NO. 1012322

SUPREME COURT OF THE STATE OF WASHINGTON

ECHO GLOBAL LOGISTICS, INC.,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Respondent.

ANSWER TO PETITION FOR REVIEW

ROBERT W. FERGUSON
Attorney General

Charles Zalesky, WSBA 37777
Jessica Fogel, WSBA 36846
Assistant Attorneys General
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5515
OID No. 91027

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I. INTRODUCTION

This case arose after the Department of Revenue discovered in an audit that Echo Global Logistics (Echo) had been claiming a preferential business and occupation (B&O) tax rate as an international freight broker even though Echo operates domestically, not internationally. Only after the Department reclassified Echo's business under the correct B&O tax rate did Echo claim it should not pay the B&O tax at all. Echo claimed instead that it should be classified as a public utility subject to the state's public utility tax (PUT), which applies to certain utility and transportation businesses in lieu of the B&O tax.

Echo's entire case hinges on its claim that it qualifies as a "motor transportation business," which is a term defined in the PUT code. RCW 82.16.010(6). Under the plain language of the statutory definition, the person seeking to qualify as a motor transportation business must be "operating" motor propelled vehicles for hire. The Court of Appeals applied basic rules of

statutory construction when it concluded that freight brokers like Echo, who coordinate and manage the movement of goods by hiring third-party carriers, are not "operating" motor propelled vehicles. *Echo Global Logistics, Inc. v. Dep't of Revenue*, _ Wn. App. 2d _, 514 P.3d 704, 707-08 (2022). Therefore, Echo and other freight brokers are not "motor transportation businesses" subject to the PUT. Instead, Echo is a service provider subject to B&O tax on its in-state business activity, as the Court of Appeals correctly concluded. *Id*.

Moreover, Echo identifies no actual conflict with this Court's (or any other court's) precedent, and presents no issue of substantial public importance. Importantly, as demonstrated below, Echo's arguments about future detrimental impact on motor transportation businesses and distortions in the market are unsupported by evidence and rely on a warped reading of the Court of Appeals decision. That decision does nothing more than require Echo to pay its lawfully owed taxes. It does not impact those businesses that meet the statutory definition of a

motor transportation business. This Court should reject Echo's unsubstantiated claim of a widespread transformation of the state's tax laws and should deny its petition for review.

II. COUNTERSTATEMENT OF THE ISSUE

Are freight brokers like Echo excluded from the PUT definition of a "motor transportation business" in RCW 82.16.010(6) when they do not operate motor propelled vehicles as part of their business activity?

III. COUNTERSTATEMENT OF THE CASE

A. Echo Arranges Transportation of its Customers' Property

Echo is a well-known freight broker that provides "technology-enabled transportation and supply chain management solutions." AR 177. As a freight broker, Echo procures transportation and provides logistics services for customers throughout the country. *Id*. Some of Echo's customers are located in Washington.

Echo itself does not actually transport anything. AR 200, 297. Rather, Echo contracts with third-party carriers that

transport property "under [their] own operating authority." AR 198, ¶¶ 1.A, 1.B. Echo's responsibility under its agreements with carriers is "limited to arranging for, but not actually performing, transportation of a shipper's freight." AR 200, ¶ 2.G. And it is the carrier, not Echo, that "become[s] fully responsible/liable for the freight when it takes/receives possession thereof," and retains that responsibility "until delivery of the shipment." *Id*., ¶ 3.B. Echo earns its revenue from arranging for transportation and providing other logistics services. AR 178.

B. The Department Assessed Echo for Underpaid B&O Tax, and the Board of Tax Appeals and Reviewing Courts All Affirmed

The Department audited Echo for the period of January 2010 through June 2014. AR 212. For that entire period, Echo reported and paid B&O tax—not PUT tax—under a preferential tax rate that applies to "international" freight brokers. AR 205-09; *see generally* RCW 82.04.260(6) (establishing a preferential

B&O tax classification for various "international" transportation agents and brokers).

In its audit, the Department concluded that Echo—which operates domestically—did not qualify for the preferential tax rate it had claimed, AR 212, and reclassified Echo's business activity as domestic freight brokering subject to the "service and other" classification of the B&O tax. AR 213; *see generally* former RCW 82.04.290(2) (2014) (the catchall B&O tax classification that applies to business activity not otherwise "taxed explicitly under another section in this chapter"). Based on that change in classification and other audit findings not at issue, the Department issued an assessment of additional B&O tax, plus penalties and interest, in the amount of $1,201,941. AR 211.

