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05667-8

NO. 65667-8-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

OLYMPIC TUG & BARGE, INC.,

Respondent,

v.

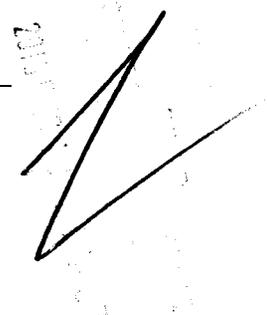
STATE OF WASHINGTON DEPARTMENT OF REVENUE,

Appellant.

RESPONDENT'S BRIEF

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I. SUMMARY INTRODUCTION

This case presents an issue of statutory interpretation of a public utility tax (“PUT”) deduction statute, RCW 82.16.050(8).¹ The PUT is a tax assessed on the gross income of certain legislatively defined public service businesses, including persons engaged in a tugboat business in the state of Washington. RCW 82.16.020(1)(f). The plain language of RCW 82.16.050(8) allows a deduction for income received from certain services that would otherwise be subject to PUT. Appellant Department of Revenue (the “Department”) contends that Respondent Olympic Tug & Barge, Inc. (“Olympic”) is not entitled to the deduction. To support this contention, the Department has had to rewrite the statute. The State Board of Tax Appeals (“BTA” or “Board”) accepted the Department’s rewrite. The BTA should not have done so, because the Department has no right to add words to a statute so that it will read the way the Department needs it to read, in order to deny Olympic the deduction. If this Court applies the rules of statutory interpretation and gives the words in the statute as enacted by the Legislature their plain meaning, this Court will reach the same conclusion as the Superior Court: that the BTA erroneously

¹ RCW 82.16.050 was amended in 2007 to bifurcate or separate former subsection (8) into two subsections, (8) and (9). 2007 c 330 § 1. The prior version of the statute contained two separate public utility tax deductions, separated by a semicolon. In the 2007 amendment, clause one of the statute remained subsection (8) and clause two became what is currently subsection (9). This dispute involves the tax year 2002 so all references to RCW 82.16.050(8) will be to the version of the statute in effect at that time.

interpreted the statute and unjustly denied Olympic a deduction from gross income for revenues from the activity of bunkering fuel.

II. COUNTER-STATEMENT OF THE CASE

A. Olympic's Business And Its Transportation Of Bunker Fuel To Vessels Engaged In Interstate Or Foreign Commerce.

Olympic is a Seattle-based tug and barge company that provides fueling and bunkering services to vessels engaged in cargo movement to and from interstate and foreign destinations. CP 40. Bunker fuel consists of “any of various fuel oils used esp. on ships.” *Webster's Third New International Dictionary* at 297 (2002). Petroleum refineries, such as Tesoro and Conoco-Phillips, produce bunker fuel in this state and sell the fuel to vessels engaged in interstate and foreign commerce.

The bunkering process begins when the refineries hire Olympic to transport the bunker fuel to vessels moored to a dock or anchored in tidewaters or navigable tributaries. CP 40. Olympic goes to the refinery with a tug boat and barge and the bunker fuel is pumped into the barge. *Id.* The tug boat then pulls the barge to the side of the vessel, at which point the bunker fuel is pumped via fuel lines into the bunkers (fuel tanks) of the vessel. *Id.*; AR 548. Olympic does not own the bunker fuel, but rather receives a fee for transporting the fuel between the refinery and the vessel. AR 548.

A significant portion of the vessels to which Olympic delivers bunker fuel are located outside of the city limits from the location of the refinery where Olympic's barges load the bunker fuel. CP 40. Approximately ninety percent (90%) of Olympic's bunkering activities in 2002 (the tax year at issue in this case) involved the transfer of bunker fuel for vessels moving directly to ports in other states or foreign countries. *Id.* Modern ocean-going vessels have significant bunker fuel holding capacity and usually make their fueling port selection based on the price of bunker fuel because it is a regularly-traded commodity worldwide. *Id.*

Approximately ninety-seven percent (97%) of the fuel delivered to ocean-going vessels by Olympic in 2002 was not used in Washington state waters. CP 41. Foreign fuel exemption certificates were provided by the vessel owners attesting that the bunker fuel would not be burned within the territorial boundaries of Washington State. AR 472-478. The attestation that the bunker fuel will not be burned in Washington state waters operated to exempt the fuel from the retail sales and use taxes. RCW 82.08.0261. Olympic contends that the fees that it received for transportation of bunker fuel to ocean-going vessels whose owners attest that the fuel in question was not burned within the territorial boundaries of the state are not subject to PUT, because the second clause of former

RCW 82.16.050(8) provided a deduction for the income Olympic received for these bunkering services.

B. Procedural Facts and History.

Olympic asks this Court to uphold the Superior Court's reversal of the final decision entered by the BTA on June 25, 2009. AR 46-67. The BTA's decision sustained the assessment of PUT made by the Department, which denied Olympic a deduction from gross income for amounts derived from the transportation of bunker fuel from points of origin located outside the corporate limits of a city to an ocean-going vessel located within the corporate limits of a city, even if that vessel's owners attested that the fuel would not be burned within the territorial waters of the state. *Id.*

The issue in this appeal was not unfamiliar to the Board. In 2000, Olympic appealed a similar determination of the Department to the Board, in which the Department similarly denied Olympic the deduction under RCW 82.16.050(8) for the tax years 1994 through 1997. AR 627-35.² In that determination, the Department held that the bunker fuel no longer remained a commodity once delivered to the foreign-bound vessel, and thus Olympic's bunkering activity did not satisfy the requirements that the

² *Olympic Tug & Barge, Inc. v. Dep't of Revenue*, BTA Docket No 55558 (2001). The 2000 appeal was under Washington Administrative Code Chapter 456-10 (Informal Hearings).

commodity be forwarded in its original form to an interstate or foreign destination. *Id.*

The Board reversed the Department's determination, permitting Olympic to deduct amounts received from its bunkering operations from its gross income, provided that the bunkering operation originated *outside* the corporate city limits where the bunker fuel was ultimately offloaded. AR 627-35. The Board concluded that PUT did not apply to income from the transportation of bunker fuel to vessels having an interstate or foreign destination. *Id.*

The Department did not agree with the Board's decision, and two years later the Department unilaterally issued Excise Tax Advisory 2009-1S.32 (October 31, 2003) ("ETA")³, in which the Department presumed to give notice that it would "not follow the Board's holding that for purposes of the public utility tax on fuel bunkering services under RCW 82.16.050(8), a taxpayer is transporting commodities when the fuel in question is consumed on the high seas and is never resold." AR 197. As a result of the Department's "nonacquiescence" to the Board's decision,⁴ Olympic has been assessed PUT in a number of subsequent years

³ ETA 2009-1S.32 (October 31, 2003), was reissued as 3055-2009, on February 2, 2009, when the Department revised its number classifications for all ETAs.

⁴ There is no statutory or other authority for the Department to "nonacquiesce" to a BTA decision, and the Department can cite to none, either.

including the tax year in question (2002), on the income from the identical bunkering activity that was held by the Board in 2001 to be deductible from gross income, and thus not subject to PUT. AR 627-35.⁵

The issue in this case arose in 2006 when the Department assessed PUT against Olympic for the 2002 tax year. The ETA issued by the Department indicating that it would not acquiesce to the Board's decision was not issued until October 31, 2003, almost a full year after the close of the 2002 tax year.

Unlike its previous appeal to the Board in 2000, Olympic appealed the Department's determination of the 2002 tax year under Chapter 456-09 WAC (Formal Hearings). The Board held a hearing on March 3, 2009. AR 46. In its final decision, dated June 25, 2009, the Board overruled its prior decision from 2001 and sustained the determination of the Department, denying Olympic the deduction under RCW 82.16.050(8), on the grounds that it believed the Legislature intended a distinction to be drawn between commodities that can be consumed and those that cannot be consumed. AR 64. Specifically, the Board concluded that the deduction under RCW 82.16.050(8) only applied to "commodities" that are forwarded to a *specific* place outside of Washington, not to

⁵ Olympic is currently under audit (or has been assessed) for unpaid PUT for the tax years 2003, 2004, 2005, and 2006. These subsequent years are not before the Court in this appeal, but are subject to ongoing administrative appeals.

commodities that are also consumables that are used in the business of forwarding non-consumable commodities to interstate or foreign destinations” (emphasis added). *Id.* The Board further concluded that the bunker fuel was not delivered “ship side,” despite the fact that the Board recognized that the bunker fuel was delivered to vessels at anchor. According to the Board, “ship side” included only the “area on a dock alongside a ship.” AR 57. Because the vessel may not have been tethered to a dock when it received the bunker fuel from Olympic, the Board concluded Olympic was not entitled to the deduction. AR 64.

