No. 46102-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

OLYMPIC TUG & BARGE, INC.,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Respondent

ON APPEAL FROM THURSTON COUNTY SUPERIOR COURT
Honorable Gary R. Tabor

APPELLANT'S OPENING BRIEF

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ASSIGNMENTS OF ERROR

1. The Thurston County Superior Court (the "trial court") erred by misinterpreting RCW 82.04.260(7) (sometimes referred to as the "statute").[1] Verbatim Report of Proceedings ("VRP") 31-32.

2. The trial court erred in the way it attempted to apply the rule of construction for tax imposing statutes, that any ambiguity in the language of the statute must be resolved in favor of the taxpayer and against the taxing authority. VRP 28.

3. The trial court erred by "primarily and foremost" denying the summary judgment motion of plaintiff and appellant Olympic Tug and Barge, Inc. ("Olympic") on the basis of "the very first sentence in the statute[,] . . . '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.'" VRP 31-32.

4. The trial court erred when it held that the decision of Division One in *Olympic Tug & Barge, Inc. v. Dep't of Revenue*, 163 Wn. App. 298, 259 P.3d 338 (2011), *rev. denied*, 173 Wn.2d 1021, 272 P.3d 850 (2012), ruled that "fueling was not pertinent to the movement of goods and commodities." VRP 32.

5. The trial court erred when it stated that it was Olympic who argued that "any activity that could in any way be associated with the

[1] RCW 82.04.260(7) is reproduced in the Appendix to this brief.

movement of goods and commodities . . . would [be an] associated activity" (VRP 32) when, in fact, it was the defendant and respondent Department of Revenue (the "Department") that advanced this argument in opposing Olympic's motion for summary judgment (CP 281).

6. The trial court erred by interpreting the "incidental vessel services" language of RCW 82.04.260(7) to apply only to "cargo or commodities." VRP 32-33.

7. The trial court erred when it interpreted the "securing ship hatch covers" language in the statute to include only "hatch covers in areas of containers [and] receptacles . . . involving cargo or commodities." VRP 33.

8. The trial court erred when it ruled that the statute does not apply "to the fuel that is being brought by a tug boat pulling a barge." VRP 33.

9. The trial court erred when it held that Division One's decision in *Olympic I* "applies in this particular case." VRP 34.

10. The trial court erred by (i) denying Olympic's motion for partial summary judgment; (ii) granting summary judgment to the Department; and (iii) awarding the Department statutory costs and attorney fees in the amount of $200.00. CP 302.

STATEMENT OF THE ISSUE

The single question before the Court pertains to all of the assignments of error: whether Olympic's fuel bunkering services are taxable under the Public Utility Tax (Chapter 82.16 RCW) or the

"Stevedoring and Associated Activities" (RCW 82.04.260(7)) classification of the business and occupation ("B&O") tax. Olympic believes that the proper tax is the Stevedoring B&O tax, and that the plain language of the statute supports this conclusion.

I. INTRODUCTION

This appeal asks this Court to determine whether Olympic's bunker fuel services business falls under RCW 82.04.260(7), entitling it to report income derived from bunkering fuel under this B&O tax classification.

The operative facts are not disputed.

Olympic operates a fleet of tugboats and barges in Washington. Its business includes the transportation of bulk fuel oil products, primarily bunker fuel.[2] Olympic generally picks up the fuel at an oil refinery or storage depot, and transports the fuel via tug and barge to the side of a ship, where the fuel is loaded into the vessel's fuel bunkers.

Prior to 1979 a "tugboat business" was subject to the Public Utility Tax. *See* RCW 82.16.010(10) (definition of "tugboat business"); 82.16.020(1)(f) (imposition of the Public Utility Tax on tugboat businesses). That year the Legislature created a new B&O tax classification for "stevedoring and associated activities pertinent to the movement of goods and commodities in waterborne interstate or foreign

[2] Bunker fuel, or marine bunker fuel, is the residual fuel oil that remains after gasoline and distillate fuel are extracted from crude oil. *Tesoro Refining and Marketing Company v. Dep't of Revenue*, 173 Wn.2d 551, 554, 269 P.3d 1013 (2012).

commerce." RCW 82.04.260(7); 1979 ex.s. c. 196 § 2. The Legislature made clear that taxpayers subject to the new classification who had previously been taxed under the Public Utility Tax would no longer be subject to that tax: "[p]ersons subject to taxation under this subsection are exempt from payment of taxes imposed [under the Public Utility Tax] for that portion of their business subject to taxation under [RCW 82.04.260(7)]." RCW 82.04.260(7).

