

**COURT OF APPEALS,  
DIVISION I  
OF THE STATE OF WASHINGTON**

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**No. 73606-0**

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**UNITED AIRLINES, INC.,**

Appellant,

v.

**WASHINGTON STATE DEPARTMENT OF REVENUE, ET AL,**

Respondents.

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**APPELLANT'S REPLY BRIEF**

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STATE OF WASHINGTON  
COURT OF APPEALS  
DIVISION I

ORIGINAL

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## I. INTRODUCTION

This appeal arises out of the assessment of possessory interest taxes on airport property leased by United Airlines, Inc. (“UAL”) at the SeaTac International Airport. The Washington State Department of Revenue and King County (collectively “DOR”) mischaracterizes UAL’s appeal as a dispute over valuation of these possessory interests. Although an understanding of the methodology employed for valuing possessory interests provides an important context for this matter, the “manifest error” committed by DOR arose out of its use of a methodology which failed to account for the tax-exempt reversionary interest of the Port of Seattle and instead imposed this tax on UAL. A tax assessment which imposes a tax on a taxpayer for tax-exempt property constitutes a “manifest error”. **WAC 458-14-005(14)(h)**.

In their Response Brief, DOR fails to address the impact of the holdings of ***Duwamish Warehouse*** and ***Pier 67***, which are dispositive of the issues on this appeal. ***Pier 67*** required DOR to consider the actual term of UAL’s lease with SeaTac Airport for its airport properties when it assessed UAL’s possessory interest in these properties (versus some hypothetical lease term as used by DOR); and ***Duwamish Warehouse*** required DOR to take into

account the tax-exempt reversionary interest of the Port of Seattle when it assessed the airline-leased airport properties at SeaTac Airport (which the DOR failed to do). DOR makes no effort to address the holding of the ***Duwamish Warehouse*** case – failing to reference or cite to this controlling decision anywhere in its 44-page brief. DOR internal documents further confirm the methodology challenged by UAL, presumed a reversionary interest of “nil”, and taxed UAL as if it owned the Airport Properties in fee simple, which is a manifest error.

UAL presented credible evidence to the trial court in conjunction with the summary judgment proceedings, including expert testimony and admissions and statements in DOR’s own internal documents, which at a very minimum, created a disputed issue of material fact as to whether or not DOR’s methodology used during the relevant timeframe taxed UAL for the Port of Seattle’s exempt reversionary interest. In the context of a party responding to a motion for summary judgment, UAL was entitled to have all facts viewed in its favor and entitled to the benefit of all reasonable inferences. If, based on the evidence offered by UAL, it is even possible DOR’s methodology assessed taxes on any tax-exempt property and imposed this tax on UAL, the trial court erred in granting



DOR's summary judgment motion, this appeal should be granted, and this matter should be remanded for further proceedings.

## II. ARGUMENT

### I. SUMMARY JUDGMENT

#### A. **The standard of review for a summary judgment ruling is *de novo*.**

DOR contends UAL was required to prove DOR erred in its valuation of the airport properties by "clear, cogent and convincing evidence" under RCW 84.40.0301. This standard does not apply to this appeal. UAL's appeal is based on a "manifest error" under RCW 84.69.020, not a valuation determination. The Court need only conclude DOR failed to account for the tax-exempt interest of the Port in its calculations and assessed taxes against UAL for this interest – which is a "manifest error" in assessment under RCW 84.69.020(2) and WAC 458-14-005(14). Regardless of the "correct" value of UAL's possessory interests, if UAL is able to demonstrate DOR's methodology assessed taxes against UAL for any amount of exempt property, this is a manifest error. Although the issue of the value of UAL's possessory interests is relevant to the underlying appeal, the question before the trial court was whether DOR committed a "manifest error" by assessing taxes against UAL for the

value of the Port of Seattle's exempt reversionary interest. Therefore, the clear, cogent and convincing evidentiary standard is inapplicable.

The proper standard of review for this appeal of the summary judgment ruling is *de novo*. See, ***Keates v. City of Vancouver***, 73 Wn. App. 257, 263, 869 P.2d 88 (1994). The Court of Appeals engages in the same inquiry as the trial court in determining whether summary judgment is appropriate. ***Lybbert v. Grant County***, 141 Wn. 2d 29, 34, 1 P.3rd 1124 (2000).

