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

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

STATE OF WASHINGTON DEPARTMENT OF REVENUE,

Appellant,

v.

OLYMPIC TUG AND BARGE, INC.,

Respondent.

APPELLANT'S BRIEF

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TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	ASSIGNMENT OF ERROR.....	2
III.	ISSUES PERTAINING TO ASSIGNMENT OF ERROR.....	2
IV.	STATEMENT OF THE CASE.....	2
V.	ARGUMENT	5
	A. Standard Of Review.....	5
	B. The Deduction In RCW 82.16.050(8) (2002) Only Applies To The Transportation Of Commodities Being Shipped To Interstate Or Foreign Destinations.	7
	1. The bunker fuel transported by Olympic is not “forwarded” to an interstate or foreign destination because it is not transported by a carrier as cargo or freight.	8
	2. The final destination for the bunker fuel is the ship located in Washington waters, not an interstate or foreign destination.	11
	3. The bunker fuel is not a “commodity” forwarded by the vessel to interstate or foreign destinations.....	13
	4. The legislative history and historical context of the statute show that the Legislature did not intend Olympic’s bunkering service to qualify for the deduction.	15
	5. Cases applying the Import-Export Clause support the conclusion that deduction does not apply to the transportation of commodities consumed by the vessel.	21

C.	The Board’s Interpretation That The Bunker Fuel Was Not Delivered To The “Ship Side” Is A Reasonable Interpretation Of The Statute.	23
D.	The Board’s Strict But Fair Interpretation Of The Statute Was Appropriate Because Deductions Must Be Narrowly Construed.	25
E.	Olympic Is Also Not Entitled To A Refund Because It Has Not Proven That All Of The Fuel It Delivered Was Transported Outside The State.....	26
F.	The Board Correctly Determined That Collateral Estoppel Does Not Bar The Department From Fully Litigating The Question Of Whether Olympic’s Activities Qualify For The Deduction.	29
G.	The Doctrine Of Collateral Estoppel Also Does Not Apply In This Case Because There Was Not A Decision On The Merits Of The Current Issue In The Prior Case.....	33
VI.	CONCLUSION	36

APPENDICES:

A	-	RCW 82.16.050(8) (2002)
B	-	Laws of 1965, ch. 173, § 22(8)
C	-	Washington State Tax Commission Revenue Act Rule 179 (1945)
D	-	13 C.J.S. Carriers § 149
E	-	49 U.S.C. § 1002(5) (1964)

TABLE OF AUTHORITIES

Cases

<i>ARCO Prods. Co. v. Utilities & Transp. Comm'n</i> , 125 Wn.2d 805, 888 P.2d 728 (1995).....	6
<i>Belas v. Kiga</i> , 135 Wn.2d 913, 959 P.2d 1037 (1998).....	25
<i>Callecod v. Wash. State Patrol</i> , 84 Wn. App. 663, 929 P.2d 510, <i>review denied</i> , 132 Wn.2d 1004 (1997).....	7
<i>Christensen v. Grant Cy. Hosp. Dist. No. 1</i> , 152 Wn.2d 299, 96 P.3d 957 (2004).....	30
<i>City of Seattle, Executive Services Dep't v. Visio Corp.</i> , 108 Wn. App. 566, 31 P.3d 740 (2001).....	30
<i>City of Spokane ex rel. Wastewater Mgmt. Dep't v. Dep't of Revenue</i> , 145 Wn.2d 445, 38 P.3d 1010 (2002).....	8
<i>City of Tacoma v. Taxpayers of City of Tacoma</i> , 108 Wn.2d 679, 743 P.2d 793 (1987).....	8
<i>City of Univ. Place v. McGuire</i> , 144 Wn.2d 640, 30 P.3d 453 (2001).....	6
<i>Dep't. of Ecology v. Campbell & Gwinn, L.L.C.</i> , 146 Wn.2d 1, 43 P.3d 4 (2002).....	8
<i>Group Health Coop. of Puget Sound v. Washington State Tax Comm'n</i> , 72 Wn.2d 422, 433 P.2d 201 (1967).....	25
<i>Heinmiller v. Dep't of Health</i> , 127 Wn.2d 595, 903 P.2d 433 (1995), <i>cert. denied</i> , 518 U.S. 1006, 116 S. Ct. 2526, 135 L. Ed. 2d 1051 (1996).....	6

<i>Inland Empire Distrib. Sys., Inc. v. Utilities & Transp. Comm'n</i> , 112 Wn.2d 278, 770 P.2d 624 (1989).....	6
<i>King County v. Bd. of Tax Appeals</i> , 28 Wn. App. 230, 622 P.2d 898 (1981).....	29, 31
<i>Pettit v. Bd. of Tax Appeals</i> , 85 Wn.2d 646, 538 P.2d 501 (1975).....	31
<i>Port of Port Angeles v. Henneford</i> , 193 Wash. 229, 74 P.2d 1025 (1938)	10, 15, 16
<i>Puget Sound Stevedoring Co. v. State Tax Comm'n of Washington</i> , 189 Wash. 131, 63 P.2d 532 (1937)	16
<i>Puget Sound Stevedoring Co. v. Tax Comm'n of State of Washington</i> , 302 U.S. 90, 58 S. Ct. 72, 82 L. Ed. 68 (1937) <i>overruled by Dep't of Revenue of State of Wash. v. Ass'n of Washington Stevedoring Companies</i> , 435 U.S. 734, 98 S. Ct. 1388, 55 L. Ed. 2d 682 (1978)....	16
<i>Sehome Park Care Ctr., Inc.</i> , 127 Wn.2d 774, 903 P.2d 443 (1995).....	15
<i>Shell Oil Co. v. California Bd. of Equalization</i> , 64 Cal.2d 713, 414 P.2d 820 (Cal. 1966)	21, 22
<i>Simpson Inv. Co. v. Dep't of Revenue</i> , 141 Wn.2d 139, 3 P.3d 741 (2000).....	25, 26
<i>State ex rel. N. Pac. Ry. Co. v. Pub. Serv. Comm'n of Washington</i> , 95 Wash. 376, 163 P. 1143 (1917)	9
<i>State Farm Mut. Ins. Co. v. Avery</i> , 114 Wn. App. 299, 57 P.3d 300 (2002).....	29, 30, 32, 33
<i>State v. Great Northern R. R. Co.</i> , 98 Wash. 197, 167 P. 103 (1917)	10
<i>Swan & Finch Co. v. United States</i> , 190 U.S. 143, 23 S. Ct. 702, 47 L. Ed. 984 (1903).....	22

<i>Terry v. Employment Sec. Dep't</i> , 82 Wn. App. 745, 919 P.2d 111 (1996).....	6
<i>Tidewater Terminal Co. v. State</i> , 60 Wn.2d 155, 372 P.2d 674 (1962).....	16, 18
<i>Washington State Nurses Ass'n v. Bd. of Med. Examiners</i> , 93 Wn.2d 117, 605 P.2d 1269 (1980).....	15
<i>Waste Mgmt. of Seattle, Inc. v. Utilities & Transp. Comm'n</i> , 123 Wn. 2d 621, 869 P.2d 1034 (1994).....	6
<i>Weyerhaeuser Co. v. Dep't of Revenue</i> , 106 Wn.2d 557, 723 P.2d 1141 (1986).....	19

Constitutional Provisions

U.S. Const. art. I, § 10, cl. 2.....	21
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Statutes

49 U.S.C. § 1 et seq. (1964).....	20
49 U.S.C. § 1002(5) (1964)	20
49 U.S.C. § 902 (1964).....	20
Laws of 1937, ch. 227.....	16
Laws of 1937, ch. 227, § 12(h)	15, 17
Laws of 1949, ch. 228, § 11(h).....	19
Laws of 1965, ch. 173, § 22(8)	11
Laws of 1967, ch. 149, § 25(8).....	20
RCW 34.05	5
RCW 34.05.570(1)(a)	6

RCW 34.05.570(3)(e)	6
RCW 81.28.030	10
RCW 82.03.140	31
RCW 82.03.180	5, 31
RCW 82.16.050(8) (2002)	passim
RCW 82.32.180	30, 31

Regulations

WAC 458-20-102(11).....	26
WAC 458-20-175	4, 26, 27
Washington State Tax Commission Revenue Act Rule 179 (1945).....	9, 17

Other Authorities

13 C.J.S. Carriers § 149, Appendix D.....	9
<i>Webster’s Third New International Dictionary</i> (2002)	passim

I. INTRODUCTION

The Public Utility Tax deduction in RCW 82.16.050(8) (2002) is a technically worded and nuanced deduction for specific activities involving the transportation of commodities to and from other states or countries. The Board of Tax Appeals (Board) recognized this and correctly determined that Olympic Tug & Barge, Inc.'s (Olympic) activities did not qualify for the deduction because the bunker fuel transported by Olympic was burned by the ship, not "forwarded" to an interstate or foreign destination.

Olympic's arguments before the Board and the superior court consisted of conclusory statements regarding the scope of the deduction with little statutory analysis. Like Olympic, the superior court did not properly analyze the term "commodities ... forwarded, ... by vessel, in their original form, to interstate or foreign destinations." It assumed that the statute covered goods to be consumed by a ship during its voyage outside the state and did not explain why these goods are "commodities ... forwarded ... in their original form, to interstate or foreign destinations."

Because the statutory language contradicts the superior court's conclusion, the Department of Revenue (Department) requests that this Court reverse the superior court's order and affirm the Board's Final Decision.

II. ASSIGNMENT OF ERROR

The superior court erred in reversing and remanding the Board's Final Decision on the grounds that the Board erroneously interpreted the statute.

III. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Did the Board properly hold that Olympic's bunkering service did not qualify for the Public Utility Tax deduction in RCW 82.16.050(8) (2002), because the bunker fuel was not a commodity sent to an interstate or foreign destination in its original form?

2. Did the Board properly hold that the Olympic's bunkering service did not qualify for the Public Utility Tax deduction in RCW 82.16.050(8) (2002), because the bunker fuel was not delivered to an "export elevator, wharf, dock or ship side?"

IV. STATEMENT OF THE CASE

Olympic provides "bunkering services" whereby it transports barges containing fuel from oil refineries and fuel depots to ocean-going vessels anchored in Puget Sound and pumps the fuel into the vessels' fuel tanks (bunkers). CP 160-61. Olympic delivers different types of bunker fuels, including marine distillate and heavy fuel oils. *Id.* Once the fuel is pumped into the ship's bunker it is burned to power the ship. *Id.*

In 2001, Olympic filed an informal appeal with the Board alleging that the Department improperly denied it the Public Utility Tax deduction (PUT deduction) in RCW 82.16.050(8) (2002). The Board held an informal hearing and concluded that the transportation of bunker fuel that could not be used in Washington because of environmental restrictions qualified for the PUT deduction. *Olympic Tug & Barge v. Dep't of Revenue*, Board Docket No. 55558 at 5, AR¹ 527 (BTA Doc. No. 19 at A3-5). The Department then issued an Excise Tax Advisory stating that it would not follow the Board's informal decision. ETA 3055.2009, AR 189 (BTA Doc. No. 7 at App. B).

