No. 92265-9

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 46102-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

OLYMPIC TUG & BARGE, INC.,

Petitioner,

v.

WASHINGTON STATE DEPARTMENT OF REVENUE,

Respondent

PETITION FOR REVIEW

George C. Mastrodonato, WSBA #7483
Michael B. King, WSBA #14405

CARNEY BADLEY SPELLMAN, P.S.
701 Fifth Avenue, Suite 3600
Seattle, Washington 98104-7010
Telephone: (206) 622-8020
Facsimile: (206) 467-8215
Attorneys for Petitioner Olympic Tug & Barge, Inc.

TABLE OF CONTENTS

APPENDICES

TABLE OF AUTHORITIES

Page(s)

Treatises

Other Authorities

Page(s)

I. IDENTITY OF PETITIONING PARTY

Olympic Tug and Barge, Inc. ("Olympic"), Appellant in the Court of Appeals, petitions for review of the decision terminating review identified below.

II. COURT OF APPEALS DECISION TO BE REVIEWED

Olympic seeks review of the Published Opinion ("Decision") issued on July 21, 2015. A copy of the Decision is attached as Appendix A. Olympic timely moved for reconsideration, which was granted in part on August 18, 2015. A copy of the Order Granting Motion to Reconsider in Part and Amending Opinion in Part is attached in Appendix B.[1]

III. STATEMENT OF ISSUES PRESENTED FOR REVIEW

This appeal involves RCW 82.04.260(7), the statute that imposes the "stevedoring and associated activities" business and occupation (B&O) tax.[2] The trial court ruled that Olympic's business did not fall under the stevedoring tax and the Court of Appeals affirmed.

---

[1] All citations to the Decision are to the original Slip Opinion ("Slip. Op."), which is reproduced as Appendix A. The Decision is currently reported at ___ P.3d ___, 2015 WL 4457660 (Wash. App. Div. 2, July 21, 2015). The only difference between the original and amended Decision is on page 6, where the Court of Appeals removed the words "for the first time at oral argument" from footnote 5. No other portion of the Decision was amended and the result of the Decision did not change.

[2] The full name of the tax is "stevedoring and associated activities pertinent to the movement of goods and commodities in waterborne interstate or foreign commerce." RCW 82.04.260(7) states in its entirety as follows:

> Upon every person engaging within this state in the business of stevedoring and associated activities pertinent to the movement of goods and commodities in waterborne interstate or foreign commerce; as to such persons the amount of tax with respect to such business is equal to the gross proceeds derived from such activities multiplied by the rate of 0.275 percent. Persons subject to taxation under this

(Footnote continued next page)

The Decision conflicts with decisions of this Court and of the Court of Appeals, as described more fully in Sections V.A and V.B of this petition. *See* RAP 13.4(b)(1), and (2). The Decision also involves a significant question of law under the constitutions of the state of Washington and the United States, and issues of substantial public interest that should be determined by this Court, as described more fully in Sections V.C and V.D of this petition. *See* RAP 13.4(b)(3), (4).

IV. STATEMENT OF THE CASE

A. Olympic's Business.

Olympic operates a fleet of tugboats and barges in Puget Sound and has locations within the ports of Seattle and Tacoma. CP 23. Olympic's primary business is the transportation of bulk fuel oil products, including the "bunkering" of fuel to vessels engaged in the movement of

---

subsection are exempt from payment of taxes imposed by chapter 82.16 RCW for that portion of their business subject to taxation under this subsection. Stevedoring and associated activities pertinent to the conduct of goods and commodities in waterborne interstate or foreign commerce are defined as all activities of a labor, service or transportation nature whereby cargo may be loaded or unloaded to or from vessels or barges, passing over, onto or under a wharf, pier, or similar structure; cargo may be moved to a warehouse or similar holding or storage yard or area to await further movement in import or export or may move to a consolidation freight station and be stuffed, unstuffed, containerized, separated or otherwise segregated or aggregated for delivery or loaded on any mode of transportation for delivery to its consignee. Specific activities included in this definition are: Wharfage, handling, loading, unloading, moving of cargo to a convenient place of delivery to the consignee or a convenient place for further movement to export mode; documentation services in connection with the receipt, delivery, checking, care, custody and control of cargo required in the transfer of cargo; imported automobile handling prior to delivery to consignee; terminal stevedoring and incidental vessel services, including but not limited to plugging and unplugging refrigerator service to containers, trailers, and other refrigerated cargo receptacles, and securing ship hatch covers.

For an analysis of each sentence in this statute, *see* Appellant's Opening Brief 16-19 and Appellant's Reply Brief 5-18.

goods and commodities in waterborne interstate or foreign commerce. CP 24. "Bunkering" involves using tugboats to transport barges containing fuel transloaded from oil refineries and storage facilities to ocean-going vessels under anchor or docked at port facilities. *Id.* Olympic pumps the fuel into the vessel's fuel hold or tanks, which are called "bunkers." *Id.*

Olympic delivers different types of "bunker" fuels, including marine distillate and heavy fuel oils. CP 24. Olympic will load the fuel either at a refinery or other storage facility and transport it to the ship. *Id.* The tugboat pulls and maneuvers the barge loaded with the fuel to the side of the vessel. *Id.* The fuel is then transloaded from the barge into the fuel tanks (bunkers) of the vessel. *Id.* Once the fuel is pumped into the ship's bunker, Olympic's vessels are removed from the side of the ship. *Id.* Olympic does not own the fuel that it delivers to and pumps into the ships. CP 24. Instead, Olympic receives a fee for the service of loading, transporting and off-loading the fuel. *Id.* These services are performed while the ocean-going vessels are in port and are being loaded or unloaded with cargo. *Id.*

How Olympic operates is documented in a sample transaction in the record. *See* CP 52-60.[3] In the representative transaction, Olympic was

[3] During discovery the Department asked Olympic to produce copies of every invoice related to bunkering services provided to customers during the tax years 2003 to 2008. Because those transactions totaled several thousand (*see* CP 25), Olympic produced two representative transactions for each year. *See* CP 53-60. This limited production was made with the understanding that the parties would first resolve the legal question whether the bunkering services were properly taxable under the stevedoring B&O tax classification, as alleged by Olympic, or the PUT, as claimed by the Department.

hired by Tesoro Refining and Marketing Company to load, transport, and unload fuel for a customer of Tesoro. CP 25, 53. The fuel was loaded at "Tesoro Anacortes" (the Tesoro refinery) and delivered to the ship "APL Sweden" docked at Terminal 5 in the Port of Seattle ("Seattle P-5"). *Id.* A total of 14,251.37 barrels of fuel oil were loaded into the vessel APL Sweden. CP 25, 53. There was a 15,000 barrel minimum (at a charge of $1.17 per barrel) and the charge to APL Sweden was $17,100.00. *Id.* A "Fuel Transfer Fee" of $80.96 plus a "Fuel Surcharge" of $967.50 brought the total of Invoice No. 12179 to $18,148.46. *Id.* CP 54-60 provided the backup to this transaction, including time and information on the loading and discharge of the fuel (CP 54), the name of the tugboat ("Lela Joy") and barge ("Bernie 112") involved (CP 55), and the barge logs and bills of lading for the loading and discharge of the fuel. *See* CP 25. During the tax years at issue (2003-2008) there were thousands of these types of transactions. CP 25.

B. The Tax Assessments.

The present action arises out of tax assessments issued by Respondent Department of Revenue's for calendar years 2003 through 2008, in which the Public Utility Tax ("PUT"), RCW 82.16, was assessed on Olympic's bunkering revenues. Because the "stevedoring" B&O tax is imposed at a lower rate than the PUT, Olympic is seeking a refund of the difference between what it has been compelled to pay under the PUT, and what Olympic contends it should pay under the stevedoring

classification of the B&O tax. *See* CP 9 (Complaint for Refund of Excise Taxes at 6, ¶¶ 29-30); *see also* CP 26-51.[4]

C. Procedural History.

Following the filing of Olympic's refund complaint and after a period for discovery, Olympic moved for partial summary judgment on the legal issue of whether the gross revenues from the activity of bunkering fuel was taxable under the PUT or the "stevedoring" B&O tax. CP 10-21. The trial court denied Olympic's motion and granted summary judgment for the Department. CP 301-303. Olympic timely appealed to the Court of Appeals (CP 304), which upheld the Superior Court's ruling that Olympic's activities did not fall under the "stevedoring" B&O tax classification. Slip Op. 1.

V. ARGUMENT IN SUPPORT OF GRANTING REVIEW

A. ISSUE ONE: The Decision Is Based on an Argument Raised For the First Time at Oral Argument, Which Conflicts With Decisions of This Court and the Court of Appeals.

