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SUPERIOR COURT
THURSTON COUNTY, WASH.

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1 No Hearing Set
2 Hearing is Set
3 Judge Carol Murphy/Civil

Pulled from Docket 1-31-23

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SUPERIOR COURT OF WASHINGTON
FOR THURSTON COUNTY

JUBITZ CORPORATION,

Plaintiff,

v.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,

Defendant.

NO. 19-2-00004-34

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW AND
ORDER**

EX PARTE

I. INTRODUCTION

A. Trial

The trial in this matter was held November 7th through 10th, 2022, before the Honorable Carol Murphy. The matter was tried as a bench trial without a jury.

B. Appearances

Plaintiff Jubitz Corporation (Jubitz) appeared through its attorneys of record, Scott Edwards and John S. Devlin III, Lane Powell, PC. Defendant Department of Revenue (Department) appeared through its attorneys of record, Travis Yonker, Assistant Attorney General, and David Hankins, Senior Counsel, Washington State Attorney General's Office.

1 **C. Exhibits Received**

2 The Court admitted 25 exhibits into evidence. As set out in the clerk's Exhibit List,
3 substantive exhibits considered by the Court in rendering its decision consisted of Exhibits 2,
4 3, 5, 6, 8, 10, 12 through 19, 39, 41, 48, 51 through 54, 501, 507, 514, and 517.

5 **D. Witnesses Called**

6 The following witnesses were called and testified at trial:

7 **1. Jubitz's Witnesses**

- 8 a. Mark Gram, Chief Operating Officer, Jubitz
- 9 b. Tom Wieland, Program Manager, Department of Revenue
- 10 c. Tim Jennrich, Assistant Director, Department of Revenue
- 11 d. Derek Malsam, Chief Financial Officer, Jubitz

12 **2. Department's Witness**

- 13 a. Rebecca Bao, Revenue Auditor 3, Department of Revenue

14 **II. FINDINGS OF FACT**

15 After considering the sworn testimony of the witnesses and the exhibits admitted into
16 evidence, the Court now makes the following Findings of Fact:

- 17 1. In 2014, the Department's Audit Division selected Jubitz for a routine excise
18 tax audit.
- 19 2. The audit period at issue is January 1, 2010, through December 31, 2014 (Audit
20 Period).
- 21 3. Throughout the Audit Period, Jubitz reported all sales of fuel and related
22 products at its Washington gas stations under the retailing B&O tax classification, and reported
23 service and other activities B&O tax on what it described as its credit extension activities on
24 the service fees charged on a per-gallon basis and on any finance charges.

1 4. Essentially, Jubitz reported sales of fuel withdrawn at its own locations under
2 the retailing B&O tax classification, and Jubitz reported sales of fuel withdrawn at non-Jubitz
3 locations under the service and other activities B&O tax classification and based only on its
4 mark up.

5 5. Transactions involving fuel cards were within the scope of the audit, but
6 transactions involving traditional credit cards such as Visa were not within the scope of the
7 audit.

8 6. The audit did not involve any records indicating the sale of food or beverages
9 during the relevant time period.

10 7. The Department found that Jubitz should have reported its sales to its fuel card
11 users for fuel withdrawn at non-Jubitz locations under the retailing B&O tax classification
12 based on the gross proceeds of sales, as opposed to under the service and other activities B&O
13 tax classification based only on Jubitz's profit margin.

14 8. The Department found that Jubitz should have reported its sales of fuel to other
15 fuel network participants under the wholesaling B&O tax classification as opposed to the
16 retailing B&O tax classification.

17 9. The Department found that Jubitz should have reported its income from lube
18 drum fees, scaling, and Voyager fees, all under the service and other activities B&O tax
19 classification.

20 10. Based on these findings, the Department issued a tax assessment of \$435,979
21 for the Audit Period.

22 11. Jubitz paid the tax assessment and commenced this action seeking a tax refund.

23 12. Jubitz is a family-owned company based in Portland, Oregon.

24 13. Jubitz operates a truck stop with many services in Oregon.

25 14. Jubitz provides fleet services, which includes operating commercial gas stations
26 and credit services.

1 15. During the Audit Period, Jubitz operated commercial gas stations, including
2 seven gas stations in Washington.

3 16. Jubitz sells gasoline and diesel, collectively called on-road fuel, off-road diesel
4 or dyed diesel, and diesel exhaust flued at the pump at its Washington gas stations.

5 17. Jubitz also sells motor oil out of vending machines at its Washington gas
6 stations.

7 18. Jubitz accepts multiple cards as payment at its gas stations, including CFN,
8 Pacific Pride, Comdata, TCS, Voyager, Wex, T-check, EFS, and Fleet One.

