100497-4

No. 1~~00437-1~~

SUPREME COURT
OF THE STATE OF WASHINGTON

Lakeside Industries, Inc.

Petitioner,

v.

Washington State Department of Revenue

Respondent.

ON PETITION FOR REVIEW FROM
COURT OF APPEALS, DIVISION I

LAKESIDE INDUSTRIES, INC.'S PETITION FOR REVIEW

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I. INTRODUCTION

The Court of Appeals' decision erroneously creates an entire class of agency action for which there is no judicial review. This result is contrary to both the statutory framework and the case law governing review of Department of Revenue actions. This Court should grant review under RAP 13.4(b)(1),(2), and (4) to correct these conflicts and ensure that the Department's actions cannot escape judicial scrutiny.

Lakeside Industries, Inc. invoked the superior court's appellate jurisdiction under the Administrative Procedure Act ("APA") to challenge the validity of written instructions issued by the Department of Revenue. The instructions, which did not assess any tax, order Lakeside to calculate the value of its manufacturing products in a manner that is contrary to the applicable authority and not based on any supported facts. Lakeside undisputedly satisfied all the requirements of the Administrative Procedure Act to obtain judicial review, including challenging final "agency action" and timely filing a

petition in the county of its place of business. Yet Lakeside has been denied the ability to obtain relief from the Department of Revenue's wrongful actions.

The Court of Appeals correctly reversed the superior court's conclusion that it lacked subject matter jurisdiction over this matter. The Court of Appeals nevertheless dismissed Lakeside's petition for judicial review for failure to state a claim under the assumption that Lakeside could obtain relief by paying a tax and seeking review under the statutory procedures in Title RCW 82.32 for contesting a tax assessment or seeking a tax refund. But there is no avenue of relief available to Lakeside to challenge the Department's written instructions except under the Administrative Procedure Act. The instructions do not assess or order Lakeside to pay any tax, and Lakeside is not contesting a tax or seeking a refund of any tax. There simply is no tax to first pay in order for Lakeside to invoke the de novo procedures set forth in RCW 82.03.180 or RCW 82.32.180.

The Court of Appeals' decision denying Lakeside review

conflicts with authority from this Court and other Courts of Appeal that recognize that the procedures in Title 82 RCW do not provide the exclusive means for reviewing all tax-related matters. Instead, RCW 82.03.180 and RCW 82.32.180 are limited to their express meaning, and when they are silent other statutory mechanisms for court review—including the judicial review procedures under the APA—can apply. If allowed to stand, the Court of Appeals' decision would mean that no one could challenge Department of Revenue action unless a tax can first be paid. That is not and cannot be the law.

II. IDENTITY OF PETITIONER AND COURT OF APPEALS DECISION BELOW

Lakeside Industries, Inc. seeks review of the Court of Appeals' published decision, *Lakeside Industries, Inc. v. Department of Revenue*, No. 81502-4-I, __Wn.App.2d__, 495 P.3d 257 (Sept. 13, 2021), *reconsideration denied* (Nov. 18, 2021). A copy is attached.

III. ISSUE PRESENTED FOR REVIEW

The issue presented for review would be:

1. May a taxpayer obtain judicial review under the Administrative Procedure Act, RCW 34.05, of mandatory reporting instructions issued by the Department of Revenue when the instructions do not impose any tax, the taxpayer does not seek to enjoin the Department from collecting any tax, and the taxpayer does not seek the refund of any tax?

IV. STATEMENT OF THE CASE

A. The History of Lakeside's Use of Actual Costs to Value its Products Used in Public Road Construction Projects.

Lakeside is an asphalt manufacturer, retailer, and paving company. Clerk's Papers ("CP") 26 (AR 79).[1] It uses a significant portion of the asphalt it manufactures in public road construction activities. AR 79. Taxpayers engaged in public road construction must report and pay use tax on the value of material used in the project that they self-manufacture. *See* RCW

[1] The Administrative Record is located beginning at CP 26 ("Email/s") and consists of 126 pages marked ADMIN followed by a six-digit number. Lakeside cites to the administrative record as "AR" and the corresponding page number. References to the Clerk's Papers will be cited as "CP".

82.12.010(7)(b); RCW 82.04.450; WAC 458-20-171.

RCW 82.04.450 provides in relevant part that, when a manufacturer's products are manufactured for commercial or industry use, the value of the products

> shall correspond *as nearly as possible* to the gross proceeds from sales in this state *of similar products of like quality and character*, and *in similar quantities* by other taxpayers, plus the amount of subsidies or bonuses ordinarily payable by the purchaser or by any third person with respect to the extraction, manufacture, or sale of such products.

RCW 82.04.450(1)(a), (2) (emphasis added). Comparably, for certain public construction projects, the value of the manufactured product is determined (1) first by the retail selling price of the article; (2) or, in the absence of selling price, "as nearly as possible to the retail selling price at place of use of similar products of like quality and character;" (3) or, "*in the absence of either"* the value *"may be determined upon a cost basis."* RCW 82.12.010(7)(b) (emphasis added). WAC 458-20-112 ("Rule 112") likewise provides that the value of products is based on "sales at comparable locations in this state of similar

products of like quality and character, in similar quantities, under comparable conditions of sale, to comparable purchasers." "In the absence of sales of similar products," a taxpayer may determine the value based on the cost of the product. Rule 112(3).

Lakeside manufactures many types of asphalt products that are tailored to specific projects for use in different locations. AR 3. Pricing for a particular asphalt product on a specific public road construction job may depend on the time and quantity, cost of materials to create the asphalt, the availability of skilled labor, and the schedules for jobs in the current backlog. AR 3, 18, 24-39. Also, different road projects require different asphalt product specifications and design mixtures. AR 19. For example, a short arterial road in Longview will have a different product specification and design mixture than a stretch of 1-90 in Snoqualmie Pass. *Id*. Because of these and other factors, the Department previously accepted Lakeside's use of the cost method to value the asphalt Lakeside uses in its public road

construction business. *See* AR 3, 97, 106.