In 2006, the Department assessed PUT on Olympic's bunkering service revenue for the 2002 audit period. CP143. Olympic appealed to the Board alleging again that its services qualified for the PUT deduction in RCW 82.16.050(8) (2002) and that the Department was bound by the prior informal Board decision under the doctrine of collateral estoppel. CP 144. Prior to the hearing, Olympic admitted that environmental restrictions did not prohibit the use of bunker fuel in Washington waters. AR 418 (BTA Doc. No. 15 fn. 1). At the hearing, Olympic introduced sample Foreign Fuel Exemption Certificates (FFEC) in an attempt to show that the fuel was not

¹ Administrative Record for Board of Tax Appeals Formal Docket No. 08-096.

used in Washington waters. Transcript² at 12. These certificates were provided by the operators of the ship to the oil companies selling the bunker fuel in order to avoid paying sales or use tax on the sale of the bunker fuel. WAC 458-20-175. If the fuel was used, the ship operators became liable for paying use tax on the amounts they used in Washington. *Id.*

The Department argued that the certificates were irrelevant because the destination for the fuel was the ship located in Washington waters. The Department also objected to the use of the FFECs as evidence that the fuel was used outside of Washington, as the ships may have used a portion of the fuel in Washington and paid use tax at a later time. CP 152.

The Board agreed with the Department that the destination of the fuel was the ship located in Washington waters and therefore Olympic was not eligible for the deduction because the bunker fuel was not a commodity forwarded to interstate or foreign destinations. CP 161. The Board also agreed with the Department that collateral estoppel did not apply in this case because the Department did not have the right to appeal from the prior informal decision and a material fact in the prior decision was not true. CP 162.

Olympic appealed the Board's decision to King County Superior Court under the Administrative Procedure Act, chapter 34.05 RCW. CP 3.

² Board Formal Docket No. 08-096 Hearing Transcript.

The superior court held that the Board erroneously interpreted the statute and reversed and remanded the Board's Final Decision to allow the deduction where the bunker fuel is not burned in Washington waters. CP 128.

V. ARGUMENT

Olympic's bunkering service does not qualify for the Public Utility Tax deduction in RCW 82.16.050(8) (2002). The deduction only applies to commodities shipped into or out of the state. In this case, the bunker fuel is not shipped into or out of the state. The fuel is shipped from a refinery in Washington to a ship in Washington waters. CP 160-61. Once the fuel is loaded onto the ship there is no further destination for the fuel, it merely travels around until it is burned by the ship. *Id.* Thus, the origin and final destination of the bunker fuel transported by Olympic are in Washington, not other states or countries. Because the bunker fuel transported by Olympic is not being shipped to a final destination outside the state, the Board properly concluded Olympic's bunkering service did not qualify for the deduction and rejected its claims. Therefore, this Court should reverse the superior court's order and affirm the Board's Final Decision.

A. Standard Of Review

Formal decisions of the Board are reviewed under the Administrative Procedure Act (APA), RCW 34.05. RCW 82.03.180.

Under the APA, the appellate court reviews the agency's order without consideration of the superior court's findings or conclusions. *Waste Mgmt. of Seattle, Inc. v. Utilities & Transp. Comm'n*, 123 Wn. 2d 621, 633, 869 P.2d 1034 (1994). The burden of demonstrating the invalidity of agency action is on Olympic, because it is the party asserting invalidity. RCW 34.05.570(1)(a). An agency's interpretations of the law are reviewed de novo. However, the court should give deference to an agency's interpretation of the law where the agency has specialized expertise in a certain subject area. *Inland Empire Distrib. Sys., Inc. v. Utilities & Transp. Comm'n*, 112 Wn.2d 278, 282, 770 P.2d 624 (1989).

Factual findings of agencies are reviewed under a substantial evidence standard.³ RCW 34.05.570(3)(e); *Terry v. Employment Sec. Dep't*, 82 Wn. App. 745, 748, 919 P.2d 111 (1996). The substantial evidence standard is "highly deferential" to the agency fact finder. *ARCO Prods. Co. v. Utilities & Transp. Comm'n*, 125 Wn.2d 805, 812, 888 P.2d 728 (1995). Further, the court should view the evidence in the light most favorable to the party who prevailed in the highest administrative forum to exercise fact-finding authority. *City of Univ. Place v. McGuire*, 144 Wn.2d 640, 652, 30 P.3d 453 (2001). As such, if there are sufficient facts

³ Under RCW 34.05.570(3)(e), "substantial evidence" is evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premise. See *Heinmiller v. Dep't of Health*, 127 Wn.2d 595, 607, 903 P.2d 433 (1995), cert. denied, 518 U.S. 1006, 116 S. Ct. 2526, 135 L. Ed. 2d 1051 (1996).

in the record from which a reasonable person could make the same finding as the agency, the agency's finding should be upheld, even if the reviewing court would make a different finding from its reading of the record. *Callecod v. Wash. State Patrol*, 84 Wn. App. 663, 667, 929 P.2d 510, *review denied*, 132 Wn.2d 1004 (1997).

B. The Deduction In RCW 82.16.050(8) (2002) Only Applies To The Transportation Of Commodities Being Shipped To Interstate Or Foreign Destinations.

This case centers on the PUT deduction in RCW 82.16.050(8)

(2002). The deduction applies to:

Amounts derived from the transportation of commodities from points of origin in this state to final destination outside this state, or from points of origin outside this state to final destination in this state, with respect to which the carrier grants to the shipper the privilege of stopping the shipment in transit at some point in this state for the purpose of storing, manufacturing, milling, or other processing, and thereafter forwards the same commodity, or its equivalent, in the same or converted form, under a through freight rate from point of origin to final destination; and amounts derived from the transportation of commodities from points of origin in the state to an export elevator, wharf, dock or ship side on tidewater or navigable tributaries thereto from which such commodities are forwarded, without intervening transportation, by vessel, in their original form, to interstate or foreign destinations: PROVIDED, That no deduction will be allowed when the point of origin and the point of delivery to such an export elevator, wharf, dock, or ship side are located within the corporate limits of the same city or town.

RCW 82.16.050(8) (2002), Appendix A (emphasis added).

This is a precise and technically worded deduction that focuses on the shipment of commodities into and out of the state. Read in context, the statutory language requires the commodities being transported to have a specific destination in another state or country. Transporting goods that are eventually consumed outside of Washington does not fall within the narrow scope of the deduction.

The court's fundamental objective in construing a statute is to ascertain and carry out the Legislature's intent. *Dep't. of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). A court should interpret the meaning of terms in the context of the statute as a whole and consistently with the intent of the Legislature. *City of Tacoma v. Taxpayers of City of Tacoma*, 108 Wn.2d 679, 693, 743 P.2d 793 (1987). When the Legislature uses technical language in a technical field it should be given its technical meaning. *City of Spokane ex rel. Wastewater Mgmt. Dep't v. Dep't of Revenue*, 145 Wn.2d 445, 452, 38 P.3d 1010 (2002).

- 1. The bunker fuel transported by Olympic is not “forwarded” to an interstate or foreign destination because it is not transported by a carrier as cargo or freight.**

The PUT deduction at issue uses technical shipping terms to describe the transportation activities that qualify for the deduction; thus

the terms should be given their technical meanings. By referencing carriers forwarding commodities under a “through freight rate” and “delivery to ... an export elevator, wharf, dock or ship side,” the Legislature plainly used technical shipping terms to describe the deductible activities. *See* RCW 82.16.050(8) (2002). Moreover, the structure of the statute shows that the Legislature was describing specific activities and practices in the shipping industry.

In the first clause of RCW 82.16.050(8) (2002), the statute authorizes a deduction for the transportation of commodities where the carrier grants the shipper a transit privilege. A transit privilege allows the shipper to stop the shipment in transit for purposes of storing or processing the commodity and thereafter forward the same or processed commodity to its final destination under a “through freight rate.” Washington State Tax Commission Revenue Act Rule 179 (1945), Appendix C-2; *see also State ex rel. N. Pac. Ry. Co. v. Pub. Serv. Comm'n of Washington*, 95 Wash. 376, 381-82, 163 P. 1143 (1917) (discussing privilege of forwarding of milled grain under a through rate). A “through freight rate” is a single rate for transporting a shipment on a “through route” that may involve multiple carriers or segments. *See* Washington State Tax Commission Revenue Act Rule 179 (1945); 13 C.J.S. Carriers § 149, Appendix D.

In the second clause, the statute allows a deduction for the transportation of commodities to “an export elevator, wharf, dock or ship side” where the commodities are forwarded by vessels in their original form to interstate or foreign destinations. Used in this manner, the Legislature is referring to specific locations and facilities used for the transshipment of goods from water carriers to other carriers. *See Port of Port Angeles v. Henneford*, 193 Wash. 229, 230, 74 P.2d 1025 (1938) (describing docks, piers, wharves, elevators as facilities for the transshipment of goods).

Reading the clauses together, the deduction applies only where the commodity stops at an intermediate point in Washington and is then carried to its final destination. Both clauses use the term “forward” to describe the movement of the commodities to their final destination. In the context of transportation, “forward” is often used to describe the carriage of goods to a final destination by one or more carriers. In *State v. Great Northern R. R. Co.*, 98 Wash. 197, 202, 167 P. 103 (1917), the court stated that a common carrier must accept goods and carry them to the final destination or the end of its line. If the carrier cannot deliver the goods to the ultimate destination it must deliver them to another common carrier to be “forwarded or carried to their ultimate destination”. *Great Northern R. R. Co.*, 98 Wash. at 202; *see also* RCW 81.28.030 (common carriers must

forward goods to their destination or another carrier whose line is nearest to the destination).

Thus, the term “forward” restricts the deduction to the transportation of commodities traveling via a carrier before and after they make an intermediate stop. In the first clause, this requirement is even clearer as the shipment must be made under a “through freight rate” that includes the transportation before and after the shipment is stopped. RCW 82.16.050(8) (2002). Until 1967, the second clause even stated “forwarded by water carrier.” Laws of 1965, ch. 173, § 22(8), Appendix B-4. Thus, both clauses involve the shipment of commodities to or from interstate or foreign destinations via a carrier.

In this case, the bunker fuel is not shipped to an interstate or foreign destination. The fuel is delivered to the ship to be consumed. The fuel is not delivered to the ship to be “forwarded or carried” to a final destination in another state or country. Therefore, Olympic’s bunkering service does not qualify for the PUT deduction.

2. The final destination for the bunker fuel is the ship located in Washington waters, not an interstate or foreign destination.

Olympic’s service also does not qualify for the deduction because the final destination of the fuel transported by Olympic is a ship located in Washington. CP 161. The word “destination” is defined, in relevant part,

as “a place which is set for the end of a journey or to which something is sent.” *Webster’s Third New International Dictionary* at 614 (2002).

Olympic is paid to move the fuel from the refinery to the ship. Unlike the situations described in the PUT deduction, the refinery is only sending the fuel to the ship, not a final destination in another state or country. Once aboard the ship, the fuel travels around on the ship until it is burned. CP 161. Thus, there is no destination for the bunker fuel other than the ship located in Washington.

Olympic argued below that the fuel’s “destination” is the place where it is burned. CP 47. But to say the destination of the fuel in its original form is the point where it is burned strains the language of the statute. CP 155. To adopt Olympic’s reading of the statute, the court would have to find that the refinery or the ship intended to send the fuel to every point along the ship’s route where the fuel was burned. At the hearing, Olympic’s Chief Financial Officer testified that a ship could potentially travel to Singapore and back on the bunker fuel delivered by Olympic. Transcript at 55-56; CP 146. Given the range of these vessels, the bunker fuel delivered by Olympic could return to Washington many times before it is burned at some point outside of Washington. As such, substantial evidence supports the Board’s finding that the final destination of the fuel was the ship located in Washington waters. CP 161.

Moreover, the facts show that Olympic's position is not a reasonable interpretation of the term "forwarded ... by vessel, in [its] original form, to interstate or foreign destinations."

