NO. 73606-0

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

UNITED AIRLINES, INC., a Delaware Corporation,

Appellant,

v.

KING COUNTY, a governmental entity, and WASHINGTON STATE DEPARTMENT OF REVENUE,

Respondents.

BRIEF OF RESPONDENTS

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I. INTRODUCTION

United Airlines asks this Court to overturn an administrative decision of the King County Assessor denying a property tax refund claim United filed in December 2013. The refund claim was filed under RCW 84.69.020, which permits a county to refund property taxes under limited circumstances and only when there is no dispute regarding the value of taxable property.

The Assessor properly denied United's refund claim because it involved a dispute over the value of United's interest in property it leased from the Port of Seattle, which is not the type of dispute the Assessor was authorized to resolve under RCW 84.69.020. The superior court affirmed the Assessor's decision on summary judgment. Because the undisputed facts in the record confirm that United is disputing the assessed value of its taxable interest in property leased from the Port, this Court should affirm.

In addition, United's refund claim was not "verified by the person who paid the tax" as required by RCW 84.69.030(1)(a). Compliance with this verification requirement is mandatory. *See* RCW 84.69.130. This procedural defect provides an alternative ground to uphold the Assessor and the superior court.

Finally, there is no merit to United's claim that the superior court erred in denying United's motion to amend its complaint. United's proposed amended complaint raised no new claims and added no new parties. Instead, it merely asserted additional factual allegations that were already in the record as part of the summary judgment proceedings and had no material bearing on the outcome of the case. Under these circumstances, the motion to amend was futile and was properly denied.

II. COUNTERSTATEMENT OF THE ISSUES

1. RCW 84.69.020 authorizes county officials to grant property tax refunds only in limited circumstances, and expressly prohibits refunds for "any error in determining the valuation of property." Did the King County Assessor correctly deny United's refund claim under RCW 84.69.020 because that claim involved a disagreement over the method employed by the Department of Revenue to value United's interest in property it leases from the Port of Seattle?

2. Should United's refund claim be denied because it was not verified by the person who paid the tax as expressly required by RCW 84.69.030(1)(a)?

3. Did the trial court correctly deny United's motion to amend its complaint when the proposed amended complaint raised no new claims and merely added factual allegations that were already part of the summary judgment record?

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III. STATEMENT OF THE CASE

A. United Is Subject To Property Tax On The Value Of Its Possessory Interest In Government-Owned Property.

United is an "airplane company" subject to property tax assessment by the Department of Revenue, rather than by the individual counties in which it operates. *See* RCW 84.12.200(3) (defining "airplane company"); RCW 84.12.270 (providing that the Department of Revenue shall annually assess the operating property of utilities and transportation companies). The Department valued United's operating property for each of the 2009, 2010, and 2011 assessment years using generally accepted appraisal methods. *See* CP 098 (summary of 2009 appraised value); CP 102 (summary of 2010 appraised value); CP 106 (summary of 2011 appraised value).[1] Included as part of United's taxable operating property was United's interest in property it leased from the Port of Seattle and used in its business operations at Sea-Tac International Airport. CP 113-14 (answer to Interrogatory No. 3(a)). That leased property included the exclusive or preferential right to use office space, a VIP lounge, ticket counters, baggage check areas, and boarding gates. CP 114; CP 592 (defining "Exclusive Premises"); CP 593 (defining "Preferential Use Premises"). The lease agreement also allowed United to use other airport

[1] The term "operating property" means all property owned or used by a centrally assessed utility or transportation company in the conduct of its business operations. RCW 84.12.200(8).

property on a non-exclusive basis. CP 114; CP 595-96 (describing non-exclusive rights to use public areas and common use premises).

A "possessory interest" is a leasehold interest that is created when a non-exempt taxpayer leases or is granted a right to use tax exempt government property. CP 045; *Clark-Kunzl Co. v. Williams*, 78 Wn.2d 59, 64, 469 P.2d 874 (1970). Under Washington law, property owned by the United States, the State, counties, school districts, and other municipal corporations is exempt from property tax. *See* Const. art. VII, § 1; RCW 84.36.010(1). This exemption does not apply to non-government entities that lease or are granted the right to use government-owned property. *Clark-Kunzl*, 78 Wn.2d at 64. Instead, the non-government entity is taxed on the value of its possessory interest. *Id.* The purpose for taxing possessory interests in government-owned property is to ensure that those who receive the benefits of the use and enjoyment of government-owned property share in the tax burdens. 84 C.J.S. *Taxation* § 236 (2014).

In most cases, a taxpayer leasing tax exempt government-owned property is subject to "leasehold excise tax." The leasehold excise tax is set out in chapter 82.29A of the Revised Code of Washington and is imposed in lieu of property tax. *Crystal Mountain, Inc. v. Dep't of Revenue*, 173 Wn. App. 925, 930, 295 P.3d 1216 (2013). If, however, the taxpayer is a centrally assessed utility or transportation company, the

possessory interest in government-owned property is subject to property tax, not leasehold excise tax. RCW 84.36.451(2)(a). United is a centrally assessed taxpayer and is subject to property tax, not leasehold excise tax, on the value of its interest in property leased from the government.

