Supreme Court No. 102223-9

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

Court of Appeals No. 57312-1-II

ANTIO, LLC, AZUREA, LLC, BACK BOWL I, LLC, CANDICA, LLC, CERASTES-WTB, LLC, GCG EXCALIBUR, LLC, LINDIA, LLC, OAK HARBOR CAPITAL, LLC, OAK HARBOR CAPITAL II, LLC, OAK HARBOR CAPITAL III, LLC, OAK HARBOR CAPITAL IV, LLC, OAK HARBOR CAPITAL VI, LLC, OAK HARBOR CAPITAL VII, LLC, OAK HARBOR CAPITAL X, LLC , OAK HARBOR CAPITAL XI, LLC, and VANDA, LLC,

Petitioners,

v.

DEPARTMENT OF REVENUE

Respondent.

PETITION FOR REVIEW

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I. INTRODUCTION, PETITIONERS, AND CITATION TO OPINION

Petitioners, investment funds operating in Washington State, ask this Court to accept review of the Court of Appeals' published decision in *Antio, LLC v. Dep't of Rev.*, 527 P.3d 164 (2023), issued on April 11, 2023.

In 2002, in the wake of substantial confusion about the applicability of the deduction for "investment income" from the Washington B&O tax base, the legislature overhauled the taxation of financial businesses. The intent of the 2002 revision to RCW 82.04.4281 was to create bright line rules.

Under the new rules, the investment income of certain statutorily specified financial businesses remained subject to B&O tax. But all other taxpayers—including those operating financial businesses—were entitled to deduct their investment income from their B&O tax base.

Relying on case law decided prior to 2002, the Court of Appeals limited the availability of the investment income

deduction to amounts earned on the "incidental investment of surplus income." However, as a result of the 2002 statutory change, the rationale underpinning the pre-2002 case law regarding the investment income deduction no longer exists.

Given the large number of investment funds and other businesses—and the billions of dollars of investment into the state they bring annually—potentially affected by the Court of Appeals' ruling, this Court should accept review to clarify the tax obligations of financial businesses and acknowledge the legislative purpose underlying RCW 82.04.4281's current form.

II. ISSUE PRESENTED FOR REVIEW

Whether, in light of the legislature's 2002 revision of RCW 82.04.4281, the Court of Appeals erred in limiting the availability of the "amounts derived from investments" deduction from the B&O tax base to only taxpayers in non-financial businesses who had income from the "incidental investment" of "surplus proceeds of the business?"

III. STATEMENT OF THE CASE

Petitioners are Washington-based investment funds, who receive money from investors in private offerings. Petitioners provide no services, and all of Petitioners' income is from the returns on their investments.

Petitioners initially paid B&O tax on their investment income, but in December of 2019 filed refund claims covering B&O tax they paid on their investment income for 2015–2018. The Department denied their claims.

Petitioners then filed a tax refund action in Thurston County Superior Court. The Department moved for summary judgment, arguing that Petitioners were not entitled to a refund because the income at issue did not meet the definition of "investments" set out in *O'Leary v. Dep't of Rev.*, 105 Wn.2d 679 (1986), which involved the prior version of RCW 82.04.4281.

Despite the legislature's overhaul of the statute in 2002,

the trial court applied rules developed by the judiciary with regard to the pre-2002 version of the statute and granted summary judgment in favor of the Department.

Petitioners appealed to Division II of the Court of Appeals, which upheld the trial court's determination in a published opinion on April 11, 2023. Petitioners' timely request for reconsideration was denied on June 27, 2023.

IV. REASONS TO ACCEPT REVIEW

One of the legislature's stated goals in revising RCW 82.04.4281 in 2002 was "to provide a positive environment for capital investment in this state * * *." House Bill 2641, § 1.

In making their investment decisions, investors, both inside and outside Washington, have relied on both the plain language of the statute, as well as the Department's representations on its website that "most mutual funds, private investment funds, family trusts, and other collective

investment vehicles * * * are allowed the B&O tax deduction for amounts derived from investments." CP at 160.

If not revised, the uncertainty engendered and the apparent new tax obligation required by the Court of Appeals' decision will play havoc with investments by Washington businesses, along with investments into Washington.[1]

The magnitude of this issue cannot be overstated: Washington received $20.6 billion in private equity investment in 2022. *Top States & Districts in 2022*, Am. Invest. Council 5 (2023), https://www.investmentcouncil.org/wp-content/uploads/2023/03/Top-States-and-Districts-in-2022-Report.pdf. In both 2021 and 2022, more than $8 billion in venture capital investments came into Washington. *2021*

[1] An investment fund located outside of Washington that meets the economic nexus standard would be required to pay B&O tax on its Washington investment income under the Court of Appeals' holding, which certainly may impact the decision to invest into the state.

Yearbook, Nat'l Venture Cap. Ass'n 29 (March 2022), https://nvca.org/wp-content/uploads/2022/03/NVCA-2022-Yearbook-Final.pdf; *2022 Yearbook*, Nat'l Venture Cap. Ass'n 23 (March 2023), https://nvca.org/wp-content/uploads/2023/03/NVCA-2023-Yearbook_FINALFINAL.pdf.

The aggregate amount invested over the years in Washington by private investment funds, mutual funds, family trusts, and other collective investment vehicles is not easy to determine, but the amount is likely in the hundreds of billions of dollars. Similarly, Washington businesses have enormous investments outside the State. What is at stake is the taxability of the earnings on such investments, and in turn the efficiency of funding Washington's growth.

In reforming the investment income deduction, the legislature intended to make Washington a desirable location for the investment of capital, with predictable tax consequences.

The Court of Appeals' interpretation of "investments" is not only unsupported by the current statutory structure, but also is counter to the legislature's stated intent underlying its 2002 revision. The Court of Appeals' decision renders operation of the deduction substantively indistinguishable from its pre-2002 form, making Washington a less desirable location for investment. Such a dramatic change in the incidence of taxation is reserved to the province of the legislature, not the courts.

V. ARGUMENT

A. The History of the "Incidental Income" Formulation and the 2002 Statutory Revision

Prior to 2002, significant uncertainty existed regarding whether a given business could claim the "investment income" deduction, because the statute provided that the deduction was unavailable to "those engaging in banking, loan, security or *other financial businesses*." Laws of 1980, ch. 37, § 2, 1980 Wash. Laws 1, 84 (amended 2002; current version at RCW

82.04.4281) (emphasis added) (hereinafter "Former RCW 82.04.4281").[2]

By 2000, the phrase "other financial business" had become the subject of extensive litigation between taxpayers and the Department.[3] In the wake of the uncertainty engendered by the statutory term "other financial business," the legislature determined to revise the statute to create bright line rules and generally remove most types of investment income from the ambit of the B&O tax.

The plain meaning of the current statute, which has been in place since 2002, generally allows the investment

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[2] A copy of the statute as it existed prior to the 2002 amendment is attached at Appendix, Section A.

