./Audit No. . . .

[1] RULE 175; RCW 82.08.0262; RCW 82.12.0254: RETAIL SALES TAX AND USE TAX -- WATERCRAFT EXEMPTIONS -- DELIVERING BUNKER FUEL -- TRANSPORTING THEREIN OR THEREWITH -- INTERSTATE OR FOREIGN COMMERCE. The fact that ocean-going vessels to which Taxpayer's watercraft deliver bunker fuel cannot consume the fuel until they are in international waters, does not bring Taxpayer's instate transportation of the bunker fuel within the exemptions in RCW 82.08.0262 and RCW 82.12.0254. The bunker fuel is no longer an item of commerce once Taxpayer unloads it onto the other vessels in Washington waters, thus Taxpayer's transportation is not a leg of a continuing movement in interstate or foreign commerce.

[2] RULE 175; RCW 82.08.0262; RCW 82.12.0254: RETAIL SALES TAX AND USE TAX -- WATERCRAFT EXEMPTIONS -- DELIVERING BUNKER FUEL -- TRANSPORTING THEREIN OR THEREWITH -- INTERSTATE OR FOREIGN COMMERCE. Delivering marine bunker fuel, for consumption, to other vessels carrying and moving cargo in interstate or foreign commerce, does not constitute "transporting" the cargo that is aboard the other vessels. It is not a use that qualifies for the exemptions in RCW 82.08.0262 and RCW 82.12.0254.

[3] RULE 175; RCW 82.16.050(8): PUBLIC UTILITY TAX -- DEDUCTIONS -- EXPORTS -- COMMODITIES -- FORWARD -- FOREIGN DESTINATIONS. Revenue from transportation of bunker fuel, for consumption, to ship side on Washington tidewater or navigable tributaries, is not deductible under RCW 82.16.050(8). There is no forwarding of commodities to interstate or foreign destinations required by the statute.

Headnotes are provided as a convenience for the reader and are not in any way a part of the decision or in any way to be used in construing or interpreting this Determination.

NATURE OF ACTION:

A taxpayer that transports marine fuel and transfers (bunkers) fuel to ocean-going vessels located in Washington waters, appeals assessment of use tax on its use of tugs and barges in conducting its activities, and appeals assessment of public utility tax (PUT) on its revenue from fuel transportation and bunkering. It seeks the benefit of an exemption from the use tax, RCW 82.12.0254, and a deduction allowed in computing PUT, RCW 82.16.050(8).[1]

FACTS:

Prusia, A.L.J. -- . . . ("Taxpayer") is a Washington corporation with offices in [Washington] and [outside Washington]. Approximately 90% of Taxpayer's activity is bunkering fuel to ocean-going vessels that will move directly to ports in other states or foreign countries. "Bunkering" means an oil transfer operation to replenish a self-propelled vessel with fuel used to propel the vessel. Taxpayer does not own or sell the marine fuel. It transports the fuel for oil companies for hire, and bills the oil companies for its services. In addition to bunkering ships, Taxpayer transports oil from refineries to oil storage tanks for the oil companies, and offers some towing services.

Taxpayer does about 70-80% of its bunkering business in Puget Sound, with the remainder performed [outside Washington]. Taxpayer handles about . . .% of the total bunkering business conducted in Washington. Typically, an oil company will direct Taxpayer to pick up fuel at a Washington or . . . oil terminal and deliver it to an ocean-going vessel located in the tidewaters or navigable tributaries. At least 80% of the vessels are located outside of the city limits of the city where the loading terminal (fuel storage tank) is located. None of the bunkering is performed on the high seas. Sometimes Taxpayer's vessels pass through Canadian waters while traveling between points in Washington, especially when bunkering in the Strait of Juan de Fuca, where all outbound traffic is required to stay north of the mid-channel buoys.

In delivering the bunker fuel, Taxpayer's tugs and barges tie up to and physically connect with the ships that are receiving the fuel. The vessels are made fast in order to prevent separation during the fueling process.

Approximately 97% of the bunker fuel Taxpayer delivers is heavy bunker fuel for use only outside the State of Washington due to environmental considerations. Taxpayer delivers this fuel to ships for use only on the high seas, a fact substantiated by foreign fuel exemption certificates filed by the ships. Approximately 3% of the bunker fuel Taxpayer delivers is lighter and cleaner burning oil that vessels use in Puget Sound and other ports.

Taxpayer points out its customers and the ships it bunkers enjoy tax exemptions on the sales of the marine fuel it delivers. A seller of fuel can deduct amounts derived from sales for consumption outside U.S. territorial waters from the measure of its B&O tax, under RCW 82.04.433. Pursuant to an exemption granted by RCW 82.08.0261, retail sales tax does not

[1] Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410.

apply to bunker fuel sales, even though possession is taken in Washington. The ships are not required to pay use tax on use of the purchased fuel, unless they actually use that fuel in Washington.

