BEFORE THE INTERPRETATION AND APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Correction of Assessment of	)	D E T E R M I N A T I O N
	)	No. 88-379
. . .	)	Registration No. . . .
	)	. . . /Audit No. . . .
and	)	
	)	
	)	Registration No. . . .
. . .	)	. . . /Audit No. . . .

[1] **RULE 179 AND RULE 182:** RCW 82.16.010(11) -- PUBLIC UTILITY TAX -- EXCLUSION -- STORAGE -- PUBLIC SERVICE BUSINESS. Charges for storage of a customer's property are not subject to the public utility tax where the business was not defined by RCW 82.16.010 as either subjected to state control, having the powers of eminent domain, or declared to be of a public service nature. Shurgard Mini-Storage v. Department of Rev., 40 Wn.App. 721 (1985) followed.

[2] **RULE 136:** B&0 TAX -- PROCESSING FOR HIRE -- SERVICE -- STORAGE -- MEASURE OF TAX. The activities of blending, processing, and packaging antifreeze and of mixing fuel fall within the classification of "processing for hire." Persons who process for hire are taxable under that classification upon the total charges made therefor, including associated storage, unloading and loading charges.

[3] **RULE 224:** B&O TAX -- SERVICE -- STORAGE -- FILTERING FERTILIZER -- DRYING SOLVENTS. Storing and handling chlorinated solvents and storing, filtering, and bagging fertilizer found subject to Service B&O where the taxpayer's activities did not produce a new or different product.

[4] **RULE 193D:** B&O TAX -- STEVEDORING -- ASSOCIATED ACTIVITIES -- STORAGE. Charges for unloading and loading vessels, where not done in conjunction with

processing for hire, are subject to B&O tax at the Stevedoring rate. Charges for associated activities, including short-term storage, in conjunction with the stevedoring also are subject to B&O tax at the stevedoring rate.

[5] **RULE 111:** B&O TAX -- EXCLUSION -- REIMBURSEMENTS -- "WASH SALES" --GROSS INCOME OF THE BUSINESS. Reimbursements from customers for amounts paid by the taxpayer on their behalf do not qualify as nontaxable "reimbursements" under Rule 111 unless the taxpayer is not primarily or secondarily liable for the fees or costs.

[6] **RULE 118**: B&O TAX -- EXEMPTION -- REAL PROPERTY -- LEASE -- LICENSE TO USE DISTINGUISHED. Agreement to lease a portion of a taxpayer's facilities as office space found to be for the rental of real estate where the customer/lessee was the exclusive occupant of a specific office and the taxpayer only provided janitorial services.

Headnotes are provided as a convenience for the reader and are not in any way a part of the decision or in any way to be used in construing or interpreting this Determination.

TAXPAYER REPRESENTED BY: . . .

DATE OF HEARING: October 6, 1987

NATURE OF ACTION:

The taxpayers protest the assessment of public utility tax on income from its storage and handling activities and the assessment of tax on "wash sales."

FACTS AND ISSUES:

Roys, A.L.J. -- The taxpayers' records were examined for the period January 1, 1982 through June 30, 1986. . . . .

The taxpayers protest the assessments. Because they are affiliated corporations and are protesting similar assessments, they filed a consolidated petition for purposes of appeal.

The taxpayers' representative described the activities at the . . . facility, [Corporation A], as follows:

> The primary activity at this facility was blending and packaging antifreeze for several large chemical companies. None of the basic ingredients were produced

at the [Corporation A] facility in . . . . The primary ingredient, ethylene glycol, was produced at the customers' own plants, most of which are located on the Gulf Coast of the United States. The basic ingredients needed to meet antifreeze demands in the Pacific Northwest were shipped in bulk by rail or ocean-going vessel to the [Corporation A] facility at . . . . [Corporation A] then blended the ingredients according to each customer's formula and either packaged the finished product (in gallon jugs or 55-gallon drums) or re-shipped in bulk. [Corporation A] supplied packaging materials (e.g., drums, jugs, and cartons) and separately charged its customers for them. Most of the finished product, whether packaged or bulk, was shipped out by truck. It was shipped as promptly as possible in order to minimize the customers' holding costs and because the [Corporation A] facilities were not designed for long-term storage. In 1986, for example, filled cases of antifreeze averaged only 17.5 days in temporary storage awaiting shipment.