B. The Department Has Employed Several Methods For Valuing Possessory Interests, Including The "Residual Method" And The "Imputed Return Method."

When a centrally assessed taxpayer leases or is granted a right to use government-owned property as part of its business operations, that interest is valued at fair market value. RCW 84.40.030(2). In 1970 the Department issued guidelines to assessors outlining the permissible methods for valuing possessory interests. CP 032 (Beith Decl., ¶ 15); CP 040-083 (Department guidelines). The Department explained that possessory interests could be valued using an "imputed return approach," a "residual approach," or a "sales data approach." CP 032 (Beith Decl., ¶ 17); CP 053.

For the 2006 through 2011 assessment years, the Department valued possessory interests using a variation of the "residual approach." CP 033-034 (Beith Decl., ¶¶ 23-27). Starting with the 2012 assessment year, the Department changed to a variation of the "imputed return approach." CP 035 (Beith Decl., ¶ 28). There are several key differences between the residual approach used for the 2006 through 2011 assessment

years and the imputed return approach used for the 2012 assessment year. CP 035 (Beith Decl., ¶ 30). The most notable difference is that the imputed return approach is a simplified "one step" approach that does not require the assessor to consider or compute the value of the government-owner's reversionary interest. Additionally, the imputed return approach used for the 2012 assessment year used a different method for estimating the value of the possessory interest (a "yield capitalization" method rather than a "direct capitalization" method), used a different capitalization rate, and applied a presumption that the non-government lessee would retain its beneficial interest in the property only through the end of the express term of the lease. *Id.*

For some taxpayers, including United, the simpler imputed return approach resulted in a lower value estimate and a lower tax assessment. This lower value was primarily due to the fact that the Department, in applying the approach, presumed that the non-exempt lessee would retain its beneficial interest in the property only through the end of the express term of the lease. As a result of this presumption, the estimated value of the interest is lower during the last two or three years of the lease term. In contrast, the value estimate under the imputed return method will typically be *higher* than under the residual approach in the early years of a long term lease. *See* CP 150 (7/19/12 email from United's tax consulting firm

advising United of the property tax consequences of a long-term lease of port-owned property).

While United and other airlines benefited from the Department's 2012 decision to change the method used to value possessory interests, the change was prospective only. CP 36 (Beith Decl., ¶ 34). This was consistent with the Department's normal practice. CP 36 (Beith Decl., ¶ 35). The Department did not anticipate that changing valuation methods would result in litigation or that it would potentially harm the counties and other taxing districts that receive and rely on the property tax payments.

C. United Filed An Administrative Refund Claim Challenging The Department's Appraisal Methodology And Appealed The Denial Of That Refund Claim.

Once the Department determines the taxable value of United's operating property, that value is apportioned to the various counties in which United operates, including King County. *See* RCW 84.12.360 (method of apportion operating property of airplane companies). For each of the 2009 through 2011 assessment years, the King County Assessor billed United for the property tax owed on the portion of its Washington taxable value allocated to King County. *See* CP 130 (example tax billing statement). United paid the tax without protest. VRP 18, ln. 24. Consequently, United was not permitted to seek a refund of the taxes it paid for the 2009 through 2011 assessment years under the "pay under

protest" tax refund statutes. *See* RCW 84.68.020 (permitting a de novo action in superior court to recover property taxes paid under written protest). Its only avenue for claiming a refund was the administrative refund provisions set out in RCW 84.69, which authorize the county to refund erroneously paid property taxes in limited circumstances.

In December 2013, United filed an administrative refund claim with the King County Treasurer under RCW 84.69.020, seeking a refund of a portion of the property taxes it paid to King County for the 2009 through 2011 assessment years. CP 120. The refund claim was based on what United's tax consultant characterized as "[t]he assessment of property exempted by law from taxation," and requested a refund of $1,571,818 plus interest. *Id.* United (through its tax consultant) claimed that the refund amount was a mere mathematical computation that required no "re-valuation" of United's possessory interest in the property United leased from the Port of Seattle. CP 124.

The administrative refund claim was sent to the King County Assessor's Office for review.[2] The Assessor denied the refund claim, explaining that the issue raised in the claim involved a dispute over the value of United's operating property, which is not the type of claim that

[2] King County has delegated responsibility for reviewing and approving administrative property tax refund claims to the county assessor. *See* King County Code 4.64.020.

can be addressed under the administrative refund chapter. CP 148; *see also* RCW 84.69.020 (listing the circumstances where the county is authorized to refund property taxes and specifying that "[n]o refunds under the provisions of this section shall be made because of any error in determining the valuation of property, except as authorized in subsections (9), (10), (11), and (12) of this section").[3]

Several months later, United filed a complaint in Thurston County Superior Court seeking judicial review of the denial of its administrative refund claim. CP 1029. By agreement of the parties, the Department of Revenue was permitted to intervene. CP 979. The case was transferred to the King County Superior Court in July 2014.[4] CP 858.