Taxpayer understands that some of the bunker fuel it delivers is later sold in other markets where the price for bunker fuel is good, rather than consumed by the ship. Taxpayer does not know, when it delivers bunker fuel, whether the ship will consume all the fuel or sell a portion.

Taxpayer has a fleet of tugs and barges it uses to provide bunkering and fuel transport services. Taxpayer owns . . . tugboats and . . . fuel barges based in [Washington], and . . . tugboats and . . . fuel barges based [outside Washington]. Additionally, it leases . . . fuel barges from unrelated third parties, which it uses to transport fuel between the Puget Sound oil terminals and storage tanks [outside Washington]. It also uses some smaller tugs to meet its larger tugs and tows, which assist in towing the barge to its docking site and in maneuvering the barge into its slip. It also has a barge, the ". . .," that is chartered to a cement manufacturer.

The Audit Division of the Department of Revenue (Department) examined Taxpayer's books and records for the period January 1, 1994 through December 31, 1997. On December 16, 1998, the Audit Division issued tax assessment number FY. . ., for additional taxes and interest owing for the audit period in the total amount of $. . . . The assessment remains unpaid.

Taxpayer requests correction of the following portions of the assessment. We present them out of order, to make the presentation and discussion easier.

Schedule 4 - $. . . in sales and/or use tax on capital asset acquisitions (mostly tugs and barges)

During the audit period, Taxpayer purchased capital assets on a non-routine basis, on which it did not pay sales tax. The majority of the purchases were of tugs and barges. Schedule 4 assesses deferred sales or use tax on the purchases. The Audit Division concluded the tugs and barges were not exempt from tax, because they were not "primarily used" in interstate or foreign commerce.

Taxpayer concedes the vessels were primarily used within Washington waters. Taxpayer contends its use of the vessels nonetheless was exempt, under RCW 82.12.0254 and WAC 458-20-175 (Rule 175), which exempt the use of watercraft "used primarily in conducting interstate or foreign commerce by transporting therein or therewith persons or property for hire."

Schedule 3 -- $. . . in sales and/or use tax on consumables, e.g. paints, hoses, and engine parts

During the audit period, Taxpayer purchased supplies to outfit and maintain its tugs and barges, on which it did not pay retail sales tax. Schedule 3 details those purchases, using a test period, and assesses sales and/or use tax. Schedule 3 details a variety of items, such as paints, hoses, engine parts, fasteners, plywood, lights, hatches, seals, bushings, pumps, filters, and gauges.

In its petition, Taxpayer states that retail sales tax or use tax was properly paid on all purchases of consumable supplies consumed in the state. At hearing, it argued its use of supplies on its tugs and barges was covered by the same exemption that applied to its tugs and barges, RCW 82.12.0254.

Schedules 5 and 8 - $. . . in public utility tax (PUT) on transportation activity; less $. . . credit for stevedoring tax paid; [barge] lease payments

During the audit period, Taxpayer reported its revenue from transporting and bunkering fuel under the Stevedoring B&O tax classification. The Audit Division concluded the activity is taxable under the higher public utility tax (PUT). During the audit investigation, Taxpayer contended that if PUT applied, most of the revenue could be deducted under RCW 82.16.050(8), which allows a deduction for certain revenues derived from the transportation of commodities to vessels which will continue the transportation to an interstate or foreign destination. The Audit Division concluded the deduction did not apply, stating the following reason for its conclusion:

> The delivery of fuel oil to ocean-going vessels does not qualify for the deduction contained in RCW 82.16.050(8) for two reasons. First, the marine fuel oil is not a commodity that is consigned to an interstate or foreign destination. The sale of marine fuel oil for use in propelling ocean-going vessels is purely local activity and the destination of the fuel is aboard ship within the state. Second, it appears that most of the marine fuel oil is transported from storage tanks to ocean-going vessels located within the corporate limits of the same city or town. The deduction is not available when the point of origin and the point of delivery is within the corporate limits of the same city or town.

Taxpayer states that some of the revenue assessed PUT under Schedule 5 was from its charter of the barge . . . to a cement manufacturer. It states the cement manufacturer used the barge in Washington to haul clay between the manufacturer's clay pit and its cement manufacturing plant, and used the barge as a storage site for clay at its manufacturing plant when the barge was not actually in transit. Taxpayer contends the revenues attributable to its charter of the [barge] to the cement manufacturer should be subject to the B&O tax at the retail rate, and requests that a study be undertaken to determine the exact amount.

Schedule 6 - $. . . in public utility tax (PUT) on unreported revenue from tug and barge used in bunkering for [Fuel Co.]

During 1997, Taxpayer began bunkering fuel for [Fuel Co.] using a designated tug and barge. Taxpayer did not report the revenue from the activity. The Audit Division assessed public utility tax on the unreported revenue. The report accompanying the assessment refers to the amounts paid by [Fuel Co.] as "income received from the [Fuel Co.] tug and barge charter."

