NO. 92265-9

SUPREME COURT OF THE STATE OF WASHINGTON

OLYMPIC TUG & BARGE, INC.,

Petitioner,

v.

WASHINGTON STATE DEPARTMENT OF REVENUE,

Respondent.

ANSWER TO PETITION FOR REVIEW

ROBERT W. FERGUSON
Attorney General

Kelly Owings, WSBA No. 44665
Assistant Attorney General
Revenue Division, OID No. 91027
P.O. Box 40123
Olympia, WA 98504-0123
(360) 753-5528

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I. INTRODUCTION

RCW 82.04.260(7) creates a special business and occupation tax rate for "stevedoring and associated activities," which focuses on activities involving loading and unloading cargo at a wharf or similar structure. In this case, the Court of Appeals properly concluded that Olympic Tug & Barge, Inc.'s gross income does not fall within the stevedoring statute because its business has no relationship whatsoever with cargo. Instead, Olympic operates tugboats and barges that load fuel into ocean-going vessels that the vessels consume during their travels. Accordingly, the Court of Appeals correctly upheld the Department's assessment against Olympic for public utility tax as a tugboat business.

Review of the Court of Appeals decision is not warranted. The Court of Appeals addressed a straightforward statutory interpretation issue: whether Olympic's fuel delivery activities should be subject to the stevedoring rate for business and occupation tax or to the public utility tax as a tugboat business. In deciding this issue, the Court of Appeals followed established principles of statutory interpretation, holding that the plain meaning of the definition for "stevedoring and associated activities" does not include Olympic's tugboat operations. Olympic's petition strains to characterize the Court of Appeals decision as creating conflicts and

issues of substantial public interest where none exist. This Court should deny Olympic's petition for review.

II. COUNTERSTATEMENT OF THE ISSUE

Did the Court of Appeals properly hold that Olympic's gross income should be subject to public utility tax rather than business and occupation tax under the "stevedoring and associated activities" rate when Olympic's business does not relate to loading and unloading cargo, but instead involves delivering fuel by tugboats and barges to ocean-going vessels?

III. COUNTERSTATEMENT OF THE CASE

Olympic is primarily in the business of fuel bunkering. Fuel bunkering involves transporting fuel from refineries and storage facilities to docked or anchored ocean-going vessels. CP 24. To provide this service, Olympic first loads fuel onto its barges. CP 24. Olympic's tugboats then move these barges to the sides of the vessels preparing to head out to sea. CP 24. Once beside the ship, Olympic pumps the fuel into the fuel tanks of the vessels, which are known as "bunkers." CP 24. Olympic admits that during this process, the fuel is "not loaded onto the vessels by passing the bunker fuel over, onto, or under a wharf, pier, or similar structure." CP 66. Olympic never takes title to the fuel that it

loads into the vessels, but merely transports it. *See* CP 11-13, 24-25; App. Br. at 7.

After Olympic loads the fuel into the bunkers of the vessels, the vessels burn the fuel during their travels. CP 5. Because the vessels consume the fuel, the fuel is not a "commodity." *Olympic Tug & Barge, Inc. v. Dep't of Revenue*, 163 Wn. App. 298, 307-09, 259 P.3d 338 (2011), *review denied*, 173 Wn.2d 1021 (2012) (*Olympic Tug & Barge I*). Olympic also does not contend that the fuel it delivers is "cargo." *See, e.g.*, App.'s Opening Br. at 20 (distinguishing between the fuel Olympic provides and the cargo loaded onto a ship).

Olympic has been disputing the taxes it owes on these fuel bunkering activities for decades. In a series of tax challenges at the Board of Tax Appeals, Olympic initially claimed that its revenue from fuel bunkering qualified for a complete deduction as income derived from the transportation of commodities forwarded to interstate and foreign destinations. CP 75-82, 94-114 (referencing former RCW 82.16.050(8) (2006)). Ultimately, the Board rejected Olympic's argument and affirmed the Department's assessment of public utility tax under RCW 82.16.020(1) against Olympic as a tugboat business. CP 94-114. The Court of Appeals affirmed the Board's decision, holding that Olympic's fuel bunkering did not qualify for the deduction under former RCW

82.16.050(8) (2006) because its fuel was not a "commodity." *Olympic Tug & Barge I*, 163 Wn. App. at 308-10. This Court denied further review. *Olympic Tug & Barge, Inc. v. Dep't of Revenue*, 173 Wn.2d 1021, 272 P.3d 850 (2012).