A secondary activity at . . . during the audit period was the handling and packaging of fertilizer (sometimes referred to as urea in the audit report). The fertilizer was shipped to the facility in bulk . . . . [Corporation A] screened all fertilizer for oversized particles and metal. It packaged some of the fertilizer into 80-pound bags (supplied by the customer) and the rest was re-shipped in bulk. Bagged fertilizer was shipped out by truck and bulk fertilizer was re-shipped by either truck or rail. As in the case of the antifreeze, the fertilizer was re-shipped as fast as possible. In 1986, for example, bagged fertilizer averaged only 8.6 days in storage before shipment. Bulk fertilizer was moved through the facility on a similar timetable. . . .

A third, minor activity at the . . . facility was the handling of chlorinated solvents for . . . and, formerly, ... This material came in by rail and was shipped out by truck. While in storage at the [Corporation A] facility, the product was "dried" (i.e., its water content was reduced to an acceptable level).

A fourth type of activity during the audit period, also a minor one, was "direct pumping." [Corporation A] pumped some customers' liquid products directly from inbound railcars to outbound tank trucks. A variety of products were handled in this manner, primarily

> chlorinated solvents, latex, and resins. Resins required heating, also provided by [Corporation A], before they could be pumped off the railcars.

The . . . facility, [Corporation B], was designed primarily as a bunkering operation. The facility also handles clean diesel fuel. During the audit period, the entire facility was under contract to a single customer, ...

The taxpayer described its activities as follows:

> In the bunkering operations, [Corporation B] received the customers' "residual fuel" and "cutter stock" by barge or tanker. Residual fuel is the basic fuel burned by cargo ships. Sometimes its quality was high enough to be used without further processing by [Corporation B], but usually it had to be blended with cutter stock (essentially a low grade diesel fuel) to be usable. During pumping the residual fuel sometimes needed heating . . .and while in storage it sometimes required circulation to prevent stratification. When a ship ordered bunker fuel from . . . (or its sublessee) the fuel was pumped by [Corporation B] onto a contract barge for delivery to the ship. Tugs requiring diesel fuel were able to fill up at the [Corporation B] dock. Aviation fuel was shipped out by tank truck.

The taxpayers had reported the income from the various activities as subject to either wholesaling, stevedoring, or the service classification of the B&O tax. The auditor agreed with the taxpayer's classification of sales of packing materials at [Corporation A's] facility as wholesaling, but disagreed with the classification of the storage and handling activities. The auditor concluded their primary business purpose was operating storage terminals for liquid commodities and that the income from those activities during the audit period was subject to taxation as a warehouse business under the Public Utility Tax statutes, Chapter 82.16 RCW.[1] The auditor's instructions added that effective July 1, 1986, SHB 1846 removed the taxpayers' type of warehouse activities from the public utility tax and added it to the B&O tax.

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[1] The audit was done at the out-of-state office of the parent corporation. The taxpayers' books were kept more for federal tax purposes and the income from the activities which it contends are "processing for hire" was lumped under the "warehousing" category. The auditor did not have copies of the contracts which the taxpayers subsequently provided on appeal. The contracts explain their activities in more detail.

The auditor included "wash sales" which the taxpayer had not reported. These sales represent specific expenses incurred, as natural gas utility costs, which the taxpayer billed back to its customers as a separate item per agreement. The taxpayers protests the tax on "wash sales" contending the expenses were incurred in its name as a convenience to its customers. . . . .

The taxpayers' position is that none of the income at issue is from a "public service business" subject to the public utility tax. They rely on Shurgard Mini-Storage v. Department of Rev., 40 Wn.App. 721 (1985). The taxpayers contend the loading and unloading of trucks and tank cars was properly classified as service and other business income. They contend the remaining income should be subject to B&O tax as follows: (l) income from mixing, blending, packaging and drying materials for customers at the processing for hire classification; (2) the loading and unloading of vessels at both facilities at the stevedoring rate; (3) income from the storage of chlorinated solvents at [Corporation A's facility] at the Service rate and (4) the income from other charges for storage as either part of stevedoring or an incident of processing for hire.