Taxpayer explains it had a tug and barge available to [Fuel Co.]. The arrangement was an operating charter, not a bareboat charter. [Fuel Co.] paid Taxpayer to have the vessels on call. Taxpayer contends its activities for [Fuel Co.] were no different than its other transportation

taxed under Schedule 5, and that the [Fuel Co.] revenue is exempt or deductible from PUT for the same reasons. It adds that an additional fact makes the [Fuel Co.] revenue clearly exempt and deductible -- the [Fuel Co.] tug and barge were in the Strait of Juan de Fuca more than 75% of the time, and were required, by maritime regulations, to pass through Canadian waters on those trips.

Schedule 2 -- $. . . in use tax on fuel Taxpayer consumed in Washington

Schedule 2 assesses use tax on fuel Taxpayer purchased and placed aboard its watercraft in Washington, and consumed in operating the vessels. The Audit Division stated the following reason for the assessment:

> The use tax does apply to the actual use within this state of all other types of tangible personal property purchased at retail and upon which the sales tax has not been paid. Included herein are all consumable goods for use on and placed aboard carrier property while within this state, but only to the extent of that portion consumed herein.

In its petition, Taxpayer asserted that retail sales tax or use tax was properly paid on all fuel purchased and consumed in the state. At hearing, Taxpayer stated it paid sales tax on some fuel it purchased, when the fuel was for activities that would not involve transportation in interstate commerce. It assumed other purchases would be exempt from use tax, based on its understanding that it was engaging in interstate or foreign commerce.

Schedule 7 - $. . . in public utility tax (PUT) on unreported fuel transfer fee charges

Schedule 7 assesses PUT on unreported fuel transfer fees. Taxpayer's memorandum describes the fees as follows:

> [Taxpayer] is required by the State of Washington Oil and Hazardous Substance Spill Act of 1990 to join an oil spill response co-op in order to transact its business in the State of Washington. The company is required to pay a fee of $75.00 for each vessel loading or unloading which it undertakes, which fee is billed directly through the customer.

At the hearing, Taxpayer stated the fee is collected by the Washington State Maritime Cooperative (WSMC). Taxpayer includes the fee in its transportation charges, and the marine fuel seller passes along the charge to the ship (purchaser of the fuel). When the fuel seller receives the payment, it passes the fee along to Taxpayer with Taxpayer's transportation charges, and Taxpayer in turn passes the fee along to WSMC. Taxpayer's understanding is that the vessels receiving the fuel are responsible for the fee, and Taxpayer acts as a collection agency for WSMC. It contends the fuel transfer fees constitute taxes that it, as a collecting agent, is allowed to exclude or deduct under WAC 458-20-195 (Rule 195).

In assessing the additional public utility tax on the fee receipts, the Audit Division stated: "The fuel transfer fee is not a tax levied on your customers by the state, or its political subdivisions and therefore not deductible from gross revenue, WAC 458-20-195 attached."

Refund Claim

In its Memorandum in support of its petition, Taxpayer states that in 1998, it filed a claim for refund of $. . . for its B&O tax it paid for 1998 under the stevedoring classification on revenue from transportation and bunkering. Its refund claim was based on its belief the revenue was exempt from taxation under RCW 82.16.050(8). Taxpayer states the Department has not notified it of a decision on the request, and contends the amount should be refunded for the same reasons Schedule 5 should be corrected.

Policy Considerations

Finally, Taxpayer argues that to interpret the exemption statutes as the Audit Division has done is inconsistent with state policy to assist or benefit interstate commerce, and keep Seattle an active port. It argues Seattle must be a full-service port if it is to compete effectively with Portland, ports in California, and ports in other countries. If bunkered oil becomes too expensive in Washington's ports, ships will not bunker here. The business will go to other ports. Taxpayer presented an article that indicates the market for bunker fuel collapsed in California when that state adopted a sales tax on bunker fuel, which resulted in California repealing the tax.

It argues taxing its purchase or use of tugs and barges would discourage it from having the best equipment and technology. It would discourage Taxpayer from buying newer, safer equipment.

Taxpayer argues that taxing its vessels puts it at a competitive disadvantage with respect to other companies that bunker in Puget Sound. It does not have the ability its larger competitors have to escape tax liability. They engage predominantly in activities that cross state lines, and use their tugs mostly for towing. They have the ability to switch use of each vessel to ensure that vessels that perform bunkering are used more than 50% in clearly exempt activities. Taxpayer's business is almost entirely bunkering. It cannot arrange its activities with an eye to qualifying under other exempt uses.

ISSUES:

1. Was Taxpayer's use of the tugs and barges, and component parts thereof, exempt from use tax under RCW 82.12.0254, as use "primarily in conducting interstate or foreign commerce by transporting therein or therewith property and persons for hire"?

2. Was Taxpayer's revenue from its marine oil transportation activities exempt from PUT as revenue derived from engaging in interstate or foreign commerce, or deductible from gross income in computing PUT under RCW 82.16.050(8)?

3. Does Schedule 5 assess PUT on revenues from the lease of the [barge], and should revenues from that lease be subject to retailing B&O tax rather than PUT?