The heart of the Decision is the Court of Appeals' reading of the fourth sentence of RCW 82.04.260(7). That sentence lists "specific activities" included within the definition of "stevedoring and associated activities pertinent to the movement of goods and commodities in

[4] CP 26-51 are excerpts from the tax assessments issued to Olympic by the Department. The PUT was assessed by the Department under the "other public service" classification at a rate of 1.926 percent. *See* RCW 82.16.020(1)(f), (2). The stevedoring B&O tax is imposed at the rate of .275 percent. RCW 82.04.260(7). *See* CP 9 (Complaint at 6, ¶¶ 29-32).

waterborne interstate or foreign commerce."[5] The critical part of this sentence is the last phrase: "terminal stevedoring and incidental vessel services, including but not limited to plugging and unplugging refrigerator service to containers, trailers, and other refrigerated cargo receptacles, and securing ship hatch covers." The Court of Appeals' reading of this sentence deprives the phrase "incidental vessel services" of any meaning independent of the phrase "terminal stevedoring":

> . . . the phrase "incidental vessel services" does not appear in isolation; instead, it appears as the phrase "terminal stevedoring and incidental vessel services." RCW 82.04.260(7). Because "incidental vessel services" is a general term appearing in conjunction with the specific term "terminal stevedoring," we deem "incidental vessel services" to incorporate only "those things similar in nature or 'comparable'" to terminal stevedoring. [citation omitted]

Slip Op. 7-8.

There is nothing in the plain language of the portion of the sentence that begins "terminal stevedoring and incidental vessel services..." which suggests these two activities must be read together, that "the statute's organization shows that 'terminal stevedoring and incidental

---

[5] This sentence includes the following activities:

> Wharfage, handling, loading, unloading, moving of cargo to a convenient place of delivery to the consignee or a convenient place for further movement to export mode; documentation services in connection with the receipt, delivery, checking, care, custody and control of cargo required in the transfer of cargo; imported automobile handling prior to delivery to consignee; terminal stevedoring and incidental vessel services, including but not limited to plugging and unplugging refrigerator service to containers, trailers, and other refrigerated cargo receptacles, and securing ship hatch covers"

RCW 82.04.260(7), fourth sentence.

vessel services' is one category of activities, not two" (Slip Op. 8), or that the incidental vessel services that qualify for the "stevedoring" B&O tax rate must be similar in nature or comparable to terminal stevedoring. On the contrary, the two concepts are clearly independent of one another and one has to look no further than the two examples in this fourth sentence to confirm this fact.[6]

The first example – "plugging and unplugging refrigerator service to containers, trailers, and other refrigerated cargo receptacles" – clearly relates to terminal stevedoring because the activity deals with containers. *See* Olympic's Reply Brief at 12-13. But the second example – "securing ship hatch covers" – is clearly *not* "terminal stevedoring" and is just as clearly an example of an "incidental vessel service." This is obvious from the fact that ship hatch covers are not generally associated with vessels carrying containers, where such containers are stacked high upon one another both below and above the deck of the ship. *See* Appendix C for photos of ocean-going container ships. There would be little, if any, need

[6] The Court of Appeals claims to have read the phrase "in conjunction with the rest of the statutory section[,]" reasoning that because "[t]here is no punctuation between 'terminal stevedoring' and 'incidental vessel services'" and "semicolons divide the other groups of examples from each other" this means "in context, the word 'incidental' modifies the phrase 'terminal stevedoring,' rather than simply the term 'vessel.'" Slip Op. 8 (citing RCW 82.04.260(7)). The court cited no authority for this novel interpretation of what these semicolons and commas mean in this sentence. If the Legislature truly intended to say what the Court of Appeals claims, why didn't the Legislature just write the statute to say "terminal stevedoring and incidental services related thereto?" What the Court of Appeals has done, without admitting as much, is to rewrite the statute, and the courts of this state are not empowered to rewrite statutes. *See, e.g., HomeStreet, Inc. v. Dep't of Revenue*, 166 Wn.2d 444, 455, 210 P.3d 297 (2009).

to secure ship hatch covers on these vessels. On the other hand, an ocean-going vessel that carries bulk commodities – such as grain or cement – would have a need to secure the ship's hatch covers so the goods carried in the bowel of the vessel are not exposed to the weather. *See* Appendix D for photos of bulk commodity carriers.

The Court of Appeals' conclusion that the "phrase 'terminal stevedoring and incidental vessel services' describes stevedoring and vessel services incidental to terminal stevedoring" is adopted from an argument *first raised by the Department at oral argument.* At argument, the Department contented *for the first time* that the terms "terminal stevedoring and incidental vessel services should be read together" and that "vessel services are those incidental to terminal stevedoring." One can scour the Department's brief in this appeal and one will find not even a hint of this argument, or any variation of it. The Department had never previously argued that "incidental vessel services" subject to tax under the "stevedoring" classification must be closely associated with, or closely related to, "terminal stevedoring," or that the word "incidental," as in the term "incidental vessel services," is to be read as modified by the phrase "terminal stevedoring."

This Court has made crystal clear the procedure that must be followed by a party if it wishes to raise an issue not addressed in its brief:

> If a party has a meritorious argument, which has not been briefed, that is believed to be necessary to the resolution of the case, the party may notify the court, and we may consider the issue pursuant to RAP 12.1(b). Here, the defendant, at oral argument, did not

> inform the court that the issue was not presented by the briefs nor did defendant give the court the opportunity to determine if the issue should be considered to decide the case.

State v. Johnson, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992) (refusing to consider argument not raised in the brief of the party who first raised it at oral argument). The requirement is a venerable one, *see Dearborn Foundry Co. v. Augustine,* 5 Wash. 67, 72, 31 P. 327 (1892) (cited in *State v. Johnson*, 119 Wn.2d at 170), has been repeatedly applied by the Court of Appeals, *see, e.g., Apostolis v. City of Seattle*, 101 Wn. App. 300, 306, n.11, 3 P.3d 198 (2000) (citing *State v. Johnson*), and has been codified in RAP 12.1(a).

Here, the Department did exactly what the defendant did in *State v. Johnson*: advanced an argument not set forth in its brief, and without notice to the court or Olympic that it was going to do so, as required by the plain language of RAP 12.1. Yet the Court of Appeals adopted the argument — that the phrase "terminal stevedoring and incidental vessel services" *really means* "vessel services incidental to terminal stevedoring" — as its principle and fundamental basis for ruling in the Department's favor. This action warrants review because it conflicts with decisions of this Court and of the Court of Appeals. *See* RAP 13.4(b)(1) and (2).

B. ISSUE TWO: The Decision is in Conflict With This Court's Decision in *Dep't of Ecology v. Campbell & Gwinn.*

In *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 43 P.3d 4 (2002), this Court stated that the "plain meaning" rule of statutory interpretation is derived not only "from what the Legislature has

said" in the statute "and related statutes which disclose legislative intent about the provision in question" but the analysis also includes

> . . . taking into account the *statutory context*, basic rules of grammar, and any special usages stated by the legislature on the face of the statute. So defined, the plain meaning rule requires courts to consider legislative purposes or policies appearing on the face of the statute as part of the statute's context. In addition, *background facts of which judicial notice can be taken are properly considered as part of the statute's context because presumably the legislature also was familiar with them when it passed the statute.*

Id. at 11 (quoting 2A Norman J. Singer, *Statutes and Statutory Construction* § 48A:16, at 809-10 (6th ed. 2000) (extracts from R. Randall Kelso & C. Kevin Kelso, *Appeals in Federal Courts by Prosecuting Entities Other than the United States: The Plain Meaning Rule Revisited,* 33 Hastings L.J. 187, 207-08 (1981)) (emphasis added).