3. The bunker fuel is not a "commodity" forwarded by the vessel to interstate or foreign destinations.

The Board also correctly concluded that the bunker fuel was not a "commodity" under the terms of the deduction. The bunker fuel at issue is not a "commodity" in the context of RCW 82.16.050(8) (2002) because once it is loaded onto the ships the fuel is intended to be consumed and not traded. CP 157-58, 161. The statute states:

[a]mounts derived from the transportation of commodities from points of origin in the state to an export elevator, wharf, dock or ship side on tidewater or navigable tributaries thereto from which such commodities are forwarded, without intervening transportation, by vessel, in their original form, to interstate or foreign destinations.

RCW 82.16.050(8) (2002) (emphasis added).

As noted above, this language clearly contemplates the transportation of goods by a carrier to a specific interstate or foreign destination. *Webster's Third New International Dictionary* defines "commodity" as:

2 a: an economic good...**b:** an article of commerce; esp :
one delivered to a transportation company for shipment

Webster's Third New International Dictionary at 458. As the definition shows, the term "commodity" often refers to an article of commerce delivered to a carrier for shipment. This definition fits precisely within the language of the statute. Thus, a commodity is something held for sale or transfer. Here, the bunker fuel Olympic delivers to the ship is not intended to be sold or transferred, nor is it delivered to the ship for shipment to another destination. CP 160-61. Rather, the bunker fuel is a provision to be consumed in powering the ship.

While Olympic noted below that commonly traded items sold to consumers are "commodities," and cites cases identifying items as commodities, these cases are not on point. CP 44. Many things are commodities, apples, gold, nuts and bolts, etc., but at some point they cease to be commodities as the term is used in RCW 82.16.050(8) (2002) because they are no longer intended to be sold or transferred, let alone delivered to a transport company for shipment.

Because the fuel transported by Olympic is not a "commodity" "forwarded" in its original form "an interstate or foreign destination," the Board correctly concluded that Olympic is not entitled to the deduction.

4. The legislative history and historical context of the statute show that the Legislature did not intend Olympic's bunkering service to qualify for the deduction.

As shown above, Olympic's activities do not qualify for the deduction under the plain language of the statute. However, if the Court concludes that the statutory language is ambiguous, it should consider the legislative history and historical context of the statute to determine the Legislature's intent. *In re Sehome Park Care Ctr., Inc.*, 127 Wn.2d 774, 778, 903 P.2d 443 (1995); *Washington State Nurses Ass'n v. Bd. of Med. Examiners*, 93 Wn.2d 117, 121, 605 P.2d 1269 (1980). Here, the legislative history and historical context shows that the Legislature intended to only exempt the shipment of commodities by carriers to and from interstate or foreign destinations, not goods consumed by the carriers.

The Legislature initially added the deduction in former subsection (8) to the PUT statute in 1937. Laws of 1937, ch. 227, § 12(h), Appendix B-2. At that time services related to the transportation of goods between states and foreign countries were typically considered part of interstate commerce and immune from taxation. *Port of Port Angeles v. Henneford*, 193 Wash. at 233-34. However, if the goods came to rest in the state then further transportation or handling of the goods could be

taxed. *Id.*; *Tidewater Terminal Co. v. State*, 60 Wn.2d 155, 161-62, 372 P.2d 674 (1962). Determining whether the goods had come to rest or if the transportation services were part of interstate commerce was not an easy or straightforward matter and there was substantial uncertainty about the scope of the tax immunity. *See, e.g., Port of Port Angeles*, 193 Wash. at 233-34; *Tidewater Terminal*, 60 Wn.2d at 161-62. In January 1937, a decision by the Washington Supreme Court increased that uncertainty. *See Puget Sound Stevedoring Co. v. State Tax Comm'n of Washington*, 189 Wash. 131, 63 P.2d 532 (1937). In *Puget Sound Stevedoring*, the Washington Supreme Court held that a business and occupation tax on stevedoring, the loading and offloading of ships, was not barred as a burden on interstate or foreign commerce because the tax was only on a local activity and not on interstate commerce itself.⁴ *Id.* at 137. Apparently in response, the Legislature passed the PUT deduction during the 1937 session. Laws of 1937, ch. 227, § 12(h).

The original version of the statute passed in 1937 allowed a deduction for three different activities: (1) “[a]mounts derived from the

⁴ The United States Supreme Court reversed the Washington Supreme Court’s decision in November 1937. *Puget Sound Stevedoring Co. v. Tax Comm'n of State of Washington*, 302 U.S. 90, 58 S. Ct. 72, 82 L. Ed. 68 (1937) *overruled by Dep't of Revenue of State of Wash. v. Ass'n of Washington Stevedoring Companies*, 435 U.S. 734, 98 S. Ct. 1388, 55 L. Ed. 2d 682 (1978). Nonetheless, the case highlights the uncertainty in 1937 regarding the taxation of activities that could be characterized as either local or interstate in nature.

transportation of commodities from points of origin in the State of Washington into transit stations in Washington and thereafter forwarded, either in like kind or in their original or converted form, to interstate or foreign destinations”; (2) “amounts derived from the transportation of commodities from points of origin outside the State of Washington into transit stations in Washington and thereafter forwarded, either in like kind or in their original or converted form, to destinations in the State of Washington”; and (3) “amounts derived from the transportation of commodities from points of origin in the State of Washington to export elevators, docks or ship side on tidewater and the Columbia River and thereafter forwarded, either in like kind or in their original or converted form, to interstate or foreign destinations.” Laws of 1937, ch. 227, § 12(h). In 1945, the Washington State Tax Commission enacted rules defining a “transit station” for purposes of the deduction as a place where a carrier grants a transit privilege for purposes of storage or processing.⁵ Washington State Tax Commission Revenue Act Rule 179 (1945).

In all of the situations addressed by the PUT deduction, there could be some question as to whether the goods had come to rest or if the break in the transportation chain meant that the local segment of the overall movement of the goods into or out of the state could be taxed. In

⁵ In 1949, the Legislature incorporated the Tax Commission’s definition into the statute. *See* Laws of 1949, ch. 228, § 11(h).

Tidewater Terminal, the court analyzed whether the stop was definite or indefinite, whether the goods were converted in some manner, whether the bill of lading listed the storage facility or terminal as the destination, and also whether the duration of the stop indicated that the storage facilities were merely a conduit for a continuous flow of incoming or outgoing goods. *Tidewater Terminal*, 60 Wn.2d at 160. In the situations described in the PUT deduction, the commodities could be stored or converted, but the transit station or terminal would not be the final destination of the commodities. Also, the length of storage could vary greatly, but the locations identified in the statute appear to be primarily conduits for moving the commodities into and out of the state. By providing a blanket deduction for the transportation of commodities with points of origins in the state and final destinations in other states or countries, and vice versa, the Legislature avoided the intense factual inquiry needed to determine if the Public Utility Tax was preempted by the interstate and foreign commerce clauses in specific instances.

In 1949, the Legislature rewrote the second clause to provide:

amounts derived from the transportation of commodities to an export elevator, wharf, dock or ship side on tidewater or navigable tributaries thereto, from points of origin in the State of Washington, and 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

an export elevator, wharf, dock, or ship side are located within the corporate limits of the same city or town.

Laws of 1949, ch. 228, § 11(h), Appendix B-3 (emphasis added).

In the 1949 statute, the Legislature clearly intended the term “forwarded” to mean carriage of the commodity by a water carrier. In that case, the carrier would be transporting the commodity for another party, not consuming it. *See Weyerhaeuser Co. v. Dep’t of Revenue*, 106 Wn.2d 557, 561-63, 723 P.2d 1141 (1986) (a carrier transports another person’s property from one place to another for hire). This usage is consistent with the requirement that the commodities must be carried in their original form to an interstate or foreign destination. It would not make sense to say that the bunker fuel at issue is “forwarded by water carrier, in [its] original form, to interstate or foreign destinations.” First, there is no destination for the bunker fuel in its original form besides the ship. The bunker fuel travels around in the ship’s fuel tanks until it is burned to power the ship. Moreover, the bunker fuel is not part of the cargo being forwarded or carried by ship, it is a provision used to power the ship. Therefore, the bunker fuel is not “forwarded by water carrier, in [its] original form, to interstate or foreign destinations.”

In 1967, the Legislature clarified the scope of the PUT deduction. Digest of the Enacted Laws, Fortieth Legislature Regular & Extraordinary

Sessions 1967, Ex. Sess. at 5, AR 545 (BTA Doc. No. 16 at A-3). This was not a substantive change. By replacing the term “forwarded by water carrier” with “forwarded, without intervening transportation, by vessel,” it appears that the Legislature intended to clarify that the commodity cannot be transported further, such as from an export elevator in Seattle to a dock in Tacoma. *See* Laws of 1967, ch. 149, § 25(8), Appendix B-5. The Legislature may have substituted the term “vessel” for “water carrier” to avoid confusion or unintended consequences caused by using a term defined in federal laws such as the Interstate Commerce Act, 49 U.S.C. § 1 et seq. (1964).⁶ The phrases “forwarded by water carrier” and “forwarded ...by vessel” are materially the same in that the both refer to forwarding, which implies transportation by a carrier. Also, nothing suggests the Legislature intended to change the law to allow the transportation of goods that are consumed by water carriers to qualify for the deduction. Accordingly, the legislative history shows that the term “forwarded ... by vessel” refers to transportation of the commodity by a common or private carrier, not goods consumed by the carrier.

⁶ Under the Interstate Commerce Act, commodities could be forwarded by a “freight forwarder” that would not technically be classified as a “water carrier” even though the goods travel by a vessel. 49 U.S.C. § 1002(5) (1964), Appendix E-3 (freight forwarder assumes responsibility for transportation of goods but is not a railroad, motor carrier or water carrier). Also, it appears that “water carriers” could include the operators of export elevators, wharfs, docks. 49 U.S.C. § 902 (1964) (“transportation” includes use of “transportation facilities” such as wharfs, docks or elevators).

5. Cases applying the Import-Export Clause support the conclusion that deduction does not apply to the transportation of commodities consumed by the vessel.

The term “forwarded...by vessel, in their original form, to interstate or foreign destinations” is almost identical to the definition of the word “export.”⁷ Moreover, the statutory history shows that the purpose of the deduction was to exempt the revenue of companies transporting commodities in the process of being exported from Washington to other states or countries. Therefore, cases interpreting the Import-Export Clause⁸ are useful in determining whether the commodities being transported fall within the scope of the PUT deduction.

The Import-Export Clause only applies to goods being delivered to a foreign destination. In *Shell Oil Co. v. California Bd. of Equalization*, 64 Cal.2d 713, 414 P.2d 820 (Cal. 1966), the California Supreme Court held that bunker fuel was not an export under the Import-Export Clause because it was never delivered to a foreign destination. *Shell Oil*, 414 P.2d at 824. The California Supreme Court relied on an earlier U.S. Supreme Court decision holding that oil consumed by ships on

⁷ “Export” is defined in relevant part as “to carry or send (a commodity) to some other country or place.” *Webster’s Third New International Dictionary* at 802 (2002). It also means “something that is exported; *specif*: a commodity conveyed from one country or region to another for purposes of trade.” *Id.*

⁸ “No State shall, without the Consent of Congress lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws.” U.S. Const. art. I, § 10, cl. 2.

international voyages was not an export for the same reason. *See Shell Oil*, 414 P.2d at 824 (citing *Swan & Finch Co. v. United States*, 190 U.S. 143, 23 S. Ct. 702, 47 L. Ed. 984 (1903)). As noted above, RCW 82.16.050(8) (2002) is clearly aimed at the revenues derived in the process of exporting commodities from the state. The term “forwarded ...to ... interstate or foreign destinations” is simply another way of saying “exported.” *See Webster’s Third New International Dictionary* at 802 (2002) (“export” means “to carry or send (a commodity) to some other country or place”).