Around the same time that the case was transferred to King County, United filed a second administrative refund claim with King County. CP 544-556. That second refund claim (unlike the first) was signed by an officer of United who verified that the contents of the claim were "true and correct." *See, e.g.*, CP 546. The King County Assessor denied the second refund claim because it involved the same valuation issue that United had raised in its initial administrative refund claim. CP 558-59. United did not appeal the denial letter. Because United did not

[3] None of the exceptions specified in RCW 84.69.020 apply here.

[4] The Attorney General's Office appeared on behalf of both King County and the Department. CP 976 (substitution of counsel).

appeal the denial of its second refund claim, that claim was not directly at issue below.

In April 2015 the Department filed a summary judgment motion on behalf of itself and King County asking the superior court to affirm the King County Assessor's denial of United's initial property tax refund claim. CP 001. United filed a cross-motion. CP 205. After hearing argument on both motions, the superior court found that no genuine issues of material fact were in dispute, granted summary judgment to the Department, and denied United's cross-motion. CP 839. The court also denied a motion United had filed nine days before the scheduled summary judgment hearing seeking leave to file an amended complaint. CP 745 (motion); CP 842 (order denying motion). United has appealed from both the summary judgment order and the order denying leave to file an amended complaint. CP 845.

IV. ARGUMENT

A. Standard Of Review.

Under Washington's property tax laws, the value determination of the state or local official charged with the duty of establishing that value is presumed to be correct and will be reversed only by clear, cogent and convincing evidence. RCW 84.40.0301. "Clear, cogent and convincing evidence is evidence which is weightier and more convincing than a

preponderance of the evidence, but which need not reach the level of 'beyond a reasonable doubt.'" *In re the Disciplinary Proceeding Against Deming,* 108 Wn.2d 82, 109, 736 P.2d 639, 744 P.2d 340 (1987) (quoting *Davis v. Dep't of Labor & Indus.*, 94 Wn.2d 119, 126, 615 P.2d 1279 (1980)). Here, United is challenging the value determination of the Department of Revenue, which is tasked with the duty to value the property owned or used by inter-county utilities and transportation companies. *See* RCW 84.12.270; *Flight Options, LLC v. Dep't of Revenue*, 172 Wn.2d 487, 501, 259 P.3d 234 (2011).

The trial court decided the matter on summary judgment. On appeal, this Court reviews summary judgments de novo. *Reed-Jennings v. Baseball Club of Seattle, L.P.*, 188 Wn. App. 320, 327, 531 P.3d 887 (2015). Under Civil Rule 56(c), a summary judgment "shall be rendered forthwith" if the materials before the court "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." A "material" fact is one that affects the outcome of the litigation. Disputes about facts that do not affect the outcome of the case are not material and do not preclude summary judgment. *Elcon Constr., Inc. v. E. Wash. Univ.*, 174 Wn.2d 157, 164, 273 P.3d 965 (2012); *accord Anderson v. Liberty Lobby, Inc.*, 477 U.S.

242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986) (interpreting Fed. R. Civ. P. 56).

A trial court's decision regarding a motion to amend a complaint is reviewed for abuse of discretion. *McDonald v. State Farm Fire and Cas. Co.*, 119 Wn.2d 724, 737, 837 P.2d 1000 (1992). It is not an abuse of discretion to deny a motion to amend when the new claims raised in the amended complaint would be futile. *Doyle v. Planned Parenthood,* 31 Wn. App. 126, 131, 639 P.2d 240 (1982).

Here, the superior court properly concluded that the Department and King County were entitled to judgment as a matter of law and affirmed the King County Assessor's denial of United's property tax refund claim. The superior court also properly denied United's motion for leave to amend its complaint, which raised no new claims.

B. The King County Assessor Correctly Denied United's Administrative Refund Claim.

Persons seeking a refund of property taxes may bring an action in superior court under RCW 84.68, or may seek administrative review by county officials under RCW 84.69. The procedural requirements under these two refund chapters differ in material respects, as do the nature of the allowed claims. In order to bring an action in superior court to recover unlawful or excessive property tax assessments, the taxpayer must have

paid the disputed tax under written protest "setting forth all of the grounds upon which such tax is claimed to be unlawful or excessive." RCW 84.68.020. In addition, the action must be initiated by filing a complaint on or before June 30 of the year following the year the disputed taxes were payable. RCW 84.68.060.

United did not pay its assessment year 2009 though 2011 property taxes under written protest, VRP 18, ln. 24, nor did it file a complaint in superior court within the limited time permitted under RCW 84.68.060. As a result, the "payment under protest" refund chapter did not apply. Instead, United sought a refund under the administrative refund chapter, RCW 84.69. That Chapter allows for an administrative refund claim to be filed with the county treasurer without the need to pay the tax under written protest. *See* RCW 84.69.170. However, the county is authorized to refund taxes only in specified circumstances, and may *not* refund any taxes based on "any error in determining *the valuation of property*, except as authorized in subsections (9), (10), (11), and (12) of this section." RCW 84.69.020 (emphasis added).[5] In addition, the claim for refund must be verified by the person who paid the tax, must be filed within three years

[5] The specific circumstances where a county is authorized to refund taxes are listed in RCW 84.69.020 and include situations where the taxes were paid more than once, were paid as a result of a manifest error in the description of the property, were paid as a result of a clerical error in listing the property, or if the value of the property has been reduced by either a county board of equalization or the state Board of Tax Appeals. *See* RCW 84.69.020(1)-(16).

from the due date of the tax payment sought to be refunded, and must state the ground upon which the refund is claimed. RCW 84.69.030(1). The person claiming the refund must first exhaust its administrative remedies with the county before seeking judicial review. RCW 84.69.130. And judicial review is limited to only those grounds asserted in the claim for refund. *Id.*

1. Because United's refund claim involved a dispute over appraisal methodology, it necessarily involved a dispute over the value of United's interest in leased property.