Olympic argued to the Court of Appeals that the context within which RCW 82.04.260(7) was enacted in 1979 confirms that the Legislature intended for the "stevedoring" B&O tax rate to be applied to more activities than just the mere handling of cargo. *See* Appellant's Opening Brief at 12, 14-16. That "context" showed that, as of the year 1978, the stevedores in Washington had gone from being *exempt* from B&O tax to being subject to B&O tax at the "service" tax rate of one percent (1%) as a result of the United States Supreme Court's decision in *Dep't of Revenue v. Ass'n of Wash. Stevedoring Cos.*, 435 U.S. 734, 749-750, 98 S. Ct. 1388, 55 L. Ed. 2d 682 (1978). The Legislature stepped in the following year and reduced the stevedores' B&O tax rate from one

percent to 0.275 percent. The Legislature did not just reduce the stevedores' tax, but went further and also lowered the tax rate to 0.275 percent for business activities "associated" with stevedoring, including "incidental vessel services." And, the Legislature declared in the second sentence of RCW 82.04.260(7) that businesses now subject to this new classification, and which may have been previously subject to the PUT, would no longer be subject to that latter tax (and its often higher tax rates).[7]

The Court of Appeals failed to take judicial notice, consistent with *Campbell & Gwinn*, of these facts along with the fact that waterborne interstate and foreign commerce has long been a competitive *and important* business in the State of Washington. The court also failed to note that water-borne carriers have many options along the West Coast of the United States (as well as in Canada and Mexico) to load and unload their ships, and they will go to those ports where, all other factors being equal, their costs will be lowest. By reducing the tax burden on those businesses in Washington performing "stevedoring *and associated activities*" including "incidental vessel services," the Legislature obviously expected that the ensuing tax savings would be passed on at least in part to these ships, which would in turn attract more carriers to Washington ports to off-load and load their vessels. The plain language of the first sentence

[7] At the time RCW 82.04.260(7) was enacted, persons taxable under the PUT paid rates that varied from .6 percent to 3.6 percent; the PUT on tugboat businesses was 1.8%. Former RCW 82.16.020(5) (Laws of 1971 ex.sess. ch. 299 § 12).

in RCW 82.04.260(7), covering persons engaging within this state in the business of stevedoring *and associated activities pertinent to the movement of goods and commodities in waterborne interstate or foreign commerce*, shows that the Legislature targeted for the lower tax rate persons servicing the vessel from the time it arrives, while cargo is being loaded and unloaded, and while the vessel is being readied for departure. The Legislature obviously concluded that if more ships came to ports in Washington it would mean more commerce for this state, more local jobs, and (ultimately) more tax dollars flowing to state and local governments.

In light of these legislative policy objectives, it does not make any sense to exclude Olympic's business from the benefit of the lower tax rate, which business is directly and intricately connected to the servicing of the vessel while it is in port. As Olympic has previously pointed out during this appeal, nothing could be more "pertinent to the movement of goods and commodities in waterborne interstate or foreign commerce" than loading a ship with fuel, for without the fuel to power the ship the goods and commodities will not get moved anywhere. The plain meaning rule of statutory interpretation adopted by this Court in *Campbell & Gwinn* requires courts to not only "consider legislative purposes or policies appearing on the face of the statute as part of the statute's context" but also *"background facts of which judicial notice can be taken [that] are properly considered as part of the statute's context* because presumably the legislature also was familiar with them when it passed the statute."

Campbell & Gwinn, 146 Wn.2d at 11 (citing Singer and quoting Kelso, *supra*) (emphasis added).[8]

The Court of Appeals failed to properly apply *Campbell & Gwinn's* plain meaning rule. While acknowledging Olympic's argument "that the context surrounding the enactment of RCW 82.04.260(7) should inform part of our plain meaning analysis," the court placed itself in conflict with that rule when it stated that "we look to the statutory language, not the *legislative history*, during a plain meaning analysis." Slip Op. 6, n.6 (citing *Cashmere Valley Bank v. Dep't of Revenue*, 181 Wn.2d 622, 631, 334 P.3d 1100 (2014); *Campbell & Gwinn*, 146 Wn.2d at 12) (emphasis added). The Court of Appeals erred by equating the background facts surrounding the enactment of the classification with legislative history, and in doing so effectively truncated the context approach to an analysis of statutory language alone. The resulting conflict with *Campbell & Gwinn* warrants review under RAP 13.4(b)(1).

C. ISSUE THREE: The Decision Raises a Significant Question of Law Under the State and Federal Constitutions Regarding Equal Protection.

The Court of Appeals ruled that Olympic's fuel bunkering services are not taxable under the "stevedoring" B&O tax because the service does "not involve loading fuel 'onto the vessels by passing the bunker fuel over, onto or under a wharf, pier, or similar structure." Slip Op. 6 (citing

[8] The historical record reflects intense concern about maintaining the competitiveness of Washington ports. *See, e.g.*, P. Burke, A History of the Port of Seattle at 131-32 (Seattle 1976) (summarizing the competitive challenges facing the Port of Seattle, *e.g.*, the growth of container vessel transport).

Clerk's Papers at 66).[9] This ruling followed the Court of Appeals' reading of the definition of "stevedoring and associated activities" to include only those "activities of a labor, service or transportation nature whereby cargo may be loaded or unloaded to or from vessels or barges, *passing over, onto or under a wharf, pier, or similar structure.*" Slip Op. 6 (quoting RCW 82.04.260(7)) (emphasis added). In short, the Court of Appeals held that if the fuel is loaded into the ship by a process that passes the fuel over, onto or under a wharf, pier or similar structure, this would be an "incidental vessel service" taxable under the "stevedoring" B&O tax. But if the fuel is loaded into the ship from the waterside of the vessel, as was done here, this would not be an incidental vessel service taxable under that classification.

The Court of Appeals' interpretation of RCW 82.04.260(7) raises a significant equal protection issue under both the state and federal constitutions. Here, the activity is the same – loading the vessel with bunker fuel – but, according to the Court of Appeals, only if the fuel is loaded from the dockside is the activity entitled to the lower B&O tax rate; if the fueling is done from the waterside, even though the vessel is docked for loading, the higher PUT rate must be paid. This distinction makes no sense, and violates Olympic's rights under the equal protection clause of

[9] CP 66 is a cite to a departmental Request for Admission where Olympic admitted that "the bunker fuel at issue in this case [and] transported by Olympic in the contested transactions, was not loaded onto the vessels by passing the bunker fuel over, onto or under a wharf, pier, or similar structure."

the 14th amendment to the U.S. Constitution and art. 1, § 12 of the state constitution.

This Court has held that constitutional questions such as this are to be analyzed under the "minimal scrutiny" or "rational basis" test in *Yakima Cy. Deputy Sheriff's Ass'n v. Board of Comm'rs*, 92 Wn.2d 831, 601 P.2d 936 (1979), *appeal dismissed*, 446 U.S. 979 (1980). *See Associated Grocers, Inc. v. State*, 114 Wn.2d 182, 187, 787 P.2d 22 (1990). Under this test, the court is to make three inquiries: "(1) whether the classification applies alike to all members within the designated class; (2) whether some basis in reality exists for reasonably distinguishing between those within and without the class; and, (3) whether the challenged classification bears any rational relation to the purposes of the challenged statute. *Assoc. Grocers, supra* (citing *Yakima Cy.*, 92 Wn.2d at 835-36). Each inquiry must be answered "yes" for the statutory classification to be deemed constitutional and if only one inquiry is answered "no" the interpretation is unconstitutional. *Assoc. Grocers, supra.*

Here, suppliers of bunker fuel to ocean-going vessels engaged in waterborne interstate or foreign commerce are clearly a single class of taxpayers under RCW 82.04.260(7) and there is nothing in the plain language of that statute that expresses any intent that the stevedoring B&O tax should not be applied identically for both subclasses of taxpayers within the class (those who load the fuel from the dock and those who load from a tug and barge on the waterside of the vessel). Indeed, this would be the case for any person performing "incidental vessel services" for

ships engaged in waterborne interstate or foreign commerce. RCW 82.04.260(7) even describes one incidental vessel service: "securing ship hatch covers." Under the Decision, a person boarding the vessel to secure the ship's hatch covers from the dock would pay B&O tax under the "stevedoring" classification, but if another person performing the same service boarded the vessel from a tug or tender, the higher PUT would be paid. This is a patently irrational distinction; its application by the Court of Appeals violates Olympic's rights under the equal protection clause of the fourteenth amendment to the United States Constitution and the privileges and immunities clause of the state constitution, and warrants review by this Court. *See* RAP 13.4(b)(3).

D. ISSUE FOUR: The Proper Weight to Be Given to a Department of Revenue Administrative "Precedent" Is A Matter of First Impression and an Issue of Substantial Public Interest That Should Be Determined By This Court.

The Department published its Determination 14-0196 as a "precedent"[10] after the parties completed their briefing to the Court of Appeals. Olympic submitted the determination as an additional authority

[10] RCW 82.32.410 provides that the director of the Department "may designate certain written determinations as precedents." This statute does not define what is meant by the term "precedents" so the Court may look to the dictionary to determine the common and ordinary meaning of the undefined word. *Cregan v. Fourth Memorial Church*, 175 Wn.2d 279, 285, 285 P.3d 860 (2012). "Precedent" is defined as "a judicial decision, a form of proceeding, or course of action that serves as a rule for future determinations in similar or analogous cases : an authority to be followed in courts of justice." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, 1783 Vol. II (1993). BLACK'S has a similar definition: "A decided case that furnished a basis for determining later cases involving similar facts or issues. See STARE DECISIS." BLACK'S LAW DICTIONARY, 1295 (9th ed. 2009).

to the Court of Appeals, and successfully moved for oral argument so that the parties and the Court could address this post-briefing development.[11]

The heart of the Department's argument in this case has been the claim that RCW 82.04.260(7) is "reserved for businesses that *work with cargo.*" Brief of Respondent at 1 (emphasis added). The Department repeated this theme at oral argument, contending that the "stevedoring" B&O tax was for activities "immediately associated with loading and unloading cargo" and that Olympic does not qualify for the stevedoring classification because Olympic does not "work with cargo."

