

056007-8

056007-8

NO. ~~65677-8~~  
056007-8

---

**COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON**

---

STATE OF WASHINGTON DEPARTMENT OF REVENUE,

Appellant,

v.

OLYMPIC TUG AND BARGE, INC.,

Respondent.

---

**REPLY BRIEF**

---

ROBERT M. MCKENNA  
Attorney General

BRETT DURBIN  
Assistant Attorney General  
WSBA #35781  
Revenue Division  
7141 Cleanwater Drive SW  
PO Box 40123  
Olympia, WA 98504-0123

2011 JAN 27 AM 10:29  
COURT OF APPEALS  
DIVISION I  
CLERK OF COURT  
JULIA M. WOOD

**ORIGINAL**

## TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	ARGUMENT .....	2
	A. In The Context Of The Public Utility Tax Deduction At Issue, The Terms “Ship Side” And “Shipside” Are Synonymous.....	3
	B. The Definition of “Ship Side” Adopted By The Board Does Not Render The Term “On Tidewater” Superfluous.....	5
	C. The Dictionary Definition Of “Forward” Is Consistent With The Board’s Interpretation And Shows That The Bunker Fuel Is Not Forwarded To An Interstate Or Foreign Destination.....	9
	D. The 1967 Amendments Do Not Show That The Legislature Intended To Expand The Deduction From Commodities Carried As Cargo To Goods Consumed By The Ship.....	13
	E. Olympic’s Arguments Concerning The Term “Destination” Ignore The Statutory Context And Fail To Refute The Board’s Finding That The Ship In Washington Is The Destination Of The Bunker Fuel. ....	14
	F. Cases Dealing With The Import-Export Clause Are Relevant Because The Deduction Is Concerned With Activities Related To The Shipment Of Goods Into And Out Of The State. ....	19
	G. The Issue In This Case Is Not Identical To The Issue In The Prior Informal Hearing Because It Does Not Turn On The Type Of Bunker Fuel Being Transported. ....	20

H. Collateral Estoppel Does Not Apply Because The  
Department Did Not Have The Opportunity Seek Review  
And Correct The Board's Prior Erroneous Interpretation.....22

III. CONCLUSION .....25

## TABLE OF AUTHORITIES

### Cases

<i>Alexander Sprunt &amp; Son v. United States</i> , 281 U.S. 249, 50 S. Ct. 315, 74 L. Ed. 832 (1930).....	4
<i>American Paper &amp; Pulp Co. v. Denenberg</i> , 233 F.2d 610 (C.A.3 1956).....	4
<i>Burns v. City of Seattle</i> , 161 Wn.2d 129, 164 P.3d 475 (2007).....	2
<i>Carson Petroleum Co. v. Vial</i> , 279 U.S. 95, 49 S. Ct. 292, 73 L. Ed. 626 (1929).....	9
<i>Dep't. of Ecology v. Campbell &amp; Gwinn, L.L.C.</i> , 146 Wn.2d 1, 43 P.3d 4 (2002).....	2
<i>Frese v. Snohomish County</i> , 129 Wn. App. 659, 120 P.3d 89 (2005).....	21
<i>In re Lofton</i> , 142 Wn. App. 412, 174 P.3d 703 (2008).....	2, 3
<i>Int'l Longshoremen's and Warehousemen's Union, Local 32 v. Pacific Maritime Ass'n</i> , 773 F.2d 1012 (C.A.9, 1985).....	4
<i>Landstar Exp. America, Inc. v. Federal Maritime Comm'n</i> , 569 F.3d 493 (C.A.D.C., 2009).....	4
<i>Puget Sound Stevedoring Co. v. Tax Comm'n of State of Washington</i> , 302 U.S. 90, 58 S. Ct. 72, 82 L. Ed. 68 (1937) <i>overruled by Dep't of Revenue of State of Wash. v. Ass'n of Washington Stevedoring Companies</i> , 435 U.S. 734, 98 S. Ct. 1388, 55 L. Ed. 2d 682 (1978).....	9, 17
<i>Schneider v. Forcier</i> , 67 Wn.2d 161, 406 P.2d 935 (1965).....	7

<i>Southern Ry. System v. Leyden Shipping Corp.</i> , 290 F. Supp. 742 (D.C.N.Y, 1968).....	4
<i>State Farm Mut. Ins. Co. v. Avery</i> , 114 Wn. App. 299, 57 P.3d 300 (2002).....	21, 22, 23
<i>State v. Hahn</i> , 83 Wn. App. 825, 924 P.2d 392 (1996).....	2
<i>State v. Public Service Comm'n of Washington</i> , 117 Wash. 510, 201 P. 749 (1921) .....	6
<i>Tidewater Terminal Co. v. State</i> , 60 Wn.2d 155, 372 P.2d 674 (1962).....	17
<i>U.S. v. I. C. C.</i> , 352 U.S. 158, 77 S. Ct. 241, 1 L. Ed. 2d 211 (1956).....	4