Regardless, even if this Court agreed a more stringent standard applies, UAL has met this standard by offering detailed expert testimony from an MAI certified commercial property appraiser – who confirmed DOR's methodology assessed taxes against UAL for the Port of Seattle's tax-exempt reversionary interest. **CP 228-249**. UAL presented credible testimony demonstrating DOR's methodology used from 2006-2011 failed to account for the tax exempt reversionary interest of the Port of Seattle. As more fully set forth below, DOR did not comply with the requirements of Washington law for valuing a possessory interest, and, to the extent such a proof standard applied, UAL met this burden. This is particularly true in the context of summary judgment

where UAL was the responding party and entitled to all inferences in its favor. UAL met its burden of proof – at least sufficient to create a disputed issue of material fact precluding the entry of summary judgment in favor of DOR.

**B. Under *Pier 67*, DOR was not permitted to ignore the language of UAL’s existing lease agreement, including the term of the lease, when calculating UAL’s possessory interest.**

In *Pier 67 II, Inc. v. King County*, 78 Wash 2d 48, 469 P2d 902 (1970), the Supreme Court of Washington set forth the factors DOR must consider when valuing a leasehold possessory interest. In *Pier 67*, a taxpayer challenged the validity of valuations for a leasehold interest and improvements on state owned land. *Id.*, at 48-49. The Court found that in determining the taxable value of a leasehold interest “the value to be taxed is the value of the right to use the property over the period of the lease.” *Id.*, at 56-57 (*emphasis added*). The Court in *Pier 67* also noted that a leasehold interest: “It cannot be valued without reasonable knowledge of its probable remaining life.” *Id.*, at 58.

Notwithstanding this clear statement of law, it is undisputed DOR changed its practice for valuing possessory interests in 2006, when it began assuming a hypothetical perpetual lease term for airport properties instead of the actual lease term for each respective

taxpayer. After substantial controversy, including claims made by Alaska Airlines and a lawsuit by Southwest Airlines, DOR changed its practice for assessment year 2012 - using the actual term of the lease.

**C. When assessing a possessory interest in public land, *Duwamish Warehouse* required the DOR to account for the tax-exempt reversionary interest of the government owner.**

In *Duwamish Warehouse v. Hoppe*, 102 Wn. 2d 249, 684 P.2d 703 (1984), Duwamish Warehouse appealed the valuation of its leasehold interest on lands owned by the Port of Seattle. The assessor had valued the warehouse at its full market value, without consideration of the Port of Seattle's tax-exempt reversionary interest. The *Duwamish* court noted that where "fee interest is privately owned" the assessor may impose a single tax on the entire estate; but where the fee interest is owned by the government (and therefore tax-exempt), the possessory interest must be taxed separately from the reversionary interest. *Id.*, at 253. The *Duwamish* court noted the statute required the assessor to tax the property at "full and fair value" and where there is "any doubt as to the meaning of a tax statute, it must be construed against the taxing power." *Id.*, at 254 (emphasis added).

Ordinarily, full and fair value means the amount a willing buyer would pay a seller who is willing but not obligated to sell . . . Where private land is leased, the willing buyer is contemplated to be purchasing the entire fee, including leasehold and improvements...In the circumstances of state-owned interests in the land, however, the State's ownership interest cannot be purchased. Thus, a willing buyer would not logically pay a price for the entire fee....

*Id.*, at 254. The ***Duwamish*** court concluded the reversionary interest of the public must be considered in determining the value of a leasehold interest in public property:

To disregard the fact that this building reverts to the Port at the end of the lease term, long before its useful life is up, would be to disregard a factor which plainly would affect the price negotiations between a willing buyer and a willing seller.

*Id.*, at 256 - 257.

UAL's possessory interest is not taxed under RCW 84.40.030 (a leasehold excise tax), but the principles of assessment are identical. **CP 446-455**. DOR's decision to assume the reversionary interest for the Airport Properties to be zero is a legal fiction - contrary to the requirements of Washington law and the holding of ***Duwamish***. Washington requires leasehold possessory interests to be valued over the period of the actual lease (***Pier 67***) and requires DOR to account for the reversionary tax-exempt interest of the government when determining assessable value (***Duwamish***). In

the present case, DOR chose to ignore both of these mandates and used a methodology which assumed a perpetual lease and failed to account for the tax-exempt reversionary interest of the Port – thereby imposing taxes assessed on the Port’s exempt interest against UAL. This was a “manifest error” under RCW 84.69.020(2) and WAC 458-14-005(14).

