NO. 46102-1-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

OLYMPIC TUG & BARGE, INC.,

Appellant,

v.

DEPARTMENT OF REVENUE,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

For two decades Olympic Tug and Barge has been fighting its taxes. Its latest argument is that when it delivers fuel to oceangoing vessels by tugboat and barge it is actually engaged in "stevedoring and associated activities." As such, Olympic maintains its income from fuel delivery should be taxed under RCW 82.04.260(7)'s business and occupation tax classification for stevedoring instead of at the higher public utility tax rate that RCW 82.16.020(1) establishes for "tugboat businesses." Olympic reaches this conclusion by interpreting the words "associated activities" and "incidental vessel services" in RCW 82.04.260(7) to mean every activity that plays any role in the shipping of cargo by sea. Besides being contrary to the plain language of the statute, Olympic's proposed construction is profoundly overbroad and would lead to absurd results.

Olympic is a tugboat business, and its fuel delivery income is properly assessed at the public utility tax rate. The lower rate for stevedoring and associated activities in the business and occupation tax chapter is reserved for businesses that work with cargo, not for every business that has anything to do with the shipping industry. The Superior

Court properly granted summary judgment to the Department, and this Court should affirm.

II. COUNTERSTATEMENT OF ISSUE[1]

Under RCW 82.16.020(1), "tugboat businesses" owe the public utility tax on their gross income. "Tugboat businesses" are businesses that operate tugboats "in the towing or pushing of vessels, barges, or rafts for hire." RCW 82.16.010(10). The business and occupation tax statute, RCW 82.04.260(7), imposes a lower tax rate on the gross income of those engaging in the business of "stevedoring and associated activities." Olympic delivers fuel by tugboat and barge from oil refineries and storage facilities to ocean-going vessels. Did the trial court correctly hold as a matter of law that income from Olympic's tugboat business was taxable under the public utility tax rather than under the business and occupation tax?

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[1] Nine of Olympic's ten assignments of error address the Superior Court's oral statements rather than the judgment that Olympic is appealing. *See* Appellant's Opening Brief (App. Br.) at 1-2. A trial court's oral ruling is "'no more than a verbal expression of [its] informal opinion at that time,'" and is useful only in interpreting an ambiguous written order. *See State v. Hescock*, 98 Wn. App. 600, 605-06, 989 P.2d 1251 (1999) (quoting *Ferree v. Doric Co.*, 62 Wn.2d 561, 567, 383 P.2d 900 (1963)).

The Superior Court's judgment is not ambiguous: It denied Olympic's motion for summary judgment and granted summary judgment to the Department. CP 301-303; *see also* App. Br. at 2 (assigning error to Superior Court's order). There is no need to examine the court's "informal opinion," and Olympic's frequent references to the court's oral statements, *e.g.*, App. Br. at 4, 17, 21, 22, 22 n.10, are irrelevant. This is particularly so when, as set out below, this Court's review is de novo.

III. STATEMENT OF THE CASE

A. Olympic's Business

The facts regarding Olympic's fuel delivery business are straightforward and undisputed. Olympic transports fuel from refineries and storage facilities to docked or anchored ocean-going vessels. Olympic first loads the fuel onto its barges, which are then moved by Olympic's tugboats to the ships' sides. At that point Olympic pumps the fuel into the vessels' tanks or fuel holds, also known as "bunkers." This process is called "fuel bunkering," and the fuel is known as "bunker fuel" and "fuel oil." CP 24. Olympic has admitted that the fuel at issue in this case "was not loaded onto the vessels by passing the bunker fuel over, onto or under a wharf, pier, or similar structure." CP 66.

Besides transporting fuel directly to ships, Olympic also moves oil from one terminal to another, including to and from refineries, offshore platforms, and storage facilities. Olympic also may remove oil from ships that are outside of ports, a process known as lightening, and subsequently reload the fuel onto the ships after the ships leave the port. CP 24.

The ships to which Olympic delivers fuel oil burn it during their travels. CP 5.[2] Because the ships burn the fuel, it is not a "commodity." *See 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 also does not contend that the fuel it moves is "cargo." *See, e.g.*, Appellant's Opening Brief (App. Br.) at 20 (distinguishing between "the fuel provided by Olympic's services" and "the cargo with which [the ship] has just been loaded").[3] Olympic is paid for the bunkering service it provides, and at no time does it take title to the fuel it delivers. *See* CP 11-13, 24-25; App. Br. at 7; *see generally Olympic Tug & Barge,* 163 Wn. App. at 308.

