1
BEFORE THE BOARD OF TAX APPEALS

2
STATE OF WASHINGTON

3 SAGE V FOODS, LLC,)
4 Appellant,)
5 v.) Docket No. 11-704
6) RE: Excise Tax Appeal
STATE OF WASHINGTON) FINAL DECISION
7 DEPARTMENT OF REVENUE,)
8 Respondent.)
9)
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11 This matter came before the Board of Tax Appeals (Board) on July 31, 2012, for a formal
12 hearing pursuant to the rules and procedures set forth in chapter 456-09 Washington
Administrative Code (WAC). Victor P. Vegas, Owner/Founder, represented Appellant, Sage V
13 Foods LLC (Sage). Charles Zalesky, Assistant Attorney General, represented Respondent, State
14 of Washington Department of Revenue (Department). Laura Chartoff, Department of Revenue,
observed.
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16 The Board heard the testimony, reviewed the evidence, and considered the arguments
made on behalf of both parties. The Board now makes its decision as follows:
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INTRODUCTION
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This is an excise tax case involving sales at wholesale of rice flour and other rice-based
19 products manufactured outside Washington by Sage and sold to Washington customers. During
20 the January 2003 through June 2010 audit period, Sage had annual Washington destination sales
21 ranging from $1.8 million to $4.6 million per year. Most of the products Sage sold to
Washington customers were delivered in railcars leased to Sage. Delivery of goods occurred
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every month, but one, during the audit period—and usually several times a month.[1] In addition, the president of Sage made one short visit to Washington during the seven-year audit period to meet with Sage's primary customer, and he combined that visit with a leisure trip to Seattle with his wife.

In May 2010, the Department discovered that Sage was making Washington destination sales. Because Sage was not registered with the Department, the Department began a nexus investigation. At the conclusion of that investigation, the Department determined that Sage had sufficient nexus with the state to be required to register with the Department and to comply with Washington's excise tax laws. The nexus investigation also resulted in the assessment of wholesaling business and occupation ("B&O") tax and litter tax on Washington destination sales made by Sage during January 2003 through June 2010. Sage appealed to the Department's Appeals Division, which upheld the tax assessments in Determination No. 11-0309. This appeal followed.

STATEMENT OF THE FACTS

1. Sage is a California limited liability company with its principal place of business in Los Angeles, California. Sage is primarily owned by Mr. Pete Vegas, its president.

2. Sage specializes in the manufacture of value-added products from rice. The company buys milled rice or rice byproducts, and processes that raw ingredient into finished products that are primarily sold to food manufacturers. Exhibit R3-2 (answer to Interrogatory No. 1(a)).

3. Sage manufactures and sells rice flour, a product that makes up approximately 45 percent of Sage's sales. Rice flour is primarily sold to food manufacturers who use the flour as an ingredient in the manufacture of cereals, granola bars, baby food, coatings, snacks, and other finished products. Exhibit R3-3 (answer to Interrogatory No. 1(b)).

[1] There is no record of any delivery in railcars leased to Sage during the month of January 2010.

4. Sage has two manufacturing plants in Arkansas and one manufacturing plant in Texas. Exhibit R3-2 (answer to Interrogatory No. 1(a)). Sage has no manufacturing facility, warehouse, or offices in Washington.

5. During the period January 2003 through June 2010, Sage sold products to approximately 20 customers in Washington. Exhibit R5-2 (answer to Interrogatory No. 3). Over 90 percent of those sales involved one customer, Columbia Basis Blends, who purchased bulk rice flour from Sage. *Id.*

6. Columbia Basis Blends uses the rice flour purchased from Sage as an ingredient in a clear coating used in the manufacture of french-fries for Burger King. The coating makes french-fries crispier and helps them retain heat after cooking.

7. Around the year 2000, Burger King sought bids from companies interested in producing the coating. The bid specifications listed Sage as the rice flour supplier, so any successful bidder was obligated to buy the rice flour from Sage. Lamb Weston, Inc. (a wholly owned subsidiary of ConAgra, Inc.) was one of the successful bidders, and one of its subsidiaries, Columbia Basin Blends, began blending the dry ingredients used in making the coating shortly thereafter at its manufacturing facility in Pasco, Washington. As required by the bid specifications, Sage began selling rice flour to Columbia Basin Blends in 2000.