Echo sought administrative review of the assessment within the Department, arguing its business activity should be reclassified as either "motor transportation business" or "public

service business" subject to the PUT. AR 223. The Department rejected both claims. AR 232-40.[1]

Echo appealed to the Board of Tax Appeals, seeking de novo review. AR 296. On cross motions for summary judgment, the Board granted the Department's motion and denied Echo's motion, concluding that Echo did not meet the plain terms of the PUT classifications it was claiming. AR 32-33.

The Superior Court affirmed the Board's decision on review under the Administrative Procedure Act. CP 189. The Court of Appeals also affirmed, concluding Echo met neither the "motor transportation business" definition nor the "public service business" definition. *Echo Global*, 514 P.3d at 710. Echo now seeks this Court's review on only the issue of whether its business falls within the "motor transportation business" classification of the PUT. Pet. Rev. at 4-5.

[1] Echo dropped its claim that it is a "public service business" in its petition for review.

IV. REASONS WHY THE COURT SHOULD DENY REVIEW

Echo fails to satisfy the RAP 13.4(b) review criteria. Echo points to no case with which the Court of Appeals' decision actually conflicts. Nor does the application of statutory language to Echo's business activity raise a substantial public policy issue warranting this Court's review.

A. The Decision Below Does Not Conflict with Any Decision of This Court or the Court of Appeals

Rather than identifying a conflict with any specific case, Echo argues that the Court of Appeals' decision conflicts with rules of statutory construction, the context of the PUT scheme, and nonbinding administrative guidance. Pet. Rev. at 8-15. But even if these alleged conflicts existed (they do not), they are not the type of reviewable conflict contemplated by RAP 13.4(b)(1).

Courts have long recognized that rules of interpretation and construction "are not rules of positive law, unless expressly provided by statute." Henry Campbell Black, *Handbook on the*

Construction and Interpretation of the Laws § 3, at 9 (2d ed. 1911). Rather, "they are rules in aid of construing legislation and an aid in the process of determining legislative intent." *Johnson v. Cont'l West, Inc.*, 99 Wn.2d 555, 559, 663 P.2d 482 (1983). They are "tools of argument." Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to Be Construed*, 3 Vand. L. Rev. 395, 401 (1950). Thus, even if Echo were correct that the Court below erred in applying canons of construction, or misconstrued statutory language, that would not establish a "conflict" necessitating review by this Court. And, in any event, Echo is wrong about any alleged conflict.

1. The Court of Appeals' decision faithfully applies the rules of statutory construction

The decision by the Court of Appeals comports with the rules of statutory interpretation. In upholding the Board's grant of summary judgment to the Department, the Court of Appeals correctly stated and applied the principles of statutory interpretation followed by Washington courts. *Echo Global*,

514 P.3d at 707. Specifically, the Court explained that when construing statutes to ascertain the Legislature's intent, courts apply the plain meaning, considering the relevant statutory text, its context, and the statutory scheme, and may resort to dictionaries to determine the meaning of an undefined term. *Id*.

Because Echo's legal theory hinged on whether it was "operating any motor propelled vehicle by which persons or property of others are conveyed for hire," and because the term "operate" is not defined in the PUT statutes, the Court of Appeals analyzed several possible dictionary definitions of "operate" within the context of the statutory language. The Court agreed with the Department that the statute uses "operating" as a transitive verb, which is a verb that acts on something and whose meaning must be determined in relation to its direct object. *Echo Global*, 514 P.3d at 707. Within the context of the statute, a "motor propelled vehicle" is the direct object of "operating," like "operating a car" or "operating a forklift." Therefore, under basic rules of grammar, the proper

meaning of "operating" must be determined in relation to a motor propelled vehicle, which is the thing (direct object) being operated. *Id*.

The Court noted that Echo's first proposed definition of operate—which was to "produce as effect"—would alter the grammatical structure of the sentence by changing the direct object from a "motor propelled vehicle" to "transportation." *Id*. The Court logically rejected Echo's grammatically incorrect dictionary definition.

The Court also reasoned that Echo's two alternative definitions of operate—"to perform a work or labor" and "to exert power or influence"—did not support Echo's proposed construction of a motor transportation business. *Id*. This was so because both definitions suggested a "direct connection" between the performance or exertion of work, labor, or power and the consequential result on the motor propelled vehicle. *Id*. The Court concluded Echo's business activity of facilitating transportation by hiring third-party carriers was "too attenuated

from the physical movement of a motor propelled vehicle to reasonably fall within even its own proposed grammatically appropriate dictionary definition of 'operate.'" *Id*.