This case turns on whether the bunkering of fuel for ocean-going vessels preparing to moving goods and commodities in waterborne interstate or foreign commerce is an "incidental vessel service"; if it is, then income from this activity is taxable under the stevedoring and associated activities classification of the B&O tax. There really should be no question that Olympic's business is taxable under this classification. The delivery and loading of fuel into cargo vessels by Olympic is indisputably an "incidental *vessel* service" that is "pertinent to the *movement* of goods and commodities in waterborne interstate or foreign commerce[.]" For without the fuel provided to the vessel by Olympic, that ship ***cannot move*** goods or commodities to interstate or foreign destinations.

The trial court nonetheless ruled that Olympic is not entitled to report its bunkering income under the Stevedoring B&O tax classification, because that supposedly was ruled out by Division One's decision in *Olympic Tug & Barge, Inc. v. Dep't of Revenue*, 163 Wn. App. 298, 259 P.3d 338 (2011), *rev. denied*, 173 Wn.2d 1021, 272 P.3d 850 (2012)

("*Olympic I*"). But that decision did not address whether the Public Utility Tax or the B&O tax applied to Olympic's revenues. Division One only addressed the question of whether a specific Public Utility Tax deduction statute, RCW 82.16.050(8) (now codified in RCW 82.16.050(9)), applied (Division One ruled the deduction did not apply). In short, the application of RCW 82.04.260(7) to Olympic's business was never addressed in *Olympic I*.[3]

That Olympic's bunkering revenues were from the performance of "incidental vessel services" "pertinent to the movement of goods or commodities in waterborne interstate or foreign commerce" cannot be fairly disputed under the plain and unambiguous language of RCW 82.04.260(7). Accordingly, this Court should reverse the trial court, declare that the intended scope of RCW 82.04.260(7) allows Olympic to pay Stevedoring B&O tax on its fuel bunkering revenues that otherwise meet the requirements of that statute, and remand the case to the trial court to determine the amount of the refund owed to Olympic.

II. STATEMENT OF THE CASE

The facts were generally summarized in Olympic's Notice of Appeal and Complaint for Refund of Taxes (*see* CP 4-7 (Compl. ¶¶ 2-17)) and the Declaration of Todd Prophet (CP 23-25 with attached Exhibits (CP 26-60)).

[3] The history of Olympics' tax payments, and in particular the shift at one point from paying under the Stevedoring classification to paying under the Public Utility Tax, is addressed in section II.B of the 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 (Prophet Decl. ¶ 3). Olympic's primary business is the transportation of bulk fuel oil products, including the bunkering of heavy fuel oil to vessels engaged in the movement of goods and commodities in waterborne interstate or foreign commerce. CP 24 (Prophet Decl. ¶ 4). "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. CP 24 (Prophet Decl. ¶ 5). Olympic then pumps or loads the fuel into the vessel's fuel hold or tanks (called "bunkers"). *Id.*

Olympic delivers different types of "bunker" fuels, including marine distillate and heavy fuel oils. CP 24 (Prophet Decl. ¶ 6). Olympic loads the fuel either at a refinery or other storage facility and transports it to the ship. *Id.* The tugboat will pull and maneuver 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, the 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 (Prophet Decl. ¶ 7). Instead, Olympic receives a fee for the service of loading, transporting and off-loading the fuel. *Id.* These services are performed while the vessels are in port and are being loaded or unloaded with cargo. *Id.*

Olympic transports petroleum products for all of the major oil companies with refining operations in Washington State. CP 24 (Prophet Decl. ¶ 8). Olympic also will move product from one terminal to another, including to and from refineries, offshore platforms, and storage facilities in preparation for loading the fuel onto the oceangoing vessels. *Id.* At times, Olympic will temporarily remove marine fuel from ships just outside of port (called lightering) and later put the fuel back into the ship after it leaves port. *Id.* In all cases where Olympic moves marine fuel, that fuel eventually is pumped into the holds of ocean-going vessels for use or sale outside Washington waters. *Id.* ¶ 9.