**D. As the nonmoving party, UAL was entitled to all inferences in its favor and by presenting expert testimony on the ultimate issue it created a disputed issue of material fact which was not subject to resolution on summary judgment.**

In ruling on a motion for summary judgment, the trial Court is required to consider all material evidence and all reasonable inferences therefrom in favor of the nonmoving party; if reasonable persons might reach different conclusions, the motion must be denied. *Millikan v. Board of Directors of Everett Sch. Dist. No. 2*, 93 Wn.2d 522, 531, 611 P.2d 414 (1980); *Fairbanks v. J.B. McLoughlin Co., Inc.*, 131 Wn.2d 96, 102, 929 P.2d 433 (1997). In ruling on DOR’s motion for summary judgment, UAL as the nonmoving party was entitled to all reasonable inferences in its favor.

Furthermore, presented with conflicting expert testimony (e.g., Cook vs. Hunnicutt) on a material issue created a disputed issue of material fact. “In general, an affidavit containing admissible

expert opinion on an ultimate issue of fact is sufficient to create a genuine issue as to that fact, precluding summary judgment.” *J.N. v. Bellingham Sch. Dist. No. 501*, 74 Wn. App. 49, 60-61, 871 P.2d 1106 (1994) (reversing summary judgment where the trial court “discounted the sworn testimony of J.N.’s experts”). See also *Lamon v. McDonnell Douglas Corp.*, 91 Wn.2d 345, 351-53, 588 P.2d 1346 (1979) (reversing summary judgment where the expert affidavit presented by the plaintiff created at least one genuine issue of material fact); *Morton v. McFall*, 128 Wn. App. 245, 254-55, 115 P.3d 1023 (2005) (reversing summary judgment where the declaration of plaintiff’s medical expert contradicted the declaration of defendant’s expert as to the necessity of certain medical tests, thus raising an issue of material fact).

UAL’s expert, David Hunnicutt, an MAI certified commercial real estate appraiser, offered expert opinions, on a more probable than not bases and stated to a reasonable degree of certainty in his profession:

- (1) The methodology used by the DOR to value and assess UAL leasehold possessory interests at SeaTac for 2009, 2010, and 2011, failed to account for the reversionary interest of the Port of Seattle.
- (2) As a result, the calculations relied upon by DOR for value, improperly took into account the value of the tax exempt interest of the Port.

(3) The DOR when assessing taxes for UAL's possessory interests in airport properties, effectively taxed UAL as if it owned the airport properties in fee simple.

(4) UAL was assessed taxes for exempt Port-owned property.

**CP 228-249.**

In stark and direct contrast, Neal Cook, DOR's appraisal expert, offered contradictory opinions in his declaration:

(1) The methodology used by the DOR from 2006 – 2011 “produced an accurate estimate of the value of the property rights transferred to a lessee....”

(2) The methodology used by DOR from 2006 – 2011 to assess possessory interests “did not include the value estimate of the lessor's reversionary interest”.

(3) The methodology used did not value the fee simple interest of the subject property.

**CP 170-200.**

Mr. Cook claims DOR's methodology did not assess taxes on the Port's exempt interest, but Cook and DOR fail to explain how the Port's interest was accounted for or how it was excluded from the assessment. **CP 170-200; CP 29-92; CP 813-821.** In light of the ***J.N.***, ***Lamon*** and ***Morton*** decisions, the contradictory expert opinions presented to the trial court below on the ultimate issue of



fact, created a disputed issue of material fact precluding the entry of summary judgment.

**E. DOR claims the assessment methodology used for assessing possessory interests from 2006-2011 was a two-step process – but it failed to calculate the second step: discounting for the value of the tax-exempt reversionary interest.**

For 2006-2011 DOR contends it engaged in a two-step process to calculate UAL's possessory interest in the SeaTac property. **CP 29-92; CP 170-200.** DOR describes the process as follows:

In the first step of the two-step calculation the value of the beneficial rights transferred to the lessee of the property was computed by capitalizing the net annual lease payments for a single year using a capitalization rate...