B. The Department Orders Lakeside to Value its Products Based on Comparable Sales.

In June 2018, the Department's Audit Division performed a partial audit of Lakeside's vehicle sales for the tax period January 1, 2014 to March 31, 2018. AR 85-90. The partial audit resulted in no tax adjustment or assessment of additional taxes due by Lakeside with respect to its motor vehicle sales or any other activity. *See* AR 86 ("Tax Adjustment…$0.00"); AR 87 ("Reconciliation of Vehicle Sales—No Tax Due"); AR 88 ("No adjustments have been made for the period audited."). The Department, however, used the audit letter as a means to issue "specific written instructions" ordering Lakeside to prepare the value of its asphalt products "based on a 'comparable sales' value, and not on a cost basis." AR 125-26. The instructions were issued even though the Department never reviewed Lakeside's public road construction sales records. AR 79.

Lakeside petitioned the Department to withdraw the future reporting instructions and for an adjudication under RCW

34.05.413 and WAC 458-20-100. AR 78-83. Lakeside objected to the Department's use of the vehicle sales audit as a means of issuing reporting instructions on Lakeside's public road construction activities. AR 80-81. Lakeside also asserted that the Department's reporting instructions were not consistent with RCW 82.12.010 and WAC 458-20-112, and arbitrary and capricious because they were not based on Lakeside's actual records and Lakeside had no comparable sales by which it could adhere to the Department's reporting instructions. AR 81-83.

The Audit Division admitted that, "[a]s part of the preparation for the field work for the current audit," it had reviewed a 10-year old audit from Lakeside's predecessor and interviewed the former auditor to determine how Lakeside had been reporting public road construction jobs. AR 93. The Audit Division also indicated it reviewed several of Lakeside's Public Works Contract reconciliations to justify the reporting instructions. *Id.* However, the reconciliations provide only a general breakdown of the job revenue and computation of the

applicable taxes for public works projects. *See* AR 99-101. They do not show sales of asphalt products, nor do they include specific descriptions of the projects, products used, quantities, or conditions of sale. *See id.*

On November 21, 2018, a Department Tax Review Officer held a hearing on Lakeside's protest of the future reporting instructions. *See* AR 43. Nearly ten months later, on August 28, 2019, the Tax Review Officer upheld the instructions with some modification. AR 44. The Determination concluded that reconciliation tax reports for two different road construction projects showed that comparable sales were available. *Id*.

Lakeside sought reconsideration. AR 16-23. It pointed out that the two road construction projects relied on by the Department were paving projects that did not involve sales of asphalt and were not comparable paving projects based on several factors. AR 19-21. Lakeside also objected to the modified reporting instructions as impracticable because the Department made assumptions about how Lakeside could comply without

reviewing Lakeside's sales records. AR 21-22. And, there were, in fact, no comparable sales that Lakeside could use to comply with the Department's instructions. *Id*.

Two months later, the Tax Review Officer issued its reconsideration decision. AR 57-63. The Department agreed that the two road construction projects on which it had based the original determination were not actually comparable sales, AR 61, but nevertheless asserted that Lakeside could find comparable sales somewhere. *See* AR 61-62. The Department again modified Lakeside's future tax reporting instructions:

> ***Starting with the period beginning January 1, 2020, Taxpayer must report the value of its manufactured asphalt and other products that are incorporated into its public road construction projects using the comparable sales method pursuant to RCW 82.04.450 and WAC 458-20-112.***
>
> . . . .
>
> ***The reporting instructions in this Determination shall remain binding until*** … the department notifies the taxpayer in writing that these instructions are no longer valid. ***Any change in these instructions will have prospective application only. These instructions constitute "specific written instructions" within the meaning***

> ***of RCW 82.32.090. Failure to follow these instructions will subject the taxpayer to the additional ten percent penalty mandated by that section. This decision constitutes the final action of the Department of Revenue.***

AR 62-63. (Emphases added).

C. The Lower Courts Deny Lakeside the Opportunity to Contest the Department's Mandatory Written Instructions.

Lakeside timely filed a Petition for Judicial Review under the Administrative Procedure Act in King County Superior Court of the Department's final decision. CP 1-8. Shortly thereafter, the Department of Revenue moved to dismiss under Civil Rules 12(b)(1), (3), and (6), asserting that Lakeside had no "legitimate basis" for seeking judicial review of the Department's reporting instructions. CP 12-20. Specifically, the Department asserted that statutes requiring a taxpayer contesting a tax assessment or collection of a tax to first prepay the tax preclude Lakeside from challenging the Department's reporting instructions under the APA. CP 15-16. The Department also contended that the statutes require tax refund actions to be filed in Thurston County Superior

Court. *Id*.

Concurring with the Department, the King County Superior Court dismissed Lakeside's Petition for Judicial Review with prejudice under CR 12(b)(1), (6). CP 199-203. Lakeside appealed. CP 204-05. The Court of Appeals agreed that the superior court erred in dismissing Lakeside's petition for lack of subjection matter jurisdiction. *Lakeside Indus. Inc.*, 495 P.3d at 260-61. It, however, affirmed dismissal because "Lakeside petitioned under the APA rather" than under RCW 82.03.180 or RCW 82.32.180, and had not first paid any tax. *Id.* Lakeside asked the Court to reconsider, which the Court of Appeals denied on November 18, 2021. Lakeside now seeks review from this Court so that it and others can seek relief from the courts when the Department of Revenue oversteps its authority in matters where no de novo review is available under RCW 82.03.180 or RCW 82.32.180.

