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Supreme Court No. 96694-0

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

FIRST STUDENT, INC.,

Appellant/Petitioner,

v.

STATE OF WASHINGTON
DEPARTMENT OF REVENUE,

Respondent.

**CORRECTED MEMORANDUM OF AMICUS CURIAE
DURHAM SCHOOL SERVICES LP**

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TABLE OF CONTENTS

	<u>Page</u>
I. IDENTITY AND INTEREST OF AMICUS CURIAE.....	1
II. ISSUES OF CONCERN TO AMICUS CURIAE	1
III. ARGUMENT	2
A. Deference To An Agency’s Interpretation Of A Statute Is Only Appropriate Where The Agency Uses Specialized Knowledge To Establish A Persuasive And Consistently Applied Administrative Policy.	2
1. The Department’s arguments in this case are not based on an established agency policy involving the interpretation of “for hire.”	5
2. The Department’s interpretation of “for hire” is not based on any “special knowledge.”	7
3. The interpretation of “for hire” advanced by the Department is not a sound or persuasive interpretation of the statute because it contradicts the Department’s prior administration of the PUT.....	8
B. Motor Carriers Are Taxable Under The Urban Transportation Classification As Long As They Provide Services To A Subset Of The Public.....	11
IV. CONCLUSION.....	15

TABLE OF AUTHORITIES

	<u>Page</u>
Cases	
<i>Association of Washington Business v. Dep't of Revenue</i> , 155 Wn.2d 430, 120 P.3d 430 (2005).....	3
<i>Bostain v. Food Exp., Inc.</i> , 159 Wn.2d 700, 153 P.3d 846 (2007).....	2
<i>Cockle v. Dep't of Labor & Indus.</i> , 142 Wn.2d 801, 16 P.3d 583 (2001).....	3, 4, 5
<i>Courtney v. Washington Utilities & Transp. Comm'n</i> , 3 Wn. App. 2d 167, 414 P.3d 598 (2018), <i>review</i> <i>denied</i> , 191 Wn.2d 1002, 422 P.3d 911 (2018)	11, 12
<i>Cowiche Canyon Conservancy v. Bosley</i> , 118 Wn.2d 801, 828 P.2d 549 (1992).....	5, 6, 7
<i>Cushing v. White</i> , 101 Wash. 172, 172 P. 229 (1918).....	13, 14
<i>First Student v. Dep't of Revenue</i> , 4 Wn. App. 2d 857, 862, 423 P.3d 921 (2018).....	2
<i>In re Jerome S.</i> , 968 N.E.2d 769 (Ill. App. Ct. 2012)	11
<i>Othello Cmty. Hosp. v. Employment Sec. Dep't</i> , 52 Wn. App. 592, 762 P.2d 1149 (1988).....	<i>passim</i>
<i>Surface Transportation Corp. of New York v. Reservoir Bus</i> <i>Lines, Inc.</i> , 271 A.D. 556, 67 N.Y.S.2d 135 (1946)	10
<i>Terminal Taxicab Co. v. Kutz</i> , 241 U.S. 252, 36 S.Ct. 583	11, 12, 14

Statutes

RCW 82.16.010(6).....2
RCW 82.16.010(6) and (12)5
RCW 82.16.010(12).....1, 12

Other Authorities

Black’s Law Dictionary7

Appendixes

Appendix A – Det. No. 91-164, 11 WTD 337 (1991)8, 14
Appendix B – Det. No. 90-385, 10 WTD 332 (1990)9, 14

I. IDENTITY AND INTEREST OF AMICUS CURIAE

Durham School Services LP (“Durham”) is a transportation company that provides transportation services for school districts, as well as charter services for other types of organizations. Durham currently operates more than 16,000 school buses, serving more than 400 school districts in 31 states across the country. Durham is also a division of National Express Group, which operates transit, paratransit, and shuttle bus services across the USA.

The Court’s decision in this case would directly affect Durham as it has filed refund lawsuit against the Department of Revenue on the same issue and the refund lawsuit is currently stayed pending the outcome of First Student’s case.

II. ISSUES OF CONCERN TO AMICUS CURIAE

This memorandum seeks to address:

1. Whether an agency’s interpretation of a statute advanced for the first time in litigation is entitled to deference, when the interpretation is inconsistent with the agency’s prior administration of the statute.
2. Whether motor carriers providing transportation services under contracts with multiple organizations can fall the “urban transportation business” classification in RCW 82.16.010(12).