In the second step of the calculation, the present value of the government owner's reversionary interest in the beneficial rights was estimated and subtracted to arrive at the estimated market value of the non-government lessee's beneficial rights.

**CP 170-200.** UAL agrees in principle with how DOR calculated the first step. However, DOR never calculated the value of the reversionary interest owned by the tax-exempt Port as required by step two. As a result, Port-owned exempt property was valued and assessed against UAL. **CP 446-573; CP 813-821; CP 228-249.**

DOR contends “where the evidence suggested that the lease would continue to be renewed into the foreseeable future, the government owner’s reversionary interest was considered minimal.” **CP 29-92. Pier 67** does not allow for this speculation. UAL entered into a lease with the Port of Seattle on January 1, 2006 for the use of certain defined airport property (the “Airport Property”). **CP 579-693; CP 574-578**. This was a 6 year lease with no renewal options set to expire on December 21, 2012. *Id.* The fact that airline companies enter into new leases at the conclusion of each lease term does not mean that the airline companies occupy the same property in each consecutive lease. **CP 737-740**.

The lease provides UAL’s right to use portions of the airport may change from time to time. **CP 579-693**. The only property UAL has a right to possess at any given time is expressly stated in the lease in effect at the time. It is absurd for DOR to assume a hypothetical perpetual term to UAL whereby the taxable property is greater than that which is granted under the terms of a lease.

Pursuant to **Pier 67** and **Duwamish**, DOR does not have the legal right to ignore the actual lease and thereby erred in its assumption the taxable lessee’s interest will continue to perpetuity. Moreover, to the extent DOR claimed it somehow accounted for the

port's reversionary interest, but deemed it "nominal", this characterization fails DOR's argument because: (1) this statement is contradicted by admissions in its own internal documents where it acknowledges that the methodology assume the reversionary interest is "nil" (vs. "nominal"); and (2) even if it were legally permissible to assume the reversionary interest is "nominal", there would still be some value which had to be accounted for and backed out of the assessment imposed on UAL. Whether the Port of Seattle's tax-exempt reversionary interest was "nominal" or significant, that value had to be accounted for to ensure DOR was not assessing and imposing possessory use taxes on UAL for tax-exempt property.

**F. UAL's Administrative Refund Claim Complied with the Statutory Requirements Under RCW 84.69.030(1)(a)**

DOR contends the administrative refund claims presented by UAL were not "verified" because they were not signed under oath by a UAL employee. This argument fails for a number of reasons. RCW 84.69.030(1)(a) provides, in full:

Except as provided in this section, no orders for a refund under this chapter may be made except on a claim verified by the person who paid the tax, the person's guardian, executor or administrator.

The term "executor" is not defined in the code. An "executor"

is commonly defined as “[s]omeone who performs or carries out some act.” ***Black’s Law Dictionary*** (10th ed. 2014). Mr. Perkins was acting as UAL agent and authorized representative when he presented UAL’s administrative appeal. **CP 446-573; CP 579-693**. He qualified as an “executor” for UAL. King County did not raise any objection to UAL’s petition, or express any concern, reservation or doubt as to Mr. Perkins’ authority to present the claims on UAL’s behalf. **CP 446-573**.

Nor is the term “verified” defined by statute. DOR wants this court to construe the definition of “verify” narrowly—alleging that it means to swear to the truth or the facts asserted—contrary to what the Legislature intended in RCW 84.69 *et seq.* ***Black’s Law Dictionary*** defines “verify”: “1. To prove to be true; to confirm or establish the truth or truthfulness of; to authenticate. . . .” ***Black’s Law Dictionary*** (10th ed. 2014). If the Legislature intended “verify” to mean oath or swear, it would have, as shown by the statute defining the terms “oath” and “swear”: “‘Oath’ may be held to mean affirmation, and the word ‘swear’ may be held to mean affirm.” **RCW 84.04.070**.

The Legislature chose to not use either the term “oath” or “swear” but instead the term “verify”, meaning something less than a

requirement of signing under oath or under penalty of perjury. The term “verify” should be given its broadest interpretation.

To the extent there is any argument as to what the legislature intended with regards to the term “verify” or “executor”, where there is any doubt as to the meaning of a tax statute, it must be construed against the taxing power. *Duwamish*, at 254; citing *Mac Amusement Co. v. Dept. of Revenue*, 95 Wn. 2d 963, 966, 633 P.2d 68 (1981).