[Corporation B] also protests the assessment of Service B&O on income from the rental of an office to its customer. (. . .). The auditor found that the taxpayer had charged its customer for the use of a portion of its facility as an office site. The auditor relied on WAC 458-20-118, concluding the income was from the granting of a license to use real estate and subject to Service B&O tax. The taxpayer contends the income is from the rental of real estate and exempt under RCW 82.04.390.

DISCUSSION:

[1] Chapter 82.16 imposes the public utility tax on public service businesses. During the audit period at issue, "public service business' was defined in RCW 82.16.010(10) as including any of the businesses defined in the first ten subsections or:

> . . .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 by the legislature to be of a public service nature. It includes, among others, without limiting the scope hereof: Airplane transportation, boom, dock, ferry, log patrol, pipe line, warehouse, toll bridge, toll

> logging road, water transportation and wharf businesses;[2]

The taxpayers contend that none of their activities were properly taxed as a "public service business" because neither taxpayer was subject to control by the state, had power of eminent domain, or was otherwise declared by the legislature to be of public service nature.

In Shurgard Mini-Storage v. Department of Rev., supra, the Court rejected the Department's position that the definition of a public service business in RCW 82.16.010(11) included any one of the enumerated businesses specified in the statute. The Court stated:

> The last sentence of former RCW 82.16.010(11) is merely descriptive of the types of business or activities defined in the first sentence as businesses either subjected to state control, having the powers of eminent domain, or declared to be of a public service nature. Each of the businesses enumerated in the last sentence was regulated by the State. Specifically, the operation of a storage warehouse, which was described as a building where goods are received for storage for compensation (but excluding certain agricultural goods), required licensing by the State and the filing of rates and, furthermore, was declared to be a "public service company." Former RCW 81.92, repealed by Laws of 1981, ch.13, section 6. The warehousing of certain agricultural commodities was also controlled by RCW 22.09 during the audit period. These kinds of activities are clearly public service businesses encompassed by the statute.

40 Wn.App. at 727-28.

Applying the Court's analysis, we find the taxpayers are not "public service" corporations and that none of the income at issue is subject to the public utility tax. The Legislature "did not intend to extend the public service tax to every business whose income or part thereof was derived from providing facilities capable of storing tangible personal property." Id.

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[2]The definition was amended in 1986 to delete the reference to warehouse business. (1986 Ch. 226 sec. 3) RCW 82.04.280 was amended to include operating a "storage warehouse" as subject to the B&O tax.

[2] The term "processing for hire" is defined in WAC 458-20-136 (Rule 136) as:

> . . .the performance of labor and mechanical services upon materials belonging to others so that as a result a new, different or useful article of tangible personal property is produced. Thus, a processor for hire is any person who would be a manufacturer if he were performing the labor and mechanical services on his own materials.

We agree with the taxpayers' position that the charges for blending antifreeze and sorting and bagging fertilizer at [Corporation A's] facility, and the charges for blending fuel at [Corporation B's] facility, fall within the classification of "processing for hire." This position is consistent with previous Determinations which have found such activities were processing for hire.

Charges for unloading and loading the vessels also are subject to the B&O tax at the stevedoring rate where the charges are in conjunction with processing for hire. Rule 136, subsection 11, states that persons processing for hire are taxable under the processing for hire classification "upon the total charges made therefor." The total charges include unloading and loading. Where the charges for unloading and loading vessels are separate charges and not in conjunction with any processing activities, as in the movement of the diesel and aviation fuel, the charges are subject to tax at the stevedoring rate.

[3] The Service B&O classification is the "catchall" classification that applies to business activities for which no rate is specifically enumerated. RCW 82.04.290 and WAC 458-20-224. In the present case, the charges for actual storage and the handling, sorting, weighing, etc., activities attendant to storage of goods, are subject to Service B&O tax. For example, the monthly charges for the storage and handling of items not packaged by the taxpayer are subject to B&O tax at the service rate. Also, we agree with the taxpayer that the charges for the direct pumping are taxable at the service rate.