B. Prior Tax Disputes

Incorporated in 1987, Olympic paid business and occupation (B&O) taxes on the gross income from its bunkering activities under the

[2] As it did below, Olympic claims that the fuel it transports may later be sold. *See* App. Br. at 7; CP 12, 24; *see also* CP 299-300 (declaration describing "custom [] in the industry for ships to trade or transfer fuel between vessels. . . . It is probably the exception and not the norm, but it could occur"). This unsubstantiated assertion is inconsistent with Olympic's own pleadings. *See, e.g.*, CP 18-19 (Olympic distinguishing bunker fueling from cargo loading); 5 (Complaint alleging that "[t]he fuel is then used to power the vessel in interstate or foreign commerce"). It is also unrelated to any of Olympic's actual arguments. To be clear, however: this case concerns oil that Olympic delivers to ships for their use as fuel.

[3] "Cargo" is the "lading or freight of a ship, airplane, or vehicle: the goods, merchandise, or whatever is conveyed . . . ." *Webster's Third New International Dictionary* 339 (2002); *see also Black's Law Dictionary* 193 (10th ed. 2014) (defining "cargo" as "goods transported by vessel, airplane, or vehicle; FREIGHT"). By definition, fuel oil loaded onto ships for use during transit is not "cargo."

stevedoring classification for the first "several years" of its existence. CP 299. After an audit covering the tax years 1994-1997, however, the Department determined that this classification was wrong and that Olympic instead should have paid the public utility tax as a tugboat business. CP 77.[4]

Olympic appealed the resulting assessment, arguing not that the stevedoring classification it had used for years was correct, but that its taxes should have been calculated at a third, even more generous rate. Specifically, Olympic argued that its fuel bunkering income should be deducted entirely from its gross income, claiming that the fueling income was "derived from the transportation of commodities . . . [that] are forwarded . . . to interstate or foreign destinations." *See* CP 77-78, (quoting former RCW 82.16.050(8) (2006), now codified at RCW 82.16.050(9), *see* Laws of 2007, ch. 330, § 1). In other words, Olympic took the position that it need not pay any taxes at all on its fuel bunkering income.[5]

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[4] Olympic claims to have paid taxes under the stevedoring classification for 11 years (a figure not mentioned in the record), but omits the fact that the Department rejected this classification long ago. *See* App. Br. at 7; CP 77.

[5] Olympic attributes its change in position to "advice from its outside accounting firm." App. Br. at 7; *see also* CP 299 (declaration discussing advice from "outside Certified Public Accounting firm"). Coincidentally, this advice first appeared in Olympic's appeal from the 1994-1997 Department assessment.

The Board of Tax Appeals (BTA) accepted Olympic's argument, and in 2001 issued an informal decision holding that "the language of [former] RCW 82.16.050(8) (2006) . . . is sufficiently broad to encompass gross revenues derived from Olympic's inter-city delivery of bunker fuel . . . ." CP 75-82 (*Olympic Tug & Barge, Inc. v. Dep't of Revenue*, BTA Dkt. No. 55558 (2001)) at 81. Because this was an informal decision, the Department was prohibited from appealing it. *See* WAC 456-10-010(b); *Olympic Tug & Barge*, 163 Wn. App. at 303-04. Shortly after the decision, however, the Department issued a Notice of Nonacquiesence stating that it would not follow the holding. CP 85-92.

Meanwhile, Olympic continued to appeal its tax assessments, and in 2009 the firm's challenge for tax year 2002 reached the BTA. That appeal raised the same issue that the BTA had decided in 2001, *i.e.*, whether Olympic's income from fuel bunkering was subject to the public utility tax or whether it was instead deductible under former RCW 82.16.050(8) (2006).

Holding that its interpretation of former RCW 82.16.050(8) (2006) in the 2001 case "was erroneous," the BTA denied Olympic's appeal in a formal decision, and it affirmed application of the public utility tax to the firm's fuel bunkering income. CP 94-114 (*Olympic Tug & Barge, Inc. v.*

Dep't of Revenue, BTA Dkt. No. 08-096 (2009)). Olympic appealed the BTA decision for its 2002 tax year, and the Superior Court reversed it in June 2010. CP 117-20.