V. REASONS WHY REVIEW SHOULD BE GRANTED

The Court of Appeals adopted the Department of

Revenue's overly restrictive view that all matters tangentially related to tax must be funneled solely through the appeal process for tax assessments or obtaining a refund of a tax, even when there is no tax assessment or tax refund at issue. In doing so, the Court of Appeals ignored the plain text of multiple statutory provisions in both the APA and Title 82 RCW, as well as how this Court and other courts have analyzed the interplay amongst these laws. Because the Court of Appeals' decision creates a conflict in the law and deprives access to the courts for those seeking to challenge Department of Revenue actions unrelated to tax assessments or tax refunds, Lakeside asks this Court to accept review.

A. The Court of Appeals' Decision Conflicts With the Statutory Scheme in Both the APA and Title 82 RCW

The Court of Appeals concluded that the procedures in Title 82 RCW allow for de novo review of the Department's written instructions, and thus judicial review under the APA was foreclosed to Lakeside. *See Lakeside*, 495 P.3d at 262. Neither the text of the relevant statutes—specifically RCW 34.05.510(3),

RCW 82.03.180, and RCW 82.32.180—nor the case law analyzing those statutes support the Court of Appeals' conclusion. Only the APA provides for judicial review of the Department of Revenue's written instructions.

1. The APA Gives Way Only to Another Expressly Applicable Means of Court Review.

RCW 34.05.510 provides that the APA establishes the "exclusive means of judicial review of agency action, except . . . to the extent that de novo review . . . of agency action is expressly authorized by provision of law." RCW 34.05.510(3). While this Court has not had an opportunity to address this provision, the Courts of Appeals have held that the plain meaning of the text is that the Legislature had to have expressly authorized de novo review of the exact same action in another statute for the exception to apply. *See Wells Fargo N.A. v. Dep't of Revenue*, 166 Wn. App. 342, 353-54, 271 P.3d 268 (2012) (adopting the Department's argument that no statute in RCW 82.32 expressly authorized de novo review of Department closing agreements, therefore the APA governed review of the agreement);

Washington Citizen Action v. Office of Ins. Comm'r, 94 Wn. App. 64, 72, 971 P.2d 527 (1999) (finding no statute authorized de novo review of an Insurance Commissioner's decision related to disclosure of certain documents, therefore the APA governed the decision); *but see Booker Auction Co. v. Dep't of Revenue*, 158 Wn. App. 84, 89, 241 P.3d 439 (2010) (extending the de novo exception in RCW 34.05.510 to Department reporting instructions under RCW 82.32.180; discussed further *infra*). This plain meaning construction requiring express authorization is consistent with the explicit language used in RCW 34.05.510(3), as well as the Legislature's intent that the APA would generally govern challenges to most agency actions. *See* RCW 34.05.510; *Hillis v. Dep't of Ecology*, 131 Wn.2d 373, 381, 932 P.2d 139 (1997) (recognizing "limited exceptions" to APA exclusivity); *accord Wells Fargo*, 166 Wn. App. at 358.

The Court of Appeals stated that "the APA's general provisions cannot overcome Title 82 RCW specific ones." *Lakeside*, 495 P.3d at 263 (citing *Booker*, 158 Wn. App. at 90).

But the Court of Appeals did not analyze whether any statute expressly authorized court review of the written instructions at issue in Lakeside's petition; rather the Court of Appeals merely assumed that the statutory procedures in RCW 82.03.180 and RCW 82.32.180 could apply. *See id.* Neither statute, however, expressly authorizes de novo court review of written reporting instructions issued by the Department, or even apply to Lakeside's circumstances. The statutes simply do not take priority over the procedures set forth in the APA.

2. No Statute in Title 82 RCW Provides for Review of Department Written Instructions.

The Court of Appeals first pointed to the availability of Lakeside obtaining de novo review of the Department of Revenue's written instructions through the Board of Tax Appeals under RCW 82.03.180. *Lakeside*, 495 P.3d at 261, 263. It is incontrovertible that the Board of Tax Appeals does not have jurisdiction to review the Department's written instructions issued under RCW 82.32.090. *See* RCW 82.03.130 (setting Board jurisdiction over certain appeals, which do not include

determinations addressing written instructions issued under RCW 82.32.090); *see, also*, *Four Winds International Corp. v. Dep't of Revenue*, BTA Dkt. 50315, 1998 WL 1165612 at *2 (1998) (holding that Board of Tax Appeals does not have jurisdiction to review written instructions issued by the Department).[2] Thus, the procedural appeal path for de novo review under RCW 82.03.180 is thus statutorily unavailable to challenge the Department's action in issuing the written instructions.

The Court of Appeals next pointed to RCW 82.32.180. *Lakeside Indust., Inc.*, 495 P.3d at 262. But that statute also does not authorize de novo court review of reporting instructions issued by the Department. It authorizes de novo review when a taxpayer who has "paid any tax as required and feeling aggrieved by the amount of the tax" appeals to the superior court to

[2] The Department agreed below. *See* Dep't COA Response Br. at 11 n. 1 ("The Board's jurisdiction does not extend to reviewing determinations addressing solely future reporting instructions.").

"recover the amount paid." RCW 82.32.180. It also authorizes de novo review when a taxpayer has applied for a refund of paid taxes and been denied by the Department. *Id.* In other words, the statute authorizes a mechanism only for obtaining a tax refund. *See Washington Bankers Assoc. v. State of Washington*, __Wn.2d__, 495 P.3d 808, 827 (2021) ("RCW 82.32.180 provides the procedure for taxpayers seeking a tax refund."). Nothing in the plain text of the statute authorizes de novo review of Department reporting instructions.

