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No. 96694-0

**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

FIRST STUDENT, INC.,

Petitioner,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Respondent.

**BRIEF OF AMICUS CURIAE
NATIONAL ASSOCIATION FOR PUPIL TRANSPORTATION**

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I. INTEREST OF AMICUS CURIAE

As described further in the accompanying Motion for Leave to File Amicus Curiae Brief, the National Association for Pupil Transportation (NAPT) is a nonprofit association under Internal Revenue Code § 501(c)(6). NAPT is the country's leading trade association for student transportation providers. Its members form a diverse community of people and organizations that share a passion for safe and efficient student transportation.

This case has broad impact on school transportation providers in Washington, including NAPT members. If the decision below is affirmed, it will result in higher school transportation costs for school districts throughout the state. The decision below also affects NAPT's members outside of Washington because it disturbs the well-settled understanding of transportation "for hire" across many different legal and regulatory regimes. NAPT is not aware of any other court that has held that the transportation of students for compensation does not qualify as "for hire" because the student-passengers do not pay their own way.

II. ISSUES OF CONCERN TO AMICUS

1. Whether the Court of Appeals erred by failing to provide the term "for hire" its familiar legal meaning and instead deferring to the Department's unreasonable interpretation advanced in litigation?

2. Whether the term “public use” should be interpreted as including services offered to customers to transport a segment of the public, in accordance with Washington law and the Department’s history of administering the public utility tax?

III. STATEMENT OF THE CASE

NAPT adopts the Statement of the Case presented in First Student’s Supplemental Brief.

IV. ARGUMENT

A. “For Hire” Must Be Given Its Familiar Legal Meaning.

At issue in this appeal is whether the phrase “for hire” in RCW 82.16.010(6) and (12) includes transportation services provided in exchange for compensation. As explained in First Student’s Supplemental Brief, numerous decisions around the country have held that transportation services paid for by third parties to transport passengers are “for hire.” *E.g., Surface Transp. Corp. of N.Y. v. Reservoir Bus Lines, Inc.*, 67 N.Y.S.2d 135, 271 A.D. 556 (N.Y. App. Div. 1946); *see* First Student Supp. Br. at 14-15 & n.8. NAPT is not aware of any case that disturbs this familiar meaning to construe the phrase “for hire” to mean the passengers themselves must pay for the transportation.

“A familiar legal term used in a statute is given its familiar legal meaning.” *Rasor v. Retail Credit Co.*, 87 Wn.2d 516, 530, 554 P.2d 1041

(1976). Likewise, “[i]f the legislature uses a term well known to the common law, it is presumed that the legislature intended it to mean what it was understood to mean at common law.” *Ralph v. Dep’t of Nat. Res.*, 182 Wn.2d 242, 248, 343 P.3d 342 (2014) (citation omitted).

The Court of Appeals did not follow these well-established standards to interpret “for hire” according to its familiar meaning. Instead, it adopted an unfamiliar construction of the statute: “the legal (or technical) meaning of the term ‘for hire’ at the time the statute was drafted contemplated that the ‘passengers’ would be directly responsible for any compensation paid.” *First Student, Inc. v. Dep’t of Revenue*, 4 Wn. App. 2d 857, 868, 423 P.3d 921 (2018); *see also* DOR Supp. Br. at 13 (“First Student’s passengers do not pay a transportation fare so First Student would not qualify as providing transportation ‘for hire.’”).

No case supports the interpretation urged by the Department and accepted by the Court of Appeals. The Department attempts to manufacture uncertainty regarding the common-law meaning of “for hire” by citing four cases that do not support its position. *See* DOR Supp. Br. at 14-15. For example, the Department cites a case in which the New York Supreme Court, Appellate Division, held that a school bus *owned and operated by the school district* was not transportation of passengers “for hire.” *Gibson v. Bd. of Educ. of Watkins Glen Cent. Sch. Dist.*, 414

N.Y.S.2d 791, 793, 68 A.D.2d 967 (N.Y. App. Div. 1979). The court simply concluded that the school district was not being compensated for providing transportation to students. The same is true in Washington—a school district that owns and operates its *own* school buses does not provide transportation “for hire” because no one pays for the transportation (except if another school district or third party hired the district to provide the service).

The Department’s position also fails to find support in the cases it cites from Texas and Connecticut, both of which address whether companies providing school bus transportation qualify as “common carriers.” See *Durham Transp. Inc. v. Valero*, 897 S.W.2d 404, 409 (Tex. App. 1995) (holding that a company providing school bus transportation was not a “common carrier”); *Hunt v. Clifford*, 152 Conn. 540, 544, 209 A.2d 182 (1965) (addressing the standard of care owed to school bus passengers and concluding that a school bus operator was not a “common carrier”). Although common carriers may provide transportation “for hire,” not all for-hire transportation is provided by common carriers. See RCW 82.16.010(6); RCW 81.80.010 (distinguishing between “common carriers,” “contract carriers,” and “private carriers,” all of which may transport persons or property “for hire”). These cases therefore do not muddy the common-law meaning of “for hire.”

Finally, the Illinois Court of Appeals has held that a school bus operated in by First Student was not “public transportation” because “First Student was hired to transport special education children” and such transportation “is not available to the general public.” *In re Jerome S.*, 360 Ill. Dec. 276, 280-81, 968 N.E.2d 769 (Ill. App. Ct. 2012). But this case had nothing to do with whether the transportation was for “for hire” or how it was paid for.

None of these authorities bolsters the Department’s novel theory that was accorded deference by the Court of Appeals. At common law, any consideration provided for transportation makes those services “for hire.” Only the Court of Appeals’ anomalous interpretation in this case undermines the uniform common law understanding of the phrase “for hire.”

B. The Department’s Interpretation of “For Hire” Is Unreasonable.

A statute is ambiguous if it is “susceptible to two or more reasonable interpretations” but not “merely because different interpretations are conceivable.” *HomeStreet, Inc. v. Dep’t of Revenue*, 166 Wn.2d 444, 452, 210 P.3d 297 (2009) (citations omitted).

Beyond having no basis in the common law, the Department’s interpretation of “for hire” adopted by the court below is untenable as a

matter of statutory construction. The phrase “for hire” appears nine times in the statute defining the businesses subject to public utility tax. *See* RCW 82.16.010. Six of these uses are plainly inconsistent with the Court of Appeals’ interpretation of “for hire” because there are no “passengers” that could be responsible for payment. *See id.* (defining various public service businesses “for hire,” such as distributing gas, electrical energy and water, providing telephonic and telegraphic communications, or “towing or pushing . . . vessels, barges or rafts”). The interpretation urged by the Department makes little more sense with any other definitions because each involves the transportation of “persons *or property* . . . for hire.” RCW 82.16.010(6) (emphasis added).

The Department’s interpretation also leads to the absurd result that the payor of a service determines its tax treatment. A transportation service provider would be subject to public utility tax when the passenger purchases a bus ticket because such service would be “for hire,” but the same service would be subject to a higher business and occupation tax when purchased by a passenger’s employer, parent, friend, or—in this case—school district. Courts avoid statutory constructions that produce such “[u]nlikely, absurd or strained consequence[s].” *Bowie v. Dep’t of Revenue*, 171 Wn.2d 1, 14-15, 248 P.3d 504 (2011).

C. The Department’s Litigation Position Is Not Entitled to Deference.

The theory of deference applied by the Court of Appeals defies the constitutional design by reallocating the core judicial role to the executive. The Washington Constitution provides: “[t]he judicial power of the state shall be vested in a supreme court, superior courts, . . . and such inferior courts as the legislature may provide.” Const. art. IV, § 1. This Court has explained that “the very division of our government into different branches has been presumed throughout our state’s history to give rise to a vital separation of powers doctrine.” *Carrick v. Locke*, 125 Wn.2d 129, 135, 882 P.2d 173 (1994). Although the branches are not “hermetically sealed off from one another,” *id.*, “[i]t is emphatically the province and duty of the judicial department to say what the law is.” *Hale v. Wellpinit Sch. Dist. No. 49*, 165 Wn.2d 494, 506, 198 P.3d 1021 (2009) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L. Ed. 60 (1803)).

Interpreting the statutory phrase “for hire”—which the Department has never before deemed necessary to construe—is a classic task for the courts. Yet the court below afforded “great weight” to the Department’s exclusion of “school buses” under WAC 458-20-180(5) despite the regulation’s silence on the meaning of “for hire.” *First Student, Inc.*, 4 Wn. App. 2d at 871. Such mechanical deference raises significant

separation of powers concerns. *See Pereira v. Sessions*, 138 S. Ct. 2105, 2120-21, 201 L. Ed. 2d 433 (2018) (Kennedy, J., concurring) (“The type of reflexive deference exhibited in some of these cases is troubling. . . . The proper rules for interpreting statutes . . . should accord with constitutional separation-of-powers principles and the function and province of the Judiciary.”).