9 19. Jubitz also issues fuel cards to eligible customers that those customers may use
10 to withdraw fuel from various locations and then pay for such withdrawn fuel through periodic
11 invoices issued by Jubitz.

12 20. The fuel cards also serve as an extension of credit in certain circumstances.

13 21. To receive a fuel card from Jubitz, a prospective customer completed a credit
14 application and accompanying credit agreement.

15 22. In response to the application, Jubitz conducted an investigation and determined
16 whether or not to allow establishment and maintenance of a credit account with Jubitz.

17 23. If approved, Jubitz entered into a "Motor Fuel Use Agreement" with the
18 customer, identified as a "user."

19 24. Jubitz sets the price charged for each type of fuel. The price may be changed
20 from time to time by Jubitz.

21 25. Jubitz invoices the user for all fuels withdrawn through the use of the user's fuel
22 card.

23 26. Jubitz invoices itemized the amount due by fuel type and any applicable fees.

24 27. Jubitz invoices included fuel withdrawn from both Jubitz locations and non-
25 Jubitz locations, without any distinct billing treatment.

26

1 28. Jubitz provides custom invoices and certain controls on the use of the fuel cards,
2 including limiting the type or volume of fuel that could be accessed.

3 29. In exchange, users agreed to pay Jubitz for all motor fuel withdrawn by use of
4 cards and all non-fuel transactions by use of cards issued to user.

5 30. Jubitz is a participant in two larger fuel networks—Pacific Pride and CFN.

6 31. Jubitz has agreements with Pacific Pride and CFN, which dictate and define
7 certain terms.

8 32. Jubitz accepts other cards as a result of joint user and reciprocal access
9 agreements with Pacific Pride and CFN.

10 33. Under the Pacific Pride Franchise Agreement, Jubitz must purchase from other
11 Pacific Pride franchisees the “foreign purchases” made by Jubitz fuel card users at other
12 franchisees’ locations.

13 34. The price Jubitz must pay for foreign purchases is the “transfer price” set by
14 Pacific Pride.

15 35. The other Pacific Pride franchisees must, through Pacific Pride, pay to Jubitz
16 the price for “foreign sales” made by other franchisees’ fuel card users at Jubitz’s locations at
17 the “retail transfer price” established by Pacific Pride.

18 36. Jubitz may charge its own fuel card user independently from Pacific Pride or
19 other franchisees whatever price it chooses, and may consider the transfer price and retail
20 transfer as it desires when choosing its pricing to its fuel card users.

21 37. Pacific Pride facilitates the payments between Jubitz and other franchisees in
22 the Pacific Pride fuel network, characterizing itself as the clearinghouse for payments to and
23 from all franchisees.

24 38. Pacific Pride electronically debits—in the case of “foreign purchases”—or
25 credits—in the case of “foreign sales”—Jubitz’s account for all transactions that occur during
26 the billing cycle.

1 39. Other Pacific Pride franchisees paid Jubitz for “foreign sales,” which Jubitz
2 received in the form of a credit from Pacific Pride, and Jubitz paid other Pacific Pride
3 franchisees for “foreign purchases” through a debit to Pacific Pride.

4 40. The CFN fuel network operates similarly to that of Pacific Pride.

5 41. Under the CFN Mutual Access Agreement, Jubitz is deemed to have made a
6 standing offer to sell fuel to any other CFN participant whose fuel card user accesses fuel from
7 a Jubitz location.

8 42. Acceptance of Jubitz’s standing offer to sell fuel to other CFN participants
9 occurred at the time the other CFN participant’s fuel card user withdrew fuel at a Jubitz
10 location.

11 43. Under the CFN Mutual Access Agreement, the other CFN participants then
12 immediately thereafter sells that fuel to its own fuel card users.

13 44. The price Jubitz must pay other CFN fuel network participants for “remote
14 transactions” at those other participants’ location, and also the price for which Jubitz sells fuel
15 to other participants through “foreign transactions” at Jubitz’s locations, were both based on a
16 purchase price formula determined by CFN.

17 45. Jubitz was independently responsible for invoicing and collecting payment from
18 its own fuel card users that accessed fuel at other CFN participants’ locations.

19 46. Under the agreement, CFN facilitated the payments between Jubitz and other
20 participants in the CFN fuel network, serving only as a clearinghouse.

21 47. CFN issued periodic statements to its participants that itemized all “remote
22 transactions” and “foreign transactions” that occurred during the statement period, debiting
23 from Jubitz’s account all “remote transaction” amounts, and crediting from Jubitz’s account all
24 “foreign transaction amounts.