UAL verified the petition through its authorized agent and subsequently, out of an abundance of caution, submitted a supplemental petition signed under oath by an officer of UAL, further ratifying the December 2012 petition. **CP 446-573; CP 579-693**. On December 31, 2012, UAL verified the refund petition for tax years 2009, 2010, and 2011 through its executor who was an authorized agent acting on behalf of UAL, David Perkins. *Id.* Perkins reviewed the underlying data, including UAL’s payment of taxes and the calculations for the amount of tax refunds UAL believed to be due. *Id.* The data was all verified as true and correct by UAL officers in their tax department and Perkins. *Id.*

On April 29, 2014, UAL submitted a supplemental refund petitions for assessed years 2009, 2010 and 2011, relating back to

the initial petitions. **CP 446-573**. These petitions were signed by Bill Gile, Senior Manager of Tax for UAL, and utilized the forms designated by DOR. **CP 579-693**.

Moreover, DOR's own form offered for "manifest error" claims contradicts DOR's current position. In DOR's form, on page 2, there is a section entitled "Statement By Taxpayer":

Statement By Taxpayer		
I hereby state that the contents of the foregoing petition are true and correct to the best of my knowledge and belief, and request that the said tax be refunded in conformity with this petition.		
Date	Signature of Taxpayer or Agent	Title
Address		
City, State, Zip		

**CP 446-573.**

This form allows the "Taxpayer or Agent" to sign the petition. The form does not require the signor "swear", "affirm" or "declare under penalty of perjury" any aspect of the claim. This language does not satisfy the requirements for a declaration. **RCW 9A.72.085**. For DOR to claim "verified" means to *swear to the truth* is inconsistent with its own authorized form. David Perkins, UAL authorized agent acting on behalf of UAL, complied with the statutory requirements of RCW 84.69.030(1)(a).

**G. DOR memos and internal discussions concerning possessory interest valuation are relevant and admissible under ER 401, 402 and 408**

DOR claims that its various internal discussion documents which include various admissions and statements against interest should not have been considered by the trial court or by the appellate court. DOR's arguments fail for a number of reasons.

DOR's reliance on the holding of *Avnet, Inc. v. Dept. of Revenue*, 187 Wn. App 427, 437, n.6, 348 P.3d 1273 (2015) is misplaced. In *Avnet*, the court was reviewing an appeal of a refund request for B&O taxes, and the taxpayer offered DOR documents discussing a proposed amendment to a WAC interpretive rule. DOR cites to a footnote in the opinion, which is mere dicta and of limited precedential value. This note, in its entirety states:

Avnet points to a number of e-mails and internal memoranda, obtained from the Department through discovery, concerning proposed amendments to the rule, which documents Avnet asserts show that the Department itself recognized that WAC Rule 193 as written precludes application of the B & O tax to these transactions. At most, these documents show a concern among certain department staff that parties would rely on the disputed language in WAC Rule 193 to make the argument that Avnet makes here. Because such arguments apparently ran counter to the Department's position, the staff members suggested clarifying the rule to preclude parties from making them. Regardless, Avnet points to no authority suggesting that an agency's internal debates

concerning possible amendments to a rule bear on a court's interpretation of the rule.

*Id.*, at 437, n. 6.

In this footnote the court indicated the internal debate within the agency played no role in the court's ultimate interpretation of the WAC rule at issue. Here, the change in appraisal method implemented by DOR was not a proposed interpretive rule amendment as in *Avnet*, but an evaluation of DOR's own existing methodology and whether they were legally valid. The statements by DOR in its internal documents and affirmed in deposition testimony by its witnesses are statements against interest or, in some cases, admissions, and are admissible. The various memos and other exhibits offered with UAL's briefing below are not offered to interpret DOR's policy *per se*, but to show DOR was aware its methodology effectively assessed possessory interests at full fee simple value – and failed to account for the exempt reversionary interest. These are classic admissions and/or statements against interest which are admissible and properly before the court in the context of a ruling on summary judgment. Moreover, the damning statements contained in DOR's internal documents were ratified and acknowledged by the DOR's own witness, Assistant Director of



Property Tax Division, Kathy Bieth, in her deposition and pertinent portions of her deposition transcript were submitted to the trial court for consideration in the summary judgment hearing. **CP 318-333.**

DOR also argues its internal documents are inadmissible under ER 408. ER 408 in pertinent part states:

This rule does not require exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. . . .