[3] For example, in 2000, the Supreme Court ruled that a holding company that managed its subsidiaries' businesses could not deduct dividends it received from its subsidiaries, because the management of subsidiaries constituted an "other financial business." *Simpson Inv. Co. v. Dep't of Rev.*, 141 Wn.2d 139 (2000).

income deduction to businesses, only disallowing the deduction with respect to "amounts received from loans," as well as "amounts received by a banking, lending or security business." RCW 82.04.4281(2)(a) and (b). There are special definitions in the statute with respect to what constitutes a banking, lending, or security business, and there is no contention that Petitioners' investment businesses fall in any of those disfavored categories. A copy of the current version of RCW 82.04.4281 is attached at Appendix, Section B.

1. The Creation of the "Incidental Investments of Surplus Funds" Formulation Under Prior Law

In *John H. Sellen Constr. Co. v. Dep't of Rev.*, 87 Wn.2d 878 (1976), the taxpayers before the court were a group of non-financial operating companies, each of which had invested a small percentage of their annual gross revenues. The Department argued that the various investments of the taxpayers constituted "other financial

businesses" within the meaning of the pre-2002 version of RCW 82.04.4281. The *Sellen* court disagreed.

The *Sellen* court noted that the Department had a penchant to characterize virtually every investment activity on the part of a taxpayer as an "other financial business" for purposes of Former RCW 82.04.4281:

> It is [the Department's] position that [taxpayers] are 'financial businesses' within the meaning of the deduction statute.
>
> * * *
>
> If we adopt [the Department's] interpretation of [Former RCW 82.04.4281] then few taxpayers, if any, making incidental investments of surplus funds could receive the deduction. ***[The Department] equates investing any income with being a financial business and, in effect, this renders the statute a nullity***. By interpretation we should not nullify any portion of the statute.

87 Wn.2d at 882–83 (emphasis added and internal footnotes omitted).

To avoid nullifying a portion of the statute, the *Sellen* court formulated a limitation on deductible investments under

Former RCW 82.04.4281 to amounts derived from the "incidental investment of surplus funds." This was an effort to harmonize the general allowance of an investment income deduction with the disallowance of such deduction to "other financial businesses" contained elsewhere in the statute. In the *Sellen* court's view, not every investment of a non-financial business should amount to an "other financial business." Allowing non-financial businesses to make "incidental investments of surplus funds" was an interpretation that avoided "nullity" and gave effect to both parts of the statute.

A decade later, in *O'Leary v. Dep't of Rev.*, 105 Wn.2d 679 (1986), the Court applied Former RCW 82.04.4281 with respect to interest received on the sale of apartment complexes. In determining that this interest income was not deductible because it was connected with the taxpayer's

business investments (rather than constituting income from "incidental investments") the *O'Leary* court cited *Sellen*:

> In *Sellen*, we allowed a deduction for income from a business' 'incidental investments' of surplus funds. *Sellen*, at 883. Whether an investment is "incidental" to the main purpose of a business is an appropriate means of distinguishing those investments whose income should be exempted from the B & O tax of [Former] RCW 82.04.4281.

Id. at 682.

Thus, the *O'Leary* court followed *Sellen* in recognizing a requirement for deductible investment income under Former RCW 82.04.4281 that only non-financial businesses could meet, i.e., "incidental investment of surplus proceeds." Contrary to the opinion of the Court of Appeals in this case, the *O'Leary* court did not purport to define the term "investments." *See id.* Rather it only stated that, because the amounts at issue did not constitute the incidental investment of

surplus proceeds, the amounts did not qualify for deduction under Former RCW 82.04.4281.[4]

After *O'Leary* and *Sellen* were decided, the Department released Excise Tax Advisory 571, explaining the "incidental investments" test:

> A two part inquiry is used to determine if the taxpayer is a "banking, loan, security, or other financial business." The first inquiry requires determining whether the primary purpose and objective of the taxpayer is to earn income through the utilization of significant cash outlays or whether these activities are merely "incidental" to the taxpayer's nonfinancial business activities.

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[4] After finding that the real estate contracts were neither "incidental investments" nor made from "surplus income," in an alternative ground for its holding, the *O'Leary* court also found that the taxpayer's seller-financed sale of its apartment buildings "was not an investment 'or the use of money as such.'" *Id.* at 682–83. It thus saw no need to determine if the taxpayer was engaged in a "financial business." *Id.* at 683.

Dep't of Rev. ETA 571.04.169 (June 30, 1995) (cancelled effective July 2, 2002) (hereinafter "ETA 571"). This ETA essentially rephrased the holdings in *Sellen* and *O'Leary*.

2. The 2002 Revision to RCW 82.04.4281

The current statutory scheme dates from 2002. Approximately two years before RCW 82.04.4281's revision, the Court in *Simpson Inv. Co., v. Dep't of Rev.*, 141 Wn.2d 139 (2000), considered the case of a holding company that invested its subsidiaries' surplus funds. The *Simpson* court held that the holding company was ineligible for the deduction because it was an "other financial business" for purposes of the then-operative statutory text of Former RCW 82.04.4281. This decision provoked an almost immediate reaction from a wide spectrum of lawmakers.

In early 2001, the legislature passed House Bill 1361. H.B. 1361, 57th Cong., Reg. Sess. (2001). Section 18 of the Bill expressed the desire for clearer and more certain rules

relating to the operation of RCW 82.04.4281 than those set out by the Court in its prior decisions.[5]

Section 20 of the Bill required the Department to report back to the fiscal committees concerning "the progress made in working with affected businesses on potential amendments to RCW 82.04.4281" to clarify the application of the statute to "other financial businesses."

Governor Locke approved the Bill on May 15, 2001, except for Section 19 (providing a standstill with respect to DOR audits), which he vetoed. In his statement explaining the partial veto, Governor Locke indicated he had directed the Department to set up a task force, including stakeholders, to develop a proposal for consideration by the legislature in

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[5] In section 18, the legislature referred to Supreme Court "decisions" in the plural, indicating dissatisfaction with more than the *Simpson* opinion alone. *See id*. (emphasis added).

2002. Gov. Gary Locke, *Veto Message on HB 1361* (May 15, 2001).

In early 2001, Senate Bill 6184, which contained many of the features ultimately incorporated in the 2002 revision to RCW 82.04.4281 (i.e., restricting the disallowance of the investment income deduction to a few specific categories of financial businesses) was introduced. S.B. 6184, 57th Cong., 1st Spec. Sess. (2001). The sponsoring Senators' explanation for the proposed change was as follows:

> The legislature finds that a narrow interpretation of RCW 82.04.4281 is clearly not in the best interest of this state or its citizens. Therefore, ***it is the intent of this act to clarify the deductibility of investment income and to specifically identify persons who may not take the deduction*** provided in RCW 82.04.4281.

S.B. 6184, § 1 (emphasis added).

Not only did a DOR/stakeholder task force take up the project of revising RCW 82.04.4281 in late 2001, but the Washington Competitiveness Council also commented

favorably on pending legislation to revise RCW 82.04.4281, including the removal of the "other financial businesses" categorization:

> The [proposed] legislation ***allows the deduction from B&O for income from investments by those not engaged in banking or lending activities***. The proposal explains that the financial income that is subject to B&O tax is all otherwise nonexempt gross income of financial institutions, securities firms, lending businesses, from accounts receivable and of lending income for all businesses.
>
> ***The proposed change will positively impact the competitiveness of the state by removing a disincentive to locating investment activities in Washington, will provide greater predictability for tax planning purposes, will allow flexibility for entrepreneurial businesses (available venture capital), and will have a positive impact on innovation and research and development***.