The "payment under protest" avenue is the avenue by which a taxpayer can seek a refund if it disagrees with the assessed value of its property, and the administrative refund provisions are reserved for clerical-type errors that do not involve a dispute over the value of property. United did not pay its property taxes under written protest. Consequently, it was forced to find a creative way to recast its claim as a mere clerical error. The King County Assessor easily saw through the subterfuge.

United identified RCW 84.69.020(2) as the statutory ground for its refund claim. CP 120. RCW 84.69.020(2) provides that the county may refund taxes that were paid as a result of a "manifest error in description" of the property. The term "manifest error" means "an error in listing or assessment, which does not involve a revaluation of property." WAC

458-14-005(14). For example, a manifest error in description occurs if the assessor misidentifies the subject property, overstates the size of the subject property, or makes other errors that do not require the exercise of appraisal judgment. *See* CP 342, n. 16 (manifest error relating to a non-existent tennis court included in the initial appraisal); CP 359 (manifest error relating to the assessor's "erroneous measurement" of two parcels of real property); CP 365-66 (manifest error based on assessor's "erroneous measurement" and use of "incorrect characteristic data"). Thus, under the administrative refund statutes, a county official can correct errors in describing or listing property on the assessment rolls, but not errors in valuing property.

In the refund claim filed with King County, United asserted that there was a manifest error in the 2009 through 2011 property assessments prepared by the Department, that the purported error was "[t]he assessment of property exempted by law from taxation," and that the overpaid taxes resulting from the purported manifest error could be determined without revaluing the property. CP 120, CP 124. More specifically, United argued that the Department valued the Port of Seattle's "fee simple" interest in the leased property, which includes the Port's reversionary interest. CP 123.

The King County Assessor denied the claim, explaining that the claim was "based on your disagreement with the valuation of operating property as determined by the Department of Revenue." CP 148. The Assessor also explained that RCW 84.69.020 prohibits a refund based on any error in determining the value of property except in circumstances not applicable to United's claim. *Id.*

The Assessor was correct. The refund claim pertained to United's disagreement with the method the Department used to value United's possessory interest in property leased from the Port of Seattle. During 2009 through 2011 the Department used a "residual approach" to estimate the value of possessory interests in government-owned property. CP 033 (Beith Decl., ¶ 23); *see also* CP 172-76 (Cook Decl., ¶¶ 12-21, explaining the method employed and the appraisal theory supporting the method). The residual approach is one of the three approaches authorized by the Department of Revenue in 1970. *See* CP 032 (Beith Decl., ¶ 15); CP 054. More importantly, that approach is consistent with Washington law.

The value of the taxable possessory interest in government-owned property is the amount that a willing buyer would pay a willing seller for the lessee's rights in the property without any reduction on account of the rent payments or other debts owed by the lessee. RCW 84.40.030(2); *Pier 67, Inc. v. King County*, 78 Wn.2d 48, 57-58, 469 P.2d 902 (1970). This is

equivalent to the lump sum amount a willing buyer would pay a willing lessee for the lessee's rights in the property without taking on the lessee's capital debt. *Pier 67*, 78 Wn.2d at 57 (lessee's debt "does not represent a burden on the leasehold"). Valuing those rights requires the exercise of appraisal judgment, and "the assessor has a number of appraisal methods at his disposal" in measuring fair market value. *Id.* No single method is mandatory. *Id.*

In *Pier 67*, the Supreme Court addressed some of the facts and circumstances that an assessor may consider when valuing a possessory interest in property owned by the State.

> The market value of a leasehold is to be measured by considering both benefits to be garnered from the use of the property over the term of the lease and the burdens placed upon it. Burdens on the leasehold are restrictions which limit its use. These burdens may arise from zoning ordinances or other legal limits on land use or may be restrictions imposed by the terms of the lease itself.
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> . . . .
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> The benefits of a leasehold may stem from its economic productivity. It cannot be valued without reasonable knowledge of its probable remaining life. Further, an option to renew the lease may increase the value of the leasehold because it may afford an opportunity to extend the duration of the benefits.

Id. at 57-58. These factors are not exclusive. *Id.* at 58. Rather, the assessor "must consider all relevant circumstances pertinent and helpful in making his assessment within the ambit of the applicable statutes." *Id.*

Based on the valuation principles discussed in *Pier 67*, it is apparent that valuing possessory interests in government-owned property is not a purely mechanical endeavor. Rather, judgment must be exercised by the appraiser. Stated somewhat differently, the appraisal of property is "an attempt by humans to establish the true value of property pursuant to legal guidelines," and the process leaves "ample room for the necessary exercise of discretion on the part of the assessor." *Folsom v. County of Spokane*, 111 Wn.2d 256, 271, 759 P.2d 1196 (1988).