Deference was improper here because WAC 458-20-180 (Rule 180) is an *interpretive* rule. As this Court has explained, interpretive rules “are not binding on the courts and are *afforded no deference other than the power of persuasion*.” *Ass’n of Washington Bus. v. Dep’t of Revenue*, 155 Wn.2d 430, 447, 120 P.3d 46, 54 (2005) (emphasis added). That means “[r]eviewing courts are not required to give any deference whatsoever to the agencies’ views on” the “correctness and desirability of the agencies’ interpretations.” *Id.* (quoting Arthur Earl Bonfield, *State Administrative Rule Making* § 6.9.1, at 281-82 (1986)) (internal quotation marks omitted).

The deference the Court of Appeals afforded to the Department’s interpretive rule is even more troubling in this case because the Department’s rule does not interpret the statutory language that the Department claims is ambiguous—“for hire.” Although an agency’s contemporaneous or longstanding interpretation of ambiguous statutory

language might be entitled to deference, *see In re Sehome Park Care Ctr., Inc.*, 127 Wn.2d 774, 780, 903 P.2d 443 (1995), no such deference is due here because no such interpretation exists. Rule 180 shows only that the Department historically excluded “school buses” from the definition of “motor transportation businesses.” But Rule 180 does not define or interpret “for hire.” No Department regulation defines or interprets “for hire.” No published guidance says that a transportation service is not “for hire” unless the passenger pays the fare. The statutory gloss set forth by the Department represents nothing more than layering a novel and previously undisclosed legal justification of “for hire” onto its historical policy of excluding school buses from “motor transportation businesses” under WAC 458-20-180(5).

When an agency has not interpreted the statutory ambiguity, it is well-established that this Court does not defer:

If an agency is asserting that its interpretation of an ambiguous statute is entitled to great weight it is incumbent on that agency to show that it has adopted and applied such interpretation as a matter of agency policy. . . . Therefore, even if we were to assume for the sake of argument that the statute was ambiguous, . . . the Department has not established an agency interpretation entitled to great weight. Instead, it attempts to bootstrap a legal argument into the place of agency interpretation.

Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 815, 828 P.2d 549 (1992); *see Sleasman v. City of Lacey*, 159 Wn.2d 639, 646, 151 P.3d

990 (2007) (“Lacey’s claimed definition was not part of a pattern of past enforcement, but a by-product of current litigation. . . . [T]he agency must show it adopted its interpretation as a ‘matter of agency policy.’”) (citation omitted); *see also Alaska v. Fed. Subsistence Bd.*, 544 F.3d 1089, 1095 (9th Cir. 2008) (“We do not afford . . . deference to litigation positions unmoored from any official agency interpretation because ‘Congress has delegated to the administrative official and not to appellate counsel the responsibility for elaborating and enforcing statutory commands.’ (citations omitted)).

Finally, deferring to litigation-based agency interpretation disrupts the separation of powers. This case is no exception. The Department relied on Black’s Law Dictionary to argue that school buses are not “for hire”; the definition therein derives from (non-Washington) case law, not the agency’s expertise applying the statutory scheme. No deference should apply. *See Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1341 (D.C. Cir. 2002) (“There is therefore no reason for courts—the supposed experts in analyzing judicial decisions—to defer to agency interpretations of the Court’s opinions.” (citation omitted)). That is no small flaw. And there is good reason to doubt a recently minted agency interpretation. *Cf.* Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 371 (1986) (explaining that courts scrutinize “whether the

agency can be trusted to give a properly balanced answer” due to “fear that certain agencies suffer from ‘tunnel vision’ and as a result might seek to expand their power beyond the authority that Congress gave them”).

D. The Department’s New “Public Use” Argument Is Both Irrelevant and Incorrect.

The Department argues for the first time in its Supplemental Brief that it is actually doing school bus operators a favor by subjecting them to business and occupation (B&O) tax instead of the public utility tax (PUT). DOR Supp. Br. at 18. According to the Department, if school bus operators were subject to PUT, they would be required to pay the higher rate applicable to “motor transportation businesses,” not the lower rate applicable to “urban transportation businesses,” because school bus operators “do[] not meet the ‘public use’ element of the ‘urban transportation business.’” *Id.*

The Department’s interpretation of “public use” is both irrelevant and incorrect. Whether school bus operators are operated “for public use” under RCW 82.16.010(12) has no bearing on the question posed to this Court, which is whether the term “for hire” encompasses the transportation services those operators provide in exchange for compensation. This Court therefore should disregard the Department’s new “public use” argument.

But even if the “public use” question were relevant, the Department’s interpretation is incorrect and contrary to its own longstanding administration of the public utility tax. The statute defines “[u]rban transportation business” as “the business of operating any vehicle *for public use* in the conveyance of persons or property for hire” with some geographic limitations. RCW 82.16.010(12) (emphasis added).¹ The Department argues that school bus operators like First Student are not “for public use” because they provide transportation “only to certain students pursuant to their pupil transportation services contracts, not to the general public.” DOR Supp. Br. at 19.

Not so. Transportation services “for public use” include those where a customer designates a subset of the public to be transported. “The public does not mean everybody all the time.” *Terminal Taxicab Co. v. Kutz*, 241 U.S. 252, 255, 36 S. Ct. 583, 584 (1916). In *Terminal Taxicab*, the U.S. Supreme Court held that a transportation service provided exclusively to customers of certain hotels was “for public use” and subject to regulation by the District of Columbia. *Id.* at 254-255. That the service was limited to guests of the hotel did not “remove[] the public character of

¹ The Department is correct that school bus operators would be subject to PUT under the higher motor transportation rate on certain rural routes *that are more than five miles outside the corporate limits of a city or town*. RCW 82.16.010(12). But even in rural areas, this represents a small percentage of school bus transportation.

the service,” as the Court observed that “[n]o carrier serves all the public” in that its “customers are limited by place, requirements, ability to pay, and other facts.” *Id.* at 255.

Similarly, the Court of Appeals recently held that several proposed ferry services on Lake Chelan were “for the public use” even though they were limited to guests of specific businesses. *See Courtney v. Washington Utilities & Transp. Comm’n*, 3 Wn. App.2d 167, 177-83, 414 P.3d 598, 604, *review denied*, 191 Wn.2d 1002, 422 P.3d 911 (2018). Because the phrase was not defined, the Washington Utilities and Transportation Commission (WUTC) looked to dictionary definitions and concluded that “for the public use” meant “accessible to all persons *that are part of a group with common interests.*” *Id.* 177 (emphasis added) (internal quotation marks omitted). The Court of Appeals agreed with the WUTC that “[l]imiting service to guests of one or more [specific] businesses does not strip the proposed ferry service of its public character.” *Id.* at 182.

Accordingly, transportation services can be offered “for public use” even where, as here, a customer specifies the subset of the public to be transported. In this case, as with most school bus operators, service is broadly available to anyone wishing to hire a bus—First Student provided transportation for hire to numerous school districts as well as to churches, youth groups, and summer camps. CP 30-31, 35, 50; *see also* First

Student, *Charter Bus Rentals*, <http://www.firststudentinc.com/services/charter-bus-rentals> (last visited July 29, 2019) (“Charter school bus rentals can also meet personal or company needs, whether it’s transporting a group of employees to a corporate retreat, friends to the big game or guests to your wedding and parties.”). Indeed, the Department advised First Student that its transportation services for customers other than school districts were subject to PUT as urban or motor transportation, even though such transportation was limited to passengers designated by its customers. CP 128. School bus operators providing services under contract with school districts are no different: they provide service to a subset of the public with a common interest (generally, public school students). The subset of the public serviced by school bus operators is far broader than service to hotel guests in *Terminal Taxicab* or the guests of certain businesses in *Courtney*. Their transportation services thus plainly meet the “public use” element.

Finally, the Department’s new “public use” argument conflicts with its long history of administering PUT on urban transportation and motor transportation business without a distinction based on whether they served a segment of the public. As the Department itself has explained, it “has *never made a distinction* between ‘motor transportation business’ and ‘urban transportation business,’ *other than the geographical limitations*

that apply to the latter.” Wash. Dep’t of Revenue, Det. No. 12-0040ER, 33 WTD 506, 511-12 n.11 (2014) (Appendix A) (emphasis added). Numerous “precedential”² decisions of the Department confirm this approach. For example, in Determination No. 90-385, 10 WTD 332 (1990), the Department held that a taxpayer was subject to tax as an urban transportation business, despite contracting “with local governmental agencies to provide transportation services to *segments of the community.*” *Id.* (Appendix B) (emphasis added); *see also* Wash. Dep’t of Revenue, Det. No. 91-164, 11 WTD 337 (1992) (Appendix C) (determining that a taxpayer that transported elderly and physically-challenged passengers for hire under contract with local and states agencies was subject to PUT as an urban transportation business); Wash. Dep’t of Revenue, Det. No. 90-370, 11 WTD 87 (1990) (Appendix D) (determining that a taxpayer that transported physically-challenged passengers was subject to PUT classifications “of urban transportation business and motor transportation business, not service B&O”).