Olympic argued below that the statute must apply to more than commodities that are exported, otherwise the Legislature would have merely used the term itself. CP 112. However, the Legislature used the term “forwarded” to accurately describe the situation it was dealing with, where the commodities stop at an intermediate point and then continue to their final destination via a carrier.⁹ Accordingly, Olympic’s revenues do not qualify for the PUT deduction because the bunker fuel is not sent or delivered to a foreign or interstate destination, just as the bunker fuel in *Shell Oil* was not “exported.”

⁹ The Legislature also probably wanted to avoid confusion as to whether the deduction applied to commodities traveling to interstate destinations as the term “export” is typically used to describe shipping goods to foreign countries.

C. The Board’s Interpretation That The Bunker Fuel Was Not Delivered To The “Ship Side” Is A Reasonable Interpretation Of The Statute.

In the superior court, Olympic argued that the Board erred in finding that the bunker fuel was not delivered to a “ship side” as the term is used in RCW 82.16.050(8) (2002). CP 49. While Olympic contended the plain meaning of the statute supports its interpretation, it criticized the Board for relying on a dictionary definition of “ship side.” CP 42-43, 49. Olympic argued that the Board’s definition of “ship side” would be redundant as it would be included in the term “dock.” CP 49. However, Olympic failed to note that the terms “wharf” and “dock” and “ship side” are virtually identical.

A “wharf” is defined as “a structure... built along or at an angle from the shore of navigable waters ... so that vessels may lie alongside to receive and discharge cargo and passengers.” *Webster’s Third New International Dictionary* at 2599 (2002). A “dock” is defined in relevant part as “**2:** a place for the loading or unloading of materials as **a:** WHARF **b:** a raised platform used for loading or unloading wheeled freight carriers.” *Id.* at 665. “Shipside” is also defined as “the area adjacent to shipping that is used for storage and loading of freight and passengers: DOCK.” *Id.* at 2098. All of these definitions describe the same place.

Thus, the statute merely lists the different terms that describe the structure or area on the structure used to load or unload cargo from a ship.

Olympic also alleged the Board's conclusion that loading fuel onto a ship at anchor does not qualify as transporting the fuel to a "ship side" was a "woeful misinterpretation of the Legislature's intent." CP 49. Yet, Olympic failed to provide any evidence supporting its view of the Legislature's intent. Olympic contended the Board's interpretation would create an absurd result since a company would not qualify for the deduction if it transported lumber the dock and placed it directly on the ship without first placing the lumber on the dock. *Id.* While it appears that this would still qualify as transportation to a "dock," Olympic did not show why this is an absurd result that the Legislature clearly did not intend. On the contrary, the legislative history shows the Legislature may not have intended the PUT deduction to include the transportation of commodities transferred directly from carrier to carrier without stopping. *See supra* pp. 12-15. In either case, the Board's determination that loading fuel onto a ship at anchor does not qualify as transporting the fuel to a "ship side" is a reasonable interpretation of the statute.

D. The Board's Strict But Fair Interpretation Of The Statute Was Appropriate Because Deductions Must Be Narrowly Construed.

Even if there were some ambiguity as to whether Olympic's bunkering service qualifies for the PUT deduction, deductions must be narrowly construed. *Simpson Inv. Co. v. Dep't of Revenue*, 141 Wn.2d 139, 149-50, 3 P.3d 741 (2000). The court should find a deduction only where the Legislature has authorized the deduction by clear and explicit language. *See Belas v. Kiga*, 135 Wn.2d 913, 932-34, 959 P.2d 1037 (1998) (exemptions must be clearly authorized); *Group Health Coop. of Puget Sound v. Washington State Tax Comm'n*, 72 Wn.2d 422, 429, 433 P.2d 201 (1967) (deductions and exemptions construed the same). A strict but fair reading of the statute supports the Board's interpretation that the commodities must be carried as cargo destined for delivery at a location in another state or country in its original form to qualify for the deduction. Unlike the timber and grain carried as cargo, fuel consumed by a ship is not destined for delivery to an interstate or foreign destination in its original form. Accordingly, the Board correctly determined that Olympic's bunkering service does not qualify for the deduction.

E. Olympic Is Also Not Entitled To A Refund Because It Has Not Proven That All Of The Fuel It Delivered Was Transported Outside The State.

Olympic bears the burden of proving that it qualifies for the deduction. *Simpson Inv. Co.*, 141 Wn.2d at 149. Thus, Olympic must provide evidence supporting all of the factual assertions supporting its claim that it is entitled to the deduction. Olympic's allegation that the bunker fuel can only be used outside of Washington is also incorrect. Olympic admits that bunker fuel can be burned in Washington waters as a legal and technical matter. AR 524 (BTA Doc. No. 15 at fn. 1); Transcript at 119. Thus, bunker fuel can be used by a vessel in Washington waters. Olympic's allegation that the Foreign Fuel Exemption Certificates (FFECs) prevent the fuel from being used in Washington is also incorrect. CP 47. Like resale certificates, all FFECs do is allow the sellers to avoid collecting sales or use tax on the sale of the bunker fuel. WAC 458-20-175. The FFECs do not prohibit the vessel from using the fuel in Washington. If the vessel ends up using the fuel in Washington, all that happens is that vessel operator becomes liable for the tax and must pay use tax on the fuel it used in Washington waters.¹⁰ At the hearing, Olympic's witness admitted that there was no

¹⁰ Compare WAC 458-20-102(11) "If the buyer gives a resale certificate for all purchases and thereafter consumes some of the articles purchased, the buyer must set up in his or her books of account the value of the article used and remit to the department the

way for Olympic to know if the vessels burned the fuel and reported the tax. Transcript at 116.

Olympic's claim that "the majority of the bunker [fuel] in question was delivered to customers in foreign ports" is likewise unsupported by the evidence Olympic provided. CP 48 (emphasis added). In the section of the Transcript that Olympic cites to support this claim, Mr. Prophet testified only that the ships may have offloaded some of the bunker fuel in foreign ports. Transcript at 55. However, he had no knowledge of whether this actually happened to the fuel at issue, let alone that a majority of the fuel was offloaded in foreign ports. *Id.*

Further, Olympic's statement that all of the fuel it delivered was transported outside Washington is mere speculation. CP 47. Olympic only provided FFECs for 20 transactions out of the 750 transactions it claims qualify for the deduction. Additionally, many of the FFECs Olympic provided were improper because the certificates did not specify the amounts of fuel that would not be burned. Transcript at 22; AR 108-17 (BTA Doc. No. 5 at A21-A24). Since they did not state the amounts

applicable deferred sales tax." *with* WAC 458-20-175 "Liability for the use tax arises at the time of actual use thereof in this state... persons engaged in the business of operating as private or common carriers by air, rail or water in interstate or foreign commerce will be permitted to pay the use tax directly to the department of revenue rather than to the seller, and such sellers are relieved of the liability for the collection of such tax."

of fuel that would not be burned, these FFECs did not actually certify that the fuel Olympic delivered would not be burned.

Moreover, Olympic contradicted itself below by stating that “[a]pproximately ninety percent (90%) of the bunker [fuel] delivered to ocean-going vessels by Petitioner in 2002 was not used in Washington State waters.”¹¹ CP 40. If this statement were true, then only 90% of the fuel was transported outside of Washington, not “all of the bunker [fuel] delivered by Petitioner.” CP 47. Olympic also stated that three percent (3%) of the fuel it delivered was Marine Distillate Oil that “may have been used by the ships prior to reaching foreign waters. CP 41. However, Olympic provided FFECs for deliveries that included Marine Distillate Oil that did not list the amount of Marine Distillate Oil that would be consumed in Washington.¹² Accordingly, Olympic failed to prove that the FFECs prohibit the bunker fuel from being burned in Washington. As such, Olympic has not presented adequate evidence to support its refund claims, even under its interpretation of the statute.

¹¹ This statement is not supported by the citation, as Mr. Prophet only states that 90% of Olympic’s total business activities was bunkering service as opposed to towing services, not that 90% of the bunker fuel was used outside the state.

¹² See, e.g., AR 105, 108, 111, 117 (BTA Doc No. 5 at A20-1, A21-1, A22-1, A24-1).

F. The Board Correctly Determined That Collateral Estoppel Does Not Bar The Department From Fully Litigating The Question Of Whether Olympic's Activities Qualify For The Deduction.

While the superior court did not reach the issue of collateral estoppel, Olympic may argue that the superior court's order can be affirmed on basis that the Department is collaterally estopped. However, collateral estoppel does not apply to informal Board decisions. Informal decisions of the Board cannot be appealed by the Department or the taxpayer. *King County v. Bd. of Tax Appeals*, 28 Wn. App. 230, 234, 622 P.2d 898 (1981). In Washington, collateral estoppel does not apply if a party is statutorily denied the right to appeal a decision. *State Farm Mut. Ins. Co. v. Avery*, 114 Wn. App. 299, 309, 57 P.3d 300 (2002). Therefore, collateral estoppel did not bar the Board from reconsidering its 2001 informal decision, and affirming the Department's assessment.

Olympic has argued that the mere opportunity for the Department to convert Board hearings into formal hearings means that the decision was a final decision on the merits. CP 114. However, this assertion is irrelevant as the judgment in *State Farm* was a final judgment on the merits, but the lack of an opportunity to appeal prevented the application of collateral estoppel. *State Farm*, 114 Wn. App. at 309.¹³

¹³ "Even though an issue was essential to the judgment, was actually litigated, and was embodied in a valid final judgment, we will not deny a party the chance to

The cases cited by Olympic to the superior court are distinguishable because they do not deal with situations where the party was statutorily denied the right to appeal. CP 53. In *City of Seattle, Executive Services Dep't v. Visio Corp.*, 108 Wn. App. 566, 572, 31 P.3d 740 (2001) the City appealed the decision of the superior court and later withdrew its appeal. Thus, in *Visio* the City not only had the opportunity to appeal the decision in the prior litigation, it actually exercised its right to appeal. As such, *Visio* does not stand for the proposition that collateral estoppel can be applied where a party is statutorily denied the right to appeal the prior decision.

In its briefing below, Olympic noted that collateral estoppel does not apply where it would work an injustice on the party against whom it is applied. CP 51 citing *Christensen v. Grant Cy. Hosp. Dist. No. 1*, 152 Wn.2d 299, 96 P.3d 957 (2004). Olympic went on to argue that an informal proceeding before the Board is a “full and fair opportunity to litigate the issues.” CP 52. However, Olympic provides no analysis of why an informal proceeding before an administrative agency with no opportunity to appeal is a full and fair opportunity to litigate the issues.

Unlike the Department, taxpayers can get relief from an informal Board decision by filing a de novo refund action under RCW 82.32.180.

litigate the issue if it was statutorily denied an opportunity to appeal.” *State Farm*, 114 Wn. App. at 309.

While this is technically not an appeal, it provides taxpayers an opportunity to obtain relief. *Pettit v. Bd. of Tax Appeals*, 85 Wn.2d 646, 649, 538 P.2d 501 (1975). On the other hand, the Department is without recourse if the Board erroneously sides with the taxpayer. *See King County*, 28 Wn. App. at 234. Thus, an informal Board hearing does not give the Department a full and fair opportunity to litigate the issues, as the Department cannot get relief from an adverse decision.

Olympic has also asserted that the Department's failure to abide by the Board's informal decision opens the door to annual re-litigation of the same issue. CP 50. However, if the taxpayer desires finality, it can choose to litigate the matter as a formal proceeding before the Board or file a refund action. RCW 82.03.140; RCW 82.32.180. Both these avenues provide an opportunity for appeal and would yield a binding result. *See* RCW 82.03.180. Thus, a taxpayer concerned with obtaining a result that will carry forward to future tax periods needs to choose a formal hearing, as Olympic has done in this case.