B. The Tax Assessments.

Olympic was organized in 1987. CP 299 (2nd Prophet Decl. ¶5). For the next 11 years, Olympic reported its bunkering revenues and paid B&O tax to the Department under the Stevedoring classification. *Id.* ¶¶ 5, 7. In 1998, Olympic changed its reporting, from the Stevedoring B&O tax to the Public Utility Tax, on the advice of its outside accounting firm (KPMG), which believed that Olympic would be eligible for a deduction provided by the Public Utility Tax. *Id.* ¶¶ 6, 7.[4]

When the Department first denied the deduction under the Public Utility Tax, Olympic filed an informal appeal to the Board of Tax Appeals, which ruled in favor of Olympic. *Olympic I*, 163 Wn. App. at

[4] The KPMG auditor who advised Olympic to report under the Public Utility Tax, and to take the deduction provided for by that tax, was a former Department of Revenue auditor and audit manager. CP 299 (2nd Prophet Decl. ¶ 7).

301-02. The Department then issued an excise tax advisory stating that it would not follow the Board's informal decision. *Id.* (citing Wash. Dep't of Revenue, Excise Tax Advisory (ETA) 2009–1S.32 (October 18, 2004), reissued as ETA 3055.2009, at 2 (February 2, 2009)). The Department then denied the deduction a second time, in an assessment issued for calendar year 2002. 163 Wn. App. at 302. Olympic again appealed to the Board, but this time the Board ruled that Olympic was not entitled to the deduction. *Id.*

Olympic appealed under the Administrative Procedure Act (APA), RCW Chapter 34.05, the Superior Court (King County, Hon. Mary Yu) reversed the Board and held Olympic was entitled to the deduction. 163 Wn. App. at 302. The Department appealed to Division One, which ruled that Olympic was not entitled to the deduction because "the bunker fuel was not a commodity being forwarded to an interstate or foreign destination," a requirement of the deduction statute. *Id.* at 301.

The present action arises out of the Department's assessments for calendar years 2003 through 2008. Olympic is seeking a refund of the difference between what it has been compelled to pay under the Public Utility Tax, 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 25 (Prophet Decl. at 3, ¶ 10); *see* CP 26-51 (Exhibits A-F attached thereto).[5]

[5] Exhibits A-F to the Prophet Declaration (CP 26-51) were excerpts from the tax assessments, consisting of the tax assessment notice and the narrative explanation for the

(Footnote continued next page)

C. The Sample Transaction in the Record.

A sample transaction was included in the record at CP 52-60 (Prophet Decl., Exhibit G).[6] In this representative transaction, Olympic was hired by Tesoro Refining and Marketing Company to load, transport, and unload fuel for a customer of Tesoro. CP 25 (Prophet Decl. ¶ 12) and CP 53 (Ex. G). 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.*

In the sample transaction, a total of 14,251.37 barrels of fuel oil were loaded into the vessel APL Sweden. CP 25 (Prophet Decl. ¶ 13) and CP 53 (Ex. G). Because there was a 15,000 barrel minimum (at a charge of $1.17 per barrel), the total 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 dated January 31, 2005, to $18,148.46. *Id.* The remaining pages (CP 54-60) of Olympic's Exhibit G

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assessment. The exhibits do not include schedules that supported the figures set forth in each tax assessment notice.

[6] 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 (Declaration of Todd Prophet ¶ 11)), Olympic produced two representative transactions for each year. *See* CP 53-60 (Ex. G to Prophet Decl. (a representative sample transaction)). 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 Public Utility Tax, as claimed by the Department. If the final ruling is that the revenues were taxable under the B&O tax (instead of the Public Utility Tax), examination of all documents by the Department and a determination of the refund owed to Olympic would come at a later time. But, if ultimately the decision is that the Public Utility Tax applies here, then the parties would be spared the time and expense of producing and examining a significant number of documents. Hence, the verification of the amount of any refund owed to Olympic would be made only after a ruling in favor of Olympic and a remand to the trial court.

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 (Prophet Decl. ¶ 14). During the tax years at issue (2003-2008) there were thousands of these types of transactions. CP 25 (Prophet Decl. ¶ 11).

