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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.

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

The Department's position that First Student's services are not provided "for hire" is based on an interpretation that is not supported by any authorities. The Department fails to cite any case law, statutes, regulations, or administrative decisions holding that the term "for hire" is limited to situations where the passengers themselves directly pay for the transportation service.

The Department's entire position is based on a definition found in a 1951 edition of *Black's Law Dictionary*. That definition relies on a 1920 South Dakota case involving the transportation of bread by a baker. The Department acknowledges that the holding in that case does not support the distinction it attempts to draw. Resp. Br. at 21. Rather, it asserts without citation that the statement in the case reflected the common understanding of the term at the time. *Id.* However, the case law and transportation statutes from that time defining "for hire" directly contradict this assertion.

In fact, the 1921 version of Washington's motor vehicle statutes defined "for hire" as "all motor vehicles other than auto stages, used for the transportation of persons, for which transportation remuneration of any kind is received, either directly or indirectly." Laws of 1921, ch. 96, § 2. The Washington Attorney General's Office even opined a number of times

that a person using a vehicle to transport school children for compensation must have a “for hire” license under these statutes. AGO 1931-32 at 342; AGO 1919-20 at 180-81.

Despite repeatedly claiming that the Legislature in 1955 would not have considered school bus transportation to be provided “for hire,” the Department makes no effort to explain how this position is consistent with its own statement in the 1949 version of WAC 458-20-180 (“Rule 180”) that “[p]ersons operating school buses *for hire* are taxable under the classification of ‘Service and Other Activities.’” Washington Tax Commission Rule 180 (1949) (emphasis added).

The language of the 1955 amendment clearly shows the Legislature intended to expand the scope of the PUT statutes to include all “for hire” vehicles, including those exempt from the definition of “auto transportation company,” such as taxicabs, hotel buses, and school buses. RCW 81.68.015.

Given this background, there is no credible basis to assert that the Legislature in 1955 would have understood that school buses operated for compensation were not operated “for hire.” The Department cannot use its failure to update its rule as grounds to rewrite the PUT statute to include an exemption for school buses. Legislative acquiescence can apply only when the statute in question is ambiguous and there is

subsequent legislation dealing with the issue. Here, there is no ambiguity in the statute and there has been no subsequent legislation amending the language at issue.

For these reasons, First Student's transportation services were subject to PUT and exempt from B&O tax. Accordingly, this Court should reverse the trial court's grant of summary judgment to the Department and remand the matter for a calculation of the proper amount of the refund.

II. ARGUMENT

A. **The Department's Reading Of The Term "For Hire" Draws A Distinction That Has Not Been Applied In Any Legal Authority.**

The Department's interpretation of "for hire" is based on a strained reading of a single definition from *Black's Law Dictionary*. Resp. Br. at 20-21. When viewed in light of the case law and other authorities, the Department's strained reading of the *Black's Law Dictionary* definition is not consistent with the common legal usage of the term "for hire."

The Department cites *Cashmere Valley Bank v. Department of Revenue*¹ for the proposition that familiar legal terms are given their familiar legal meanings. Resp. Br. at 20. However, it fails to show how its reading of the term "for hire" is consistent with any legal authorities.

¹181 Wn.2d 622, 334 P.3d 1100 (2014)

1. No statutes or case law limits the term “for hire” to situations where the passengers are directly responsible for paying the compensation.

As pointed out in First Student’s opening brief,² the case referenced in the *Black’s Law Dictionary* definition, *Michigan Consolidated Gas Co. v. Sohio Petroleum Co.*, 321 Mich. 102, 32 N.W.2d 353 (1948), contained citations to two different cases: *Murphy v. Standard Oil Co.*, 49 S.D. 197, 207 N.W. 92, 93 (1926), and *City of Sioux Falls v. Collins*, 43 S.D. 311, 178 N.W. 950, 951 (1920). *Michigan Consolidated Gas* quoted both of these cases as authority for determining the meaning of the term “transport for hire.” 32 N.W.2d at 356.

The term ‘transport for hire’ has been defined as follows:

“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.

“‘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.

² Brief of Appellant (“App. Br.”)

See also *State v. Manhattan Oil Co.*, 199 Iowa 1213, 203 N.W. 301; *Kroger Grocery & Baking Co. v. Cynthiana*, 240 Ky. 701, 42 S.W.2d 904; *Hughson Condensed Milk Co. v. State Board of Equalization*, 23 Cal.App.2d 281, 73 P.2d 290.