4. Was Taxpayer's revenue from its use of a dedicated tug and barge in transporting bunker fuel for [Fuel Co.] exempt from PUT?

5. Was the fuel Taxpayer purchased and used in Washington to propel its vessels exempt from use tax?

6. Was Taxpayer entitled to exclude or deduct the fuel transfer fee as a tax pursuant to Rule 195?

DISCUSSION:

RCW 82.08.020 imposes a retail sales tax on each retail sale in this state. RCW 82.12.020 imposes the use tax "for the privilege of using within this state as a consumer any article of tangible personal property purchased at retail." The use tax complements the retail sales tax by imposing a tax equal to the sales tax on an item used in this state on which the retail sales tax was not paid. WAC 458-20-178 (Rule 178).

RCW 82.16.020 imposes a public utility tax (PUT) on the act or privilege of engaging within this state in specified businesses, among which are the "water transportation business" and the "tugboat business." The tax imposed is equal to the gross income of the business, multiplied by a rate specified for the type of business. WAC 458-20-179(3)(d) provides that "[p]ersons engaged in hauling persons or property for hire by watercraft between points in Washington are taxable under the public utility tax."

The Commerce Clause, U.S. Const. Art. 1, § 8, cl. 3, circumscribes the authority of the states to tax interstate or foreign commerce, but does not preclude such taxation. Activity that is performed entirely within a state may be part of interstate or foreign commerce. Historically, interstate commerce has been defined by reference to the origin and destination of what is moved in commerce. The focus is on what the actor does, not where it does it. For example, stevedoring for interstate or foreign commerce has been held a part of the commerce itself, even though performed entirely within the state. *See, Dept. of Revenue v. Association of Washington Stevedoring Companies*, 435 U.S. 734 (1978). In Det. No. 91-323ER, 13 WTD 39 (1991), the Department concluded that watercraft that escort other vessels moving cargo in interstate or foreign commerce are involved in interstate or foreign commerce, even though the escort vessels operate entirely in Washington waters, and perform no actual transportation or handling of export goods.

The courts currently apply four criteria in determining whether a state statute affecting interstate commerce is valid under the Commerce Clause, first set out in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). The Washington Supreme Court has summarized the Commerce Clause test in *Complete Auto* as follows:

> Under this test, state taxation of interstate business must (1) tax only interstate activities having a sufficient connection to the taxing state (nexus requirement); (2) be fairly apportioned to taxpayer's activities in the state (apportionment requirement); (3) not discriminate against interstate commerce (nondiscrimination requirement); and (4) be fairly related to the services provided by the state.

American National Can v. Dept. of Revenue, 114 Wn.2d 236, 241, 787 P.2d 545 (1990). *See also, United Parcel Service v. Dept. of Revenue*, 102 Wn.2d 355, 687 P.2d 186 (1984), a use tax case.

Rule 193D explains the extent to which the state may tax services that constitute interstate or foreign commerce:

> **Business and Occupation Tax, Public Utility Tax**
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> In computing tax there may be deducted from gross income the amount thereof derived as compensation for performance of services which in themselves constitute interstate or foreign commerce to the extent that that a tax measured thereby constitutes an impermissible burden upon such commerce. A tax does not constitute an impermissible burden upon interstate or foreign commerce unless the tax discriminates against that commerce by placing a burden thereon that is not borne by intrastate commerce, or unless the tax subjects the activity to the risk of repeated exactions of the same nature from other states. Transporting across the state's boundaries is exempt, whereas supplying such transporters with facilities, arranging accommodations, providing funds and the like, by which they engage in such commerce is taxable.
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> **Examples of Exempt Income:**
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> (1) Income from those activities which consist of the actual transportation of persons or property across the state's boundaries is exempt.
>
> . . .
>
> **Examples of Taxable Income:**
>
> (1) Compensation received by persons engaged in business within this state for performance of business activities which are only ancillary to transportation across the state's boundaries is taxable.

Department statutes and rules contain general exemptions for uses and amounts derived from business activity that the state is prohibited from taxing under the U.S. Constitution.[2] Washington

[2] With respect to the use tax, RCW 82.12.0255 and WAC 458-20-178 (Rule 178), subsection (7)(n), provide that use tax shall not apply to the use of any article of tangible personal property which the state is prohibited from

also has specific statutory exemptions and deductions that are relevant to this proceeding, the benefit of which Taxpayer claims.

Schedule 4 - Was Taxpayer's use of tugs and barges (and component parts) exempt from use tax?

Taxpayer did not pay retail sales tax on its purchases of the tugs and barges. It used the tugs and barges in Washington. Its use was subject to use tax, unless the use qualified for a statutory exemption. Rule 178; *United Parcel Service*, *supra*. Taxpayer contends its use qualified for exemption under RCW 82.12.0254.