The Public Utility Tax 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 .275 percent. RCW 82.04.260(7). As stated, Olympic contends that a refund was owed to it based on the difference between the Public Utility Tax rate and the Stevedoring rate. *See* CP 9 (Compl. at 6, ¶¶ 29-32).

D. 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 Public Utility Tax or the Stevedoring B&O tax. CP 10-21 (Plaintiff's Motion for Partial Summary Judgment and Memorandum in Support). Olympic's motion was heard on February 28, 2014. VRP at 1. At the conclusion of the argument, the Superior Court (Thurston County, Hon. Gary R. Tabor) denied Olympic's motion (VRP 31) and granted summary judgment to the Department (VRP 34-35). An "Order Denying Plaintiff's Motion for Partial Summary Judgment and Granting Summary Judgment to Defendant" was entered on March 7,

2014. CP 301-303. Olympic then filed a timely Notice of Appeal to this Court. CP 304.

III. STANDARD OF REVIEW

This case presents an appeal from a trial court summary judgment in a tax refund case, which this Court reviews *de novo*. *Estate of Bracken*, 175 Wn.2d 549, 562, 290 P.3d 99 (2012) (citations omitted). In reviewing the denial of a summary judgment motion de novo, this Court performs the same inquiry as the trial court. *Macias v. Saberhagen Holdings, Inc.*, 175 Wn.2d 402, 407-08, 282 P.3d 1069 (2012).

IV. ARGUMENT

A. The Plain Meaning of a Statute Does Not Require Construction.

This case involves statutory interpretation and the application of the "plain meaning" rule. "The primary objective of any statutory construction inquiry is 'to ascertain and carry out the intent of the Legislature.'" *HomeStreet, Inc. v. Dep't of Revenue*, 166 Wn.2d 444, 451, 210 P.3d 297 (2009) (quoting *Rozner v. City of Bellevue*, 116 Wn.2d 342, 347, 804 P.2d 24 (1991)). The starting point for determining legislative intent, however, is the *language* of the statute, and if that language lends itself to only one interpretation, the court's inquiry is at an end because plain language does not require construction. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). In other words, where the language of a statute is unambiguous, courts must give effect to that language's plain meaning, *Burton v. Lehman*, 153 Wn.2d 416, 422, 103

P.3d 1230 (2005), and only if the court concludes that statutory language is ambiguous may a court resort to the rules of statutory construction. *Top Line Builders, Inc. v. Bovenkamp*, 179 Wn. App. 794, 811-12, 320 P.3d 130 (2014).

B. Under Washington's Plain Meaning Rule, The Context Surrounding the Enactment of RCW 82.04.260(7) is Material to Determining Its Plain Meaning. Here, that Context Establishes a Legislative Intent to Extend to Businesses Like Olympic the Benefits of the Tax Reduction Effected by the Establishment of the Stevedoring B&O Tax Classification.

Under the "plain meaning" rule, the interpretation of a statute is "derived from what the Legislature has said" in the statute "and related statutes which disclose legislative intent about the provision in question." *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002). This analysis 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. (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))).

The Public Utility Tax (RCW Chapter 82.16) is imposed on certain businesses that are of a public service nature. The tax thus applies to businesses engaged in sewerage collection (RCW 82.16.020(1)(a)); light and power (RCW 82.16.020(1)(b)); gas distribution (RCW 82.16.020(1)(c)); certain carriage and transportation (RCW 82.16.020(1)(d), (f)); and water distribution (RCW 82.16.020(1)(g)). "Tugboat business" is also a business that is taxable under the Public Utility Tax. *See* RCW 82.16.020(1)(f); *see also* (RCW 82.16.010(10)) ("'Tugboat business' means the business of operating tugboats, towboats, wharf boats or similar vessels in the towing or pushing of vessels, barges or rafts for hire"). The tax on tugboat businesses is imposed at the rate of 1.8 percent (RCW 82.16.020(1)(f)) plus a surcharge of seven percent (RCW 82.16.010(2), 82.02.030), which makes the total tax rate 1.926 percent.