III. ARGUMENT

A. Deference To An Agency’s Interpretation Of A Statute Is Only Appropriate Where The Agency Uses Specialized Knowledge To Establish A Persuasive And Consistently Applied Administrative Policy.

The current case is a review of a summary judgement order issued in a tax refund lawsuit. The superior court found as a matter of law that First Student’s home-to-school transportation services did not fall within the scope of the public utility tax (“PUT”) as either motor or urban transportation business under RCW 82.16.010(6) or (12). *First Student v. Dep’t of Revenue*, 4 Wn. App. 2d 857, 862, 423 P.3d 921 (2018). In affirming the superior court’s grant of summary judgment, the Court of Appeals found that the statutory language was ambiguous and deferred to the interpretation advanced by the Department. *Id.* at 870-71. In granting deference to the Department in this case, the Court of Appeals ignored the unique circumstances that make deference in this case inappropriate.

This Court has the ultimate authority to interpret a statute, and deference is accorded an agency’s interpretation only if “(1) the particular agency is charged with the administration and enforcement of the statute, (2) the statute is ambiguous, and (3) the statute falls within the agency’s special expertise.” *Bostain v. Food Exp., Inc.*, 159 Wn.2d 700, 716, 153 P.3d 846 (2007). The basis for these limitations on deference to an agency’s

interpretation is explained, in *Othello Cmty. Hosp. v. Employment Sec. Dep't*, 52 Wn. App. 592, 762 P.2d 1149 (1988).

The rationale behind the deference principle is that substantial consideration should be given to the special knowledge of administrative agencies [], and we do not see here any special knowledge to which we should defer. The weight given an administrative policy depends upon the thoroughness evidenced in its consideration, the validity of its reasoning, and all those factors that give it power to persuade, if lacking power to control. []. Deference is appropriate only when the agency's action has a sound basis.

Othello, 52 Wn. App. at 596 (internal citations omitted).

This explanation is consistent with the Court's decision in *Association of Washington Business v. Dep't of Revenue*, 155 Wn.2d 430, 447, 120 P.3d 430 (2005). In that case, the Court stated that interpretive rules, such as the administrative rule at issue in this case, are only entitled to deference to the extent they provide a persuasive explanation of the statute. *Ass'n of Wash. Bus.*, 155 Wn.2d at 447 (interpretive rules "are not binding on the courts and are afforded no deference other than the power of persuasion").

The deference discussion in *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 16 P.3d 583 (2001), provides a useful reminder of the role that agency interpretations play in determining the meaning of statutes.

While we may "defer to an agency's interpretation when that will help the court achieve a proper understanding of the statute," ..., such interpretation is not binding on us. ...

“[B]oth history and uncontradicted authority make clear that it is emphatically the province and duty of the judicial branch to say what the law is[]” and to “determine the purpose and meaning of statutes....”

Cockle, 142 Wn.2d at 812 (internal citations omitted).

These cases make it clear that an agency’s interpretation is a factor to be considered in determining the meaning of a statute, but that it does not control the court’s analysis of the statutory language.

As with any factor considered in interpreting the meaning of a statute, the appropriate weight varies depending on the circumstances of the case. Because an agency’s interpretation is given weight due to the agency’s “special knowledge,” the appropriate weight given to the interpretation must start with an analysis of whether the agency’s interpretation is based on specialized knowledge. As noted in *Othello*, where the agency has not employed any specialized knowledge in its interpretation, deference is not appropriate. *Othello*, 52 Wn. App. at 596. If some specialized knowledge is employed by the agency, the court must also examine the thoroughness with which the agency employed the specialized knowledge in arriving at its interpretation. *Id.* Finally, the court must determine if the manner in which the agency employed its specialized knowledge results in a sound and persuasive interpretation of the statute. *Id.*

If an analysis of these factors is not performed, then the court improperly delegates the analysis of the statute to the agency and has not met its duty to “determine the purpose and meaning” of the statute itself. *See Cockle*, 142 Wn.2d at 812. In this case, the Department’s interpretation of the term “for hire” should be granted little, if any, weight even if the term “for hire” in RCW 82.16.010(6) and (12) is ambiguous.¹

1. The Department’s arguments in this case are not based on an established agency policy involving the interpretation of “for hire.”