B. The Court of Appeal's Analysis Conflicts with this Court's Analysis in *Washington Bankers Association.*

The Court of Appeals determined that Lakeside's petition was ultimately a challenge to its tax liability that must be brought under Title 82 RCW. *Lakeside*, 495 P.3d at 263. Relying on the *Booker* decision, the Court of Appeals erroneously assumed that "payment of the use tax [by Lakeside] is imminent," such that Lakeside could ultimately file a refund action under RCW 82.32.180 as a means to challenge the Department's reporting

instructions. *Id.*[3] But the analysis in *Booker* is not consistent with the plain meaning of RCW 82.32.180. The Court of Appeals was wrong to give that decision any weight and preclude Lakeside from seeking review under the APA based only on a hypothetical, which may never come to pass.

Booker involved review of future reporting instructions issued as part of an audit. The Department determined that Booker Auction had improperly claimed a tax exemption and thus should have paid additional taxes. *Booker*, 158 Wn. App. at 86-87. Rather than assessing the company, the Department issued prospective reporting instructions telling the company that it must collect sales tax in the future. *Id*. at 87. When the company sought review under the APA, the Court of Appeals concluded that review of the Department's reporting instructions

[3] The Court of Appeals cited no factual basis to support its presumption that Lakeside would be required to pay additional use tax in the near future or that Lakeside's objective is to challenge the amount of taxes it owes. *See id.* The reason is because there is none.

under the APA was barred by the provisions in RCW 82.32.150 and .180. *Booker*, 158 Wn. App. at 88-89.

Like the Court of Appeals did here, the *Booker* court did not address the distinction between a challenge to an assessment of taxes governed by RCW 82.32.150 and .180, and a challenge to written reporting instructions issued under RCW 82.32.090. *See* RCW 82.32.150 ("All taxes, penalties, and interest shall be paid in full *before any action* may be instituted in any court *to contest all or any part of such taxes, penalties, or interest*"); RCW 82.32.180 ("Any person . . . having paid *any tax as required* and feeling *aggrieved by the amount of the tax* may appeal to the superior court of Thurston county . . . for a refund"); RCW 82.32.090 ("specific written instructions as to reporting *or* tax liabilities") (emphases added to all). The *Booker* court only summarily stated that "because RCW 82.32.180 provides de novo review," the judicial review procedures under the APA did not apply to the reporting instructions even though they did not impose any tax liability. *See Booker*, 158 Wn. App. at 89 (citing

RCW 34.05.510(3)).

The *Booker Auction* court also did not explain how RCW 82.32.180 could be construed to expressly authorize de novo review of written reporting instructions as is required to trigger the exception in RCW 34.05.510(3). *See id.* Instead, like the Court of Appeals below, the *Booker* court only assumed that the provisions in RCW 82.32.180 could hypothetically apply. But both Courts of Appeals' hypothetical extension of RCW 82.32.180's potential future applicability to preclude access to the courts is not consistent with how this Court recently analyzed the statute in the *Washington Bankers Association* case. Unlike the lower courts, this Court held that RCW 82.32.180 does not exclude other statutory mechanisms for challenging tax-related matters when no refund is actually being sought. *Washington Bankers Assoc.*, 495 P.3d at 827-28.

In *Washington Bankers Association*, the State of Washington and Department of Revenue had asserted that challengers to a tax statute lacked standing under the Uniform

Declaratory Judgment Act because their associational members were required to bring a refund action under RCW 82.32.180. *See id.* at 827 ("According to the State, when the legislature enacted RCW 82.32.180, it set out the exclusive process for challenging excise taxes."). This Court rejected the State's argument, finding that RCW 82.32.180 was silent as to the circumstances presented in that case. *Id.* at 827-28.[4] The Court concluded that "RCW 82.32.180 does not require Association members to utilize its process to the exclusion of the UDJA." *Id.*

Same too here. RCW 82.32.180 applies only to actions brought by taxpayers for refunds of taxes paid. It is silent as to the procedures when a party seeks to challenge only Department of Revenue mandatory written instructions and does not seek a refund of a tax. RCW 82.32.180. Just as in the *Washington*

[4] The plaintiff Associations had not paid any tax before bringing the lawsuit and it appears that only some banks had paid the additional tax at issue by the time the opinion was rendered. *See Wash. Bankers Assoc.*, 495 P.3d at 813, 828. None were seeking a refund of the tax in that particular action. *Id.* 827-28. They were challenging the constitutionality of the statute. *Id.*

Bankers Association case, the de novo procedure in RCW 82.32.180 for tax refunds does not preclude Lakeside or others from seeking relief under the APA for other Department actions. Instead, under RCW 34.05.510, the APA provides the exclusive means for such judicial review.

C. The Courts of Appeals' Decision Conflicts with Other Appellate Court Decisions.

The Court of Appeals' denial of Lakeside's petition for judicial review is also in conflict with the holdings of two other appellate decisions: *AOL, LLC vs. Dep't of Revenue*, 149 Wn. App. 533, 205 P.3d 159 (2009) and *Wells Fargo*, 166 Wn. App. at 353. The Court of Appeals tried to distinguish these cases based on its erroneous premise that the provisions in Title 82 RCW require payment of a tax before initiating any appeal of the Department's actions. *Lakeside Indus.*, 495 P.3d at 262, n. 6. But a close analysis shows the decisions were on point.

In *AOL*, the Court of Appeals concluded that the "taxes" referred to in RCW 82.32.150 are the "taxes, penalties, and interest" assessed by the Department for a specific tax period.

