Cite as Det. No. 16-0089, 35 WTD 549 (2016)

BEFORE THE 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. 16-0089
. . .	)	Registration No. . . .

RCW 82.16.020: The gross income from towing adrift, undamaged vessels is a "tugboat business," subject to public utility tax. The activity is not salvaging because there is no evidence that such vessels were in peril.

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.

Anderson, A.L.J. – A rescue vessel operator appeals a portion of an assessment of public utility tax ["PUT"], and asserts such tax was improperly assessed on towing adrift, undamaged vessels because such vessels were in peril and the assistance activity was actually salvage. Petition denied.[1]

ISSUE

Whether [PUT] was properly assessed on the towing of adrift, undamaged vessels under RCW 82.16.020.

FINDINGS OF FACT

[Taxpayer is] … an "on call" service operator; it assists disabled vessels at sea and offers the following services: Diving (i.e., fishing line removal from vessel propellers), towing, salvage, fuel runs, jump starts, ungrounding (removal of vessels stranded on rocks/sand bars), dock removal/installation, and vessel assist training.[2]

[1] Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410.

[2] Taxpayer is a member of the industry group, Conference of Professional Operators for Response Towing ("C-Port"), which describes its vessel assistance membership as follows:

> Our members are dedicated to providing prompt, professional and timely assistance to all boaters and to actively partner and cooperate with local law enforcement and the U.S. Coast Guard. They are professionals, dedicated to the growth and development of their respective businesses and committed to furthering the advancement of our waterways and the boating community.

Taxpayer maintains a fleet of response vessels that are approximately 26 feet in length and built for speed in strong and quickly changing currents. It receives assistance requests from customers [directly], the United States Coast Guard, and [Vendor]. Taxpayer receives a majority of its income from boaters insured by [Vendor]. When Taxpayer provides vessel assistance to a [Vendor] customer, it completes a ticket for payment [from Vendor] and describes the service it performed for the customer.

The Washington State Department of Revenue's (the "Department's") Audit Division ("Audit") reviewed Taxpayer's books and records for January 1, 2011 through December 31, 2013 (the "Audit Period"). Audit determined that Taxpayer had incorrectly reported and paid business and occupation ("B&O") tax at the wholesaling B&O tax classification (0.484%). Audit determined that Taxpayer should be reporting its income under the following tax classifications, based upon the assistance activity performed for the customer: (1) [PUT] classification (1.926%) – Grounding, towing, and income differences; (2) Retailing B&O (0.471%) - Diving, dock removal/installation, fuel runs, jump starts, lifts, line repair, and stand down charges; [3] and (3) Service and other activities B&O (1.8%/1.5%) – Salvage, training, bonus, and fees.

To calculate an assessment, Audit and Taxpayer selected 2011 as a sample year and sorted Taxpayer's income into the tax classifications listed above, based upon the predominate assistance activity listed on invoice/customer ticket. Then, Audit calculated a percentage [of total income] for each tax classification. For 2011, Audit determined that 34.23% of Taxpayer's income stemmed from assistance activities properly reportable under the PUT tax classification; 3.03% under the retail (wholesale) B&O tax classification; and 62.74% under the service and other activities B&O tax classification. Audit applied these percentages to the amounts of gross income listed on Taxpayer's Federal Income Tax Returns [covering the Audit Period] and assessed taxes accordingly.[4]

On February 25, 2015, Audit issued Taxpayer an assessment in the amount of $ . . . , consisting of a $ . . . credit for paid wholesaling B&O tax paid, $ . . . in service and other activities B&O tax, $ . . . in PUT, $ . . . in interest, and $ . . . in 5% assessment penalty.

Taxpayer appeals only a portion of the assessment of PUT. Taxpayer asserts that PUT was improperly assessed on most of the assistance activities identified as "towing" in Taxpayer's invoices, because, even though the vessels may not have been injured or damaged, there was a reasonable apprehension of peril and these activities meet the definition of salvaging.[5]

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http://www.cport.us/about/history.html (last viewed August 14, 2015). C-Port Board of Director's Member Roger Preston Slade explains that C-Port and its members came about as a result of ". . . the Marine Assistance Act of 1982 whereby Congress determined that the United States Coast Guard would no longer respond, in general, to non-distress incidents involving recreational boaters." Thus, should a recreational boater need assistance in a non-life threatening situation, a commercial vessel assistance provider will respond. Commercial vessel assistance providers work with the United States Coast Guard to cover assigned areas and a provider must be able to respond to assistance calls within its assigned area within one hour.

[3] Audit also stated that when diving, fuel runs, jump starts, dock removal, and dock installation are provided for resale, they are taxable under the wholesaling B&O tax classification.

[4] Audit did not assess retailing B&O tax and retail sales tax because the projected amounts for these tax classifications were deemed immaterial.

[5] During the hearing, Taxpayer pointed to the defined terms in its 2011 License/Service Agreement with [Vendor] that defines "salvaging – ungrounding" to require imminent peril to the boat or a protected marine environment,

ANALYSIS

Washington law provides separate tax classifications for the business activities of vessel towing and salvage. RCW 82.16.020; RCW 82.04.290.

