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Division II
State of Washington

No. 96694-0

No. 49979-7-II
Thurston County Superior Court Case No. 15-2-02666-34

IN THE COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

FIRST STUDENT, INC.,
Plaintiff/Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,

Defendant/Respondent.

BRIEF OF APPELLANT

Brett S. Durbin, WSBA No. 35781
Stoel Rives LLP
600 University Street, Suite 3600
Seattle, WA 98101
brett.durbin@stoel.com

Attorneys for Plaintiff/Appellant

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I. INTRODUCTION

Businesses whose activities are taxable under the Public Utility Tax ("PUT"), ch. 82.16 RCW, are exempt from Business and Occupation ("B&O") taxes, ch. 82.04 RCW. RCW 82.04.310. As a transportation company that provides bus transportation to organizations including school districts, youth groups, summer camps, and churches, as well as private parties, First Student's services clearly fall within the scope of the motor and urban transportation PUT classifications. These PUT classifications apply to anyone in the business of operating any vehicle in the conveyance of persons or property "for hire." RCW 82.16.010(6), (12); WAC 458-20-180(5). The definition of "urban transportation business" even goes so far as to say that "[i]ncluded herein, but without limiting the scope hereof, is *the business of operating passenger vehicles of every type.*" RCW 82.16.010(12) (emphasis added). Because the statutes clearly impose PUT on First Student's transportation activities, First Student is entitled to a refund of the B&O taxes it paid on those activities.

In denying First Student's refund request, the Department cited a provision in WAC 458-20-180 ("Rule 180") that excludes school bus operators from the PUT and subjects them to the Service and Other B&O tax, RCW 82.04.290. WAC 458-20-180(5)(a). However, this provision

was superseded by statute many years ago and is no longer consistent with the statute. Despite First Student's requests at the administrative level, the Department could not explain how the school bus provision in Rule 180 is consistent with the current statutory language. It was not until the Department's response to First Student's motion for summary judgment that the Department offered any explanation for its position based on the statutory language.

In an attempt to salvage the school bus exclusion, the Department advanced a reading of the term "for hire" in the motor and urban transportation PUT classifications that conflicts with the basic tenets of statutory interpretation, the legislative history, and even the Department's own administration of the PUT. Despite longstanding and consistent authority defining the term "for hire" as provided in exchange for compensation, the Department took the position that the term "for hire" is limited to situations where the passengers themselves pay for the transportation, as opposed to a third party.

The Department's position is based on a hyper-literal reading of the definition of "for hire" in the 1951 version of *Black's Law Dictionary*. This reading of the term "for hire" is not consistent with any other dictionary definition or any legal authorities First Student has been able to find. Moreover, the Department's strained interpretation of "for hire"

makes the PUT classifications referencing the term "for hire" incomprehensible and is contrary to the Department's own administration of the PUT. In fact, in its last audit of First Student, the Department agreed that First Student's non-school charter services were taxable under the PUT as motor or urban transportation, even though there were no material differences between the services provided to school districts and those provided to other organizations.

While the trial court did not totally agree with the Department's reading of the term "for hire," it held that the services must be charged on a per-passenger basis (without citing any legal precedent to support its position) and ruled for the Department. Both the Department's and the trial court's positions that school bus operators are not taxable under the motor and urban transportation PUT classifications are contrary to the plain language of the statute and the legislative history. Accordingly, this Court should reverse the trial court's order granting summary judgment to the Department.

II. ASSIGNMENT OF ERROR

The trial court erred in denying First Student's motion for summary judgment, granting summary judgment to the Department, and dismissing First Student's B&O tax refund action.

III. STATEMENT OF ISSUE

Whether the transportation services First Student provides to school districts are provided "for hire" and therefore taxable under the motor and urban transportation PUT classifications.

IV. STATEMENT OF THE CASE

A. Undisputed Facts

First Student is a transportation company that provides transportation services to organizations including school districts, youth groups, summer camps, and churches, as well as private parties. CP 30 ¶ 3. First Student uses the same buses to transport passengers, regardless of the type of customer receiving the service. CP 30 ¶ 4. The buses operated by First Student typically hold between 20 and 84 passengers. CP 30 ¶ 5. The contracts between First Student and its customers specify that First Student is providing transportation services in exchange for compensation. CP 30-31 ¶ 6; CP 35; CP 50. Because First Student is in the business of operating vehicles to transport passengers for compensation, it is registered as a carrier with both the Washington Utilities and Transportation Commission and the U.S. Department of Transportation. CP 31 ¶¶ 10 & 12; CP 56-57. The Department admits that First Student was "in the business of operating vehicles that transported passengers" and

received compensation for transporting students as passengers. CP 26-27 (Requests for Admission Nos. 3-5).

B. Procedural History

Between December 1, 2008 and December 31, 2014, First Student paid B&O taxes on its transportation services. CP 31 ¶ 14. After realizing that these activities were not subject to B&O tax, First Student filed refund requests with the Department requesting a refund of the overpaid B&O taxes for these tax periods. CP 21. In November 2015, the Department issued a determination denying First Student's refund request. CP 22. Despite First Student's explicit arguments that the school bus provision in Rule 180 is contrary to the statute, the Department did not explain how the provision was consistent with the statute, instead stating that the Department will stick by its rules unless and until they are stricken by a court. *Id.* First Student petitioned for reconsideration, which the Department denied without explanation. CP 11. First Student then timely filed the current refund action challenging the Department's determination. CP 9.

First Student filed a motion for summary judgment arguing that the school bus exclusion in Rule 180 was contrary to the statute. CP 58. In response, the Department asserted for the first time that the school bus exclusion was consistent with the statute, because the services First

Student provided to school districts were not provided "for hire." CP 142-144. The Department argued that under the 1951 version of *Black's Law Dictionary*, the term "for hire" required the passengers themselves to pay for the services. CP 143. According to the Department, First Student's school bus services were not provided "for hire," because the school children themselves did not pay for the transportation service. CP 143-144.

