

Cite as Det No. 11-0298, 32 WTD 16 (2013)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Correction of)	<u>D E T E R M I N A T I O N</u>
Assessment of)	
)	No. 11-0298
...)	
)	Registration No. . . .
)	Doc. No. . . . /Audit No. . . .
)	Docket No. . . .

RULE 180; RCW 82.16.020(1)(f): PUBLIC UTILITY TAX – MOTOR CONTRACT CARRIER – INTRASTATE HAULS: Gross income earned by a motor contract carrier for the intrastate hauling of recyclable materials for an affiliated, but separately registered LLC is subject to motor transportation business PUT.

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.

De Luca, A.L.J. – A LLC (the taxpayer) doing business as a motor contract carrier protests the assessment of public utility tax (PUT) under the motor transportation business classification on gross income earned for the intrastate hauling of recyclable materials for an affiliated LLC. Holding: Gross income earned by the taxpayer from such intrastate hauling is subject to motor transportation business PUT. Decision: Petition denied and assessment affirmed.¹

ISSUE

Is the gross income of a motor contract carrier earned from the intrastate hauling of recyclable materials for an affiliated company subject to motor transportation business PUT per RCW 82.16.020(1)(f) and WAC 458-20-180 (Rule 180) or wholesaling business and occupation (B&O) tax under RCW 82.04.060 as the taxpayer contends?

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

FINDINGS OF FACT

The taxpayer is registered with the Department of Revenue (DOR) under its own name and entity. It is a LLC headquartered outside Washington, but doing business in this state as a motor contract carrier hauling recyclable materials for an affiliated LLC. The taxpayer and the affiliated LLC signed a "Transportation Agreement" by which the affiliated LLC "... wishes to utilize [the taxpayer's] services to transport recyclable commodities and other materials [the affiliated LLC] may time-to-time require transportation for. Similarly, [the taxpayer] wishes to offer its services to [the affiliated LLC] for such purposes." The contract then describes the transportation charges (compensation for carriage is determined by allocating 1.005% of the affiliated LLC's gross revenue to the taxpayer), the liability for freight loss and damage, freight retention terms, notices, etc. Occasionally, the taxpayer will carry back-haul shipments for third-party shippers. A back haul is the return movement of a vehicle that has carried goods to its intended destination. The taxpayer did not own, sell, or buy the materials that it carried for the affiliated LLC or for the third parties shippers. It merely carried their recyclable materials for a charge.

The Taxpayer Account Administration (TAA) Division of the Department of Revenue (DOR) audited the taxpayer for the period from June 1, 2005, through June 30, 2009, and assessed \$. . . in motor transportation PUT, use tax, interest, and a penalty after crediting the taxpayer \$. . . in wholesaling B&O tax that it had reported. The taxpayer does not dispute the \$. . . in use tax that was assessed largely on equipment and vehicle purchases. TAA assessed \$. . . in PUT, but only on gross income earned from intrastate shipments that occurred in Washington. TAA did not assess gross income earned from interstate shipments. Nearly all PUT assessed was based on gross income the taxpayer earned from carrying materials for its affiliated LLC. Consequently, TAA assessed only a very small amount of PUT against one intrastate third-party back haul shipment that included an invoice in the amount of \$. . . because all other third-party back haul shipments were interstate in nature. The assessment remains unpaid. The taxpayer timely appealed.

ANALYSIS

RCW 82.16.020(1)(f) imposes PUT on the motor transportation business. RCW 82.16.010(6) defines "motor transportation business" as follows:

"Motor transportation business" means the business (except urban transportation business) of operating any motor propelled vehicle by which persons or property of others are conveyed for hire, and includes, but is not limited to, the operation of any motor propelled vehicle as an auto transportation company (except urban transportation business), common carrier, or contract carrier as defined by RCW 81.68.010 and 81.80.010. . . .

See also Rule 180.²

² Rule 180 provides in part, in language nearly identical to the statute, as follows:

RCW 81.80.010 provides in pertinent parts:

1) "Common carrier" means any person who undertakes to transport property for the general public by motor vehicle for compensation, whether over regular or irregular routes, or regular or irregular schedules, including motor vehicle operations of other carriers by rail or water and of express or forwarding companies.

(2) "Contract carrier" includes all motor vehicle operators not included under the terms "common carrier" and "private carrier" as defined in this section, and further includes any person who under special and individual contracts or agreements transports property by motor vehicle for compensation.