Id. (ellipsis in original).

Black's Law Dictionary could have chosen either of these two quotes to use as a definition of “for hire.” If *Black's Law Dictionary* had chosen the quote from *Murphy* instead of *City of Sioux Falls*, the Department would have nothing to point to for its reading of the term “for hire.” The Department’s attempt to draw a distinction where none exists is further demonstrated by the fact that none of the cases citing *City of Sioux Falls*, none of the cases citing *Murphy*, and none of the cases string-cited in *Michigan Consolidated Gas*, distinguish a “for hire” carrier based on whether the passengers themselves paid for the rides.

2. The familiar legal meaning of “for hire” in the transportation context is “the transportation of persons or property for compensation.”

Not only does the case law surrounding the *Michigan Consolidated Gas* case fail to support the Department’s position, it directly supports First Student’s reading of “for hire.” The statute at issue in *Murphy* defined “for hire” as “for remuneration of any kind, paid or promised, either directly or indirectly.” *Murphy*, 207 N.W. at 93. Importantly, this language is almost identical to the definition of “for hire” in the

Washington statutes at the time, which was “all motor vehicles other than auto stages, used for the transportation of persons, for which transportation remuneration of any kind is received, either directly or indirectly.” Laws of 1921, ch. 96, § 2. The statute in a case citing *City of Sioux Falls* also defined “for hire” in a manner identical to the statute at issue in *Murphy*. *See Bd. of R.R. Comm’rs v. Gamble-Robinson Co.*, 111 Mont. 441, 111 P.2d 306, 307 (1941) (“The words ‘for hire’ mean for remuneration of any kind, paid or promised, either directly or indirectly.” (citation omitted)).

Finally, in 1963 the Alabama Supreme Court went so far as to say:

The term ‘operate for hire’ has a well-known and definite meaning in the jurisprudence of this country. The term means in law, in commercial usage, and in ordinary parlance, *the transportation of persons or property for compensation* and could not possibly apply to a lessor, such as the appellee, which leases the vehicles to a lessee to carry his own goods or products.

Brown v. Nat’l Motor Fleets, Inc., 276 Ala. 493, 164 So. 2d 489, 490

(1963) (emphasis added). This pronouncement is consistent with a number of statutes defining “for hire,” the dictionary definitions of “hire” and “for hire,” and the case law analyzing the term “for hire.” Taken together, there is little doubt that the familiar legal meaning of the term “for hire” is “the transportation of persons or property for compensation.” *Id.*

B. Washington Attorney General Opinions Show That Transporting School Children For Compensation Falls Within The Familiar Legal Meaning Of “For Hire.”

In the 1920s and '30s the term “for hire” was defined in Washington’s motor vehicle statutes as “all motor vehicles other than auto stages, used for the transportation of persons, for which transportation remuneration of any kind is received, either directly or indirectly.” Laws of 1921, ch. 96, § 2. As discussed above, this definition is consistent with the well-known meaning of “for hire” “in law, in commercial usage, and in ordinary parlance.” *Nat’l Motor Fleets*, 164 So. 2d at 490.

In applying this definition to individuals and companies transporting school children for compensation, the Washington Attorney General’s Office concluded a person receiving \$10 per month from a school district to transport school children fell squarely within the definition of “for hire.” AGO 1931-32 at 342; Appendix A. It went on to state that “[t]here is no statute exempting transportation of school children from the operation of this statute.” *Id*; *see also* AGO 1919-20 at 180-81; Appendix B (where the owner of a truck receives remuneration for the transportation of pupils, the owner must have a “for hire” license).

While the Department fails to discuss or even cite these Washington Attorney General opinions, it does cite another Washington Attorney General opinion it argues supports its position. *See* Resp. Br. at

22 (citing AGO 1956 No. 242). However, that opinion deals with a different factual scenario and does not support the proposition that school bus transportation is “for hire” *only* when the students pay the fare. *Id.* The opinion states that “to charge a fare would cause such vehicles to acquire a ‘for hire’ status as defined by RCW 46.04.190.”³ AGO 1956 No. 242 at 4. But this portion of the opinion is directed to local school boards and how they should use “their buses.” *Id.* As such, it addresses the situation where a school district is charging for the use of its own school bus, not a situation where a school district is paying a third party to transport school children. As shown in the two Attorney General opinions cited above, that arrangement falls within the definition of “for hire” as well.