In reply, First Student pointed out that no legal authorities supported the Department's reading of the *Black's Law Dictionary* definition, and that the 1949 version of Rule 180 stated that the school bus exclusion applied to "persons operating school buses *for hire*." CP 180-182. Despite these arguments, the trial court granted summary judgment for the Department, concluding that the term "for hire" required compensation for the service to be provided on a per-passenger basis. The trial court cited no authority for this interpretation, but rather distinguished the facts of the current case from one where the Department of Corrections or a law enforcement agency buys a bus ticket for an individual. CP 287. The trial court reasoned that in those situations there is a payment for an individual seat and since First Student charged by hour or by route, First Student's school bus service was not provided "for hire on an individual seat basis." *Id.*

First Student moved for reconsideration, noting that almost all of its charter services were provided on an hourly or route basis, and that the Department agreed in a prior audit that the non-school charter services were subject to tax under the motor and urban transportation classifications. CP 303. The trial court denied First Student's motion for reconsideration without hearing, from which First Student filed this timely appeal. CP 311, 313.

V. ARGUMENT

Companies in the business of operating vehicles to transport people or property for compensation have generally been subject to PUT since 1935. *See* Laws of 1935, ch. 180, § 36. Under the plain language of the current statutes any business operating vehicles for compensation is taxable under either the motor or urban transportation tax classifications in RCW 82.16.010 and exempt from B&O tax. *See* RCW 82.04.310 (excluding activities subject to PUT from B&O tax).

Here, it is undisputed that First Student is in the business of operating vehicles to transport passengers for compensation. CP 27 (Requests for Admission Nos. 3-5). Therefore, First Student is entitled to a refund of the B&O taxes it paid on its transportation services.

A. Standard of Review

Orders granting or denying summary judgment are reviewed de novo. *TracFone Wireless, Inc. v. Dep't of Revenue*, 170 Wn.2d 273, 280–81, 242 P.3d 810 (2010). Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Id.*

B. The Plain Language of the Statutes Imposes PUT on Companies Using Vehicles to Transport Passengers for Compensation.

Under the current statutes, the operation of a vehicle to transport people or property "for hire" is subject to PUT as either a motor or urban transportation business. Nothing in the language of the statutes limits the scope of the motor or urban transportation business classifications based on the type of vehicle or passenger involved in the transportation, or how the company is compensated for its service.

"Motor transportation business" is defined as:

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

RCW 82.16.010(6) (emphases added).

"Urban transportation business" is defined as:

> [T]he business of operating *any vehicle* for public use *in the conveyance of persons or property for hire*, insofar as [it operates within a certain proximity to a city]. *Included herein, but without limiting the scope hereof, is the business of operating passenger vehicles of every type.*

RCW 82.16.010(12) (emphases added).

Consistent with the plain language of the statutes, Rule 180 acknowledges a company is taxable under one of these PUT classifications, if it is in the "business of operating motor-driven vehicles, on public roads, used in transporting persons or property belonging to others, on a for-hire basis." WAC 458-20-180(5).

As the names suggest, the distinction between these classifications is whether or not the company provides transportation for hire within an urban area (*i.e.*, five miles of the limits of a city or town or the nearby cities or towns).[1] If the company provides transportation within an urban area, it is considered an "urban transportation business." WAC 458-20-180(4). If the company provides longer-haul transportation between points located outside of a single urban area, it is considered a "motor transportation business." WAC 458-20-180(4)(c). If a company provides

[1] *Compare* RCW 82.16.010(6) (defining "motor transportation business" to exclude "urban transportation business") *with* RCW 82.16.010(12) (limiting "urban transportation business" to companies "(a) operating entirely within the corporate limits of any city or town, or within five miles of the corporate limits thereof, or (b) operating entirely within and between cities and towns whose corporate limits are not more than five miles apart or within five miles of the corporate limits of either thereof").

both types of transportation services, it reports the revenues associated with each type of transportation separately. WAC 458-20-180(6).

Under both definitions, there are three common elements:

1. The operation of any vehicle;
2. To convey persons or property;
3. For hire.

See RCW 82.16.010(6) & (12).

The Department does not dispute that the transportation services First Student provides to school districts include the operation of a vehicle to transport people. CP 27 (Requests for Admission Nos. 3-5). The Department's sole argument is that the transportation services provided to school districts are not provided "for hire."

The term "for hire" is not defined in RCW 82.16.010. When a term is not defined in a statute, the courts will look to the plain meaning of the words as they are ordinarily given. *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002). The plain meaning of a statute requires examining words in the context in which they are found and the statutory scheme as a whole. *Id.*

The plain meaning of the term "for hire" is "available for use or service in return for payment." *Webster's Third New International Dictionary* 1072 (2000). In other words, provided for compensation. This

definition is completely consistent with the use of the term "for hire" in other PUT classifications and the history of the statute.

1. The motor and urban transportation PUT classifications have always been tied to the transportation of persons or property for compensation.

When it was first enacted, the PUT tied the "motor transportation business"[2] tax classification exclusively to the motor carrier definitions in the statutes regulating motor transportation. *See* Laws of 1935, ch. 180, § 36. All of the motor carrier definitions referenced in the original PUT statute applied to persons providing transportation "for compensation."[3]

In 1937, the PUT definition was updated to reflect changes in the referenced motor carrier definitions. *See* Laws of 1935, ch. 227, § 37(i) (updating the references to "certified freight carrier," "contract hauler," and "for hire carrier" to the newly defined terms "common carrier" and "contract carrier"). These motor carrier definitions are still referenced in the current version of the PUT statute, and the motor carrier definitions are still tied to the provision of transportation "for compensation."[4]

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[2] The "highway transportation business" classification was renamed the "motor transportation business" classification in 1961. Laws of 1961, ch. 293, § 12(9).

[3] Laws of 1921, ch. 111, § 1(d) (defining "auto transportation company" as any person transporting passengers "for compensation"); Laws of 1933, ch. 166, §§ 1(f), 13 (defining "contract hauler" and "for hire carrier" as persons engaged in the business of transporting property "for compensation"); Laws of 1933, Ex. Sess., ch. 55, § 1(e) (defining "certified freight carrier" as persons engaged in the transportation of property "for compensation as a common carrier").