ER 408 (emphasis added).

Here, documents offered by UAL make no reference to an offer of compromise or to any settlement negotiations of any type or nature. Nor is there any evidence the offered documents reflect communications to any third party (Alaska Airlines, Southwest Airlines or other) concerning settlement discussions. ER 408 excludes evidence of a settlement communication to prove liability. The offered documents are not settlement communications and should not be excluded under ER 408. The exhibits offered by UAL include admissions and statements against interest: confirming the DOR was on notice of a problem with its possessory interest appraisal practice. The documents include admissions and statements against interest noting that (1) the methodology used assumed a “perpetual” lease term contrary to Washington law (*Pier*

67); (2) the reversionary interest under the model utilized by DOR was “nil”; (3) the methodology was valuing the airline properties as if the airlines owned the property in fee simple; (4) the methodology was exposing DOR to a “risk of litigation”; (5) the propriety of the methodology used by DOR was a legal question (and not a valuation question); and (6) a tacit acknowledgement that the methodology used by DOR was taxing exempt property.

**H. DOR’s Manifest Error can be corrected by reference to the record and does not require the exercise of appraiser judgment**

There is no appraiser judgment required to correct DOR’s error in this matter. **CP 813-821**. There are only 3 inputs necessary to determine the value of a possessory interest (a) income to be capitalized; (b) time period (i.e., the actual term of the lease or something less or more than the term of the lease); and, (c) rate at which to discount the income over the time period to reflect present value. *Id.* There is no dispute as to the income to be used. *Id.* Both DOR and UAL agree the appropriate income to be discounted is UAL’s net annual lease payment. *Id.* This leaves only two remaining inputs to be discussed: time period and discount rate. *Id.*

DOR’s direct capitalization method can readily be converted to a yield capitalization method without exercising appraiser

judgment, the only remaining material correction is to the remaining term. *Id.* DOR would argue that in addition to the term, the discount rate used in a yield capitalization technique requires appraiser judgement. *Id.* However, the discount rate has only a relatively nominal effect on these calculations compared to the dramatic difference the difference in lease term makes (i.e., a hypothetical 7, indefinite, or per actual lease term). *Id.* (**see Chart 1, 2, and 3**).

## **II. MOTION TO AMEND COMPLAINT**

### **A. DOR admits that UAL's proposed amendments would not have caused it any prejudice.**

The touchstone for ruling on a motion to amend a pleading is the whether such amendment would prejudice the nonmoving party. *Wilson v. Horsley*, 137 Wash. 2d 500, 505, 974 P.2d 316 (1999). Absent prejudice to defendant, the motion should be granted. Here, DOR admitted UAL's proposed Amended Complaint would not result in any prejudice to the DOR. **CP 828**. DOR further admitted the proposed Amended Complaint did not make any new claims, did not add any new parties, and merely added three new allegations of fact. **DOR Response Brief, @ 46**. Absent any prejudice, the trial court should have granted the motion to amend, and abused its discretion when it denied the motion. A trial court

abuses its discretion when “discretion is exercised on untenable grounds or for untenable reasons, considering the purposes of the trial court’s discretion.” **Coggle v. Snow**, 56 Wash.App. 499, 507, 784 P.2d 554 (1990) (citing **State ex rel. Carroll v. Junker**, 79 Wash.2d 12, 26, 482 P.2d 775 (1971)). Without any prejudice to the nonmoving party, it was an error and an abuse of discretion for the trial court to deny UAL’s motion under CR 15.

**B. The April 2014 petition for refund was a ratification of the prior December 2012 petition and the proposed Amended Complaint relates back to UAL’s initial Complaint.**

UAL’s proposed Amended Complaint referenced the April 2014 petition which, by its express terms, related back to the 2012 petition for refund. **CP 446-573**. The “new” proposed factual allegations confirmed that UAL had previously ratified its prior petitions – to the extent the DOR’s defense was premised on a claim UAL’s December 2012 petitions had not been properly “verified” by a UAL employee.