Judicial economy and the convenience of the parties would not be furthered if the Department were collaterally estopped from litigating issues in informal hearings. If collateral estoppel did apply, the Department would need to convert every hearing to a formal hearing to preserve its ability to fully litigate the issues. This would greatly increase

the cost of litigating minor issues to both the Department and the taxpayers, and would be highly inefficient in light of the very small number of informal decisions that the Department decides to non-acquiesce in and fully litigate the issues. *See* ETA 3055.2009, AR 189 (BTA Doc. No. 7 App. B) (listing nine informal Board decisions the Department issued non-acquiesces for). It would also undermine the purpose of informal hearings: to provide an opportunity to quickly and informally resolve disputes with the Department.¹⁴

Olympic also argued that denying preclusive effect to the prior informal decision would allow the Department to harass “taxpayers by imposing taxes that it knows will not survive legal scrutiny.” CP 54. On the contrary, Board’s decision to reverse its prior ruling in this case and affirm the Department, shows that taxes were proper and highlights unfairness of binding the Department to an informal decision from which it cannot appeal. Accordingly, collateral estoppel does not apply in this case under the holding in *State Farm* and the requirement that the application of collateral estoppel not work an injustice.

¹⁴ At informal hearings the Department is typically represented by its own employees, not attorneys from the Attorney General’s Office and it typically does not conduct significant discovery to verify factual representations.

G. The Doctrine Of Collateral Estoppel Also Does Not Apply In This Case Because There Was Not A Decision On The Merits Of The Current Issue In The Prior Case.

Collateral estoppel also does not apply because the issues are not identical to the issues decided in the prior informal Board case. *See State Farm*, 114 Wn. App. at 304 (collateral estoppel only applies where the identical issue was decided in prior action). The Board's prior decision dealt with the application of the deduction based on the misunderstanding that the fuel could not legally be used in Washington. In this case the parties agree that the bunker fuel can legally be burned in Washington. Therefore, the issue in this case is not identical to the issue decided in the prior Board of Tax Appeals case.¹⁵

In 2001, the Board issued a decision holding that Olympic's transportation of heavy bunker fuel qualified for the deduction in RCW 82.16.050(8) (2002), but not the lighter Marine Distillate Oil.¹⁶ *Olympic Tug & Barge v. Dep't of Revenue*, Board Docket No. 55558 at 5, AR 527 (BTA Doc. No. 19 at A3-5). In that case, the parties stipulated that environmental restrictions prohibited vessels from burning heavy bunker fuel in Washington State waters. *Id.* at 2. The parties also stipulated that

¹⁵ Additionally, the Board's 2001 decision did not address whether the bunker fuel was transported to an "export elevator, wharf, dock or ship side."

¹⁶ Board's conclusion "applies only to bunker fuel of a type that cannot be used in Washington territorial waters." *Olympic Tug & Barge*, Board Docket No. 55558 at 5, AR 527 (BTA Doc No. 19 at A3-5).

Olympic delivered a lighter Marine Distillate Oil (MDO) that could be burned in Washington State waters. *Id.* The Board concluded that the transportation of heavy bunker fuel that could not be burned in qualified for the PUT deduction. *Id.* at 5. By limiting this conclusion to the heavy bunker fuel, the Board's conclusion was based largely on the stipulation that environmental restrictions prohibited burning heavy bunker fuel in Washington waters.

Thus, the Board's prior decision only addressed the issue of whether the transportation of bunker fuel that could not be legally used in Washington State waters qualifies for the deduction. Here, Olympic has admitted there are no environmental restrictions preventing heavy bunker fuel from being burned in Washington State waters.¹⁷ Therefore, the issue here is not identical to the one decided by the Board in the prior informal decision.

Ironically, if the Court found that the issues were identical, Olympic wouldn't qualify for the deduction. The Board's prior decision held that the transportation of Marine Distillate Oil which could legally be burned in Washington did not qualify for the deduction. Accordingly,

¹⁷ "The assertion made in Appellant's Hearing Brief that bunker fuel, by law, could not be burned in Washington State waters was incorrect." AR 418 (BTA Doc No. 15 at fn. 1).

Olympic wouldn't qualify for the deduction, because the bunker fuel Olympic transported could legally be burned in Washington.

Olympic argued below that filling out Foreign Fuel Exemption Certificates (FFECs) is materially the same as the supposed environmental restriction. CP 55. This is incorrect. Vessels could have filed FFEC for the Marine Distillate Oil, which could have legally been burned in Washington State waters under the stipulation in the prior case. In fact, Olympic submitted a number of FFECs which included Marine Distillate Oil on the certificate.¹⁸ Yet under the Board's prior informal decision, deliveries of Marine Distillate Oil did not qualify for the deduction because under the stipulations in the 2001 case, Marine Distillate Oil could be used in Washington State waters. Accordingly, the critical fact in the prior Board decision was the environmental restriction prohibiting the heavy bunker fuel from legally being burned in Washington State waters. Because Olympic admits in this case there are no environmental restrictions prohibiting heavy bunker fuel from being burned in Washington waters the issue in this case is materially different from the issue decided in the prior Board decision. As such, the doctrine of collateral estoppel does not apply.

¹⁸ AR 105, 108, 111, 117 (BTA Doc No. 5 at A20-1, A21-1, A22-1, A24-1).

VI. CONCLUSION

The Board's decision should be affirmed as Olympic has failed to show that the Board erroneously interpreted or applied the law. The plain language of the statute requires the taxpayer to transport commodities that are shipped via carrier to foreign or interstate destinations. The destination of the fuel Olympic transports is a ship in Washington waters, not a location in another state or country. The Board's interpretation is a reasonable interpretation of the statute, especially in light of the rule that deductions are narrowly construed.

In addition, Olympic's interpretation results in a strained reading that the fuel is sent to every location where it is ultimately burned along the ship's route. Moreover, its interpretation is contrary to the plain meaning and legislative history of the statute. The Department respectfully requests that the Court reverse the superior court's order and affirm the Board's decision.

RESPECTFULLY SUBMITTED this 13th day of October, 2010.

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82.16.050 Deductions in computing tax. In computing tax there may be deducted from the gross income the following items:

(1) Amounts derived by municipally owned or operated public service businesses, directly from taxes levied for the support or maintenance thereof: PROVIDED, That this section shall not be construed to exempt service charges which are spread on the property tax rolls and collected as taxes;

(2) Amounts derived from the sale of commodities to persons in the same public service business as the seller, for resale as such within this state. This deduction is allowed only with respect to water distribution, gas distribution or other public service businesses which furnish water, gas or any other commodity in the performance of public service businesses;

(3) Amounts actually paid by a taxpayer to another person taxable under this chapter as the latter's portion of the consideration due for services furnished jointly by both, if the total amount has been credited to and appears in the gross income reported for tax by the former;

(4) The amount of cash discount actually taken by the purchaser or customer;

(5) The amount of credit losses actually sustained by taxpayers whose regular books of accounts are kept upon an accrual basis;

(6) Amounts derived from business which the state is prohibited from taxing under the Constitution of this state or the Constitution or laws of the United States;

(7) Amounts derived from the distribution of water through an irrigation system, for irrigation purposes;

(8) Amounts derived from the transportation of commodities from points of origin in this state to final destination outside this state, or from points of origin outside this state to final destination in this state, with respect to which the carrier grants to the shipper the privilege of stopping the shipment in transit at some point in this state for the purpose of storing, manufacturing, milling, or other processing, and thereafter forwards the same commodity, or its equivalent, in the same or converted form, under a through freight rate from point of origin to final destination; and amounts derived from the transportation of commodities from points of origin in the state to an export elevator, wharf, dock or ship side on tidewater or navigable tributaries thereto from which such commodities are forwarded, without intervening transportation, by vessel, in their original form, to interstate or foreign destinations: PROVIDED, That no deduction will be allowed when the point of origin and the point of delivery to such an export elevator, wharf, dock, or ship side are located within the corporate limits of the same city or town;

(9) Amounts derived from the production, sale, or transfer of electrical energy for resale within or outside the state or for consumption outside the state;

(10) Amounts derived from the distribution of water by a nonprofit water association and used for capital improvements by that nonprofit water association;

(11) Amounts paid by a sewerage collection business taxable under RCW 82.16.020(1)(a) to a person taxable under chapter 82.04 RCW for the treatment or disposal of sewage. [2000 c 245 § 1; 1994 c 124 § 12; 1989 c 302 § 103; 1987 c 207 § 1; 1982 2nd ex.s. c 9 § 3; 1977 ex.s. c 368 § 1; 1967 ex.s. c 149 § 25; 1965 ex.s. c 173 § 22; 1961

c 15 § 82.16.050. Prior: 1959 ex.s. c 3 § 18; 1949 c 228 § 11; 1937 c 227 § 12; 1935 c 180 § 40; Rem. Supp. 1949 § 8370-40.]

Effective date—Application—2000 c 245 § 1: "(1) Section 1 of this act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [March 31, 2000].

(2) Section 1 of this act applies to all amounts due prior to and after March 31, 2000." [2000 c 245 § 3.]

Finding, purpose—1989 c 302: See note following RCW 82.04.120.

Effective date—1982 2nd ex.s. c 9: See note following RCW 82.16.010.

82.16.053 Deductions in computing tax—Light and power businesses. (1) In computing tax under this chapter, a light and power business may deduct from gross income the lesser of the amounts determined under subsections (2) through (4) of this section.

(2)(a) Fifty percent of wholesale power cost paid during the reporting period, if the light and power business has fewer than five and one-half customers per mile of line.

(b) Forty percent of wholesale power cost paid during the reporting period, if the light and power business has more than five and one-half but less than eleven customers per mile.

(c) Thirty percent of the wholesale power cost paid during the reporting period, if the light and power business has more than eleven but less than seventeen customers per mile of line.

(d) Zero if the light and power business has more than seventeen customers per mile of line.

(3) Wholesale power cost multiplied by the percentage by which the average retail electric power rates for the light and power business exceed the state average electric power rate. If more than fifty percent of the kilowatt hours sold by a light and power business are sold to irrigators, then only sales to nonirrigators shall be used to calculate the average electric power rate for that light and power business. For purposes of this subsection, the department shall determine state average electric power rate each year based on the most recent available data and shall inform taxpayers of its determination.

(4) Four hundred thousand dollars per month. [1996 c 145 § 1; 1994 c 236 § 1.]

Effective date—1996 c 145: "This act shall take effect July 1, 1996." [1996 c 145 § 2.]

Effective date—1994 c 236: "This act shall take effect July 1, 1994." [1994 c 236 § 2.]

82.16.055 Deductions relating to energy conservation or production from renewable resources. (1) In computing tax under this chapter there shall be deducted from the gross income:

(a) An amount equal to the cost of production at the plant for consumption within the state of Washington of:

(i) Electrical energy produced or generated from cogeneration as defined in RCW 82.35.020; and

(ii) Electrical energy or gas produced or generated from renewable energy resources such as solar energy, wind energy, hydroelectric energy, geothermal energy, wood, wood wastes, municipal wastes, agricultural products and wastes, and end-use waste heat; and

the total gross operating revenue for a taxable bi-monthly period is one thousand (\$1,000.00) dollars, or more, no exemption or deductions from the gross operating revenue is allowed by this provision.

Deductions.