V. CONCLUSION

The Court of Appeals erred in deferring to the Department’s litigation position, which gives “for hire” a meaning that is inconsistent

² *See* RCW 82.32.410 (“The director may designate certain written determinations as precedents.”).

with its familiar legal meaning in the common law. The Department’s new argument regarding “public use” is without merit and irrelevant to the legal issue in this appeal—the meaning of “for hire.” For the foregoing reasons, the Court of Appeals’ decision should be reversed.

Respectfully submitted.

DATED: July 29, 2019.

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CERTIFICATE OF SERVICE

Today I electronically filed the foregoing document via the Washington State Appellate Courts' Secure Portal, which will automatically cause such filing to be served on counsel for all other parties in this matter via the Court's e-filing platform.

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

DATED: July 29, 2019, at Seattle, Washington.

s/ Jessica Flesner _____
Jessica Flesner
Legal Practice Assistant

APPENDICES

Appendix A - Wash. Dep't of Revenue, Det. No. 12-0040ER, 33
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87 (1990)

APPENDIX A

Cite as Det. No. 12-0040ER, 33 WTD 506 (2014)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Correction of	)	<u>EXEC</u>
Assessment of	)	<u>LEVEL DETERMINATION</u>
)	
	)	No. 12-0040ER
...)	
	)	Appeal of Determination No.12-0040
	)	Registration No. . . .
)	

[1] RCW 82.16.010: PUBLIC UTILITY TAX – If a business collects construction, demolition, and land clearing debris (CDL) for disposal or incineration, the income is subject to the Service & Other Activities B&O tax, and the collection service provider must collect the solid waste collection tax. If a business collects CDL for recycling at its own facility, the income is subject to Service & Other Activities B&O tax. If a business collects CDL and merely hauls for hire to a third-party recycling facility, the income is subject to public utility under either the Motor Transportation or Urban Transportation classification.

[2] RCW 82.04.120; RCW 82.08.02565: MACHINERY & EQUIPMENT EXEMPTION - Sorting, cleaning, and packaging recycling materials are not manufacturing activities under RCW 82.04.120 because the process does not create a new, different, or useful substance.

[3] RCW 82.08.050(9): BUYER TO PAY, SELLER TO COLLECT TAX – STATEMENT OF TAX - Even if the buyer and seller represent that the invoiced amount includes retail sales tax, RCW 82.08.050(9) requires the retail sales tax be separately stated on any sales invoices or other instrument of sale.

Headnotes are provided as a convenience for the reader and are not in any way a part of the decision or in any way to be used in construing or interpreting this Determination.

Callahan, A.L.J. – A company (“Taxpayer”) primarily engaged in the business of collecting construction, demolition, and land clearing debris (CDL) and hauling it to third-party recycling facilities petitions for Executive Reconsideration of a determination concluding that: 1) Taxpayer’s income from the collection and hauling of CDL to third-party recycling facilities for compensation is subject to the Service & Other Activities business and occupation (B&O) tax classification, rather than the Motor Transportation or Urban Transportation public utility tax

(PUT) classification; 2) Taxpayer's rental of a trackhoe for use at its recycling facility does not qualify for the manufacturer's machinery and equipment retail sales tax exemption (M&E exemption); and 3) Taxpayer failed to establish that it paid retail sales tax on recycling containers at the time of purchase. Taxpayer's petition is granted with regard to the first issue, but denied as to the remaining issues; however, with regard to the third issue, the Department will adjust the measure of the retail sales tax on the recycling containers to reflect the actual purchase price.¹

ISSUES

1. Is the collection and hauling of CDL to third-party recycling facilities for compensation subject to Service & Other Activities B&O tax under RCW 82.04.290(2), or is it subject to either the Motor Transportation or Urban Transportation PUT classification under RCW 82.16.010 (5) or (11)?
2. Does Taxpayer's rental of a trackhoe for use at its recycling facility qualify for the "M&E exemption" for machinery and equipment used directly in a manufacturing operation under RCW 82.08.02565?
3. Has Taxpayer substantiated that it paid retail sales tax on recycling containers at the time of purchase?

FINDINGS OF FACT

Taxpayer's primary business activity is collecting construction, demolition, and land clearing debris (known in the industry as "CDL"),² which it hauls to third-party recycling facilities. Taxpayer also operated a recycling facility.

Taxpayer reported its income from collecting and hauling CDL under the Wholesaling B&O or Retailing B&O tax classifications from January 1, 2006, to October 30, 2008, and under the Service & Other Activities B&O tax classification from November 1, 2008, to March 31, 2010.³

The Department of Revenue's (the "Department") Audit Division examined Taxpayer's books and records for the period of January 1, 2006, through March 31, 2010 (the "audit period"), and issued a tax assessment (Doc. No. 201108388) in the amount of \$. . .⁴ In the assessment:

¹ Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410.

² Construction, demolition, and land clearing debris (CDL) are wastes generated at new construction, remodeling, and demolition sites, as well as wastes that come from road and utilities projects. CDL waste includes concrete, pavement, roofing materials, wood products, glass, carpet, paint, gypsum wallboard, appliances, and fixtures, to list just a few. <http://www.ecy.wa.gov/programs/swfa/greenbuilding/AltWaste.html>, visited December 3, 2012.

³ On August 20, 2008, Taxpayer requested a letter ruling from the Department's Taxpayer Information and Education (TI&E) Division on the correct B&O tax classification of its business activities. On October 28, 2008, TI&E responded that Taxpayer's income is subject to the Service & Other Activities B&O tax classification. Taxpayer has been reporting its income under the Service & Other Activities B&O tax classification since November 2008.

⁴ The assessment consisted of retail sales tax of \$. . . , a Wholesaling B&O tax credit of \$. . . , Service & Other Activities B&O tax of \$. . . , use tax/deferred sales tax of \$. . . , and interest of \$. . .

1. Audit reclassified the income from collecting and hauling CDL that Taxpayer had reported under Wholesaling or Retailing B&O tax classification during the earlier part of the audit period to the Service & Other Activities B&O tax classification, resulting in additional taxes owed.⁵ Taxpayer asserts that this income is properly subject to either the Motor Transportation or Urban Transportation classification of the Public Utility Tax (PUT), and exempt from Service & Other Activities B&O tax.
2. Audit also assessed retail sales tax on a trackhoe that Taxpayer rented for use at its recycling facility. Taxpayer asserts that this equipment qualifies for the “M&E exemption.”
3. Finally, Audit assessed retail sales tax on recycling containers. Taxpayer asserts that it paid retail sales tax to the manufacturer/vendor of the recycling containers at the time of purchase.

Taxpayer’s website⁶ describes the CDL collection and hauling portion of its business as follows:

[W]e drop off and pick up steel containers to job sites and private residences to capture all the “recyclable” building materials. When your container is full call dispatch and we’ll pick it up.

Taxpayer’s website also states that it does not pick up household garbage, TVs, computers, or monitors, oils, solvents, or paints, asbestos containing materials, treated wood, fluorescent tubes, car batteries, or tires.

When Taxpayer is hired by a customer, Taxpayer and the customers enter a Transport Agreement (“Agreement”). The Agreement, in relevant part, contains the following language:

TERMS AND CONDITIONS: [Taxpayer] agrees to set a container at your (customer) site, pick up the container from the customers site and recycle the materials at a recycling facility. For this service it is agreed that the customer will pay per agreed terms . . .

. . . .

CONTAMINATED LOADS: [Taxpayer] accepts only recyclable material including construction, demolition, land clearing and yard debris. [Taxpayer] will not transport household garbage, tires, treated wood, paints, oils, solvents, railroad ties, PCB’s, asbestos materials, monitors, TV’s or other items not deemed “recyclable” by our partner facilities. If these items are discovered, we will ask you to remove them and/or your invoice will reflect a surcharge indicating the amount found.

⁵ Audit also found that Taxpayer collected retail sales tax on sales it had reported under the Retailing B&O tax classification and failed to remit the tax to the Department. This collected but unremitted retail sales tax was included in the assessment.

⁶ . . . visited December 3, 2012.

To emphasize for the customer that Taxpayer only accepts recyclable material, the following warning appears immediately before the customer signature line on the Agreement:

Protect Yourself - Please Read: [Taxpayer] will not transport garbage, tires, hazard [sic] materials, fluorescent tubes, paints, oils, car batteries, TVs, monitors, asbestos containing materials or other non-construction, land clearing and demolition materials. If a container is “tipped” and any of these materials are found then [Taxpayer] will sur-charge this credit card as separate charge to reflect the amount of material found. . . . Your signature below acknowledges acceptance of this disclaimer and subsequent charges to the credit card listed.