**Statutes**

Laws of 1937, ch. 227, § 12(h) .....	18
Laws of 1949, ch. 228, § 11(h) .....	19
RCW 12.40.027 .....	23
RCW 28A.410.240.....	5
RCW 34.05.230 .....	25
RCW 35.88.080 .....	6
RCW 42.17.367 .....	5
RCW 82.03.130 .....	24
RCW 82.03.180 .....	24
RCW 82.08.0255 .....	16
RCW 82.16.050 .....	3

RCW 82.16.050(8).....	2, 16
RCW 82.16.050(8) (2002) .....	6, 7, 16, 19
RCW 82.32.150 .....	25

**Other Authorities**

Bryan A. Garner, <i>The Redbook: A Manual on Legal Style</i> , at 95 (2nd ed. 2002) .....	4
University of Chicago Press, <i>Chicago Manual of Style</i> , at 300 (15th ed. 2003) .....	4

**Treatises**

Restatement (Second) of Judgments § 28(1) .....	22, 23
---	--------

**Dictionaries**

<i>Webster's Third New International Dictionary</i> 458 (2002) .....	18
<i>Webster's Third New International Dictionary</i> 614 (2002) .....	21
<i>Webster's Third New International Dictionary</i> 802 (2002) .....	25
<i>Webster's Third New International Dictionary</i> 896 (2002) .....	17
<i>Webster's Third New International Dictionary</i> 1574 (2002) .....	6
<i>Webster's Third New International Dictionary</i> 2590 (2002) .....	11

## I. INTRODUCTION

A statute must be read as a whole to determine the Legislature's intent. Olympic instead carves up the statute into individual words and construes each of them individually without reference to their context or technical usage, suggesting meanings that are contrary to the larger context of the statute. Even then, Olympic's arguments often boil down to conclusory statements that do not flow from its analysis of the statutory language. Accordingly, Olympic's arguments are not grounded in an analysis of the Legislature's intent, but a manipulation of the statutory language to suit its position that the service at issue qualifies for the deduction. As a result, Olympic's interpretation is not based on a reasonable reading of the statute as a whole or of the language in context.

Olympic's arguments also fail to demonstrate that the Board's interpretation of the statute is unreasonable, let alone incorrect. Olympic's focus on minutia and the mechanical application of rules of statutory construction works to obscure the Legislature's intent rather than reveal it. When the rules of statutory construction are sensibly applied and the terms of the statute are read in context they support the Board's position. Therefore, this Court should reverse the superior court's order and affirm the Board's final decision.

## II. ARGUMENT

The court's fundamental objective in construing a statute is to ascertain and carry out the Legislature's intent. *Dep't. of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). The court assesses the meaning of a statute “viewing the words of a particular provision in the context of the statute in which they are found, together with related statutory provisions, and the statutory scheme as a whole.” *Burns v. City of Seattle*, 161 Wn.2d 129, 140, 164 P.3d 475 (2007). Courts also consider the subject, nature, and purpose of the statute as well as the consequences of adopting one interpretation over another. *Id.* at 146. The goal is to determine what the Legislature intended not what the words could conceivably mean. *See State v. Hahn*, 83 Wn. App. 825, 831, 924 P.2d 392 (1996). Only if the court finds a statute to be ambiguous, after applying the analysis identified in *Campbell & Gwinn* and *Burns*, is it appropriate to apply rules of statutory construction. *See In re Lofton*, 142 Wn. App. 412, 415, 174 P.3d 703 (2008). The disputed provisions of former RCW 82.16.050(8) are not ambiguous, and Olympic does not demonstrate ambiguity. Instead, Olympic employs technical rules of statutory construction to redefine selected words in the statute, offering definitions that distort legislative intent and disregard related statutory provisions and the statutory scheme as a whole.

Ironically, Olympic contends the Department's arguments rewrite the statute by adding or deleting words. Fairly considered, however, the Department is doing no more than attempting to explain the meaning of the statutory language in the context of the statute as a whole, without simply repeating the same words used in the statute. *See In re Lofton*, 142 Wn. App. at 417 ("here we are interpreting the words as they exist, not adding language to the statute"). When the words are read in context, they are not ambiguous: the Legislature intended the deduction in RCW 82.16.050 to apply to the shipment of goods into and out of the state where the goods stop at an intermediate point in Washington.

**A. In The Context Of The Public Utility Tax Deduction At Issue, The Terms "Ship Side" And "Shipside" Are Synonymous.**

Olympic erroneously argues that the term "ship side" used in the 1937 statute is somehow a different term than the term "shipside" in a modern dictionary. Resp. Br. at 19. This error is the result of reading words out of context and failing to recognize the technical nature of the language used in the statute.