After losing *Olympic Tug & Barge I*, Olympic filed this refund action for the 2003 through 2008 tax years. CP 4-9. In this case, Olympic asserted a different argument: its income should be subject to business and occupation tax under the "stevedoring and associated activities" classification, not public utility tax. The trial court disagreed, and granted summary judgment to the Department. CP 301-03.

On Olympic's appeal, the Court of Appeals again agreed with the Department. *Olympic Tug & Barge, Inc. v. Dep't of Revenue*, 188 Wn. App. 949, 355 P.3d 1199 (2015) (*Olympic Tug & Barge II*). It concluded that the plain language of RCW 82.04.260(7) does not apply to Olympic's fuel bunkering services. *Id.* at 958. According to the Court, Olympic's fuel bunkering does not fit within the definition of "stevedoring and associated activities" or the specific examples of activities that the statute provides, including "terminal stevedoring and incidental vessel services." *Id.* Olympic now seeks this Court's review of the Court of Appeals decision.

IV. REASONS WHY THE COURT SHOULD DENY REVIEW

RAP 13.4(b) sets forth four limited circumstances where this Court may choose to accept review of a decision by the Court of Appeals. Olympic argues that it meets the requirements for discretionary review under all four of RAP 13.4(b)'s criteria. Olympic is mistaken. This appeal involves a straightforward statutory interpretation issue. Both the trial court and the Court of Appeals correctly resolved this issue to hold that the plain meaning of the "stevedoring and associated activities" statute does not apply to Olympic's fuel bunkering activities. Instead, its fuel delivery income is subject to public utility tax.

A. The Court Of Appeals Decision Is Consistent With Previous Decisions By This Court And The Court Of Appeals.

This Court may accept review of a Court of Appeals decision if the decision conflicts with this Court's prior decisions or a Court of Appeals decision. RAP 13.4(b)(1)-(2). Contrary to Olympic's arguments, the Court of Appeals decision is entirely consistent with previous caselaw.

1. The Court of Appeals properly decided the only issue before it: whether Olympic's fuel bunkering qualifies as "stevedoring and associated activities."

Olympic argues that the "heart" of the Court of Appeals decision is the interpretation of a particular phrase in RCW 82.04.260(7): "terminal stevedoring and incidental vessel services." Pet. at 5. According to

Olympic, the Court's interpretation is based upon an argument the Department allegedly advanced for the first time at oral argument. Pet. at 5-9. Thus, Olympic asserts that the Court of Appeals ignored RAP 12.1 and prior caselaw interpreting this rule. Pet. at 8-9. Olympic mischaracterizes the Court of Appeals decision, the Department's arguments, and prior caselaw.

The "heart" of the Court of Appeals decision is not the Court's analysis of a single phrase or clause in RCW 82.04.260(7), but its interpretation of the statute as a whole. The Court of Appeals decision sets forth the language of RCW 82.04.260(7) in its entirety. *Olympic Tug & Barge II*, 188 Wn. App. at 953-54. The decision quotes RCW 82.04.260(7)'s specific definition of "stevedoring and associated activities pertinent to the conduct of goods and commodities in waterborne interstate or foreign commerce":

> 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.

Id. at 954 (quoting RCW 82.04.260(7)). Based on this language, the Court of Appeals explained that only activities "involving the loading or unloading of cargo over, under, or onto a wharf, pier, or similar structure," fall within the statute. *Id.*[1]

The Court of Appeals then included the rest of RCW 82.04.260(7)'s language, which identifies examples of activities that meet the statute's definition for "stevedoring and associated activities":

> 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.

Id. (quoting RCW 82.04.260(7)).