Because the definition of “for hire” in the Washington statute is almost identical to the familiar legal meaning of the term “for hire,” the Attorney General opinions demonstrate that transporting school children for compensation falls within the plain meaning of the term “for hire.”

³ RCW 46.04.190 is the successor to the “for hire” statute at issue in the prior Attorney General opinions. The Laws of 1921, ch. 96, § 2 was amended by Laws of 1937, ch. 189, § 1 and codified in part as RCW 46.04.190 in 1959. Laws of 1959, ch. 49, § 20.

C. The Department's Interpretation Is Not Consistent With The Context Of The Statute.

The context of the statute further demonstrates that the Department's argument about the proper interpretation of "for hire" is not reasonable. As shown in First Student's opening brief, applying the Department's reading of "for hire" to the language of the other PUT classifications creates absurd results. App. Br. at 22.

The Department asserts that its reading is consistent with the statutory context, but it does not directly demonstrate this for most of the PUT classifications. Instead, it claims that most of the other PUT classifications referencing the term "for hire" do not involve the transportation of passengers, and ignores those classifications. Resp. Br. at 29. By making this distinction, the Department seems to contend that the transportation of property can be "for hire" if a third party pays for the transportation of property, but transportation of passengers cannot be "for hire" if a third party pays for the transportation. However, nothing in the statutory context, the dictionary definitions, or the case law supports a reading of the term "for hire" that changes depending on whether the transportation involves passengers versus property.

It would be odd for the Legislature to use the phrase "operating any motor propelled vehicle by which persons or property of others are

conveyed for hire,” if the meaning of “for hire” was radically different when used in the context of transporting property versus passengers. *See* RCW 82.16.010(6) (defining “motor transportation business”). The consistent use of the term “persons or property” in the PUT definitions referencing the transportation of people for hire reinforces the conclusion that the Legislature did not intend the term “for hire” to acquire a different meaning depending on whether passengers or property is transported.

Moreover, there is no evidence in the statute that the Legislature intended to distinguish between companies that receive payment directly from the passengers versus those that receive the compensation from a third party. Such a distinction makes no sense given the structure of the statute. What would it matter if a hotel bus transporting guests received compensation from the hotel versus the guests themselves?

In both cases the activity of the company remains the same: to transport the hotel’s guests to and from the hotel. Nothing in the statute or the Department’s rules shows that the source of payment is a relevant consideration in determining the scope of the tax. Rather, the focus of the PUT statutes and the Department’s rules is the nature of the activity the company engages in. *See* RCW 82.16.010; Rule 180.

The strained nature of the Department’s interpretation is particularly apparent given that the common meaning of “for hire” in the

dictionaries, statutes, and case law, is completely consistent with all of the uses of the term in the statute, without needing to change the meaning of the term.

Additionally, the Department fails to explain how its position is consistent with the express inclusion of “auto transportation compan[ies]” in the “motor transportation” PUT definition. *See* RCW 82.16.010(6). If the Department were correct, there would be instances where a company would be operating as an “auto transportation company” because it is transporting passengers “for compensation,” but not “for hire,” because it received the compensation from a third party. As the Department acknowledges, statutes are to be read together, whenever possible, to achieve a harmonious total statutory scheme that maintains the integrity of the respective statutes. *See* Resp. Br. at 31 (citing *Am. Legion Post No. 149 v. Dep’t of Health*, 164 Wn.2d 570, 588, 192 P.3d 306 (2008)). By interpreting the statute in a manner that creates a needless conflict between the definitions of “motor transportation business” and “auto transportation company,” the Department fails to interpret the statutes harmoniously. Accordingly, its interpretation should be rejected.

D. First Student’s Reading Of The Statute Does Not Render The Term “For Hire” Superfluous, Nor Should It Be Presumed That “For Hire” Must Have A Different Meaning Than “For Compensation.”

The Department asserts that “for hire” must have a different meaning than “for compensation” and that First Student’s position renders the term “for hire” superfluous. Resp. Br. at 37. In doing so, the Department applies the rules of statutory construction mechanically and to an extent that ignores the statutory context and common sense.