25 48. Similar to Pacific Pride, Jubitz was paid by other CFN participants for “foreign
26 transactions” at its location—in the form of a credit from CFN—and paid other CFN

1 participants for “remote transactions” by Jubitz’s fuel card users at the other participants’
2 locations—in the form of a debit to CFN.

3 49. Pacific Pride has entered into joint user agreements with non-Pacific Pride
4 entities.

5 50. The joint user agreements allow Pacific Pride fuel network participants’ fuel
6 card users to withdraw fuel at certain gas stations.

7 51. CFN has also entered into agreements with other entities to allow for “extended
8 transactions” in which participants’ fuel card users may also withdraw fuel at certain retail or
9 commercial gas stations.

10 52. Only network participants or those associated with an acceptance agreement
11 may purchase fuel at network gas stations.

12 53. Transactions involving joint users and extended transactions are tracked by the
13 respective fuel network clearinghouses and appeared on the fuel networks’ periodic statements
14 to Jubitz alongside the other in-network transactions based on the applicable price.

15 54. Jubitz’s invoices contain no charges for “card services” or “credit card services”
16 or “advancing credit and servicing credit accounts” or similar language. The invoices simply
17 itemize all fuel withdrawn by the fuel card user and charges the user for each gallon of fuel
18 withdrawn.

19 55. Jubitz reported the amounts it received from “foreign sales” in the case of
20 Pacific Pride, and “foreign transactions” in the case of CFN, under the retailing B&O tax
21 classification, because the fuel in those transactions was withdrawn from a Jubitz location.

22 56. Jubitz received a small amount of income from at least three miscellaneous
23 sources, including (1) lube drum fees, (2) income from scaling, and (3) Voyager fees. Jubitz
24 reported the income associated with lube drum fees under either the retailing or wholesaling
25 B&O tax classifications, but did not report the income for the other two categories.

26

1 **III. CONCLUSIONS OF LAW**

2 Based on the above findings, this Court makes the following Conclusions of Law:

3 1. This Court has jurisdiction over this matter under RCW 82.32.180.

4 2. Jubitz bears the burden of proving the tax it paid is incorrect, and what the
5 correct amount of tax should be.

6 3. Washington's B&O tax is imposed upon every person "for the act or privilege
7 of engaging in business activities."

8 4. Within the B&O tax chapter, the Legislature has created a number of tax
9 classifications that impose different tax rates to a variety of business activities.

10 5. Businesses are taxed based on the type of business activity in which they
11 engage.

12 6. The wholesaling B&O tax classification has a tax rate of 0.484 percent,
13 measured by the gross proceeds of the taxpayer's wholesale sales, sourced to the location
14 where the wholesale buyer receives possession of the goods.

15 7. The retailing B&O tax classification has a rate of 0.471 percent measured by the
16 gross proceeds of retail sales and is sourced to the location where the retail buyers receives the
17 property.

18 8. RCW 82.04.250(1) imposes retailing B&O tax upon the business activity of
19 "making sales at retail."

20 9. A "retail sale" generally means "every sale of tangible personal property."
21 RCW 82.04.050(1)(a).

22 10. When the property is sold "for resale," it is not a retail sale. RCW
23 82.04.050(1)(a)(i).

24 11. Thus, to be subject to retailing B&O tax, the amount at issue must be from a
25 sale, and that sale must be of tangible personal property, and that sale cannot be for resale.
26

1 12. Fuel is tangible personal property. That includes gasoline, diesel, dyed diesel,
2 diesel exhaust fluid and motor oil.

3 13. Jubitz's fuel card users were not purchasing the fuel so they could resell it.

4 14. Jubitz made sales of fuel to its fuel card users when those users withdrew fuel
5 from a Jubitz location.

6 15. A "sale" is defined as "any transfer of the ownership of, title to, or possession of
7 property for a valuable consideration."

8 16. Based on the terms of Jubitz's Motor Fuel Use Agreement, Jubitz made sales of
9 fuel to its fuel card users regardless of whether the fuel was withdrawn at a Jubitz location or a
10 non-Jubitz location.

11 17. The agreement further states that Jubitz periodically invoices the user for all
12 fuels withdrawn through the use of the fuel card.

13 18. Based upon the language in the agreement, the invoices show that Jubitz
14 charged its fuel card users for all fuel, whether the fuel was withdrawn at a Jubitz or a non-
15 Jubitz location.

16 19. The price set and charged by Jubitz in the invoices to its fuel card users was the
17 valuable consideration it received for the fuel withdrawn by Jubitz's fuel card users at any
18 location.