In legal authorities dealing with the shipping industry, the spellings "ship side," "ship-side," and "shipside" are used interchangeably. In a United States Supreme Court decision from 1930, for example, the Supreme Court used all three spellings interchangeably. *See Alexander*

*Sprunt & Son v. United States*, 281 U.S. 249, 50 S. Ct. 315, 74 L. Ed. 832 (1930).<sup>1</sup> This mixed usage persisted in other cases dealing with the shipping industry, with “shipside” eventually becoming the prevalent spelling.<sup>2</sup> Therefore, the use of the term “ship side” in the 1937 statute does not indicate the Legislature meant something different than a “shipside;” its use simply reflects the evolution of language and the fact that the spelling “shipside” was not as prevalent or accepted as it is now. This is analogous to the evolution of the term “web site” into “website.” See Bryan A. Garner, *The Redbook: A Manual on Legal Style*, at 95 (2nd ed. 2002). Compound words often start out as two separate words but over time become hyphenated and then joined as a single word. See *The Redbook*, at 95; see also, University of Chicago Press, *Chicago Manual of Style*, at 300 (15th ed. 2003).

---

<sup>1</sup> “[T]here were on all the railroads two schedules of rates on cotton—the domestic or city-delivery rates and the export or ship side rates... The difference ... between the domestic and the export rates is approximately equal to the cost of transporting the cotton, by dray or by switching, from uptown concentrating and high density compressing plants in the ports to ship side... From these plants, there was no need of local transportation, by dray or switching, to shipside... It found that ‘for the purposes of this case a fair and reasonable basis for equalizing the city-delivery and ship-side rates will be to increase the city-delivery rates 1 cent per 100 pounds and reduce the ship-side rates exclusive of wharf or pier terminal charges.’” *Alexander Sprunt & Son*, 281 U.S. at 252-54.

<sup>2</sup> See, e.g., *U.S. v. I. C. C.*, 352 U.S. 158, 167, 77 S. Ct. 241, 1 L. Ed. 2d 211 (1956) (“shipside” & “ship-side”); *Southern Ry. System v. Leyden Shipping Corp.*, 290 F. Supp. 742, 745 (D.C.N.Y., 1968) (“ship side”); *American Paper & Pulp Co. v. Denenberg*, 233 F.2d 610, 613 (C.A.3 1956) (“delivery of the goods ship-side for forwarding overseas”); *Int’l Longshoremen’s and Warehousemen’s Union, Local 32 v. Pacific Maritime Ass’n*, 773 F.2d 1012, 1014 (C.A.9, 1985) (“shipside”); *Landstar Exp. America, Inc. v. Federal Maritime Comm’n*, 569 F.3d 493, 495 (C.A.D.C., 2009) (“shipside”).

The shipping industry cases cited above show that the term “ship side” used in the 1937 statute is the same term as “shipside” in a modern Webster’s dictionary, just as the terms “web site” and “website” are alternative spellings of the same term used in statutes today.<sup>3</sup> Accordingly, Olympic’s argument that “ship side” must mean something different than “shipside” is unfounded. Likewise, Olympic’s interpretation of “ship side” is as absurd and unlikely as arguing the term “web site” in RCW 42.17.367 means the location of “a radio or television network.” See *Webster’s Third New International Dictionary* at 2590 (2002) (defining “web” in a part as “a radio or television network”).

Olympic acknowledges that “shipside” “carries the specific connotation urged by the Board and the Department.” Resp. Br. at 19. Because “ship side” is just a different spelling of the term “shipside,” Olympic has therefore effectively conceded that its services do not qualify for the deduction as the bunker fuel is not delivered to a “ship side.”

**B. The Definition of “Ship Side” Adopted By The Board Does Not Render The Term “On Tidewater” Superfluous.**

Olympic’s failure to read words in context also leads it to argue erroneously that the phrase “on tidewater” in former RCW 82.16.050(8)

---

<sup>3</sup> Compare RCW 28A.410.240 (“The report shall be made available through the state library, on the website of the office of superintendent of public instruction.”) with RCW 42.17.367 (“the commission shall operate a web site or contract for the operation of a web site that allows access to reports...filed with the commission.”) (emphasis added)

(2002) meant that the term “ship side” had to include the area of water next to a ship. Resp. Br. at 20. Olympic contends a “ship side” must be something other than a fixed structure such as a dock, wharf, or export elevator because the Legislature used the phrase “ship side on tidewater or navigable tributary thereto,” and therefore must have intend to include the area of water next to a ship. Resp. Br. at 21. Yet even a cursory review of the phrase “on tidewater” in statutes and case law shows that it means adjacent to waters affected by the tides, not located on top of such waters. In 1941, for example, the Legislature prohibited “[a]ny city not located on tidewater, having a population of one hundred thousand or more” from discharging sewage in rivers or lakes. RCW 35.88.080. Clearly, the phrase “on tidewater” in RCW 35.88.080 refers to cities located adjacent to tidedwaters, not to floating cities.<sup>4</sup>

The context of former RCW 82.16.050(8) shows the phrase is used in much the same sense to describe structures located adjacent to tidewaters or navigable tributaries. The statute requires the commodities be transported to “an export elevator, wharf, dock or ship side located on tidewater or navigable tributary thereto.” The most natural reading of this