As shown above, “for hire” and “for compensation” have almost identical meanings.⁴ Indeed, prior to 1955 the scope of the “motor transportation business” classification was defined solely with reference to motor transportation statutes that used the term “for compensation.” App. Br. at 11. While the motor transportation statutes used the term “for compensation,” the PUT statute used the term “for hire.” Compare RCW 82.16.010 (using “for hire”) with RCW 81.68.010 and RCW 81.80.010 (using “for compensation”). Thus, when the Legislature chose to expand the PUT definition in 1955 to tax the companies expressly exempted from the motor transportation statutes, such as taxicabs, hotel buses, and school buses, it made sense for the Legislature to be consistent with the language in other PUT classifications and use the term “for hire” versus “for

⁴ See also *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)

compensation.” The mere fact that a different term was used as part of a different statute does not compel a different meaning.⁵

The Department seems to admit that the current meaning of “for hire” is “available for use or service in return for payment.” *Webster’s Third New International Dictionary* 1072 (2000); Resp. Br. at 27. Yet, under the Department’s analysis, if the current Legislature were to make the same amendment that the Legislature made in 1955 to expand the scope of the PUT statute, the term “for hire” could not be given its current meaning as that would violate the rules of statutory construction. Such an application of the rules of statutory construction creates an absurd result and should be rejected. *See Davis v. State ex rel. Dep’t of Licensing*, 137 Wn.2d 957, 971, 977 P.2d 554 (1999) (the rule of statutory construction that trumps every other is that courts should not construe statutory language so as to result in absurd or strained consequences).

E. Decisions From Other States Support First Student’s Interpretation, Not The Department’s.

The Department cites a few cases from other states that it claims support its reading of “for hire.” However, a cursory review of these cases shows that they support First Student’s reading, not the Department’s.

⁵ The rule of statutory construction that different terms should be given different meanings only applies within the same statute. *See Simpson Inv. Co. v. Dep’t of Revenue*, 141 Wn.2d 139, 160, 3 P.3d 741 (2000) (when different words are used *in the same statute*, it is presumed that a different meaning was intended to attach to each word).

1. The cases cited by the Department do not support its position.

The *In re Jerome S.* case cited by the Department addressed whether a First Student school bus monitor assaulted by Jerome S. was a “public transportation employee.” 2012 IL App (4th) 100862, 968 N.E.2d 769, 771. The court concluded that the employee was not a “public transportation employee” because the school bus was not available to the general public. *Id.* at 774. Thus, the holding in the case did not turn on whether First Student was providing transportation “for hire.”

In fact, the court in *Jerome* even cited to prior cases holding that a school bus was a “private carrier” and not a “common carrier.” *Id.* at 773. Those cases defined a “private carrier” as someone who “undertakes by special agreement, in a particular instance only, to transport persons or property from one place to another either gratuitously or *for hire*.”⁶ Thus, the court in *Jerome* implicitly acknowledged that First Student was providing transportation for hire, but concluded that the employee was not a “public transportation employee” because First Student was not providing transportation to the general public.

Likewise, the *Durham Transportation, Inc. v. Valero* case cited by the Department dealt with the issue of whether a school bus company was

⁶ *Jerome*, 968 N.E.2d at 773 (emphasis added) (citing *Green v. Carlinville Cmty. Unit Sch. Dist. No. 1*, 381 Ill. App. 3d 207, 887 N.E.2d 451, 455 (2008)).

subject to a heightened duty of care as a “common carrier.” 897 S.W.2d 404, 408-09 (Tex. App. 1995). As the court did in *Jerome*, the Texas Court of Appeals concluded that the school bus operator was not a “common carrier” because it did not serve members of the general public. *Id.* at 409. The Department relies on the statement in *Durham* that a school bus operator is not “available for hire to any person other than the school children living within the districts with which it contracts.” *Id.* at 408; Resp. Br. at 33. But this statement proves First Student’s position, not the Department’s—while *Durham* may not have provided transportation for hire to the general public, it was “available for hire” to the school children.

Finally, the *Gibson v. Board of Education of Watkins Glen Central School District*⁷ and *Nebinger v. Maryland Casualty Co.*⁸ cases are distinguishable. *Gibson* is distinguishable because it involved a driver employed directly by a school district. *Gibson*, 414 N.Y.S.2d at 792. The buses were owned or operated by the school district itself and there is no evidence that the school district charged anyone for the use of the school buses. *Id.* at 792-93. In this situation, First Student agrees that the school buses are not operated for hire because the school district is not receiving compensation for transporting the school children.