Pursuant to RCW 34.05.514 and 34.05.546, Olympic filed a petition for review in King County Superior Court. CP 3-36. Olympic asserted that the Board erroneously sustained the determination of the Department, which denied Olympic a deduction under RCW 82.16.050(8) for the 2002 tax year. *Id.* Olympic argued that the plain language of the statute only required that commodities be forwarded in their original form to interstate or foreign destinations and that any point outside the state of Washington met this requirement. CP 47. In a written decision dated June 8, 2010, the Superior Court agreed with Olympic that RCW 82.16.050(8) merely required that bunker fuel be forwarded in its original form to a destination outside the territorial limits of Washington state. CP 128. The Department timely filed a notice of appeal to this Court. CP

133-164.

III. STANDARD OF REVIEW

This Court reviews the BTA's decision, not the trial court's decision. *Dep't of Revenue v. Sec. Pac. Bank of Wash. Nat'l Ass'n*, 109 Wn. App. 795, 802-03, 38 P.3d 354 (2002). "On review of an agency order under the Administrative Procedures Act, chapter 34.05 RCW, [the court] will reverse an agency decision based on an erroneous interpretation or application of the law." *Skagit County Public Hospital Dist. No. 1 v. Dep't of Revenue*, 2010 WL 4457379, *2, ¶9 (Nov. 9, 2010) (citing RCW 34.05.570(3)(d)).

The question before the Court is one of statutory interpretation: Is Olympic entitled to a deduction under former RCW 82.16.050(8) for income Olympic received from the transportation and delivery of bunker fuel from points of origin in the state to vessels bound for interstate and foreign destinations, when such vessels were located outside the corporate limits of the city in which the transportation and delivery of the bunker fuel originated and when the fuel in question would remain in its original form until the vessel had left the territorial waters of this state?

There are several rules of statutory interpretation that implicate this question. First, decisions based on interpretation of the law are reviewed de novo. See *Advanced Silicon Materials, LLC v. Grant County*, 156

Wn.2d 84, 89, 124 P.3d 294 (2005); *City of Seattle v. Burlington N. R.R.*, 145 Wn.2d 661, 665, 41 P.3d 1169 (2002); *see also Dot Foods, Inc. v. Dep't of Revenue*, 166 Wn.2d 912, 919, 215 P.3d 185 (2009) (citing *State v. J.P.*, 149 Wn.2d 444, 449, 69 P.3d 318 (2003)) (the court “review[s] questions of statutory interpretation de novo”). As noted in *Weyerhaeuser Co. v. Dep't of Revenue*, 16 Wn. App. 112, 114, 553 P.2d 1349 (1976), the court’s “function . . . is to ascertain the legal effect of uncontroverted facts which involves a question of law.” While the Court will accord substantial weight to the agency’s interpretation of the law, the Court may substitute its judgment for that of the agency. *Haley v. Med. Disciplinary Bd.*, 117 Wn.2d 720, 728, 818 P.2d 1062 (1991). In short, this Court has the inherent and statutory authority to make a de novo review independent of the Board's decision. *Leschi Improvement Council v. State Highway Comm'n*, 84 Wn.2d 271, 286, 525 P.2d 774 (1974); RCW 34.04.130(6)(d). As the challenging party, Olympic bears the burden of demonstrating an invalid agency action. *Skagit County Public Hospital, supra* (citing RCW 34.05.570(1)(a); *DaVita, Inc. v. Dep't of Health*, 137 Wn. App. 174, 180, 151 P.3d 1095 (2007)).

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)). Courts look to the statute’s plain meaning in order to fulfill their obligation to give effect to legislative intent. See *G-P Gypsum Corp. v. Dep’t of Revenue*, 169 Wn.2d 304, 309, 237 P.3d 256 (2010) (citing *Dep’t of Ecology v. Campbell & Gwynn, LLC*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002)); see also *Dot Foods*, 166 Wn.2d at 919 *supra* (“In reviewing a statute, we give effect to the legislature’s intent, primarily derived from the statutory language. Where statutory language is plain and unambiguous, we ascertain the meaning of the statute solely from its language”).

Courts may “neither add language to nor construe an unambiguous statute.” *Bowie v. Dep’t of Revenue*, 150 Wn. App. 17, 21, 206 P.3d 675 (2009) (citing *Cerrillo v. Esparza*, 158 Wn.2d 194, 201, 142 P.3d 155 (2006)). “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, *regardless of contrary interpretation by an administrative agency.*” *Agrilink Foods, Inc. v. Dep’t of Revenue*, 153 Wn.2d 392, 396, 103 P.3d 1226 (2005) (emphasis added) (citations omitted). The court “is required to assume the Legislature meant exactly what is said and apply the statute *as written.*” *Duke v. Boyd*, 133 Wn.2d 80, 87, 942 P.2d 351 (1997) (emphasis added).

IV. ARGUMENT

A. The Language Of Former RCW 82.16.050(8) Is Plain And Unambiguous And Establishes Olympic's Right To The Deduction At Issue.

Prior to the 2007 amendment (*see* n.1, *supra*) a deduction from the income subject to PUT was provided as follows:

Amounts derived from the transportation of commodities from points of origin in this state to final destination outside this state, or from points of origin outside this state to final destination in this state, with respect to which the carrier grants to the shipper the privilege of stopping the shipment in transit at some point in this state for the purpose of storing, manufacturing, milling, or other processing, and thereafter forwards the same commodity, or its equivalent, in the same or converted form, under a through freight rate from point of origin to final destination; and amounts derived from the transportation of commodities from points of origin in the state to an export elevator, wharf, dock or ship side on tidewater or navigable tributaries thereto from which such commodities are forwarded, without intervening transportation, by vessel, in their original form, to interstate or foreign destinations: PROVIDED, That no deduction will be allowed when the point of origin and the point of delivery to such an export elevator, wharf, dock, or ship side are located within the corporate limits of the same city or town.

RCW 82.16.050(8).

This statute consisted of two distinct clauses, separated by a semicolon and distinguished by different terms and requirements. The Washington Legislature amended RCW 82.16.050(8) in 2007, resulting in the bifurcation of the statute into two separate and distinct subsections. "Clause One" remained subsection (8) of RCW 82.16.050, while "Clause

Two” became subsection (9) of RCW 82.16.050. This appeal centers on the proper interpretation of Clause Two of the former statute.

Clause Two of the statute contained four requirements for a taxpayer to be eligible for the deduction:

1. The amount deducted was derived from the transportation of commodities;
2. The commodities were transported from a location within the state to an export elevator, wharf, dock or ship side on tidewater or navigable tributaries;
3. The commodities were forwarded, without intervening transportation, by vessel, in their original form, to interstate or foreign destinations; and
4. The point of origin and the point of delivery to the export elevator, wharf, dock or ship side were not located in the corporate limits of the same city or town.

The fourth requirement is not in dispute; the first three are. The key questions before this Court are: (1) is bunker fuel a commodity? (2) is the bunker fuel transported from its point of origin to a location defined as “ship side?” and (3) is the bunker fuel forwarded by a vessel to interstate or foreign destinations? To answer these questions, each term and requirement of the statute must be examined to ascertain its plain meaning.

1. **Bunker Fuel Is A “Commodity”.**

“[A]bsent a statutory definition, words of a statute must be accorded their usual and ordinary meaning[.]” *Pac. First Fed. Sav. and*

Loan Ass'n v. Washington, 92 Wn.2d 402, 409, 598 P.2d 387 (1979). To do that one turns to dictionaries, and doing so here reveals that the usual and ordinary meaning of the word “commodity” is “an economic good[.]” *Webster’s Third New International Dictionary* at 458 (2002) (def. 2.a). Bunker fuel is a heavy fuel oil that is a regularly-traded commodity worldwide. AR 547-48. It quite obviously is an “economic good,” and therefore a “commodity” under the usual and ordinary meaning of the term. And under well established principles of statutory interpretation, one must conclude that the Legislature intended bunker fuel, like any other “economic good,” would be deemed a “commodity” for purposes of the deduction from PUT set forth in former RCW 82.16.080(8).