---

<sup>4</sup> The word “on” can be used to refer to something located next to or adjacent to, as in “the house located ~ the river.” See *Webster’s Third New International Dictionary* at 1574; see also *State v. Public Service Comm’n of Washington*, 117 Wash. 510, 511, 201 P. 749 (1921) (“extension was to serve a mill, proposed to be rebuilt on tidewater.”).

phrase is that the “export elevator, wharf, dock or ship side” must be located adjacent to tidewater.<sup>5</sup>

All of the structures the Legislature listed in former RCW 82.16.050(8) are located next to water. *See* App. Br. at 23. Because the statute applies only to goods that are forwarded to interstate or foreign destinations by vessel, without intervening transportation, it is hard to imagine how the goods could leave the state by vessel, without intervening transportation, unless all of the structures listed were located next to tidewater or a navigable tributary leading to tidewater. Moreover, the Legislature uses the phrase “export elevator, wharf, dock, or ship side” later in the statute without adding “on tidewater or navigable tributary thereto.” Therefore, the context of the statute shows that the phrase “on tidewater or navigable tributary thereto” qualifies all of the structures in the list, not just the term “ship side.”

Olympic also argues that the Board’s interpretation should be rejected because it is absurd to claim that goods loaded directly onto a ship would not qualify if they are not delivered to “an export elevator, wharf, dock or ship side.” *Resp. Br.* at 22. However, as discussed in the Appellant’s Brief, the Legislature may have been concerned only with

---

<sup>5</sup> While the “last antecedent rule” might suggest the term “on tidewater” relates only to “dock or ship side,” the rule is flexible and does not apply where the context of the statute shows a contrary intent. *Schneider v. Forcier*, 67 Wn.2d 161, 164, 406 P.2d 935 (1965).

goods that stop at an intermediate point for an indefinite amount of time before continuing on to their destination. App. Br. at 17-18. This legislative focus is evidenced by the specific language used to describe the locations and structures in the statute.

It strains the statutory language to say that commodities loaded directly onto a ship from another carrier are transported to “an export elevator, wharf, dock or ship side ... from which such commodities are forwarded... by vessel.” The phrase “from which” implies that the goods stop at the intermediate location (i.e., the elevator, wharf, dock, or ship side) and there is a break in the transportation chain because of the stop. This would not be true if the commodities were placed directly onto the vessel by the carrier as they would be transported to the ship.

Under Olympic’s reading, any commodities loaded on to a vessel to be shipped out of the state would qualify. It makes little sense for the Legislature to have used such specific language if it intended to include any commodities shipped from the state by vessel. It would have been much easier to omit the list of specific locations and say “amounts derived from the transportation of commodities that are forwarded by vessel to interstate or foreign destinations.” However, this is not the language used by the Legislature, and Olympic’s attempt to construe the statute in this way impermissibly reads language out of the statute.

Rather, the statutory language and historical context demonstrate that the Legislature intended to identify intermediate points in transit where commodities temporarily stop, creating uncertainty as to whether the in-state transportation was part of the interstate transportation or export of the commodities.<sup>6</sup> *See* App. Br. at 18. Reading the language in context, it makes sense to conclude that the transportation of commodities loaded directly onto a vessel does not qualify for the deduction, as there is no intermediate stop. Unlike Olympic’s proposed construction, the interpretation adopted by the Board does not render any part of the statute superfluous and is a reasonable interpretation of the statutory language.

**C. The Dictionary Definition Of “Forward” Is Consistent With The Board’s Interpretation And Shows That The Bunker Fuel Is Not Forwarded To An Interstate Or Foreign Destination.**

Olympic’s argument that the bunker fuel is “forwarded” rests entirely on a conclusory assertion that has no support in the record. Olympic argues that “forwarded” means “to send or ship onward from an intermediate post or station in transit.” Resp. Br. at 24. It goes on to claim that the bunker fuel is forwarded because “there is no dispute that

---

<sup>6</sup> In 1937, cases applying the Interstate Commerce and Export Clause preempted Washington’s PUT tax on transportation services considered part of the interstate transportation or export of goods. *See Tidewater Terminal Co. v. State*, 60 Wn.2d 155, 161-62, 372 P.2d 674 (1962) (discussing preemption of state taxes under *Carson Petroleum Co. v. Vial*, 279 U.S. 95, 49 S. Ct. 292, 73 L. Ed. 626 (1929) and *Puget Sound Stevedoring Co. v. Tax Comm’n of State of Washington*, 302 U.S. 90, 58 S. Ct. 72, 82 L. Ed. 68 (1937) overruled by *Dep’t of Revenue of State of Wash. v. Ass’n of Washington Stevedoring Companies*, 435 U.S. 734, 98 S. Ct. 1388, 55 L. Ed. 2d 682 (1978)).

the bunker fuel at issue is in transit.” *Id.* This claim is flatly contradicted by the Board’s findings of fact and a significant portion of the Department’s brief. Moreover, the definition advanced by Olympic contradicts its own interpretation of the statute while supporting the Board’s interpretation.