As the court in *Othello* noted, “[t]he weight given an administrative policy depends upon the thoroughness evidenced in its consideration.” 52 Wn. App. at 596. In this case, the Department has not pointed to any interpretive statements or agency policies supporting its interpretation of the term “for hire.” In fact, if anything, the Department’s prior administration contradicts the interpretation of “for hire” it advances in this case. Thus, there is no “administrative policy” involving the interpretation of “for hire” to which the Court should defer.

The decision in *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 828 P.2d 549 (1992) makes it clear that the courts only defer to clearly established agency policies.

¹ Durham agrees with First Student’s arguments that deference is not appropriate because the term “for hire” is not ambiguous. Supplemental Brief of First Student, Inc. at 14-15.

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. It need not be by formal adoption equivalent to an agency rule, but it must represent a policy decision by the person or persons responsible. Nothing here establishes such an agency policy, and nothing shows any uniformly applied interpretation. The evidence establishes that the application and “interpretation” here was nothing more than an isolated action by the Department. Therefore, even if we were to assume for the sake of argument that the statute was ambiguous, and thus the *Hama Hama* analysis applicable, 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.

118 Wn.2d at 815(italics in original).

It is clear in this case that the Department’s interpretation of “for hire” is a legal argument advanced to support its action in this case, and not the result of a long-standing or uniformly applied policy position.

As pointed out in First Student’s Opening Brief, the first time the Department advanced its interpretation of “for hire” was in response to First Student’s motion for summary judgment. Brief of Appellant at 5-6. There is no indication that the Department adopted or applied this interpretation as a matter of agency policy. The Department has not pointed to any interpretive rule, excise tax advisory, published determination, industry guide, or policy manual stating that vehicles are operated “for hire” only when the passengers themselves pay. As such, the Department has not met

its burden “to show that it has adopted and applied such interpretation as a matter of agency policy.”² Therefore, the Department’s interpretation of “for hire” in this case is not an administrative policy entitled to deference.

2. The Department’s interpretation of “for hire” is not based on any “special knowledge.”

As noted above, the first time the Department’s interpretation of “for hire” in this case was articulated was in its response to First Student’s motion for summary judgment. Despite explicit arguments that the school bus exclusion in Rule 180 was contrary to the statute, the Department did not provide any explanation for how the school bus exclusion was consistent with the statute during the years-long administrative process. CP 22. Rather, the Department stated that it was going to stick by its rules. *Id.* Accordingly, there is no evidence that the Department used any specialized knowledge when interpreting the term “for hire” in this case.

Rather, the interpretation of “for hire” advanced by the Department is based on the definition of “for hire” in the 1955 version of *Black’s Law Dictionary*. Department of Revenue’s Supplemental Brief (“DOR Supp. Br.”) at 12-13. This is the type of information that all parties and the courts

² See *Cowiche Canyon Conservancy*, 118 Wn.2d at 815 (“[i]f 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*”)(emphasis added).

rely on in when interpreting statutes. Thus, the Department’s interpretation in this case does not involve “any special knowledge to which [the Court] should defer.” *See Othello*, 52 Wn. App. at 596.

3. The interpretation of “for hire” advanced by the Department is not a sound or persuasive interpretation of the statute because it contradicts the Department’s prior administration of the PUT.

In addition to the factors discussed above, the Department’s interpretation of “for hire” in this case does not appear to be the result of a carefully considered policy position to be applied to all types of motor transportation companies.

In addition to the inconsistencies discussed in First Student’s Court of Appeals and Supplemental Brief, the interpretation of “for hire” advanced by the Department is inconsistent with its historic administration of the PUT in numerous contexts. See Supplemental Brief of First Student at 19; Reply Brief of Appellant at 17-19.

First, the Department has historically taxed amounts received by transportation providers operating under contracts from state and local agencies under the motor and urban PUT classifications. In a published determination, the Department held that a taxpayer providing “cabulance”³

³ Cabulances “are vans equipped with wheel chair lifts for the physically challenged.” Det. No. 91-164, 11 WTD 337 (1991).

services under contracts with state and local agencies were taxable under the urban transportation PUT classification and not subject to service B&O. *See* Det. No. 91-164, 11 WTD 337 (1991), Appendix A.