After examining RCW 82.04.260(7)'s language as a whole, the Court of Appeals concluded that Olympic's fuel bunkering could not meet the statute's definition for "stevedoring and associated activities." *Id.* at 955-56. The Court reached this conclusion based on Olympic's

[1] Because Olympic's activities do not include moving cargo to a warehouse, storage yard, consolidation freight station, etc., the Court of Appeals had no need to address the remaining clauses of the definition.

concession that its fuel bunkering services do not involve loading or unloading fuel over, under, or onto a wharf, pier, or similar structure. *Id.* at 955. Accordingly, the Court held that Olympic's business activities did not fall within RCW 82.04.260(7). *Id.* at 956. This conclusion mirrors the Department's primary argument in its briefing. Resp. Br. at 15-16.

Only after reaching this conclusion did the Court address the final phrase in RCW 82.04.260(7), which includes "terminal stevedoring and incidental vessel services" as an example of "stevedoring and associated activities." *Id.* at 956. The Court of Appeals addressed this phrase in response to Olympic's primary argument that loading fuel into a ship is an "incidental vessel service" because without such fuel, the vessel could not move. *Id.* at 956 (citing App. Br. at 19-20). In rejecting Olympic's argument, the Court of Appeals simply explained that "incidental vessel services" must be read in conjunction with "terminal stevedoring," and in the context of the statute's definition for "stevedoring and associated activities." *Id.* at 956-58. Otherwise, the Court concluded, Olympic's interpretation would broaden the exemption to include any service incidental to waterborne commerce. *Id.* at 958.

Olympic claims that the Court of Appeals' interpretation of "terminal stevedoring and incidental vessel services" is inconsistent with the examples that RCW 82.04.260(7) provides of such activities. Pet. at 6-

8. Specifically, Olympic asserts that the statute's example of "securing ship hatch covers" would not qualify as "terminal stevedoring and incidental vessel services" because ship hatch covers are allegedly "not associated with vessels carrying containers." Pet. at 7. But there is nothing in the record to support Olympic's allegations, and Olympic cites no authority for this proposition. Recognizing this, Olympic has attached photographs as appendices to its petition that it claims demonstrate "securing ship hatch covers" is not required for "terminal stevedoring." Because these photographs appear nowhere in the record, they should not be considered. *See* RAP 10.3(a)(8) (generally prohibiting an appendix from containing materials outside of the record without the appellate court's permission). Instead, this Court should reject Olympic's attempts to make its case by referring to factual matters outside the record.

The Court of Appeals' interpretation of "terminal stevedoring and incidental vessel services," also does not, as Olympic suggests, create any conflict with RAP 12.1 or the caselaw interpreting that rule. RAP 12.1(a) requires appellate courts to decide cases on the basis of the issues briefed by the parties. Applying RAP 12.1, appellate courts have refused to consider issues that a litigant has raised for the first time at oral argument without notifying the court or addressing in its brief. *See, e.g., State v. Johnson*, 119 Wn.2d 167, 170-71, 829 P.2d 1082 (1992) (refusing to

consider argument raised at oral argument that statute was unconstitutionally vague when only issue in brief related to interpretation of the statute).

There is no RAP 12.1 problem in this case. The Court decided the only issue that Olympic properly raised in its appeal: how to interpret RCW 82.04.260(7) and apply it to Olympic's business.[2] The Department thoroughly briefed this issue, primarily arguing that reading RCW 82.04.260(7) as a whole demonstrates that the statute only applies to loading and unloading cargo, and activities directly involving loading and unloading cargo. Resp. Br. at 17-18.