The invoices that Taxpayer issues to its customers reflect that Taxpayer charges its customers a service fee referred to as “Round Trip Truck.” The fee is measured by the weight of the debris in the containers when they are picked up. Taxpayer charges its customers over weight fees when applicable. Taxpayer does not charge its customers separately for the containers that it leaves at the sites. Taxpayer charges its customers a separate dump fee for dropping off the materials to a third-party recycling facility. Pursuant to the agreement with its customer, its customers know that the debris collected in Taxpayer’s containers is for recycling.

Taxpayer is regulated as a common carrier by the Washington Utilities and Transportation Commission (WUTC), and has held a WUTC permit since July 2, 2007. WUTC has confirmed that Taxpayer’s activity of hauling CDL to recycling facilities for compensation makes it subject to regulation as a “common carrier” as that term is defined in RCW 81.80.010(1).⁷

With respect to the trackhoe rental, Taxpayer explained that it operated a recycling facility during the audit period. Taxpayer used the trackhoe to handle recyclable raw materials and finished products at its recycling facility. Taxpayer asserts that recycling is a manufacturing activity, and, therefore, the trackhoe qualifies for the M&E exemption.

With respect to the recycling containers, the Department assessed retail sales tax because Taxpayer provided insufficient records showing that it paid retail sales tax to the manufacturer/vendor at the time of purchase. Taxpayer asked the vendor to provide records of the transaction. In response, the vendor provided invoices for the containers with a total purchase

⁷ An email dated September 17, 2012, [an employee of], WUTC, states in part:

I am familiar with [Taxpayer] and their business activities. [Taxpayer] holds Common Carrier Permit # . . . issued by the UTC. They hold that permit because they are subject to regulation by the UTC as a Common Carrier as that term is defined in RCW 81.80.010 (1). Specifically [Taxpayer] transports its customer’s recyclable materials from client work sites to appropriate recycling facilities. To perform the task they deliver large empty metal containers to the customer’s site. The customer fills the container with recyclable material from the site. When the customer has filled the container it calls [Taxpayer] to pick up the full container and transport the recyclable material to a recycling facility where the container load is delivered.

Being compensated to transport its customers recyclable material to recycling facilities makes [Taxpayer] a Common Carrier as that term is defined in RCW 81.80.010 (1). As a Common Carrier [Taxpayer] is subject to regulation by the (UTC).

price, including shipping/freight, of \$. . .⁸ The invoices also included separately stated retail sales tax totaling \$. . . However, the vendor also provided two subsequently issued credit invoices in the same amount as the retail sales tax. The vendor provided a memo dated September 16, 2010, explaining that it issued the credit invoices for the retail sales tax after receiving Taxpayer's resale certificate, which was dated December 20, 2007.⁹

In a letter dated December 20, 2007 (the same date as the resale certificate), Taxpayer sent a letter to the vendor stating that the pay-off amount for the recycling containers was \$. . . (i.e., the total amount of the invoices described above, exclusive of retail sales tax). The letter further stated that Taxpayer was enclosing a check in the amount of \$. . . in payment toward the pay-off amount, less \$. . . that Taxpayer was holding back because of manufacturing defects in the recycling containers "until repairs are completed to our satisfaction." The vendor signed the letter accepting this partial payment, and acknowledging that it would make the repairs within a reasonable amount of time. Taxpayer never paid the additional \$. . . because the vendor failed to repair the recycling containers.

Taxpayer explains that it gave the resale certificate to the vendor believing that it might resell some of the recycling containers, but in fact did not. However, Taxpayer insists that it paid the vendor retail sales tax, and has provided an affidavit by a former employee of the vendor dated October 23, 2012, stating that the \$. . . included retail sales tax.

Taxpayer asserts that it neither requested nor received a refund of the retail sales tax paid on the containers. Taxpayer claims that the vendor, without Taxpayer's knowledge or consent, requested a refund of retail sales tax from the Department. Instead of repairing the defective recycling containers, Taxpayer asserts that the vendor applied the refunded retail sales tax to the disputed \$. . . Taxpayer speculates that the invoices showing a total purchase price of \$. . . and separately stated retail sales tax totaling \$. . . , as well as the subsequent invoices crediting the sales tax, were created after the fact.

Between the invoices showing a purchase price of \$. . . , exclusive of sales tax, and an after-acquired affidavit claiming this amount included retail sales tax, we find the former to be more credible evidence. We note the purchase prices on the individual invoices are round numbers that do not suggest the inclusion of retail sales tax.

[On March 6, 2012, the Department issued Determination No. 12-0040 to Taxpayer. Det. No. 12-0040 held, as follows: (1) Taxpayer's collection of materials for recycling is subject to the service and other activities B&O tax; (2) Taxpayer was not in the urban transportation business and was not subject to the public utility tax [PUT]; (3) Taxpayer was neither a manufacturer, nor a processor for hire, and was not eligible for the machinery and equipment [M&E] exemption; and (4) Taxpayer was liable for retail sales tax on containers that it did not resell, but instead used in its own business. Taxpayer timely filed a petition for executive reconsideration of Det. No. 12-0040.]

⁸ Multiple invoices between April and August 2007

⁹ The resale certificate stated that it was effective for the period 3/31/05 – 3/31/08.

ANALYSIS

A. Taxation of Income from Collecting and Transporting CDL to Third-Party Recyclers

Washington imposes a B&O tax “for the act or privilege of engaging in business” in the State of Washington. RCW 82.04.220. Business activities other than those that are specifically taxable elsewhere in Chapter 82.04 RCW are subject to the Service & Other Activities B&O tax classification. RCW 82.04.290(2).

However, RCW 82.04.310 provides the B&O tax:

[D]oes not apply to any person in respect to a business activity with respect to which tax liability is specifically imposed under the provisions of chapter 82.16 RCW including amounts derived from activities for which a deduction is allowed under RCW 82.16.050.

The PUT applies to motor transportation and urban transportation businesses. RCW 82.16.020(1)(d), (f). Therefore, if Taxpayer’s business activity constitutes either motor transportation business or urban transportation business, then the B&O tax does not apply.¹⁰

“Motor transportation business” is defined as:

[T]he business (except urban transportation business) of operating any motor propelled vehicle by which persons or property of others are conveyed for hire, and includes, but is not limited to, the operation of any motor propelled vehicle as an auto transportation company (except urban transportation business), common carrier, or contract carrier as defined by RCW 81.68.010 and 81.80.010. . . .

RCW 82.16.010(5).

“Urban transportation business” is defined as:

[T]he business of operating any vehicle for public use in the conveyance of persons or property for hire, insofar as (a) operating entirely within the corporate limits of any city or town, or within five miles of the corporate limits thereof, or (b) operating entirely within and between cities and towns whose corporate limits are not more than five miles apart or within five miles of the corporate limits of either thereof. . . .

RCW 82.16.010(11).¹¹

¹⁰ Motor Transportation PUT tax rate (0.01926) is actually higher than the Service & Other Activities B&O tax rate (0.018), while the Urban Transportation PUT rate (0.00642) is much lower. Taxpayer argues for application of the PUT rather than B&O tax because it asserts that it has sufficient records to demonstrate that it qualifies for the lower Urban Transportation PUT rate. [The Department held, in Det. No. 12-0040 that Taxpayer was not in the urban transportation business and was not subject to taxation at the PUT rate.]

¹¹ While the definition of “urban transportation business” does not include the reference to “common carrier” as defined in RCW 81.80.010, we assume that person operating a motor vehicle as common carrier as defined in RCW 81.80.010 would qualify for the preferential Urban Transportation PUT rate if it operated within the prescribed

RCW 81.80.010 provides:

(1) “Common carrier” means any person who undertakes to transport property for the general public by motor vehicle for compensation, whether over regular or irregular routes, or regular or irregular schedules, including motor vehicle operations of other carriers by rail or water and of express or forwarding companies.

Persons who collect and transport solid waste for disposal are “common carriers” as defined by RCW 81.77.010(3);¹² however, RCW 82.16.100 provides that the public utility tax does not apply to transporters of solid waste.¹³ Nor is there any specific B&O tax classification applicable to these businesses. Consequently, solid waste collection businesses fall under the catch-all Service & Other Activities B&O tax classification provided in RCW 82.04.290(2).

Title 81.77 RCW, which contains the regulatory provisions relating to solid waste collection businesses, distinguishes between solid waste collection and the transportation of recyclable materials to a recycler for recycling or reclamation. RCW 81.77.010(8) provides:

“Solid waste collection” does not include collecting or transporting recyclable materials from a drop-box or recycling buy-back center, or collecting or transporting recyclable materials by or on behalf of a commercial or industrial generator of recyclable materials to a recycler for use or reclamation. Transportation of these materials is regulated under chapter 81.80 RCW.