Second, in Det. No. 90-385, 10 WTD 332 (1990), the Department held that a taxpayer contracting with “local government agencies to provide transportation service to segments of the community” was subject to PUT under the urban transportation classification. Det. No. 90-385, 10 WTD 332 (1990), Appendix B. This situation is directly analogous to the services at issue, as both First Student and Durham are contracting with “local government agencies to provide transportation service to segments of the community.” *Id.*

Third, the Department taxed First Student’s charter operations under the motor and urban transportation classifications, even though the passengers did not pay First Student. *See* CP 194-95, 212-218 (identifying amounts from charter customers taxed under motor or urban transportation), CP 257 (invoice to YMCA for charter services).

Because the Department’s own published determinations and administration of the PUT contradict its interpretation in this case, it is hard to see how the interpretation in this case is a thoroughly considered and persuasive interpretation of the statute.

On a fundamental level, the Department’s interpretation of “for hire” is not based on a sound analysis of the statute. The Department has not advanced any theory as to why the Legislature would want to limit the motor and urban PUT classification to situations where the passengers themselves, versus a third party, pays for the transportation service. As the court noted in *Surface Transportation Corp. of New York*, the motor carrier is performing the same activity whether it is paid by the passengers themselves or a third party.⁴ Additionally, the Department fails to explain and how it has consistently applied this understanding to all of the taxpayers subject to the motor and urban classification.

Taken together with the lack of a clearly established and uniformly applied Department policy regarding the term “for hire,” the Department’s interpretation of “for hire” lacks “the factors that give it the power to persuade.” *See Othello*, 52 Wn. App. at 596. For these reasons, giving deference to the Department’s interpretation of “for hire” is not appropriate under the unique circumstances of this case.

⁴ *See Surface Transportation Corp. of New York v. Reservoir Bus Lines, Inc.*, 271 A.D. 556, 560, 67 N.Y.S.2d 135 (1946)(“Defendant's contention that it is not carrying passengers for hire is baseless. Its omnibuses are carrying passengers under contract with the landlords. Each landlord pays to defendant a monthly lump sum to furnish the service. *The compensation is paid to defendant for carrying passengers. Whether the cost of the service is borne by the landlords or by the tenants is immaterial.* The fact remains that defendant is receiving pay to transport passengers and is accordingly carrying passengers for hire.”)(emphasis added).

B. Motor Carriers Are Taxable Under The Urban Transportation Classification As Long As They Provide Services To A Subset Of The Public.

The Department argues, for the first time, that school buses would not be taxable under the urban transportation business classification because they do not meet the “public use” requirement. DOR Supp. Br. at 18. To support this assertion, the Department cites an out of state case involving a statute regarding “the business of transporting the public for hire.” See *In re Jerome S.*, 968 N.E.2d 769, 771 (Ill. App. Ct. 2012). It is telling that in making its “public use” argument, the Department ignored the recent Washington Court of Appeals decision interpreting the term “for the public use” in the context of a Washington Utilities and Transportation (“WUTC”) proceeding. See *Courtney v. Washington Utilities & Transp. Comm'n*, 3 Wn. App. 2d 167, 414 P.3d 598 (2018), *review denied*, 191 Wn.2d 1002, 422 P.3d 911 (2018) (addressing whether the WUTC erred in too broadly construing “for the public use.”).

In *Courtney*, the Court of Appeals found that the WUTC’s appropriately interpreted the term “public use” as “accessible to all persons *that are part of a group with common interests.*” *Courtney*, 3 Wn. App. 2d at 177(italics in original). In reaching this conclusion the Court examined the United States Supreme Court’s decision in *Terminal Taxicab Co. v. Kutz*, 241 U.S. 252, 36 S.Ct. 583 (1916), which the Court of Appeals

identified as the leading case discussing the phrase “public use” when the statutes were enacted. *Id.* at 182.

Terminal Taxicab involved a taxicab company that “limited its services to a subset of the public, i.e., only persons who were guests of hotels with whom it had a contract.” *Id.* (citing *Terminal Taxicab*). In *Terminal Taxicab* the statute at issue applied to persons “controlling or managing any agency or agencies for public use for the conveyance of persons or property within the District of Columbia for hire.” *Id.* This statute is materially the same as the urban transportation statute which applies to “operating any vehicle for public use in the conveyance of persons or property for hire.” RCW 82.16.010(12).