Contrary to Olympic’s assertion, there is a significant dispute in this case as to whether the bunker fuel is in transit once it is delivered to the ship. Bunker fuel is not “in transit” if it has reached its final destination: the ship that will be burning the fuel. In its decision, the Board found that “the final destination for the bunker fuel is just the ship located in Washington state waters.” CP 161 (Finding of Fact No. 4). In its opening brief, the Department argued substantial evidence supports this finding and that “there is no destination for the bunker fuel other than the ship located in Washington.” App. Br. at 12. Olympic fails to address the Board’s finding and the Department’s arguments. Instead Olympic relies on conclusory statements that the bunker fuel’s destination was the high seas and the statute only requires that the commodity leave Washington. Resp. Br. at 29.

While Olympic focuses on the phrase “in transit,” a fair reading of the entire definition supports the Board’s interpretation. Olympic defines “forward” as “to send or ship onward from an intermediate post or station

in transit.” Resp. Br. at 24. Where something is sent or shipped “onward from an intermediate post or station in transit,” it is still in the process of being sent or shipped to its destination after it reaches the “intermediate post or station in transit.” Here, the bunker fuel is not delivered to the ship for shipment to another destination. App. Br. at 14; CP 160-61. The bunker fuel is delivered to the ship to be used as fuel and it stays on the ship until it is burned. *Id.* There is no destination other than the ship. Therefore, the ship is the final destination, not “an intermediate post or station in transit.”

Ironically, the dictionary definition of “forward” cited by Olympic goes on to specify “as from one carrier to another.” *Webster’s Third New International Dictionary* at 896. This definition is consistent with the Department’s argument that “the term ‘forward’ restricts the statutory deduction to the transportation of commodities traveling via a carrier before and after they make an intermediate stop.” App. Br. at 11. At the very least, it shows that the Legislature was addressing commodities that are shipped as cargo, not goods consumed by a vessel. App. Br. at 19.

Olympic also misconstrues the Board’s conclusion that the bunker fuel in this case is not a “commodity” as the term is used in the statute. Resp. Br. at 14. This too is a result of reading the word in isolation without regard to its context. Olympic criticizes the Board for agreeing

that bunker fuel is a commodity in the broad sense of the term but finding in this case it was not a “commodity” as the term is used in the statute.

Yet there is a very sensible reason for this distinction. A “commodity” is defined as “**2 a:** an economic good...**b:** an article of commerce; esp : one delivered to a transportation company for shipment.” *Webster’s Third New International Dictionary* at 458. Olympic focuses solely on first definition and simply ignores the more applicable second definition.

The Board recognized the different connotations of the term “commodity” and concluded the context of the statute shows the term was used in the narrower sense as “an article of commerce delivered to a transportation company for shipment.” CP 153-54, 158, 161. The Board acknowledged that bunker fuel is a commodity in the broader sense of the word. CP 153. However, it also recognized that the bunker fuel at issue is not delivered to a transportation company for shipment; it is delivered to the ship to be consumed. CP 153-54. Thus, it was not a “commodity” in the sense that the Legislature used that term in the statute. CP 161.

Contrary to Olympic’s arguments, the Board did not say the transportation of items that can be consumed could never qualify for the deduction. Indeed, if bunker fuel were delivered to an export elevator for shipment to a factory in Singapore, it would be a “commodity” as the term is used in the statute and the transport service would qualify for the

deduction. However, that was not the case here. The bunker fuel was delivered to the ship for consumption, not shipment to another location.<sup>7</sup>

**D. The 1967 Amendments Do Not Show That The Legislature Intended To Expand The Deduction From Commodities Carried As Cargo To Goods Consumed By The Ship.**

Olympic seems to admit that its bunkering services would not qualify for the deduction under the pre-1967 version of the statute which required the commodities to be “forwarded by water carrier.” Resp. Br. at 24. Instead, Olympic maintains the statute underwent a major alteration in 1967, and that the requirement for the commodities to be transported by a “water carrier” was eliminated. *Id.* at 26-27. However, Olympic does not explain why the change from “forwarded by water carrier” to “forwarded, without intervening transportation, by vessel” expands the exemption from commodities carried as cargo to commodities consumed by the vessel. Olympic only states that every amendment is presumed to effect some material purpose. *Id.* at 27. While the Department does not dispute this general rule of construction, nothing in the amendment suggests that the Legislature intended to expand the deduction beyond commodities carried as cargo.

---

<sup>7</sup> The mere possibility that the bunker fuel could eventually be offloaded and sold in rare instances does not change the intent to use the fuel to power the ship when it is pumped into the ship’s fuel tanks. App. Br. at 27.

Looking at the amendment as a whole, the primary change was the insertion of the term “without intervening transportation,” not the change from “water carrier” to “vessel.” Yet, Olympic focuses only on the change from “water carrier” to “vessel” and ignores whether its suggested interpretation is consistent with the amendment as a whole. When taken together, the changes to the statute indicate an attempt to clarify that the deduction applies only to the last segment of the transportation before the commodities are forwarded out of the state as cargo on a vessel. The Legislative Digest supports this view by stating the statute “[c]larifies public utility tax exemption on handling commodities to export dock.”<sup>8</sup> There is no evidence that the 1967 Legislature intended to enact a significant expansion of the statute as Olympic contends.