Although United attempts to cast its refund claim as a correction to a "manifest error," the underlying dispute pertains to United's claim that the Department erred when it valued United's interest in property it leased from the Port of Seattle. As discussed below, the Department did not err in making this valuation. But even if it had, United's refund claim still fails because administrative refund claims cannot be based on an error in valuation. RCW 84.69.020.

2. The Department did not err in valuing United's possessory interest in port-owned property.

The refund claim filed on behalf of United was based on the false premise that the Department of Revenue erred by including tax exempt property within the 2009 through 2011 assessed values of United's possessory interest in the property it leased from the Port of Seattle. CP

120. The Department did not err. Rather, the Department simply used a more complex "residual" method for valuing United's interest in the port-owned property that applies different appraisal techniques and appraisal assumptions than the simplified "imputed return" approach used in 2012. The residual method produced a rational and valid estimate of the fair market value of United's interest in the port-owned property, which is not exempt from tax.

Under the residual method the Department employed during 2009 through 2011, the market value of a possessory interest was determined by a two-step process. In the first step, the value of the lessee's beneficial rights in the leased property was computed using a "direct capitalization" model that capitalized the net lease payments for a single year into an estimate of value. For airplane companies like United that leased property from the Port of Seattle, the Department used a capitalization rate derived from its review of "cap rate studies" developed and published by the PriceWaterhouseCoopers accounting and consulting firm. CP 174 (Cook Decl., ¶ 18). The Department used a capitalization rate at the high end of the overall capitalization rate range "in order to derive a conservative value estimate." CP 174-75 (Cook Decl., ¶ 18). The Department also presumed that the rent United paid for the use of the Port-owned property was the "market rent" that a willing lessee would pay a willing lessor for

the specific property rights being transferred. *See* CP 173 (Cook Decl., ¶ 13). Thus, the direct capitalization method employed by the Department valued only those property rights that were transferred to United; not the Port's fee simple interest in the property. CP 176 (Cook Decl., ¶ 22).

In the second step of the calculation, the government-owner's reversionary interest was considered and was subtracted if it had any material value. CP 175 (Cook Decl., ¶ 19). The Department considered both the stated term of the lease agreement and the established course of dealing between the non-exempt lessee and the government lessor when determining the value, if any, of the government's reversionary interest. *Id.* When the relevant facts and circumstances suggest that the lease will continue to be renewed into the foreseeable future, the government owner's reversionary interest was considered to be minimal. *Id.*

With respect to United, the Department concluded that United's lease with the Port would likely continue to be renewed into the foreseeable future and, as a result, the Port's reversionary interest was estimated to be of no present value. United has leased property from the Port of Seattle since the mid-1940s when Sea-Tac International Airport was constructed. CP 112 (answer to interrogatory no. 2). Some of the leases have been of relatively short duration, but they have always been renewed. From this roughly 60-year course of dealing, it was reasonable

for the Department to conclude that United would continue to lease operating property from the Port for the foreseeable future. Moreover, consistent with the holding in *Pier 67*, the course of dealing between the lessee and the tax exempt government owner of the property is relevant in determining the "probable remaining life" of the lessee's interest in the leased property. *Pier 67*, 78 Wn.2d at 58. If the law were otherwise, a lessee such as United would have a financial incentive to enter into a series of short-term lease agreements rather than a long term lease. *See* CP 150 (7/19/12 email from tax consulting firm to United's Property Tax Manager warning against entering into a long term lease with the Port of Seattle).

The Department did not err in considering this 60-plus-year course of dealing between United and the Port of Seattle, or in concluding that the lease agreement would likely be renewed into the foreseeable future. In fact, United conceded that it has no plans to discontinue leasing property from the Port of Seattle for use in its operations at Sea-Tac airport. CP 116 (answer to interrogatory no. 5). Thus, it was entirely rational for the Department to conclude that the value of the Port's reversionary interest was minimal and had no material impact on the fair market value of United's possessory interest.

The Department, in its role as appraiser, enjoys "broad discretion to determine the proper method of appraisement." *Chief Seattle Properties, Inc. v. Kitsap County*, 86 Wn.2d 7, 25, 541 P.2d 699 (1975) (citing *Pier 67*). The Department did not abuse that discretion when it estimated the market value of United's possessory interest in government-owned property for the 2009 through 2011 assessment years. It simply used a valuation method that United dislikes, which is not a recognized ground for obtaining a refund of property taxes. *See Pier 67*, 78 Wn.2d at 58 (it is the "responsibility of the assessor to determine the true cash value of the property" being valued, and an assessment that is "within the ambit of the applicable statutes" will not be set aside absent convincing evidence of overvaluation).

3. Any error in valuing United's interest in leased property was not a "manifest error in description" under RCW 84.69.020(2).