During oral argument, the Court specifically asked the Department whether it should be focusing upon the term "incidental vessel services." Oral Argument, *Olympic Tug & Barge, Inc. v. Dep't of Revenue*, at 14:16-14:23 (May 22, 2015). In response, the Department explained that "incidental vessel services" must be read together with "terminal stevedoring" as a single phrase in RCW 82.04.260(7). *Id.* at 14:24-47. This response provided the same approach for interpreting RCW 82.04.260(7) that the Department advocated for in its brief: examining the

[2] Olympic's opening brief listed 10 assignments of error to the trial court's decision. App. Br. at 1-2. Nine of these related to the trial court interpretations of the law. App. Br. at 1-2. As the Court of Appeals explained, however, most of these assignments of error were not relevant because the Court reviews whether the trial court properly denied summary judgment to Olympic and granted summary judgment to the Department de novo. *Olympic Tug & Barge II*, 188 Wn. App. at 952 n.3.

statute in its entirety, instead of emphasizing a single word or phrase. In contrast, the cases on which Olympic relies in its petition involve a party raising an entirely new issue for the first time at oral argument. *Johnson*, 119 Wn.2d at 170-71 (raising constitutional issue for first time at oral argument). Accordingly, the Court of Appeals decision complies with RAP 12.1 and related case law.

2. The Court of Appeals decision followed this Court's guidance for interpreting statutes according to their plain meaning.

Olympic further argues that the Court of Appeals decision conflicts with the rules for statutory interpretation that this Court delineated in *Department of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 43 P.3d 4 (2002). Pet. at 9-13. This argument does not provide a basis for this Court's review. In addition, Olympic misunderstands the plain meaning analysis for interpreting statutes that this Court has adopted.

It is questionable whether Olympic's disagreement with how the Court of Appeals applied the plain meaning standards in *Campbell & Gwinn* qualifies as the type of conflict contemplated by RAP 13.4(b)(1). Courts and commentators have long recognized that rules of interpretation and construction "are not rules of positive law, unless expressly provided by statute." Henry Campbell Black, *Handbook on the Construction and Interpretation of the Laws* § 3, at 9 (2d ed. 1911); *see also Johnson v.*

Continental West, Inc., 99 Wn.2d 555, 559, 663 P.2d 482 (1983) (rules of statutory construction "are rules in aid of construing legislation" and "are not statements of law").

Even if a statutory interpretation guideline could provide the basis for finding a conflict, the Court of Appeals decision discussed and applied the proper standard for interpreting a statute. *Olympic Tug & Barge II*, 188 Wn. App. at 952-953 ("We endeavor to effectuate the legislature's intent by applying the statute's plain meaning, considering the relevant statutory text, its context, and statutory scheme.") (internal quotations omitted). As described above, the Court of Appeals examined the "stevedoring and associated activities" statute in its entirety. *Id.* at 953-958. It also considered the context and statutory scheme by examining the language of the related public utility tax statute. *Id.* at 953, 958. After conducting this analysis, the Court concluded that Olympic's fuel bunkering did not fall within the plain meaning of the stevedoring statute. *Id.* at 958.

Despite this full examination of the statute, Olympic complains that the Court did not follow a proper plain meaning analysis of RCW 82.04.260(7). Pet. at 13. Ironically, however, it is Olympic that fails to apply *Campbell & Gwinn's* standards for statutory interpretation. Rather than considering RCW 82.04.260(7)'s language, context, and statutory

scheme as a whole, Olympic has chosen to focus on a single phrase in the statute to make its case: "incidental vessel services." By doing so, Olympic ignores the majority of RCW 82.04.260(7)'s language.

Still, Olympic insists that the Court of Appeals failed to conduct a proper plain meaning analysis because it did not take judicial notice of essential background facts. Pet. at 13. Olympic, however, does not state any facts "capable of accurate and ready determination." *See Campbell & Gwinn*, 146 Wn.2d at 11; ER 201(b) (court may take judicial notice of a fact that is generally known within a court's jurisdiction or is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned"). Instead, Olympic's petition merely describes RCW 82.04.260(7)'s legislative history and the competition Washington ports historically faced. Pet. at 10-12. It then relies on these alleged facts to explain what activities the Legislature intended the definition of "stevedoring and associated activities" to include. Pet. at 10-13. But Olympic's own explanation of why the Legislature chose to pass RCW 82.04.260(7) is not a background fact of which the Court of Appeals can take judicial notice.