Without adopting a specific definition, the Court concluded that because Echo merely arranges for transportation by a third party, "[u]nder the plain language of the statute, Echo is not a motor transportation business and the Board did not err in so holding." *Id*. at 707-08. In short, the Court of Appeals applied the statute's plain language, taking into account its grammatical structure, to Echo's business activities. Its analysis is supported by generally recognized rules of construction and does not conflict with any decision from this Court or the Court of Appeals. Thus, review under RAP 13.4(b)(1) is not warranted.

2. The Court of Appeals' decision is consistent with *First Student*

The only case Echo cites in support of a proposed conflict is *First Student v. Department of Revenue*, 194 Wn.2d 707, 451 P.3d 1094 (2019). Pet. Rev. at 10. There is no conflict.

Echo initially cites *First Student* for the unremarkable point that courts derive legislative intent from the plain language of the statute, considering the text, the context, related provisions, amendments and the statutory scheme. *Id*. The Court of Appeals identified and applied these same interpretive principles. *Echo Global*, 514 P.3d at 707. Thus, the Court of Appeals' decision is entirely consistent with this Court's *First Student* decision with respect to statutory interpretation principles.

Echo also cites *First Student* in support of its argument that the Court of Appeals' decision conflicts with the Department's interpretation of the PUT. Pet. Rev. at 14-15. In *First Student*, this Court resolved an ambiguity with respect to the activity of operating school buses by applying the Department's longstanding interpretation, reflected in WAC 458-20-180, that the activity is subject to B&O tax, not the PUT. 194 Wn.2d at 718-19. Echo contends that the Court of Appeals should have looked to a Department interpretive

statement pertaining to the tax treatment of freight brokers and freight forwarders as guidance in interpreting the meaning of a "motor transportation business." However, even if the relevant PUT statute was ambiguous (as was the circumstance in *First Student*), the Court of Appeals' decision below is consistent with the Department's interpretive statement, as discussed below. Thus, there is no conflict with *First Student* on this point either.

3. The Court of Appeals' decision is consistent with the Department's guidance

In an effort to find a "conflict," Echo points to Department guidance pertaining to the tax imposed on freight forwarders. Pet. Rev. at 12-15. The argument fails on two levels.

First, a conflict with an *agency* interpretation would not form the basis for this Court's review under RAP 13.4(b)(1). If the Department's guidance conflicts with the Court of Appeals holding below, the Court of Appeals interpretation controls. What Echo calls a "conflict" is nothing more than an effort to

find a new forum to re-argue its claim that it is a motor transportation business subject to the PUT.

Second, there is no conflict. According to Echo, the decision below limits the PUT's "motor transportation business" classification to taxpayers that directly and personally operate motor vehicles. *See* Pet. Rev. at 10. Echo claims this conclusion conflicts with Department guidance applying that classification to taxpayers who "provide transportation services to customers through contracts with third-party motor carriers." *Id.* at 12.

Contrary to Echo's claim, however, the Court of Appeals did not select the definition of "operate" that required "direct personal effort." Pet. Rev. at 10. The Court did not select any specific definition. Instead, it simply reasoned that in light of the statutory language and its grammatical structure, Echo's business activity was "too attenuated from the physical movement" of a motor vehicle to come within even Echo's proposed definitions. *Echo Global*, 514 P.3d at 707. Nowhere

did the Court hold that a taxpayer must directly and physically control the vehicle.

Moreover, the Court's conclusion that Echo's business activities were too attenuated to constitute "operating" a motor propelled vehicle is consistent with the Department's published guidance. Specifically, in Department Excise Tax Advisory (ETA) 3149, an interpretative statement authorized by RCW 34.05.230(1), the Department advised the public that freight brokers like Echo "are taxable under the service and other activities B&O tax classification." AR 86. This is because a freight broker "neither physically transports its customer's property nor is contractually liable for the transportation of its customer's property." *Id*. The ETA explained that a taxpayer has "contractual liability" when it is "contractually (but not necessarily physically) responsible for transporting the property using motor vehicles, *and is liable for any damages or loss in the transportation of that property*." *Id*. (emphasis added).