Determination 14-0196 demolishes this contention. In that determination, an administrative law judge ruled that dockage fees, collected by a port from vessels docking at the port's facilities in order to offload or to take on cargo, were subject to tax under the "stevedoring and associated activities" classification of the B&O tax. The ALJ rejected the position of the Department's Audit Division that these revenues should be taxed instead under the PUT. Quite obviously, the port was not "working with cargo" when it charged vessels for the privilege of tying up to its docks, in order to offload or take on cargo; the stevedores did that work.

[11] When the Court of Appeals criticized Olympic for raising the Determination for the first time at oral argument (App. A, Slip Op. 6, n.5), Olympic moved for reconsideration and in that motion reminded the court that the Department had not transformed the Determination into a precedent until after briefing had been completed, and that Olympic had moved for oral argument precisely so the Determination could be the subject of argument (as opposed to simply being submitted as an additional authority). The court granted reconsideration and removed the criticism from its opinion. *See* App. B (Order).

Yet the ALJ still ruled that the port was entitled to pay at the lower rate for stevedoring.

The Department based its restrictive "working with cargo" reading on the third sentence of the statute, claiming that the language of this sentence was dispositive. Determination 14-0196 confirmed that, as Olympic has consistently argued in this case, one must look at the entire statute, and not just one sentence, in order to determine whether the stevedoring classification was applicable to Olympic. The ALJ looked at the statute's fourth sentence, and the term "wharfage" set forth in that sentence, in determining that the port's dockage fees were to be taxed under the stevedoring classification. Olympic similarly urged the Court of Appeals to look at the fourth sentence, and the phrase "incidental vessel services," in determining whether Olympic's fueling service fees should be taxed under the "stevedoring" classification.

The Court of Appeals dismissed Olympic's reliance on Det. 14-0196 on the basis that "berthing activities constituted 'wharfage,' which was specifically enumerated in the stevedoring tax classification" and "wharfage is not at issue in this case." Slip Op. 6, n.5 (citing Det. 14-0196, 34 WTD at 39). The court noted that the taxpayer in Det. 14-0196 "berthed the vessel at a dock before loading or unloading cargo" (*id.*) but the court did not explain how Olympic's fueling services *which also take place while the vessel is berthed at a dock while loading and unloading cargo* are any less cargo-related, especially considering that the fuel will allow the cargo to move in interstate or foreign commerce. In point of

fact, the fueling service that Olympic provides is no less "cargo-related" than the docking service that the port provides.[12]

The Department has designated Determination 14-0196 to be a "precedent," using the authority granted by the Legislature in 1991 and codified in RCW 82.32.410. At oral argument, counsel for the Department claimed Determination 14-0196 was "not binding" on the Court of Appeals. This contention flies in the face of the plain meaning of "precedent": "a rule for future determinations in similar or analogous cases" (WEBSTER'S 1783); "a basis for determining later cases involving similar facts or issues" (BLACK'S 1295). No appellate court has addressed what the term "precedent" means in the context of this statute. This Court should accept review of this case to determine this issue of first impression and substantial public interest. *See* RAP 13.4(b)(4).

VI. CONCLUSION

The Court should grant review to address the conflicts between the Decision and decisions of this Court and the Court of Appeals, as well as the important constitutional and public policy implications of the Decision.

---

[12] As an additional point of fact, the statute does not say that the "stevedoring" classification applies to "cargo-related" activities. The phrase "cargo-related" is the Department's phrase. The statute says that the classification applies to activities "pertinent to the movement of goods and commodities" -- in other words, of cargo -- "in waterborne interstate and foreign commerce." Allowing a vessel to dock so it can take on such goods and commodities is plainly "pertinent" to their movement in interstate and foreign waterborne commerce. *See* Olympic's Opening Brief at 20-21; Reply Brief at 7-8, for a discussion of what "pertinent" means. So, too, is supplying the fuel that *makes possible* that movement.

RESPECTFULLY SUBMITTED this 15th day of September, 2015.

CARNEY BADLEY SPELLMAN, P.S.

By _____
George C. Mastrodonato, WSBA #7483
Michael B. King, WSBA #14405
Attorneys for Olympic Tug & Barge, Inc.

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

OLYMPIC TUG & BARGE, INC., Appellant, v. WASHINGTON STATE DEPARTMENT OF REVENUE, Respondent.	No. 46102-1-II PUBLISHED OPINION

WORSWICK, P.J. — Olympic Tug & Barge, Inc. (Olympic) appeals the superior court's denial of its motion for partial summary judgment and award of summary judgment dismissal to the Department of Revenue (DOR). The superior court ruled that Olympic's activities did not fall under the business and occupation (B&O) tax classification for stevedoring and associated activities set forth in RCW 82.04.260(7). We affirm.

FACTS

The facts in this case are undisputed. Olympic is a Washington corporation in the business of operating tugboats and barges. Relevant to this appeal, Olympic performs fuel bunkering services, which consist of delivering bunker fuel[1] to commercial vessels in the Puget Sound. Olympic delivers this fuel while the receiving vessel is either tied to a dock or at anchor in a harbor. Olympic's tugboats transport the fuel to the receiving vessel, then pump the fuel through fuel lines into the vessel's fuel tanks.

[1] Bunker fuel is the type of fuel burned by ships at sea.

Olympic has litigated its assessed taxes for several years. It has paid the public utility tax (PUT) since 1994. *See* chapter 82.16 RCW. Olympic sued the DOR for a partial refund of PUT paid on its fuel bunkering revenues for the tax years 2003 through 2008. It argued that it owed only the business and occupation (B&O) taxes for stevedoring and associated activities and not the higher PUT.[2] *See* RCW 82.04.260(7).

Olympic moved for partial summary judgment under CR 56, seeking an order declaring that its fuel bunkering services were subject to the stevedoring tax classification found in RCW 82.04.260(7). After a hearing, the superior court denied Olympic's motion for partial summary judgment. The DOR then moved orally for summary judgment dismissal and the superior court granted this motion. The superior court granted the DOR statutory costs and attorney fees. Olympic appeals.

ANALYSIS

I. STANDARD OF REVIEW

We review a trial court's order granting or denying summary judgment de novo.[3] *In re Estate of Hambleton*, 181 Wn.2d 802, 817, 335 P.3d 398 (2014). Summary judgment is

---

[2] Olympic previously appealed taxes assessed on revenue derived from its fuel bunkering activities, arguing it was entitled to a deduction from the PUT as revenues derived from the transportation of commodities. Division One of this court rejected Olympic's position, holding that the bunker fuel was not a commodity. *Olympic Tug & Barge, Inc. v. The Dep't of Revenue*, 163 Wn. App. 298, 301, 259 P.3d 338 (2011), *review denied*, 173 Wn.2d 1021 (2012).

[3] Olympic lists 10 assignments of error. Most of these (assignments of error 1-9) concern the superior court's interpretations of the law. But we review de novo whether the superior court erred in denying Olympic's motion for partial summary judgment and granting DOR's motion for summary judgment dismissal. Thus, the superior court's interpretations of the law are not pertinent to this appeal, and we do not address these individual assignments of error. We may

appropriate where, viewing the evidence in the light most favorable to the nonmoving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *TracFone Wireless, Inc. v. The Dep't of Revenue*, 170 Wn.2d 273, 281, 242 P.3d 810 (2010). Because there are no disputed material facts here, we review de novo the question of law whether Olympic was subject to the stevedoring tax classification. *See Bravern Residential, II, LLC v. The Dep't of Revenue*, 183 Wn. App. 769, 776, 334 P.3d 1182 (2014).

Statutory interpretation is a question of law we review de novo. *Cashmere Valley Bank v. Dep't of Revenue*, 181 Wn.2d 622, 631, 334 P.3d 1100 (2014). We endeavor to effectuate the legislature's intent by applying the statute's plain meaning, considering the relevant statutory text, its context, and the statutory scheme. *Cashmere*, 181 Wn.2d at 631. When a statute includes general terms in conjunction with specific terms, we deem the general terms "only to incorporate those things similar in nature or 'comparable to' the specific terms." *Simpson Inv. Co. v. The Dep't of Revenue*, 141 Wn.2d 139, 151, 3 P.3d 741 (2000). Only if the statute remains ambiguous after this plain meaning analysis do we proceed to look at other sources of interpretation, such as legislative history. *The Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 12, 43 P.3d 4 (2002). We avoid reading a statute in a way that produces absurd results. *Tingey v. Haisch*, 159 Wn.2d 652, 663-64, 152 P.3d 1020 (2007).