The Department took the next step, appealing the Superior Court's decision, and in 2011 the Court of Appeals settled the issue. In *Olympic Tug & Barge*, Division One held that the deduction Olympic sought under former RCW 82.16.050(8) (2006) was not available for its fuel bunkering activities:

> The fuel, when offloaded by Olympic from a barge to a vessel, was at its final destination. It was on the vessel that would consume it. It was no longer a commodity being forwarded to another destination. It was at that point a consumable in possession of the end user, being used to transport cargo. It was no longer a commodity being forwarded to an interstate or foreign destination.

Olympic Tug & Barge, Inc., 163 Wn. App. at 308-09 (CP 125-135). The Supreme Court denied Olympic's request to review the Court of Appeals decision. *Olympic Tug & Barge, Inc. v. Dep't of Revenue*, 173 Wn.2d 1021 (2012).

C. The Current Litigation

Unfortunately, the prior litigation did not entirely resolve the question of what taxes Olympic owes on its fuel bunkering income. While Olympic's appeal of its 2002 assessment was winding its way through the

courts, the firm was also contesting its taxes for 2003 through 2008. CP 27-51 (assessments); 138-256 (BTA appeals). In each of these BTA appeals the Department had assessed the public utility tax on the income from Olympic's fuel bunkering business, and in each Olympic argued that this income should have been deductible under RCW 82.16.050(8) (2006) (pre-2007), or (9) (2007 and 2008).

As noted above, in 2011 the Court of Appeals rejected Olympic's challenge to its 2002 assessment, and in 2012 the Supreme Court denied review of that decision. None of Olympic's BTA appeals for subsequent years had been resolved by that time. Shortly after the Supreme Court denied review, however, Olympic voluntarily dismissed all of them and then filed this Court refund action for the same years. CP 258-67 (dismissal orders); 4-9 (Complaint).

Having lost its "commodities" argument in the Court of Appeals, Olympic now argues that its fuel bunkering operations are actually "stevedoring and associated activities" and should be taxed as such. The Superior Court disagreed and granted summary judgment to the Department. CP 301-03. In doing so, the Superior Court affirmed the position that the Department has taken since the 1994-1997 audit: that

Olympic is a "tugboat business," and its fuel bunkering income is subject to the public utility tax. *See* CP 1-3; RP 31-35.

IV. ARGUMENT

This case is about which of two tax statutes applies to the gross income from Olympic's tugboat and barge operations.[6] The first of these, RCW 82.16.020(1), is the public utility tax, which governs a variety of public service businesses, including "tugboat businesses." The second is RCW 82.04.260(7), the B&O tax classification for "stevedoring and associated activities." The parties agree that these statutes are unambiguous. App. Br. at 12-19; CP 10-11. The Superior Court upheld the Department's assessment of Olympic under the public utility tax.

The Superior Court dismissed Olympic's lawsuit on summary judgment. CP 301-03. Since this matter was resolved on summary judgment, it is subject to de novo review. *Cashmere Valley Bank v. Dep't of Revenue*, ___ Wn.2d ___, ___, ___ P.3d ___, 2014 WL 4792055 (September 25, 2014) at *4; *HomeStreet, Inc. v. Dep't of Revenue*, 166 Wn.2d 444, 451, 210 P.3d 297 (2009).

While this Court's review is de novo, "the burden shall rest upon the taxpayer to prove that the tax as paid by the taxpayer is incorrect."

[6] Copies of the statutes are attached in the Appendix.

RCW 82.32.180. Thus, Olympic has the burden of showing that its fuel bunkering income for 2003-2008 is not subject to the public utility tax under RCW 82.16.020(1)(f), and is instead subject to the preferential B&O tax rate for stevedoring and associated activities. *See Washington Imaging Servs. LLC v. Dep't of Revenue*, 171 Wn.2d 548, 557, 252 P.3d 885 (2011); *see generally Lamtec Corp. v. Dep't of Revenue*, 170 Wn.2d 838, 843, 246 P.3d 788 (2011) ("while we interpret statutes to give effect to legislative intent and review summary judgments de novo, the taxpayers have the burden of proving they are factually exempt," *citing* RCW 82.32.180).