In finding that the operator’s transportation services were subject to regulation under the statute, even though they were limited to guests of the hotels, the Supreme Court noted:

The service affects so considerable a fraction of the public that it is public in the same sense in which any other may be called so. *The public does not mean everybody all the time.*

Terminal Taxicab, 241 U.S. at 255 (citations omitted) (emphasis added).

Thus, a person operates a vehicle for “public use” when its services are “accessible to all persons that are part of a group with common interests.” *Courtney*, 3 Wn. App. 2d at 177.

This Court's decision in *Cushing v. White*, 101 Wash. 172, 181, 172 P. 229 (1918) provides further support for this reading. In determining whether a company was a common carrier, the Court noted:

[A] 'common carrier' one whose occupation is the transportation of persons or things from place to place for hire or reward, and who *holds himself out to the world as ready and willing to serve the public indifferently in the particular line or department* in which he is engaged; *the true test being whether the given undertaking is a part of the business engaged in by the carrier which he has held out to the general public as his occupation*, rather than the quantity or extent of the business actually transacted, or the number and character of the conveyances used in the employment. On the other hand, *if the undertaking be a single transaction, not a part of the general business or occupation engaged in*, as advertised and held out to the general public, then the individual or company furnishing such service is a private and not a common carrier.

Cushing, 101 Wash. at 181 (emphasis added).

In this case, both First Student and Durham provide transportation services to the public, the same as any other charter carrier. They both offer transportation services to school districts that wish to engage them. In other words the school bus transportation services are “part of the business engaged in by the carrier ... [and] held out to the general public as [their] occupation.” *Id.*

Moreover, school districts are merely one of their types of clients. First Student provides transportation services to other types of organizations. CP 30. Thus, the services provided by First Student and

Durham are public in nature in that they both contract with multiple organizations as part of their transportation service business. The fact that the services provided to a particular client do not allow every member of the public to use the service at the same time, does not mean that the transportation business operated by First Student and Durham does not affect a considerable fraction of the public or are “a single transaction, *not a part of the general business or occupation engaged in.*” See *Cushing*, 101 Wash. at 181. As the Supreme Court noted in *Terminal Taxicab*, “the public does not mean everybody all the time.” 241 U.S. at 255.

Indeed, applying the Department’s “public use” argument contradicts its own application of the urban transportation classification in the context of charter companies and paratransit contractors. These types of activities do not allow the general public to use the services. Rather, the passengers must be part of group identified by the charter customer or the paratransit agency. Therefore, the Department’s taxation of paratransit, cabulance, and charter service revenue under the urban transportation PUT classification,⁵ is inconsistent with the “public use” argument raised for the first time in the Department’s Supplemental Brief.

⁵ See Det. No. 91-164, 11 WTD 337 (1991), Appendix A (taxing cabulance revenues under urban PUT transportation); Det. No. 90-385, 10 WTD 332 (1990), Appendix B (taxing paratransit revenues under urban transportation PUT classification); CP 214-18 (taxing First Student’s charter revenues under urban transportation PUT classification).

IV. CONCLUSION

For the foregoing reasons, the Court of Appeals erred in deferring to the Department's interpretation of "for hire" and its decision should be reversed. Additionally, the Department's "public use" argument is deeply flawed and should be rejected.

RESPECTFULLY SUBMITTED this 13th day of August, 2019.

LANE POWELL PC

By 
Brett S. Durbin, WSBA #35781

Attorneys for Durham School Services LP

CERTIFICATE OF SERVICE

I certify that on August 13, 2019, I served a copy of the foregoing
CORRECTED MEMORANDUM OF AMICUS CURIAE DURHAM
SCHOOL SERVICES LP via electronic mail and via U.S. first class mail,
in a sealed envelope, with postage prepaid, upon the following counsel of
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Counsel for Respondent

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

DATED: August 13, 2019, at Seattle, Washington.



Kathi Milner, Legal Assistant
LANE POWELL PC

APPENDIX A

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 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.

LANE POWELL PC

August 13, 2019 - 4:48 PM

Transmittal Information

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