Washington's sales and use tax statutes specifically exempt the purchase and use of specified instrumentalities of interstate or foreign commerce. RCW 82.08.0262 states the sales tax exemption. RCW 82.12.0254, the companion use tax statute, grants a use tax exemption for specified transport vehicles, and component parts thereof, as follows:

> The provisions of this chapter shall not apply in respect to the use of any airplane, locomotive, railroad car, or watercraft **used primarily in conducting interstate or foreign commerce by transporting therein or therewith property and persons for hire** . . . , and in respect to use of tangible personal property which becomes a component part of any such airplane, locomotive, railroad car, or watercraft, . . . and in respect to the use by the holder of a carrier permit issued by the Interstate Commerce Commission of any motor vehicle or trailer whether owned or leased with or without driver to the permit holder and used in substantial part in the normal and ordinary course of the user's business for transporting therein persons or property for hire across the boundaries of this state . . . ." (Emphasis added).[3]

The term "primarily" means "at least 51% of each [vessel's] usage." Det. No. 91-323ER, *supra*.

WAC 458-20-175 (Rule 175), is the administrative rule that explains and implements excise tax exemptions for persons engaged in the business of operating as a private or common carrier by air, rail, or water in interstate commerce. Rule 175 restates the RCW 82.12.0254 exemption, and provides definitions of key words and phrases therein, including "watercraft" and "component part." It defines "watercraft" as including "every type of floating equipment which is designed for the purpose of carrying therein or therewith persons or cargo. It includes tow boats . . . ."

Taxpayer argues its use of tugboats and barges in performing bunkering services qualified for the RCW 82.12.0254 exemption, for two reasons. First, by attaching to ocean-going vessels that were carrying exempt cargo, and delivering the fuel those vessels required, Taxpayer's

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taxing under the Constitution or laws of the United States. For purposes of computing PUT, RCW 82.16.050(6) allows a deduction from gross income for "[a]mounts derived from business which the state is prohibited from taxing under the Constitution of this state or the Constitution or laws of the United States."

[3] The version set out here is the version in effect during the audit period. The statute was amended in 1998.

watercraft became an integral part of transporting the exempt cargo in interstate or foreign commerce. What Taxpayer did was as important to movement in interstate commerce as towing a vessel, which the Department determined was an exempt use in Det. No. 91-323ER, *supra*. Under Det. No. 91-323ER, it does not matter whether Taxpayer's tugs and barges remained at all times in Washington waters. Second, Taxpayer's own movement of bunker fuel was a leg of a continuing interstate or foreign movement of that fuel from the fuel tanks to the point of use. 97% of the fuel Taxpayer bunkers cannot be used in Washington waters. It has to be transported beyond Washington's borders before it is consumed. Thus, Taxpayer's barges were transporting a commodity that was en route in interstate or foreign commerce. This was even more clearly the case with respect to bunker fuel the ships later sold in other markets.

[1] Addressing the second argument, we find the bunker fuel was not property moving in interstate or foreign commerce. Once Taxpayer unloaded the bunker fuel onto ships in Washington waters, the bunker fuel was no longer an item of commerce. It was a consumable. It had reached the seller's buyer. There was a continuing movement of the bunker fuel across the state's boundaries, but the continuing movement was not for hire. That some buyers may later have decided to re-sell some of the oil rather than consume it is irrelevant, because the fuel was not identified as an item of export when Taxpayer was handling it. Because the bunker fuel was not property moving in interstate or foreign commerce, use of the tugs and barges in transporting the fuel did not qualify for the RCW 82.12.0254 exemption.

[2] If Taxpayer's use of its vessels is to qualify for the RCW 82.12.0254 exemption, it must be on the theory that its bunkering activities constituted "transporting" the exempt cargo that was aboard the ocean-going ships it serviced. We addressed whether vessels that are primarily used to provide towing or escort services in Puget Sound qualify for the exemption in Det. No. 91-323ER. The vessels in that case conducted assist and escort activities entirely within Washington's territorial waters. The assist activities involved physically attaching to and moving the ships containing cargo moving in interstate or foreign commerce. The escort activities involved guiding, nudging, and escorting vessels moving cargo in interstate or foreign commerce, at the dock and in Puget Sound. Det. No. 91-323ER concluded that both activities involved interstate or foreign commerce, in that the assist activity involved actual physical transportation of the exempt commodities, and the escort activities were akin to stevedoring. However, it determined that only vessels primarily used to physically tow exempt vessels qualified for the RCW 82.12.0254 use tax exemption, because they were the only vessels that were physically transporting property moving in interstate or foreign commerce. In that regard, the determination stated:

> We have said that "therewith" qualifies the . . . assist [vessels] because they physically connect to the other exempt vessels, virtually making the two vessels one. These [vessels] then move the property "together with" the cargo-exempt vessels. This, we said, is transporting property therewith.

In the present case, Taxpayer's tugs did not tow the vessels containing the exempt cargo. Taxpayer's tugs did not physically continue the movement of exempt cargo. They simply delivered the fuel the other vessels required to operate their engines.