Even if this Court were to conclude that material issues of disputed fact exist with respect to the manner in which the Department valued United's interest in port-owned property, summary judgment in favor of the Department and King County was still proper because the purported error involved a valuation dispute which is not the type of dispute the County Assessor is authorized to decide.

As noted above, the Department valued United's possessory interest using a recognized valuation method that was permitted under Washington law, applied an appropriate capitalization rate derived from its review of a published cap rate study, and considered all relevant circumstances bearing on the probable remaining life of that interest, including United's long history of leasing property at the Sea-Tac International Airport. CP 172-75 (Cook Decl., ¶¶ 12-19). This was not a manifest error. And United's claim to the contrary completely disregards controlling law.

According to United, the amount of overpaid property taxes resulting from the purported error can be readily determined by a simple mathematical computation that involves no revaluation of United's possessory interest. CP 124.[6] This is nonsense. As our Supreme Court has stated on numerous occasions, the valuation of property involves considerable appraisal judgment and discretion. *See, e.g. Folsom*, 111 Wn.2d at 271; *Chief Seattle Properties,* 86 Wn.2d at 25; *Sahalee Country Club, Inc. v. Board of Tax Appeals*, 108 Wn.2d 26, 36, 735 P.2d 1320 (1987). No "'rule of thumb' can be formulated to fit every situation." *Pier 67*, 78 Wn.2d at 58. Instead, the assessor has discretion to select the

[6] "Revaluation" is defined as "a revised or new valuation or estimate." *Webster's Third New International Dictionary* 1942 (3d ed. 2002); *see also* WAC 458-14-005(20) (defining "revaluation" as "a change in value of property based on an exercise of appraisal judgment").

appropriate appraisal methods, and the assessor's value estimate will be upheld absent clear, cogent, and convincing evidence that the property was overvalued. RCW 84.40.0301; *Weyerhaeuser Co. v. Easter,* 126 Wn.2d 370, 380, 894 P.2d 1290 (1995).

United's tax consultant was not a certified appraiser. CP 161. It is also clear that the consultant did not perform an appraisal designed to determine the fair market value of United's possessory interest. He simply plugged numbers into a yield capitalization model that was similar to the "imputed return" approach the Department used for the 2012 assessment year. CP 124. Plugging numbers into an imputed return valuation formula to derive a different value estimate is not clear, cogent and convincing evidence of a "manifest error in description of the property" for the simple reason that the imputed return method the Department used in 2012 is not the only permissible method to value possessory interests. *See* CP 053-054 (imputed return method is one of three distinct methods the Department has authorized for valuing possessory interests). In addition, even if that method was mandatory—which it is not—proper application of any approach to valuing property requires sound appraisal judgment. *See Washington Beef, Inc. v. County of Yakima*, 143 Wn. App. 165, 180, 177 P.3d 162 (2008) ("Fair market value is a matter of opinion rather than of hard fact. Each expert witness is called upon to use his or

her judgment regarding the appropriate factors to be considered in each particular case.") (Citations omitted).

If the Department erred in valuing United's possessory interest in port-owned property, that error can be corrected only by revaluing that interest through the exercise of appraisal judgment. Simply plugging numbers into a different valuation formula is not an acceptable substitute and completely disregards the teachings of *Pier 67*, *Washington Beef*, and other Washington authority. The King County Assessor correctly understood that United's claim for refund involved a valuation dispute and correctly denied United's administrative refund claim on that basis. *See* CP 148 ("Your claim for refund was based on your disagreement with the valuation of operating property as determined by the Department of Revenue."). And the superior court correctly affirmed that administrative decision when it ruled on the cross-motions for summary judgment. CP 839. This Court should affirm.

4. The Department's internal discussions about changing its appraisal method in 2012 are not relevant and do not support United's claim for a refund.

United suggests that internal Department of Revenue discussions, when "juxtaposed with the expert testimony offered by UAL's expert witness, confirmed that there were disputed issues of material fact which

precluded the entry of summary judgment – for either party." App. Br. at 17. United is incorrect for several reasons.

First, as Division II of the Court of Appeals addressed in a recent tax case, internal discussions between Department employees are not relevant or probative in determining whether a plaintiff is entitled to a refund of taxes. *Avnet, Inc. v. Dep't of Revenue*, 187 Wn. App. 427, 437 n.6, 348 P.3d 1273 (2015). United, like the taxpayer in *Avnet*, points to no authority suggesting that the Department's internal discussions have any bearing on the Court's determination of whether the King County Assessor erred in denying United's refund claim. At most, the Department's internal discussions support the Assessor's finding that United's refund claim related to a dispute over valuation, which United is prohibited from raising in this administrative tax refund action.

The second problem United faces is that several of the internal Department documents it relies on involved settlement discussions that are inadmissible under ER 408. *See, e.g.*, CP 299 (agency memo discussing settlement options); CP 304 (same). That rule provides that evidence in a civil case pertaining to settlements is not admissible to prove liability for, or invalidity of, the claim or its amount. ER 408. The underlying purpose for ER 408 is to address the dual concerns that settlement discussions and related conduct have "little probative value because an offer to settle may

be motivated solely by a desire to buy peace," and that "it is sound public policy to encourage the settlement of disputes by creating at least a limited privilege for settlement negotiations." Karl B. Tegland, 5A Wash. Prac., *Evidence Law and Practice* § 408.1 (5th ed. 2014). The rule applies when an actual dispute has arisen, even if no action has been filed at the time. *Duckworth v. Langland*, 95 Wn. App. 1, 5-6, 988 P.2d 967 (1998).