In 1979 the Legislature created a special B&O tax classification for "stevedoring and associated activities pertinent to the movement of goods and commodities in waterborne interstate or foreign commerce." RCW 82.04.260(7); 1979 ex. s. c. 196 § 2. This legislation was a response to the decision by the United States Supreme Court in *Department of Revenue v. Ass'n of Wash. Stevedoring Cos.*, 435 U.S. 734, 98 S. Ct. 1388, 55 L. Ed. 2d 682 (1978) ("*Stevedoring*"). In *Stevedoring* the Department sought to apply the Service B&O tax (RCW 82.04.290) to stevedores. The United States Supreme Court had held in *Puget Sound Stevedoring Co. v. State Tax Comm'n*, 302 U.S. 90, 58 S. Ct. 72, 82 L. Ed. 68 (1937) ("*Puget*

Sound"), that application of Washington's B&O tax to stevedoring was "unconstitutional as violative of the Commerce Clause of the United States Constitution." *Stevedoring*, 435 U.S. at 736 (discussing *Puget Sound*) (footnote omitted). Thus, *Stevedoring* was the "second time ... the State of Washington [sought to] apply its business and occupation tax to stevedoring." *Id.* In *Stevedoring*, the Supreme Court overruled *Puget Sound* and held that the B&O tax on stevedores was not unconstitutional, either under the Commerce Clause or the Import-Export Clause.[7]

At the time the Supreme Court upheld the imposition of the general service B&O tax on stevedores, the tax was imposed at the rate of one (1) percent. *Stevedoring*, 435 U.S. at 750. The Supreme Court issued its decision in *Stevedoring* in April 1978. The Legislature responded to the decision in *Stevedoring* the following year, by enacting the special Stevedoring B&O tax, 1979 ex.s. c. 196 § 2:

- ***First***, the Legislature lowered the B&O rate on stevedores from 1% to .275 percent.

- ***Second***, the Legislature imposed this lower tax rate not only on the business of "stevedoring,"[8] but also on "associated activities."

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[7] This about-face followed from the Supreme Court's restructuring of "Dormant" Commerce Clause law in its decision the year before in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S. Ct. 1076, 51 L. Ed. 2d 326 (1977), in which the Supreme Court abrogated its long-standing bar on "direct" state taxation of interstate commerce. *See Stevedoring,* 435 U.S. at 745 (*Complete Auto Transit* "requires ... rejection" of *Puget Sound*).

[8] The activity of stevedoring involves " 'the business of loading and unloading [cargo from ships] . . . to and from the 'first place of rest,' which means that it covered the space between the hold of the vessel and a convenient point of discharge upon the dock[.].' "

(Footnote continued next page)

The Legislature provided definitions of both "stevedoring" and "associated activities," with the latter including "incidental vessel services." It is clear that the Legislature intended that the bundle of business activities surrounding the loading and unloading of cargo, including preparation of ships for their journey into interstate and foreign destinations, should now benefit from the reduction in B&O taxes immediately triggered by the U.S. Supreme Court's about-face on the issue of whether Washington could tax stevedoring.

- ***Third***, the Legislature extended the benefit of its tax reduction by making businesses previously taxed under the Public Utility Tax, but which now fell within the scope of the new stevedoring "and associated activities" classification, no longer be subject to the higher tax rates imposed by the Public Utility Tax. This further confirmed a legislative intent to effect tax relief extending beyond stevedoring to all businesses "pertinent" to the movement of cargo by water in interstate or foreign commerce.

As a "tugboat business," Olympic's revenues had previously been subject to the Public Utility Tax imposed by RCW 82.16.020. A tugboat business involved in getting fuel to vessels so they can proceed on their way in interstate and foreign commerce clearly fits within a legislative goal to reduce tax rates on all business engaged, along with stevedoring, in activities that contribute to the process of moving goods into and out of

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Stevedoring, 435 U.S. at 737, n.3 (quoting *Puget Sound Stevedoring Co. v. State Tax Comm'n*, 302 U.S. 90, 93, 58 S. Ct. 72, 82 L. Ed. 68 (1937)).

the flow of waterborne interstate and foreign commerce. "[T]he plain meaning rule requires courts to consider legislative purposes or policies appearing on the face of the statute [as well as] ... background facts of which judicial notice can be taken.'" *Dept. of Ecology v. Campbell & Gwinn*, 146 Wn.2d at 11 (quoting 2A Norman J. Singer, *Statutes and Statutory Construction* § 48A:16, at 809-10 (6th ed. 2000)). Here, the application of this principle compels the conclusion that the Legislature intended that a business like Olympic's should receive the benefit of the reduction in tax rates effected by the establishment of the stevedoring "and associated activities" B&O tax.