We conclude that Taxpayer's vessels were not "used primarily in conducting interstate or foreign commerce by transporting therein or therewith property or persons for hire" for purposes of RCW 82.12.0254. Therefore, its use of its tugs and barges in conducting bunkering activity was not exempt from use tax under the statute. For the same reason, Taxpayer's use of tangible personal property, which became a component part of the vessels, did not qualify for the exemption. Taxpayer has identified no other basis for exempting its watercraft from use tax, nor do we find any. We find no basis for reversing the assessments under Schedules 3 and 4.

Schedules 5 and 8, and Refund Claim - Were Taxpayer's revenues from its fuel transportation and bunkering activities exempt or deductible from Public Utility Tax (PUT)?

With respect to PUT, Rule 175 provides:

> Persons engaged in [the business of transporting persons or property for hire] are not subject to [B&O] tax or [public] utility tax with respect to operating income received for transporting persons or property in interstate or foreign commerce. (See WAC 458-20-193).

Rule 193D, set out in relevant part above, explains the extent of the exemption. Income from actual transportation of persons or property across the state's boundaries is exempt, but compensation received for performing activities which are only ancillary to actual transportation across the state's boundaries is taxable.

We understand Taxpayer to contend that some of its revenue from oil transportation on which PUT was assessed under Schedule 5 involved transportation from refineries and storage tanks in Washington to customers' storage facilities [outside Washington]. Such transportation was for hire, involved transportation across Washington's boundaries to destinations in another state or country, and thus was exempt from PUT. Rule 175; Rule 193D. Taxpayer's contention that such activity was assessed PUT raises a factual question that is best addressed by the Audit Division. We will remand this issue to the Audit Division to allow the taxpayer an opportunity to support is contention.

Revenue from transportation of oil from refineries or storage tanks in Washington to storage facilities in Washington was not exempt or deductible from PUT, and we do not understand Taxpayer to claim an exemption or deduction for such revenues.[4] To the extent the assessment under Schedule 5 involved such transportation, it is sustained.

[4] Any claim that such transportation was a leg in a continuing export movement would fail. Regarding when goods are considered to be in the export stream, Rule 193C, states: ". . . exportation will not necessarily be deemed to have begun if the goods are merely in storage awaiting shipment, even though there is a reasonable certainty that the goods will be exported. . . . [T]here must be an actual entrance of the goods into the export stream." *See also, Kosydar v. National Cash Register Co.*, 417 U.S. 62 (1974), in which the court held that virtual certainty of export alone does not confer immunity from state taxation, and applied the requirement that goods physically enter the stream of exportation.

More than 90% of Taxpayer's activity was bunkering. Its bunkering activity did not involve actual transportation of property across the state's boundaries, and therefore income from the activity was not exempt from PUT under Rule 193D. Taxpayer's bunkering activity in the Strait of Juan de Fuca did not constitute transportation of the bunker fuel across the state's boundaries for purposes of Rule 193D, even though the trips required Taxpayer's vessels to take a route partially through Canadian waters en route to Washington destinations. Rule 193 concerns commerce between states and nations, not commerce between points in Washington.[5]

[3] RCW 82.16.050(8) allows two deductions from gross income in computing PUT. Taxpayer contends its revenues from bunkering activities were deductible under the second provision in that subsection, which allows a deduction for:

> [A]mounts derived from the transportation of commodities from points of origin in this state to an export elevator, wharf, dock or ship side on tidewater or navigable tributaries thereto from which such commodities are forwarded, without intervening transportation, by vessel, in their original form, to interstate or foreign destinations: PROVIDED, That no deduction will be allowed when the point of origin and the point of delivery to such an export elevator, wharf, dock, or ship side are located within the corporate limits of the same city or town . . . .

Taxpayer contends its transportation of bunker fuel met all the requirements for that deduction, in that it transported the bunker fuel to ship side on tidewater, and the receiving ships forwarded the fuel, in its original form, to international waters, which is a "foreign destination." It argues that because the ships had to transport the fuel beyond Washington's territorial waters before they legally could use it, the destination of the fuel necessarily was a foreign destination.

We find Taxpayer's interpretation of RCW 82.16.050(8) incompatible with the plain language of the statute.

The deduction applies to the transportation of "commodities" that a receiving ship "forwards" to interstate or foreign "destinations." The term "commodities" means "articles of trade or commerce." Black's Law Dictionary, Revised Fourth Edition, 342 (1968). "To forward" means "[T]o send to a subsequent destination or address." Webster's II New College Dictionary, 441 (1995). The common meaning of the word "destination" is a "place or point to which one is going or something is directed." Webster's II New College Dictionary, 308 (1995). In this case, the bunker fuel was no longer a commodity after the taxpayer delivered it in Washington. It was a consumable. The receiving ship was not transporting the fuel to any subsequent address or point. The fuel's final destination was the receiving ship itself.