**E. Olympic’s Arguments Concerning The Term “Destination” Ignore The Statutory Context And Fail To Refute The Board’s Finding That The Ship In Washington Is The Destination Of The Bunker Fuel.**

Olympic argues that the bunker fuel is forwarded to “interstate or foreign destinations” because the high seas are a foreign destination. Resp. Br. at 28. This argument misses the point of the Department’s argument and Board’s decision. Neither the Board nor the Department

---

<sup>8</sup> Digest of the Enacted Laws, Fortieth Legislature Regular & Extraordinary Sessions 1967, Ex. Sess. at 5, AR 545 (BTA Doc. No. 16 at A-3). The Department can cite only the Digest as contemporaneous evidence of legislative intent because bill reports were not preserved and are unavailable before the early 1970’s.

dispute that the high seas might be a foreign destination; rather, that the high seas are not the destination of the bunker fuel Olympic delivers to the ships. App. Br. at 11-12. If Olympic were to transport bunker fuel that was forwarded to an oil platform located outside Washington waters, Olympic would likely qualify for the deduction.

In this case, however, the bunker fuel's destination is a ship located in Washington waters, not a location on the high seas. "Destination" is defined as "the place which is set for the end of the journey or to which something is sent." *Webster's Third New International Dictionary* at 614. Here, the refinery was sending the fuel to a ship located in Washington waters, not some location in the middle of the ocean. CP 161. Once aboard the ship the bunker fuel stayed on the ship until it was burned. *Id.* Thus, the ship located in Washington waters was the bunker fuel's "destination" as it was the place set for the end of the bunker fuel's journey. As noted in the Board's decision, it makes no sense to say that the refineries were sending the bunker fuel to each spot where the bunker fuel was burned. CP 159. As such, the Board correctly found that the ship located in Washington waters is the bunker fuel's destination.

Olympic does not argue that the Board erred in finding that the ship located in Washington waters was the destination of the bunker fuel.

Rather, it claims former RCW 82.16.050(8) requires only “that the commodity must *leave* Washington for consumption *outside* Washington.” Resp. Br at 29. This reading is simply not supported by the phrase “forwarded ... to interstate or foreign destinations,” which implies that the commodities stop at an intermediate point in the process of being shipped to a location outside Washington.<sup>9</sup> *Supra* at 8. If Olympic were correct, the Legislature could have simply said “amounts derived from the transportation of commodities used outside Washington.”<sup>10</sup> It did not. Instead, it selected technical terms used in the transportation industry to describe a very specific situation: where the commodities stop at an intermediate point for purposes of transshipment to vessels leaving the state. The Legislature likely did so because it wanted to draw a narrow deduction related to the shipment of goods in interstate and foreign commerce and avoid fact-intensive preemption analyses under the Interstate and Foreign Commerce Clauses. *See* App. Br. at 15-18, 21-22. Thus, the deduction is intended to address the situation where a break in the interstate transportation or export process creates uncertainty as to

---

<sup>9</sup> As amended in 1967, RCW 82.16.050(8) provides a deduction for “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” (emphasis added).

<sup>10</sup> The Legislature knows how to use this language when that is what it intends. In RCW 82.08.0255, the Legislature allowed an exemption for fuel “subsequently established to have been actually transported and used outside this state by persons engaged in interstate commerce.”

whether the intrastate transportation was considered part of interstate or foreign commerce. *Tidewater Terminal*, 60 Wn.2d at 161-62. Because the transportation service at issue did not involve the interstate or foreign shipment of commodities, there is no reason to believe that the Legislature intended for it to qualify for the deduction.<sup>11</sup>

The context of the deduction further demonstrates the deduction was aimed at the shipment of commodities from locations in Washington to locations in other states or countries. App. Br. at 9-11. Since the public utility tax only applies to persons providing transportation for hire, the deduction addresses the situation where there are intrastate and interstate segments of the shipment. *Id.* In this context there will be clearly identified, specific destinations for the commodities being shipped. CP 159. A person would not deliver a shipment to a transportation company with directions simply to send it outside the state. Thus, it is absurd to say that the Legislature intended to allow a deduction for any goods that leave Washington and are consumed outside the state without having been sent to a specific location.<sup>12</sup>

---

<sup>11</sup> Olympic contends that the purpose of the public utility tax deduction is to encourage interstate commerce and strengthen the role of the ports. Resp. Br. at 32 fn. 8. However, Olympic provides no evidence or authority to support this contention. Nor does it provide any argument refuting the Department's analysis of the Legislature's purpose for enacting the deduction.