Wash. Competitiveness Council, *Final Report,* § *2.2.2, Recommendation 3: Clarification of Investment Income* 8 (2001) (emphasis added).

Ultimately, in early 2002, after receiving the report from the DOR/stakeholder task force, the legislature returned to the task of revising the scope of RCW 82.04.4281. House Bill 2641 was introduced in early 2002. Section 1 of the Bill provided the rationale underlying the amendment:

> Sec. 1. The legislature finds that the application of the business and occupation tax deductions provided in RCW 82.04.4281 for investment income of persons deemed to be "other financial businesses" has been the subject of uncertainty, and therefore, disagreement and litigation between taxpayers and the state. The legislature further finds that the decision of the state supreme court in *Simpson Investment Co. v. Department of Revenue* could lead to a restrictive, narrow interpretation of the deductibility of investment income for business and occupation tax purposes. As a result, the legislature directed the department of revenue to work with affected businesses ***to develop a revision of the statute that would provide certainty and stability for taxpayers and the state. The legislature intends, by adopting this recommended revision of the statute, to provide a positive environment for capital investment in this state***, while continuing to treat similarly situated taxpayers fairly.

H.B. 2641, 57th Cong., Reg. Sess. (2002) (emphasis added);

See also S.B. 6384, 57th Cong., Reg. Sess. (2002) (containing identical language).

The drafters of S.B. 6384 summarized the effect of the bill as limiting the deduction disallowance to certain specifically identified financial businesses:

> The term "other financial business" is no longer used for B&O tax purposes. ***Instead, tax is specifically applied to*** banking businesses, lending businesses, security business, loans or the extension of credit, revolving credit arrangements, installment sales, and the acceptance of payment over time for goods or services.

S. Comm. Ways & Means Rep., S.B. 6384 (Feb. 1, 2002) (emphasis added). Identical language is found in the House Finance Committee's Bill Analysis of H.B. 2641.

Under the 2002 revision of RCW 82.04.4281, which is the statute's current form, "amounts derived from investments" are deductible, except to the extent that such amounts constitute "amounts received from loans" or "amounts received by a banking, lending, or security

business." RCW 82.04.4281(1)(a), (2)(a), and (2)(b).

After RCW 82.04.4281 was amended by H.B. 2641, the Senate 2002 Supplemental Budget Summary described the statutory change as "eliminating" the B&O tax on the investment income of financial businesses, except for those businesses specifically identified in the statute:

> HB 2641 INVESTMENT INCOME TAX DEDUCTION — $3.62 MILLION GENERAL FUND REVENUE DECREASE
>
> ***Eliminates the business and occupation taxation of investment income received by businesses that might be considered financial businesses***, except for banking businesses, lending businesses, security business, loans or the extension of credit, revolving credit arrangements, installment sales, and the acceptance of payment over time for goods or services.

S. Comm. Ways & Means, *Senate 2002 Supplemental Budget Summary* 40 (Mar. 5, 2002) (emphasis added).

Through its elimination of the "other financial business" category and the explicit listing of certain defined financial

businesses for whom the deduction would be unavailable, the legislature significantly narrowed the set of financial businesses not entitled to the investment income deduction under revised RCW 82.04.4281, i.e., only banking, lending, and securities businesses.

The legislative history makes it abundantly clear that those financial businesses who engage in investment activities not described in the statutory carve outs are permitted to take the deduction provided in RCW 82.04.4281 when calculating their B&O tax. Finally, not once did the legislature refer to the "incidental investment of surplus proceeds" as the test for deductible investment income.

3. The Department's Reaction to the 2002 Amendment

In its Fiscal Note, the Department recognized that the financial investment income of most taxpayers (except for the statutorily disfavored banks, lenders, and securities firms) was no longer subject to the B&O tax under the proposed statutory

change:

> The proposal explains that ***the financial income that is subject to B&O tax*** is all otherwise non-exempt gross income of financial institutions, securities firms, and lending businesses; income from accounts receivable and lending income for all businesses.

Dep't of Rev., Fiscal Note for HB 2641 AMS S4691.2 (2002) (emphasis added).[6]

The Department also cancelled ETA 571, effective June 30, 2002. Dep't of Rev. ETA 3002.2009 (Feb. 2, 2009) (collecting cancelled interpretive statements).

In guidance placed on its website on June 2, 2017, the Department explained which financial businesses are eligible for the RCW 82.04.4281 deduction under the revised statute:

> A trader not meeting the characteristics of a broker, dealer, or broker-dealer is not a security business and would be eligible for the B&O tax deduction for amounts derived from

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[6] In its Fiscal Note, the Department forecast a significant reduction in B&O revenue from $10.6 to $7 million (a 33% reduction) per year over a five-year period as a result of the change.

> investments. Additionally, most mutual funds, private investment funds, family trusts, and other collective investment vehicles are not a securities business, and are allowed the B&O tax deduction for amounts derived from investments.

CP at 160.[7]

The Department's public announcement of the proper interpretation of the statute is entirely consistent with the statutory language and the legislative history.

B. The Court of Appeals Reached an Incorrect Result

1. The Court of Appeals Improperly Relied on the Obsolete *Sellen/O'Leary* Treatment of the Investment Income Deduction

The Court of Appeals' opinion failed to take into account the robust legislative history explaining that the statutory change was for the purpose of limiting the B&O taxation of investment income to certain defined sets of financial businesses and

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[7] This guidance, located at https://dor.wa.gov/forms-publications/publications-subject/tax-topics/investments, is still available on the DOR website as of July 25, 2023.

activities, and "provide a positive environment for capital investment in [Washington]."

Instead, the Court of Appeals looked to *O'Leary*, reasoning that "incidental investment of surplus proceeds" remained the *sine qua non* of deductible investments, because there was no change to the definition of "investments" as part of the 2002 revision. The Court failed to appreciate that the specific *Sellen/O'Leary* formulation (limiting deductible investments to those representing the incidental investment of surplus funds) was born out of an effort to give effect to ***both*** the general allowance of a deduction for investment income ***and*** the disallowance of such deduction to those engaged in an "other financial business" under the pre-2002 statute. The revised RCW 82.04.4281 eliminated that tension, providing instead a bright line rule that allowed the investment income deduction for all businesses, except certain statutorily enumerated financial businesses.

Moreover, continuing to apply the *Sellen/O'Leary* rules regarding the deduction would frustrate the legislature's desire to bring clarity and predictability to the operation of the statute. In determining what investment income is deductible under RCW 82.04.4281(1)(a), taxpayers would still be forced to guess whether their investment income was derived from the "incidental investment of surplus proceeds" or exceeded such amount.

2. The 2002 Statutory Revision Accomplished Far More than the Reversal of *Simpson*

As additional support for its determination that the *O'Leary* definition remained the law, the Court of Appeals pointed to a snippet from the legislative history, suggesting that the legislature was reacting to the decision in *Simpson* alone, and did not reference any problems with *O'Leary*. Yet the revision to RCW 82.04.4281 went far beyond fixing the taxation of the holding company structure at issue in *Simpson*.