8. Rice flour sold to Columbia Basis Blends is delivered in bulk by rail car. The rail cars are leased to Sage under long term lease agreements. During January 2003 through June 2010, Columbia Basis Blends received approximately 450 deliveries of rice flour in rail cars (PD or bulk hopper) leased to Sage. Prior to 2007, Pete Vegas was the sole salesman for Sage. Exhibit R3-3 (answer to Interrogatory No. 1(d)). The company focused its sales activities on large industrial customers. *Id.*

9. During January 2003 through June 2010, Mr. Vegas made only one visit to Washington, to Columbia Basin Blends. The trip lasted less than an hour and did not involve the direct solicitation of orders, but was primarily a "goodwill" visit. Mr. Vegas combined the visit with a vacation in Seattle with his wife. The visit was not necessary to maintain Sage's

business with Columbia Basin Blends because Burger King requires Columbia Basin Blends to use Sage's product.

10. The Department's Compliance Division initially discovered that Sage was making sales to Washington customers in May 2010. At the time, Sage was not registered with the Department. Consequently, the Department's Compliance Division began an investigation of Sage's business activities to determine if the company had sufficient connection with the state to be subject to Washington B&O tax.

11. At the conclusion of its investigation, the Compliance Division issued two tax assessments to Sage, the first covering the January 2003 through December 2007 reporting periods, and the second covering the January 2008 through June 2010 reporting periods. Exhibit R1-1 (assessment covering January 2003 through December 2007) and Exhibit R1-2 (assessment covering January 2008 through June 2010). Together, the two tax assessments assert additional wholesaling B&O tax, litter tax, penalties, and interest in the total amount of $176,643.

12. Sage timely appealed both tax assessments to the Department's Appeals Division. The Appeals Division upheld the assessments in Det. No. 11-0309, issued October 24, 2011. Exhibit R2. Shortly thereafter Sage paid both assessments in full, including updated interest.

13. Sage filed a timely appeal to the Board, seeking de novo review of the two tax assessments issued by the Department and a refund of the tax, penalty, and interest it paid on those assessments.

ISSUE

Whether the Commerce Clause of the United States Constitution prohibits Washington from levying its wholesaling B&O tax and litter tax on gross proceeds from Washington destination sales made by an out-of-state seller, where the goods are delivered in railcars leased to the seller under long-term lease agreements, and the railcars are physically present within the state on a regular basis delivering rice flour to a manufacturer for processing and resale.

EVIDENCE AND ARGUMENT

Sage's Case

Sage's case relies on the ruling of the United States Supreme Court in *Complete Auto Transit v. Brady*,[2] establishing a "four prong" test for the constitutionality of attacks under the Commerce Clause. For a tax on an out of state company to be legal all four of these tests must be passed:

Substantial Nexus. An activity with substantial nexus in the taxing state.
Fair relationship. The tax is fairly related to services provided by the State.
Fair Apportionment. The tax is fairly apportioned.
Non Discrimination. The tax does not discriminate against interstate commerce.

Sage argues that the tax does not pass three of the four tests.

Substantial Nexus

Sage asserts that its activities do not constitute substantial nexus under relevant court cases and decisions of the Board.

WAC 458-20-193 (Rule 193) describes the types of nexus-creating activities, when performed by a seller or its representative, that "establish or maintain a market for its products in Washington." These include activities where:

> (7)(c)(v) The out-of-state seller, either directly or by an agent or other representative, performs significant services in relation to establishment or maintenance of sales into the state, even though the seller may not have formal sales offices in Washington or the agent or representative may not be formally characterized as a "salesperson".

As the sole salesman for Sage, Mr. Vegas visited Columbia Basin Blends, by far Sage's largest Washington customer, once in a seven-year period. His purpose in visiting was to say hello and put a face to Columbia as a new buyer. He did not collect any money, negotiate prices,

[2] 430 U.S. 274, 279, 97 S. Ct. 1076, 51 L. Ed. 2d 326 (1977).

present marketing materials, or attempt to solicit any future business. The meeting lasted less than one hour, and he combined that visit with a vacation in Seattle with his wife. Sage has only one significant competitor. Sage's entire business model is based on his development of products and business, and he does no work to maintain the business. All that's required is to maintain the quality and pricing required by the customer (e.g.,Burger King) that requires Sage's product be used by their suppliers.