[5] For example, Rule 193C defines "foreign commerce" as "that commerce which involves the purchase, sale or exchange of property and its transportation from a state or territory of the United States to a foreign country, or from a foreign country to a state or territory of the United States. Rule 179(3)(d) is the applicable rule when the activity is the hauling of property for hire between points in Washington. It provides such hauling is subject to PUT.

Prior Department decisions indicate the deduction is properly viewed as an "export" deduction. It applies when goods have entered the export stream, and the intrastate movement in question is part of a continuous movement of such goods from the state to a point outside the state for sale or trade. *See*, Det. No. 87-53, 2 WTD 269 (1986); Det. No. 91-243, 11 WTD 413 (1992); Det. No. 93-142, 13 WTD 287 (1994). Here, the bunker fuel did not enter the export stream. The movement outside the state was not for sale or trade.[6]

We conclude that Taxpayer's revenues from its transportation of bunker fuel were not deductible under RCW 82.16.050.[7] Therefore, we sustain the Schedules 5 and 8 portions of the assessment. In sustaining these portions, we necessarily deny Taxpayer's request for refund of B&O tax paid on the revenues for 1998.

Schedule 5 - Public utility tax (PUT) allegedly assessed on charter of [the barge]

Taxpayer states its charter of the barge . . . was a bareboat charter, i.e. a lease under which the lessee assumed all responsibility for operation. The leasing of tangible personal property constitutes a retail sale. RCW 82.04.040 and RCW 82.04.050. See also WAC 458-20-211 (Rule 211). Retailing B&O tax is assessed on persons "engaging within this state in the business of making sales at retail." RCW 82.04.250. If Taxpayer in fact leased the [barge] to another party as a bareboat charter, the revenue from the lease should have been taxed under the retailing B&O classification, not assessed PUT.

The schedules accompanying the audit assessment do not indicate whether revenue from the charter of the [barge] was included in the revenue on which PUT was assessed, and Taxpayer has not provided evidence that revenue from the vessel was received under a lease agreement. Taxpayer's contention presents factual questions. We will remand this issue to the Audit Division to allow the taxpayer an opportunity to support is contention that Schedule 5 erroneously assesses PUT on revenue from the lease of the [barge].

Schedule 6 - Public utility tax (PUT) on revenue from charter of tug and barge to [Fuel Co.]

Taxpayer's "charter" of a tug and barge to [Fuel Co.] during 1997 was simply taxpayer's dedication of one of its tugs and one of its barges exclusively for transporting fuel for [Fuel Co.]. The revenues thus were with respect to Taxpayer's watercraft and tugboat business using specific vessels. We understand that to be Taxpayer's and the Audit Division's characterization.

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[6] The term "export" is defined in Rule 193C, dealing with sales of goods. That definition requires that the articles be "destined for a purchaser in a foreign country." Merely taking consumables outside the territory of the U.S. before consuming them does not turn the consumables into "exports."

[7] Even if Taxpayer otherwise qualified for the deduction, the statute expressly disallows a deduction for amounts earned from bunkering the approximately 20% of the vessels that Taxpayer indicates it bunkers within the corporate limits of the same city or town where it picks up the fuel.

Taxpayer contends its income from [Fuel Co.] was not subject to PUT, for the same reason PUT was not due on its other bunkering activities taxed under Schedule 5. Taxpayer also relies upon its assertion that the [Fuel Co.] vessels were operating in the Strait of Juan de Fuca more than 75% of the time, an area where vessels are required to pass through Canadian waters when outbound.

For the same reasons we sustain the assessment under Schedule 5, we sustain the assessment under Schedule 6. That the [Fuel Co.]-dedicated vessels generally passed through Canadian waters when outbound does not transform the activity into foreign commerce, for reasons discussed above. The trips involved transportation between a point of origin in Washington and a point of destination (delivery) in Washington, not transportation from Washington to a point in Canada.

Schedule 3 - Use Tax on fuel purchased and consumed by Taxpayer

Taxpayer argues that to the extent it was engaging in exempt transportation, and qualified for the exemptions in RCW 82.12.0254 and RCW 82.16.050, its use of fuel in performing exempt activities also was exempt. As we discuss above, for the most part Taxpayer was not engaging in activity exempt from PUT. Moreover, regardless of whether the revenue was exempt, Taxpayer's use of fuel in conducting those activities within Washington was subject to use tax.

RCW 82.08.0261 provides:

> The tax levied by RCW 82.08.020 shall not apply to sales of tangible personal property (other than the type referred to in RCW 82.08.0262) for use by the purchaser in connection with the business of operating as a private or common carrier by air, rail, or water in interstate or foreign commerce: PROVIDED, That any actual use of such property in this state shall, at the time of such actual use, be subject to the tax imposed by chapter 82.12 RCW.

Rule 175 provides as follows with respect to consumables, including fuel, placed aboard carrier property in Washington:

> The use tax does apply upon the actual use within this state of all other types [other than component parts] of tangible personal property purchased at retail and upon which the sales tax has not been paid. Included herein are all consumable goods for use on and placed aboard carrier property while within this state, but only to the extent consumed herein. Thus the tax applies upon the use of the amount consumed in this state of ice, fuel, and lubricants which are placed aboard in this state . . . .