As described in Section V.A.2, *supra*, the legislature and

interested parties worked for almost two years to fashion the resulting legislation. Both the legislative history and the administrative guidance issued by the Department at the time reflect an understanding that the new statute had effected a radical change in the taxation of investment income, fashioning a new bright line test for the investment income deduction intended to attract investment into Washington.

3. The New Statute is not Ambiguous and Should Be Interpreted in Accordance with its Plain Meaning

In its opinion, the Court of Appeals repeated the oft-stated maxim that, if there is ambiguity, tax exemptions should be construed narrowly. As an initial matter, the legislative history specifically disavowed a restrictive interpretation of RCW 82.04.4281 ("The legislature finds that a narrow interpretation of RCW 82.04.4281 is clearly not in the best interest of this state or its citizens.") S.B. 6184, § 1.

But more fundamentally, there is no ambiguity: the

words of the statute compel the result sought by Petitioners. In this regard, the instant case is similar to *HomeStreet, Inc. v. Dep't of Rev.*, 166 Wn.2d 444 (2009). In *HomeStreet*, the Court was required to interpret the phrase "amounts derived from interest" for purposes of the deduction set out in RCW 82.04.4292.[8]

HomeStreet had resold some of its loans on the secondary market, retaining a portion of the income stream as a "servicing fee." The Department argued these fees should not be characterized as "amounts derived from interest." Rejecting this interpretation, the Court adopted a commonsense, natural language interpretation of each word in the statute.[9]

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[8] The phrase "amounts derived from interest" in RCW 82.04.4292 is identical in structure to the "amounts derived from investments" in RCW 82.04.4281(1)(a).

[9] The *HomeStreet* court looked to standard dictionary definitions in defining "interest":

Following *HomeStreet*'s approach in this case results in the "amounts derived from investments" being deductible by Petitioners.

While there is not an internal definition of the term "investment" in RCW 82.04.4281, in other contexts, the courts have turned to the common and ordinary definition of "investment":

> The common and ordinary definition of "investment" is "an expenditure of money for income or profit . . ." or "the commitment of funds with a view to minimizing risk and

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> "Interest" is defined as "[t]he compensation fixed by agreement or allowed by law for the use or detention of money, or for the loss of money by one who is entitled to its use; esp., the amount owed to a lender in return for the use of borrowed money." BLACK'S LAW DICTIONARY 829 at para. 3. (8th ed. 1999). "Interest" is also defined as "the price paid for borrowing money generally expressed as a percentage of the amount borrowed paid in one year." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1178 (2002).

Id. at 453.

> safeguarding capital while earning a return . " WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1190 (1981) * * *.

Seattle v. King Cnty., 52 Wn. App. 628, 631 at n. 1 (1988) (*citing Security Sav. Soc'y v. Spokane Cnty.*, 111 Wash. 35, 37 (1920)); *See also Lumbermen's Indem. Exch. v. State*, 113 Wash. 82 (1920) (discussing various definitions of "investment," including "to lay out (money or capital) in business with the view of obtaining an income or profit; to place money so that it will yield a profit."). None of these definitions are limited to the "incidental investment of surplus proceeds."

4. The Court of Appeals Erred by Assigning no Weight to the DOR's Website Guidance

The Department published guidance on its website informing taxpayers like Petitioners that they could deduct investment income from their B&O tax base. Citing *Bravern Residential II, LLC v. Dep't of Rev.*, 183 Wn. App. 769 (2014) and *Dynamic Resources, Inc. v. Dep't of Rev.*, 21 Wn.

App. 2d 814 (2022), the Court of Appeals held that "the information on the DOR website is immaterial to the resolution of this case."

While it is undisputed that unambiguous statutory language prevails over an inconsistent interpretation by the Department, Petitioners only argued that the public guidance formulated by the agency charged with administering revenue laws would assist the court in interpreting the scope of the post-2002 interest deduction.

While there does not appear to be any Washington case law regarding the role of sub-regulatory guidance in statutory interpretation, on the federal side, the courts treat guidance on which the IRS has invited reliance (*e.g.*, Revenue Rulings) as a concession if the IRS takes an inconsistent position in litigation. *See, e.g.*, ***Rauenhorst v. Comm'r***, 119 T.C. 157, 166–73 (2002). Even with respect to explicitly non-precedential guidance, federal courts have found IRS releases

helpful in interpreting the tax code—particularly when those materials constitute the only guidance for the regulated community and there is otherwise "an almost total absence of case law." *Morganbesser v. United States*, 984 F.2d 560, 565–64 (2d Cir. 1993) (internal citations omitted).

The Department's litigating position represents a 180-degree departure from the position set out on the DOR website and confounds taxpayers' legitimate expectations. *See id.* at 564 (relying on non-precedential authority and suggesting that if the agency found such guidance too liberal "it should restrict the definition, but it should not do so retroactively.") Moreover, taxpayers who followed the advice on the DOR website would almost certainly find themselves subject to penalties if their returns were audited for this issue. WAC 458-20-228(5)(c).[10]

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[10] A 5% penalty is automatically applied if the taxpayer has paid less than 80% of the tax resulting from audit. WAC 458-

Finally, permitting the Department to completely contradict its published guidance in litigation creates a significant risk that the tax laws will not be equally enforced. In this regard, in determining that placing temporary, free-standing ads in third party stores did not constitute "decorating" real property (which would be subject to the sales tax), the taxpayer in *Dynamic Resources*, *supra*, relied on a DOR guide which stated that real estate staging services (similar to what the taxpayer was doing in using personal property to create temporary displays) were not subject to retail sales tax. The Department disavowed its own published

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20-228(5)(a). If the additional tax is not paid within 60 days of the assessment, the aggregate penalties under WAC 458-20-228(5)(a) and (c) reach 54% of the tax. Moreover, out-of-state businesses who otherwise have no Washington tax obligations, if subject to tax on their Washington investment income, would also be subject to an additional 5% penalty for failing to register with the State. *Id.* at 228(5)(b). Accordingly, reliance on the Department's guidance could ultimately subject an out-of-state taxpayer to penalties of at least 10% and perhaps as much as 59% of the tax determined owing.

guidance, arguing that its guide reflected an incorrect interpretation of the law. The *Dynamic Resources* court agreed with the Department's litigating position, holding that the DOR guide was merely informal guidance and should be accorded no weight. *Dynamic Resources, Inc. v. Dep't of Rev.*, 21 Wn. App. 2d 814, 823 (2022). Yet, three years after prevailing in Thurston County and 15 months after having that ruling upheld on appeal, the guidance remains on the DOR website.[11] Moreover, there is no indication that the Department has since attempted to apply the *Dynamic Resources* ruling against businesses involved in real estate staging.

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[11] *See* Dep't of Rev., *Interior Decorators, Designers & Consultants Guide* (last updated January, 2010), https://dor.wa.gov/book/export/html/1062 ("Charges for "staging or "showcasing" real property are subject to the B&O tax under the *services and other activities* classification. For purposes of state taxation, "staging" or "showcasing" is considered to be **temporary changes made to a home typically for purposes of showcasing the home or similar homes for sale.**" (emphasis in original)).