Sage asserts that the rail car issue does not constitute substantial nexus. The Union Pacific supplies its own cars for moving grain products across its rail lines, but the rice flour requires a special PD car that Union Pacific does not have in its fleet. It once had PD cars, but did not acquire the improved new cars, so Sage had to make other arrangements to be able to ship its product in the new model of PD cars. Since most midsize customers do not have a fleet of cars, Sage determined to rent such PD cars on operating leases for its sales to Columbia Basin Blends. The cars are managed by Union Pacific, and the only instruction Sage gives to Union Pacific is the place to which the rice flour should be delivered. Sage could have instead required that Columbia Basin Blends to lease the PD cars and adjusted the price for the product accordingly. Larger customers lease their own fleets of the PD cars. Sage does not now and has never owned, rented, or leased any real or tangible personal property in the state of Washington.

Fair Relationship

Sage argues that there must be a fair relationship between taxes paid and the services provided by the state to Sage. Sage cites no specific authority in support of its conclusion that no such fair relationship existed. The PD cars travel over Union Pacific rails, except for when they move onto rails owned by the customer at the customer's plant. Moreover, only 1 to 2 percent of Columbia Basin Blends' product is in products sold in Washington. Sage sees no benefit to it from the amount of taxes assessed by Washington.

Fair Apportionment

Sage argues that the amount of taxes that the Department is attempting to collect is not a fair apportionment of Sage's taxes paid to Arkansas, Texas, and California where it has significant business assets, employees, and activities (and significant use of state government services). Although only 4 percent of its sales are here, the Washington tax is more than what

Sage pays to Texas, and similar to what it pays to Arkansas. If, on the other hand, this was an income tax such as Sage pays in California, there would be a direct offset against Sage's California income tax (as there is for income taxes paid to Arkansas) and "we would not even be here." But the tax here equates to a 16 percent income tax which, if Sage paid that high a tax in every state where Sage does business, Sage would "go broke." Sage cites no authority cited in support of this conclusion.

Department's Case

The Department responds to Sage's case by referring to *Complete Auto Transit, supra,* as follows:

A. Sage Has Substantial Nexus With Washington.

Sage has for many years availed itself of the benefits of Washington's market, making over $23 million dollars of sales during the seven and one-half year audit period. Moreover, during that same period Sage has made over 450 deliveries of rice flour to Columbia Basin Blends in Pasco, Washington using railcars leased to Sage. Those railcars are physically present within Washington on a regular basis. Under these circumstances, requiring Sage to abide by Washington's tax laws creates no undue burden on interstate commerce, but merely ensures that Sage bears its fair share of the Washington B&O tax on in-bound sales. *See Western Live Stock v. Bureau of Revenue,* 303 U.S. 250, 254, 58 S. Ct. 546, 82 L. Ed. 823 (1938) (it is "not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing the business").

The regular and systematic in-state delivery of goods in railcars leased to Sage, along with the occasional in-state visits by its president, establish a presence within the state that is demonstrably more than a slightest physical presence. The regular presence of Sage's leased property is sufficient to meet the substantial nexus requirement of the dormant Commerce Clause. That is certainly so when Sage's in-state presence is viewed in light of its significant

economic presence in this state, represented by its gross sales to Washington customers of roughly $3.1 million per year on average.

In addition, the presence and use of Sage's leased railcars, which are designed to prevent Sage's rice flour from spoiling while in transit, was significantly associated with Sage's ability to maintain its valuable market in the state. Providing unspoiled rice flour to Columbia Basis Blends was clearly important to Sage's ability to maintain its Washington market. Sage's regular in-state physical presence coupled with its significant economic presence is more than sufficient to meet the substantial nexus requirement of *Complete Auto Transit, supra.* Consequently, the tax imposed on Sage's Washington destination sales does not violate the dormant Commerce Clause.