See AOL, 149 Wn. App. at 546 (AOL required to pay entire 4-year assessment before contesting any tax amounts covered by the assessment). The Court of Appeals in *AOL* also noted that "the legislature frequently uses the term 'assessment' in conjunction with 'taxes, penalties, or interest' or variations of that phrase." *Id*. at 548 n. 18. It went on to state that in Chapter 82.32 RCW "the legislature uses the term 'assessment' interchangeably with the phrase 'such tax, penalties, and interest'." *Id*. at 549 n. 20. The Court of Appeals' interpretation of the phrase "taxes penalties, and interest" in *AOL* is consistent with the language in RCW 82.32.150, which shows the Legislature intended to prohibit taxpayers from contesting the *assessment* of taxes without first paying the tax. It does not prohibit any dispute tangentially related to excise taxes.

In *Wells Fargo*, the taxpayer filed a declaratory judgment action against the Department claiming that the Department owed refund interest on the settlement amount agreed to in a closing agreement. *Wells Fargo*, 166 Wn. App. at 349. The

Department moved to dismiss the action on the grounds that its refusal to pay interest under the closing agreement was an "other agency action" that was only reviewable under the APA and that Wells Fargo's challenge to that action was untimely under the APA. *Id*. The Court of Appeals agreed that the Department's actions related to the closing agreement was the "implementation of the Department's regulatory authority under RCW 82.32.350" and therefore qualified as an "agency action." *Wells Fargo*, 166 Wn. App. at 352. It went on to hold that no statute in RCW 82.32 expressly authorizes the de novo review of closing agreements and, therefore, Wells Fargo's action did not fall within the exceptions in RCW 34.05.510 governing de novo actions. *Id*. at 353-54.

The Court of Appeals in *Wells Fargo* recognized that the Department engages in actions that do not involve the assessment or refund of taxes under its general regulatory authority. *See Wells Fargo*, 166 Wn. App. at 352. Likewise, the reporting instructions at issue here fall under the Department's regulatory

authority. *See* RCW 82.32A.020 (providing taxpayers the right to rely on specific written instructions); RCW 82.32.090 (setting forth when and how the Department may issue specific written instructions). Moreover, just like the closing agreement in *Wells Fargo*, the Department's reporting instructions are not covered by any de novo review action in Title 82 RCW. *See* 166 Wn. App. at 353. Just as in *Wells Fargo*, the Department's action requiring Lakeside to follow specific written instructions when valuing its manufacturing products is an "agency action" reviewable exclusively under the APA. The Court of Appeals was wrong to conclude otherwise.

D. This Court Should Grant Review to Ensure Department Action Does Not Go Unchecked.

The Legislature determined that agency action should be reviewable by the courts, either under the APA or by another statute expressly authorizing de novo review. RCW 34.05.510. The Court of Appeal's decision leaves Lakeside no avenue for review of the Department's written instructions under the APA. Nor does Lakeside have an avenue for review under RCW

82.32.180 because it does not have comparable sales on which it can calculate whether it owes any additional use tax and then, if so, sue for a refund—for the sole purpose of seeking relief from the Department's invalid written instructions regarding the valuation method of its products.

The Court of Appeals' decision, however, does not just apply to Lakeside. The decision eliminates judicial review for anyone challenging written instructions that are not part of an assessment or refund of taxes. It thus creates an entire class of agency action taken by the Department that can escape judicial scrutiny, no matter how arbitrary or legally incorrect. The agency should not have such autonomy.

Lack of judicial review of an entire class of agency action is an issue of substantial public interest as the Court of Appeal's foreclosure of judicial review harms not only Lakeside, but anyone facing similar circumstances. This Court should grant review to protect the public's interest and ensure that the agency's exercise of regulatory authority does not escape judicial

review.

VI. CONCLUSION

By rejecting Lakeside's petition for review under the APA, the Court of Appeals ultimately denied access to the courts and prevented any review of the Department of Revenue's written instructions. Its decision is in conflict with the relevant statutes and case law. For these reasons, Lakeside respectfully asks this Court to grant review and reverse the Court of Appeals.

Respectfully submitted December 20, 2021,

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CERTIFICATE OF COMPLIANCE

I certify that this memorandum contains 4,722 words in compliance with RAP 18.17.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on December 20, 2021, I caused the foregoing Petition for Review to be filed with the Supreme Court of the State of Washington, and caused a true and correct copy of same to be served upon the following parties as indicated below:

Andrew Krawczyk Heidi A. Irvin 7141 Cleanwater Drive SW P.O. Box 40123 Olympia, WA 98504-0123 andrew.krawczyk@atg.wa.gov Heidi.Irvin@atg.wa.gov REVOlyEF@atg.wa.gov Julie.Johnson@atg.wa.gov *Attorney for Respondent, State of Washington, Department of Revenue*	☑ by Appellate Web Portal ☐ by Electronic Mail ☐ by Facsimile Transmission ☐ by First Class Mail ☐ by Hand Delivery ☐ by Overnight Delivery

DATED this 20th day of December, 2021, at Seattle, Washington.

s/Angela Craig
Angela Craig, Legal Assistant

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

LAKESIDE INDUSTRIES, INC.,	)	No. 81502-4-I
	)	
Appellant,	)	DIVISION ONE
	)	
v.	)	
	)	
WASHINGTON STATE DEPARTMENT OF REVENUE,	)	PUBLISHED OPINION
	)	
	)	
Respondent.	)	

BOWMAN, J. — Lakeside Industries Inc. is an asphalt manufacturer and retailer that uses much of its product for its own public road construction activities. Lakeside appealed the Department of Revenue's (DOR's) specific written instructions that Lakeside must utilize comparable sales instead of a "cost basis" method to calculate the amount of asphalt use-tax owed. DOR upheld the written instructions, and Lakeside petitioned for judicial review under the Administrative Procedure Act (APA), chapter 34.05 RCW, in King County Superior Court. The court dismissed the petition for lack of subject matter jurisdiction and failure to state a claim upon which the court can grant relief because Lakeside sought relief under the APA instead of Title 82 RCW, and did not follow the statutory requirements to appeal a tax matter. We conclude the trial court erred by dismissing Lakeside's petition for lack of subject matter jurisdiction, but affirm the dismissal for failure to state a claim.