C. The Plain Meaning of the Language of RCW 82.04.260(7) Confirms That Olympic's Bunkering Business Is Covered Under This Statute.

The first sentence of RCW 82.04.260(7) imposes the special B&O tax 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.

The second sentence of the statute proclaims that any business taxable under this B&O tax statute is not taxable under the Public Utility Tax. Reading these two sentences together, one concludes that the Legislature intended that (1) the B&O tax be imposed at "the rate of 0.275 percent" 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" measured by "the gross proceeds derived from such activities," and that (2) this rate should be in lieu of the higher rate imposed by the Public Utility Tax that would otherwise be imposed "for that portion of [the] business subject to taxation" under RCW 82.04.260(7).

The trial court denied Olympic's motion for summary judgment "primarily and foremost [based on] the very first sentence in the statute ..., 'Upon every person engaging within this state in the business of stevedoring and associate activities . . . pertinent to the movement of goods and commodities in waterborne interstate or foreign commerce.' " VRP 31-32; *see* Assignment of Error No. 3. The trial court held that "the Court of Appeals made clear [in *Olympic I*] that . . . fuel[ing] was not pertinent to the movement of goods and commodities." VRP 32. There are two basic errors in this reasoning. First, Division One in *Olympic I* did not hold that "fueling was not pertinent to the movement of goods and commodities" and this Court will search in vain for anything in that decision where such a statement was made, even by way of *dicta*. Second, RCW 82.04.260(7) contains three additional sentences and the trial court failed to consider the language of these provisions, as required by the context approach to plain meaning analysis laid down in *DOE v. Campbell & Gwinn*.

After the initial two sentences the statute consists of two additional sentences, both of which are multi-part. The third sentence in RCW 82.04.260(7) defines what "[s]tevedoring and associated activities

pertinent to the conduct[9] of goods and commodities in waterborne interstate or foreign commerce" means, as follows:

> 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 [1] cargo may be loaded or unloaded to or from vessels or barges, passing over, onto or under a wharf, pier, or similar structure; [2][a] cargo may be moved to a warehouse or similar holding or storage yard or area to await further movement in import or export or [b] 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.

(Bracketed inclusions added for clarity.)

The fourth and final sentence in RCW 82.04.260(7) lists "[s]pecific activities included in [the] definition" of "stevedoring and associated activities," as follows:

> [1] Wharfage, handling, loading, unloading, moving of cargo to a convenient place of delivery to the consignee or a convenient place

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[9] The first sentence in RCW 82.04.260(7) describes this special B&O tax classification as "stevedoring and associated activities pertinent to the *movement* of goods and commodities in waterborne interstate or foreign commerce" (emphasis added). The third sentence in the statute uses a nearly identical phrase, but in this latter sentence the wording is "stevedoring and associated activities pertinent to the *conduct* of goods and commodities in waterborne interstate or foreign commerce" (emphasis added). In effect, the two phrases are identical *except* the word "movement" appears in the first sentence and "conduct" in the third. Neither of these terms is defined in the statute, and absent ambiguity or a statutory definition, courts give the words in a statute their common and ordinary meaning. *Garrison v. Wash. State Nursing Bd.*, 87 Wn.2d 195, 196, 550 P.2d 7 (1976). To determine the common and ordinary meaning of an undefined term, courts look to the dictionary. *Id.* The definition of the word "movement" includes "the act or process of moving." WEBSTER'S NEW WORLD DICTIONARY (3d Coll. Ed. 1994) 889. The definition of the word "conduct" includes "to be able to transmit or carry; convey." *Id.* at 290. The use of the term conduct is confirmatory of the broad scope the Legislature evidently intended should be given to the phrase "stevedoring and associated activities."

> 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*** [a] plugging and unplugging refrigerator service to containers, trailers, and other refrigerated cargo receptacles, and [b] securing ship hatch covers.

(Bracketed inclusions added for clarity; bold emphasis added.)

The trial court erred because it failed to apply the entire statute, in particular, the fourth sentence. The trial court failed to recognize that Olympic's bunkering services are "activities pertinent to the *movement* of goods and commodities in waterborne interstate or foreign commerce" (RCW 82.04.260(7) (emphasis added)) because the provision of fuel is a service critical to effecting the *movement* of goods and commodities in waterborne commerce.