B. The Washington Wholesaling B&O Tax Is Inherently Apportioned.

Washington courts have previously held that the Washington B&O tax on retail sales and wholesale sales is inherently apportioned and meets the "fair apportionment" requirement set out in *Complete Auto Transit, supra. See, e.g., W.R. Grace & Co. v. Dep't of Revenue*, 137 Wn.2d 580, 596-97, 973 P.2d 1011 (1999), *cert. denied*, 528 U.S. 950 (1999). In *Am. Nat. Can Corp. v. State, Dep't of Revenue*, 114 Wn.2d 236, 787 P.2d 545 (1990), the Washington Supreme Court noted that "[a] long line of precedent has held that Washington's B & O tax meets the fair apportionment test." *Id.* at 248 (citations omitted). The court has also rejected fair apportionment challenges to local wholesaling B&O taxes, reasoning that the taxed transaction (wholesale sale of goods occurring within the city) is inherently apportioned. *Ford Motor Co. v. City of Seattle*, 160 Wn.2d 32, 50, 156 P.3d 185 (2007). Because this issue has already been conclusively decided by the Washington Supreme Court, Sage's challenge to the assessed tax as not fairly apportioned is incorrect as a matter of law. The tax is fairly apportioned under established Washington Supreme Court precedent.

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C. The Washington Tax Is Fairly Related To Services Provided By The State.

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Sage also argues that the assessed B&O tax and litter tax was not fairly related to services provided by the state. Again, Sage is incorrect.

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As the Board correctly pointed out in *Relton v. Dep't of Revenue*, BTA Docket No. 93-38 (1996), the "fair relation" prong of *Compete Auto Transit, supra,* asks only whether the measure of the state tax is reasonably related to the services or benefits provided by the taxing state. This is not a question of math or a balancing of benefits with burdens. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 190, 109 S. Ct. 1698, 104 L. Ed. 2d 209 (1989) ("there is no constitutional requirement that the benefits received from a taxing authority by an ordinary commercial taxpayer … must equal the amount of its tax obligation"). Rather, the underlying concept is whether the state, in a general sense, has provided sufficient benefits and protections for which it can ask a return. As explained by the U.S. Supreme Court in *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 101 S. Ct. 2946, 69 L. Ed. 2d 884 (1981), "[a] tax is not an assessment of benefits. It is, as we have said, a means of distributing the burden of the cost of government. The only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes." *Id.* at 622-23 (quoting *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 521, 57 S. Ct. 868, 81 L. Ed. 1245 (1937)).

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Like the tax imposed in *Relton, supra*, the Washington tax imposed on Sage was directly related to business activities directed toward the Washington market. That market is established, safeguarded, and enhanced through the myriad of protections, opportunities, and benefits provided by the state and for which the state is permitted to ask a return in the form of a non-discriminatory B&O and litter tax measured by the gross sales of products delivered to Washington customers. Consequently, the tax does not violate the forth prong of the *Complete Auto Transit* test.

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ANALYSIS

This case hinges upon whether, under the facts, taxable nexus or connection exists, or more precisely whether the activity of the seller was *significantly* associated with the seller's ability to establish or maintain a market for its product or products in the state of Washington.

To show such significant activity, the Department asserts that the regular and systematic in-state delivery of goods in railcars leased to Sage, along with the occasional in-state visits by its president, establish a presence within the state that is demonstrably more than a slight physical presence. Moreover, the Department also asserts that the in-state activity was significantly associated with Sage's ability to establish and maintain its valuable market in the state for wholesale sales of rice flour and other rice-based products.

Tyler Pipe Indus., Inc. v. Dep't of Revenue, 105 Wn.2d 318, 323, 715 P.2d 123 (1986) explained the federal constitutional law that controls the question of taxable "nexus," quoting from the Washington Supreme Court's determination that "the *crucial* factor governing nexus is whether the activities performed in this state on behalf of the taxpayer are *significantly associated with the taxpayer's ability to establish and maintain a market in this state for the sales.*" (Emphasis added.) The Washington court had found this standard was satisfied because Tyler's "sales representatives perform any local activities necessary for maintenance of Tyler Pipe's market and protection of its interests." *Id.* at 321. The supreme court agreed that the activities of Tyler's sales representatives adequately support the State's jurisdiction to impose wholesale tax on Tyler. *Id.* at 250-251.

The Board finds no cases in the state supporting a finding of nexus with the only physical contact being one visit in seven years with the principal (almost only) Washington customer. The Department appears to rely primarily on the presence within the state of Washington of railroad cars, in which the taxpayer Sage has a lessee's interest. It is uncontroverted that the product that Sage sold came by common carrier, Union Pacific Railway, by the special railroad cars necessarily used because of the nature of the product.