FACTS

Lakeside is an asphalt manufacturer, retailer, and paver. It uses much of its asphalt on its own public road construction projects. Lakeside must pay a "use tax" on the value of the self-manufactured asphalt utilized in their projects. RCW 82.12.010(7)(b); WAC 458-20-171. To calculate the use tax, the value of the asphalt is based on "sales at comparable locations in [Washington] [S]tate of similar products of like quality and character, in similar quantities, under comparable conditions of sale, to comparable purchasers." WAC 458-20-112(3). If no comparable sales exist, Lakeside may use the cost of manufacturing the asphalt to determine its value. WAC 458-20-112(3).

According to Lakeside, very few comparable sales exist because of the hundreds of different types of asphalt they manufacture, and because sales are influenced by job specification, location, conditions, and market forces. As a result, Lakeside has historically relied on the "cost basis" method to calculate its use tax, and DOR has accepted its valuation.

In June 2018, DOR performed a partial audit of Lakeside's vehicle sales for January 1, 2014 to March 31, 2018. The partial audit led to no tax adjustment or assessment of additional taxes for vehicle sales. But along with the audit results, DOR issued "specific written instructions,"[1] directing Lakeside to use comparable sales to calculate the value of its self-manufactured asphalt used in future public construction projects. The instructions informed Lakeside it could no longer calculate value on a cost basis.

[1] If a taxpayer disregards "specific written instructions as to reporting or tax liabilities," DOR "must" assess a penalty of 10 percent of the amount of tax owed. RCW 82.32.090(5).

Lakeside petitioned DOR for "an adjudication and the withdrawal" of the instructions, seeking both formal review under the APA and informal administrative review under WAC 458-20-100. Lakeside argued that DOR could not issue specific written instructions as part of an unrelated audit and that the instructions were arbitrary and capricious because they were not based on Lakeside's "actual records," which showed no comparable sales for asphalt.

DOR conducted an informal administrative review, the only type available for rulings on future tax liability. See WAC 458-20-100(1)(a). A tax review officer from DOR's Administrative Review and Hearings Division held a hearing on Lakeside's petition and issued Determination No. 19-0219 (Wash. Dep't of Revenue, Admin. Review & Hr'gs Div., Aug. 28, 2019) (unpublished). The determination upheld the written instruction with modifications. It also authorized Lakeside to seek a "Letter Ruling" from DOR approving a return to the cost-basis method if Lakeside "ceases to have comparable sales." But Lakeside would have to "include copies of one year of invoices to substantiate its Letter Ruling request."

Lakeside petitioned for reconsideration. A tax review officer issued Determination No. 19-0219R (Wash. Dep't of Revenue, Admin. Review & Hr'gs Div., Dec. 20. 2019) (unpublished), denying Lakeside's petition but revising the effective date of the written instructions. The decision became DOR's final action and remains "binding"

> until the facts change, the applicable statute or rule changes, or is ruled invalid by a published appellate court decision not subject to review, [DOR] publicly announces a change in the policy upon

> which these instructions are based, or [DOR] notifies the taxpayer in writing that these instructions are no longer valid.

Lakeside then petitioned the King County Superior Court for judicial review under the APA. Lakeside asked the court to set aside Determination No. 19-0219R and DOR's written instructions. DOR moved to dismiss Lakeside's petition under CR 12(b)(1), (3), and (6), claiming the case "was filed at the wrong time, in the wrong county, and under the wrong statute."

The court granted the motion to dismiss under CR 12(b)(1) and (6) for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. The court noted that case law establishes "there's no mechanism for direct judicial review of [DOR]'s denial of a ruling request," and access to court review requires taxes be "paid . . . in full." The court dismissed the case "for failure to follow the [Title 82 RCW] statutory requirements for a challenge such as the one that's before the court."

Lakeside appeals.

ANALYSIS

Lakeside argues the trial court erred in dismissing its petition under CR 12(b)(1) and (6) for lack of subject matter jurisdiction and failure to state a claim upon which the court can grant relief. Whether a court has subject matter jurisdiction is a question of law reviewed de novo. Young v. Clark, 149 Wn.2d 130, 132, 65 P.3d 1192 (2003). We also review de novo a trial court's ruling to dismiss for failure to state a claim. Kinney v. Cook, 159 Wn.2d 837, 842, 154 P.3d 206 (2007).

Subject Matter Jurisdiction

Lakeside claims the trial court erred by dismissing its petition under CR 12(b)(1) because the legislature "authorized superior courts to review excise tax controversies under Title 82 RCW." We agree.

"Generally speaking, jurisdiction is the power of a court to hear and determine a case." In re Marriage of Buecking, 179 Wn.2d 438, 447, 316 P.3d 999 (2013). "Subject matter jurisdiction" refers to "the court's ability to entertain a type of case." Buecking, 179 Wn.2d at 448. Under the Washington Constitution, the superior court has original jurisdiction in all cases that involve "the legality of any tax," and appellate jurisdiction in cases "as may be prescribed by law." Art. IV, § 6. Title 82 RCW confers appellate jurisdiction over tax related matters to the superior court. See RCW 82.32.180; RCW 82.03.180.