The charges for the drying and storage of chlorinated solvents and the sorting and bagging of fertilizer at [Corporation A's] present a closer question. In their petition, the taxpayers stated the storage of chlorinated solvents "is more properly classified as service income." (Petition p.6) In their summary of the proper tax classifications of the various activities, however, they stated the drying of chlorinated solvents was processing for hire.

The Department has found that the mixing of fertilizer, grains, or seeds was processing for hire. In such cases, a new product is produced. On the other hand, the Department has found that the cleaning of grain constituted a "purification" of the original natural product which did not result in a "new" or "different" article. We believe the charges for drying and storage of chlorinated solvents and sorting and bagging fertilizer are more properly classified as service activities. If the taxpayers submit evidence that either the fertilizer or the chlorinated solvents were not "useful" as fertilizer or solvents until dried or sorted, we would agree that the filtering or drying is processing for hire. See, e.g. J.J. Dunbar & Company v. State, 40 Wn.2d 763 (1952) (screening and filtering raw whiskey into a beverage suitable for consumption constitutes manufacturing).

[4] Where the primary activity is the loading and unloading of fuel on vessels, as [Corporation B's] diesel operations, we agree that the charges are subject to B&O tax at the stevedoring rate. See RCW 82.04.260(12) and WAC 458-20-193D. The charges for the associated activities, as short term storage, also are subject to tax at the stevedoring rate.

[5] "Wash sales." Unlike the income tax, the B&O tax applies to the "gross income of the business" without any deduction for costs. RCW 82.04.080. The Department recognizes a limited deduction for advances and reimbursements if the taxpayer meets the requirements of WAC 458-20-111 and WAC 458-20-159 and the costs are not part of the taxpayer's costs in performing its services. To be excludable, the taxpayer must not be primarily or secondarily liable for payment of the fees or costs, other than as agent for the affiliate.

The taxpayer provided copies of invoices showing that it separately billed its customers for the charges at issue. It stated that its federal income tax returns do not include the "wash sales" as gross income. Furthermore, the taxpayer contends that the "wash sales" billings could have been credited to its specific expense accounts and would not have been shown as operating income on its books.

Although the taxpayer may consider the charges at issue as reimbursed expenses and may have made them as a convenience to its customers, the taxpayer has not shown that the customers alone are responsible for the charges. If the taxpayer contracted for the charges, for example the wharf charges, the costs are part of the taxpayer's costs of doing business. Accordingly, the assessment of B&O tax on the "wash sales" is sustained.

[6] Rental income. Income from the rental of real estate is not subject to the B&O tax. RCW 82.04.390. WAC 458-20-118, which distinguishes a lease or rental of real estate from a license to use real estate, provides that:

> A license grants merely the right to use the real property of another but does not confer exclusive control or dominion over the same. Usually, where the grant conveys only a license to use, the owner controls such things as lighting, heating, cleaning, repairing and opening and closing the premises.

[Corporation B] stated its customer is the exclusive occupant of a specific office and that the customer is not dependent upon the taxpayer for access. It provided a copy of the portion of the contract for the "lease" of approximately 250 square feet of office space. The contract states the customer shall be the owner of all office equipment on the leased premises and that the taxpayer shall provide reasonable janitorial services in connection with the leased premises.

We find the income from the office rental is for the rental of real estate and excludable from the B&O tax. Accordingly, the taxpayer's petition is granted as to this issue.

DECISION AND DISPOSITION:

The taxpayer's petition is granted as to the deletion of an assessment of B&O tax on the income from the rental of office space at [Corporation B's] and as to the classification of its income as subject to the public utility tax. The petition is denied as to the assessment of B&O tax on "wash sales." The matter is referred back to audit for review of the contracts and records subsequently provided by the taxpayer to determine the proper classification of the taxpayers' income. An amended assessment will be issued.

DATED this 7th day of October 1988.