Here, Echo does not physically transport its customer's property, nor is it liable for any damages or loss in the transportation of the property. AR 200. The third-party carrier Echo hires take on these responsibilities. *Id*. Thus, under the Department's ETA, Echo would be taxed under the B&O tax code, not the PUT. This conclusion is entirely consistent with the Court of Appeals' decision below and with a fair reading of the PUT definition of a "motor transportation business." In short, even if RAP 13.4(b)(1) were expanded to include a conflict with an administrative agency's interpretation of the law, there is no conflict here.

4. The Court of Appeals' decision is consistent with the statutory context

Echo next argues that the Court of Appeals erred by failing to consider the context of the PUT scheme as a whole, and in particular the PUT deduction for "services furnished jointly." Pet. Rev. at 10; *see also* RCW 82.16.050(3) (deduction for "[a]mounts actually paid . . . for services furnished jointly") (discussed in more detail below). The Court of Appeals did not

err. Rather, Echo's argument rests on an incorrect assumption that it could reduce the taxes it owes by deducting amounts it pays to those motor carriers it hires to transport its customers' property. But the deduction Echo hopes to utilize would almost certainly not apply, as explained below.

By way of background, the deduction Echo seeks is available only to taxpayers reporting under the PUT. Those taxpayers are generally not permitted to deduct their costs of doing business, as the PUT is a "gross receipts" tax not a net income tax. However, the Legislature does permit a limited deduction for costs paid to another PUT-taxable business for "services furnished jointly." RCW 82.16.050(3). Specifically, the deduction authorizes utilities and transportation businesses subject to the PUT to deduct "[a]mounts actually paid . . . to another person taxable under [the PUT] as the latter's portion of the consideration due for services furnished jointly by both, if the total amount has been credited to and appears in the gross income reported for tax by the [taxpayer]." *Id*.

Like most tax deductions, the deduction for services furnished jointly is narrowly construed. Thus, for example, in *Puget Sound Energy v. Department of Revenue*, 158 Wn. App. 616, 248 P.3d 1043 (2010), *rev. denied,* 171 Wn.2d 1010 (2011), the Court of Appeals held that a business providing natural gas service to its retail customers could not claim the deduction in RCW 82.16.050(3) with respect to amounts it paid to a natural gas transportation business because the two businesses were providing different services, not a "jointly furnished" service. *Id*. at 622.

The primary example where the deduction would apply is when a customer hires a motor carrier to haul goods from point "A" to point "B" and the motor carrier then hires a subcontractor to perform a portion of the haul. *See* WAC 458-20-179(202)(f) (Example 1). In that scenario, two motor carriers are performing the same service for the customer—the transportation of goods. The prime contractor receives full payment from the customer, and is permitted to deduct the

amount it then pays to the subcontractor for the subcontractor's portion of the "jointly furnished" transportation service. *Id*.

The relationship between freight brokers and motor carriers is more like that between the service providers described in *Puget Sound Energy* than the example of two motor carriers in WAC 458-20-179(202)(f). Freight brokers arrange transportation by third-party carriers, which is a different service from the actual transportation. A useful (but perhaps outdated) comparison would be a travel agent and an airline. Arranging and coordinating travel (of people or goods) is not the same as performing the actual transportation. Because brokers and carriers perform different services, Echo's presumption that it would be permitted to deduct amounts it pays to motor carriers if the PUT applied to its business activity likely fails under established law.

Neither the Board of Tax Appeals nor the Court of Appeals reached the issue because they each concluded that Echo's business activity was subject to B&O tax, which does

not allow a deduction for "services furnished jointly." Echo's speculation that it might meet the requirements of the deduction—which is almost certainly incorrect—does not warrant this Court's review.

B. The Court of Appeals' Decision Raises No Issue of Substantial Public Importance

The Court should also reject Echo's claim that this case presents an issue of substantial public importance. The claim rests on Echo's erroneous contention that the Court of Appeals' construction of a motor transportation business "requires direct personal effort to cause a vehicle to function." Pet. Rev. at 16. Based on this claim, Echo argues the Court should accept review because the decision allegedly impacts "other motor carriers and freight forwarders" who report and pay PUT "when they contract with third-party carriers to transport their customers' property." *Id*.

Echo mischaracterizes the Court of Appeals' decision. As discussed above, the Court of Appeals did not adopt a specific definition of "operating." Instead it considered several

definitions and determined that under any of them, Echo's business activities were too attenuated from the operation of motor propelled vehicles to fairly meet the relevant statutory definition. *Echo Global*, 514 P.3d at 707. Nothing in the Court's application of the undisputed facts or its construction of the PUT statutes is of broad public importance. It is important only to Echo.