The Department does its best to evade this conclusion, including by mischaracterizing the Board’s findings and conclusions as to whether bunker fuel is a commodity under the statute. According to the Department, “[t]he Board . . . correctly concluded that the bunker fuel was not a ‘commodity’ under the terms of the deduction.” *See* Appellant’s Brief at 13. In fact, the Board noted in its final decision that “[t]he Board also agreed with Olympic that *bunker fuel is a commodity* because it is a type of tangible personal property that is routinely bought and sold.” AR 56 (emphasis added).

Yet despite its finding that bunker fuel is a commodity, the Board

proceeded to overrule its 2001 decision. Stating that “[t]he [prior] Board erroneously decided BTA Docket No. 55558 (2001) because we adopted an inappropriately broad interpretation of the word ‘commodity’ in RCW 82.06.050(8) [sic], and because statutory language providing a deduction must be strictly construed, which it was not[,]” the Board then held that the word “commodity” did not apply to “commodities *that are also consumable.*” AR 64 (emphasis added).

In short, the Board’s findings of fact do not support its conclusions of law. It would have been one thing had the Board found that the economic concept of a commodity does not extend to include bunker fuel. But the Board did not do that -- presumably because it would have been so obviously absurd to make such a finding that the Board chose not to do so. Instead, the Board expressly made a finding that bunker fuel *is* a commodity, *then* presumed to draw the legal conclusion that Olympic is not entitled to the deduction because bunker fuel is a commodity that can be consumed -- a distinction not supported by any authority including the Board’s own findings of fact. *See Netversant Wireless Systems v. Dep’t of Labor & Indus.*, 133 Wn. App. 813, 822, 138 P.3d 161 (2006) (“We review Board findings of fact for substantial evidence and must determine whether those findings support its conclusions of law”); *see also* RCW 34.05.461(3).

Former RCW 82.16.050(8), as interpreted by the Board, requires that the commodity be forwarded in its original form without intervening transportation *and without being consumed during the course of the voyage*, by vessel to specific interstate or foreign destinations. According to the Board, the Legislature intended the deduction of former RCW 82.16.050(8) to apply only to “‘commodities’ that are forwarded to a specific place outside of Washington, not to commodities that are also consumables that are used in the business of forwarding non-consumable commodities to interstate or foreign destinations.” AR 64. But the intent of the Legislature is to be deduced from the words of the statute, and if the meaning of those words is plain and unambiguous then that meaning is to be respected as establishing what the Legislature intended, and the statute is to be applied in accordance with that intent. If the Legislature had intended to exclude -- as the Board would have it -- “commodities that are also consumables that are used in the business of forwarding non-consumable commodities,” the Legislature presumably would have expressed that intent by including limiting language to that effect. Given the Legislature did not include such language, the Legislature must be presumed *not* to have intended such a limitation and the Board has no right to ignore that intent and impose such a limitation on its own authority.

To support its interpretation of RCW 82.16.050(8) the Board turned to *United Parcel Serv. v. Dep't of Revenue*, 102 Wn.2d 355, 687 P.2d 186 (1984), a case addressing a state use tax exemption. In *United Parcel*, UPS claimed that its vehicles (used primarily in *intrastate* commerce) were exempt from use tax because these vehicles were necessary to facilitate the shipment of goods in *interstate* commerce. The court concluded that UPS was not entitled to the exemption because its vehicles must “actually cross the state boundaries in order to be eligible for exemption from the use tax.” *United Parcel*, 102 Wn.2d at 363. The Board concluded that the absence of the word “use” in former RCW 82.16.050(8) could imply only one thing:

[T]he presence of the qualifying word “use” in RCW 82.08.0261 and not in RCW 82.16.050(8) supports our conclusion that the legislature did not intend that RCW 82.16.050(8) apply to the transportation of the type of commodity that is “used” in interstate or foreign commerce (such as bunker fuel), only that it apply to transportation of the type of commodities (such as timber, fruit, and grain) that are transported to an export elevator, wharf, dock or “ship side” for forwarding, “in their original form,” to a specified place to which they are being sent (i.e., their “destination”).

AR 60 (emphasis by the Board).

United Parcel is of no relevance whatsoever to determining the intended scope of the PUT deduction at issue in this case. Olympic is not contending that its vessels are exempt from use tax because they are used primarily in interstate commerce; instead, Olympic seeks a deduction from

income subject to the PUT. In *United Parcel*, the word “use” was being applied in the context of the vehicles’ primary function (their use in transporting the packages). It is not, as the Board seemingly believes, evidence that the packages being transported were being “used” by the vehicles and that the vehicles themselves therefore were not entitled to an exemption from use tax. The Board’s reliance on a statute providing for a *use tax exemption* to discern the intent of the Legislature in a statute permitting the *deduction from gross income subject to PUT* is something less than equating apples to oranges; it is more akin to equating apples to broccoli.

The Board’s conclusion that a commodity loses its status as a commodity under former RCW 82.16.050(8) merely because it can be consumed (“used”) also overlooked decisions by Washington courts and the Board itself that have recognized that the term “commodity” includes articles that are sold directly to a consumer. *See Tonasket v. State*, 84 Wn.2d 164, 167, 525 P.2d 744 (1974) (court referred to cigarettes that were being sold to Indians and non-Indians as a “commodity”; there is little doubt that cigarettes are consumable commodities and that these items, if placed aboard a foreign-bound vessel, would entitle the transporter to the deduction under RCW 82.16.050(8)); *see also Longview Fibre Co. v. Dep’t of Revenue*, BTA Docket No. 12685 (1975) (the Board

considered wood chips, purchased by Longview Fibre for use in its paper production, a “commodity”). In sum, the Board’s restrictive reading of the term “commodity” constituted an erroneous interpretation of Clause Two of former RCW 82.16.050(8).

2. **The Bunker Fuel Is Transported To A Location That Is “Ship Side” On “Tidewater” Or “Navigable Tributaries Thereto”.**

According to the Department, the usual and ordinary meaning of “ship side” is “the area adjacent to a ship; specifically: a dock at which a ship loads or unloads passengers and freight;” the Department ostensibly relies on a definition of “ship side” from Merriam-Webster’s Third New International Dictionary. *See* Appellant’s Brief at 23. But a check of Webster’s discloses that the Department has cited the definition for *the single word “shipside.”* Former RCW 82.16.050(8), however, uses *the phrase “ship side,”* formed by the two words “ship” and “side.” The Department’s assertion that the Board correctly determined that “ship side” only applies to “the area on a dock alongside a ship” turns out to be the result of confusing the statutory two-word phrase “ship side” with the single word “shipside.” The Board made the same mistake, but in its case the mistake appears to have been the result of relying on definitions taken from the internet, and specifically the online dictionary

“YourDictionary.com.” *See* AR 57.⁶

The Department argues that “[w]hen the Legislature uses technical language in a technical field it should be given its technical meaning,” Appellant’s Brief at 8, and that argument would have force if the Legislature had employed the single word “shipside” (which online research suggests *does* carry the specific connotation urged by the Board and the Department). But the Legislature did not use the single term “shipside,” instead choosing to use the two word phrase “ship side.” The ordinary and usual meaning of “ship” is “any large seagoing boat,” *Webster’s Third New International Dictionary* at 2096 (2002) (def. 1.a), and the ordinary and usual meaning of “side” is “one of the surfaces or surface parts of an object which are distinguishable from the ends as being longer and from the front or back as being more or less perpendicular to the observer.” *Id.* at 2111 (def. 3). The ordinary and usual meaning of the phrase “ship side” thus is either of the longer surfaces of a large seagoing boat. When that meaning is applied to the statute one derives a legislative

⁶ The Court can see for itself how the Board ended up off track in its definition of “ship side,” by replicating the Google search that the Board likely used. Typing in the separate words “ship,” “side,” and “definition” pulls up a list of definitions leading off with the same definition of the *single word* “shipside” cited by the Board from YourDictionary.com. (The peculiarly 21st century nature of this error would suggest that lawyers engaged in legal research, at least when it comes to determining the ordinary and usual meaning of words, should stick to older, “paper” sources; the Department’s error is somewhat harder to fathom, since the Department has cited to Webster’s *print* dictionary, the Third New International Dictionary, 2002 edition, at page 2099.)

intent that the deduction would apply if the commodity is (in relevant part) transported to either of the surfaces distinguishable from the ends of a large seagoing boat “located on tidewater or navigable tributaries thereto” -- which is precisely what Olympic did with the bunker fuel at issue in this case, so it could be pumped into the vessel’s fuel bunkers.