Taxpayer was liable for use tax on fuel it purchased for its own use, which it loaded in Washington and consumed in Washington.

Taxpayer contends its watercraft consumed some of the fuel in Canadian waters, particularly when Taxpayer performed bunkering in the Strait of Juan de Fuca. Taxpayer states it is difficult to know

when a vessel operating in the strait is in Washington waters and when it is passing through Canadian waters. Taxpayer has provided no evidence showing what portion of the fuel in question was consumed in Canadian waters. It appears doubtful such evidence is obtainable. Taxpayer is, of course, always at liberty to request a refund of tax paid, within the statutory time limitations, upon presentation of additional documentation showing that a percentage of the fuel upon which Schedule 3 assesses use tax was consumed outside Washington.

We find no basis in the statutes or rules for reversing the assessments under Schedule 2.

Public Utility Tax on fuel transfer fees charged to customers

Washington's Oil Spill Prevention and Response Act, Chapter 88.46 RCW, requires vessels transiting the state's navigable waters to have a contingency plan for the containment and cleanup of oil spills, and provide evidence of financial responsibility. It establishes a nonprofit corporation to provide oil spill response and contingency plan coverage for vessels that do not have their own plan.

According to Taxpayer, the fuel transfer fees that are the subject of the assessment under Schedule 7 were fees owed by the ships receiving bunker oil, that Taxpayer merely collected for the agency that administers the Act, WSMC. Taxpayer contends the fuel transfer fees constituted taxes that it, as a collecting agent, was allowed to exclude or deduct under WAC 458-20-195 (Rule 195).

Rule 195 explains the circumstances under which taxes may be deducted from the gross amount reported as the measure of tax under PUT, and lists examples of specific deductible and nondeductible taxes. The rule expressly provides: "License and regulatory fees are not deductible."

Subsection (4) of Rule 195 provides:

> The amount of taxes collected by a taxpayer, as agent for the state of Washington or its political subdivisions, or for the federal government, may be deducted from the gross amount reported. . . .
>
> This deduction applies only where the amount of such taxes is received by the taxpayer as collecting agent and is paid by the agent directly to the state, its political subdivisions, or to the federal government. When the taxpayer is the person upon whom a tax is primarily imposed, no deduction or exclusion is allowed, since in such case the tax is part of the cost of doing business. There mere fact that the amount of tax is added by the taxpayer as a separate item to the price of goods sold, or to the charge for services rendered, does not in itself, make such taxpayer a collecting agent for the purpose of this deduction.

Taxpayer has provided no evidence to support its contention that the fees it collected were taxes, that they were imposed upon its customer rather than upon Taxpayer, or that it received them as

collecting agent for the state. We find no tax provision in chapter 88.46 RCW. We sustain the portion of the assessment under Schedule 7. Taxpayer is, of course, always at liberty to request of refund of tax paid, within the statutory time limitations, upon presentation of additional documentation showing that the fees were deductible taxes under Rule 195.

Public policy arguments

Taxpayer forcefully argues that public policy requires it not be taxed on its marine fuel bunkering activities, or on its use of vessels in conducting the bunkering activities. We find Taxpayer's analogy to California's experience overstated, in that California's loss of business followed repeal of a sales and use tax exemption for marine fuel, whereas the PUT, even if passed along to the consumer, is a much lower tax. Nonetheless, we recognize that allowing Taxpayer the exemptions and deductions it seeks would give it some competitive advantage in an increasingly competitive global economy. However meritorious Taxpayer's policy arguments may be, they are arguments it must address to the Legislature rather than the Department. As an administrative body, the Department does not have the discretion to rewrite the law.

DECISION AND DISPOSITION:

Taxpayer's petition is denied in part and remanded in part. It is denied with respect to the amounts assessed under Schedules 3 (use tax on consumables), 4 (use tax on tugs and barges), 6 (PUT on revenue from [Fuel Co.]), and 7 (PUT on fuel transfer fees) of the assessment. With respect to the assessment under Schedule 5, Taxpayer's claim that its revenue from bunkering activity was deductible under RCW 82.16.050(8) is denied. The file is returned to the Audit Division to allow Taxpayer and opportunity to provide the Audit Division with documentation supporting two contentions with respect to the amounts assessed under Schedule 5: 1) Taxpayer's contention that some of the revenue assessed PUT under Schedule 5 was from transportation from refineries and storage tanks in Washington to storage facilities [outside Washington], and 2) its contention that some of the revenue assessed PUT under Schedule 5 was from the lease of a barge, ... Taxpayer is allowed thirty (30) days from the date of this determination to provide such documentation, plus such additional time as the Audit Division in its discretion may allow. Failure to provide such documentation will result in the assessment of tax becoming final.

Dated this 30th day of March, 2000.