Likewise, WAC 480-70-011¹⁴ provides in part:

(2) The following collection and hauling operations are not regulated by the commission [WUTC] as solid waste:

...

(b) A carrier collecting or transporting recyclable materials from a drop box or recycling buy-back center, or collecting or transporting recyclable materials by or on behalf of a commercial or industrial generator of recyclable materials to a recycler for use or reclamation. This type of operation is regulated under chapter 81.80 RCW as transportation of general commodities.

geographical limitations. The Department has never made a distinction between “motor transportation business” and “urban transportation business,” other than the geographical limitations that apply to the latter.

¹² [The fact that the definition of “motor transportation business” “includes” common carriers as defined in RCW 82.68.010 and RCW 81.80.010 does not mean common carriers as defined in other statutes, such as RCW 81.77.010(3), are necessarily precluded from being “motor transportation businesses.” For example, if a business operated a motor vehicle to convey persons or property of others for hire, it may qualify as a “motor transportation business.” Being a common carrier as defined in RCW 82.68.010 and RCW 81.80.010 is a sufficient, but not a necessary, condition to fall within the definition. It is RCW 82.16.100 that precludes application of the PUT.]

¹³ In excluding solid waste businesses from the PUT, RCW 82.16.100 distinguishes recycling materials. The definition of “solid waste” applied in RCW 82.16.100 expressly excludes “material collected primarily for recycling or salvage.” RCW 82.18.010(3).

¹⁴ Chapter 480-70 WAC pertains to solid waste and/or collection companies.

(Brackets added.)

Title 81.80 RCW, which contains the regulatory provisions relating to motor freight carriers (including “common carriers” as defined in RCW 81.80.010 (1) and contract carriers defined in RCW 81.80.010(2)), contains a similar provision. RCW 81.80.470(1)¹⁵ provides:

The collection or transportation of recyclable materials from a drop box or recycling buy-back center, or collection or transportation of recyclable materials by or on behalf of a commercial or industrial generator of recyclable materials to a recycler for use or reclamation is subject to regulation under this chapter.

Title 81.77 RCW also distinguishes between solid waste collection and collection and transportation of recyclable materials by a recycling company. RCW 81.77.140 provides in part:

Nothing in this chapter shall prevent a recycling company or nonprofit entity from collecting and transporting recyclable materials from a buy-back center, drop-box, or from a commercial or industrial generator of recyclable materials, or upon agreement with a solid waste collection company.

Such businesses are not regulated by WUTC. WAC 480-70-011 provides in part:

(1) The following collection and hauling operations are not regulated by the commission:

...

(e) The operations of a recycling company or nonprofit entity collecting and transporting recyclable materials from a buy-back center, drop box, or from a commercial or industrial generator of recyclable materials when those recyclable materials are being transported for use other than disposal or incineration, or under agreement with a solid waste collection company (refer to RCW 81.77.140);

Based on the foregoing, we conclude:

- If a business collects CDL for disposal or incineration, the income is subject to the Service & Other Activities B&O tax, and the collection service provider must collect the solid waste collection tax.¹⁶
- If a business collects CDL for recycling at its own facility, the income is subject to Service & Other Activities B&O tax.

¹⁵ This provision was enacted in 2007, and consequently was not in effect during the entire audit period. However, the provision in RCW 81.77.010(8) stating that, “Transportation of these materials [solid waste] is taxable under chapter 81.80 RCW” was in effect during the entire audit period. The 2007 enactment provided clarification by including within Title 81.80 RCW, relating to motor freight carriers, a provision similar to the one already contained in Title 81.77 RCW. This view is consistent with the fact that the Code Reviser chose as the caption to RCW 81.80.470 the words “Recyclable materials collection and transportation – Construction.”

¹⁶ See RCW 82.18.020, -.040.

- If a business collects CDL and merely hauls for hire to a third-party recycling facility, the income is subject to PUT under either the Motor Transportation or Urban Transportation classification. In this situation, the operator is responsible solely for loading, unloading, and transporting another's materials to a third-party recycling facility (i.e., the operator does not sort or otherwise handle CDL).¹⁷ However, any amounts the business separately charges its customers as a dump fee or "tipping" fee paid to the recycling facility are subject to Service & Other Activities B&O tax.

We reverse Det. No. 12-0040 to the extent it is inconsistent with this conclusion.

B. Application of M&E Exemption to Trackhoe Rental

With respect to the M&E exemption issue, Taxpayer relies on Det. No. 95-170, 16 WTD 043 (1995) and argues that the operation of its recycling facility qualifies as either manufacturing or processing for hire. That determination concluded that sorting and compacting loose sheet metal into cubes for others constituted "processing for hire." The determination explained that the metal reclamation process involves heating the scrap metal in large melting pots. If only loose sheet metal were put into the pots approximately 75% of the metal would be burned up by the process. However, if compacted sheet metal cubes are used, the metal melts instead of burning and the loss is reduced to 5%. 16 WTD 043 therefore concluded that there was a significant change in the form and the physical properties of the metal, which resulted in a new, different, or useful substance within the meaning of RCW 82.04.120.

Taxpayer's reliance on 16 WTD 043 is misplaced. Taxpayer's recycling facility merely sorts, cleans, and packages the recycling materials. Unlike the taxpayer in 16 WTD 043, Taxpayer does not turn the recyclable materials into something new, different, or useful. The activities conducted at Taxpayer's recycling facility more closely align with those described in Det No. 10-0108, 31 WTD 1 (2012), where we concluded that:

[T]he sorting and bundling of recyclable materials is not manufacturing under RCW 82.04.120 because the process does not create a new, different, or useful substance. While the process changes the value of the materials, it does not change their form or properties or meet the other factors of manufacturing.

We affirm our conclusion in Det. No. 12-0040 that retail sales tax was properly assessed on the trackhoe rental payments.

C. Retail Sales Tax on Recycling Containers

With respect to the retail sales tax on the recycling containers issue, the after-acquired affidavit from the vendor's former employee stating that the \$. . . purchase price included retail sales tax is not persuasive. Moreover, even if the parties agreed and understood this amount to include retail sales tax, RCW 82.08.050(9) requires that the retail sales tax be separately stated on any sales invoice or other instrument of sale. Taxpayer has presented no sales invoices or other instruments of sale showing that retail sales tax was paid on this amount. On the contrary, the

¹⁷ See ETA 3050.2014, which was issued on April 29, 2014.

copies of the invoices the vendor issued and Taxpayer's letter of December 20, 2007, letter clearly demonstrate that the price of the recycling containers, exclusive of retail sales tax, was \$. . . . In short, we see no evidence that retail sales tax was paid on the recycling containers at the time of purchase.

However, we note that the Taxpayer's letter of December 20, 2007, states that Taxpayer would only pay \$. . . , and would withhold \$. . . from the purchase price until the recycling containers were repaired to Taxpayer's satisfaction. The vendor accepted this reduced amount and agreed to repair the containers. Taxpayer never paid the additional \$. . . because the vendor failed to repair the containers. Under these circumstances we conclude the selling price under RCW 82.08.010(1)(a) was the amount actually paid, i.e., \$. . . , rather than the amount originally invoiced to Taxpayer.

DECISION AND DISPOSITION

Taxpayer's petition is denied in part and granted in part.

Dated this 20th day of May, 2014.

APPENDIX B

Cite as 10 WTD 332 (1990).

BEFORE THE INTERPRETATION AND APPEALS DIVISION DEPARTMENT OF REVENUE STATE OF WASHINGTON

In the Matter of the Petition) D E T E R M I N A T I O N
For Correction of Assessment of)
) No. 90-385
)
) Registration No. . . .
) . . ./Audit No. . . .
)
)

[1] RULES 180, 179 AND 189, RCW 82.16.020: PUBLIC UTILITY TAX -- TAXICABS -- URBAN TRANSPORTATION. Cab operator's income from contracting with local public transportation agencies to provide transportation services to segments of public is taxable.

[2] RULES 180, 179 AND 189, RCW 82.16.020: PUBLIC UTILITY TAX -- TAXICABS -- URBAN TRANSPORTATION. The taxpayer's gross receipts from the taxi business are subject to the public utility tax with no deductions for compensation paid to drivers, who were under taxpayer's direction and control.

[3] RULES 180, 179 AND 189, RCW 82.16.020: PUBLIC UTILITY TAX -- TAXICABS -- URBAN TRANSPORTATION. Income received by taxi cab business from transporting elderly and physically challenged passengers is subject to public utility tax, just like income from other passengers is taxed.