The Board asserted that “[d]elivery ‘ship side’ is an important distinguishing factor because it demonstrates that only those commodities that are delivered to a ‘dock’ (or wharf or grain elevator) are meant to be included in RCW 82.16.050(8).” AR 57. But this interpretation of the statute impermissibly renders meaningless the balance of the phrase “...on tidewater or navigable tributaries thereto[.]” See *G-P Gypsum Corp. v. Dep’t of Revenue*, 169 Wn.2d 304, 309, 237 P.3d 256 (2010) (“Statutes must be interpreted and construed so that all of the language used is given effect, with no portion rendered meaningless or superfluous”). The ordinary and usual meaning of “tidewater” is “water overflowing land at flood tide; *also* : water (as rivers and streams) affected by the ebb and flow of the tide.” *Webster’s Third New International Dictionary* at 2390 (2002) (def. 1). The ordinary and usual meaning of “navigable” is “capable of being navigated: deep enough and wide enough to afford passage to ships.” *Id.* at 1509 (2002) (def.1). The ordinary and usual meaning of “tributary” (the singular form of “tributaries”) is “one that is tributary to

another: as...a stream feeding a larger stream or a lake.” *Id.* at 2441 (2002) (def. 2.a). It makes no sense for the Legislature to have said “ship side on tidewater or navigable tributaries thereto” if it intended “ship side” to denote only fixed structures such as docks, wharfs, or grain elevators -- especially given that the Legislature *separately listed all of those fixed structures as places to which commodities could be transported from their points of origin.* The only sensible interpretation is that the Legislature intended to provide a marine transporter of commodities like Olympic with an additional location to which they could transport commodities and remain eligible for the deduction, and expressed that intention by using the phrase “ship side on tidewater or navigable tributaries.”

The Board’s interpretation of ship side recognizes only locations that are similar to a dock, wharf, or grain elevator, and would rule out recognizing a location on the water-side of the ship to be ship side. Under this rationale, the Board would deny Olympic a deduction under RCW 82.16.050(8) if the vessel were tied to a dock or wharf and the bunkering activity were to take place on the water-side, because ship side “does not apply to pumping fuel into the bunker *on board* the ship.” AR 57 (emphasis by the Board). The Department correctly notes that Olympic has previously argued that this interpretation leads to absurd results. Specifically, Olympic argued that if lumber were to be placed directly on

the vessel without first placing the lumber on the dock, the transportation of the lumber would not be entitled to the RCW 82.16.050(8) deduction. The Department apparently believes it has managed to refute this argument because, although the lumber in Olympics' hypothetical is never actually delivered to the dock prior to being placed on the foreign-bound vessel, it "would still qualify as transportation to a 'dock.'" See Appellant's Brief at 24.

Perhaps a more specific example will more fully showcase the absurdity of the Board's reasoning. Assume that a foreign-bound vessel is tethered to a dock. For any number of reasons, the lumber may not be transported via motor vehicle to the dock in accordance with the Department's interpretation, but instead must be transported via barge to the side of the foreign-bound vessel that is *not* tethered to the dock (*e.g.*, the side of the vessel facing the open water) where it is then loaded onto the vessel. Under the Board's rationale, the deduction would be denied because "ship side" is limited to the "area on a dock alongside a ship." AR 57. There is no good reason for believing that the Legislature intended to make such a nonsensical distinction, yet such distinctions necessarily result under the Board's and the Department's interpretation.

Moreover, this interpretation requires rewriting the statute, first by substituting the single term "shipside" for the two word phrase "ship side"

and second by writing out the follow-on phrase “on tidewater or navigable tributaries thereto[.]” This rewrite is no more permissible than the earlier rewrite inserting the limiting phrase “and without being consumed during the course of the voyage” in order to rule out bunker fuel as a commodity. It renders the entire phrase “ship side on tidewater or navigable tributaries thereto” meaningless and superfluous, and that is something neither courts nor agencies may do. *G-P Gypsum Co. v. Dep’t of Revenue*, 169 Wn.2d 304, 309, 237 P.3d 256 (2010) (“Statutes must be interpreted and construed with no portion rendered meaningless or superfluous”) (citing *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (quoting *Davis v. Dep’t of Licensing*, 137 Wn.2d 957, 963, 977 P.2d 554 (1999) (quoting *Whatcom County v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996))). In sum, the Board’s restrictive reading of the phrase “ship side” constituted an erroneous interpretation of former RCW 82.16.050(8).

3. **The Bunker Fuel Is “Forwarded” By “Vessel” To “Interstate” Or “Foreign” “Destinations”.**

The final operative phrase of Clause Two is “forwarded, without intervening transportation, by vessel, in their original form, to interstate or foreign destinations.” *Id.* The Superior Court correctly concluded that Olympic satisfied both parts of this final requirement.

a. **The Bunker Fuel Is Forwarded By Vessel.**

The ordinary and usual meaning of “forward” (present tense) is “to send forward: Transmit;...to send or ship onward from an intermediate post or station in transit.” *Webster’s Third New International Dictionary* at 896 (2002) (defs. 2.a & b). Forwarded, the term used in the statute, is simply the past tense of the word “forward.” Any commodity that was in transit squarely meets this definition of the word “forward,” and there is no dispute that the bunker fuel at issue here was in transit.

The Department goes to great lengths to show that the word “forwarded” requires carriage of a commodity by a “water carrier.” *See* Appellant’s Brief at 19. A complete legislative history is provided by the Department to lead this Court to the conclusion that the Legislature in 1949 intended a water carrier to forward the commodity for another party and not consume the commodity itself in the process of forwarding. *See Id.* The Department relies on *Weyerhaeuser Co. v. Dep’t of Revenue*, 106 Wn.2d 557, 561-63, 723 P.2d 1141 (1986), to argue that in order to be a “carrier” the taxpayer must transport another person’s property from one place to another for hire. Olympic does not dispute the Department’s assertion that *in 1949*, the taxpayer claiming the deduction under this statute had to be classified as a “water carrier.” However, the tax year at issue is 2002, not 1949, and the term “water carrier” was removed from

Clause Two of the statute in 1967. *See* 1967 ex. S. c 149 § 25.

The underlying premise of the Department's argument is that the term "water carrier" still applies today to define the term "vessel." Unlike the term "water carrier," which requires a transportation-for-hire component, for an object to be classified as a "vessel," it merely needs to be a "hollow structure used on or in the water for purposes of navigation: a craft for navigation of the water; *esp*: a watercraft or structure with its equipment whether self-propelled or not that is used or capable of being used as a means of transportation in navigation or commerce on water and that usu[ally] excludes small rowboats and sailboats." *See Webster's Third New International Dictionary* at 2547 (2002) (def. 3.a).

In 1967, the statute underwent a major alteration. *See* Laws of 1967, Ch. 149, Sect. 25 (at 2411). The specific technical term "water carrier" was removed and replaced with the much broader term "vessel." In order to illustrate the differences between the statutes as they appeared in 1949 and 1967, the following is a direct "red-line" comparison of the statute:

Amounts derived from the transportation of commodities from points of origin in this state to final destination outside this state, or from points of origin outside this state to final destination in this state, with respect to which the carrier grants to the shipper the privilege of stopping the shipment in transit at some point in this state for the purpose of storing, manufacturing, milling or other processing, and thereafter forwards the same commodity, or its

equivalent, in the same or converted form, under a through freight rate from point of origin to final destination; and amounts derived from the transportation of commodities from points of origin in the state to an export elevator, wharf, dock or ship side on tidewater or navigable tributaries thereto, from points of origin in the State of Washington, and thereafter from which such commodities are forwarded, without intervening transportation, by water carrier vessel, in their original form, to interstate or foreign destinations; Provided, That no deduction will be allowed when the point of origin and the point of delivery to such an export elevator, wharf, dock, or ship side are located within the corporate limits of the same city or town;

The struck language indicates the statute as it appeared in 1949; the underlined language indicates the additions made and incorporated into the statute in 1967. Moreover, the Legislature left the term “carrier” in the *first* clause of the statute. That the Legislature chose to leave the requirement of transport by a carrier in the circumstances addressed by Clause One while allowing carriage by a vessel in the circumstance addressed by Clause Two is further evidence that the Legislature intended to broaden the deduction set forth in the second clause to apply to vessels other than those transporting another’s property for hire.