The Department spent roughly two years evaluating concerns raised by Alaska Airlines and Southwest Airlines with respect to the direct capitalization method the Department used to value possessory interests. CP 035-036 (Beith Decl., ¶¶ 28, 31-32). The Department was in litigation with Southwest Airlines during this period, and Alaska Airlines had threatened to file a refund lawsuit. CP 312; CP 299. Unlike United, both of these taxpayers had paid their property taxes under written protest, so their claims were not limited to the types of claims that can be addressed under the administrative refund chapter.

Because an actual dispute had arisen, the Department carefully considered and internally debated settlement options and weighed the costs associated with a protracted property tax refund lawsuit. In the end, the Department decided it was better to "buy peace" by changing its appraisal method rather than to litigate. Had the Department been informed by United or by any other taxpayer that this decision would

actually *create* litigation, the Department's ultimate decision to change methods might well have been different. Moreover, the Department changed its appraisal method on a purely prospective basis, which is its normal custom. CP 036 (Beith Decl., ¶ 34). "Alaska Airlines did not ask, and the Department did not offer, to apply the new method for past assessment years." *Id.*

United's efforts to support its summary judgment motion with inadmissible evidence should be rejected. "A court cannot consider inadmissible evidence when ruling on a motion for summary judgment." *Dunlap v. Wayne*, 105 Wn.2d 529, 535, 716 P.2d 842 (1986); *see also Laue v. Estate of Elder*, 106 Wn. App. 699, 710, 25 P.3d 1032 (2001) (the party seeking to use a settlement offer in a summary judgment proceeding must establish a convincing reason why the offer would be otherwise admissible under ER 408). At most, the internal Department documents should be considered only as background information confirming that there is more than one permissible way to value a lessee's possessory interest in government-owned property. *See* CP 301-03 (discussing three options for valuing possessory interests).

Finally, none of the Department internal discussion documents creates a dispute of any material fact. The valuation of a taxpayer's possessory interest in government-owned property requires appraisal

judgment and knowhow. Neither the Legislature nor Washington courts have mandated a specific approach to determining that value. To the contrary, "[p]roperty valuation is a very complicated, subjective process," and Washington appraisers are permitted to use any approach that is supported by the law and by generally recognized appraisal practice. *Folsom v. Spokane County*, 106 Wn.2d 760, 769, 725 P.2d 987 (1986). The Department used a valid appraisal method during the 2009 through 2011 assessment years, and its decision to change to a different method beginning with the 2012 assessment year is not evidence of a manifest error. United's claim to the contrary was correctly rejected by the trial court and should be rejected here.

5. California law does not apply here and, even if it did, it does not apply the *per se* rule United advocates.

Lacking support in Washington law, United turns to a 1976 California Court of Appeals decision to support what it contends is a *per se* rule that appraisers must value possessory interests using a yield capitalization approach that considers only the existing lease term. App. Br. at 31-33 (discussing *American Airlines, Inc. v. County of Los Angeles*, 65 Cal. App. 3d 325 (1976)). That California case does not help United for several reasons.

First, Washington applies Washington law, not California law, in determining the value of taxable property located in this state. Under Washington law, "the assessor has a number of appraisal methods at his disposal" in measuring fair market value. *Pier 67*, 78 Wn.2d at 57. "No 'rule of thumb' can be formulated to fit every situation." *Id.* at 58. Instead, the assessor may consider all relevant facts and circumstances, including the course of dealing between the lessee and the government owner of the property, when determining the value of possessory interests. *Id.*; *see also* CP 055 (Department's 1970 Procedure Guide, explaining that assessor may consider, in addition to the express lease term, "the lessee's intent, the lessor's history of actions in similar possessory interests, and the life expectancy of the improvements erected by the lessee"). Thus, even if *American Airlines* did establish a *per se* rule that assessors must follow in California, that case does not trump *Pier 67* or the other Washington authority that permits Washington assessors more latitude in determining the fair market value of possessory interests.

Second, *American Airlines* did not establish a *per se* rule even in California. Instead, as discussed in a later case, California law provides assessors with some leeway in determining the probable remaining life of a possessory interest. *Silveira v. County of Alameda*, 139 Cal. App. 4th 989 (2006). In *Silveira*, the plaintiff argued (as United does here) that

American Airlines "precluded application of an anticipated term of possession longer than the term specified in [the] lease." *Id.* at 997. In rejecting this argument, the California Court of Appeals held that "*American Airlines* does not stand for the proposition that the taxable term of possession can never exceed the stated term of the lease." *Id.* at 998. Rather, the court in *American Airlines* simply found, based on the testimony and other evidence presented, that the anticipated term of possession did not exceed the actual term of the lease agreement *in that case*. *Id.*

Finally, nothing in *American Airlines* supports United's argument that it was a "manifest error" for the Department to use a valuation method that differed from the method described in that California case. As discussed above, to qualify as a manifest error in the description of property, the county treasurer or assessor must be able to correct the purported error without revaluing the property. WAC 458-14-005(14). Applying the valuation method approved in *American Airlines* would necessarily require the King County Assessor to revalue United's possessory interest in port-owned property. Thus, even if it was an error to value United's interest in port-owned property using a direct capitalization method, it was not a manifest error of the type the King County Assessor is authorized to correct.