Allowing the Department to litigate against its own publicly available guidance without consequence creates the very real risk of unequal enforcement of the tax law. As it stands today, the Department can seek enforcement of a new and different approach to the law against disfavored taxpayers, while still assuring favored taxpayers that their position is acceptable.

VI. CONCLUSION

Petitioners respectfully request that this Court accept review of this matter and issue a decision in their favor.

RESPECTFULLY SUBMITTED this 27th day of July, 2023.

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CERTIFICATE OF COMPLIANCE

Pursuant to RAP 18.17(b) & (c), I, John Colvin, certify that the accompanying Petition for Review, which was prepared using CG Times 14-point typeface, contains 4,998 words, excluding the parts of the document exempted from word count by RAP 18.17(c). This certificate was prepared in reliance on the word-count function of the word-processing system (Microsoft Word) that was used to prepare the document.

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

DATED this 27th day of July, 2023, at Seattle, Washington.

COLVIN + HALLETT, P.S.

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CERTIFICATE OF SERVICE

I, Daniela Garduno, certify that I caused to be served a copy of this document via certified mail, return receipt requested, and via electronic mail, as mutually consented to by the parties' counsel under an Electronic Service Agreement pursuant to GR 30(b)(4), 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 27th day of July, 2023, at Seattle, Washington.

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Appendix

Antio, LLC v. State of Washington, Dep't of Rev.
Petition for Review from Court of Appeals No. 57312-1-II

1979 ex. sess. and RCW 82.04.431; adding new sections to chapter 15, Laws of 1961 and to chapter 82.04 RCW; adding new sections to chapter 15, Laws of 1961 and to chapter 82.08 RCW; adding new sections to chapter 15, Laws of 1961 and to chapter 82.12 RCW; creating a new section; repealing section 82.04.430, chapter 15, Laws of 1961, section 5, chapter 293, Laws of 1961, section 11, chapter 173, Laws of 1965 ex. sess., section 5, chapter 65, Laws of 1970 ex. sess., section 2, chapter 101, Laws of 1970 ex. sess., section 1, chapter 13, Laws of 1971, section 1, chapter 105, Laws of 1977 ex. sess., section 5, chapter 196, Laws of 1979 ex. sess. and RCW 82.04.430; repealing section 1, chapter 12, Laws of 1979, section 6, chapter 266, Laws of 1979 ex. sess. and RCW 82.08.030; repealing section 2, chapter 12, Laws of 1979, section 7, chapter 266, Laws of 1979 ex. sess. and RCW 82.12.030; and declaring an emergency.

Be it enacted by the Legislature of the State of Washington:

NEW SECTION. Section 1. The separation of sales tax exemption, use tax exemption, and business and occupation deduction sections into shorter sections is intended to improve the readability and facilitate the future amendment of these sections. This separation shall not change the meaning of any of the exemptions or deductions involved.

NEW SECTION. Sec. 2. There is added to chapter 15, Laws of 1961 and to chapter 82.04 RCW a new section to read as follows:

In computing tax there may be deducted from the measure of tax amounts derived by persons, other than those engaging in banking, loan, security, or other financial businesses, from investments or the use of money as such, and also amounts derived as dividends by a parent from its subsidiary corporations.

NEW SECTION. Sec. 3. There is added to chapter 15, Laws of 1961 and to chapter 82.04 RCW a new section to read as follows:

In computing tax there may be deducted from the measure of tax amounts derived from bona fide initiation fees, dues, contributions, donations, tuition fees, charges made for operation of privately operated kindergartens, and endowment funds. This paragraph shall not be construed to exempt any person, association, or society from tax liability upon selling tangible personal property or upon providing facilities or services for which a special charge is made to members or others. If dues are in exchange for any significant amount of goods or services rendered by the recipient thereof to members without any additional charge to the member, or if the dues are graduated upon the amount of goods or services rendered, the value of such goods or services shall not be considered as a deduction hereunder.

NEW SECTION. Sec. 4. There is added to chapter 15, Laws of 1961 and to chapter 82.04 RCW a new section to read as follows:

In computing tax there may be deducted from the measure of tax the amount of cash discount actually taken by the purchaser. This deduction is not allowed in arriving at the taxable amount under the extractive or manufacturing classifications with respect to articles produced or manufactured, the reported values of which, for the purposes of this tax, have been computed according to the provisions of RCW 82.04.450.

Appendix Section B - Current RCW 82.04.4281

PDF **RCW 82.04.4281**

Deductions—Investments, dividends, interest on loans.

(1) In computing tax there may be deducted from the measure of tax:

(a) Amounts derived from investments;

(b) Amounts derived as dividends or distributions from the capital account by a parent from its subsidiary entities; and

(c) Amounts derived from interest on loans between subsidiary entities and a parent entity or between subsidiaries of a common parent entity, but only if the total investment and loan income is less than five percent of gross receipts of the business annually.

(2) The following are not deductible under subsection (1)(a) of this section:

(a) Amounts received from loans, except as provided in subsection (1)(c) of this section, or the extension of credit to another, revolving credit arrangements, installment sales, the acceptance of payment over time for goods or services, or any of the foregoing that have been transferred by the originator of the same to an affiliate of the transferor; or

(b) Amounts received by a banking, lending, or security business.

(3) The definitions in this subsection apply only to this section.

(a) "Banking business" means a person engaging in business as a national or state-chartered bank, a mutual savings bank, a savings and loan association, a trust company, an alien bank, a foreign bank, a credit union, a stock savings bank, or a similar entity that is chartered under Title *30, 31, 32, or 33 RCW, or organized under Title 12 U.S.C.

(b) "Lending business" means a person engaged in the business of making secured or unsecured loans of money, or extending credit, and (i) more than one-half of the person's gross income is earned from such activities and (ii) more than one-half of the person's total expenditures are incurred in support of such activities.

(c) The terms "loan" and "extension of credit" do not include ownership of or trading in publicly traded debt instruments, or substantially equivalent instruments offered in a private placement.

(d) "Security business" means a person, other than an issuer, who is engaged in the business of effecting transactions in securities as a broker, dealer, or broker-dealer, as those terms are defined in the securities act of Washington, chapter **21.20** RCW, or the federal securities act of 1933. "Security business" does not include any company excluded from the definition of broker or dealer under the federal investment company act of 1940 or any entity that is not an investment company by reason of sections 3(c)(1) and 3(c)(3) through 3(c)(14) thereof.

[**2007 c 54 § 9**; **2002 c 150 § 2**; **1980 c 37 § 2**. Formerly RCW **82.04.430**(1).]

NOTES:

***Reviser's note:** Title **30** RCW was recodified and/or repealed pursuant to 2014 c 37, effective January 5, 2015.

Severability—2007 c 54: See note following RCW **82.04.050**.