<sup>12</sup> As the United States Supreme Court noted in *Puget Sound Stevedoring Co. v. Tax Comm'n of State of Washington*, 302 U.S. 90, 58 S. Ct. 72, 82 L. Ed. 68 (1937),

Olympic also contends that the deduction applies the moment the commodities leave the state. Resp. Br. at 32. This position highlights the unreasonable nature of Olympic's interpretation. If Olympic was correct, then a shipment of diesel fuel from a refinery in Blaine to a mill in Port Angeles would qualify for the deduction if the barge entered Canadian waters during the voyage. This would clearly be contrary to the statute as the destination would be the mill in Port Angeles, not a location in another country or state. Here, the bunker fuel delivered to the ship may return to Washington many times. In fact the bunker fuel could eventually be offloaded in Washington. *See* AR 475.

Olympic also contends that the use of the term "final destination" in the first clause and the use of the term "destinations" in the second shows that any transportation of the commodity outside Washington qualifies as "[a]n infinite number of destinations between the beginning and the end of a carrier's path." Resp. Br. at 36. This argument illustrates the danger of mechanical application of rules of statutory construction.

When the statute was enacted in 1937, both clauses referred to commodities "forwarded, either in like kind or converted form to interstate or foreign destinations." Laws of 1937, ch. 227, § 12(h). However, the first clause referred to "transit stations," which was apparently used as a

---

"[t]ransportation of cargo by water is impossible or futile unless the thing to be transported is put aboard the ship and taken off at destination."

term of art and was defined by the State Tax Commission in Rule 179, adopted in 1943. The definition of “transit station” in the rule used the phrase “from point of origin to final destination.” Washington State Tax Commission Revenue Act Rule 179 (1945), App. Br. Appendix C-2. In 1949, this definition was incorporated into the statute almost exactly. *See* Laws of 1949, ch. 228, § 11(h). Thus, by using the term “final destination,” the Legislature was only attempting to clarify the term “transit station,” not change the scope of the statute.

**F. Cases Dealing With The Import-Export Clause Are Relevant Because The Deduction Is Concerned With Activities Related To The Shipment Of Goods Into And Out Of The State.**

Olympic argues that Import-Export Clause cases do not apply because the statutory deduction does not address the activity of exporting goods. Resp. Br. at 42. Again Olympic is incorrect. The shipment of goods to foreign destinations is the very definition of exporting. *See Webster’s Third New International Dictionary* at 802 (“export” means “to carry or send (a commodity) to some other country or place” as well as “something that is exported; *specif*: a commodity conveyed from one country or region to another for purposes of trade.”). The deduction applies to commodities “forwarded ... to interstate or foreign destinations.” Former RCW 82.16.050(8). Given the definition of “forward” cited above, the deduction is clearly aimed at the transportation

of commodities that will be exported. *Supra* at 9. Even though the deduction applies only to the intrastate portion of the transportation chain, it is still tied to the activity of sending commodities to another state or country. As such, there is no reason to ignore the Import-Export Clause cases cited by the Department. App. Br. at 21-22.

**G. The Issue In This Case Is Not Identical To The Issue In The Prior Informal Hearing Because It Does Not Turn On The Type Of Bunker Fuel Being Transported.**

Olympic argues that the issues in this case are identical to those in the prior Board decision. Resp. Br. at 45. Olympic claims the Board's prior decision did not distinguish between fuel that could not *legally* be burned and fuel that could legally be burned in the state but was not. *Id.* at 46. That is incorrect. The Board's prior decision relied on the stipulation that heavy bunker fuel could not legally be used in Washington, while the lighter Marine Distillate Oil (MDO) could. The Board's prior decision stated that it "applies only to *bunker fuel of a type* that cannot be used in Washington territorial waters." Board Docket No. 55558 at 7 (emphasis added). Thus, the Board's prior decision drew a line based on the legal characteristics of the *type* of fuel transported, i.e. whether it could legally be burned in Washington.

The Board did not allow the deduction for transportation of types of fuel that can legally be burned in Washington, but were not as a factual

matter. *See* Board Docket No. 55558 at 3, 7. Because the parties stipulated that MDO *could* legally be burned in Washington, the Board did not allow the deduction for Olympic's transportation of MDO. *Id.*

Olympic's maintains that it qualifies for the deduction whenever a ship files a Foreign Fuel Exemption Certificates (FFEC) for the fuel delivered to the ship and has produced FFECs attesting that MDO will not be burned in Washington waters. *See, e.g.*, AR 105. If Olympic were to prevail in this case, deliveries of MDO would qualify for the deduction, even though the Board's prior decision held that shipments of MDO did not qualify for the deduction. This shows the issues in the two hearings were not identical.

By arguing a FFEC is similar to the legal restrictions in the prior case, Olympic confuses the merits of the case with the procedural collateral estoppel issue. Resp. Br. at 46. Collateral estoppel prevents relitigation of the issues *actually litigated* and decided in the prior case, not analogous issues. *See State Farm Mut. Ins. Co. v. Avery*, 114 Wn. App. 299, 304, 57 P.3d 300 (2002). Consequently, the issues must be identical. *Frese v. Snohomish County*, 129 Wn. App. 659, 665, 120 P.3d 89 (2005). This is important because collateral estoppel forecloses a decision on the merits in the current case, even if the prior decision was erroneous. *State Farm*, 114 Wn. App. at 306.