SEC. 40. In computing tax there may be deducted from the gross operating revenue the following items:

(a) Amounts derived by municipally owned or operated public service businesses, directly from taxes levied for the support or maintenance thereof;

(b) Amounts derived from the sale of commodities to persons in the same public service business as the seller, for resale as such within this state. This deduction is allowed only with respect to water distribution, light and power, gas distribution or other public service businesses which furnish water, electrical energy, gas, or any other commodity in the performance of public service business;

(c) Amounts actually paid by a taxpayer to another person taxable under this title as the latter's portion of the consideration due for services furnished jointly by both, if the total amount has been credited to and appears in the gross operating revenue reported for tax by the former;

(d) The amount of cash discount actually taken by the purchaser or customer;

(e) The amount of credit losses actually sustained by taxpayers whose regular books of accounts are kept upon an accrual basis;

(f) Amounts derived from business which the State of Washington is prohibited from taxing under the constitution of this state or the constitution or laws of the United States;

(g) Amounts derived from the distribution of water through an irrigation system, for irrigation purposes.

SEC. 41. Nothing herein shall be construed to exempt persons taxable under the provisions of this title from tax under any other titles of this act with respect to activities other than those specifically within the provisions of this title.

Does not exempt from taxes under other titles.

SEC. 42. The taxes imposed hereunder shall be due and payable in bi-monthly installments and remittance therefor shall be made on or before the fifteenth day of the month next succeeding the end of the bi-monthly period in which tax accrued. The taxpayer, on or before said fifteenth day of said month, shall make out a return, upon such forms and setting forth such information as the tax commission may require, showing the amount of the tax for which he is liable for the preceding bi-monthly period, sign and transmit the same to the tax commission, together with a remittance for said amount in the form required in title XVIII of this Act. The tax commission may, in its discretion, require verified annual returns from any taxpayer, setting forth such additional information as it may deem necessary to correctly determine tax liability.

Bi-monthly returns.

SEC. 43. All of the provisions contained in title XVIII of this Act shall have full force and application with respect to taxes imposed under the provisions of this title.

Title XVIII applicable.

TITLE VI. ADMISSIONS TAX.

SEC. 44. (a) From and after the first day of May, 1935, there is hereby levied and there shall be collected a tax of one cent for each twenty (20) cents or fraction thereof of the amount paid for admission to any place, including admission by season ticket or subscription, to be paid by the person paying for such admission; except that in the case the amount paid for admission is less than ten (10¢) cents, no tax shall be imposed. In the case

For each 20 cents or fraction thereof.

incidental thereto, but without any deduction on account of the cost of the commodity furnished or sold, the cost of materials used, labor costs, interest, discount, delivery costs, taxes, or any other expense whatsoever paid or accrued and without any deduction on account of losses;

Definitions applicable.

(m) The meaning attributed, in title II of this act, to the words or phrases; "tax year," "person," "value proceeding or accruing," "business," "engaging in business," "cash discount" and "successor" shall apply equally in the provisions of this title.

Amends § 8370-40, Rem. Rev. Stat. (§ 7030-100, P. C.)

Sec. 12. That section 40 of chapter 180, Laws of 1935, (8370-40, Remington's Revised Statutes) be and the same hereby is amended to read as follows:

Computation of tax, deductions.

Section 40. In computing tax there may be deducted from the gross operating revenue the following items:

(a) Amounts derived by municipally owned or operated public service businesses, directly from taxes levied for the support or maintenance thereof: *Provided*, That this section shall not be construed to exempt service charges which are spread on the property tax rolls and collected as taxes;

(b) Amounts derived from the sale of commodities to persons in the same public service business as the seller, for resale as such within this state. This deduction is allowed only with respect to water distribution, light and power, gas distribution or other public service businesses which furnish water, electrical energy, gas, or any other commodity in the performance of public service businesses;

(c) Amounts actually paid by a taxpayer to another person taxable under this title as the latter's portion of the consideration due for services furnished jointly by both, if the total amount has been credited to and appears in the gross operating revenue reported for tax by the former;

(d) The amount of cash discount actually taken by the purchaser or customer;

(e) The amount of credit losses actually sustained by taxpayers whose regular books of accounts are kept upon an accrual basis;

(f) Amounts derived from business which the State of Washington is prohibited from taxing under the constitution of this state or the constitution or laws of the United States;

(g) Amounts derived from the distribution of water through an irrigation system, for irrigation purposes;

(h) Amounts derived from the transportation of commodities from points of origin in the State of Washington into transit stations in Washington and thereafter forwarded, either in like kind or in their original or converted form, to interstate or foreign destinations; amounts derived from the transportation of commodities from points of origin outside the State of Washington into transit stations in Washington and thereafter forwarded, either in like kind or in their original or converted form, to destinations in the State of Washington; and amounts derived from the transportation of commodities from points of origin in the State of Washington to export elevators, docks or ship side on tidewater and the Columbia River and thereafter forwarded, either in like kind or in their original or converted form, to interstate or foreign destinations.

Sec. 13. That section 44 of chapter 180, Laws of 1935, (section 8370-44, Remington's Revised Statutes) be and the same hereby is amended to read as follows:

Amends § 8370-44, Rem. Rev. Stat. (§ 7030-104, P. C.)

Section 44. (a) From and after the first day of May, 1935, there is hereby levied and there shall be collected a tax of one cent for each twenty (20c) cents or fraction thereof of the amount paid for admission to any place, including admission by season

Admissions tax, levied.

cost of the commodity furnished or sold, the cost of materials used, labor costs, interest, discount, delivery costs, taxes, or any other expense whatsoever paid or accrued and without any deduction on account of losses;

Others.

(m) The meaning attributed, in title II of this act, to the words or phrases: "tax year," "person," "value proceeding or accruing," "business," "engaging in business," "in this state," "within this state," "cash discount" and "successor" shall apply equally in the provision of this title.

Amendment.

SEC. 11. Section 40, chapter 180, Laws of 1935, as amended by section 12, chapter 227, Laws of 1937, is amended to read as follows:

Computation of tax deductions.

Section 40. In computing tax there may be deducted from the gross operating revenue the following items:

(a) Amounts derived by municipally owned or operated public service businesses, directly from taxes levied for the support or maintenance thereof: *Provided*, That this section shall not be construed to exempt service charges which are spread on the property tax rolls and collected as taxes;

(b) Amounts derived from the sale of commodities to persons in the same public service business as the seller, for resale as such within this state. This deduction is allowed only with respect to water distribution, light and power, gas distribution or other public service businesses which furnish water, electrical energy, gas, or any other commodity in the performance of public service businesses;

(c) Amounts actually paid by a taxpayer to another person taxable under this title as the latter's portion of the consideration due for services furnished jointly by both, if the total amount has been credited to and appears in the gross operating revenue reported for tax by the former;

(d) The amount of cash discount actually taken by the purchaser or customer; Computation of tax deductions.

(e) The amount of credit losses actually sustained by taxpayers whose regular books of accounts are kept upon an accrual basis;

(f) Amounts derived from business which the State of Washington is prohibited from taxing under the constitution of this state or the constitution or laws of the United States;

(g) Amounts derived from the distribution of water through an irrigation system, for irrigation purposes;

(h) Amounts derived from the transportation of commodities from points of origin in this state to final destination outside this state, or from points of origin outside this state to final destination in this state, with respect to which the carrier grants to the shipper the privilege of stopping the shipment in transit at some point in this state for the purpose of storing, manufacturing, milling, or other processing, and thereafter forwards the same commodity, or its equivalent, in the same or converted form, under a through freight rate from point of origin to final destination; and amounts derived from the transportation of commodities to an export elevator, wharf, dock or ship side on tidewater or navigable tributaries thereto, from points of origin in the State of Washington, and 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 an export elevator, wharf, dock, or ship side are located within the corporate limits of the same city or town.

SEC. 12. Section 53, chapter 180, Laws of 1935, as amended by section 1, chapter 126, Laws of 1945, is amended to read as follows: Amendment.

Revenue and
taxation.
Public utility
tax. Imposed.

ness shall pay a tax of one-fourth of one percent on such eighty percent or more of its business and three percent on all other business;

(2) Gas distribution business: Two percent;

(3) Urban transportation business: One-half of one percent;

(4) Vessels under sixty-five feet in length, except tugboats, operating upon the waters within the state. One-half of one percent;

(5) Motor transportation and tugboat businesses and all public service businesses other than ones mentioned above: One and one-half percent.

RCW 82.16.050
amended.

SEC. 22. Section 82.16.050, chapter 15, Laws of 1961, and RCW 82.16.050 are each amended to read as follows:

Deductions in
computing tax.

In computing tax there may be deducted from the gross income the following items:

(1) Amounts derived by municipally owned or operated public service businesses, directly from taxes levied for the support or maintenance thereof. *Provided*, That this section shall not be construed to exempt service charges which are spread on the property tax rolls and collected as taxes;

(2) Amounts derived from the sale of commodities to persons in the same public service business as the seller, for resale as such within this state. This deduction is allowed only with respect to water distribution, light and power, gas distribution or other public service businesses which furnish water, electrical energy, gas or any other commodity in the performance of public service businesses;

(3) Amounts actually paid by a taxpayer to another person taxable under this chapter as the latter's portion of the consideration due for services furnished jointly by both, if the total amount has been credited to and appears in the gross income reported for tax by the former;

(4) The amount of cash discount actually taken by the purchaser or customer;

(5) The amount of credit losses actually sustained by taxpayers whose regular books of accounts are kept upon an accrual basis;

(6) Amounts derived from business which the state is prohibited from taxing under the Constitution of this state or the Constitution or laws of the United States;

(7) Amounts derived from the distribution of water through an irrigation system, for irrigation purposes;

(8) Amounts derived from the transportation of commodities from points of origin in this state to final destination outside this state, or from points of origin outside this state to final destination in this state, with respect to which the carrier grants to the shipper the privilege of stopping the shipment in transit at some point in this state for the purpose of storing, manufacturing, milling, or other processing, and thereafter forwards the same commodity, or its equivalent, in the same or converted form, under a through freight rate from point of origin to final destination; and amounts derived from the transportation of commodities to an export elevator, wharf, dock or ship side on tidewater or navigable tributaries thereto, from points of origin in the state, and 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 an export elevator, wharf, dock, or ship side are located within the corporate limits of the same city or town;

(9) Amounts derived from the production, sale, or transfer of electrical energy for resale or consumption outside the state if the production or generation of such energy is subject to tax under the

Taxation.

(5) Motor transportation and tugboat businesses and all public service businesses other than ones mentioned above: One and eight-tenths of one percent.

RCW 82.16.050 amended.

Sec. 25. Section 82.16.050, chapter 15, Laws of 1961 as amended by section 22, chapter 173, Laws of 1965 extraordinary session and RCW 82.16.050 are each amended to read as follows:

Public utility tax—
Deductions in computing tax.