Findings—Intent—2002 c 150: "The legislature finds that the application of the business and occupation tax deductions provided in RCW **82.04.4281** for investment income of persons deemed to be "other financial businesses" has been the subject of uncertainty, and therefore, disagreement and litigation between taxpayers and the state. The legislature further finds that the decision of the state supreme court in *Simpson Investment Co. v. Department of Revenue* could lead to a restrictive, narrow

interpretation of the deductibility of investment income for business and occupation tax purposes. As a result, the legislature directed the department of revenue to work with affected businesses to develop a revision of the statute that would provide certainty and stability for taxpayers and the state. The legislature intends, by adopting this recommended revision of the statute, to provide a positive environment for capital investment in this state, while continuing to treat similarly situated taxpayers fairly." [**2002 c 150 § 1**.]

Effective date—2002 c 150: "This act takes effect July 1, 2002." [**2002 c 150 § 3**.]

Finding—Intent on application of deduction—2001 c 320: "The legislature finds that the application of the business and occupation tax deduction provided in RCW **82.04.4281** for investment income of persons other than those engaging in banking, loan, security, or other financial businesses has been the subject of disagreement between taxpayers and the state. Decisions of the supreme court have provided some broad guidelines and principles for interpretation of the deduction provided in RCW **82.04.4281**, but these decisions have not provided the certainty and clarity that is desired by taxpayers and the state. Therefore, it is the intent of the legislature to delay change in the manner or extent of taxation of the investment income until definitions or standards can be developed and enacted by the legislature." [**2001 c 320 § 18**.]

Reviser's note: 2001 c 320 § 19, which was vetoed May 15, 2001, would have implemented the intent in this section.

Report to legislature—2001 c 320: "The department of revenue shall report to the fiscal committees of the legislature by November 30, 2001, on the progress made in working with affected businesses on potential amendments to RCW **82.04.4281** which would clarify the application of RCW **82.04.4281** to other financial businesses." [**2001 c 320 § 20**.]

Intent—1980 c 37: "The separation of sales tax exemption, use tax exemption, and business and occupation deduction sections into shorter sections is intended to improve the readability and facilitate the future amendment of these sections. This separation shall not change the meaning of any of the exemptions or deductions involved." [**1980 c 37 § 1**.]

COLVIN + HALLETT, P.S.

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Court of Appeals
Division Two

April 11, 2023

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

ANTIO, LLC; AZUREA I, LLC; BACK BOWL I, LLC; CANDICA, LLC; CERASTES-WTB, LLC; GCG EXCALIBUR, LLC; LINDIA, LLC; OAK HARBOR CAPITAL, LLC; OAK HARBOR CAPITAL II, LLC; OAK HARBOR CAPITAL III, LLC; OAK HARBOR CAPITAL IV, LLC; OAK HARBOR CAPITALVI, LLC; OAK HARBOR CAPITALVII, LLC; OAK HARBOR CAPITAL X, LLC; OAK HARBOR CAPITAL XI, LLC; and VANDA, LLC, Appellant, v. WASHINGTON STATE DEPARTMENT OF REVENUE, Respondent.	No. 57312-1-II PUBLISHED OPINION

MAXA, J. – Antio LLC, Azurea I LLC, Back Bowl I LLC, Candica LLC, Cerastes-WTB LLC, GCG Excalibur LLC, Lindia LLC, Oak Harbor Capital LLC, Oak Harbor Capital II LLC, Oak Harbor Capital III LLC, Oak Harbor Capital IV LLC, Oak Harbor Capital VI LLC, Oak Harbor Capital VII LLC, Oak Harbor Capital X LLC, Oak Harbor Capital XI LLC, and Vanda LLC (collectively "the LLCs") appeal the trial court's grant of summary judgment in favor of the Department of Revenue (DOR). The LLCs had challenged DOR's determination that their investment income did not qualify for a deduction from the measure of business and occupation (B&O) taxes.

The LLCs are investment funds, and all revenue that the LLCs receive is investment income. The LLCs paid B&O taxes on that revenue, and subsequently applied to DOR for tax refunds under RCW 82.04.4281(1)(a). That statute allows a deduction for "[a]mounts derived from investments" from the measure of B&O taxes. RCW 82.04.4281(1)(a). DOR denied the refund requests. The LLCs challenged this determination, and the trial court granted summary judgment in favor of DOR.

The LLCs argue that (1) the trial court erred in concluding that no genuine issues of material fact existed on summary judgment; and (2) under the plain language of RCW 82.04.4281(1)(a), they are entitled to deduct their investment income from B&O taxes. DOR argues that the LLCs are not entitled to a refund under *O'Leary v. Department of Revenue*, 105 Wn.2d 679, 682, 717 P.2d 273 (1986), in which the court held that the term "investments" in former RCW 82.04.4281 (1980) was limited to investments that were incidental to the main purpose of the taxpayer's business.

We hold that (1) no genuine issues of material fact existed on summary judgment because whether the LLCs are entitled to a deduction depends on the interpretation of RCW 82.04.4281, which is a question of law; and (2) the LLCs are not entitled to a deduction under RCW 82.04.4281(1)(a) based on the definition of "investment" in *O'Leary*. Accordingly, we affirm the trial court's order granting summary judgment in favor of DOR.

FACTS

Background

The LLCs are investment funds, and they acquire investors through private offerings under a federal securities act exemption known as a private placement. Investors invest capital

in the funds via private placements, and the LLCs then take that capital and invest it in debt instruments like defaulted credit card debt. All revenue that the LLCs receive is investment income from the debt instruments offered in private placements. The LLCs do not provide any services.

In December 2019, the LLCs submitted applications to DOR for refunds of various amounts paid in B&O taxes between January 2015 and December 2018. The LLCs sought a refund for 100 percent of the B&O taxes they had paid, claiming that all their revenue was investment income and therefore was subject to the deduction under RCW 82.04.4281(1)(a). The claimed refunds for all the LLCs totaled $404,361.87.

DOR ultimately denied the refund requests in full because all the revenue that the LLCs received was investment income. DOR stated that the LLCs did not qualify for the deduction because 100 percent of their income was derived from investments, and under RCW 82.04.4281(1)(c)[1] only investment income that is less than five percent of their gross income qualified for the deduction.[2]

Trial Court Ruling

The LLCs filed a tax refund action in superior court under RCW 82.32.180. DOR filed a summary judgment motion, arguing that the LLCs did not meet the definition of "investments"

[1] RCW 82.04.4281(1)(c) states, "Amounts derived from interest on loans between subsidiary entities and a parent entity or between subsidiaries of a common parent entity, but only if the total investment and loan income is less than five percent of gross receipts of the business annually."

[2] DOR also noted that some of the LLCs had taken small business credits during the refund request period that either reduced their tax liability to zero or to an amount that was less than the requested refund. As a result, some of the LLCs either did not actually make any payments or requested refunds for an amount that was more than what they paid.

as defined in *O'Leary*. DOR also stated the same reasoning it used in the refund denials – that the five percent limiting language in RCW 82.04.4281(1)(c) also applied to section (a). However, DOR specified that the trial court was not required to determine whether the five percent limitation applied because the LLCs' claims failed as a matter of law under *O'Leary*.