⁷ 68 A.D.2d 967, 414 N.Y.S.2d 791 (App. Div. 1979)

⁸ 312 N.J. Super. 400, 711 A.2d 985, 989 (N.J. Super. Ct. App. Div. 1998).

The *Nebinger* case is also distinguishable because the court held the clients were not paying a transportation fare, but instead were paying “for multiple services including transportation.” *Nebinger*, 711 A.2d at 989. The senior center in that case was receiving payment directly from the clients for the senior program fees and transportation was included as part of the fee. *Id.* at 986-87. This is no different than the situation in *City of Sioux Falls* where the baker was delivering bread. The transportation is incidental to the activities of the business, and the compensation received from the customers is for the products or services of the business, not the transportation.

Here, the Department admits that First Student is providing transportation for compensation. CP 27. Therefore, the holdings in *Gibson* and *Nebinger* are distinguishable and do not apply in this case.

2. Cases from other states hold that operating school buses for compensation is “for hire.”

A review of other out-of-state cases shows that companies transporting school children for compensation are doing so “for hire.” In *Burnett v. Allen*, the court stated that a “bus driver who contracts to furnish transportation and to transport school children from places at or near their residences to public free school becomes a special contractor *for hire.*” 114 Fla. 489, 154 So. 515, 518 (1934) (emphasis added).

In *Hunt ex rel. Gende v. Clarendon National Insurance Service, Inc.*, the critical question was whether a school bus company was subject to a heightened duty of care as a “common carrier.” This was similar to the issue in *Durham*. In determining that the school bus company was a common carrier, the court stated:

“Two elements characterize a carrier as a common carrier: (1) The service is for hire, and (2) the carrier holds itself out to the public.” ... Here, Johnson School Bus Service makes itself available to public school districts, *offers to transport persons identified by the district* to various locations at various times (also identified by the district), and *receives payment from the district for those services. Clearly, the service is for hire.* The part of the public attending the particular public school is served. The passengers are in the care of the operator while traveling from place to place. Johnson School Bus Service satisfies all common law characteristics of a common carrier.

278 Wis. 2d 439, 691 N.W.2d 904, 909 (Ct. App. 2004) (emphasis added; citation omitted).

Taken together, all of these cases support First Student’s position that the transportation of school children for compensation falls within the scope of providing transportation “for hire.”

F. The Department’s Position In This Case Is Inconsistent With Its Long-Standing Administration Of The PUT Statutes.

The Department’s attempts to harmonize its position in this case with its long-standing administration of the PUT are fundamentally

flawed. The statutes cited by the Department have no relevance to the scope of the PUT statute. Moreover, the assertion that charter services are provided to passengers under different legal arrangements is at best misleading. Resp. Br. at 29. While the Department points to other statutory schemes dealing with the transportation of school children and the provision of charter services, it fails to address the relevant inconsistency.⁹ Resp. Br. at 29-35.

The Department's position in this case is that the term "for hire" means that the passengers themselves must pay the transportation company. Resp. Br. at 21. Therefore, any time that the passengers are not paying for the transportation directly, the service would not be "for hire" in the Department's view. This would be the case if an employer chartered a bus to transport its employees between work sites, a nonprofit paid for a youth group to travel to a summer camp, or an airline paid for a shuttle service to transport passengers to a hotel due to a flight cancellation. None of these situations would involve the transportation of "passengers ... for a reward or stipend, *to be paid by such passengers,*" *Black's Law Dictionary* 773 (4th ed. 1951) (emphasis added), but the

⁹ The Department asserts that the Legislature has consistently distinguished between school buses and for hire vehicles. Resp. Br. at 34. However, as pointed out in First Student's opening brief, the motor vehicle statute are drawn so that regulations applying to the operation of school buses are applied consistently regardless of whether the buses are operated by the school districts themselves or for hire. App. Br. at 30.

Department taxes such carriers under the PUT statutes. There is no way to square this with the Department's interpretation of "for hire" in this case.

Further, the Department ignores the fact that Rule 180 expressly includes vehicle rentals where the lessor operates the vehicle in the conveyance of persons or property. Rule 180 (5)(b). This provision has been in Rule 180 since 1959. Washington Tax Commission Rule 180 (1960), Appendix C. Obviously, this situation also does not involve the transportation of passengers where the compensation is "paid by such passengers." Therefore, this long-standing provision is also inconsistent with the Department's arguments.