(9) A "private carrier" is a person who transports by his or her own motor vehicle, with or without compensation, property which is owned or is being bought or sold by the person, or property where the person is the seller, purchaser, lessee, or bailee and the transportation is incidental to and in furtherance of some other primary business conducted by the person in good faith.

In sum, RCW 82.16.010(1)(f) imposes PUT on the "motor transportation business." That term includes the operation of a motor propelled vehicle by carrying passengers or property for hire as either a common carrier or contract carrier. RCW 82.16.010(6) and Rule 180. The taxpayer meets the definition of a contract carrier for the transportation services it provides for compensation under contract to its affiliated LLC. And it appears to be a common carrier for the back hauls it provides the third-party shippers because we have not seen a transportation contract for the back haul shipments.

But contrary to the taxpayer's contention, it is not a "private carrier" because it does not transport property that it owns by its own motor vehicles. Like all carriers, it is a bailee, but it is not the owner of the cargo. The property it transports is owned either by the affiliated LLC for whom it contracts to carry the recyclable materials for a charge or the third party shippers that it charges for the back hauls. Moreover, the taxpayer is not transporting materials incidentally in furtherance of some other primary business that it conducts. The taxpayer's primary business is being a motor carrier for hire as either a common carrier or a contract carrier.

The taxpayer argues that, with the exception of the back haul services it provides to third parties, its business activities are simply incidental to the wholesaling activities of its affiliated LLC that

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sells recyclable materials. Consequently, it contends that its activities, too, should be classified as wholesaling for B&O tax purposes.³ In effect, the taxpayer asks that DOR ignore the separate legal entities of it and the affiliated LLC, including their transportation agreement. In *Washington Sav-Mor Oil Co. v. State Tax Commission*, 58 Wn.2d 518, 364 P.2d 440 (1961), the court found the sale of property by a wholly-owned subsidiary to its parent corporation constituted a sale for purposes of the B&O tax. The court quoted the following portion of the annotation "Sale by wholly owned subsidiary to parent corporation, or vice versa, as within retail sales tax, or similar, statute," 64 A.L.R.2d 769 (1959).

Since a wholly owned subsidiary is generally incorporated or acquired by the parent corporation for the purpose of advantageously carrying on some phase of the parent corporation's activities or business, the courts have been reluctant to disregard the separate legal entities of the parties merely to grant relief from sales, or similar, taxes at the expense of the state or its subdivision. Thus, the contention that because the wholly owned subsidiary and the parent corporation are so closely integrated, sales by one to the other do not constitute 'sales' within the meaning of a sales tax, or similar, statute has been rejected by a number of courts.

This result has been reached in a number of cases involving sales by a wholly owned subsidiary to the parent corporation, especially where the parties to the transaction have recognized their status as separate legal entities for a considerable time, enjoyed the economic advantages resulting therefrom, and in making the transactions observed the usual formalities of purchase and sale.

58 Wn.2d at 521; *see also* Det. No. 08-197, 28 WTD 076 (2009); Det. No. 87-342, 4 WTD 229 (1987); Det. No. 96-046, 16 WTD 74 (1996) (Where a subsidiary, as a separate legal entity, had secured financial and competitive advantages by its separate existence, it was not in a position to ask that the separate corporate existence be disregarded at the expense of the state, citing *Washington Sav-Mor Oil Co.*, *supra*.) As shown by the express language of their transportation agreement, the taxpayer, as a separate legal entity, is selling its transportation services to its affiliated LLC, another separate legal entity, for a charge. . . .

The taxpayer cites *Standard Oil Co. v. State*, 57 Wn.2d 56, 355 P.2d 349 (1960) in support of its argument that wholesaling B&O tax is the correct tax classification for its business activity. We do not find the case applicable to this matter. *Standard Oil* concerned a refund claim by that taxpayer for the B&O tax paid under RCW 82.04.270(2) for what was known as the "wholesale functions" or the "internal distribution" tax. . . .

³ Assuming arguendo that the taxpayer was engaged in wholesaling activities during the audit period, it would have been required to obtain resale certificates from its affiliated LLC. Failure to obtain resale certificates would have subjected it to retail sales tax. RCW 82.04.050, RCW 82.04.060; RCW 82.08.020. We note that resale certificates were no longer valid effective January 1, 2010. SB 6173. But the definition of "retail sale" in RCW 82.04.050 does not include the motor transportation business, which, as noted, is subject to PUT and not retail sales tax. RCW 82.16.010(1)(f).