[4] *See* RCW 82.16.010(6) (defining "motor transportation business"); RCW 81.68.010(3)

(...continued)

While the definitions of "auto transportation company," "common carrier," and "contract carrier" were broadly defined to encompass most motor transportation provided for compensation, there were specific exclusions from these definitions. Importantly, the definition of "auto transportation company" excluded taxicabs, hotel buses, school buses, and vehicles exclusively transporting agricultural products from the point of production to a market. Laws of 1935, ch. 120, § 1(d).

The 1949 version of Rule 180 notes that "persons operating school buses *for hire*" are taxable under the Service and Other B&O tax classification. Washington State Tax Commission Rule 180 (1949) (emphasis added), App. A. Thus, the school bus exclusion in Rule 180 had its origins in the definition of "auto transportation company," which excluded school buses, not a strained reading of the term "for hire."

In 1955, the Legislature amended the statute to expand the definition of "highway transportation company" (the predecessor of the "motor transportation business" classification) to include all "for hire" motor transportation companies regardless of whether they fell within the referenced definitions.

(...continued)
(defining "auto transportation company"); RCW 81.80.010(1)-(3) (defining common and contract carriers).

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

Laws of 1955, ch. 389, § 28(9) (emphasis added). Thus, the PUT statute expanded to include the businesses operating taxicabs, hotel buses, school buses, and agricultural vehicles that were specifically excluded from the definition of "auto transportation company" in RCW 81.68.010. In its description of this amendment shortly after it was passed, the Department noted that it:

> Redefines the term "highway transportation business," as used in the Public Utility Tax, so as to include all for-hire transportation by motor vehicle other than that specifically falling within the statutory definition of "urban transportation business," and irrespective whether or not such hauling services are performed in whole or in part on public roads, private roads or on private lands.

Sixteenth Biennial Report of the Tax Commission of the State of Washington for the Period Ending June 30, 1956 at 18, Appendix B.[5]

The relevant portions of the current statute have not been amended since 1955. *Compare* Laws of 1955, ch. 389, § 28(9) *with* RCW 82.16.010(6). Thus, the current version of the statute clearly applies to all

[5] The Tax Commission was the predecessor to the Department of Revenue.

companies operating vehicles to transport people or property for compensation. As it is undisputed that First Student transports students as passengers for compensation, its services are taxable under the motor and urban transportation PUT classifications and exempt from B&O tax under RCW 82.04.310.[6]

2. The term "for hire" does not depend on who pays the fare or how the company charges for transportation services.

To avoid the plain meaning of the term "for hire," the Department argued that when the Legislature amended the statute in 1955, the term "for hire" was limited to situations where the passengers were responsible for paying the fare. CP 143. To support this interpretation, the Department cherry-picks a single definition of the term "for hire" from the 1951 version of *Black's Law Dictionary* and applies it to the statute without regard to the statutory context, contrary to the plain meaning analysis adopted in *Campbell & Gwinn.*

The definition cited by the Department states:

> **FOR HIRE OR REWARD**. To transport passengers for property of other persons than owner or operator of vehicle for a reward or stipend, to be paid by such passengers, or persons for whom such property is transported, to owner or operator. *Michigan Consol. Gas Co. v. Sohio Petroleum Co.*, 32 N.W.2d 353, 356, 321 Mich. 102.

[6] RCW 82.04.310 exempts activities subject to PUT from the B&O tax.

CP 372.

Under the Department's reading, if a third party pays for the transportation, then the service is not provided "for hire" as the passengers themselves are not responsible for paying the compensation. See CP 143. The Department's hyper-literal reading of the definition distorts its meaning and creates a distinction that is not consistent with the common legal usage of the term or the statutory context. A natural reading of the definition is that providing transportation "for hire" is dependent on receiving a reward for transporting other people or their property. In other words, a person transporting themselves or their own property is not providing transportation "for hire."

A cursory review of the case cited in the definition, and the precedent that case relies on, shows the distinction the Department attempts to draw is not consistent with the common legal usage of the term "for hire." In *Michigan Consolidated Gas Co. v. Sohio Petroleum Co.*, the issue was whether a company using its pipeline to transport its own natural gas was transporting the gas "for hire, compensation or otherwise." 321 Mich. 102, 32 N.W.2d 353, 355 (1948). The court noted that the term "transport for hire" had been defined in the following manner:

> "In order to support the conclusion that defendant is a carrier for hire, there must be evidence showing that defendant is equipped for carrying persons or property, and

> that it is engaged in carrying or offers to carry persons or property other than itself or its own property for a compensation in some form." *Murphy v. Standard Oil Co.*, 49 S.D. 197, 207 N.W. 92, 93 [(1926)].
>
> "'For hire or reward,' as used in these ordinances, means to transport passengers or the property of other persons than the owner or operator of such truck for a reward or stipend, to be paid by such passengers or the persons for whom such property is transported to the person owning or operating the truck * * *." *City of Sioux Falls v. Collins*, 43 S.D. 311, 178 N.W. 950, 951 [(1920)].

Id. at 356 (ellipsis in original).

In the *City of Sioux Falls* case, which formed the basis of the *Black's Law Dictionary* definition, the court held that a baker was not transporting property for hire when delivering his bakery products to customers. 178 N.W. at 951. There is no indication the court's language was intended to distinguish between carriers that receive compensation directly from their passengers or the owners of the property and carriers that are paid by a third party for transporting passengers or the property of others.

The lack of distinction is consistent with the other holding cited in *Michigan Consolidated Gas*, which stated that a person provides transportation for hire when it is "'engaged in carrying or offers to carry persons or property other than itself or its own property for a compensation in some form.'" 32 N.W.2d at 356 (quoting *Murphy*, 207 N.W. at 93). Again, there is no distinction based on whether the

passengers themselves are paying the fare. What is relevant is that the carrier is transporting someone else for compensation. As such, the case law relied on by the 1951 edition of *Black's Law Dictionary* is completely consistent with the plain meaning of the term in *Webster's Third New International Dictionary*.