In computing tax there may be deducted from the gross income the following items:

(1) Amounts derived by municipally owned or operated public service businesses, directly from taxes levied for the support or maintenance thereof: *Provided*, That this section shall not be construed to exempt service charges which are spread on the property tax rolls and collected as taxes;

(2) Amounts derived from the sale of commodities to persons in the same public service business as the seller, for resale as such within this state. This deduction is allowed only with respect to water distribution, light and power, gas distribution or other public service businesses which furnish water, electrical energy, gas or any other commodity in the performance of public service businesses;

(3) Amounts actually paid by a taxpayer to another person taxable under this chapter as the latter's portion of the consideration due for services furnished jointly by both, if the total amount has been credited to and appears in the gross income reported for tax by the former;

(4) The amount of cash discount actually taken by the purchaser or customer;

(5) The amount of credit losses actually sustained by taxpayers whose regular books of accounts are kept upon an accrual basis;

(6) Amounts derived from business which the state is prohibited from taxing under the Constitu-

tion of this state or the Constitution or laws of the United States;

(7) Amounts derived from the distribution of water through an irrigation system, for irrigation purposes;

(8) Amounts derived from the transportation of commodities from points of origin in this state to final destination outside this state, or from points of origin outside this state to final destination in this state, with respect to which the carrier grants to the shipper the privilege of stopping the shipment in transit at some point in this state for the purpose of storing, manufacturing, milling, or other processing, and thereafter forwards the same commodity, or its equivalent, in the same or converted form, under a through freight rate from point of origin to final destination; and amounts derived from the transportation of commodities from points of origin in the state to an export elevator, wharf, dock or ship side on tidewater or navigable tributaries thereto from which such commodities are forwarded, without intervening transportation, by vessel, in their original form, to interstate or foreign destinations: *Provided*, That no deduction will be allowed when the point of origin and the point of delivery to such an export elevator, wharf, dock, or ship side are located within the corporate limits of the same city or town;

(9) Amounts derived from the production, sale, or transfer of electrical energy for resale or consumption outside the state if the production or generation of such energy is subject to tax under the manufacturing classification of chapter 82.04 RCW: *Provided*, That the exemption set forth in RCW 82.04.310 shall not be applicable to the generation or production of the electrical energy so produced, sold, or transferred: *And provided further*, That no credit has been claimed as an offset to taxes imposed under RCW 82.04.240.

bi-monthly period in which the tax accrued. Forms and instructions for making returns will be furnished upon request made to the Tax Commission at Olympia or to any of its branch offices.

See Rule 221 for liability of retailers for collection of Compensating Tax.

Effective May 1, 1943.

PUBLIC UTILITY TAX (TITLE V)

Rule 179.

Persons engaged in certain public service businesses are taxable under Title V, and are exempt from tax under Title II in respect to such businesses. However many persons taxable under Title V are also engaged in some other business which is taxable under Title II. For example, a light and power company engaged in operating a plant or system for the generation or distribution of electrical energy for sale, may also be engaged in selling at retail various electrical appliances. Such a company would be taxable under Title V in respect to the sale of electrical energy, and also taxable under Title II in respect to the sale of electrical appliances.

Persons who are taxable under Title V, and the rate of such tax, which is applied to gross operating revenues, are those engaged in the following businesses:

Railroad, express, railroad car, water distribution, light and power, telephone and telegraph. Rate of tax 3%.

Gas distribution. Rate of tax 2%.

Urban transportation, and vessels under 65 feet in length operating upon the waters of the State of Washington. Rate of tax, $\frac{1}{2}$ of 1%.

Highway transportation, and all public service businesses other than those heretofore mentioned. Rate of tax $1\frac{1}{2}$ %.

The term "public service business" means any business subject to control by the state, or having the powers of eminent domain and the duties incident thereto, or any business hereafter declared to be of a public service nature by the legislature of this state.

The term "subject to control by the state" means control by the Department of Public Utilities or the Department of Transportation as to rates charged or services rendered.

Volume Exemption—Any person engaged in one or more businesses taxable under Title V, whose gross operating revenue is less than \$1,000.00 during a taxable bi-monthly period, is exempt from the payment of tax for such period.

Persons who receive a gross operating revenue of \$1,000.00 or more during a taxable bi-monthly period are not permitted any deduction in computing tax.

Deductions—Amounts derived from the following sources do not constitute taxable income in computing tax under Title V, viz:

- (1) Amounts derived by municipally owned or operated public service businesses directly from taxes levied for the support thereof, but not including service charges which are spread on the property tax rolls and collected as taxes.
- (2) Amounts derived by persons engaged in the water distribution, light and power, or gas distribution business, from the sale of

commodities to persons in the same public service business for resale as such within this state.

- (3) Amounts actually paid by a taxpayer to another person taxable under Title V as the latter's portion of the consideration due for services jointly furnished by both. This includes the amount paid to a ferry company for the transportation of a vehicle and its contents, when such vehicle is carrying freight or passengers for hire and is being operated by a person engaged in the business of urban transportation or highway transportation. It does not include amounts paid for the privilege of moving such vehicles over toll bridges.
- (4) Amounts derived from the distribution of water through an irrigation system, solely for irrigation purposes.
- (5) Amounts derived from the transportation of commodities from points of origin in the State of Washington into transit stations in Washington and thereafter forwarded in original or converted form to interstate or foreign destinations; also amounts derived from the transportation of commodities from points of origin outside the State of Washington into transit stations in Washington and thereafter forwarded in original or converted form to destinations in Washington; also amounts derived from the transportation of commodities from points of origin in the State of Washington to export elevators, docks or ship side on tidewater or the Columbia River and thereafter forwarded in original or converted form to interstate or foreign destinations.

The term "transit station," as used herein, means a point or place in respect to which a transit privilege has been granted by a common carrier to its shippers or consignees.

The term "transit privilege" means the privilege of stopping a commodity in transit at some intermediate point known as a "transit station," for the purpose of storing, manufacturing, milling, or other processing or service, and thereafter forwarding the same commodity, or its equivalent, in the same or converted form under a through freight rate from point of origin to final destination which is lower than the freight rate from point of origin to the transit station plus the freight rate from the transit station to final destination.

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 the moving or altering the utility's plant or equipment when done for the benefit or convenience of such individuals or

13 C.J.S. Carriers § 149

Corpus Juris Secundum
Database updated May 2010
Carriers

Paul Coltoff, J.D.; Glenda Harnad, J.D., of the National Legal Research Group; Caeli E. Kimball, J.D.; Jack K. Levin, J.D.; Carmela Pellegrino, J.D.; and Eric C. Surette, J.D.

XIV. Rates and Tariffs
B. Through Rates

Topic Summary References Correlation Table

§ 149. Generally

West's Key Number Digest

West's Key Number Digest, Commerce ~~85~~85.18

A "through rate" is the rate applicable to carriage on a through route.

A "through rate" is the rate applicable to carriage on a through route, under federal law.¹

A through rate is not necessarily a "joint rate," but may be merely an aggregation of separate rates fixed independently by the several carriers forming the through route,² known as a "combination rate."³

The individual rates which, when aggregated, produce the combination rate may be either "local rates," applicable to any shipment between the relevant points served by the particular carrier, or "proportional rates," applicable only to that carrier's portion of a through movement.⁴ It is usually within a rail carrier's discretion to provide service in the form of a joint rate with another railroad, or a proportional rate.⁵ Where a through route has a bottleneck segment, the railroad is not required to provide separate local rates for bottleneck service, and a railroad may charge rates up to stand-alone cost for complete origin-to-destination service, as required to achieve revenue adequacy.⁶ Shippers or their customers that adequately demonstrate an absence of effective competition over the entire origin-to-destination route may challenge the origin-to-destination rate provided by the carrier.⁷

1 U.S.—Thompson v. U.S., 343 U.S. 549, 72 S. Ct. 978, 96 L. Ed. 1134 (1952).

2 U.S.—Thompson v. U.S., 343 U.S. 549, 72 S. Ct. 978, 96 L. Ed. 1134 (1952).
Joint rates are discussed in §§ 152 et seq.

3 U.S.—Seaboard Coast Line R.R. v. U.S., 724 F.2d 1482 (11th Cir. 1984).

4 U.S.—Pittsburgh and Lake Erie R. Co. v. I.C.C., 796 F.2d 1534 (D.C. Cir. 1986).

5 U.S.—MidAmerican Energy Co. v. Surface Transp. Bd., 169 F.3d 1099 (8th Cir. 1999).

6 U.S.—MidAmerican Energy Co. v. Surface Transp. Bd., 169 F.3d 1099 (8th Cir. 1999).

7 U.S.—MidAmerican Energy Co. v. Surface Transp. Bd., 169 F.3d 1099 (8th Cir. 1999).
As to regulation in the absence of effective competition, see § 135.

(b) The Governor of Guam is authorized to carry out the provisions of the related laws set forth in section 784 of this title, with such modifications as he shall deem necessary to meet special conditions on Guam; and the Governor is further authorized to make such rules and regulations as may be necessary to carry out the provisions of this chapter on Guam. (Aug. 9, 1939, ch. 618, § 9, as added Aug. 1, 1956, ch. 852, § 22, 70 Stat. 911.)

Chapter 12.—INTERSTATE COMMERCE ACT, PART III; WATER CARRIERS

- Sec.
901. Short title.
902. Definitions.
903. Application of provisions; exemptions.
904. General powers and duties of the Commission.
905. Rates, fares, charges, and practices; through routes.
906. Tariffs and schedules.
907. Commission's authority over rates; complaints; hearings.
908. Reparation awards; limitation of actions.
909. Certificates of public convenience and necessity and permits.
910. Dual operations under certificates and permits.
911. Temporary operations.
912. Transfer of certificates and permits.
913. Accounts, records, and reports.
914. Allowances to shippers for transportation services.
915. Notices, orders, and service of process.
916. Enforcement and procedure.
917. Unlawful acts and penalties.
918. Collection of rates and charges.
919. Employees.
920. Repeals.
921. Transfer of employees, records, property, and appropriations.
922. Existing orders, rules, tariffs, etc.; pending matters.
923. Separability of provisions.

NATIONAL TRANSPORTATION POLICY

Act Sept. 18, 1940, ch. 722, title I, § 1, 54 Stat. 899, amended the Interstate Commerce Act, chapters 1, 8, 12, 13 and 19 of this title, by inserting before part I thereof (chapter 1 of this title) the following provision entitled "National Transportation Policy": "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this act shall be administered and enforced with a view to carrying out the above declaration of policy."

INTERSTATE COMMERCE ACT

The Interstate Commerce Act of Feb. 4, 1887, ch. 104, 24 Stat. 379, as it existed prior to its division into parts, is embodied in chapter 1 of this title. The original act was designated "part I" and a new part II, comprising chapter 8 of this title, was added by act Aug. 9, 1935, ch. 498, 49 Stat. 543. Part III, constituting chapter 12 of this title, was added by act Sept. 18, 1940, ch. 722, title II, § 201, 54 Stat. 929. Part IV, constituting chapter 13 of this title, was added by act May 16, 1942, ch. 313, § 1, 56 Stat. 284. Part V, constituting chapter 19 of this title, was added by Pub. L. 85-625, § 2, Aug. 12, 1958, 72 Stat. 568.

CROSS REFERENCES

Appeals to Supreme Court, see section 45 of this title. Charges for long and short hauls and on through route, prohibitions, see section 4 of this title.

Combinations and consolidations of carriers, prohibitions, see section 5(1) of this title.

Common carriers by railroad, duty to establish reasonable through routes with common carriers by water subject to this chapter, see section 1(4) of this title.

Exchange of telephone, telegraph, or cable services, see section 1(5½) of this title.

Expedition of actions by United States under this chapter involving general public importance, see section 44 of this title.

Interchange of traffic, connecting line defined, see section 3(4) of this title.

Intervention of representatives of employees, see section 17(11) of this title.

§ 901. Short title.

This chapter may be cited as part III of the Interstate Commerce Act. (Feb. 4, 1887, ch. 104, pt. III, § 301, as added Sept. 18, 1940, ch. 722, title II, § 201, 54 Stat. 929.)

EFFECTIVE DATE OF CHAPTER

Section 202 of act Sept. 18, 1940, ch. 722, provided that: "Part III of the Interstate Commerce Act [this chapter] shall take effect on the date of the enactment of this Act [September 18, 1940], except that sections * * * (904 (c), 905—908, 909 (a) and (f), 913—918, 920, 921, and 922 of this title) shall take effect on the 1st day of January 1941: *Provided, however,* That the Interstate Commerce Commission shall, if found by it necessary or desirable in the public interest, by general or special order postpone the taking effect of any of the provisions above enumerated to such time, but not beyond the 1st day of April 1942, as the Commission shall prescribe."