D. The Bunkering of Fuel is an "Incidental Vessel Service" That is Obviously Necessary to the Movement of Goods in Waterborne Interstate or Foreign Commerce.

RCW 82.04.260(7) lists certain "incidental vessel services" that qualify for the "stevedoring" B&O tax classification:

- "plugging and unplugging refrigerator service and containers, trailers, and other refrigerator cargo receptacles" and
- "securing ship hatch covers."

These specifically listed services are preceded by the introductory phrase "including but not limited to." The use of this language – "including but not limited to" – in the statute expresses the Legislature's recognition that

there are "incidental vessel services" covered under the statute beyond the two listed in the statute.

The term "incidental" is not defined in RCW 82.04.260(7). This Court therefore looks to the dictionary to determine the common or ordinary meaning of the word. *Garrison v. Wash. State Nursing Bd.*, 87 Wn.2d at 196. "Incidental" means "**1** a) happening as a result of or in connection with something more important; . . . b) likely to happen as a result or concomitant . . . **2** secondary or minor, but usually associated." Webster's New World Dictionary (3rd coll. ed. 1994) 682. The bunkering services here are "*incidental* vessel services" because the loading of ships with fuel by Olympic happens at the same time a vessel is in port in Washington and is "as a result of or in connection with" the loading of the ship with goods and commodities. Indeed, it is difficult to imagine how there could ever *not* be such loading, given that 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. The plain meaning of the word "incidental" thus supports Olympic's entitlement to the benefits of the Stevedoring B&O tax classification on its bunkering services.

This conclusion is reinforced by the statute's use of the term "pertinent," in the phrase "stevedoring and associated activities *pertinent* to the movement of goods and commodities in waterborne interstate or foreign commerce" (emphasis added). The term "pertinent" likewise is not defined in the statute. In turning once again to the dictionary, one

finds that "pertinent" means "having some connection with the matter at hand; relevant; to the point." Webster's, *supra* at 1009. Bunkering a ship with fuel oil clearly has "some connection with the matter at hand," which is the loading of goods and commodities into vessels, which will then proceed to move those goods and commodities in waterborne interstate or foreign commerce. No vessel can do that without fuel, and it is Olympic's bunkering services which provide that fuel. The common and ordinary meaning of the word "pertinent" further supports Olympic's entitlement to the Stevedoring B&O tax classification on its bunkering services.

In sum, Olympic's bunkering business constitutes an "*incidental* vessel service" that is "*pertinent* to the ***movement*** of goods and commodities in waterborne interstate and foreign commerce" within the plain meaning of RCW 82.04.260(7). Accordingly, the gross proceeds derived from this activity are taxable under the "stevedoring and associated activities" classification of the B&O tax, and such revenues are not taxable under the Public Utility Tax.

The trial court ruled that the "incidental vessel services" language of RCW 82.04.260(7) applied only to services related "to cargo or commodities." VRP 32-33. But if the Legislature had intended the "incidental vessel services" part of the statute to apply only "to cargo or commodities" it would have written the statute to say "incidental *cargo* services." The trial court also addressed the "securing ship hatch covers" language in the example set forth in the statute, ruling that this language showed an intent to limit vessel services to those involving cargo or

commodities, and not fueling. *See* VRP at 33. But this interpretation reads the "including, but not limited to..." language that preceded this example completely out of the statute, which violates the rule that "all words in a statute must be accorded their meaning." *HomeStreet*, 166 Wn.2d at 454-55.

The trial court also asserted that the statute does not apply "to the fuel that is being brought by tug boat pulling a barge." VRP 33. But to reach this conclusion one must read in limiting language that is not in the statute, violating the rule that prohibits courts "from adding words or clauses to an unambiguous statute when the legislature has chosen not to include that language." *State v. Kintz*, 169 Wn.2d 537, 549-550, 238 P.3d 470 (2010) (citing *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003); *State v. Thompson*, 151 Wn.2d 793, 800-01, 92 P.3d 228 (2004)). Here, the ordinary meaning of "pertinent" and "incidental," combined with the use of the phrase "vessel services," establishes an unambiguous expression by the Legislature that amounts derived from fueling a vessel (which is what Olympic does) come within the scope of the statute.[10]