3. When viewed together, none of the common or legal dictionary definitions support the Department's or the trial court's position.

Many dictionaries do not have a specific definition of the term "for hire," but rather define the term "hire." The common and legal dictionary definitions of "hire" from this period are entirely consistent with the present day definition of "for hire" in *Webster's Third New International Dictionary* and do not support either the Department's or the trial court's position.

The 1969 version of *Ballentine's Law Dictionary* defines "for hire or compensation" as "a vehicle operated to carry passengers or freight for a direct charge, not a vehicle used for the delivery of one's own property or products." CP 170.

Likewise, *Webster's New International Dictionary of the English Language* (2d ed. unabridged) published in 1948 defines the word "hire" as:

> *Transitive*: 1. To engage or purchase the labor or

> services of (anyone) for compensation or wages; as, to hire a servant, an agent, or an advocate.
>
> 2. To procure (any chattel or estate) from another person, for temporary use, for a compensation or equivalent, as, to hire a farm for a year; to hire money.
>
> 3. To grant the temporary use of, for compensation; to engage to give the service of, for a price; to let; lease.
>
> They ... have hired out themselves for bread. 1 *Sam.* ii, 5,
>
> **Syn.**—HIRE, CHARTER. HIRE is the general term; CHARTER is commonly applied to vessels, but is occasionally used (colloq.) of other conveyances. See EMPLOY.
>
> *Intransitive*: To engage oneself to give service for hire;- usually with *out*. *Colloq*.

CP 160 (emphases in original). The 1940 edition of *A Dictionary of American English* defines "hire" in relevant part as:

> 2. To procure the use of (any thing) for a consideration to its owner.
>
> In recent usage, few Americans would "hire" land or a house; they would "rent" them. A car would be "rented" but a moving van would probably be "hired," the difference seeming to be that things are "rented" if no service or labor goes along with them, but are "hired" if a person is employed with them.

CP 164.

Remarkably, the language in these definitions is almost identical to a provision in Rule 180, which defines motor and urban transportation to include: "[r]enting or leasing trucks, trailers, buses, automobiles, and similar motor vehicles to others for use in the conveyance of persons or

property when as an incident of the rental contract such motor vehicles are operated by the lessor or by an employee of the lessor." WAC 458-20-180(5)(b).

In all of these definitions the test for determining whether a person is operating a vehicle for "hire" is whether or not they are providing a service or the use of the vehicle for compensation from someone else. This is completely consistent with the definitions of "auto transportation company," "common carrier," and "contract carrier" referenced in the definition of "motor transportation business," which all relate to providing transportation "for compensation."[7] Moreover, none of the dictionary definitions or the case law supports the distinction the Department attempts to draw, which excludes from the term "for hire" anyone receiving compensation from a third party who is not the passenger or owner of the property. Nor do they require that the compensation be provided on a per-passenger basis.

4. Applying the plain meaning of "for hire" to the motor and urban transportation definitions does not render the term superfluous.

The Department argued below, and apparently the trial court

[7] See RCW 81.68.010 (defining "auto transportation company" as a person "in the business of transporting persons ... for compensation"); RCW 81.80.010(3)(defining "common carrier" and "contract carrier" as a person "engaged in the business of providing ... transportation of property for compensation").

agreed, that the Legislature could not have intended "for hire" to have its common meaning because it would render portions of the definition superfluous. CP 143, 286. The Department asserts that there would be no need to include the term "for hire" in the statute if it merely meant "for compensation" as a business would be taxable under the PUT classification by merely transporting persons or property as part of its business. CP 143. However, this argument misses the key aspect of the "for hire" definition clearly announced in the case law.

As noted above, the definition of "for hire" requires that the payment be received for providing the transportation service directly, rather than indirectly as a part of the customer's payment for general goods or services, such as when a baker delivers bread to customers. *See City of Sioux Falls,* 178 N.W. at 951. Merely transporting a company's own products as part of its general business operations is not enough to fall within the definition of "for hire." *Id.* Thus, it would not be superfluous to equate "for hire" with "for compensation" in the PUT statutes as both phrases require the direct or specific payment for the service being provided. *See Elkins v. Schaaf,* 189 Wash. 42, 48, 63 P.2d 421 (1936) (the term "for compensation" did not include transporting a person's own property).

In fact, the definition of "motor transportation business" itself equates "for hire" with "for compensation" by expressly including companies that provide transportation "for compensation" as examples of companies providing transportation of persons or property "for hire." *See* RCW 82.16.010(6). Therefore, the Department's and the trial court's strained reading of the term "for hire" should be rejected.

C. The Department's Interpretation of the Term "For Hire" Is Completely at Odds with the Statutory Context and Its Own Administration of the PUT.

The term "for hire" is used or referenced in 11 of the 16 PUT classifications in RCW 82.16.010. These classifications cover a wide variety of businesses, including many that do not involve vehicles, such as "gas distribution business," "light and power business," "network telephone service," and "water distribution business." There is nothing in the language or structure of the statute indicating that the Legislature intended a separate or distinct meaning of the term "for hire" for each type of business. *See Timberline Air Serv., Inc. v. Bell Helicopter-Textron, Inc.,* 125 Wn.2d 305, 313, 884 P.2d 920 (1994) ("When the same words are used in different parts of the same statute, it is presumed that the Legislature intended that the words have the same meaning."). Therefore, the Legislature's use of the same term in virtually all of the PUT

definitions should be read in a manner that makes sense for all of the PUT classifications.

While First Student's reading of "for hire" is completely consistent with all of the PUT definitions, the Department's reading creates illogical and absurd results for all of them and, therefore, should be avoided. *See Tingey v. Haisch*, 159 Wn.2d 652, 664, 152 P.3d 1020 (2007) (an interpretation that produces absurd results must be avoided because it cannot be presumed that the Legislature intended absurd results).