---

affirm summary judgment on any ground supported by the record. *Pacific Marine Ins. Co. v. The Dep't of Revenue*, 181 Wn. App. 730, 737, 329 P.3d 101 (2014).

II. SUMMARY JUDGMENT MOTIONS

Olympic argues that the superior court erred by denying its motion for partial summary judgment and granting the DOR's motion for summary judgment dismissal because Olympic's fuel bunkering activities were subject to the stevedoring tax classification. We disagree.

A. *Statutory Framework*

This appeal concerns which of two taxes applies to Olympic's fuel bunkering revenues, the higher PUT or the lower B&O tax. The PUT, found in chapter 82.16 RCW, applies to a number of public service businesses, including tugboat businesses. RCW 82.16.020(1)(f). A "tugboat business" is defined as "the business of operating tugboats, towboats, wharf boats or similar vessels in the towing or pushing of vessels, barges or rafts for hire." RCW 82.16.010(10). The DOR has assessed the PUT on Olympic's fuel bunkering services for years.

The B&O tax statute provides:

> Upon every person engaging within this state in the business of stevedoring and associated activities pertinent to the movement of goods and commodities in waterborne interstate or foreign commerce . . . . Persons subject to taxation under this subsection are exempt from payment of taxes imposed by chapter 82.16 RCW for that portion of their business subject to taxation under this subsection.

RCW 82.04.260(7). Thus, the B&O tax applies to businesses performing "stevedoring and associated activities," and such businesses are exempt from the PUT. RCW 82.04.260(7).

The statute then defines "[s]tevedoring and associated activities pertinent to the conduct of goods and commodities in waterborne interstate or foreign commerce" as

> all activities of a labor, service or transportation nature whereby cargo may be loaded or unloaded to or from vessels or barges, passing over, onto or under a wharf, pier, or similar structure; cargo may be moved to a warehouse or similar holding or storage yard or area to await further movement in import or export or may move to a consolidation freight station and be stuffed, unstuffed, containerized, separated or

> otherwise segregated or aggregated for delivery or loaded on any mode of transportation for delivery to its consignee.

RCW 82.04.260(7). Thus, to come under the statute, an activity must be of a type involving the loading or unloading of cargo over, under, or onto a wharf, pier, or similar structure.[4]

Finally, the statute identifies the specific activities included in the definition of "[s]tevedoring and associated activities pertinent to the conduct of goods and commodities in waterborne interstate or foreign commerce":

> Specific activities included in this definition are: Wharfage, handling, loading, unloading, moving of cargo to a convenient place of delivery to the consignee or a convenient place for further movement to export mode; documentation services in connection with the receipt, delivery, checking, care, custody and control of cargo required in the transfer of cargo; imported automobile handling prior to delivery to consignee; *terminal stevedoring and incidental vessel services*, including but not limited to plugging and unplugging refrigerator service to containers, trailers, and other refrigerated cargo receptacles, and securing ship hatch covers.

RCW 82.04.260(7) (emphasis added). In summary, the B&O tax classification exempts certain revenues from the PUT if they are derived from "stevedoring and associated activities." RCW 82.04.260(7). "[T]erminal stevedoring and incidental vessel services" include those specific activities listed in the statute. RCW 82.04.260(7).

B. *Stevedoring Tax Classification Inapplicable to Olympic*

Olympic argues that under the plain meaning of the stevedoring tax classification, Olympic's fuel bunkering services are "stevedoring 'and associated activities'" because they are

[4] Olympic admitted that the fuel was "not loaded onto the vessels by passing the bunker fuel over, onto or under a wharf, pier, or similar structure." CP at 66.

"'incidental vessel services.'"[5] Br. of Appellant at 16, 19. The DOR argues that the plain meaning of the stevedoring tax classification does not apply to Olympic's fuel bunkering services. We agree with the DOR.[6]

It is undisputed that Olympic's fuel bunkering services do not involve loading fuel "onto the vessels by passing the bunker fuel over, onto or under a wharf, pier, or similar structure." Clerk's Papers at 66. This renders the entire definition of "stevedoring and associated activities" inapplicable to Olympic because the legislature defined that classification as "all activities of a labor, service, or transportation nature whereby cargo may be loaded or unloaded to or from vessels or barges, passing over, onto or under a wharf, pier, or similar structure." RCW

---

[5] Olympic argued for the first time at oral argument that a recent DOR determination should control our analysis. The determination holds that a port's dockage fees for berthing a vessel are subject to the stevedoring tax classification because they fit the definition of "stevedoring and associated activities," specifically wharfage. Wash. Dep't of Revenue, Determination No. 14-0196, 34 Wash. Tax Dec. 036 (2015). The administrative law judge found that the taxpayer's activities were of a nature "whereby cargo may be loaded or unloaded to or from vessels or barges" because the taxpayer berthed the vessel at a dock before loading or unloading cargo. Revenue Determination No. 14-0196, 34 Wash. Tax Dec. at 39. Furthermore, the administrative law judge held that the berthing activities constituted "wharfage," which was specifically enumerated in the stevedoring tax classification. Revenue Determination No. 14-0196, 34 Wash. Tax Dec. at39.

Olympic argues that this determination is dispositive here because Olympic's fueling services are equally necessary to the movement of cargo as is vessel berthing. We disagree. As we discuss below, Olympic's activities do not fall under the plain meaning of "stevedoring and associated activities." Moreover, wharfage is not at issue in this case.

[6] Olympic argues that the context surrounding the enactment of RCW 82.04.260(7) should inform part of our plain meaning analysis. But we look to the statutory language, not the legislative history, during a plain meaning analysis. *Cashmere*, 181 Wn.2d at 631; *Campbell & Gwinn*, 146 Wn.2d at 12.

82.04.260(7). Thus, we hold that Olympic's business does not fall within the plain meaning of the definition of "stevedoring and associated activities."[7]

Nevertheless, Olympic argues that the subsection's final sentence, listing types of "stevedoring and associated activities pertinent to the conduct of goods and commodities in waterborne interstate or foreign commerce" applies to Olympic because one such type is "terminal stevedoring and incidental vessel services." Br. of Appellant at 19. Olympic argues that fueling a vessel is an "incidental vessel service" because "without the fuel provided by Olympic's services the vessel, and the cargo with which it has just been loaded, would be unable to move to interstate or foreign destinations." Br. of Appellant at 20. Thus, Olympic argues that fueling a vessel is an "incidental vessel service" that is "pertinent to the conduct of goods and commodities" and falls within the subsection.

But Olympic misreads the statute's plain language. Reading "incidental vessel services" in its statutory context, it is clear that the legislature did not intend to include every service that is incidental to a vessel. First, the phrase "incidental vessel services" does not appear in isolation; instead, it appears as the phrase "terminal stevedoring and incidental vessel services." RCW 82.04.260(7). Because "incidental vessel services" is a general term appearing in conjunction with the specific term "terminal stevedoring," we deem "incidental vessel services" to

[7] Olympic argues that we must construe any ambiguities in the stevedoring tax classification in Olympic's favor. DOR argues that we must narrowly construe the stevedoring tax classification because it is an exemption. Because we hold that this statute is unambiguous, we do not resolve this dispute. *See City of Spokane ex rel. Wastewater Mgmt. Dep't v. The Dep't of Revenue*, 145 Wn.2d 445, 452 n.5, 38 P.3d 1010 (2002).

incorporate only "those things similar in nature or 'comparable to'" terminal stevedoring. *Simpson Inv. Co.*, 141 Wn.2d at 151.

Furthermore, we read this phrase in conjunction with the rest of the statutory section. There is no punctuation between "terminal stevedoring" and "incidental vessel services," but semicolons divide the other groups of examples from each other.[8] Thus, the statute's organization shows that "terminal stevedoring and incidental vessel services" is one category of activities, not two. Thus, in context, the word "incidental" modifies the phrase "terminal stevedoring," rather than simply the term "vessel." RCW 82.04.260(7). We conclude that the phrase "terminal stevedoring and incidental vessel services" describes terminal stevedoring and vessel services incidental to terminal stevedoring. RCW 82.04.260(7). It does not broadly describe any services incidental to a vessel.