These inconsistencies are important, as the Department's administration of the statute has never involved an articulation of the reason why school buses are not subject to PUT. When asked to provide the basis for the school bus exclusion at the administrative level, the Department could not come up with an answer. CP 22. It was only in response to First Student's summary judgment motion that the Department provided its current rationale. CP 58. Therefore, there is no long-standing interpretation of the term "for hire" that the Court should defer to in this case.

Indeed, as noted above, the 1949 version of Rule 180 even states that "[p]ersons operating school buses *for hire* are taxable under the

classification of ‘Service and Other Activities.’” Because this provision was in the Department’s Rule 180 for a number of years before the Legislature expanded the definition to include all “for hire” motor companies, it is hard to see how the Department’s current litigation position has any legitimacy.

Since the Department’s post hoc rationalization of the school bus exclusion conflicts with the Department’s own long-standing practice of taxing charter carriers and the historic rule language, the Court should give no deference to the interpretation of the term “for hire” the Department advances in this litigation.

G. Rule 180 Cannot Rewrite The Plain Language Of The Statute.

The Department argues extensively that the Legislature has acquiesced to Rule 180’s exclusion of school buses from the PUT. However, the Department does not dispute that an administrative rule cannot change the scope of a statute.¹⁰ Nor does it dispute that Legislative acquiescence does not apply when a statute is unambiguous.¹¹ As shown above, the Department’s position is contrary to the plain language of the statute and is not a reasonable interpretation of the term “for hire.”

¹⁰ *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).

¹¹ *Pringle v. State*, 77 Wn.2d 569, 573, 464 P.2d 425 (1970) (legislative acquiescence can only be considered when statute is ambiguous).

Therefore, the Department's legislative acquiescence argument is misplaced.

None of the cases cited by the Department applied legislative acquiescence to an unambiguous statute. In *In re Sehome Park Care Center, Inc.*, 127 Wn.2d 774, 778, 903 P.2d 443 (1995), the court found that the statute was ambiguous, and did not decide the case purely on the ground that there was a longstanding Department interpretation. Rather, the Court determined that the legislative history and the last antecedent rule supported the Department's interpretation. *Id.* at 782.

Similarly in *State ex rel. Evergreen Freedom Foundation v. Washington Education Ass'n*, the court did not decide the case based on legislative acquiescence, but what it determined was the plain meaning of the statute and the rule's clarification of ambiguities "without amending [the statute] or frustrating its intent." 140 Wn.2d 615, 640, 999 P.2d 602 (2000).

Because the plain language of RCW 82.16.010 unambiguously shows that First Student is taxable under the PUT statutes, the Department cannot use the provisions of Rule 180 to deny First Student the appropriate tax treatment.

H. This Matter Should Be Remanded To The Trial Court To Determine The Proper Amount Of The Refund.

While First Student does not admit that an offsetting PUT obligation can be used to reduce the amount of its B&O tax refund under RCW 82.32.180, this matter was not decided by the trial court and is not before this Court. As such, First Student merely requests that the Court reverse the trial court's grant of summary judgment in favor of the Department and remand the matter for a calculation of the proper amount of the refund.

III. CONCLUSION

For the foregoing reasons, the trial court's order granting summary judgment 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 are exempt from B&O tax.

DATED: December 15, 2017.

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I certify under penalty of perjury under the laws of the state of Washington that, on December 15, 2017, I caused the **Reply 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:

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Court of Appeals – Division II
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Tacoma, WA 98402

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Attorneys for Defendant

DATED: December 15, 2017, at Seattle, Washington.

STOEL RIVES LLP



Eileen E. McCarty, Legal Practice Assistant

Appendix A

OLYMPIA, WN., October 7, 1932.

*Honorable Charles R. Maybury, Director of Licenses,
Olympia, Wn.*

DEAR SIR: We have your letter of October 3d, together with enclosures, which reads as follows:

"We have had several opinions from you with reference to school buses involving those owned by the school district, those leased by the school district for their exclusive use and those hired by the school district for part time work.

"We are enclosing herewith a letter requesting that we take this matter up further with you with reference to the school bus that is rented on part time and used the balance of the time for their own use. I am enclosing herewith the letter referred to from Charles R. Sargent, clerk of the Chelan Public Schools."

In the letter from Mr. Chas. R. Sargent, clerk of Lake Chelan public schools, our previous opinions on this question are severely criticized as working an unnecessary hardship on persons transporting pupils for a compensation by requiring them to obtain a "for hire" license. A case is cited where the party transporting a few children a short distance receives only \$10.00 a month. We heartily agree with the argument advanced by Mr. Sargent, from the standpoint of public policy, but unfortunately this argument will have to be advanced to the legislature. The law is too plain for construction.