The Superior Court's decision is correct for at least three reasons. First, under the plain language RCW 82.16.020(1), Olympic operates a "tugboat business," and its income is subject to the public utility tax. Second, under the plain language of RCW 82.04.260(7), Olympic does not engage in "stevedoring and associated activities" when it loads, transports, and unloads bunker fuel. Thus, its activities are not subject to B&O tax. Third, Olympic's arguments to the contrary would lead to an absurd situation in which every activity remotely related to the shipping industry would be covered by the stevedoring classification of the B&O tax.

A. Under The Plain Language of RCW 82.16.020(1)(f), Income From Olympic's Fuel Bunkering Business Is Subject To The Public Utility Tax.

Olympic cannot meet its burden of proving the tax imposed was incorrect in this case. Its business activities fall squarely within the definition of a "tugboat business" under the public utility tax, and the Department properly taxed it as such. In contrast, because its business does not concern the loading, unloading, or transportation of cargo to and from vessels, Olympic does not qualify for the stevedoring B&O tax rate, and it is not entitled to a tax refund.

The primary objective of statutory construction is to determine and effectuate the intent of the Legislature. *Tesoro Refining and Marketing Co. v. Dep't of Revenue*, 173 Wn.2d 551, 556, 269 P.3d 1013 (2012). When possible, the court derives legislative intent from the plain language enacted by the Legislature, considering the text of the provision in question, the context of the statute in which the provision is found, related provisions, amendments to the provision, and the statutory scheme as a whole. *Department of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). "Where statutory language is plain and unambiguous, courts will not construe the statute but will glean the

legislative intent from the words of the statute itself . . . ." *Agrilink Foods, Inc. v. Dep't of Revenue*, 153 Wn.2d 392, 396, 103 P.3d 1226 (2005).

Against these general rules is one specifically applicable to revenue statutes. The Department has assessed Olympic's fueling income under the public utility tax statute, RCW 82.16.020. Olympic claims these revenues should have been classified under RCW 82.04.260(7)'s B&O rate for "stevedoring and associated activities." Businesses qualifying under the latter statute 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). Because it creates an exemption from the public utility tax in favor of the lower stevedoring rate, the statute "must be narrowly construed." *See, e.g., HomeStreet*, 166 Wn.2d at 455; *Olympic Tug & Barge, Inc.*, 163 Wn. App. at 307 ("[w]e construe tax exemptions and deductions narrowly").[7]

As its name suggests, the public utility tax applies to businesses that provide public services, such as light and power companies, gas and

[7] Olympic asserts that RCW 82.04.260(7) must be construed against the Department because it is a tax imposing statute. *See* App. Br. at 23-24. This case is not about the imposition of a tax on Olympic: there is a tax to be paid, the only question is the applicable rate. Furthermore, the rule of construction that Olympic cites applies only if a tax imposing statute is ambiguous. *E.g., Grays Harbor Energy, LLC v. Grays Harbor Cnty.*, 175 Wn. App. 578, 584 n.6, 307 P.3d 754 (2013). Olympic does not contend that RCW 82.04.260(7) is ambiguous; to the contrary, Olympic's position is that the statute's meaning is crystal-clear. *E.g.*, App. Br. at 5.

water distribution companies, and urban transportation businesses. RCW 82.16.020(1). Under the public utility tax,

> There is levied and there shall be collected from every person a tax for the act or privilege of engaging within this state in any one or more of the businesses herein mentioned. The tax shall be equal to the gross income of the business, multiplied by the rate set out after the business, as follows:
>
> . . .
>
> (f) Motor transportation, railroad, railroad car, and *tugboat businesses*, and all public service businesses other than ones mentioned above: One and eight-tenths of one percent . . .

RCW 82.16.020(1)(f) (emphasis added). A "tugboat business" is "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).[8]

As set out above, Olympic's business comprises (a) loading fuel onto barges, (b) moving the barges with tugboats, and (c) unloading the fuel at various locations, including onto ships in and out of ports. The Department assessed taxes on Olympic's fuel delivery income under the public utility tax, RCW 82.16.020.