19 20. When fuel card users withdrew fuel from a participating location, regardless of
20 whether it was a Jubitz location or a non-Jubitz location, some transfer of ownership or
21 possession of the fuel was transferred to the user by the language of the agreements.

22 21. Although Jubitz did not take physical possession of the fuel withdrawn by
23 Jubitz's fuel card users at non-Jubitz locations, the agreements that Jubitz had with Pacific
24 Pride and CFN dictate that Jubitz had constructive possession of the fuel withdrawn at non-
25 Jubitz locations, and, therefore, Jubitz was engaged in the business activity of selling fuel to its
26 fuel card users at prices set by Jubitz.

1 22. All of the gross proceeds of sales Jubitz received as payment by its fuel card
2 users were sales at retail and subject to retailing B&O tax.

3 23. The Court, therefore, concludes that Jubitz has not shown that it was in the
4 business of buying and selling accounts receivables.

5 24. Jubitz has failed to meet its burden to prove that it would be entitled to a refund
6 of B&O taxes.

7 25. Jubitz fuel cards allow access to certain products that are then billed to the fuel
8 card user later.

9 26. Unlike a credit card company, Jubitz determines the terms and conditions of the
10 fuel sale, and specifically sets the fuel price that its users ultimately pay.

11 27. RCW 82.04.270 expressly requires the wholesaling B&O tax base to be the
12 "gross proceeds of sales," which, in turn is defined under RCW 82.04.070 as "the value
13 proceeding or accruing from the sale of tangible personal property . . . without any deduction
14 on account of the cost of the property sold "[u]pon every person engaged . . . in the business of
15 making sales at wholesale," applies to Jubitz here.

16 28. RCW 82.04.270 imposes wholesaling B&O tax upon every person engaged in
17 the business of making sales at wholesale.

18 29. A "sale at wholesale" is defined as a sale, which is not a sale at retail, of
19 tangible personal property. RCW 82.04.060.

20 30. Again, to be subject to wholesaling B&O tax, the amount at issue must be from
21 a sale, and that sale must be of tangible personal property, and that sale cannot be a retail sale.

22 31. When another fuel network participant's fuel card user withdrew fuel from a
23 Jubitz location, a sale of fuel took place, and that the fuel constituted tangible personal
24 property.

25 32. Based upon the evidence and the Court's findings of fact, including the terms of
26 the agreements Jubitz had with Pacific Pride and CFN, the Court concludes that, under those

1 | agreements, Jubitz sold fuel to the other fuel network participants who, in turn, resold it to their
2 | own fuel card users at a higher retail price than the transfer price set by the fuel networks.
3 | Because these sales by Jubitz were for resale, they cannot qualify as retail sales under RCW
4 | 82.04.050(1)(a)(i), and must, therefore, be wholesale sales subject to wholesaling B&O tax.

5 | 33. Although WAC 458-20-129 (Rule 129) states that “[p]ersons operating gasoline
6 | service stations are taxable under the retailing classification,” the Court concludes that Rule
7 | 129 is not applicable here, as the Court’s conclusions are based upon applicable statutes.

8 | 34. Based upon the Court’s findings in the record, income from lube drum fees,
9 | scaling, and Voyager Fees, is properly classified under the service and other activities B&O tax
10 | classification.

11 | 35. Jubitz has not met its burden of demonstrating that amounts it received from its
12 | fuel card users for fuel they withdrew from non-Jubitz locations were subject to service and
13 | other activities B&O tax on its profit margin, rather than retailing B&O tax on its full gross
14 | proceeds of the sales.

15 | 36. Jubitz has not met its burden of demonstrating that amounts it received from
16 | other fuel network participants for fuel those other participants’ customers withdrew from
17 | Jubitz locations was subject to retailing B&O tax, rather than wholesaling B&O tax.

18 | 37. Jubitz has not met its burden of demonstrating that amounts it received for
19 | various fees and services were not subject to the service and other activities B&O tax.

20 | 38. Therefore, having failed to meet its burden, Jubitz is not entitled to a tax refund.
21 | Any Conclusion of Law that should be deemed a Finding of Fact is hereby adopted as
22 | such. From the above conclusions, the Court issues the following order:

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IV. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that Jubitz's claim for a refund of retailing B&O taxes, retail sales taxes, penalties, and interest is DENIED. Judgment is entered in favor of Defendant, Department of Revenue.


DATED this 27th day of Jan., 2023.



THE HONORABLE CAROL MURPHY

Presented by:

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*Notice of Presentation Waived
Approved as to form:*

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s/ Scott M. Edwards *Permission to sign given*
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