Second, we read "terminal stevedoring and incidental vessel services" within the context of the entire statutory subsection, which is about "stevedoring and associated activities." RCW 82.04.260(7). As described above, the legislature defined this group of activities as those which involve loading or unloading cargo onto vessels and barges "passing over, onto or under" various structures. RCW 82.04.260(7). Thus, any "incidental vessel service" must fall within this definition, which Olympic's fuel bunkering does not. Although a business need not perform stevedoring to qualify, it plainly must perform a business associated to stevedoring, and the

[8] "[1] Wharfage, handling, loading, unloading, moving of cargo to a convenient place of delivery to the consignee or a convenient place for further movement to export mode; [2] documentation services in connection with the receipt, delivery, checking, care, custody and control of cargo required in the transfer of cargo; [3] imported automobile handling prior to delivery to consignee; [4] terminal stevedoring and incidental vessel services, including but not limited to plugging and unplugging refrigerator service to containers, trailers, and other refrigerated cargo receptacles, and securing ship hatch covers." RCW 82.04.260(7).

legislature defined this phrase as relating to the loading and unloading of cargo at a dock or similar structure. Because Olympic's fuel bunkering has no relationship to the loading or unloading of cargo passing over, onto or under a wharf, pier, or similar structure, it does not fit the definition.

Third, we avoid reading the statute to produce the absurd result that anything "incidental" to the movement of cargo is exempt from the PUT. *See Tingey*, 159 Wn.2d at 663-64. Olympic argues that its interpretation is not so broad as to encompass any service related to cargo movement, and that it instead encompasses only "business activities that take place while a ship is in port, and which facilitate the movement of goods and commodities in and out of Washington." Br. of Appellant at 22 n. 10. But were we to adopt Olympic's interpretation, there would be no language in the statute to limit these "incidental vessel services" to those that occur in port. Adopting Olympic's reading of the statute to apply to fuel bunkering would require broadening the exemption to include an extensive list of services "incidental" to waterborne commerce, whether or not they relate to the loading or unloading of cargo. We decline to adopt the broad reading that Olympic urges. *See Olympic Tug & Barge*, 163 Wn. App. at 307.

Thus, we hold that the plain language of the stevedoring tax classification does not apply to Olympic's fuel bunkering. Olympic does not transport cargo over or under a wharf or similar structure, so the definition of "stevedoring and associated activities" does not apply. Moreover, the plain meaning of the phrase "terminal stevedoring and incidental vessel services" does not include all services incidental to a vessel; instead, it includes vessel services incidental to terminal stevedoring. Finally, Olympic's interpretation of the statute would lead to an absurd result, exempting countless "incidental" vessel services unrelated to stevedoring from the PUT,

all under an exemption designed for stevedoring and associated activities. Accordingly, we hold that the superior court did not err by denying Olympic's motion for partial summary judgment and granting the DOR's motion for summary judgment dismissal and we affirm the superior court's order.[9]

Worswick, P.J.

We concur:

Maxa, J.

Lee, J.

[9] We do not consider Olympic's assignment of error to the superior court's award of statutory fees and costs to DOR because it does not provide any supporting argument in its brief. RAP 10.3(a)(6); *LK Operating, LLC v. Collection Group, LLC*, 181 Wn.2d 117, 122 n. 4, 330 P.3d 190 (2014). In any event, as the prevailing party DOR is entitled to statutory fees and costs.

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

OLYMPIC TUG & BARGE, INC.,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF REVENUE,

Respondent.

No. 46102-1-II

ORDER GRANTING MOTION TO RECONSIDER IN PART AND AMENDING OPINION IN PART

APPELLANT Olympic Tug & Barge, Inc. moves for reconsideration of this court's published opinion. After due consideration, we grant the motion for reconsideration in part and amend the opinion in part as follows.

On page 6, we remove the words "for the first time at oral argument" from footnote 5. We do not amend any other portion of the opinion or the result.

SO ORDERED.

Dated this 18th day of August, 2015.

Worswick, P.J.

We Concur:

Maxa, J.

Lee, J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

OLYMPIC TUG & BARGE, INC., Appellant, v. WASHINGTON STATE DEPARTMENT OF REVENUE, Respondent.	No. 46102-1-II PUBLISHED OPINION

WORSWICK, P.J. — Olympic Tug & Barge, Inc. (Olympic) appeals the superior court's denial of its motion for partial summary judgment and award of summary judgment dismissal to the Department of Revenue (DOR). The superior court ruled that Olympic's activities did not fall under the business and occupation (B&O) tax classification for stevedoring and associated activities set forth in RCW 82.04.260(7). We affirm.

FACTS

The facts in this case are undisputed. Olympic is a Washington corporation in the business of operating tugboats and barges. Relevant to this appeal, Olympic performs fuel bunkering services, which consist of delivering bunker fuel[1] to commercial vessels in the Puget Sound. Olympic delivers this fuel while the receiving vessel is either tied to a dock or at anchor in a harbor. Olympic's tugboats transport the fuel to the receiving vessel, then pump the fuel through fuel lines into the vessel's fuel tanks.

[1] Bunker fuel is the type of fuel burned by ships at sea.

Olympic has litigated its assessed taxes for several years. It has paid the public utility tax (PUT) since 1994. *See* chapter 82.16 RCW. Olympic sued the DOR for a partial refund of PUT paid on its fuel bunkering revenues for the tax years 2003 through 2008. It argued that it owed only the business and occupation (B&O) taxes for stevedoring and associated activities and not the higher PUT.[2] *See* RCW 82.04.260(7).

Olympic moved for partial summary judgment under CR 56, seeking an order declaring that its fuel bunkering services were subject to the stevedoring tax classification found in RCW 82.04.260(7). After a hearing, the superior court denied Olympic's motion for partial summary judgment. The DOR then moved orally for summary judgment dismissal and the superior court granted this motion. The superior court granted the DOR statutory costs and attorney fees. Olympic appeals.

ANALYSIS

I. STANDARD OF REVIEW

We review a trial court's order granting or denying summary judgment de novo.[3] *In re Estate of Hambleton*, 181 Wn.2d 802, 817, 335 P.3d 398 (2014). Summary judgment is

---

[2] Olympic previously appealed taxes assessed on revenue derived from its fuel bunkering activities, arguing it was entitled to a deduction from the PUT as revenues derived from the transportation of commodities. Division One of this court rejected Olympic's position, holding that the bunker fuel was not a commodity. *Olympic Tug & Barge, Inc. v. The Dep't of Revenue*, 163 Wn. App. 298, 301, 259 P.3d 338 (2011), *review denied*, 173 Wn.2d 1021 (2012).

[3] Olympic lists 10 assignments of error. Most of these (assignments of error 1-9) concern the superior court's interpretations of the law. But we review de novo whether the superior court erred in denying Olympic's motion for partial summary judgment and granting DOR's motion for summary judgment dismissal. Thus, the superior court's interpretations of the law are not pertinent to this appeal, and we do not address these individual assignments of error. We may

appropriate where, viewing the evidence in the light most favorable to the nonmoving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *TracFone Wireless, Inc. v. The Dep't of Revenue*, 170 Wn.2d 273, 281, 242 P.3d 810 (2010). Because there are no disputed material facts here, we review de novo the question of law whether Olympic was subject to the stevedoring tax classification. *See Bravern Residential, II, LLC v. The Dep't of Revenue*, 183 Wn. App. 769, 776, 334 P.3d 1182 (2014).

Statutory interpretation is a question of law we review de novo. *Cashmere Valley Bank v. Dep't of Revenue*, 181 Wn.2d 622, 631, 334 P.3d 1100 (2014). We endeavor to effectuate the legislature's intent by applying the statute's plain meaning, considering the relevant statutory text, its context, and the statutory scheme. *Cashmere*, 181 Wn.2d at 631. When a statute includes general terms in conjunction with specific terms, we deem the general terms "only to incorporate those things similar in nature or 'comparable to' the specific terms." *Simpson Inv. Co. v. The Dep't of Revenue*, 141 Wn.2d 139, 151, 3 P.3d 741 (2000). Only if the statute remains ambiguous after this plain meaning analysis do we proceed to look at other sources of interpretation, such as legislative history. *The Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 12, 43 P.3d 4 (2002). We avoid reading a statute in a way that produces absurd results. *Tingey v. Haisch*, 159 Wn.2d 652, 663-64, 152 P.3d 1020 (2007).

---

affirm summary judgment on any ground supported by the record. *Pacific Marine Ins. Co. v. The Dep't of Revenue*, 181 Wn. App. 730, 737, 329 P.3d 101 (2014).

II. SUMMARY JUDGMENT MOTIONS

Olympic argues that the superior court erred by denying its motion for partial summary judgment and granting the DOR's motion for summary judgment dismissal because Olympic's fuel bunkering activities were subject to the stevedoring tax classification. We disagree.

A. *Statutory Framework*

This appeal concerns which of two taxes applies to Olympic's fuel bunkering revenues, the higher PUT or the lower B&O tax. The PUT, found in chapter 82.16 RCW, applies to a number of public service businesses, including tugboat businesses. RCW 82.16.020(1)(f). A "tugboat business" is defined as "the business of operating tugboats, towboats, wharf boats or similar vessels in the towing or pushing of vessels, barges or rafts for hire." RCW 82.16.010(10). The DOR has assessed the PUT on Olympic's fuel bunkering services for years.