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[8] During the audit period of 2003-2008, the definition of "tugboat business" appeared at RCW 82.16.010(11). Due to the expiration of an unrelated subsection of RCW 82.16.010, the "tugboat business" definition moved from subsection (11) to subsection (10) of the statute. *See* Laws of 2010, ch. 106, § 410; Laws of 2009, ch. 469, § 905. This brief will refer to the statute's current codification at RCW 82.16.010(10).

These statutes are not ambiguous, and Olympic does not argue that they are. The activities they describe are exactly what Olympic does when it delivers fuel, and again Olympic does not contend otherwise. *Cf. Olympic Tug & Barge*, 163 Wn. App. at 301-02 (Olympic arguing only that "revenue from bunkering services was deductible for the purpose of calculating the public utility tax . . . under chapter 82.16 RCW"). Therefore, the Superior Court's grant of summary judgment to the Department must be affirmed.

B. Olympic's Fuel Bunkering Business Does Not Meet RCW 82.04.260(7)'s Definition Of "Stevedoring And Associated Activities."

Seeking to avoid the public utility tax applicable to tugboat businesses, Olympic insists that fuel bunkering is taxable instead under the B&O tax classification for "stevedoring and associated activities." As RCW 82.04.260(7) provides in part,

> 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.
>
> . . .

RCW 82.04.260(7).[9] If Olympic could qualify for the stevedoring classification, it would be exempt from the public utility tax. *See* RCW 82.04.260(7). Because that classification carries with it both an exemption and a lower rate, it should be narrowly construed against Olympic.

1. Olympic's activities do not meet the threshold requirement for "stevedoring and associated activities": handling or related transportation of cargo.

As an initial matter, Olympic's fuel bunkering business does not meet the threshold requirement to qualify for the stevedoring statute. That law defines "stevedoring 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 . . . ." RCW 82.04.260(7). The balance of the statute provides examples of activities that meet this general definition.

Olympic has admitted that the fuel at issue in this case "was not loaded onto the vessels by passing the bunker fuel over, onto or under a

[9]The 2005 Legislature eliminated two unrelated subsections from RCW 82.04.260, renumbering section regarding stevedoring activities from RCW 82.04.260(9) to RCW 82.04.260(7). *See* Laws of 2005, ch. 443, § 4. This brief will refer to the statute by its current citation.

wharf, pier, or similar structure." CP 66. This ends the inquiry. While Olympic fastens onto a single clause that follows the actual definition of "stevedoring and associated activities," the language upon which it relies – "incidental vessel services" – has no bearing on this case because Olympic cannot even reach it. Because Olympic's business does not involve movement of goods "passing over, onto or under a wharf, pier, or similar structure," the examples of such work that follow are irrelevant. Olympic is, by definition, not engaged in stevedoring and associated activities and therefore is not covered by RCW 82.04.270(6).

Even if Olympic could bypass the definition of "stevedoring and associated activities," it cannot show that its work qualifies for classification under RCW 82.04.260(7). "Stevedoring" itself is not defined in the statute, but is generally understood to mean "the business of loading and unloading cargo from ships." *Department of Revenue v. Ass'n of Washington Stevedoring Cos.*, 435 U.S. 734, 737, 98 S. Ct. 1388, 55 L. Ed. 2d 682 (1978). Obviously Olympic is not engaged in stevedoring. The fuel it delivers is not cargo, and fueling ships has nothing whatsoever to do with "loading and unloading cargo." *See also Puget Sound Stevedoring Co. v. Tax Comm'n*, 302 U.S. 90, 92, 58 S. Ct. 72, 82 L. Ed.

68 (1937), *overruled by Ass'n of Washington Stevedoring Cos.* (describing stevedoring business).

2. Olympic's activities do not qualify as "associated activities" under RCW 82.04.260(7).

Because its fuel delivery business is not stevedoring, Olympic must show that it is an "associated activity." RCW 82.04.260(7) provides examples of qualifying business 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 . . . .

Again, Olympic quite obviously does nothing remotely similar to these activities, every one of which relates directly to cargo. It doesn't load or unload cargo. It doesn't transport cargo to a place of delivery or place for further movement. It doesn't provide documentation services related to those activities. And it doesn't handle imported automobiles.

3. Olympic's activities are not "incidental vessel services" under RCW 82.04.260(7).

And so, Olympic turns to the final part of the definition, "terminal stevedoring and incidental vessel services." *See* App. Br. at 19-23.