In response, the LLCs submitted internal DOR emails regarding the LLCs' B&O tax liability. In one email, an auditor referenced RCW 82.04.4281 and stated that amounts derived from investments are deductible for "issuers," and that the LLCs were issuers. The auditor further noted that the "[s]tatute does not require anything else" and that based on the current information she had it seemed "that the [LLCs] would be eligible for refunds." Clerk's Papers (CP) at 260. In a later email, a senior excise tax examiner noted that they were "confused about the taxability" and that the four requests being reviewed "appear[ed] to qualify for the deduction they quoted." CP at 237. The LLCs argued that DOR's argument regarding the five percent limitation was inconsistent with this internal position, which did not mention any limits.

In their opposition brief, the LLCs also quoted an interpretation of investment funds from DOR's website:

> A trader not meeting the characteristics of a broker, dealer, or broker-dealer is not a security business and would be eligible for the B&O tax deduction for amounts derived from investments. Additionally, <u>most mutual funds, private investment funds,</u> family trusts, <u>and other collective investment vehicles are not a securities business, and are allowed the B&O tax deduction for amounts derived from investments.</u>

CP at 160. The LLCs argued that because they are private investment funds, they fall within the language of DOR's published position, and any contradicting contention would create a genuine

issue of material fact. In addition, the LLCs stated that DOR's published interpretation contained no reference to a five percent limitation or to *O'Leary*.

The trial court granted DOR's summary judgment motion, declining to look at DOR's website and finding that no genuine issue of material fact existed. The LLCs filed a motion for reconsideration of the summary judgment ruling, which the court denied.

The LLCs appeal the trial court's grant of summary judgment in favor of DOR.

ANALYSIS

A. LEGAL PRINCIPLES

1. Summary Judgment Standard

For a summary judgment motion, we view the evidence and apply all reasonable inferences in the light most favorable to the nonmoving party. *Lavington v. Hillier*, 22 Wn. App. 2d 134, 143, 510 P.3d 373, *review denied*, 200 Wn.2d 1010 (2022). Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Id.*; CR 56(c). There is a genuine issue of material fact only if reasonable minds could disagree on the conclusion of a factual issue. *Lavington*, 22 Wn. App. 2d at 143. However, if the material facts are not in dispute, summary judgment can be determined as a matter of law. *Protective Admin. Servs., Inc. v. Dep't of Revenue*, 24 Wn. App. 2d 319, 325, 519 P.3d 953 (2022).

2. B&O Tax and Deductions

RCW 82.04.220(1)[3] states that entities must pay a B&O tax for the privilege of doing business in Washington. The tax is measured by the application of rates against certain types of

[3] RCW 82.04.220 has been amended since the events of this case transpired. Because these amendments do not impact the statutory language relied on by this court, we refer to the current statute.

income, including "gross income of the business." RCW 82.04.220(1). "Gross income of the business" means "value proceeding or accruing by reason of the transaction of the business engaged in." RCW 82.04.080(1). The term specifically includes interest. RCW 82.04.080(1).

However, chapter 82.04 RCW contains a number of exemptions and deductions regarding B&O taxes. RCW 82.04.4281 provides,

> (1) In computing tax there may be deducted from the measure of tax:
> (a) *Amounts derived from investments*;
> (b) Amounts derived as dividends or distributions from the capital account by a parent from its subsidiary entities; and
> (c) Amounts derived from interest on loans between subsidiary entities and a parent entity or between subsidiaries of a common parent entity, but only if the total investment and loan income is less than five percent of gross receipts of the business annually.

(Emphasis added.)

Whether a trial court correctly determined that a taxpayer was not entitled to a tax refund is a question of law that we review de novo. *Protective*, 24 Wn.2d at 325. A taxpayer must prove the incorrect amount of tax paid along with the correct amount of tax in order to establish that they are entitled to a refund. RCW 82.32.180.

3. Statutory Interpretation

A determination of whether the LLCs' investment income was deductible from their B&O taxes requires interpretation of RCW 82.04.4281(1). Interpretation of a statute is a question of law that we review de novo. *Protective*, 24 Wn.2d at 325. When interpreting a statute, our goal is to determine and give effect to the legislature's intent. *Id.* at 330. The language and context of the statute, related statutes, and the statutory scheme as a whole are considered. *Id.*

Tax exemptions are narrowly construed. *Green Collar Club v. Dept. of Revenue*, 3 Wn. App. 2d 82, 94, 413 P.3d 1083 (2018). Although an ambiguous tax exemption is construed fairly and in the ordinary meaning of its language, it is strictly construed against the taxpayer. *Id.*

In addition, we are bound by the Supreme Court's interpretation of a statute. *Yuchasz v. Dep't of Labor & Indus.*, 183 Wn. App. 879, 888, 335 P.3d 998 (2014).

B. GENUINE ISSUES OF MATERIAL FACT

The LLCs argue that the trial court erred in concluding that there were no genuine issues of material fact and that the trial court failed to consider the facts in a light most favorable to them as the nonmoving parties. We disagree.

The question here is whether the investment deduction stated in RCW 82.04.4281(1)(a) applies to the LLCs. The key material fact regarding that question is undisputed: 100 percent of the LLCs' income was investment income. We must decide as a matter of law whether DOR's position is correct that RCW 82.04.4281(1)(a) does not apply when investment is not incidental to the main purpose of the taxpayer's business or when investment income is more than five percent of the taxpayer's gross income.

The LLCs argue that a genuine issue of material fact exists because DOR's interpretation of investment funds and the application of the investment deduction on its website and in its internal email communications discussing the LLCs' eligibility for refunds contradict DOR's position that the LLCs are not entitled to a refund. But statutory interpretation is a question of law, not a question of fact. *See Protective*, 24 Wn.2d at 325. We give effect to the legislature's intent, not the interpretation of a few DOR employees or on DOR's website.

Therefore, we hold that no genuine issues of material fact existed on summary judgment.

C. APPLICATION OF RCW 82.04.4281(1)(a)

The LLCs argue that the trial court erred in determining that they were not entitled to deduct their investment income under RCW 82.04.4281(1)(a). We disagree.

1. *O'Leary* Interpretation of "Investments"

RCW 82.04.4281(1)(a) provides a B&O tax deduction for "[a]mounts derived from investments." But the statute does not define "investments." The question here is how that term should be interpreted.

The plain language of RCW 82.04.4281(1)(a) seems to support the LLCs' position. All of the LLCs' income is derived from investments. This subsection does not state or even suggest that the deduction is unavailable if the main purpose of taxpayer's business is investments. There are no limitations at all to application of the deduction in the statutory language.

But the Supreme Court in *O'Leary* provided a definition of "investments" as used in former RCW 82.04.4281.[4] The court stated, "Whether an investment is 'incidental' to the main purpose of a business is an appropriate means of distinguishing those investments whose income should be exempted from the B&O tax [in] RCW 82.04.4281." *O'Leary*, 105 Wn.2d at 682.

In *O'Leary*, the taxpayer received interest payments pursuant to real estate contracts involving the sale of apartment complexes. *Id.* at 680. The taxpayer argued that the real estate contracts constituted "investments" and therefore the interest was deductible under former RCW 82.04.4281. *Id.* After stating its interpretation of "investments," the court noted that the real estate contracts "were neither incidental investments nor were they made from surplus income of

[4] When O'Leary was decided, former RCW 82.04.4281 stated as follows in part: "In computing tax there may be deducted from the measure of tax *amounts derived* by persons, other than those engaging in banking, loan, security, or other financial businesses, *from investments* or the use of money as such." (Emphasis added.)

the partnership." *Id.* at 682. The court concluded that the sale of the apartments was not an investment and therefore that the taxpayer was not entitled to a deduction under former RCW 82.04.4281. *Id.* at 682-83.