Section 6313 (12), Rem. Comp. Stat., defines "for hire" as follows:

"'For hire' shall be taken to mean all motor vehicles other than auto stages, used for the transportation of persons, for which transportation remuneration of any kind is received, either directly or indirectly."

There is no statute exempting transportation of school children from the operation of this statute. Surely Mr. Sargent will understand that we cannot disregard the plain language of this statute.

We have construed section 2, chapter 309, Laws of 1927, as amended by section 1 (s), chapter 180, Laws of

1929, in favor of school districts by holding that a school district leasing a bus for more than thirty days and the school having the "exclusive use thereof" is entitled to an exempt license. This is, however, as far as we can go under the present statutes.

Undoubtedly a person carrying school children takes into consideration the amount of the cost of his "for hire" license in arriving at the amount he charges the school district for this service. This, of course, is an indirect charge against the school district, but it is no more a charge than the tax paid on the gasoline used in the school bus or the personal property taxes paid by the owner of the bus. There would be just as much reason under the law to exempt the owner of the bus from personal property tax or from the payment of liquid fuel tax on gasoline used in the bus as there is in exempting him from the license tax on the bus. These, however, are matters within the discretion of the legislature. Neither this office nor the courts have the power to legislate by construing statutes contrary to the plain language used by the lawmakers.

Yours respectfully,

JOHN H. DUNBAR,

Attorney General.

OLYMPIA, Wn., October 11, 1932.

*Honorable Charles R. Maybury, Director of Licenses,
Olympia, Wn.*

DEAR SIR: We have your letter of October 6th, which reads as follows:

"Under the provisions of chapter 140, Laws of 1931, will a motorcycle taxicab be required to have a for-hire license and thereby be charged the regular seat fees in addition to the \$3.00 basic fee?"

Section 6326, Rem. Comp. Stat., as amended by section 1, chapter 140, Laws of 1931, provides in part as follows:

Appendix B

Dietrich v. Fargo, 87 N. E. 518, 194 N. Y. 359, 22 L. R. A. (N. S.) 696.

In preventing their taking during certain seasons of the year in an act relating to game, the legislature of this state has expressly recognized bear as a game animal and has by the laws of this state protected the species enumerated in the section quoted above.

Section 30 of the Game Code of 1913 (Rem. 1915 Code, sec. 5395-30) provides:

"It shall be unlawful for any person at any time to sell or offer for sale any of the game birds, game animals or song birds protected by the laws of the state of Washington. Any person violating any of the provisions of this section shall be guilty of a misdemeanor."

It follows therefore that black, brown and cinnamon bear, being game animals protected by the laws of the state, the sale or offering for sale of the animals or their meat is unlawful.

Yours respectfully,
GLENN J. FAIRBROOK,
Assistant Attorney General.

OLYMPIA, Wn., October 29, 1919.

*Mr. William Stuart, Deputy Prosecuting Attorney, Kelso,
Wn.*

DEAR SIR: We are in receipt of your letter of October 25, which reads as follows:

"School district No. 36 of this county employs a large motor truck for the purpose of transporting the pupils of the district to and from the school.

"Kindly advise me if this auto truck should be classed as an auto stage and the fee of \$3.00 per passenger capacity be collected."

We assume that the owner of the truck receives remuneration for the transportation of these pupils. Sub-

division 4, section 2, chapter 59, Laws of 1919, defines an auto stage as follows:

“ ‘Auto stage’ as distinguished from ‘automobile’ shall mean a motor vehicle used for the purpose of carrying passengers, baggage and freight on a regular schedule of time and rates: *Provided, however,* That no motor vehicle shall be considered an auto stage where the whole route traveled by such vehicle is within the corporate limits of any incorporated city.”

We do not believe that a motor vehicle operated under the circumstances outlined in your letter can be said to be an auto stage. The employment arises out of a specific contract for a single purpose and the automobile is not used for the transportation of the general public, nor does it run on a regular time schedule and with fixed rates in the sense that these terms are used in the statute.

Such a vehicle, however, is a “for hire” car as it transports persons for a remuneration and would therefore have to be provided with a “for hire” license. (Opinion to Fred C. Brown, March 19, 1919.)