Even if it were, Olympic's explanation is not at all helpful in determining what the Legislature intended to include within the definition of "stevedoring and associated activities." The mere fact that the

Legislature may have intended for the lower "stevedoring and associated activities" tax rate to attract more business to Washington ports does not provide any insight as to the scope of activities that the Legislature intended to include within this preferential rate. Thus, the Court properly rejected Olympic's reference to these alleged facts as legislative history that it would not consider in a plain meaning analysis. *Olympic Tug & Barge, Inc. II*, 188 Wn. App. 955 n.6. The Court of Appeals properly interpreted RCW 82.04.260(7) according to its plain language, and this interpretation does not conflict with any decisions by this Court or the Court of Appeals.

B. The Court Of Appeals' Interpretation Of RCW 82.04.260(7) Does Not Create Any Constitutional Concerns.

Olympic argues that this case merits review because the Court of Appeals' interpretation of RCW 82.04.260(7) raises "a significant equal protection issue under both the state and federal constitutions." Pet. at 13-14; *see* RAP 13.4(b)(3). Olympic misinterprets the decision of the Court of Appeals to create a constitutional question that does not exist.

In its decision, the Court of Appeals explained that to fall within RCW 82.04.260(7)'s definition for "stevedoring and associated activities," the activity must involve "the loading or unloading of cargo over, under, or onto a wharf, pier, or similar structure." *Olympic Tug & Barge II*, 188

Wn. App. at 954. Because Olympic admitted that it did not load fuel onto vessels by passing the fuel over, under, or onto a wharf or other structure, the Court concluded Olympic's fuel bunkering could not meet this definition. *Id.* at 955-56. Thus, according to the Court, activities involving "passing over, onto, or under" various structures is a necessary condition to qualify for the stevedoring rate. *See id.* at 955-58.

Olympic claims that the Court of Appeals' interpretation of RCW 82.04.260(7) results in fuel bunkering being treated differently under the statute depending upon whether the fuel is loaded from the dockside or waterside. Pet. at 14. According to Olympic, this creates a privileges and immunities, and equal protection problem.[3] But Olympic's argument confuses what the Court of Appeals decided by treating a necessary condition as a sufficient condition.

Contrary to Olympic's assertions, the Court's conclusion does not mean that merely loading fuel over, onto, or under various structures is sufficient to qualify for the "stevedoring and associated activities" definition. To make this argument, Olympic relies on a single sentence in

[3] The Equal Protection Clause in the United States Constitution provides that a state shall not "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Similarly, the Privileges and Immunities Clause in the Washington Constitution provides that "[n]o law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations." Const. art. I, § 12. This Court has interpreted the Privileges and Immunities Clause to ensure the same level of protection as the federal Equal Protection Clause. *City of Seattle v. Rogers Clothing for Men, Inc.*, 114 Wn.2d 213, 233, 787 P.2d 39 (1990).

the opinion where the Court explained that Olympic did not fall within the statute because its business does not involve loading fuel onto vessels by "passing over, onto, or under" various structures. *Olympic Tug & Barge II*, 188 Wn. App. at 955. The Court, however, only made this statement in light of the specific facts of this case and Olympic's own admission that it did not load fuel in this manner. *See id.* Thus, Olympic cannot isolate this statement from the rest of the opinion to create a constitutional issue.

Read as a whole, the Court of Appeals decision states again and again that RCW 82.04.260(7) requires an activity to also be one whereby cargo is loaded and unloaded. *Id.* at 954, 956, 957, 958. Accordingly, regardless of whether fuel bunkering takes place dockside or waterside, it would not qualify under the stevedoring statute because it has no relationship at all to loading or unloading cargo. Fuel bunkering relates to loading *fuel* into vessels to be consumed, not loading fuel as *cargo*, i.e., a good to be exchanged. *Id.* at 951 n.1. As the Court of Appeals concluded, the Legislature intended only to exempt activities relating to loading or unloading cargo at a dock or similar structure from public utility tax and provide them with a lower business and occupation tax rate. *Id.* at 953-54. The Court of Appeals decision imposes no unequal treatment and presents no question of constitutional law for this Court to decide.

C. Olympic's Disagreement With The Court Of Appeals' Analysis Distinguishing A Department Determination From This Case Does Not Create An Issue Of Substantial Public Interest.