According to Olympic, this phrase includes all activities that contribute to the movement of a ship carrying goods and commodities. *See id.* at 19-24.[10] Once again, however, Olympic must bypass the specific examples the Legislature used to define covered activities. According to the statute, "stevedoring and associated activities" includes "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."[11] RCW 82.04.260(7). Olympic's business of transporting and loading fuel, of course, have nothing to do with any of these activities, which are, again, cargo-related.

Thus, in order to reach its desired conclusion, Olympic must ignore every single example of "stevedoring and associated activities" that the Legislature gave when it enacted RCW 82.04.260(7). This is because every one of those activities is directly related to cargo loading and unloading – a fact that makes perfect sense given what stevedoring actually is. Olympic attempts to surmount this obstacle by redefining

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[10] Olympic argues, for instance, that fuel delivery 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." App. Br. at 20.

[11] A "hatch cover" is a massive mechanical device (between 45% and 60% of a ship's breadth) that covers the ship's cargo hold. *See* http://en.wikipedia.org/wiki/Bulk_carrier (last visited October 10, 2014).

"incidental vessel services" to effectively include every single activity that might help a cargo ship move.[12]

Nothing in RCW 82.04.260(7) supports this reading. Olympic's expansive interpretation of "incidental vessel services" would swallow every other activity listed in the statute. In other words, if "incidental vessel services" means "everything that plays a role in the shipment of cargo," there would have been no need for the Legislature to write the rest of the statute. This result is contrary to a fundamental rule of statutory construction, that "all words in a statute must be accorded their meaning." *HomeStreet*, 166 Wn.2d at 454-55.

Olympic's attempt to read the general term "incidental vessel services" more broadly than the rest of RCW 82.04.260(7) also violates the doctrine of *ejusdem generis*. Under this rule, "general terms, when used in conjunction with specific terms in a statute, should be deemed only to incorporate those things similar in nature or 'comparable to' the

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[12] Olympic attempts to escape this conclusion by claiming that the Legislature intended to include within the stevedoring classification only those "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." App. Br. at 22 n.10.

This argument finds no support in RCW 82.04.260(7) or in any other statute, and appears to be an effort to rewrite the statute so that it includes everything it *says* it includes, plus Olympic's business, and nothing else. Furthermore, Olympic's attempt to gerrymander the law to suit its argument would exclude some of Olympic's own activities from the very classification that it seeks. *See* CP 24 (Olympic's business of "lightening" includes offloading fuel from ships "just outside of port" and reloading the fuel "after [the ships] leave port").

specific terms." *Simpson Investment Co. v. Dep't of Revenue*, 141 Wn.2d 139, 151, 3 P.3d 741 (2000). Here, Olympic seeks to use a general term to expand the meaning of "stevedoring and associated activities" far beyond any of the specific examples the statute uses. But the Legislature used representative activities – *e.g.*, "plugging and unplugging refrigerator service to containers, trailers, and other refrigerated cargo receptacles, and securing ship hatch covers" - for a reason. Olympic cannot simply sidestep the statute's specific language by expanding its lone general clause.

4. The limited exemption from the public utility tax in RCW 82.04.260(7) does not expand the scope of the "stevedoring and associated activities" classification beyond the Legislature's definition.

Leaving behind the plain language of RCW 82.04.260(7), Olympic argues that the statute's exemption for businesses otherwise subject to the public utility tax proves that it is covered by the stevedoring classification. *See* App. Br. at 15. The exemption in the B&O tax's stevedoring classification applies to businesses that fall within that classification. RCW 82.04.260(7).[13] Olympic's argument is thus circular: it claims that it

[13] Specifically, RCW 82.04.260(7) provides that "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."

falls within the scope of RCW 82.04.260(7) by relying on an exemption available only to businesses that already fall within the scope of the statute.

Olympic reliance on RCW 82.04.260(7)'s exemption fails to consider the statute as a whole or its context in the statutory scheme. The law's history helps make this clear.