Echo also misrepresents the "impact" of the Court of Appeals' decision on others. Echo claims the decision will mean that freight forwarders and other carriers who contract with others for transportation will no longer be subject to the PUT. Pet. Rev. at 16. And Echo claims that the decision effectively eliminates the "services furnished jointly" deduction. *Id*. at 17. Finally, Echo claims that transportation costs will "significantly increase" and that the marketplace will be distorted in favor of large motor carriers. *Id*. None of these claims are true.

First, the Court of Appeals' decision has no bearing on the classification of other transportation businesses. It simply concludes that freight brokers perform activities too attenuated from the physical movement of a motor propelled vehicle to meet any grammatically correct meaning of "operate." The decision did not address the business activities performed by freight forwarders, who either physically transport property or take on the legal liability for transporting property. Nothing in the decision precludes freight forwarders or other motor carriers from continuing to report and pay taxes under the PUT.

Second, contrary to Echo's contention, the decision does not "effectively eliminate" the services furnished jointly deduction. Pet. Rev. at 17. The decision neither addresses that deduction nor precludes future application of that deduction for motor transportation businesses that qualify for it. Freight brokers like Echo, which are not subject to the PUT and therefore not entitled to claim that deduction (and unlikely to meet the statutory requirements regardless), will continue

paying B&O tax. And businesses that are subject to the PUT and meet the statutory requirements for that deduction will continue to claim it. The Court of Appeals' decision does not change this status quo.

Third, Echo's speculation about increased transportation costs, which it tries to support with a hypothetical at pages 18-19 of the petition, is wrong on many levels. Echo incorrectly assumes that under the Court of Appeals' decision no carrier can ever contract with another carrier and still claim the "services furnished jointly" deduction. That is not true, because if two carriers have contracted to transport goods on different segments of a haul, they would be entitled to claim the deduction. Again, there is no change to the status quo.

Moreover, Echo's hypothetical wrongly assumes that prior to the Court of Appeals' decision, the deduction was available to taxpayers providing different services, like brokers and carriers. But under existing case law, taxpayers who perform different services are not eligible for that deduction.

Puget Sound Energy, 158 Wn. App. at 622. Therefore, the Court of Appeals' decision changes nothing with respect to the "services furnished jointly" deduction.

In summary, the decision below maintains the status quo with respect to freight brokers. They have been and will continue to be taxed as a service business under the B&O tax. Moreover, the decision did not address the business activities of freight forwarders or other types of motor transportation businesses, who perform materially different services. And nothing in this case warrants discretionary review of the PUT tax deduction for services furnished jointly as applied to hypothetical businesses. Echo's contention of a vastly changed tax landscape is simply not true, and Echo points to no issue of substantial public importance that is actually raised by this case. For this reason, its petition should be denied.

V. CONCLUSION

The Department respectfully requests that this Court deny review.

This document contains 3,802 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 30th day of September, 2022.

ROBERT W. FERGUSON
Attorney General

CHARLES ZALESKY, WSBA 37777
JESSICA FOGEL, WSBA 36846
Assistant Attorneys General
Attorneys for Respondent Department of Revenue, OID No. 91027

PROOF OF SERVICE

I certify that on September 30, 2022, through my legal assistant, I electronically filed and served this document with the Clerk of the Court using the Washington State Appellate Courts' e-file portal and served a copy of this document via electronic mail, pursuant to agreement, on:

Robert Mahon
Perkins Coie LLP 1201
Third Avenue, Suite 4900
Seattle, WA 98101-3099
RMahon@perkinscoie.com

Renee Rothauge
Perkins Coie LLP
1120 Couch Street, 10th Floor
Portland, OR 97209-4128
RRothauge@perkinscoie.com

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

DATED this 30th day of September, 2022, at Olympia, WA.

s/Charles Zalesky
Charles Zalesky, Assistant Attorney General

ATTORNEY GENERAL'S OFFICE - REVENUE & FINANCE DIVISION

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Sender Name: Kyleen Inman - Email: kyleeni@atg.wa.gov
Filing on Behalf of: Charles E Zalesky - Email: Chuck.Zalesky@atg.wa.gov (Alternate Email: revolyef@atg.wa.gov)

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