In general, a foreign corporation has sufficient nexus to support the imposition of the B&O tax if it (1) has more than the slightest physical presence in Washington, and (2) the purpose of its physical presence is in furtherance of the activity sought to be

taxed. *See* WAC 458-20-193. The physical presence test is satisfied by, among other things, the presence of persons acting on behalf of the corporation, whether as employees or independent contractors, in furtherance of the business activities giving rise to the tax obligation. *Tyler Pipe Indus., supra.*

The Department's operative definition of "substantial nexus" for purposes of satisfying the Commerce Clause has three elements: (1) some sort of in-state activity; (2) an in-state physical presence related to that activity; and (3) the activity's purpose is to establish or maintain a position in Washington's marketplace. See Det. 96-147, 16 WTD 117 (1996).

It is clear that Sage conducts no activity in Washington to create a market here. It is indisputable that Mr. Vegas' one visit during the audit period does not constitute sufficient activity to find nexus on the basis that it was furthering the maintenance of the market here. *See Fischer & Wieser Specialty Foods v. Dep't of Rev.*, BTA Docket No. 71069 (2010).

The Department relies primarily on Sage's operating leases for the PD railroad cars to find the substantial business activity that would constitute "substantial nexus." The Department is asking the Board in this case to expand or create a new definition of in-state activity or in-state physical presence without a human physical presence, and to equate the mere continuing delivery of its product in the desired condition using the new PD cars with "substantial activities" in furtherance of the establishment and maintenance of the company's market within the state.

The Board is not convinced that the mere leasing of the special PD cars creates substantial nexus. Heretofore, the cases have spoken of representatives of the out-of-state company, either an employee or an independent contractor, working to maintain the market by personal in-state contacts, on a regular basis. Moreover, in the prior cases, the type of activity (creating or maintaining a market) necessarily requires a level of control by the taxpayer that would require its performance by either an employee or an independent contractor. Here, it is abundantly clear that the delivery activity could have just as easily been accomplished, as it is in other states with other customers, by having the customer itself lease the PD cars.

It is noteworthy in this case that the market was established prior to any contact or delivery of product by reason of the manner in which the bid to furnish such product by Sage

was predicted by the requirements of Burger King.

The Board is also concerned that the assessment fails the "fair relationship" test. Sage's product travels over only railroad facilities owned and maintained by Union Pacific and its customer, and Columbia Basin Blends is located near the Oregon border. All but 1 to 2 percent of the product manufactured here is incorporated into a product that is also sold in Washington. The Department fails to explain exactly what services are enjoyed by Sage in relation to the amount of the assessment.

FINDINGS OF FACT

1. Appellant Sage is a California limited liability company with its principal place of business in Los Angeles California. It was founded by and primarily owned by Pete Vegas.

2. Sage specializes in the manufacture of value-added products from rice including rice flour.

3. Sage has manufacturing plants in Arkansas and Texas but no manufacturing facility, warehouse, or offices in Washington State.

4. During the period from January 2003 through June 2010, Sage sold products to approximately 20 customers in Washington State, with over 90 percent of those sales to one customer, Columbia Basin Blends, which used the rice flour to produce a coating substance for french fries.

5. Around the year 2000, Burger King sought bids from companies interested in producing the coating for french fries, listing Sage as the rice flour supplier, obligating the successful bidder to purchase the rice flour from Sage. The business relationship between Sage and Columbia Basin Blends was established prior to any in-state Washington contact.

6. Sage sold the rice flour to Columbia Basin Blends, and it was shipped by rail car, leased by Sage. As the shipments were made by Union Pacific, a common carrier, it was responsible for the freight while in route from the manufacturing plant to the customer, Columbia Basin Blends.

7. Pete Vegas was Sage's sole salesman in dealings with Washington State businesses during the time between January 2003 through June 2010; during this time period, Mr. Vegas made one short visit to Columbia Basin Blends, which lasted no more than one hour and did not involve the solicitation of orders. Sage does 93 percent of its business in Washington with Columbia Basin Blends.

8. During the audit period or since, Sage did not own, rent, or lease any real or tangible personal property in the state of Washington. Sage has never owned any intangible personal property that was used in the state of Washington. Sage has never owned or leased any office, warehouse, or other place of business in the state of Washington.