The legislature cannot restrict the court's jurisdiction where the constitution has specifically conferred dominion to the court. Buecking, 179 Wn.2d at 448. But the legislature may direct "in what manner, and in what courts, suits may be brought against the state." WASH. CONST. art. II, § 26. And it can "establish certain conditions precedent before suit can be brought against the [s]tate." McDevitt v. Harborview Med. Ctr., 179 Wn.2d 59, 66, 316 P.3d 469 (2013). This is particularly true when a party seeks the court's appellate jurisdiction rather than original jurisdiction. See ZDI Gaming Inc. v. State ex rel. Wash. Gambling Comm'n, 173 Wn.2d 608, 619, 268 P.3d 929 (2012) ("[T]he legislature has greater power to sculpt the appellate jurisdiction of the individual superior courts.").

The legislature has established two paths under Title 82 RCW by which a party may access the superior court's appellate jurisdiction for tax related matters. First, a party, "having paid any tax as required and feeling aggrieved by the amount of the tax," may appeal directly to Thurston County Superior Court. RCW 82.32.180. Alternatively, a party can first seek administrative review by the Washington State Board of Tax Appeals, and then appeal to the superior court. RCW 82.03.180. If the party is appealing from a formal administrative hearing, the APA governs judicial review. RCW 82.03.180; RCW 34.05.510. When, as here, a party appeals an informal administrative decision, judicial review occurs under RCW 82.03.180. No matter the path a tax payer follows to judicial review, "the taxpayer shall have first paid in full the contested tax, together with all penalties and interest." RCW 82.03.180; RCW 82.32.150, .180.[2]

DOR argues the superior court lacked subject matter jurisdiction to hear Lakeside's appeal of DOR's decision because Lakeside failed to pay its taxes before seeking judicial review. But statutory limitations on the exercise of a court's jurisdiction do not have the effect of depriving the court of its jurisdiction altogether. Buecking, 179 Wn.2d at 449. Either a court has subject matter jurisdiction or it does not. Williams v. Leone & Keeble, Inc., 171 Wn.2d 726, 730, 254 P.3d 818 (2011). Instead, statutory procedural requirements limit when the superior court will invoke its jurisdiction. Stewart v. Dep't of Emp't Sec., 191 Wn.2d 42, 52, 419 P.3d 838 (2018).

[2] Constitutional challenges to a tax assessment are the only exceptions to the rule that taxes must be paid in full before obtaining judicial review. RCW 82.32.150.

Here, the legislature conferred appellate subject matter jurisdiction over tax related matters to the superior court under Title 82 RCW. As a result, the superior court has the authority to hear Lakeside's appeal from DOR's informal ruling upholding the written instructions that direct Lakeside's future method of calculating its use tax. But the legislature limited when the court will invoke that jurisdiction by proscribing a procedural barrier—full payment of the disputed tax. Failure to satisfy the procedural barrier does not deprive the court of its subject matter jurisdiction.[3] Rather, it bars Lakeside from accessing the court's jurisdiction. The court erred by dismissing Lakeside's petition for judicial review under CR 12(b)(1).

Failure To State a Claim

Lakeside claims the trial court erred in granting DOR's motion to dismiss its petition for failure to state a claim upon which the court can grant relief under CR 12(b)(6). DOR asserts that Lakeside's petition for review was properly dismissed because Lakeside petitioned under the APA instead of RCW 82.03.180. We agree with DOR.

A CR 12(b)(6) motion questions the legal sufficiency of the allegations in a pleading, asking "whether there is an insuperable bar to relief." Markoff v. Puget Sound Energy, Inc., 9 Wn. App. 2d 833, 839, 447 P.3d 577 (2019), review denied, 195 Wn.2d 1013, 460 P.3d 183 (2020). A court may dismiss an action

[3] We recognize that Division Three of our court arrived at a different conclusion in Booker Auction Co. v. Washington Department of Revenue, 158 Wn. App. 84, 89, 241 P.3d 439 (2010), where it determined that failure to pay a tax before petitioning for review deprived the court of subject matter jurisdiction. But subsequent case law has "narrowed the types of errors that implicate a court's subject matter jurisdiction." Buecking, 179 Wn.2d at 448. We disagree with Booker's characterization that failure to meet a procedural requirement deprives the superior court of subject matter jurisdiction.

for failure to state a claim only if it appears beyond a reasonable doubt that no facts justifying recovery exist. Durland v. San Juan County, 175 Wn. App. 316, 320, 305 P.3d 246 (2013), aff'd, 182 Wn.2d 55, 340 P.3d 191 (2014).

The APA is the exclusive means of judicial review of an agency action unless de novo review is expressly authorized elsewhere by statute. RCW 34.05.510(3). As discussed above, the legislature expressly authorized two separate paths for de novo review of tax challenges in Title 82 RCW. See RCW 82.32.180; RCW 82.03.180. Where general and specific statutes address the same matter, the specific statute prevails. Booker, 158 Wn. App. at 90. "Thus, the APA's general provisions cannot overcome [Title 82 RCW] specific ones. The APA does not circumvent the legislature's precisely governed system for obtaining superior court review of an excise tax challenge." Booker, 158 Wn. App. at 90.

Lakeside tries to sidestep the application of Title 82 RCW by arguing it is "not challenging the assessment of any excise taxes or seeking to obtain a tax refund." According to Lakeside, DOR's written instructions are not an assessment of a tax, and "the procedural requirements set forth in those statutes simply do not apply."

Lakeside cites a recent United States Supreme Court case, CIC Services, LLC v. Internal Revenue Service, ___ U.S. ___, 141 S. Ct. 1582, 209 L. Ed. 2d 615 (2021), in support of its argument.[4] In that case, the Court considered whether the anti-injunction statute, 26 U.S.C. § 7421(a), barring suits to restrain

[4] Lakeside submitted this case in a notice of supplemental authority, filed May 24, 2021.

the assessment or collection of any tax, prohibits a challenge to an IRS[5] information reporting requirement. CIC, 141 S. Ct. at 1586-87. The reporting requirement compels tax payers and advisors in certain insurance agreements to provide a detailed description of the transaction so that the IRS can understand the tax structure and determine whether the insurance contract "is a sham" designed to escape tax liability. CIC, 141 S. Ct. at 1587. Failure to submit the detailed reports is punishable by civil tax penalties and criminal penalties. CIC, 141 S. Ct. at 1587.