In sum, Olympic's bunkering business constitutes an "*incidental* vessel service" that is "*pertinent* to the movement of goods and

[10] The trial court also seemed to suggest that Olympic was arguing that "any activity that could in any way be associated with the movement of goods and commodities . . . would [be an] associated activity." *See* VRP 32. Olympic did not advance this argument; the Department did (*see* CP 281), and Olympic rebutted it (*see* CP 292-93). What Olympic did and does argue is that the statute was intended by the Legislature to include within its scope 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. Bringing fuel to, and loading it into the fuel bunkers of a ship, is certainly one of those activities.

commodities in waterborne interstate and foreign commerce" within the plain meaning of RCW 82.04.260(7). Accordingly, the gross proceeds derived from this activity are taxable under the "stevedoring and associated activities" classification of the B&O tax, and such revenues are not taxable under the Public Utility Tax.

E. The Rules Of Statutory Construction Require That Any Doubt or Ambiguity in the Interpretation of RCW 82.04.260(7) Must Be Resolved in Favor of Olympic.

With tax statutes there are two contrasting rules of construction. The first rule "states that if there is any doubt as to the meaning of a tax statute, it must be construed against the taxing power." *MAC Amusement Co. v. Dep't of Revenue*, 95 Wn.2d 963, 966, 633 P.2d 68 (1981) (citing *Foremost Dairies, Inc. v. State Tax Comm'n*, 75 Wn.2d 758, 453 P.2d 870 (1969); *Buffelen Lumber & Mfg. Co. v. State*, 32 Wn.2d 40, 43, 200 P.2d 509 (1948)). The second rule "is that tax exemptions are to be strictly construed in favor of the tax and, as a corollary, they are not to be extended beyond the scope clearing indicated by the legislature." *MAC Amusement*, 95 Wn.2d at 966 (citing *Evergreen-Washelli Memorial Park Co. v. Department of Revenue*, 89 Wn.2d 660, 574 P.2d 735 (1978); *Pacific Northwest Conference of Free Methodist Church of N. America v. Barlow*, 77 Wn.2d 487, 493-94, 463 P.2d 626 (1969)).

The issue here is whether RCW 82.04.260(7) applies to Olympic, which implicates the rule of doubt in favor of the taxpayer: "[i]f any doubt exists as to the meaning of a taxation statute, the statute must be construed most strongly against the taxing power and in favor of the taxpayer." *Ski*

Acres v. Kittitas County, 118 Wn.2d 852, 857, 827 P.2d 1000 (1992) (citing *Puyallup v. Pacific Northwest Bell Tel. Co.*, 98 Wn.2d 443, 448, 656 P.2d 1035 (1982); *Vita Food Prods., Inc. v. State*, 91 Wn.2d 132, 134, 587 P.2d 535 (1978)). The trial court acknowledged the applicability of this rule in this case: "[I]f there is any ambiguity because this is a tax imposing statute, . . . that . . . ambiguity needs to be resolved in favor of the plaintiff here, the moving party." VRP 28. Accordingly, if at the end of its analysis this Court is left with any doubt about the application of RCW 82.04.260(7) and its "incidental vessel services" language, that doubt should be resolved in favor of Olympic.

V. CONCLUSION

This Court should rule that RCW 82.04.260(7) entitles Olympic to report income and pay B&O tax under the Stevedoring and Associated Activities classification. Accordingly, this Court should reverse and remand the case for determination of the amount of the refund owing to Olympic by the Department.

RESPECTFULLY SUBMITTED this 20th day of August, 2014.

CARNEY BADLEY SPELLMAN, P.S.

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

APPENDIX

(7) 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 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.

CARNEY BADLEY SPELLMAN

August 20, 2014 - 12:21 PM

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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

I certify that on the date set forth below I served a copy of the following: *Appellant's Opening Brief* along with a copy of the *Verbatim Report of Proceedings for the Motion for Summary Judgment* and this *Declaration of Service* upon the following attorneys of record:

Michael Hall
Attorney General of Washington
Revenue Division
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☐ U.S. Mail, postage prepaid
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 20th day of August, 2014, at Seattle, Washington.

Caroline Mundy, Legal Assistant

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