Here, the Board's prior decision only held that transportation of types of fuel that could not legally be burned in Washington qualified for the deduction. The Board did not address whether the deduction applies any time the fuel is burned outside of Washington. Accordingly, the issue in this case was not actually litigated in the prior Board hearing and, therefore, collateral estoppel does not apply.

**H. Collateral Estoppel Does Not Apply Because The Department Did Not Have The Opportunity Seek Review And Correct The Board's Prior Erroneous Interpretation.**

In *State Farm*, 114 Wn. App. at 309, the court cited the Restatement (Second) of Judgments § 28(1) for the rule that collateral estoppel does not apply if the losing party is statutorily denied the right to appeal. In an attempt to distinguish the holding in *State Farm*, Olympic claims the Department waived its right to appeal when it failed to convert the prior informal hearing to a formal hearing. Resp. Br. at 49. This argument misses the point of the holding in *State Farm* and the exception to collateral estoppel in Restatement (Second) of Judgments § 28(1). Collateral estoppel does not apply because the Department did not have an opportunity to seek a correction of the Board's prior ruling.

Under the Restatement, collateral estoppel does not apply when:

The party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action.

Restatement (Second) of Judgments § 28(1) (1982). The inability to obtain review of the judgment is the critical issue: “the availability of review for the correction of errors has become critical to the application of preclusion doctrine.” Restatement (Second) of Judgments § 28 cmt. a. The availability of review is critical because collateral estoppel applies regardless of whether the prior decision was correct. *State Farm*, 114 Wn. App. at 306. It is one thing to bind a party to an erroneous ruling where it had the opportunity to correct the error and it chose not to, but as articulated in the Restatement and *State Farm*, it would be unjust to bind a party to an erroneous decision it had no ability to correct.

Olympic claims the Department had a right to appeal the prior ruling because it had the ability to convert an informal hearing to a formal hearing. Resp. Br. at 49. This argument is incorrect. The opportunity to choose a different litigation path before a judgment is entered is not the equivalent of the right to obtain review and correct an erroneous judgment. In *State Farm*, the court found that collateral estoppel did not apply even though State Farm could have invoked RCW 12.40.027 in the prior case, which prevents small claims court judgments from having preclusive effect. *State Farm*, 114 Wn. App. at 309. This procedure is similar to the opportunity to convert an informal hearing into a formal one. Thus, *State*

*Farm* shows that the ability to choose a different litigation path is not equivalent to the right to appeal.

As explained in the Department's opening brief, applying collateral estoppel to an informal Board decision would contradict the judicial economy considerations of collateral estoppel since the Department would be forced to convert every appeal to preserve its ability to correct erroneous decisions by the Board. App. Br. at 31. It is important to understand that taxpayers initially decide whether a Board hearing is formal or informal. Contrary to Olympic's argument, the Board's decision in an informal hearing is binding on the Department for the tax periods involved in that decision even though the Department has no right to appeal the decision. Resp. Br. at 49; RCW 82.03.130, .180. If a taxpayer wishes to obtain a decision that binds the Department for future tax periods, then the taxpayer must select a formal hearing that allows the Department an opportunity to correct an erroneous decision. Because taxpayers have the irrevocable right to choose a formal hearing, they are not "compelled to litigate the same issue every year." Resp. Br. at 49.

Olympic also attempts to conflate the Department's statutory authority to issue nonacquiescence statements with the judicial doctrine of collateral estoppel. Resp. Br. at 49. Olympic's argument based on the Department's nonacquiescence statement is both inaccurate and irrelevant

to the collateral estoppel issue. Nonacquiescence statements are merely interpretive statements, issued under RCW 34.05.230, stating that the Department does not agree with the Board's decision and will not follow it in subsequent audits.<sup>13</sup> Collateral estoppel does not apply to an informal Board decision, regardless of whether the decision is the subject of a nonacquiescence statement, because the Department cannot appeal the decision. Therefore, the issuance of a nonacquiescence statement is irrelevant to the application of collateral estoppel.<sup>14</sup>

### III. CONCLUSION

This court should affirm the decision of the Board of Tax Appeals.

RESPECTFULLY SUBMITTED this 26<sup>th</sup> day of January, 2011.

ROBERT MCKENNA  
Attorney General

  
BRET DURBIN  
Assistant Attorney General  
WSBA #35781

---

<sup>13</sup> Olympic incorrectly argues that the Department is without authority to issue these statements. Resp. Br at 49. RCW 34.05.230 encourages agencies to "advise the public of its current opinions, approaches, and likely courses of action by means of interpretive or policy statements." Because the Department is merely advising taxpayers of its opinion and likely course of action, there is ample authority to issue the statements. Further, Excise Tax Advisory 3055.2009, which contains the nonacquiescence statements, clearly states that it is an interpretive statement authorized by RCW 34.05.230.

<sup>14</sup> To the extent Olympic maintains that an informal Board decision deprives the Department of the authority to issue assessments against the same taxpayer, this is flatly contradicted by RCW 82.32.150 restraining order or injunctions restraining or enjoining the collection of any tax.