RCW 82.04.260(7) is not Washington's first attempt to tax stevedoring activities. In 1935, the Legislature enacted a broad B&O tax statute that included all forms of business within its scope. *Puget Sound Stevedoring Co. v. Tax Comm'n*, 302 U.S. 90, 91, 58 S. Ct. 72, 82 L. Ed. 68 (1937), *overruled by Department of Revenue v. Ass'n of Washington Stevedoring Cos.*, 435 U.S. 734, 750, 98 S. Ct. 1388, 55 L. Ed. 2d 682 (1978). Puget Sound Stevedoring Company challenged application of the tax to stevedoring, arguing that this business was a form of interstate commerce and, as such, was not subject to state taxation. Holding that the business of loading and unloading cargo was inseparable from the transportation of that cargo by water, the United States Supreme Court agreed and found the tax unconstitutional as applied to stevedoring companies. *Id.* at 92-94.

In 1974, following a series of Supreme Court decisions that created questions about *Puget Sound Stevedoring*, Washington again sought to assess its general B&O tax against stevedoring companies. *See generally Ass'n of Washington Stevedoring Cos.*, 435 U.S. at 736-43. This time, the Supreme Court upheld application of the tax, overruling *Puget Sound Stevedoring. Ass'n of Washington Stevedoring Cos.*, 435 U.S. at 749-50.

The Supreme Court cases arose under Washington's general B&O tax. In 1979, however, the Legislature created the specific tax classification here at issue: the B&O tax for "stevedoring and associated activities." *See* Laws of 1979, 1st Ex. Sess., ch. 196, §2; *codified at* RCW 82.04.260(7). As Olympic points out, the language in the statute – "and associated activities" went beyond the stevedoring businesses with which the United States Supreme Court had dealt. *See* App. Br. at 14-15. Instead of limiting the new classification to businesses that employed stevedores, the law expanded the definition.

What Olympic ignores, however, is that the Legislature was very careful about how far the new classification would reach and how limited the exemption actually is. The Legislature defined "stevedoring and associated activities" 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 82.04.260(7). This is the traditional definition of stevedoring. *See, e.g., Department of Revenue v. Ass'n of Washington Stevedoring Cos.*, 435 U.S. 734, 737, 98 S. Ct. 1388, 55 L. Ed. 2d 682 (1978) (stevedoring is "the business of loading and unloading cargo from ships"); *Webster's New International Dictionary* (3rd Ed. 2002) 2239 (defining "stevedore" as ". . . to load or unload a ship . . ."). The Legislature then continued its definition, adding that:

> 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. The stevedoring classification thus includes two types of businesses: those that engage in stevedoring activities, and those whose businesses include moving and otherwise handling cargo before it is loaded onto, or after it is unloaded from, a ship. Every example of a covered activity contained in RCW 82.04.260(7) falls into one of these groups.

There was another issue, however. The transportation and related businesses included in RCW 82.04.260(7) were already subject to the public utility tax. *See* RCW 82.16.020(1)(f) (including motor

transportation and railroads in businesses subject to public utility tax). To avoid a double tax on the income of these businesses – businesses that handled cargo but were not actual stevedoring companies – the Legislature included an exemption in RCW 82.04.260(7) for businesses otherwise subject to the public utility tax. *See id. This* is why RCW 82.04.260(7) includes an exemption – to ensure that all aspects of cargo movement at a terminal received the benefit of a lower tax rate. *Cf. id.* (limiting "stevedoring and associated activities" to activities "whereby cargo may be loaded or unloaded to or from vessels or barges, *passing over, onto or under a wharf, pier, or similar structure*" (emphasis added)).

In sum, RCW 82.04.260(7) was, as Olympic notes at App. Br. 13, enacted in response to the United States Supreme Court's 1978 *Association of Washington Stevedoring Companies* decision. And its intent was, as Olympic also observes, to lower the tax imposed on stevedoring by establishing a new classification. The Legislature's inclusion of "and associated activities" was not, however, intended to create the unlimited expansion that Olympic seeks. That language was included so that all activities *involving the handling and moving of cargo* would receive the new, lower rate.[14]

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[14] Olympic is thus half right when it states:

The Court must interpret RCW 82.04.260(7) by examining the text of the statute, the context in which the statute is found, related provisions, and the statutory scheme as a whole. *Department of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). Here, there is a statutory scheme that defines precisely what Olympic does – it is a "tugboat business" - and imposes the public utility tax on that business. Elsewhere in RCW Title 82 is a B&O tax classification for "stevedoring and associated activities." The stevedoring tax classification statute defines the businesses it covers, and Olympic's tugboat business is not close to any of the examples.