Finally, Olympic contends that this case presents an issue of substantial public interest regarding the precedential value of tax determinations published by the Department. Pet. at 17-19. This issue does not support Olympic's petition for review because the Court of Appeals never addressed it; instead, the Court of Appeals simply found that the determination Olympic relied on was inapposite and not helpful to the analysis. As the Court of Appeals explained, the Department's determination addressed an entirely different activity, "wharfage," which is specifically listed in RCW 82.04.260(7) as falling within the definition for "stevedoring and associated activities." *Olympic Tug & Barge II*, 188 Wn. App. at 955 n.5. Thus, unlike fuel bunkering, wharfage fits within RCW 82.04.260(7)'s definition for "stevedoring and associated activities." *Id.*

Even if the determination were not distinguishable from this case, there is still no controversy requiring this Court's review. Courts, not agencies, are the ultimate arbiters of statutory interpretation. *Senate Repub. Campaign Comm. v. Pub. Disclosure Comm'n*, 133 Wn.2d 229, 241, 943 P.2d 1358 (1997). While courts may defer to an agency's interpretation of the law when it involves an area in which the agency has

special expertise, courts are not bound by an agency's determinations. *Cashmere Valley Bank v. Dep't of Revenue*, 181 Wn.2d 622, 635-36, 334 P.3d 1100 (2014). This is true even though RCW 82.32.410 uses the word "precedent" to refer to Department determinations. *See, e.g., Tacoma Subaru Inc. d/b/a The New Tacoma Nissan Subaru v. Dep't of Revenue,* Wash. Bd. Tax. App., 2004 WL 3363839, at *1 n.1 (2004) (indicating Department's determinations are binding on the Department, not the Board of Tax Appeals). To accept Olympic's arguments otherwise would adopt "an undesirable, if not dangerous, public policy" of allowing a Department determination to "usurp the basic and traditional judicial function of the courts in the interpretation of tax statutes enacted by the legislature." *Rusan's Inc. v. State*, 78 Wn.2d 601, 607, 478 P.2d 724 (1970) (explaining why neither a taxpayer nor government may stipulate to the meaning of a tax statute). Given a court's inherent role in deciding the meaning of the law, the precedential value of a Department determination is not an issue of substantial public interest that warrants this Courts consideration.

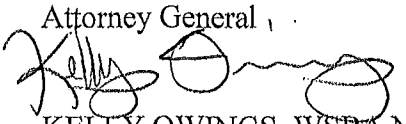
V. CONCLUSION

The Court of Appeals properly applied the plain language of RCW 82.04.260(7) to conclude that Olympic's fuel bunkering does not fit within the definition of "stevedoring and associated activities." Nothing in the

decision conflicts with prior caselaw, raises a significant constitutional question, or involves an issue of substantial public interest. Accordingly, discretionary review is not justified in this case.

RESPECTFULLY SUBMITTED this 16th day of November, 2015.

ROBERT W. FERGUSON
Attorney General



KELLY OWINGS, WSBA No. 44665
Assistant Attorneys General
Attorneys for Respondent
OID NO. 91027

PROOF OF SERVICE

I certify that I served a copy of this document, via electronic mail, per agreement, on the following:

George Mastrodonato
Michael King
Carney Badley Spellman, P.S.
701 Fifth Avenue, Suite 3600
Seattle, WA 98104
mastrodonato@carneylaw.com
mundy@carneylaw.com
king@carneylaw.com

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

DATED this 16th day of November, 2015, at Tumwater, WA

Susan Barton

Susan Barton, Legal Assistant

OFFICE RECEPTIONIST, CLERK

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Cc: Owings, Kelly (ATG)
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Cc: Owings, Kelly (ATG) <KellyO2@ATG.WA.GOV>
Subject: Olympic Tug & Barge, Inc. v. WA State Department of Revenue - Supreme Court No. 92265-9 - Answer to Petition for Review

Attached for filing is the Department of Revenue's Answer to Petition for Review.

Susan Barton, Legal Assistant
Office of the Attorney General
Revenue Division
(360) 664-4261