For example, the Department's reading of the term "for hire" would exclude virtually all charter operators from the motor and urban transportation definitions. If a church or company hired a charter carrier to transport its members or employees, the passengers would not be responsible for paying the fare. As such, the charter carrier would not be providing transportation "for hire" under the Department's definition. It is hard to square excluding so many motor carriers with the statement that "urban transportation" includes "the business of operating passenger vehicles of every type." RCW 82.16.010(12).

Applying the Department's interpretation outside of the motor and urban transportation classifications creates even more strained and absurd results. "Network telephone service" includes the "providing of telephonic, video, data, or similar communication or transmission *for*

hire." RCW 82.16.010(7)(b)(ii). Under the Department's reading of "for hire," if a school district paid a telecommunications company for a video conferencing service used by its students, the video conferencing service would not be provided "for hire" as the students themselves did not pay for the service.

Tellingly, such illogical results directly conflict with the Department's administration of the PUT. In a published determination, the Department imposed PUT on a charter bus company that was providing buses to transport its customers' employees. Det. No. 05-0288, 26 WTD 143 (2007), CP 96. The bus company was hired by railroad companies to transport their train crews between various places. *Id.* at 144, CP 97. The bus company had been reporting these activities under the Service and Other B&O tax classification, but the Department determined that these activities were subject to PUT under the motor and urban transportation classifications and assessed the bus company for unpaid PUT. *Id.*[8] If the Department truly had a longstanding interpretation of the term "for hire" that required the passengers to pay the

[8] "The Audit Division assessed the taxpayer $ . . . in motor transportation business public utility tax, and $ . . . in urban transportation business public utility tax on income earned from transporting the crews between places within Washington." Det. No. 05-0288, 26 WTD at 144, CP 97.

fare, then it should not have assessed PUT against this taxpayer as it was the employer, not the passengers, that was paying the bus company.[9]

Additionally, as noted above, the Department agreed in a prior audit that First Student's charter services provided to organizations, such churches, youth groups, and summer camps, are taxable as motor and urban transportation even though they were paid for by third parties on an hourly or per route basis. CP 194-195.

Most incredibly, the Department even stated in the 1949 version of Rule 180 that the school bus provision applied to "persons operating school buses *for hire*." Washington State Tax Commission Rule 180 (1949) (emphasis added), Appendix A. Thus, the school bus provision in Rule 180 is not based on "the Department's longstanding interpretation that school buses are not provided on a 'for hire' basis." *See* CP 144.

D. The Exclusion of School Buses in Rule 180 Is Based on an Outdated Version of the Statute and Is Contrary to the Plain Language of the Current Statute.

Rule 180 is an interpretive rule. As an interpretive rule, accuracy and logic are the only clout it wields. *See Ass'n of Wash. Bus. v. Dep't of*

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[9] The Department's administration of the PUT without regard for who pays for the service is further demonstrated by a recent determination in which it assessed PUT against a tugboat company that was towing vessels under contracts with the Coast Guard and a vessel insurance company. Det. No. 16-0089, 35 WTD 549 (2016). In both of these cases, the vessels being towed were not owned by the Coast Guard or the insurance company.

Revenue, 155 Wn.2d 430, 447, 120 P.3d 46 (2005). As discussed above the school bus exclusion is a historical artifact related to a prior version of the statute that the Department has failed to clean up.

Comparing the history of the rule and the statute shows that Rule 180 properly excluded school buses from the definition of "highway transportation business" between 1935 and 1955. The definition of "highway transportation business" in effect before 1955 only imposed PUT on "auto transportation companies," "common carriers," and "contract carriers."[10] Because the definitions of "common carrier" and "contract carrier" only apply to companies transporting property,[11] the scope of the "auto transportation company" definition determined whether a company transporting passengers was taxable as a "highway transportation business" under the pre-1955 versions of RCW 82.16.010.

The definition of "auto transportation company" in effect during this period, and even today, contains many exclusions, including taxicabs, hotel buses, school buses, and companies operating wholly within three miles of a city or town. *See* Laws of 1935, ch. 120, § 1(d); RCW 81.68.015. Therefore, Rule 180 properly excluded these businesses from

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[10] *See* Laws of 1935, ch. 180, § 36; Laws of 1949, ch. 228, § 10.
[11] *See* RCW 81.80.010 (1) & (2) (defining "common carrier" and "contract carrier").

the definition of "highway transportation business" between 1935 and 1955.

However, as noted above, the Legislature significantly amended the definition of "highway transportation business" in 1955 to broaden its scope to include anyone "operating *any motor propelled vehicle* by which persons or property of others are conveyed for hire." Laws of 1955, ch. 389, § 28(9) (emphasis added). In response to this amendment, the Department recognized the change for taxicabs, but not school buses, even though there is nothing in this statutory language that allows the Department to distinguish between taxicabs and school buses. *See* Washington State Tax Commission Rule 180 (1955) (stating that "highway transportation" and "urban transportation" include the business of operating taxicabs, but not school buses), CP 363. Because the Department failed to implement the plain language of the Legislature's 1955 amendment of the statute, Rule 180's continued exclusion of school bus operators is an unsupported and inaccurate interpretation of the statute that the Court should ignore.

E. The Provision in Rule 180 Excluding School Buses from the PUT Classifications Should Be Ignored as It Contradicts the Plain and Unambiguous Language of the Current Statute.

Given the significant conflicts between the Department's alleged statutory basis for the school bus exclusion and the plain meaning of the

words, the statutory context, and even its own administration of the PUT, there is no legitimate basis for accepting the Department's interpretation of the statute or deferring to the rule. Where the statutory language is plain and unambiguous the court ascertains the meaning of the statute solely from its language. *Dot Foods, Inc. v. Dep't of Revenue*, 166 Wn.2d 912, 919, 215 P.3d 185 (2009). While a court will give deference to an agency's interpretation of an ambiguous statute within its area of expertise, courts do not defer to an agency's interpretation when the statute is not ambiguous. *Id.* Moreover, an interpretive rule cannot change the impact of the plain language of the statute. *Campbell & Gwinn,* 146 Wn.2d at 19 ("'[A]dministrative rules or regulations cannot amend or change legislative enactments.'" (citation omitted)); *see also Avnet, Inc. v. Dep't of Revenue*, 187 Wn. App. 427, 439-40, 348 P.3d 1273 (2015) (interpretive rules do not constrain courts and cannot alter impact of the statute).