This court followed *O'Leary* in *Browning v. Department of Revenue*, 47 Wn. App. 55, 733 P.2d 594 (1987). In that case, the taxpayer claimed a deduction under former RCW 82.04.4281 for interest received on real estate contracts for the sale of rental houses. *Id.* at 56. The court quoted the passage from *O'Leary* stating that an investment must be incidental to the main purpose of the taxpayer's business to qualify for the investment income deduction. *Id.* at 58. The court affirmed the trial court's denial of the deduction, stating that "the evidence here does not establish that the real estate contracts were entered into with surplus monies or that they were incidental investments." *Id.*

Here, the LLCs' investment in debt instruments is not incidental to the main purpose of their businesses. Instead, investment is the only purpose of their businesses – 100 percent of the LLCs' income was investment income. Therefore, based on the definition of "investments" in *O'Leary*, the LLCs are not entitled to a deduction under RCW 82.04.4281(1)(a).

2. Continued Vitality of *O'Leary*

The LLCs argue that *O'Leary* has no application to this case because it was nullified by amendments to RCW 82.04.4281 that occurred after *O'Leary* was decided. The LLCs claim that these amendments affected a change in the meaning of the term "investments" as stated in *O'Leary*. We disagree.

When *O'Leary* was decided in 1986, former RCW 82.04.4281 stated that "there may be deducted from the measure of tax amounts derived by persons, other than those engaging in

banking, loan, security, or other financial businesses, from investments or the use of money as such, and also amounts derived as dividends by a parent from its subsidiary corporations."

In 2000, the Supreme Court held in *Simpson Investment Company v. Department of Revenue* that a holding corporation for multiple subsidiaries was a "financial business" for purposes of former RCW 82.04.4281. 141 Wn.2d 139, 164, 3 P.3d 741 (2000). A year later, the legislature adopted a finding regarding RCW 82.04.4281:

> The legislature finds that the application of the business and occupation tax deduction provided in RCW 82.04.4281 for investment income of persons other than those engaging in banking, loan, security, or other financial businesses has been the subject of disagreement between taxpayers and the state. Decisions of the supreme court have provided some broad guidelines and principles for interpretation of the deduction provided in RCW 82.04.4281, but these decisions have not provided the certainty and clarity that is desired by taxpayers and the state. Therefore, it is the intent of the legislature to delay change in the manner or extent of taxation of the investment income until definitions or standards can be developed and enacted by the legislature.

LAWS OF 2001, ch. 320, §18. The legislature adopted a new section that limited DOR's ability to classify an entity as a "financial business," LAWS OF 2001, ch. 320, §19, but that section was vetoed. LAWS Of 2001, ch. 320, veto statement at 1625-26.

In 2002, the legislature amended RCW 82.04.4281, changing the language to the current version. LAWS OF 2002, ch. 150, § 2. The legislature adopted the following finding:

> The legislature finds that the application of the business and occupation tax deductions provided in RCW 82.04.4281 for investment income of persons deemed to be "other financial businesses" has been the subject of uncertainty, and therefore, disagreement and litigation between taxpayers and the state. The legislature further finds that the decision of the state supreme court in *Simpson Investment Co. v. Department of Revenue* could lead to a restrictive, narrow interpretation of the deductibility of investment income for business and occupation tax purposes. As a result, the legislature directed the department of revenue to work with affected businesses to develop a revision of the statute that would provide certainty and stability for taxpayers and the state. The legislature intends, by adopting this recommended revision of the statute, to provide a positive environment for capital investment in this state, while continuing to treat similarly situated taxpayers fairly.

LAWS OF 2002, ch. 150, § 1.

Viewed in context, the findings in both 2001 and 2002 primarily related to the meaning of "other financial businesses" in former RCW 82.04.4281. The legislature was reacting to the Supreme Court's holding in *Simpson*. And in fact the provision in former RCW 82.04.4281 precluding "other financial businesses" from claiming the deduction was removed in the 2002 amendments. LAWS OF 2002, ch. 150, § 2.

Conversely, the legislature did not react at all when *O'Leary* was decided in 1986, 15 years earlier. The 2001 and 2002 findings did not mention *O'Leary* and did not address the meaning of the term "investments." And in fact the language of former RCW 82.04.4281 regarding the investment deduction remained the same after other language was deleted:

> (1) In computing tax there may be deducted from the measure of tax:
> (a) Amounts derived ~~by persons, other than those engaging in banking, loan, security, or other financial businesses,~~ from investments ~~or the use of money as such, and also~~.

LAWS OF 2002, ch. 150, § 2.

Finally, the 2002 amendments to RCW 82.04.4281 added definitions of several terms. LAWS OF 2002, ch. 150, § 2. But the legislature did not add a definition of "investment." This suggests that the legislature did not disagree with the *O'Leary* definition.

There is no basis for the LLCs' argument that the legislature's 2001 and 2002 findings and the 2002 amendment of RCW 82.04.4281 somehow superseded the definition of "investment" in *O'Leary*. Therefore, we conclude that *O'Leary* remains good law and establishes that the LLCs are not entitled to a deduction under RCW 82.04.4281(1)(a).

3. Effect of DOR Website Interpretation

The LLCs imply that an excerpt from DOR's website should control over the interpretation of "investments" in *O'Leary*. We disagree.

The LLCs suggest that we adopt DOR's interpretation of investment funds and the application of the investment deduction on its website. DOR asserts that the website excerpt on which the LLCs rely is addressing a completely different issue than the meaning of "investments" under RCW 82.04.4281(1)(a).

However, the LLCs provide no authority for the proposition that DOR guidance on its website somehow controls over the statutory language and a Supreme Court decision interpreting that language. In fact, the cases state the opposite.

In *Bravern Residential, II, LLC v. Department of Revenue*, this court rejected an argument that DOR's construction guidelines could be used to avoid taxes for construction activities. 183 Wn. App. 769, 780, 334 P.3d 1182 (2014). The court emphasized that documents like construction guidelines could not contradict the plain language of any applicable regulation. *Id.*

In *Dynamic Resources, Inc. v. Department of Revenue*, the taxpayer relied on a guide that DOR had published regarding taxes in a certain industry. 21 Wn. App. 2d 814, 823, 508 P.3d 680 (2022). The court stated,

> The Guide, however, is simply that—a guide. . . . Despite inconsistencies between the Guide and RCW 82.04.050(2)(b), the statute controls. [The taxpayer] cannot avoid its tax obligations based on informal tax guidance, and its information does not replace or substitute Washington rules or laws.

Id.

We conclude that the information on DOR's website is immaterial to the resolution of this case.

CONCLUSION

We affirm the trial court's order granting summary judgment in favor of DOR.

MAXA, J.

We concur:

CRUSER, A.C.J.

VELJACIC, J.