The B&O tax statute provides:

> Upon every person engaging within this state in the business of stevedoring and associated activities pertinent to the movement of goods and commodities in waterborne interstate or foreign commerce . . . . Persons subject to taxation under this subsection are exempt from payment of taxes imposed by chapter 82.16 RCW for that portion of their business subject to taxation under this subsection.

RCW 82.04.260(7). Thus, the B&O tax applies to businesses performing "stevedoring and associated activities," and such businesses are exempt from the PUT. RCW 82.04.260(7).

The statute then defines "[s]tevedoring and associated activities pertinent to the conduct of goods and commodities in waterborne interstate or foreign commerce" as

> all activities of a labor, service or transportation nature whereby cargo may be loaded or unloaded to or from vessels or barges, passing over, onto or under a wharf, pier, or similar structure; cargo may be moved to a warehouse or similar holding or storage yard or area to await further movement in import or export or may move to a consolidation freight station and be stuffed, unstuffed, containerized, separated or

> otherwise segregated or aggregated for delivery or loaded on any mode of transportation for delivery to its consignee.

RCW 82.04.260(7). Thus, to come under the statute, an activity must be of a type involving the loading or unloading of cargo over, under, or onto a wharf, pier, or similar structure.[4]

Finally, the statute identifies the specific activities included in the definition of "[s]tevedoring and associated activities pertinent to the conduct of goods and commodities in waterborne interstate or foreign commerce":

> Specific activities included in this definition are: Wharfage, handling, loading, unloading, moving of cargo to a convenient place of delivery to the consignee or a convenient place for further movement to export mode; documentation services in connection with the receipt, delivery, checking, care, custody and control of cargo required in the transfer of cargo; imported automobile handling prior to delivery to consignee; *terminal stevedoring and incidental vessel services*, including but not limited to plugging and unplugging refrigerator service to containers, trailers, and other refrigerated cargo receptacles, and securing ship hatch covers.

RCW 82.04.260(7) (emphasis added). In summary, the B&O tax classification exempts certain revenues from the PUT if they are derived from "stevedoring and associated activities." RCW 82.04.260(7). "[T]erminal stevedoring and incidental vessel services" include those specific activities listed in the statute. RCW 82.04.260(7).

B. *Stevedoring Tax Classification Inapplicable to Olympic*

Olympic argues that under the plain meaning of the stevedoring tax classification, Olympic's fuel bunkering services are "stevedoring 'and associated activities'" because they are

[4] Olympic admitted that the fuel was "not loaded onto the vessels by passing the bunker fuel over, onto or under a wharf, pier, or similar structure." CP at 66.

"'incidental vessel services.'"[5] Br. of Appellant at 16, 19. The DOR argues that the plain meaning of the stevedoring tax classification does not apply to Olympic's fuel bunkering services. We agree with the DOR.[6]

It is undisputed that Olympic's fuel bunkering services do not involve loading fuel "onto the vessels by passing the bunker fuel over, onto or under a wharf, pier, or similar structure." Clerk's Papers at 66. This renders the entire definition of "stevedoring and associated activities" inapplicable to Olympic because the legislature defined that classification as "all activities of a labor, service, or transportation nature whereby cargo may be loaded or unloaded to or from vessels or barges, passing over, onto or under a wharf, pier, or similar structure." RCW

---

[5] Olympic argued for the first time at oral argument that a recent DOR determination should control our analysis. The determination holds that a port's dockage fees for berthing a vessel are subject to the stevedoring tax classification because they fit the definition of "stevedoring and associated activities," specifically wharfage. Wash. Dep't of Revenue, Determination No. 14-0196, 34 Wash. Tax Dec. 036 (2015). The administrative law judge found that the taxpayer's activities were of a nature "whereby cargo may be loaded or unloaded to or from vessels or barges" because the taxpayer berthed the vessel at a dock before loading or unloading cargo. Revenue Determination No. 14-0196, 34 Wash. Tax Dec. at 39. Furthermore, the administrative law judge held that the berthing activities constituted "wharfage," which was specifically enumerated in the stevedoring tax classification. Revenue Determination No. 14-0196, 34 Wash. Tax Dec. at39.

Olympic argues that this determination is dispositive here because Olympic's fueling services are equally necessary to the movement of cargo as is vessel berthing. We disagree. As we discuss below, Olympic's activities do not fall under the plain meaning of "stevedoring and associated activities." Moreover, wharfage is not at issue in this case.

[6] Olympic argues that the context surrounding the enactment of RCW 82.04.260(7) should inform part of our plain meaning analysis. But we look to the statutory language, not the legislative history, during a plain meaning analysis. *Cashmere*, 181 Wn.2d at 631; *Campbell & Gwinn*, 146 Wn.2d at 12.

82.04.260(7). Thus, we hold that Olympic's business does not fall within the plain meaning of the definition of "stevedoring and associated activities."[7]

Nevertheless, Olympic argues that the subsection's final sentence, listing types of "stevedoring and associated activities pertinent to the conduct of goods and commodities in waterborne interstate or foreign commerce" applies to Olympic because one such type is "terminal stevedoring and incidental vessel services." Br. of Appellant at 19. Olympic argues that fueling a vessel is an "incidental vessel service" because "without the fuel provided by Olympic's services the vessel, and the cargo with which it has just been loaded, would be unable to move to interstate or foreign destinations." Br. of Appellant at 20. Thus, Olympic argues that fueling a vessel is an "incidental vessel service" that is "pertinent to the conduct of goods and commodities" and falls within the subsection.

But Olympic misreads the statute's plain language. Reading "incidental vessel services" in its statutory context, it is clear that the legislature did not intend to include every service that is incidental to a vessel. First, the phrase "incidental vessel services" does not appear in isolation; instead, it appears as the phrase "terminal stevedoring and incidental vessel services." RCW 82.04.260(7). Because "incidental vessel services" is a general term appearing in conjunction with the specific term "terminal stevedoring," we deem "incidental vessel services" to

[7] Olympic argues that we must construe any ambiguities in the stevedoring tax classification in Olympic's favor. DOR argues that we must narrowly construe the stevedoring tax classification because it is an exemption. Because we hold that this statute is unambiguous, we do not resolve this dispute. *See City of Spokane ex rel. Wastewater Mgmt. Dep't v. The Dep't of Revenue*, 145 Wn.2d 445, 452 n.5, 38 P.3d 1010 (2002).

incorporate only "those things similar in nature or 'comparable to'" terminal stevedoring. *Simpson Inv. Co.*, 141 Wn.2d at 151.

Furthermore, we read this phrase in conjunction with the rest of the statutory section. There is no punctuation between "terminal stevedoring" and "incidental vessel services," but semicolons divide the other groups of examples from each other.[8] Thus, the statute's organization shows that "terminal stevedoring and incidental vessel services" is one category of activities, not two. Thus, in context, the word "incidental" modifies the phrase "terminal stevedoring," rather than simply the term "vessel." RCW 82.04.260(7). We conclude that the phrase "terminal stevedoring and incidental vessel services" describes terminal stevedoring and vessel services incidental to terminal stevedoring. RCW 82.04.260(7). It does not broadly describe any services incidental to a vessel.

Second, we read "terminal stevedoring and incidental vessel services" within the context of the entire statutory subsection, which is about "stevedoring and associated activities." RCW 82.04.260(7). As described above, the legislature defined this group of activities as those which involve loading or unloading cargo onto vessels and barges "passing over, onto or under" various structures. RCW 82.04.260(7). Thus, any "incidental vessel service" must fall within this definition, which Olympic's fuel bunkering does not. Although a business need not perform stevedoring to qualify, it plainly must perform a business associated to stevedoring, and the

[8] "[1] Wharfage, handling, loading, unloading, moving of cargo to a convenient place of delivery to the consignee or a convenient place for further movement to export mode; [2] documentation services in connection with the receipt, delivery, checking, care, custody and control of cargo required in the transfer of cargo; [3] imported automobile handling prior to delivery to consignee; [4] terminal stevedoring and incidental vessel services, including but not limited to plugging and unplugging refrigerator service to containers, trailers, and other refrigerated cargo receptacles, and securing ship hatch covers." RCW 82.04.260(7).

legislature defined this phrase as relating to the loading and unloading of cargo at a dock or similar structure. Because Olympic's fuel bunkering has no relationship to the loading or unloading of cargo passing over, onto or under a wharf, pier, or similar structure, it does not fit the definition.