CR 15(c) provides amended pleadings arising out of the same “conduct, transaction or occurrence” relate back to the filing of the original complaint. CR 15(c). Here, it is the same conduct, transaction and occurrence at issue: DOR’s methodology for

assessing UAL's possessory interests of airport property for tax years 2009, 2010 and 2011 and the DOR's denial of the requested refund. **CP 446-573.**

Relation back of amendments is proper as long as the cause of action arose out of the same "conduct, transaction or occurrence" and defendant receives adequate notice of the amendment. See ***Olson v. Roberts & Schaeffer Co.***, 25 Wash.App. 225, 227, 607 P.2d 319 (1980). Interpreting CR 15(c) and the relation back doctrine, Washington Courts have affirmed the rule

is to be liberally construed on the side of allowance of relation back of the amendment where the opposing party will be put to no disadvantage. Modern rules of procedure are intended to allow the court to reach the merits, as opposed to disposition on technical niceties.

***Lind v. Frick***, 15 Wash. App. 614, 550 P.2d 709 (Div. 3 1976)(citations omitted).

Applying this liberal standard, and the complete lack of prejudice to DOR, UAL's motion should have been granted.

**C. UAL's proposed amended complaint merely confirmed UAL's ratification of the December 2012 petition.**

UAL's motion to allow the filing of an Amended Complaint, was filed to ensure the pleadings reflected the evidence already before the trial court. The "revised" petitions submitted by UAL in

April 2014, requested the same relief as requested by the December 2012 petitions, and merely confirmed UAL officers had ratified the prior petitions. Under agency law:

[r]atification is the affirmance by a person of a prior act which did not bind him but which was done or professedly done on his account, whereby the act, as to some or all persons, is given effect as if originally authorized by him.

***National Bank of Commerce v. Thomsen***, 80 Wash.2d 406, 413, 495 P.2d 332 (1972) (citing Restatement (Second) of Agency §82 (1958)); ***Riss v. Angel***, 131 Wn. 2d 612, 934 P.2d 669 (1997). Here, as confirmed by sworn declarations submitted by UAL officers, UAL ratified the petition submitted by Mr. Perkins in 2012, and again ratified the same allegations in 2014, when Mr. Perkins submitted “revised” petitions, which expressly related back to the 2012 petitions. **CP 446-573; CP 579-693; CP 574-578**. Such ratification, which UAL disputes was even necessary, relates back to the initial act – the presentation of the December 2012 petitions. As such, although the proposed Amended Complaint did not raise any new legal claims, as a “housekeeping” measure it was appropriate to allow UAL to file an Amended Complaint identifying these subsequent acts of ratification.

## II. CONCLUSION

DOR was required to consider the actual lease term under *Pier 67*, and was required to account for the tax exempt reversionary interest of the Port of Seattle under *Duwamish*. It did neither. DOR witnesses and own internal documents admit that the tax exempt reversionary interest of the Port of Seattle, was treated as “nil” under the model DOR utilized from 2006 – 2011. If the reversionary interest is zero, DOR was taxing the full fee interest of the properties – including the exempt reversionary interest – when it assessed and taxed UAL’s Airline Properties in 2009, 2010 and 2011. This is a “manifest error” under Washington law.

At a bare minimum, in the face of expert testimony from UAL and the various admissions and statements against interest by DOR representatives, there were disputed issues of material fact which precluded the entry of summary judgment in favor of DOR.

Furthermore, absent prejudice to DOR and in recognition that UAL’s proposed Amended Complaint merely conformed to the evidence and confirmed UAL’s ratification of its initial petition for refund, the trial Court erred when it failed to grant UAL’s request to file an Amended Complaint under CR 15.

The trial Court's decision should be reversed and this matter remanded for further proceedings.

Respectfully submitted this 12 day of February, 2016.

**PIVOTAL LAW GROUP, RLLC**

A handwritten signature in black ink, appearing to read "Christopher L. Thayer", written over a horizontal line.

Christopher L. Thayer, WSBA #23609  
Attorneys for Appellant



**CERTIFICATE OF SERVICE**

The undersigned certifies under penalty of perjury under the laws of the State of Washington, that on the below date, delivered a true copy of this document to counsel of record for the Respondent, via regular mail.

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Dated this 12<sup>th</sup> day of February 2016, at Seattle, Washington.



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