In assessing whether the reporting requirement was a tax assessment barred by the anti-injunction statute, the Court looked to the lawsuit's "purpose," and inquired "not into a taxpayer's subjective motive, but into the action's objective aim—essentially, the relief the suit requests." CIC, 141 S. Ct. at 1589. The Court determined that the petitioner sought relief from a reporting requirement, which does not levy a tax, but "compels taxpayers and their material advisors to collect and submit detailed information" to discern whether the transaction is taxable. CIC, 141 S. Ct. at 1591. The Court noted the "reporting rule and the statutory tax penalty are several steps removed from each other," requiring a "threefold contingency" before tax liability attached. CIC, 141 S. Ct. at 1591. It stated the petitioner "stands nowhere near the cusp of tax liability: Between the upstream Notice [to report information] and the downstream tax, the river runs long." CIC, 141 S. Ct. at 1591. Because of the long path between the reporting requirement and the tax, the Court concluded, "The suit contests, and

[5] United States Internal Revenue Service.

seeks relief from, a separate legal mandate" rather than a tax, and is not barred. CIC, 141 S. Ct. at 1593-94.[6]

Unlike the IRS reporting requirements in CIC that may or may not lead to tax liability, DOR's written instructions direct Lakeside to start using the comparable sales method for calculating its future use tax. Payment of the use tax is imminent. And the objective of Lakeside's lawsuit is to challenge the amount of taxes it owes. Lakeside's petition is a challenge to tax liability that must be brought under Title 82 RCW.

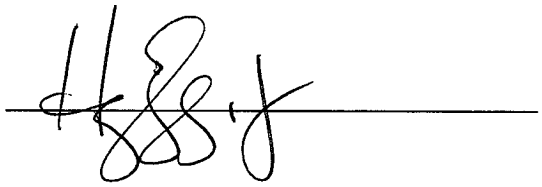
Division Three of our court reached the same conclusion in Booker. There, DOR issued prospective written instructions for excise tax on farm equipment Booker Auction Co. sold at auctions. Booker, 158 Wn. App. at 86-87. Booker petitioned the superior court for review under the APA, seeking to vacate DOR's instructions. Booker, 158 Wn. App. at 87. The court determined the APA did not apply because Title 82 RCW provides de novo review for tax challenges. Booker, 158 Wn. App. at 89. And "[a]pplying the APA to afford review of prospective reporting instructions, without payment of a tax, would directly conflict with RCW 82.32.150 by allowing review of an excise tax dispute in superior court without payment of the tax in full." Booker, 158 Wn. App. at 89.

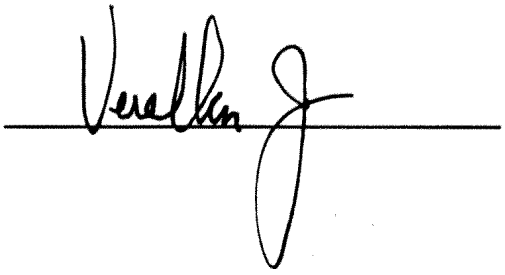
[6] Lakeside also cites AOL, LLC. V. Washington Department of Revenue, 149 Wn. App. 533, 205 P.3d 159 (2009), and Wells Fargo Bank, N.A. v. Washington Department of Revenue, 166 Wn. App. 342, 271 P.3d 268 (2012), in support of its argument. Neither case is persuasive. AOL acknowledges that the term " 'assessment' " and the phrase " 'such tax, penalties, and interest' " are used interchangeably in Title 82 RCW. AOL, 149 Wn. App. at 549 n.20 (quoting RCW 82.32.100(2)). Even so, the provisions in Title 82 RCW clearly require payment of all taxes, penalties, and interest (or assessments) before initiating an appeal. In Wells Fargo, the court determined the APA governed a dispute over a settlement agreement between DOR and a taxpayer because the provision authorizing DOR to execute settlement agreements does not provide for de novo review. Wells Fargo, 166 Wn. App. at 353-54. As discussed above, Title 82 RCW provides for de novo review of Lakeside's appeal.

Because Lakeside petitioned under the APA rather than RCW 82.03.180 and had not yet paid the use tax, it fails to state a claim upon which relief can be granted. See Blue Spirits Distilling, LLC v. Wash. Liquor & Cannabis Bd., 15 Wn. App. 2d 779, 794, 478 P.3d 153 (2020); Gorman v. Garlock, Inc., 155 Wn.2d 198, 218-19, 118 P.3d 311 (2005); Asche v. Bloomquist, 132 Wn. App. 784, 788, 133 P.3d 475 (2006). Lakeside's claim is legally insuperable and properly dismissed under CR 12(b)(6).

Affirmed.

WE CONCUR:





APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

LAKESIDE INDUSTRIES, INC.,	)	No. 81502-4-I
	)	
Appellant,	)	
	)	
v.	)	ORDER DENYING MOTION
	)	FOR RECONSIDERATION
WASHINGTON STATE DEPARTMENT OF REVENUE,	)	
	)	
	)	
Respondent.	)	

Appellant Lakeside Industries Inc. filed a motion for reconsideration of the opinion filed on September 13, 2021. A majority of the panel has determined that the motion should be denied. Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

FOR THE COURT:

Judge

LANE POWELL

December 20, 2021 - 3:57 PM

Filing Petition for Review

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	Case Initiation
Appellate Court Case Title:	Lakeside Industries, Inc., Appellant v. Department of Revenue, Respondent (815024)

The following documents have been uploaded:

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