Yours respectfully,

L. L. THOMPSON,
Attorney General.

OLYMPIA, Wn., October 29, 1919.

Mrs. Josephine Corliss Preston, Superintendent of Public Instruction, Olympia, Wn.

DEAR MADAM: In your letter of October 25th you state that certain private organizations are conducting courses in directed athletics and gymnastics. You inquire if individual students in schools enumerated in section 2, chapter 89, Laws of 1919, may be excused from the physical training therein provided for because of participation in these privately conducted courses, and if so, is there any legally constituted authority which may properly determine standards to be met by such privately conducted courses to the end that pupils participating

Appendix C

RULES

RELATING TO

THE REVENUE ACT

Chapter 180, Laws of 1935, as Amended by Chapters 191 and 227, Laws of 1937, Chapter 225, Laws of 1939, Chapters 76, 118 and 178, Laws of 1941, Chapter 156, Laws of 1943, Chapters 126 and 249, Laws of 1945, Chapter 248, Laws of 1947, Chapters 180 and 228, Laws of 1949, Chapter 5, Laws of 1950, Ex. Ses., Chapters 37, 44 and 166, Laws of 1951, Chapter 9, Laws of 1951, First Ex. Ses., Chapter 28, Laws of 1951, Second Ex. Ses., Chapters 91, 240 and 247, Laws of 1953, Chapters 95, 110, 137, 236, 389, and 396, Laws of 1955, Chapter 3 as Amended by Chapter 14, Laws of 1955 Ex. Ses., Chapter 10, Laws of 1955, Ex. Ses., Chapters 88 and 279, Laws of 1957, Chapters 197, 211, 232, 259, 270, 271 and 272, Laws of 1959, and Chapters 3 and 5, Laws of 1959, Ex. Ses.

OF THE
State of Washington



Issued by the Excise Tax Division of the Tax
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John W. Riley
Deputy Attorney General—Counsel

Revised January 1, 1960

HIGHWAY TRANSPORTATION—URBAN TRANSPORTATION**Rule 180.**

The term "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.

It includes the business of hauling for hire any merchantable extracted material, such as logs, poles, sand, gravel, coal, etc.

It does not include the hauling 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 the Business and Occupation Tax. (See Rule 171.)

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, pickup 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.

The terms "highway transportation" and "urban transportation" include the business of renting or leasing trucks, trailers, busses, 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. These terms include the business of operating taxicabs and armored cars, but do not include the businesses of operating auto wreckers or towing vehicles (taxable as sales at retail or wholesale under RCW 82.04.050), school busses, ambulances, nor the collection and disposal of refuse and garbage (taxable under the Business and Occupation Tax classification, "Service and Other Activities").

Retail Sales Tax

Persons engaged in the business of highway 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.

Persons engaged in the business of highway transportation or urban transportation must pay the Retail Sales Tax to their vendors when purchasing motor vehicles, trailers, equipment, tools, supplies and other tangible personal property for use in the conduct of such businesses. (See Rule 174 for limited exemptions allowed in the Act for motor carriers operating in interstate or foreign commerce) Persons buying motor vehicles, trailers and similar equipment solely for the purpose of renting or leasing the same **without an operator** are making purchases for resale and are not required to pay the Retail Sales Tax to their vendors.

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.

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

Public Utility Tax

Persons engaged in the business of urban transportation are taxable under the "Urban Transportation" classification upon the gross income from such business.

Persons engaged in the business of highway transportation are taxable under the "Highway Transportation" classification upon the gross income from such business.

Persons engaged in the business of both urban and highway transportation are taxable under the "Highway Transportation" classification upon gross income, unless a proper segregation of such revenue is shown by the books of account of such persons. (See Rule 193 for interstate and foreign commerce.)

Revised April 1, 1959.

VESSELS INCLUDING TUGS AND BARGES, OPERATING UPON WATERS WHOLLY WITHIN THE STATE OF WASHINGTON**Rule 181.****Business and Occupation Tax**

Retailing—Persons engaged in the business of operating such vessels and tugs are taxable under the "Retailing" classification upon the gross sales of meals (including meals to employees) and other tangible personal property taxable under the Retail Sales Tax.

Service and Other Business Activities—The business of operating tugs, barges and lighters is a service business taxable under the "Service and Other Business Activities" classification upon the gross income from such service.

STOEL RIVES LLP

December 15, 2017 - 4:49 PM

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