5. Olympic's argument would lead to absurd results.

The final flaw in Olympic's argument is the absurd results to which it would lead. According to Olympic, fuel bunkering is an "incidental vessel service" because it "is obviously necessary to the movement of goods in waterborne interstate or foreign commerce." App.

> 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 the journey into interstate and foreign destinations, should now benefit from the reduction in B&O taxes . . . .

App. Br. at 15. The Legislature did intend to include "activities surrounding the loading and unloading of cargo" in the new classification – and stated what those activities were. None of them are "preparation of ships for the journey," particularly "preparation" that has nothing at all to do with cargo handling.

Br. at 19. Along the same lines, Olympic maintains that transporting and loading fuel 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)" because ships carrying goods cannot move without fuel. App. Br. at 21 (emphasis in original).

Olympic's logic is deeply flawed. If anything that helps a cargo ship move cargo falls under the definition of "stevedoring and associated activities," revenues from countless activities would qualify for taxation under RCW 82.04.260(7). These would include but not be limited to:

- the refining process that prepares the oil that Olympic delivers;
- all other tugboat operations involving cargo shipping, including tugs that escort and guide ships into and out of ports;
- preparing and delivering food for crews to eat, since ships require crews to move and crews require food;
- manufacturing and delivering the cargo that the ships transport, since without cargo the vessels could not ship anything at all;
- manufacturing and maintaining the ships themselves (*e.g.*, garbage removal, painting the ship, servicing the engines, repairing or upgrading bridge radio and navigational equipment, etc.), since

there could be no cargo shipping without ships and functioning equipment;[15] and

- creating and maintaining a means for the ships to travel from piers and docks to the ocean, *i.e.*, dredging Puget Sound.

Courts "construe statutes to effect their purpose and avoid unlikely or absurd results." *Thompson v. Hanson*, 168 Wn.2d 738, 750, 239 P.3d 537 (2009). The consequences of Olympic's argument are not simply "unlikely or absurd," they are impossible. Olympic proposes a construction of RCW 82.04.260(7) under which three words at the end of the statute would swallow everything that precedes them while expanding the law to include innumerable activities that have nothing whatsoever to do with stevedoring. This is not the purpose of the stevedoring statute, and the Court should reject Olympic's attempt to rewrite the law, as the Superior Court did.

V. CONCLUSION

This Court should reject Olympic's latest effort to reduce taxes on its fuel bunkering business. The public utility tax statute under which it has been assessed applies specifically and directly to its activities. *See*

[15] These maintenance activities plainly are not "stevedoring and associated activities" but are performed while the ship is in port, further undermining Olympic's attempt to narrow the scope of its argument. *See* note 13, *supra.*

RCW 82.16.020(1). Olympic's attempts to shoehorn its business into a "stevedoring and associated activities" business relies on an interpretation of RCW 82.04.260(7) that is contrary to the language of the statute, contrary to established principles of statutory construction, and contrary to common sense. The Superior Court properly granted summary judgment to the Department, and this Court should affirm that judgment.

RESPECTFULLY SUBMITTED this 20th day of October, 2014.

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APPENDIX

RCW 82.16.020(1)

(1) There is levied and there shall be collected from every person a tax for the act or privilege of engaging within this state in any one or more of the businesses herein mentioned. The tax shall be equal to the gross income of the business, multiplied by the rate set out after the business, as follows:

(a) Express, sewerage collection, and telegraph businesses: Three and six-tenths percent;

(b) Light and power business: Three and sixty-two one-hundredths percent;

(c) Gas distribution business: Three and six-tenths percent;

(d) Urban transportation business: Six-tenths of one percent;

(e) Vessels under sixty-five feet in length, except tugboats, operating upon the waters within the state: Six-tenths of one percent;

(f) Motor transportation, railroad, railroad car, and tugboat businesses, and all public service businesses other than ones mentioned above: One and eight-tenths of one percent;

(g) Water distribution business: Four and seven-tenths percent.

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.

RCW 82.04.260(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.

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DATED this 20th day of October, 2014, at Tumwater, WA.

Julie Johnson, Legal Assistant

WASHINGTON STATE ATTORNEY GENERAL

October 21, 2014 - 11:45 AM

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