Realizing that the term “water carrier” has been absent from the statute for nearly four decades, the Department attempts to make the case that the term “vessel” really means “water carrier,” stating that “[t]he Legislature may have substituted the term ‘vessel’ for ‘water carrier’ to avoid confusion or unintended consequences caused by using a term

defined in federal laws such as the Interstate Commerce Act[.]” See Appellant’s Brief at 20. The Department provides no supporting authority for this claim steeped in speculation. A far more plausible explanation, and one supported by case law, is that the Legislature chose to amend the statute to eliminate the requirement that the commodities be transported by a water carrier for hire for the deduction to apply. See, e.g., *Vita Food Products, Inc. v. State*, 91 Wn.2d 132, 134, 587 P.2d 535 (1978) (“The presumption is that every amendment is made to effect some material purpose” (citations omitted)). And there is no dispute that the foreign-bound ships to which Olympic transported the bunker fuel at issue were “vessels” in the truest sense of that term.

b. The Destinations To Which The Bunker Fuel Is Forwarded Are Interstate Or Foreign.

Once the bunker fuel is aboard the vessel, it must then be forwarded to interstate or foreign destinations for the deduction to apply. The ordinary and usual meaning of “interstate” is “relating to the mutual relations of states: existing *between* or including different states – used esp. of the state of the states of the U.S. and of the states of Australia.” *Webster’s Third New International Dictionary* at 1183 (2002) (emphasis added). The ordinary and usual meaning of “foreign” is “situated *outside* a place or country.” *Id.* at 889 (def. 1). The ordinary and usual meaning

of “destination” is the “place which is set for the end of a journey or to which something is sent.” *Id.* at 614 (2002)(def. 3).

In its final decision, the Board concluded that for Olympic to be entitled to the deduction under RCW 82.16.050(8), the bunker fuel must be “delivered to a specific place, rather than used and consumed while in transit in interstate or foreign waters.” AR 58. There is no support in the plain language of the statute justifying this conclusion. The statute does not state that the commodity must be “delivered to an interstate or foreign port,” only that it be forwarded to “interstate or foreign destinations” without intervening transportation. Moreover, it has long been recognized that the high seas themselves constitute a “foreign destination.” Judge Learned Hand himself made precisely this point while serving as a District Court judge before his elevation to the Second Circuit. In *The S.S. ALEX CLARK*, 294 F. 904 (S.D.N.Y. 1923), Judge Hand ruled that a ship rendezvousing with another at a point on the high seas was engaged in a foreign voyage, even though the ship did not travel to a foreign port:

“A foreign voyage” is not necessarily a voyage to a foreign port. A point on the high seas is, indeed, not such a port. . . . *All places on the high seas are foreign to the United States, though not within the dominion of any other power. As before, it is the destination that counts[.]*

294 F. at 905 (emphasis added).⁷ Here, as well, the destination was a foreign one -- the high seas; to which the vessel would forward the bunker fuel before it began to consume it as fuel. Former RCW 82.16.050(8) does not say that the vessel must be bound for a foreign *port*; it says only that the vessel must *forward* the commodity to a foreign *destination*. The statute also does not require that the commodity be forwarded to another *port* to qualify for the deduction, only that the commodity must *leave* Washington for consumption *outside* Washington.

The Department does not dispute that any location beyond the territorial limits of the State of Washington is a foreign destination. It also is undisputed that the bunker fuel aboard the foreign-bound vessels travelled beyond the territorial boundaries of the state. Olympic provided evidence at the Board hearing that the bunker fuel is not burned by the vessels to which it is delivered within the territorial boundaries of Washington state; the foreign-bound vessels receiving this bunker fuel provided the fuel suppliers (*i.e.*, refineries) with foreign fuel exemption certificates, stating under penalty of perjury that the bunker fuel would not be burned within the waters of Washington state (thereby exempting the

⁷ This Court itself has recognized that the high seas can be a foreign destination. See *Grennan v. Crowley Marine Services, Inc.*, 128 Wn. App. 517, 525, 116 P.3d 1024 (2005) (“The ‘high seas’ simply encompass ‘all parts of the sea that are not included in the territorial sea or in the internal waters of a State’”).

purchase of the bunker fuel from Washington sales and use tax). AR 105-118, 154-161. Moreover, the Legislature purposely used the word “destinations” (plural), denoting the virtually infinite number of locations outside Washington which may constitute interstate or foreign points.

In its brief to the Superior Court, the Department asserted that “[a] strict but fair reading of the statute supports the BTA’s interpretation that the commodities *must be offloaded or delivered* to a foreign or interstate destinations in their original form to qualify for the deduction.” CP 95 (emphasis added). The Superior Court disagreed with the Department, concluding that “[t]he statute does not require the fuel to be forwarded to another port, ‘offloaded’, ‘delivered’ or not consumed once outside Washington territory.” CP 128. Apparently recognizing that its prior interpretation that the bunker fuel had to be offloaded or delivered was well beyond the text of the statute, the Department modified its argument to this Court and now says that the statute requires that the bunker fuel be forwarded to a “specific” destination. Appellant’s Brief at 13. But this, too, is not a requirement of the statute. Rather, and as the Superior Court recognized, the statute merely requires that the commodity, in this case bunker fuel, be transported to interstate or foreign destinations. CP 128. Any location beyond the territorial limits of Washington state is an interstate or foreign destination. The Department’s contention that the

term “forward” requires a “specific” destination at the time the commodity is transported is an interpretation that runs contrary to the plain meaning of the statute.

The irony of the contention that the statute mandates commodities be “offloaded” or “delivered” in order for a taxpayer to be eligible for the deduction on the transportation of the commodity from a location in this state to ship side prior to its journey to an interstate or foreign destination, is that neither the Department nor the taxpayer is truly aware whether any of the commodities transported to the vessel are ultimately offloaded or delivered in an interstate or foreign destination. AR 64. Under the Board’s interpretation of RCW 82.16.050(8), no taxpayer would ever be entitled to this deduction because there is no reasonable way to verify that the commodities actually were delivered or offloaded in an interstate or foreign destination. For example, would a taxpayer transporting “apples, gold, nuts and bolts” to a Singapore-bound vessel be entitled to the deduction if the vessel sank before reaching Singapore? Based on the Department’s argument, the answer is no, the transporter would not be entitled to the deduction under the statute because the commodities were never offloaded or delivered. The Board’s decision perpetuates this absurdity, and thereby renders the deduction meaningless. *See Sane Transit v. Sound Transit*, 151 Wn.2d 60, 93, 85 P.3d 346 (2004) (“Courts

must avoid absurd results when interpreting statutes”).

In short, the moment a vessel reaches interstate or foreign waters, the bunker fuel has been forwarded, by vessel, without intervening transportation, to an interstate or foreign destination. And as the Superior Court correctly recognized, that is all the statute requires for the deduction to apply. In summary, all four requirements for Olympic to be eligible for the PUT deduction set forth in Clause Two of former RCW 82.16.050(8) were satisfied here.⁸

B. The Board Erroneously Added Requirements To The Statute.

A fundamental principle of statutory interpretation is that the courts “should not and do not construe an unambiguous statute.” *Vita Food Products (supra)*, 91 Wn.2d at 134 (citations omitted). Courts “cannot add words or clauses to an unambiguous statute when the legislature has chosen not to include that language.” *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003). Yet, that is precisely what both the Board and the Department did when they created the requirements that former RCW 82.16.050(8) limits the deduction to taxpayers who act as the

⁸ After all, the purpose of the PUT deduction is to encourage interstate commerce and to strengthen the role of the ports, fuel suppliers and other commodity suppliers in Washington state. If shipping companies and other businesses cannot claim the PUT deduction and are forced to pay PUT simply for the privilege of buying commodities such as bunker fuel in Washington, even though they intend to use them outside the territorial waters of the state, these companies will be more likely to choose ports and suppliers in other states that do not exact this additional fee, which ultimately increases the cost of the product to the buyer.