9. Following an investigation, the Department's Compliance Division issued two tax assessments to Sage that asserted additional wholesaling B&O tax, litter tax, penalties, and interest in the total amount of $176,643.

10. Sage timely appealed both tax assessments and after the appeal was upheld by the Appeals Division paid both assessments including updated interest.

11. Sage timely filed an appeal to the Board seeking a refund of the tax, penalties, and interest paid on those assessments.

Any Conclusion of Law that should be deemed a Finding of Fact is hereby adopted as such.

From these findings, the Board comes to these

CONCLUSIONS OF LAW

1. The Board has jurisdiction over this appeal (RCW 82.03.130).

2. Washington imposes the B&O tax on interstate sales of goods into Washington pursuant to RCW 82.04.220 and WAC 458-20-193.

3. Under the first prong of the United States Supreme Court's four-prong test, Washington may tax an out-of-state corporation without offending the Commerce Clause only if the tax is "applied to an activity with a substantial nexus" to Washington.[3]

4. The Washington Supreme Court has identified "the crucial factor governing nexus" as "whether the activities performed in this state on behalf of the taxpayer are significantly associated with the taxpayer's ability to establish and maintain a market in this state for the sales."[4]

5. Mr. Vegas's visits to Washington do not satisfy the Washington Supreme Court's requirement that the "activities . . . be substantial and . . . be associated with the company's ability to establish and maintain the company's market within the state"; rather, his activities were "slight or incidental to some other purpose or activity."[5]

6. Sage's use of leased rail cars for delivery was not "significantly associated with [Sage's] ability to establish and maintain a market in this state for the sales."[6]

7. The nexus necessary to support the imposition on Sage of the B&O wholesaling tax and litter tax has not been established.

8. Sage established facts that prove it had no taxable nexus with the state of Washington under federal constitutional law and state law.

9. The Department shall refund to Sage the tax, interest, and penalties paid in this matter.

Any Finding of Fact that should be deemed a Conclusion of Law is hereby adopted as such.

From these conclusions, the Board enters this

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[3] *Complete Auto Transit, Inc. v. Brady*, *supra*.
[4] *Tyler Pipe Industries* , *supra*.
[5] *Lamtec Corp. v. Department of Revenue*, 170 Wn.2d 838, 851, 246 P.3d 788 (2011).
[6] *Tyler Pipe Industries*, *supra*, at 321.

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DECISION

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The tax assessment in the Department's Determination No. 11-0309 is set aside.

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DATED this 31st day of August, 2012.

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BOARD OF TAX APPEALS

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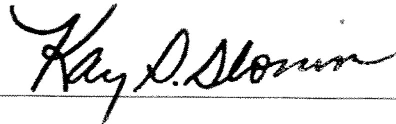

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KAY S. SLONIM, Chair

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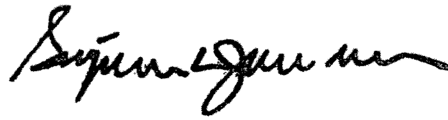

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STEPHEN L. JOHNSON, Vice Chair

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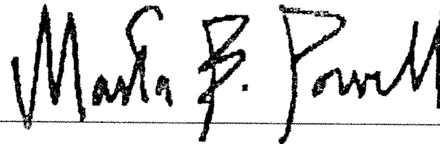

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MARTA B. POWELL, Member

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Right of Reconsideration of a Final Decision

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Pursuant to WAC 456-09-955, you may file a petition for reconsideration of this Final Decision. You must file the petition for reconsideration with the Board of Tax Appeals within 10 business days of the date of mailing of the Final Decision. The petition must state the specific grounds upon which relief is requested. You must also serve a copy on all other parties and their representatives of record. The Board may deny the petition, modify its decision, or reopen the hearing.

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Please be advised that a party petitioning for judicial review of this Final Decision is responsible for the reasonable costs incurred by this agency in preparing the necessary copies of the record for transmittal to the superior court. Charges for the transcript are payable separately to the court reporter.

Docket No(s). 11-704

CERTIFICATE OF MAILING

I certify that on August 31, 2012, I personally forwarded by United States mail or e-mailed, a true and correct copy of the attached document to the following:

SAGE V FOODS LLC
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Carol Lien, Clerk of the Board