Because the Department has not advanced a reasonable interpretation of RCW 82.16.010(6) and (12) that excludes school bus operators, it has not shown that the statute is ambiguous. *See HomeStreet, Inc. v. Dep't of Revenue*, 166 Wn.2d 444, 452, 210 P.3d 297 (2009) ("A statute is ambiguous if 'susceptible to two or more *reasonable* interpretations,' but 'a statute is not ambiguous merely because different

interpretations are conceivable.'" (emphasis added)). Without ambiguity, the Department's interpretation is irrelevant. *See Dot Foods*, 166 Wn.2d at 912 (no deference given to agency interpretation when statute unambiguous). Thus, applying the school bus provision in Rule 180 would amend the statute to add an exemption that is not there, contrary to the overwhelming case law prohibiting such an outcome.

The Department's argument that the Legislature has acquiesced to the Department's interpretation is similarly flawed as the Department has not advanced a reasonable interpretation of the statute that creates an ambiguity. Legislative acquiescence can only be considered "when the statute in question is ambiguous." *Pringle v. State Tax Comm'n*, 77 Wn.2d 569, 573, 464 P.2d 425 (1970). Moreover, this rule only applies where the Legislature enacts subsequent legislation that deals with the same or a similar issue as that covered by the rule. *Id.*

Here, the definitions of "motor transportation" and "urban transportation" have remained identical since 1955, except for two minor changes to the "motor transportation" definition related to the transportation of logs. The first change in 1961 added an exemption for the transportation of logs on private roads and changed the term "highway transportation" to "motor transportation." Laws of 1961, ch. 293, § 12. The second change in 2009 enacted a lower rate for the transportation of

logs on public roads as part of a bill providing environmental tax incentives. Laws of 2009, ch. 469, § 701. Thus, even if it were appropriate to consider, the Department cannot show legislative acquiescence to the continued exclusion of school buses in Rule 180, as no subsequent legislation has amended the statutes in ways that deal with the transportation of school children.

F. While Not Relevant to the Current Case, the Definitions of "For Hire Vehicle" in Title 46 RCW Are Consistent with the Plain Meaning of the Term "For Hire."

In seeking to bolster its arguments, the Department also asserted below that the Legislature has distinguished school bus operators from other motor carriers in title 46 RCW. While the Legislature has distinguished school buses in a few instances, the distinctions the Legislature has drawn regarding the safe operation of vehicles in title 46 RCW are not relevant in this case. It would be inappropriate to take one specific section referencing the term "for hire vehicle" out of title 46 RCW and apply it to the PUT statutes for a number of reasons, most importantly because it would create absurd results. *See State v. Edwards*, 92 Wn. App. 156, 163, 961 P.2d 969 (1998) (when the same word or phrase is used in different statutes the meaning depends on common usage and the context in which it is used, unaffected by the other statutory definitions).

As a general matter, the terms in title 46 RCW are aimed at policy goals completely different from those in RCW 82.16.010. School buses owned and operated by school districts themselves are not operated "for hire," because they are not transporting the passengers of others for compensation. As such, listing school buses separately from "for hire vehicles" makes sense in the context of title 46 RCW, because the safety regulations for school buses should be drawn without regard to whether the buses are operated by a carrier "for hire" or the school districts themselves. Also, the term "for hire vehicle" in RCW 46.72.010, cited by the Department below, is not used anywhere in RCW 82.16.010. Therefore, the definition of "for hire vehicle" in RCW 46.72.010 and its exclusions are not relevant to the statutory interpretation of the motor and urban transportation classifications in RCW 82.16.010.

To the extent the definitions in title 46 RCW are considered, they support First Student's reading of the statute. First, the fact that the Legislature expressly excluded school buses operated under a contract from the definition of "for hire vehicle" in RCW 46.72.010 shows that school buses would have been considered a "for hire vehicle" under that statute, but for the express exemption. Here, the PUT statutes have no exemption for school buses operated under a contract and no exemption can be implied. *See TracFone*, 170 Wn.2d at 297 ("Where taxing statutes

are concerned, '[e]xemptions may not be created by implication.'" (citation omitted; brackets in original)). Therefore, school buses operated under contract fall within the scope of vehicles operated "for hire."

Second, RCW 46.72.010 expressly states that the definition of "for hire vehicle" in that section is limited to that chapter. A separate section, RCW 46.04.190, provides the default definition of "for hire vehicle" for purposes of title 46 RCW.[12] RCW 46.04.190 defines "for hire vehicle" as "any motor vehicle used for the transportation of persons for compensation, except auto stages and ride-sharing vehicles." Accordingly, if any definition of "for hire vehicle" in title 46 RCW is relevant to the definitions in RCW 82.16.010, it would be the general definition of "for hire vehicle," and not the definition used for a specific chapter.

Third, the general definition in RCW 46.04.190 is more consistent with the plain language of RCW 82.16.010(12), which states that "urban transportation business" includes "the business of operating passenger vehicles *of every type.*" RCW 82.16.010(12) (emphasis added). In fact, the definition of "for hire vehicle" in RCW 46.72.010 directly conflicts

[12] *See* RCW 46.04.190 (defining "for hire vehicle" for purposes of chapter 46.04 RCW); RCW 46.04.010 (stating that terms used in title 46 RCW, unless otherwise defined, shall have the meaning given to them in chapter 46.04 RCW).

with the definition of "motor transportation business." Under RCW 46.72.010(1), "auto transportation companies" licensed under chapter 81.68 RCW are excluded from the definition of "for hire vehicle." Yet these same "auto transportation companies" are expressly included within the definition of "motor transportation business." *See* RCW 82.16.010(6) ("'Motor transportation business' ... *includes*, but is not limited to, the operation of any motor propelled vehicle as *an auto transportation company ... as defined by RCW 81.68.010.*" (emphases added)).