transporter of (i) commodities that cannot be consumed, and (ii) commodities that must be delivered to a specific interstate or foreign destination. The Department argues for a strict interpretation of the statute and advocates for the statute to be given its plain meaning, only to then insert additional words into the statute in order to “discern” the statute’s plain meaning.⁹ There is no authority -- statutory or otherwise -- for the Department or the Board to add requirements or conditions to the statute. Indeed, courts have rejected attempts by the Department to add requirements or conditions for tax exemptions that are not contained in the statute. See *Lone Star Industries, Inc. v. Dep’t of Revenue*, 97 Wn.2d 630, 647 P.2d 1013 (1982); see also *Van Dyke v. Dep’t of Revenue*, 41 Wn. App. 71, 702 P.2d 472 (1985). In *Lone Star*, the Supreme Court held that the Department’s attempt to impose a “primary purpose test” as an additional requirement of the “ingredient” exemption from sales tax was invalid:

RCW 82.04.050 does not require that the tangible personal property so purchased be acquired primarily for the purpose of such consumption in order to avoid taxation as a “retail sale.” . . . In short, in determining the applicability of the tax, there is no “primary purpose test” required for property that becomes an ingredient or component of the new article.

Lone Star, 97 Wn.2d at 634-35. Likewise, RCW 82.16.050(8) does not

⁹ “Accordingly, Olympic’s revenues do not qualify for the PUT deduction because the bunker fuel is not sent or *delivered* to a foreign or interstate destination....” Appellant’s Brief at 22 (emphasis added).

require that the commodity be something other than a consumable product, nor does it require that the commodity be delivered to a specific interstate or foreign destination in order for a taxpayer to be entitled to the deduction.

Furthermore, if the Legislature wanted to limit the deduction to only those transporters (such as Olympic) who transport *non-consumable* commodities to a dock¹⁰ and such non-consumable commodities are *delivered to specific* interstate and foreign destinations by *water carriers* it could have easily done so. For example, to limit the deduction in the manner contended by the Department (and accepted by the Board), the statute would have had to read:

... and amounts derived from the transportation of *non-consumable* commodities from points of origin in the state to an ~~export elevator, wharf, dock or ship side on tidewater or navigable tributaries thereto~~ from which such *non-consumable* commodities are *delivered* ~~forwarded~~, without intervening transportation, by *water carrier vessel*, in their original form, to a *specific* interstate or foreign destinations; . . .

(added language italicized, deleted language struck-through).

But the statute during the tax year in question (as well as the 35 years prior to that) included no such limiting language. The Board has read language into the statute, something it is not allowed to do. *See*

¹⁰ The Department argues that the terms “export elevator,” “wharf,” “dock,” and “ship side” all describe the same place. Appellant’s Brief at 23-24. *See G-P Gypsum*, 169 Wn.2d 304, 309, 237 P.3d 256 (“Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous”).

Qwest Corp. v. City of Kent, 157 Wn.2d 545, 553, 139 P.3d 1091 (2006) (citing *State v. Cooper*, 156 Wn.2d 475, 480, 128 P.3d 1234 (2006)).¹¹

This Court should read the statute as it was written in 2002, not as the Department or the Board evidently wishes it had been written then.

C. The Department Erroneously Imports Language From Clause One Into Clause Two Of The Statute.

As a basis for its argument that the bunker fuel must be delivered to specific interstate or foreign destinations in order for Olympic to qualify for the deduction, the Department argues that the language of Clause One of the statute supports its interpretation. The Department attempts to show the commonality between Clause One and Clause Two yields but one conclusion: that both clauses “describe the movement of the commodities to their *final* destination” (emphasis added). Appellant’s Brief at 10. This entire analysis is not only wrong, but actually serves to weaken the Department’s claim that the bunker fuel must be delivered to a *final*

¹¹ In interpreting RCW 82.16.050(8), the Board also examined the wording of other tax deduction statutes (i.e., RCW 82.08.0261) in an attempt to ascertain the meaning of this statute. AR 58-61. This was error and similar to a mistake the trial court made in *Bowie v. Dep’t of Revenue*, 150 Wn. App. 17, 206 P.3d 675 (2009). In *Bowie*, the Court of Appeals (Div. 2) made clear that the court’s duty is to “look to the statute’s plain meaning in order to fulfill [its] obligation to give effect to legislative intent.” *Id.* at 21 (citing *Lacey Nursing Ctr., Inc. v. Dep’t of Revenue*, 128 Wn.2d 40, 53, 905 P.2d 338 (1995)). The Court of Appeals (Div. 2) followed the rule that it will “neither add language to nor construe an unambiguous statute” (*Bowie*, 150 Wn. App. at 21 (citing *Cerrillo v. Esparza*, 158 Wn.2d 194, 201, 142 P.3d 155 (2006)) and rejected the trial court’s attempt “to examine the legislative history and intent behind the statute” as well as the court’s conclusion “that ‘the legislature passed legislation that does more than [it] intended to do.’” *Bowie*, 150 Wn. App. 17, *supra*.

interstate or foreign destination for Olympic to be entitled to the deduction under Clause Two. For the purposes of clarity, “final” is defined as “relating to or occurring at the end or conclusion: Last, Terminating.” *Webster’s Third New International Dictionary* at 851 (2002) (def. 2.a).

As noted above, Clause One of the statute states that a PUT deduction is allowed for:

Amounts derived from the transportation of commodities from points of origin in this state to *final destination* outside this state, or from points of origin outside this state to *final destination* in this state, with respect to which the *carrier* grants to the shipper the privilege of stopping the shipment in transit at some point in this state for the purpose of storing, manufacturing, milling, or other processing, and thereafter forwards the same commodity, or its equivalent, in the same or converted form, under a through freight rate from point of origin to *final destination*; ...

RCW 82.16.050(8) (emphasis added). An infinite number of destinations exist between the beginning and end of a carrier’s path, but it is clear from the definition of the word “final” as it is used in Clause One that the Legislature intended the commodity to be sent by a carrier to the final destination along the carrier’s path to qualify for the deduction.

On the other hand, Clause Two of the statute does not contain either the words “carrier” or “final,” yet the Department claims that the clauses when read in conjunction with one another “clearly contemplates the transportation of goods by a carrier to a specific interstate or foreign destination.” Appellant’s Brief at 13. On the contrary, Clause Two states

only that the commodities must be forwarded by a vessel to interstate or foreign destinations:

... and amounts derived from the transportation of commodities from points of origin in the state to an export elevator, wharf, dock or ship side on tidewater or navigable tributaries thereto from which such commodities are forwarded, without intervening transportation, by *vessel*, in their original form, *to interstate or foreign destinations*: PROVIDED, That no deduction will be allowed when the point of origin and the point of delivery to such an export elevator, wharf, dock, or ship side are located within the corporate limits of the same city or town.

Had the Legislature intended that a taxpayer seeking the deduction under Clause Two, (i) transport the bunker fuel to a *water carrier*, (as opposed simply to a vessel), (ii) be aware of the specific *final* interstate or foreign destination of the bunker fuel, and (iii) verify that the bunker fuel was *delivered* to a port in another state or country, it could have expressly said so in the statute. Yet, the Legislature did not so state.

The fact that the terms “water carrier,” “specific,” and “final” were omitted from Clause Two is fatal to the Department’s reading of the statute. For the Department to argue that Clause One provides authority to its claim that both Clause One and Clause Two require that the commodity be delivered to a “final” destination is clearly erroneous and runs afoul of the presumption that the Legislature is aware of the words it has chosen

and any omissions are deemed to be purposeful.¹² *Adams v. King County*, 164 Wn.2d 640, 650, 192 P.3d 891 (2008) (“[o]missions are deemed to be exclusions”). This argument evokes an interesting query: if “destination” always implied finality, why would the Legislature need to add the word “final” in Clause One? Moreover, why would the Legislature not add the word “final” to Clause Two if it did not intend to show a distinction between Clause One (requirement that the commodities be shipped to a *final destination*) and Clause Two (requirement that the commodities merely be shipped to *interstate or foreign destinations*)?¹³

Although the Department evidently wishes that Clause Two of former RCW 82.16.050(8) contained a provision that the commodity be delivered by a water carrier to a final destination, such language was purposefully omitted by the Legislature. This Court should decline to go along with the Department’s addition of words to the statute in order to support its unending appetite to tax businesses taking legitimate deductions provided by the Legislature.