Headnotes are provided as a convenience for the reader and are not in any way a part of the decision or in any way to be used in construing or interpreting this Determination.

TAXPAYER REPRESENTED BY: . . .
. . .

NATURE OF ACTION

The taxpayer operates a fleet of taxicabs and petitioned for a correction of an assessment of public utility tax - urban transportation - on amounts which were determined to have been received from cash fares and charge fares.

FACTS

De Luca, A.L.J. -- The audit covered the period from . . . , 1986 through . . . , 1989. The auditor assessed the taxpayer \$. . . in taxes and interest. The taxpayer leased several cabs from [a local cab company] who also charged the taxpayer for dispatching and administrative services. The taxpayer claims it works for [a local county] Transit and [a local county] Paratransit by carrying certain passengers and packages. Such work constitutes half of its business.

The taxpayer's president drove the cabs himself and employed drivers to operate them. According to the auditor, the drivers were under the taxpayer's direction and control. For example, through training, scheduling and dispatching, the taxpayer determined how, when and where the drivers worked. Each driver and the taxpayer split the fare income after each shift on a 50-50 % commission basis. The drivers did not hold themselves out to the public as engaged in business and they were not liable for the losses or expenses of conducting a business. However, the auditor stated the taxpayer did not have written cab rental agreements or commission agreements with the drivers. The agreements were verbal.

ISSUES

- 1) Is the taxpayer's income from contracting with local governmental agencies to provide transportation services to segments of the public exempt from the public utility tax?
- 2) Is the taxpayer liable for all fare income earned by its cab drivers if they do not sublease the cabs from the taxpayer, but operate them under taxpayer's direction and control?
- 3) Is the taxpayer's income from transporting elderly and physically challenged passengers exempt from the public utility tax?

TAXPAYER'S EXCEPTIONS

The taxpayer contends it should be liable for only half of the assessed taxes because half of its income is from its contracts with local public transportation agencies.

Alternatively, the taxpayer urges if the drivers are being taxed as independent contractors then it should owe only one quarter of the taxes assessed rather than the one half it otherwise proposes.

Finally, the taxpayer states that because much of its work is devoted to transporting elderly and physically challenged riders it does not believe such income should be taxed at all.

DISCUSSION

[1] The taxpayer is engaged in the urban transportation business as defined by RCW 82.16.010(9). The state imposes the public utility tax on such activity:

(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:

(d) Urban transportation business:

RCW 82.16.020. See also WAC 458-20-180 (Rule 180). The tax applies unless the taxpayer can show an exemption. The taxpayer has not cited any authority allowing such an exemption. Merely because the taxpayer contracts with local governmental agencies to provide transportation service to segments of the community does not exempt it from the tax.

Indeed, WAC 458-20-189 provides:

(3) Counties, cities and other municipal subdivisions are taxable with respect to amounts derived, however designated, from any "utility or enterprise activity" for which a specific charge is made.

(4) Utility activities. "Utility activities," which are taxable under the public utility tax, include water and electrical energy distribution, public

transportation services, and sewer collection services. (See WAC 458-20-179.) (underlining ours).

Thus, the local governments themselves are subject to the public utility tax when they perform such services. Furthermore, the taxpayer is a registered business operating in name as a corporation. Such an entity is not an employee of the governmental bodies.

[2] The taxpayer's next argument is the assessment should be reduced if its drivers are determined to be independent contractors. However, no evidence has been provided to show the drivers are independent contractors. The auditor found the drivers do not sublease the cabs from the taxpayer, but are under the taxpayer's direction and control. Therefore, all of the fare income is taxable to the taxpayer.

[3] The taxpayer's last argument is the income it receives from transporting elderly and physically challenged persons should be exempt from taxation. Again, the taxpayer has not cited any authority in support of its claim. Moreover, the taxpayer is not donating its services or fare income to such passengers. It is earning fares from them as it does from other members of the public.

DECISION AND DISPOSITION:

Taxpayer's petition is denied.

DATED this 21st day of November 1990.

APPENDIX C

Cite as 11 Det. No. 91-164, WTD 337 (1992).

BEFORE THE INTERPRETATION AND APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition	)	<u>D E T E R M I N A T I O N</u>
For Correction of Assessment of)	
	)	No. 91-164
)	
. . .	)	Registration No. . . .
	)	. . ./Audit No. . . .
)	

- [1] **RULE 180, RCW 82.16.010, .020:** CABULANCES -- URBAN OR MOTOR TRANSPORTATION BUSINESS. Cabulances which are not equipped or staffed to perform medical services should be classified as either Urban or Motor Transportation Business and not under Service B&O.

- [2] **Rule 180, RCW 82.16.047, RCW 46.74.010:** TAXI CABS -- FOR PROFIT CORPORATION -- ELDERLY OR PHYSICALLY-CHALLENGED PASSENGERS. The taxpayer/taxi cab company is a for profit corporation. Its income from fares paid by or for elderly or physically-challenged passengers is not exempt from the public utility tax. Taxpayer must be a public social agency or a private, nonprofit entity providing ride sharing for the elderly or handicapped to qualify for such an exemption.

- [3] **RULES 180 AND 211:** TAXI CAB RENTALS/LEASES -- INDEPENDENT DRIVERS/LESSEES. Income received by taxpayer taxi cab company for leasing/renting cabs to independent drivers is subject to retailing B&O and retail sales tax.

- [4] **RULES 111 AND 211, ETB 358, RCW 82.04.070:** INSURANCE CHARGES -- TAXI CAB RENTALS -- RETAILING B&O -- RETAIL SALES TAX. Where taxi cab company/lessor is the insured on automobile liability policies and is obligated to pay premiums to the insurer, the money received from independent drivers/lessees for such insurance coverage is taxable under Retailing B&O and retail sales tax as a recovery of taxpayer's own costs. The payments are not exempt advances and

reimbursements. Accord: Det. No. 86-305, 2 WTD 65 (1986), Det. No. 88-377, 6 WTD 439 (1988).

[5] **RULES 180, 211 AND 224:** TAXI CABS -- INDEPENDENT DRIVERS/LESSEES -- ADMINISTRATIVE AND DISPATCH SERVICES -- SERVICE B&O -- RETAILING B&O -- SALES TAX. Dispatching and administrative services provided to independent taxi drivers/lessees for a fee are not incidental to urban transportation business because the taxi company/dispatcher itself is not hauling for hire in these instances. Rather, income from dispatching when it is an optional service to the drivers and separately charged is taxable under Service B&O. By contrast, when dispatching is required as part of the car rental, such income is taxable under Retailing B&O and retail sales tax. Similarly, income is taxable under Service B&O when administrative services are separately charged and not related to the car rentals/leases. When administrative services are related to the car rentals, the income is taxable under Retailing B&O and retail sales tax.

[6] **RULE 257:** CAB MAINTENANCE -- RETAILING B&O -- SALES TAX. Charges to drivers/lessees for cab maintenance are subject to Retailing B&O and retail sales tax.

Headnotes are provided as a convenience for the reader and are not in any way a part of the decision or in any way to be used in construing or interpreting this Determination.

TAXPAYER REPRESENTED BY: . . .

DATE OF TELEPHONE CONFERENCE: . . .

NATURE OF ACTION:

The taxpayer seeks to correct an assessment of service and retailing business and occupation (B&O) taxes and retail sales tax. The taxpayer reported its taxes under the urban transportation business classification.

FACTS:

De Luca, A.L.J. -- The Department of Revenue's Audit Division audited the taxpayer for the period January 1, 1986 through June 30, 1989. Audit provided the assessment to the taxpayer [in May 1990]. The taxpayer was assessed \$. . . in sales tax, \$. . . in retailing B&O tax, \$. . . in service B&O tax and \$. . . in use tax. Audit credited the taxpayer for \$. . . in urban transportation taxes it had paid and another \$. . . was adjusted

in its favor. With interest, the total amount due was \$ The tax remains unpaid. The taxpayer filed its petition [in May, 1990] and was granted an extension to [July 1990] to present supporting materials.

The taxpayer is a Washington corporation It operates a taxi cab and cabulance service there. The taxpayer has taxicab rental agreements with drivers stipulating the drivers are independent contractors who are free from the taxpayer's control. The Department does not dispute this contention and does not claim the drivers are the taxpayer's employees. The Department and the taxpayer agree the drivers rent/lease the cabs.

The agreements state the drivers will rent the cabs for seven consecutive days. The drivers pay separately listed amounts for the car rental, liability insurance, and an administrative fee. Dispatching service is also available if the drivers wish to pay for it. The insurance is purchased by the taxpayer who is the named insured on the policies. The insurers' agents or brokers bill the taxpayer, not the drivers, for the premiums.

The taxpayer also operates cabulances which are vans equipped with wheel chair lifts for the physically challenged. Additionally, the taxpayer carries elderly and physically-challenged riders in its cabs as well. Both the cabulance and the elderly passengers are transported under contract with local and state agencies.