Fourth, incorporating the exclusions in RCW 46.72.010 into RCW 82.16.010 would render the PUT classification meaningless, as the many exclusions in RCW 46.72.010 would remove virtually all transportation companies from taxation. The definition of "for hire vehicle" in RCW 46.72.010 excludes:

1) auto stages,
2) school buses operating exclusively under a contract to a school district,
3) ride-sharing vehicles under chapter 46.74 RCW,
4) limousine carriers licensed under chapter 46.72A RCW,
5) vehicles used by nonprofit transportation providers for elderly or handicapped persons and their attendants under chapter 81.66 RCW,
6) vehicles used by auto transportation companies licensed under chapter 81.68 RCW,

7) vehicles used to provide courtesy transportation at no charge to and from parking lots, hotels, and rental offices, and
8) vehicles used by charter party carriers of passengers and excursion service carriers licensed under chapter 81.70 RCW.

If all of these exclusions were applied to PUT motor and urban transportation classifications, there would be very few services left to tax. Such a strained result shows that applying the exclusions in RCW 46.72.010 is not a reasonable interpretation of RCW 82.16.010(6) or (12).

Fifth, in addition to conflicting with the plain language of RCW 82.16.010(6) and (12), these exclusions are also contrary to the Department's administration of the PUT statutes. In the 2005 charter bus determination discussed above, the taxpayer was registered with the Washington Utilities and Transportation Commission as a "Charter Party Passenger (Bus) Carrier." *See* Det. No. 05-0288, 26 WTD at 144. If RCW 46.72.010 controlled the scope of the PUT classifications, then the taxpayer would not have owed PUT in that case because it was a charter party carrier licensed under chapter 81.70 RCW, and therefore excluded from the definition of "for hire vehicle" in RCW 46.72.010.

Because First Student transports passengers for compensation, it is engaged in the "conveyance of person or property for hire." RCW 82.16.010(12). To the extent that the definition of "for hire vehicle" in

title 46 RCW is relevant, First Student's operations also meet the general definition, which includes "any motor vehicle used for the transportation of persons for compensation, except auto stages and ride-sharing vehicles." *See* RCW 46.04.190.

VI. CONCLUSION

For the foregoing reasons, the trial court's order granting summary judgment to the Department should be reversed and the matter should be remanded with instructions that First Student's home-to-school services are taxable under the motor and urban PUT classifications in RCW 82.16.010(6) and (12) and exempt from B&O tax.

Respectfully submitted this August 15, 2017.

Brett Durbin, WSBA No. 35781
Stoel Rives LLP
600 University Street, Suite 3600
Seattle, WA 98101
brett.durbin@stoel.com

Attorneys for Appellant

I certify under penalty of perjury under the laws of the state of Washington that, on August 15, 2017, I caused the **Brief of Appellant** to be filed with the Court of Appeals, Division II, and caused a true and correct copy of same to be served upon the following parties by as indicated below:

Office of Clerk Court of Appeals – Division II 950 Broadway, Suite 300 Tacoma, WA 98402 coa2filings@courts.wa.gov	☐ hand delivery ☐ overnight mail ☐ U.S. Mail ☒ e-mail/E-file
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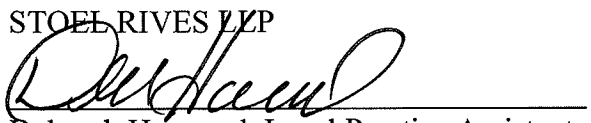
DATED: August 15, 2017, at Seattle, Washington.

STOEL RIVES LLP



Deborah Harwood, Legal Practice Assistant

APPENDICES

Appendix A - Washington State Tax Commission Rule 180 (1949)

Appendix B - Sixteenth Biennial Report of the Tax Commission of the State of Washington for the Period Ending June 30, 1956

Appendix A

thereafter forwarded by water carrier, in their original form, to interstate or foreign destinations: *Provided,* That no deduction will be allowed when the point of origin and the point of delivery to such export elevator, wharf, dock, or ship side are located within the corporate limits of the same city or town.

When revenue derived from any of the foregoing sources is included within the reported "gross operating revenue," the amount thereof may be deducted in computing tax liability.

In addition to the foregoing deductions there also may be deducted from the reported "gross operating revenue" (if included therein), the following:

(a) The amount of cash discount actually taken by the purchaser or customer.

(b) The amount of credit losses actually sustained.

(c) Amounts received from insurance companies in payment of losses.

(d) Amounts received from individuals and others in payment of damages caused by them to the utility's plant or equipment.

(e) Amounts received from individuals and others in payment for moving or altering the utility's plant or equipment when done for the benefit or convenience of such individuals or others. This does not include amounts received for extension of service lines.

(For specific rule pertaining to the classifications of "urban transportation" and "highway transportation," see Rule 180.)

Effective May 1, 1949.

HIGHWAY TRANSPORTATION—URBAN TRANSPORTATION

Rule 180.

The term "highway transportation business" means the business of operating any motor propelled vehicle, as an auto transportation company (except urban transportation business), common carrier or contract carrier as defined in chapter III, Laws of 1921, page 338, section 1, and chapter 184, Laws of 1935, page 884, section 2 and amendments thereto and includes the business of so operating within and between incorporated cities and towns whose corporate limits are more than five miles apart.

It includes the business of hauling for hire upon the highways any merchantable extracted material, such as logs, poles, sand, gravel, coal, etc. Such persons will be deemed to be engaged in the business of highway transportation when the Public Service Commission requires them to obtain a common carrier or contract carrier permit with respect thereto.

It does not include the hauling upon streets or highways of any earth or other substance excavated or extracted from or taken to the right of way of a publicly owned street, place, road or highway, by a person taxable under the classification of "public road construction" of Title II (Business and Occupation Tax). (See Rule 171.)