¹² The Department argues that “the deduction applies only where the commodity stops at an intermediate point in Washington and is then carried to its *final* destination. Both clauses...describe the movement of commodities to their *final* destination.” Appellant’s Brief at 10 (emphasis added).

¹³ Note as well that in Clause One, the word “destination” is singular and preceded by the word “final.” In Clause Two the phrase “interstate and foreign destinations” is plural, implying a multitude of destinations.

D. The Board's Interpretation Of RCW 82.16.050(8) Is Only Possible If Words Are Improperly Added To The Statute.

A longstanding principle is that deductions must be narrowly construed. *Dep't of Revenue v. Schaaque Packing Co.*, 100 Wn.2d 79, 83-84, 666 P.2d 367 (1983). Taxation is generally the rule and deductions or exemptions are the exceptions. *Budget Rent-a-Car of Wash.-Or., Inc. v. Dep't of Revenue*, 81 Wn.2d 171, 174, 500 P.2d 764 (1972) (citing *Fibreboard Paper Prods. Corp. v. State*, 66 Wn.2d 87, 91, 401 P.2d 623 (1965)).

The Department regularly trumpets these rules whenever a deduction or exemption statute is at issue.¹⁴ However, this so-called default rule applies only *after* the court has attempted to interpret the statute through plain meaning and has determined that the statute remains susceptible to more than one reasonable interpretation, *i.e.*, it is ambiguous. *See G-P Gypsum (supra)*, 169 Wn.2d at 309-10. If the plain meaning cannot be ascertained by examining the statute “in which the provision is found, as well as related statutes or other provisions of the same act in which the provision is found,” only then may the court resort to aids, such as legislative history, to construe the Legislature’s intent. *See*

¹⁴ The Department argues that “[a] strict but fair reading of the statute supports the Board’s interpretation that the commodities *must be carried as cargo destined for delivery* at a location in another state or country in its original form to qualify for the deduction” (emphasis added). Appellant’s Brief at 25.

Campbell (supra), 146 Wn.2d at 9. And if, after these two processes (*e.g.*, plain meaning and construction), the statute is deemed to be ambiguous, then the default rule that deductions are to be narrowly construed can be applied. The Department overlooks these steps to be taken in statutory interpretation and jumps straight to the default rule. But the plain language of this statute does not require construction if there is only one reasonable interpretation.

Moreover, the Department's narrow reading of the statute is only possible if words are improperly added to RCW 82.16.050(8). In *HomeStreet*, the Department attempted "to narrowly construe the statute, improperly delet[ing] words from [RCW 82.04.4292]." *See* 166 Wn.2d at 455. The Department attempts the opposite here – adding words to former RCW 82.16.050(8) – but is nevertheless still attempting to narrow the scope of the deduction. The result is the same: an improper reading of the statute that ignores its plain language. The Supreme Court condemned the Department's approach in *HomeStreet*; this Court should do the same here. Olympic has met its burden to show it qualifies for the deduction under RCW 82.16.050(8) because the bunker fuel it transports is forwarded by vessel, without intervening transportation, to interstate or foreign destinations.

E. **The Requirements Under RCW 82.16.050(8) Differ From Those Of The Import-Export Clause.**

The Department argues that little distinction, if any, exists between former RCW 82.16.050(8) and the Import-Export Clause of the United States Constitution (art. I, s 10, cl. 2). *See* Appellant's Brief at 21. The Department relies primarily on the holding in *Shell Oil Co. v. California Bd. Of Equalization*, 64 Cal.2d 713, 414 P.2d 820 (Cal. 1966), to support its conclusion that for goods to be exempt from a sales or use tax under the Import-Export Clause, they must be delivered. The Department's reliance on the Import-Export Clause has no bearing on the interpretation of former RCW 82.16.050(8). The Import-Export Clause is a federal prohibition on imposing fees on imports and exports; this case involves a state law deduction associated with intrastate activity.

The issue in *Shell Oil* was whether the taxpayer was entitled to a refund for California sales and use taxes paid on the purchase of bunker fuel. *Id.* The taxpayer claimed that the Import-Export Clause prohibited the taxation of bunker fuel because the vessels to which it was sold were engaged in interstate and foreign commerce. *Id.* The court upheld the sales and use tax assessment on the grounds that the Import-Export Clause did not apply because the bunker fuel used by the vessels was not an "export." *Id.* at 724.

Former RCW 82.16.050(8) does not address the activity of exporting goods, which is the focus of the Import-Export Clause. The Import-Export Clause specifically prohibits the laying of “any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection laws.” U.S. Const., art. I, s 10, cl. 2. It is a federal prohibition on the state from imposing fees or duties on certain goods, while former RCW 82.16.050(8) is a state statute permitting a deduction from gross income for revenue received from certain *intrastate* activity involving transportation of goods.¹⁵

The Department claims that “Olympic’s revenues do not qualify for the PUT deduction because the bunker fuel is not sent or delivered to a foreign or interstate destination, just as the bunker fuel in *Shell Oil* was not ‘exported.’” Appellant’s Brief at 22. Had the drafters of former RCW 82.16.050(8) intended the statute to be applied in the same manner as the Import-Export Clause, in that any commodities forwarded by vessel must be delivered, they would have explicitly done so. The drafters of former RCW 82.16.050(8) were aware of the Import-Export Clause at the time

¹⁵ Unlike *Shell Oil*, Olympic is not subject to a sales or use tax on the bunker fuel it is transporting. Olympic was assessed a public utility tax on the intrastate transportation of the bunker fuel. Also, Olympic is not the vessel bound for interstate or foreign destinations. The court in *Shell Oil* focused solely on the vessels engaged in interstate or foreign commerce. The court never addressed (i) the role of the *intrastate* transporter of the bunker fuel (*e.g.*, Olympic), or (ii) any public utility taxes associated with the *intrastate* transportation of the bunker fuel.

the statute was originally drafted and made no mention of the word “deliver,” “delivered,” or “export” in the statute. Moreover, the drafters of RCW 82.16.050(8) were also aware of the *Shell Oil* ruling at the time when the statute was revised in 1967, yet again, no mention of the words “deliver,” “delivered,” or “export” were included in any subsequent revisions. As such, these omissions are deemed purposeful. *See Adams*, 164 Wn.2d 640.

F. The Department Is Collaterally Estopped From Re-Litigating The Issue Previously Adjudicated.

1. The Doctrine Of Collateral Estoppel Is Intended To Prevent Retrial Of Critical Issues Previously Litigated.

Collateral estoppel (or issue preclusion) bars re-litigation of an issue in a subsequent proceeding involving the same parties. 14 A. *Karl B. Tegland, Wn. Prac., Civil Procedure* § 35.32 at 548 (3d ed. 2003). The doctrine is intended to promote judicial economy and prevent inconvenience or harassment of parties. *See Shoemaker v. City of Bremerton*, 109 Wn.2d 504, 507, 745 P.2d 858 (1987).¹⁶

For collateral estoppel to apply, the party seeking application of

¹⁶ Collateral estoppel is distinguished from claim preclusion “in that, instead of preventing a second assertion of the same claim or cause of action, it prevents a second litigation of issues between the parties, even though a different claim or cause of action is asserted.” *Rains v. State*, 100 Wn.2d 660, 665, 674 P.2d 165 (1983). “Claim preclusion, also called *res judicata*, is intended to prevent re-litigation of an entire cause of action and collateral estoppel is intended to prevent retrial of one or more of the crucial issues or determinative facts determined in previous litigation.” *Christensen v. Grant County Hosp. Dist. No. 1*, 152 Wn.2d 299, 306, 96 P.3d 957 (2004).

the doctrine must establish that (1) the issue decided in the earlier proceeding was identical with the issue presented in the later proceeding; (2) the earlier proceeding ended in a final judgment on the merits; (3) the party against whom collateral estoppel is asserted was a party to, or in privity with a party to, the earlier proceeding; and (4) application of collateral estoppel does not work an injustice on the party against whom it is applied. *Christensen v. Grant County Hosp. Dist. No. 1*, 152 Wn.2d 299, 307, 96 P.3d 957 (2004). The following three additional elements must be considered under Washington law before collateral estoppel may be applied to administrative agency findings: (1) whether the agency acted within its competence; (2) the differences between procedures in the administrative proceeding and court procedures; and (3) public policy considerations. *Id.* at 308.