The taxpayer reported its income under the tax classification of urban transportation business, RCW 82.16.010. The Audit Division determined there were more appropriate tax classifications for some of the taxpayer's various activities.

Audit placed income received for dispatching and administrative services under the service B&O classification. See Schedule III of the audit report. In Schedule IV Audit reclassified cabulance fares from the public utility tax of urban transportation to service B&O because the auditor determined the cabulances were ambulances and therefore subject to RCW 82.04.290 and WAC 458-20-224 (Rule 224).

In Schedule VI Audit found the cab leases were sales under RCW 82.04.040 and subject to retailing B&O (RCW 82.04.250) and retail sales taxes (82.08.020) upon the gross income of the rental payments when they became due. Audit cited WAC 458-20-211 (Rule 211) in support of this position.

Furthermore, insurance charges were considered a recovery of the lessor's own costs rather than advances and reimbursements. These charges were subjected to retailing B&O and retail sales

tax as part of the weekly taxicab rental rate per vehicle. Audit relied on Excise Tax Bulletin (ETB) 358.04.211, since cancelled, for assessing the taxes on the insurance income.

Finally, Audit assessed the taxpayer's fare income for carrying passengers under the urban transportation classification.

ISSUES:

Should the cabulance service be treated as ambulance service and classified under service B & O (Rule 224) or should it be taxed under the urban transportation and motor transportation classifications (Rule 180) as reported by the taxpayer?

Is taxpayer's income from elderly and physically-challenged passengers exempt from the state's taxes?

Is the taxpayer's income from the rental of cabs and the charges for insurance subject to retailing B&O and retail sales tax?

Should income from dispatching and administrative services be reclassified to service B&O or retailing B&O with sales tax?

TAXPAYER'S EXCEPTIONS:

In short, the taxpayer contends all of its income should be included in the urban transportation business classification. It believes the administrative services, dispatching, car rentals, etc. are all part of the taxi business and should be classified uniformly. However, the taxpayer claims an exemption should be allowed for carrying elderly or physically-challenged persons.

The taxpayer addressed at length why cabulances are not ambulances. The taxpayer has provided an affidavit from its president along with numerous exhibits demonstrating that it is not an ambulance service. The first exhibit is a copy of the [local] County Health Department Ambulance and Advanced Life Support Rules and Regulations, (. . .). The second exhibit is a copy of Medical Transportation Billing Instructions (Sept. 1987 rev.) promulgated by the Division of Medical Assistance, Office of Provider Services, Washington Department of Social & Health Services (DSHS).

Moreover, the taxpayer argues the tax on income received from the drivers for insurance is wrongly assessed. The taxpayer claims it merely advances money to the insurers on behalf of the drivers who, in turn, reimburse it weekly.

DISCUSSION:

WAC 458-20-180 (Rule 180) and RCW 82.16.020 (9) provide that "urban transportation business" means the business of operating any vehicle for public use in the conveyance of persons or property for hire, Included herein, but without limiting the scope hereof, is the business of operating passenger vehicles of every type"
(underlining added).

The taxpayer has amply supported its contention that it is not an ambulance service. The [local] ambulance regulations consist of twelve single-spaced pages which set compulsory minimum standards for the operation of ambulance and paramedic vehicles and services. These regulations are quite detailed in specifying the scores of medical supplies/equipment and drugs which each vehicle must carry. The supplies and drug lists alone are several pages. Moreover, the regulations require at least two persons to operate an ambulance or paramedic vehicle, and at least one of the persons on board must be a paramedic who meets statutory and regulatory standards of training. Similar complex and lengthy ambulance standards have been promulgated in regulations by DSHS. See WAC 248-17-010 et seq.

The taxpayer's president has sworn that the cabulances do not carry any of the equipment/supplies or medications required by the [local] ambulance regulations. The affiant also swore that the cabulances operate only with a driver per vehicle. The drivers are not paramedics. Conversely, the audit report contains no information to refute the affidavit.

Moreover, the DSHS Medical Transportation Billing Instructions distinguish ambulance transportation from cabulance transportation. The instructions allow the use of ambulances when specified medical (emergency or other serious) treatments have been performed on the patient.

In contrast, the instructions for cabulance service provide:

Persons transported by cabulance must be stable, must not need administration of oxygen by the provider of transportation service, must not need to be transported by stretcher, litter, or similar device, nor require medical attention enroute.

It is noted the billing instructions allow a basic one-way charge for an ambulance patient of [\$70]. In comparison, the instructions allow a basic one-way charge for a cabulance patient of [\$16].

[1] We hold income received from carrying passengers in cabulances like these which are not equipped or staffed to

perform medical services should be classified under urban/motor transportation business and not service B&O.

[2] The second issue arises because the taxpayer claims an exemption from taxation for income earned by carrying elderly and physically-challenged passengers. The taxpayer has not cited any authority for this position and we know of none. Possibly the taxpayer implies the exemption contained in RCW 82.16.047 and RCW 46.74.010 and Rule 180. Those laws allow an exemption "for amounts received for providing commuter ride sharing or ride sharing for the elderly and the handicapped..." if the transportation provider is a public social service agency or a private, nonprofit entity. The exemption does not apply here, because the taxpayer is a for-profit corporation.

[3] The next issue is whether the car rental income is subject to retailing B&O and retail sales tax. Rule 180 makes it clear it is.

RETAIL SALES TAX

Persons engaged in the business of motor transportation or urban transportation are required to collect the retail sales tax upon gross retail sales of tangible personal property sold by them. The retail sales tax must also be collected upon retail sales of services defined as "sales" in RCW 82.04.040 and "sales at retail" in RCW 82.04.050, including charges for the rental of motor vehicles or other equipment without an operator.

BUSINESS AND OCCUPATION TAX

RETAILING. Persons engaged in either of said businesses are taxable under the retailing classification upon gross retail sales of tangible personal property sold by them and upon retail sales of services defined as "sales" in RCW 82.04.040 or "sales at retail" in RCW 82.04.050.

See also Rule 211(7) and (9), subjecting the leasing or rental of unoperated equipment or other tangible personal property to retailing B&O and retail sales taxes.

[4] The next issues pertain to retailing B&O and retail sales taxes assessed against the taxpayer for money received from the drivers for liability insurance premiums. The taxpayer claims it is merely a conduit for the insurance payments which the

taxpayer, in turn, pays the insurers. The taxpayer asserts it is not liable for taxes on this income because the payments are advances and reimbursements.

WAC 458-20-111 (RULE 111) governs this issue. The rule states:

The word "advance" as used herein, means money or credits received by a taxpayer from a customer or client with which the taxpayer is to pay costs or fees for the customer or client.

The word "reimbursement" as used herein, means money or credits received from a customer or client to repay the taxpayer for money or credits expended by the taxpayer in payment of costs or fees for the client.

The words "advance" and "reimbursement" apply only when the customer or client alone is liable for the payment of the fees or costs and when the taxpayer making the payment has no personal liability therefor, either primarily or secondarily, other than as agent for the customer or client. (Underlining added).

There may be excluded from the measure of tax amounts representing money or credit received by a taxpayer as reimbursement of an advance in accordance with the regular and usual custom of his business or profession. The foregoing is limited to cases wherein the taxpayer, as an incident to the business, undertakes, on behalf of the customer, guest or client, the payment of money, either upon an obligation owing by the customer, guest or client to a third person, or in procuring a service for the customer, guest or client which the taxpayer does not or cannot render and for which no liability attaches to the taxpayer. (Underlining added).

The taxpayer's insurance records which it submitted make clear the taxpayer is primarily responsible for paying the premiums. The taxpayer itself contracted with the insurers and is named the insured on the policies. The insurers' agents bill the taxpayer, not the drivers, for the premiums. Therefore, the Rule 111 deduction does not apply to the taxpayer. The insurance income paid by the drivers is taxable to the taxpayer. Det. No. 86-305, 2 WTD 65 (1986), Det. No. 88-377, 6 WTD 439 (1988).

The next issue is whether the insurance charges should be taxable under retailing B&O and retail sales taxes or be subject to service B&O. Audit relied on ETB 358 when determining retailing B&O and retail sales taxes were the appropriate taxes. ETB was

in effect at the time of the audit and is therefore applicable to this matter. ETB 358 reads in pertinent part:

... where insurance and delivery charges are basically a recovery of lessor's own costs rather than advances and reimbursements, such charges are subject to Retailing business and occupation tax and retail sales tax as part of the charge made

Because we have ruled the insurance payments were not advances and reimbursements, but a recovery of the taxpayer's own costs, Audit was correct in assessing retailing B&O and retail sales taxes. See also Rule 211 and RCW 82.04.070.