NOTE: Persons operating school buses for hire are taxable under the classification of "Service and Other Activities" of Title II (Business and Occupation Tax) at the rate of ½ of 1% of gross income.

The term "urban transportation business" means the business of operating any vehicle for public use in the conveyance of persons or property for hire, in so far as (A) operating entirely within the corporate limits of any city or

town, or within five miles of the corporate limits thereof, or (B) operating entirely within and between cities and towns whose corporate limits are not more than five miles apart or within five miles of the corporate limits of either thereof. Included herein, but without limiting the scope thereof, is the business of operating passenger vehicles of every type and also the business of operating cartage, pick-up or delivery services, including in such services the collection and distribution of property arriving from or destined to a point within or without the state, whether or not such collection or distribution be made by the person performing a local or interstate line-haul of such property;

It does not include the business of operating any vehicle for the conveyance of persons or property for hire when such operation extends more than five miles beyond the corporate limits of any city (or contiguous cities) through which it passes. Thus an operation extending from a city to a point which is more than five miles beyond its corporate limits does not constitute urban transportation, even though the route be through intermediate cities which enables the vehicle, at all times, to be within five miles of the corporate limits of some city.

Business and Occupation Tax (Title II)

Retailing—Persons engaged in either of said businesses are taxable under the "Retailing" classification at the rate of ¼ of 1% of gross retail sales of tangible personal property sold by them.

Service and Other Business Activities—Persons engaged in either of said businesses are taxable under the "Service and Other Activities" classification at the rate of ½ of 1% of gross income received from checking service, packing and crating, commissions on sales of tickets for other lines, travelers' checks and insurance, and from rental of equipment, etc.

Persons hauling in their own equipment and for their own account, property owned or sold by them, are not taxable with respect to such operation under either Title II or Title V.

Public Utility Tax (Title V)

Persons engaged in the business of urban transportation are taxable at the rate of ½ of 1% of the gross operating revenue of such business.

Persons engaged in the business of highway transportation are taxable at the rate of 1½% of the gross operating revenue of such business.

Persons engaged in the business of both urban and highway transportation are taxable at the rate of 1½% of gross operating revenue, unless a proper segregation of such revenue is shown by the books of account of such persons.

Effective May 1, 1949.

VESSELS INCLUDING TUGS AND BARGES, OPERATING UPON WATERS WHOLLY WITHIN THE STATE OF WASHINGTON

Rule 181.

Business and Occupation Tax (Title II)

Retailing—Persons engaged in the business of operating such vessels and tugs are taxable under the "Retailing" classification at the rate of one-fourth

Appendix B

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STATE OF WASHINGTON

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SIXTEENTH BIENNIAL REPORT

OF THE

TAX COMMISSION

OF THE

STATE OF WASHINGTON

FOR THE

PERIOD ENDING JUNE 30, 1956

STATE PRINTING PLANT OLYMPIA, WASHINGTON

EXCISE TAXES — LAWS OF 1955

Chapter 95, RCW 82.08.120. Exempts from the Business and Occupation Tax the proceeds of certain accommodation sales for resale between retailers which are made at cost and for the purpose of filling a bona fide existing order of a customer of the buyer or are made within fourteen days to reimburse in kind a previous accommodation sale by the buyer to the seller.

Chapter 110, RCW 82.32.090. Extends the delinquency date for the filing of excise tax returns from the 25th day of the month in which the tax becomes due to the last day of that month.

Chapter 137, RCW 82.08.030 and 82.12.030. Exempts from the Retail Sales Tax and the Compensating Tax the sale and/or use of "cattle and milk cows used on the farm."

Chapter 236. Repeals RCW 82.32.250 relating to the lien of taxes against public works contracts, but re-enacts the substance of this section as a part of Chapter 60.28 RCW.

Chapter 389. (1) **RCW 82.04.270** extends the Business and Occupation Tax imposed upon the privilege of making sales at wholesale to include retailers performing a wholesaling function by distributing goods from a warehouse or other central location to two or more of their own retail outlets; (2) **RCW 82.04.050** extends through June 30, 1957, the definition of a "retail sale" as including the charge made for the furnishing of lodging and related services to transients by a hotel, rooming house, tourist court, motel, trailer camp, etc., and providing that the occupancy of real property for a continuous period of one month or more shall constitute a rental or lease of real property and not a license to use or enjoy the same; (3) **RCW 82.04.296** extends through June 30, 1957, the temporary surtax of twenty per cent of the Business and Occupation Tax due (but see subsequent amendment by chapter 10, Laws of 1955, Ex. Sess.); (4) imposing the application of the Compensating Tax to the use of property acquired by bailment, but providing that such tax shall not apply to such use in the event it has already been paid by the bailor (but this amendment omitted in Ch. 10, Ex. Sess.); (5) **RCW 82-.12.010** amplifies the definition of the term "consumer," for the purposes of the Compensating Tax, to mean, among others, any person who distributes or displays, or causes to be distributed or displayed, any article of tangible personal property, except newspapers, the primary purpose of which is to promote the sale of products or services; (6) **RCW 82.12.040** provides that persons maintaining in this state places of business, a resident agent or a stock of goods shall, at the time of making transfers of possession of tangible personal property for use in this state, collect the Compensating Tax from the transferee; (7) **RCW 82.16.026** extends through June 30, 1957, the temporary surtax of ten per cent applying to all classifications under the Public Utility Tax; (8) **RCW 82.16.010** redefines the term "highway transportation business," as used in the Public Utility Tax, so as to include all for-hire transportation by motor vehicle other than that specifically falling within the statutory definition of "urban transportation business," and irrespective whether or not such hauling services are performed in whole or in part on public roads, private roads or on private lands; (9) **RCW 82.28.010** redefines the term "gross operating income," as used for the purpose of computing the tax on certain mechanical devices, to mean the aggregate amount paid in to each mechanical device by all players of that device during each

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