The issues in the present case and those of *Olympic Tug*, BTA Docket No. 55558, are identical.¹⁷ Both involve assessment of the PUT on the revenues generated from the transportation of bunker fuel to vessels

¹⁷ The Department argues that the facts of this case are different from those previously decided by the Board in 2001. “The Board’s prior decision dealt with the application of the deduction based on the misunderstanding that the fuel could not legally be used in Washington. In this case the parties agree that the bunker fuel can legally be burned in Washington.” Appellant’s Brief at 33. This is a distinction without a difference. The fact that the bunker fuel was *not* burned in Washington waters (evidenced by foreign fuel exemption certificates) provided the Board with the exact same set of facts and addressed the same issue (*i.e.*, is bunker fuel forwarded in its original form to interstate or foreign destinations?). See AR 105-118, 470-478; see also Transcript of BTA Hearing at 38-39. The fact that both parties stipulated to non-existent environmental regulations prohibiting the burning of bunker fuel is irrelevant and collateral estoppel should have been applied.

located outside the corporate city limits from the point of origin of the shipment, which vessels are bound for interstate or foreign destinations. Not only has this issue been litigated, it was litigated in the exact same context by the same parties present in the current dispute. A final judgment on the merits was previously reached by the Board regarding these issues, holding that the subject revenues were deductible from gross income subject to PUT under RCW 82.16.050(8). AR 627-635.

The additional three elements required for applying collateral estoppel to *administrative agency findings* are also satisfied. The Board acted within its competence in deciding an issue related to the statutory deduction present in RCW 82.16.050(8). Furthermore, the Board hearing was conducted in a manner akin to a court proceeding, *i.e.*, lawyers were present for both parties, the rules relating to evidence were essentially the same as those of a judicial proceeding, and no alleged disparity existed between the remedies available through the administrative agency and a judicial proceeding.

2. **The Board's Reasoning To Ignore Collateral Estoppel Was Flawed.**

The Board reasoned that collateral estoppel did not apply because the 2001 Board decision was based on the belief that bunker fuel could

not, by law, be burned in the State of Washington. This is flawed reasoning.

The evidence at the formal hearing showed that the bunker fuel *was not burned* in Washington, as indicated by several foreign fuel exemption certificates that were provided to Olympic, consistent with the Board's conclusion in 2001 that bunker fuel *could not* be burned in Washington. *See* AR 105-118, 470-478; *see also* Transcript of Hearing at 38-39. The issue was whether the bunker fuel was forwarded in its original form to interstate or foreign destinations, not whether it could be burned. AR 627-635. The fact that the bunker fuel *could have* been burned in Washington waters in 2002 is a distinction without a difference. The fact remained that the bunker fuel was *not* burned in Washington.

For purposes of retail sales and use tax, the foreign fuel exemption certificates provide the Department with adequate evidence that the bunker fuel purchased by the companies owning the vessels is not burned in Washington waters and therefore exempt from sales and use tax. RCW 82.08.0261. Based solely on receipt of these fuel exemption certificates, the Department does not assess either a sales or a use tax on the bunker fuel purchased by the shipper. The Department presumes that the shipper does not burn the bunker fuel within the territorial limits of Washington. However, for purposes of the PUT, the Department argues that these

certificates are not reliable to prove that the bunker fuel is not burned within the territorial limits of Washington. Appellant's Brief at 35. The Board perpetuated this error by sanctioning the Department's refusal to accept the collection of these foreign fuel exemption certificates as evidence that the bunker fuel is used solely outside the territorial limits of Washington. AR 55.

3. **The Department's Reliance On *State Farm Mutual Automobile Insurance Company v. Avery* Is Unavailing.**

The Department relies on *State Farm Mutual Automobile Insurance Company v. Avery*, 114 Wn. App. 299, 57 P.3d 300 (2002), to argue that collateral estoppel does not apply because it was statutorily denied the right to appeal the first decision. See Appellant's Brief at 29, n. 13. The Department claims that "the Department is without recourse if the Board erroneously sides with the taxpayer." See *id.* at 31. That the Department could not appeal the Board's prior decision does not tell the complete story.

In 2003, over two years after the Board issued its final decision in favor of Olympic with respect to this same issue, the Department issued the ETA,¹⁸ stating that it would not acquiesce to the Board's decision that Olympic was entitled to a deduction under RCW 82.16.050(8) for its

¹⁸ The ETA was issued on October 31, 2003; the BTA Final Decision was issued on April 11, 2001.

bunkering activities. The effect of the Department's issuance of the ETA was to unilaterally overrule the Board's decision for all subsequent tax years. There is no statutory or other authority for the Department to "nonacquiesce."

Surely the Department would not agree were a taxpayer who disagreed with a Board's decision simply to publish an advisory that he or she would no longer follow the Board's decision for all subsequent tax years. The Department would no doubt point to the taxpayer's lack of authority to issue such an advisory. But *the Department has absolutely no authority to issue a nonacquiescence, either.*¹⁹

Consequently, the Department erroneously argues that it had no ability to appeal an informal decision. The Department had the power to force an informal appeal to be heard as a formal appeal, thereby

¹⁹ At one time, the Tax Commission performed the duties now given to the Department of Revenue and the Board of Tax Appeals. In 1967, the legislature split the Tax Commission. The legislature vested review of tax disputes in the Board of Tax Appeals. It was given broad authority to hear a variety of appeals, including appeals that come from the Department (RCW 82.03.130). Clearly, the Board of Tax Appeals has the authority and power to decide disputes between taxpayers and the Department. The Department was given broad power only to administer the tax. The legislature carefully carved out a portion of the Department's power. RCW 82.01.090 provides: "Except for the powers and duties devolved upon the board of tax appeals by the provisions of RCW 82.03.010 through 82.03.190, the director of revenue shall, after July 1, 1967, exercise those powers, duties and functions theretofore vested in the tax commission of the state of Washington, including all powers, duties and functions of the commission acting as the commission or as the state board of equalization or in another other capacity." The legislature left no review authority in the Department of Revenue. The review authority rests only in the Board of Tax Appeals and, arguably, this deprives the Department of Revenue of any power to nonacquiesce. See Fujita, Garry G., *CCH Guidebook to Washington Taxes*, ¶ 1602 at 276-77.

preserving the Department's appeal rights. *See* RCW 82.03.190; WAC 456-10-010. But, the Department elected not to preserve its appeal rights by allowing the matter to be heard as an informal appeal, believing no appeal right is necessary so long as the Department maintains its purported right to nonacquiesce to Board decisions. Nonacquiescing allows the Department to claim victory without the inconvenience of having to receive a favorable ruling from a higher court. The tactic of nonacquiescence does not promote judicial uniformity, is unfair and without authority, and gives the Department powers not granted by the Legislature. *See Kabbae v. Dep't of Social and Health Services*, 144 Wn. App. 432, 440, 192 P.3d 903 (2008) (“[B]ecause administrative agencies are ‘creatures of the legislature without inherent common-law powers,’ an agency only has those powers that are conferred either expressly or by necessary implication”) (citing *Human Rights Comm’n ex. rel. Spangenberg v. Cheney Sch. Dist. 30*, 97 Wn.2d 118, 125, 641 P.2d 163 (1982)). By taking away the precedential value of the informal decision, taxpayers have been deprived of the right to receive a binding decision, and instead are compelled to litigate the same issue every year, which is the practical effect of this issue now arising multiple times. The right of the Department to convert an informal hearing to formal provides the Department with an appeal right, which the Department may choose to

waive, and which was done here with no regard to the first decision of the BTA.

V. CONCLUSION

This Court should rule that the plain language of former RCW 82.16.050(8) entitled Olympic to a deduction from gross income (subject to public utility tax) for revenue received from the transportation of bunker fuel from oil refineries located outside the corporate limits of the city to interstate or foreign-bound vessels located within the corporate limits of a city, reverse the BTA and uphold the decision of the Superior Court. Olympic asks this Court to remand the case to the Board for the calculation and determination of the refund owed to Olympic.

RESPECTFULLY SUBMITTED, this 13th day of December, 2010.

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