On the one hand, chapter 82.16 RCW "Public Utility Tax," explicitly levies a PUT upon vessel towing by stating that tugboat businesses are subject to a PUT equal to 1.8% of the gross income from such business activity.[6] RCW 82.16.020(1)(f). "Tugboat business" is defined broadly to mean the business of operating tugboats, towboats, wharf boats or similar vessels in the towing or pushing of vessels, barges or rafts for hire. RCW 82.16.010(11) (emphasis added).

On the other hand, because the taxation of vessel salvage is not explicitly addressed, gross income from the business activity of vessel salvage is subject to a service and other activities B&O tax equal to 1.5% of the gross income from such business activity. RCW 82.04.290(2)(a).

Both the PUT and B&O tax are privilege taxes, and they operate exclusive to one another, meaning, an activity subject to PUT is not subject to the B&O tax. RCW 82.16.020, RCW 82.04.220; RCW 82.04.310(1).

Here, Audit determined that Taxpayer's response vessels were similar to a tugboat and, thus, Taxpayer's assistance activity of towing is a "tugboat business" subject to the PUT. Taxpayer disputes Audit's determination that certain assistance activities were "towing" [and not "salvaging"].

We begin our analysis by noting that vessel-specific "towing" is not defined in chapter 82.16 RCW – nor, elsewhere in the Revised Code of Washington.[7] When a statute fails to define a term, its ordinary meaning may be ascertained from the dictionary definition. *Garrison v. Wash. State Nursing Bd.*, 87 Wn.2d 195, 196, 550 P.2d 7 (1976).

. . . Webster's Third New International Dictionary defines "tow" as follows:

> **1:** to drag or pull along: HAUL, PROPEL . . .**2a:** to draw (as a ship or disabled car) or pull along behind a rope or chain <~*ed* her into a dry dock for repairs> . . . **b:** to push along (as a string of canal or river barges) – used a powerboat behind a tow ~ vi: to move in tow <piloting a ship that was ~ing into the river . . .

(Emphasis in original). A vessel tow is typically "one boat, one line" and the vessel pays an hourly charge for the time expended in towing.

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where "imminent" means "ready to take place; on the point of happening; or threatening to happen at once." Taxpayer asserts that, under these definitions, assistance activities listed as "towing" on [Vendor] payment tickets would not automatically be "towing" for tax purposes, because, although the vessel was not in imminent peril, it could be in peril that is reasonably apprehended [and be "salvaging"].

[6] The actual tax rate is slightly higher; RCW 82.16.020(2) imposes an additional tax [equal to] 7% of the tax payable [under RCW 82.16.020(1)], meaning the actual tax rates is 1.926%. RCW 82.02.030.

[7] We found several mentions of vehicle towing (Title 46 RCW "Motor Vehicles") and references to vessel towing in the context of vessel oil spill prevention and response (Chapter 88.46 RCW) and liens for breach of contract for vessel towing (RCW 60.36.060).

As relevant here, "Salvage" is defined as "[t]he rescue of imperiled property; esp., the act of saving a ship from loss, as in a storm, a fire, or a pirate attack." Black's Law Dictionary (10th ed. 2014). "Peril" is defined – generally – as "[e]xposure to the risk of injury, damage, or loss; a danger or problem in a particular activity or situation <the perils of litigation>."[8] *Id.*

. . . Over the years, courts have been asked to decide a number of cases pertaining to the law of salvage; we note that the United States Supreme Court has addressed the distinction between towing and salvage and stated:

> To determine that a salvage service (as distinct, for example, from a towing service) was performed, a court must find three specific elements: marine peril; service voluntarily rendered, not required by duty or contract; and success in whole or in part, with the services rendered having contributed to such success.

The "Sabine", 101 U.S. 384, 25 L.Ed. 982 (1880); *see Elrod v. Luckenbach S.S. Co.*, 62 F.Supp. 935, 936 (S.D.N.Y.1945).

In essence, Taxpayer is asking us to disregard the form of the transaction – charges for towing – and look, instead, to the alleged substance of the transaction. The doctrine of substance over form is generally not available to a taxpayer to eliminate the tax consequences of the taxpayer's structured form of the transaction. *See Washington Sav-Mor Oil Co. v. State Tax Comm'n,* 58 Wn.2d 518, 521, 364 P.2d 440 (1961); Det. No. 98-183, 18 WTD 220 (1999). Here, even if we look at the substance of the transactions, we have no evidence that the assistance activities at issue were salvage. Taxpayer often provided assistance as a result of a duty or contract [with the United States Coast Guard or Vendor] and not as a result of any specific marine peril. Thus, we conclude that the Department properly assessed PUT on assistance activities identified as "towing" in Taxpayer's records and accordingly, the percentage of total gross income identified as "towing" using the agreed sample.

DECISION AND DISPOSITION

Taxpayer's petition is denied.

Dated this 3rd day of March, 2016.

[8] More specifically, "maritime peril" is defined to mean "[a] danger or risk arising from navigating or being at sea," and "peril of the sea" means "[a]n action of the elements at sea having such great force as to overcome the strength of a well-founded ship and the normal precautions of good marine practice." Black's Law Dictionary (10th ed. 2014).