In *Standard Oil*, the state imposed the B&O tax on petroleum products that Standard Oil brought into Washington, then deposited at a terminal and subsequently distributed among its bulk stations in the state from where it sold them at wholesale or retail. The tax was imposed on the distribution of the products by Standard Oil from its terminal to its bulk stations. The intent of the law was to impose a tax equal to the wholesaling B&O tax upon persons performing functions comparable to a wholesaler, but not actually making sales. 57 Wn.2d at 58. In that case it was Standard Oil alone that engaged in the distribution of its products, which was the taxable event. In contrast, the taxpayer in the present matter was hired by its affiliated LLC simply to transport the recyclable materials from points of origin to points of destination in this state. Unlike Standard Oil, the taxpayer was not internally distributing its own products. It was simply hauling materials for hire that were owned by another separate legal entity.

The taxpayer also cites *Time Oil Co. v. State*, 79 Wn.2d 143, 483 P.2d 628 (1971) by arguing that because the compensation it received from its affiliated LLC was in the form of a revenue allocation rather than a flat charge this fact furthered the business purpose for which it claims it existed – to support its affiliated LLC’s recycling business. As discussed, the taxpayer and its affiliate are separate legal entities. *Washington Sav-Mor Oil Co.*, *supra*. And as noted, PUT is assessed on the taxpayer’s gross income multiplied by the applicable rate for the motor transportation business. RCW 82.16.020. “Gross income” is defined as “... the value proceeding or accruing from the performance of the particular public service or transportation business involved...” RCW 82.16.010(12). Consequently, the taxpayer’s gross income is subject to PUT whether there is a flat rate charge or revenue allocation because it derives its gross income from the value proceeding or accruing from providing motor transportation services.

Moreover, *Time Oil* is not on point. The case did not concern freight charges for hauling petroleum products. Instead, the state assessed wholesaling B&O tax on intercompany exchanges of petroleum products between oil companies whether only two companies directly exchanged the products or if one of the companies used a third company to furnish the products to the second company. Time Oil sought to distinguish the tripartite transactions from direct intercompany exchanges because, it contended, title and/or possession of the petroleum products supplied to the exchanger companies by the third party (U.S. Oil) never came to reside in Time Oil. This is so, Time Oil argued, because such incidents of ownership, as well as the indicia of title--the bills of lading--passed directly from U.S. Oil to the exchanger recipient when the products were delivered to the recipient at U.S. Oil's refinery site, and all that Time Oil received in return for its payment to U.S. Oil was a claim against the exchanger recipient for the return of a like quantity of the products involved. 79 Wn.2d at 145-46.

The court rejected the argument that Time Oil was exempt from wholesaling B&O tax in tripartite transactions by declaring it was not concerned with the technicalities of the transference of title and possession. Rather, its primary concern was whether the transactions involved constituted a taxable business activity within the contemplation of the business and occupation tax statutes. It found that they did. *Id.* The court concluded by writing “To hold otherwise would be to exalt form over substance, and would import an exemption into the tax statutes where none now exists.” The court cited *Washington Sav-Mor Oil Co.*, *supra*. 79 Wn.2d at 147.

The present taxpayer is not engaged in intercompany exchanges of recyclable materials. It simply transports the freight for a charge for other companies that own the materials

Finally, the taxpayer cites Excise Tax Advisory 3134.2009 – Transactions Between Related Entities in support of its argument that wholesaling B&O tax is the correct tax classification:

4. Where an LLC enters a contract to supply a third party with tangible personal property and an affiliate of the LLC ships the tangible personal property directly to the third party who pays the LLC and the LLC pays funds to the affiliate. The LLC is subject to B&O tax on its receipts from the third party and the affiliate is subject to B&O tax on the amounts received from the LLC.

This example merely holds that the LLC that sells the tangible personal property to a third party is subject to B&O tax on the gross receipts of the sale and the affiliated LLC that actually shipped the property to the third party is subject to B&O tax on the amounts it received from the seller LLC. This example is not factually on point with the present matter. The present taxpayer is not selling and shipping goods to a third party. It is not a seller/shipper either directly or indirectly. It is simply a carrier that is transporting for a charge the materials that are being bought or sold by its affiliated LLC.

DECISION AND DISPOSITION

Taxpayer's petition is denied.

Dated this 13th day of October 2011.