INTERSTATE COMMERCE ACT

Section 1 of act Sept. 18, 1940, amended the Interstate Commerce Act by inserting before part I thereof (chapter 1 of this title) the following provision entitled "Short Title": "This act (chapters 1, 8, 12, 13 and 19 of this title) may be cited as the Interstate Commerce Act."

§ 902. Definitions.

For the purposes of this chapter—

(a) The term "person" includes any individual, firm, copartnership, corporation, company, association, joint stock association, and any trustee, receiver, assignee, or personal representative thereof.

(b) The term "Commission" means the Interstate Commerce Commission.

(c) The term "water carrier" means a common carrier by water or a contract carrier by water.

(d) The term "common carrier by water" means any person which holds itself out to the general public to engage in the transportation by water in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, except transportation by water by an express company subject to chapter 1 of this title in the conduct of its express business, which shall be considered to be and shall be regulated as transportation subject to chapter 1 of this title.

(e) The term "contract carrier by water" means any person which, under individual contracts or agreements, engages in the transportation (other than transportation referred to in paragraph (d) of this section and the exception therein) by water of passengers or property in interstate or foreign commerce for compensation.

The furnishing for compensation (under a charter, lease, or other agreement) of a vessel, to a person

other than a carrier subject to this Act, to be used by the person to whom such vessel is furnished in the transportation of its own property, shall be considered to constitute, as to the vessel so furnished, engaging in transportation for compensation by the person furnishing such vessel, within the meaning of the foregoing definition of "contract carrier by water". Whenever the Commission, upon its own motion or upon application of any interested party, determines that the application of the preceding sentence to any person or class of persons is not necessary in order to effectuate the national transportation policy declared in the Interstate Commerce Act, it shall by order exempt such person or class of persons from the provisions of this chapter for such period of time as may be specified in such order. The Commission may by order revoke any such exemption whenever it shall find that the application of such sentence to the exempted person or class of persons is necessary in order to effectuate such national transportation policy. No such exemption shall be denied or revoked except after reasonable opportunity for hearing.

(f) The term "vessel" means any watercraft or other artificial contrivance of whatever description which is used, or is capable of being, or is intended to be, used as a means of transportation by water.

(g) The term "transportation facility" includes any vessel, warehouse, wharf, pier, dock, yard, grounds, or any other instrumentality or equipment of any kind, used in or in connection with transportation by water subject to this chapter.

(h) The term "transportation" includes the use of any transportation facility (irrespective of ownership or of any contract, express or implied, for such use), and includes any and all services in or in connection with transportation, including the receipt, delivery, elevation, transfer in transit, refrigeration or icing, ventilation, storage, and handling of property transported or the interchange thereof with any other agency of transportation.

(i) The term "interstate or foreign transportation" or "transportation in interstate or foreign commerce", as used in this chapter, means transportation of persons or property—

(1) wholly by water from a place in a State to a place in any other State, whether or not such transportation takes place wholly in the United States;

(2) partly by water and partly by railroad or motor vehicle, from a place in a State to a place in any other State; except that with respect to such transportation taking place partly in the United States and partly outside thereof, such terms shall include transportation by railroad or motor vehicle only insofar as it takes place within the United States, and shall include transportation by water only insofar as it takes place from a place in the United States to another place in the United States;

(3) wholly by water, or partly by water and partly by railroad or motor vehicle, from or to a place in the United States to or from a place outside the United States, but only (A) insofar as such transportation by rail or by motor vehicle takes place within the United States, and (B) in

the case of a movement to a place outside the United States, only insofar as such transportation by water takes place from any place in the United States to any other place therein prior to transshipment at a place within the United States for movement to a place outside thereof, and, in the case of a movement from a place outside the United States, only insofar as such transportation by water takes place from any place in the United States to any other place therein after transshipment at a place within the United States in a movement from a place outside thereof.

(j) The term "United States" means the States of the United States and the District of Columbia.

(k) The term "State" means a State of the United States or the District of Columbia.

(l) The term "common carrier by railroad" means a common carrier by railroad subject to the provisions of chapter 1 of this title.

(m) The term "common carrier by motor vehicle" means a common carrier by motor vehicle subject to the provisions of chapter 8 of this title. (Feb. 4, 1887, ch. 104, pt. III, § 302, as added Sept. 18, 1940, ch. 722, title II, § 201, 54 Stat. 929.)

REFERENCES IN TEXT

This act, referred to in subsec. (e), means the Interstate Commerce Act, which is classified to this chapter and chapters 1, 8, 13, and 19 of this title.

The national transportation policy declared in the Interstate Commerce Act, referred to in par. (e), is set out as a note preceding section 901 of this title.

EFFECTIVE DATE

See note under section 901 of this title.

§ 903. Application of provisions; exemptions.

(a) In the case of transportation which is subject both to this chapter and chapter 1 of this title, the provisions of chapter 1 of this title shall apply only to the extent that chapter 1 of this title imposes, with respect to such transportation, requirements not imposed by the provisions of this chapter.

(b) Nothing in this chapter shall apply to the transportation by a water carrier of commodities in bulk when the cargo space of the vessel in which such commodities are transported is being used for the carrying of not more than three such commodities. This subsection shall apply only in the case of commodities in bulk which are (in accordance with the existing custom of the trade in the handling and transportation of such commodities as of June 1, 1939) loaded and carried without wrappers or containers and received and delivered by the carrier without transportation mark or count. For the purposes of this subsection two or more vessels while navigated as a unit shall be considered to be a single vessel. This subsection shall not apply to transportation subject, on September 18, 1940, to the provisions of the Intercoastal Shipping Act, 1933, as amended.

(c) Nothing in this chapter shall apply to transportation by a contract carrier by water of commodities in bulk in a non-ocean-going vessel on a normal voyage during which (1) the cargo space of such vessel is used for the carrying of not more than three such commodities, and (2) such vessel passes within or through waters which are made international for

§ 1002. Definitions and exemptions.

(a) For the purposes of this chapter—

(1) The term "person" includes an individual, firm, partnership, corporation, company, association, or joint-stock association, and includes a trustee, receiver, assignee, or personal representative thereof.

(2) The term "Commission" means the Interstate Commerce Commission.

(3) The term "State" means a State of the United States or the District of Columbia.

(4) The term "United States" means the States of the United States and the District of Columbia.

(5) The term "freight forwarder" means any person which (otherwise than as a carrier subject to chapters 1, 8, or 12 of this title) holds itself out to the general public as a common carrier to transport or provide transportation of property, or any class or classes of property, for compensation, in interstate commerce, and which, in the ordinary and usual course of its undertaking, (A) assembles and consolidates or provides for assembling and consolidating shipments of such property, and performs or provides for the performance of break-bulk and distributing operations with respect to such consolidated shipments, and (B) assumes responsibility for the transportation of such property from point of receipt to point of destination, and (C) utilizes, for the whole or any part of the transportation of such shipments, the services of a carrier or carriers subject to chapters 1, 8, or 12 of this title.

(6) The term "interstate commerce" means transportation (A) between a point in a State and a point in another State, whether or not such transportation takes place wholly within the United States; (B) between points within the same State but through any place outside thereof; or (C) from or to any point in the United States to or from any point outside thereof, but only insofar as such transportation takes place within the United States.

(7) The term "service subject to this chapter" means any or all of the service in connection with the transportation in interstate commerce which any person undertakes to perform or provide as a freight forwarder, or which such person is authorized or required by or under the authority of this chapter to perform or provide; but such term shall not include that part of the undertaking of any such person for the performance of which the services of an air carrier subject to the Civil Aeronautics Act of 1938, as amended, are utilized, or for the performance of which transportation by motor vehicle exempted under the provisions of section 303 (b) (7a) of this title is utilized.

(8) Wherever reference is made to control (in referring to a relationship between any person or persons and another person or persons), such reference shall be construed to include actual as well as legal control, whether maintained or exercised through or by reason of the method or of circumstances surrounding organization or operation, through or by common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or through

or by any other direct or indirect means; and to include the power to exercise control.

(b) The provisions of this chapter shall not apply (1) to service performed by or under the direction of a cooperative association, as defined in Agricultural Marketing Act, approved June 15, 1929, as amended, or by a federation of such cooperative associations, if such federation possesses no greater powers or purposes than cooperative associations so defined, or (2) where the property with respect to which service is performed consists of ordinary livestock, fish (including shellfish), agricultural commodities (not including manufactured products thereof), or used household goods, if the person performing such service engages in service subject to this chapter with respect to not more than one of the classifications of property above specified.

(c) The provisions of this chapter shall not be construed to apply (1) to the operations of a shipper, or a group or association of shippers, in consolidating or distributing freight for themselves or for the members thereof, on a nonprofit basis, for the purpose of securing the benefits of carload, truckload, or other volume rates, or (2) to the operations of a warehouseman or other shippers' agent, in consolidating or distributing pool cars, whose services and responsibilities to shippers in connection with such operations are confined to the terminal area in which such operations are performed. (Feb. 4, 1887, ch. 104, pt. IV, § 402, as added May 16, 1942, ch. 318, § 1, 56 Stat. 284, and amended Dec. 20, 1950, ch. 1140, § 1, 64 Stat. 1113.)

REFERENCES IN TEXT

The Civil Aeronautics Act of 1938, as amended, referred to in subsec. (a) (7), was repealed by Pub. L. 85-726, title XIV, § 1401(b), Aug. 23, 1958, 72 Stat. 806, and is now covered by chapter 20 of this title.

The Agricultural Marketing Act, approved June 15, 1929, as amended, referred to in subsec. (b), is classified to sections 1141, 1141b-1141d, 1141e, 1141f, and 1141h-1141j of Title 12, Banks and Banking.

AMENDMENTS

1950—Subsec. (a) (5). Act Dec. 20, 1950, inserted "as a common carrier" following "to the general public".

EFFECTIVE DATE OF 1950 AMENDMENT

Amendment of subsec. (a) (5) effective Dec. 20, 1950, see note set out under section 1008 of this title.

EFFECTIVE DATE

Effective date of chapter, see note under section 1001 of this title.

§ 1003. General powers and duties of Commission.

(a) It shall be the duty of the Commission to administer the provisions of this chapter, and to that end it shall have the authority to make and amend such rules and regulations and to issue such orders as may be necessary to carry out its provisions.

(b) The Commission shall have authority to establish reasonable requirements with respect to continuous and adequate service.

(c) The Commission shall have authority to prescribe reasonable rules and regulations governing the filing of surety bonds, policies of insurance, qualifications as a self-insurer, or other securities or agreements, in such reasonable amount as the Commission may require, to be conditioned to pay, within the amount of such surety bonds, policies of insurance, qualifications as a self-insurer, or other

NO. 65667-8-I

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

OLYMPIC TUG AND BARGE, INC.,

Respondents,

v.

STATE OF WASHINGTON
DEPARTMENT OF REVENUE,

Appellant.

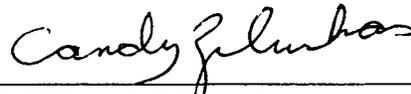
CERTIFICATE OF
SERVICE

I certify that I served a copy of Appellant's Brief and this Certificate of Service, via U.S. Mail, postage prepaid, through Consolidated Mail Services, and electronically by email, on the following:

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

DATED this 13th day of October, at Olympia, WA.



CANDY ZILINSKAS, Legal Assistant

ORIGINAL