Third, we avoid reading the statute to produce the absurd result that anything "incidental" to the movement of cargo is exempt from the PUT. *See Tingey*, 159 Wn.2d at 663-64. Olympic argues that its interpretation is not so broad as to encompass any service related to cargo movement, and that it instead encompasses only "business activities that take place while a ship is in port, and which facilitate the movement of goods and commodities in and out of Washington." Br. of Appellant at 22 n. 10. But were we to adopt Olympic's interpretation, there would be no language in the statute to limit these "incidental vessel services" to those that occur in port. Adopting Olympic's reading of the statute to apply to fuel bunkering would require broadening the exemption to include an extensive list of services "incidental" to waterborne commerce, whether or not they relate to the loading or unloading of cargo. We decline to adopt the broad reading that Olympic urges. *See Olympic Tug & Barge*, 163 Wn. App. at 307.

Thus, we hold that the plain language of the stevedoring tax classification does not apply to Olympic's fuel bunkering. Olympic does not transport cargo over or under a wharf or similar structure, so the definition of "stevedoring and associated activities" does not apply. Moreover, the plain meaning of the phrase "terminal stevedoring and incidental vessel services" does not include all services incidental to a vessel; instead, it includes vessel services incidental to terminal stevedoring. Finally, Olympic's interpretation of the statute would lead to an absurd result, exempting countless "incidental" vessel services unrelated to stevedoring from the PUT,

all under an exemption designed for stevedoring and associated activities. Accordingly, we hold that the superior court did not err by denying Olympic's motion for partial summary judgment and granting the DOR's motion for summary judgment dismissal and we affirm the superior court's order.[9]

Worswick, P.J.

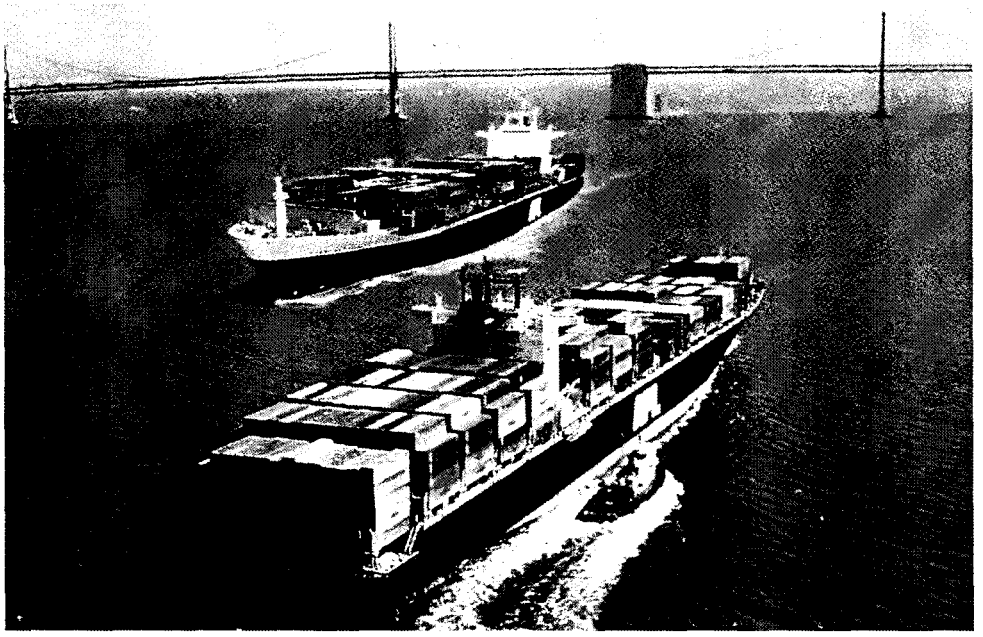
We concur:

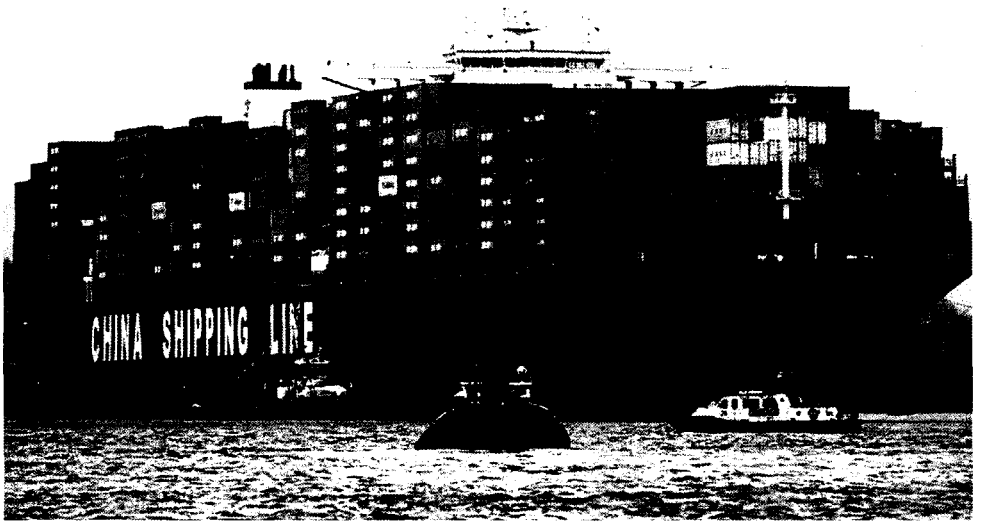
Maxa, J.

Lee, J.

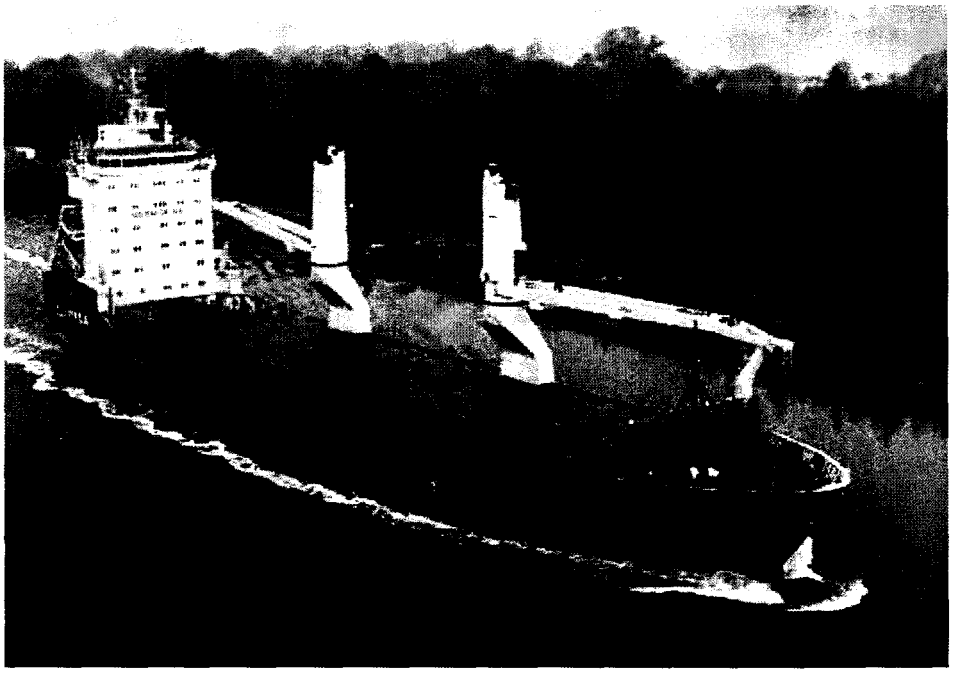
[9] We do not consider Olympic's assignment of error to the superior court's award of statutory fees and costs to DOR because it does not provide any supporting argument in its brief. RAP 10.3(a)(6); *LK Operating, LLC v. Collection Group, LLC*, 181 Wn.2d 117, 122 n. 4, 330 P.3d 190 (2014). In any event, as the prevailing party DOR is entitled to statutory fees and costs.

APPENDIX C




CHINA SHIPPING LINE

APPENDIX D



No. _____

SUPREME COURT
OF THE STATE OF WASHINGTON

NO. 46102-1-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION TWO

OLYMPIC TUG & BARGE, INC., Appellant, vs. STATE OF WASHINGTON DEPARTMENT OF REVENUE, Respondent.	DECLARATION OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

☒ Email and first-class United States mail, postage prepaid, to the following:

Kelly Owings
Attorney General of Washington
Revenue Division
7141 Cleanwater Lane SW
P.O. Box 40123
Olympia, WA 98504-0123
KellyO2@atg.wa.gov
REVOlyEF@atg.wa.gov

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 16th day of September, 2015, at Seattle, Washington.

Patti Saiden

Patti Saiden, Legal Assistant
Carney Badley Spellman, P.S.
701 Fifth Ave. Ste. 3600
Seattle, WA 98104-7010