Furthermore, insurance differs from dispatching which is optional and classified under service B&O. (See below). The taxpayer is providing the dispatching service, but not the legally-required insurance. The insurer provides that to the insured taxpayer for a fee. Consequently, the insurance is directly related to the car rental rather than to the taxpayer's services. Thus, the charges for the insurance are additional compensation for renting the cars.

[5] The next matter concerns whether income for administrative and dispatch services should be taxed under urban transportation or service B&O or retailing B&O with retail sales tax. Under these circumstances, the independent drivers are providing the urban transportation to the customers. The drivers are carrying the passengers by selling their services. On the other hand, the drivers are not selling dispatching and administrative services. Instead, they are purchasing them from the taxpayer. Therefore, the dispatching and administrative services provided to the drivers for a fee are not incidental to urban transportation, because the taxpayer itself is not hauling for hire in these instances.

Because the dispatching is optional to the drivers and is separately charged to them, income from dispatching is taxable under service B&O tax. If dispatching was required as part of the cab rentals, the income would be subject to retailing B&O and retail sales tax. Similarly, if administrative services are part of or related to cab rentals/leases, such income is subject to retailing B&O and sales taxes. By contrast, if the administrative services are separate from the cab rentals and are separately charged, such income is taxable under service B&O.

[6] Lastly, we add that charges for maintenance, if any, also are subject to retailing B&O and retail sales tax. WAC 458-20-257 (2)(C)(i) reads in part:

Maintenance agreements (service contracts) require the periodic specific performance of inspecting, cleaning, physical servicing, altering, and/or improving of tangible personal property. Charges for maintenance agreements are retail sales, subject to retailing B&O tax and retail sales tax under all circumstances.

DECISION AND DISPOSITION:

The taxpayer's petition is granted in part and denied the remainder. The taxpayer's operation of cabulances is subject to the public utility tax classifications of urban transportation business and motor transportation business, not service B & O. Because the taxpayer is engaged in the business of both urban and motor transportation, its books of account must show a proper segregation of revenue in order to report under the urban transportation classification.

The decision whether administrative services income is taxable under retailing/retail sales or service B&O will have to be made upon remand to Audit in accordance with this determination.

The remainder of the tax assessment is sustained. This matter is remanded to audit to reissue an assessment consistent with this determination. The due date will be provided thereon.

DATED this 17th day of June 1991.

APPENDIX D

Cite as 11 WTD 87 (1990).

BEFORE THE INTERPRETATION AND APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition	)	<u>D</u> <u>E</u> <u>T</u> <u>E</u> <u>R</u> <u>M</u> <u>I</u> <u>N</u> <u>A</u> <u>T</u> <u>I</u> <u>O</u>
<u>N</u>		
For Correction of Assessment of)	
	)	No. 90-370
)	
. . .	)	Registration No. . . .
	)	. . ./Audit No. . . .
)	

[1] RULE 180 AND RCW 82.16.010: PUBLIC UTILITY TAX -- URBAN TRANSPORTATION -- MOTOR TRANSPORTATION -- CABULANCES. Merely because cabulances are equipped with wheelchair lifts to transport physically challenged persons does not convert the vehicles into ambulances or their operations into ambulance services. State and local governments strictly regulate ambulances and ambulance operations regarding their medical equipment/supplies, drug contents and personnel with paramedic training. In contrast, cabulances provide only a taxi service for physically challenged persons. Cabulances and their drivers do not offer medical services.

Headnotes are provided as a convenience for the reader and are not in any way a part of the decision or in any way to be used in construing or interpreting this Determination.

TAXPAYER REPRESENTED BY: . . .

NATURE OF ACTION:

The taxpayer petitioned for a correction of an assessment of service business and occupation (B & O) tax on amounts which were determined to have been received for the operation of ambulances.

FACTS:

De Luca, A.L.J. -- The audit covered the period from April 1, 1987 through June 30, 1989. The taxpayer had reported its income under the public utility tax classifications of urban transportation and, in some instances, motor transportation. The audit division determined the proper tax classification was B & O - service and other activities. The taxpayer was assessed \$. . . in B & O taxes and \$. . . in use tax. The taxpayer was credited for having paid \$. . . for urban transportation taxes and \$. . . for motor transportation taxes. With interest, the net assessment was \$

The audit division concluded the business of operating cabulances did not constitute "motor transportation" and "urban transportation" under WAC 458-20-180 (Rule 180).¹ Instead, the audit division decided the taxpayer was operating an ambulance service under WAC 458-20-224 (Rule 224). The audit report reasoned as follows:

The dictionary defines the word "ambulance" as meaning: (1) Orig., a mobile field hospital, and (2) a specially equipped automobile or other vehicle for carrying the sick or wounded. Since the cabulances are specially equipped to transport invalids and they are not generally used as a public taxi, they fall within the common understanding of what is meant by "ambulance".

ISSUE:

Should the cabulance service be treated as ambulance service and classified under service B & O (Rule 224) or should it be taxed under the urban transportation and motor transportation classifications (Rule 180) as reported by the taxpayer?

TAXPAYER'S EXCEPTIONS:

The taxpayer contests the reclassification from urban transportation and motor transportation public utility taxes to service B & O taxes. It further requests that all interest

¹Neither the auditor nor the taxpayer has provided us with a definition of "cabulance" and we have been unable to find one. Although we do not attempt to define precisely what a cabulance is, we take note that it usually is a multi-passenger van equipped with a wheel chair lift to assist disabled persons in their transportation needs. It serves a function similar to taxicabs.

and penalties assessed due to the B & O reclassification be deleted as well.

The taxpayer contends cabulance transportation is not ambulance transportation. The taxpayer has provided an affidavit from its president along with numerous exhibits demonstrating that it is not an ambulance service. The first exhibit is a copy of the . . . County Health Department Ambulance and Advanced Life Support Rules and Regulations, (adopted [in September of 1988]). The second exhibit is a copy of Medical Transportation Billing Instructions (Sept. 1987 rev.) promulgated by the Division of Medical Assistance, Office of Provider Services, Washington Department of Social & Health Services (DSHS).

DISCUSSION:

Rule 180 and RCW 82.16.020 (9) reveal that "urban transportation business" means the business of operating any vehicle for public use in the conveyance of persons or property for hire, Included herein, but without limiting the scope hereof, is the business of operating passenger vehicles of every type" (underlining added). The taxpayer's cabulances are passenger vehicles for hire which fit this definition.

The taxpayer has amply supported its contention that it is not an ambulance service. The . . . County ambulance regulations consist of twelve single-spaced pages which set compulsory minimum standards for the operation of ambulance and paramedic vehicles and services. These regulations are quite detailed in specifying the scores of medical supplies/equipment and drugs which each vehicle must carry. The supplies and drug lists alone are several pages. Moreover, the regulations require at least two persons to operate an ambulance or paramedic vehicle, and at least one of the persons on board must be a paramedic who meets statutory and regulatory standards of training. Similar complex and lengthy ambulance standards have been promulgated in regulations by DSHS. See WAC 248-17-010 et seq.

The taxpayer's president has sworn that the cabulances do not carry any of the equipment/supplies or medications required by the . . . County ambulance regulations. The affiant also swore that the cabulances operate only with a driver per vehicle. The drivers are not paramedics. Conversely, the audit report contains no information to refute the affidavit.

Moreover the DSHS Medical Transportation Billing Instructions distinguish ambulance transportation from cabulance transportation. The instructions allow the use of ambulances when specified medical (emergency or other serious) treatments have been performed on the patient.

In contrast, the instructions for cabulance service provide:

Persons transported by cabulance must be stable, must not need administration of oxygen by the provider of transportation service, must not need to be transported by stretcher, litter, or similar device, nor require medical attention enroute.

It is noted the billing instructions allow a basic one-way charge for an ambulance patient of \$[70]. In comparison, the instructions allow a basic one-way charge for a cabulance patient of \$[15].

Furthermore, merely because physically challenged persons may not be able to use ordinary taxicabs which are not equipped with wheelchair lifts does not convert the subject vehicles and their operation into an ambulance service. There is no basis to treat differently taxicab operations which provide service to the non-physically challenged public from cabulance operations which provide similar service to the physically challenged public by the use of vans equipped with lifts. The above-cited regulations and affidavit make it clear that cabulances do not provide medical services like ambulances do.

DECISION AND DISPOSITION

The taxpayer's petition is granted. The taxpayer's operation of cabulances is subject to the public utility tax classifications of urban transportation business and motor transportation business, not service B & O. Because the taxpayer is engaged in the business of both urban and motor transportation, its books of account must show a proper segregation of revenue in order to report under the urban transportation classification. The use tax assessment is sustained.

DATED this the 29th day of October 1990.

PERKINS COIE LLP

July 29, 2019 - 2:55 PM

Transmittal Information

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