6. Evidence pertaining to how direct capitalization works does not create a material issue of disputed fact.

United also argues that the direct capitalization method the Department employed for the 2009 through 2011 assessment years "assumed a perpetual lease term" and did not account for the value of the Port's reversionary interest. App. Br. at 20-21. United supports this contention through the declaration of a property valuation expert who opined on how direct capitalization works and whether the Department "failed to account for the reversionary interest of the Port of Seattle." CP 230 (Hunnicutt Decl., ¶ 5). But the expert's declaration does not create a material issue of disputed fact in this case for the simple reason that it relates to a dispute over the *value* of United's property, which, again, is not the type of dispute the King County Assessor can address under RCW 84.69.020.

Had United paid its property taxes under written protest, it could have challenged the Department's value determination in a refund lawsuit under RCW 84.68. In that event, the testimony of valuation experts would likely be relevant. *See, e.g.*, *Washington Beef,* 143 Wn. App. at 176-78 (discussing the competing expert opinions of value in a property tax dispute governed by the "paid under protest" refund chapter). But United did not pay its 2009 through 2011 property taxes under written protest.

Consequently, there will be no trial to decide whether the Department overvalued United's possessory interest in property it leased from the Port of Seattle and, if so, to decide the corrected market value of that property.

The trial court correctly rejected United's attempt to create a dispute of fact by offering expert testimony in the summary judgment proceeding. Under the administrative refund provisions of RCW 84.69, that testimony is not material. In fact, expert testimony of the type United offered actually undercuts its refund claim. If there was a plain and undisputable administrative or clerical error of the type the King County Assessor was permitted to correct, there would be no need to consult valuation experts.

7. United's proposed approach to valuing its possessory interest is not supported by appraisal authority.

Another flaw with United's position is that the method it used to compute the tax refund it claims it is owed is illogical and supported by no appraisal authority. The consultant hired by United computed the refund amount using a limited-life yield capitalization approach that capitalized the net lease payments for the assessment year over the remaining term of the lease using the *direct capitalization rate* that had been used by the Department in valuing United's possessory interest for the 2009 through 2011 assessment years. *See* CP 124. Direct capitalization and yield

capitalization are fundamentally different methods of estimating the value of income producing property, and it is a mistake for an appraiser to confuse the two concepts or to use a direct capitalization rate in a yield capitalization model without any analytical data to support the choice. *See* CP 188-97 (excerpt from Western States Association of Tax Administrators, *Appraisal Handbook* (2009 ed.), explaining distinction between direct and yield capitalization); CP 724-25 (excerpt from Appraisal Institute, *The Appraisal of Real Estate* (14th ed. 2013), discussing how a direct or "income rate" is computed and how a yield rate is computed).

The capitalization rate used by an appraiser "makes a big difference in the value because the higher the rate, the lower the value of the [property] and vice versa, the lower the rate, the higher the value." *Washington Beef,* 143 Wn. App. at 173. Determining an appropriate capitalization rate requires sound appraisal judgment. United makes no attempt whatsoever to explain or defend the capitalization rate used by its tax consultant. In fact, United sidesteps this issue entirely by providing no discussion in its opening brief explaining how the consultant computed the refund amount United claims it is owed. United simply asserts, without evidence or argument, that it is owed a refund from King County in the aggregate amount of $1,577,665. App. Br. at 14 (citing CP 455).

No appraisal authority supports United's contention that a direct capitalization rate can be used in a yield capitalization model, or its implied claim that the value derived under this hybrid approach is *per se* correct and requires no appraisal judgment. Moreover, even if United did offer some argument or authority supporting the manner in which the refund amount was computed, its claim would still pertain to a valuation dispute, which is not the type of dispute the King County Assessor is authorized to decide.

C. United's Administrative Refund Claim Was Not "Verified By The Person Who Paid The Tax" As Required Under RCW 84.69.030(1)(a).

United's refund claim was also procedurally defective. The Legislature has strictly limited administrative refund claims to those complying with stated procedural requirements. In particular, "no orders for a refund under this chapter may be made" unless a claim is "[v]erified by the person who paid the tax, [or by] the person's guardian, executor or administrator." RCW 84.69.030(1)(a). United's claim did not comply with this requirement. David Perkins, the tax consultant who signed and filed the refund claim, is not an officer or employee of United, and was not United's "guardian, executor or administrator."

By contrast, had United paid its 2009 through 2011 assessment year taxes under written protest and sued for a refund under the "paid

under protest" refund chapter, Mr. Perkins could have acted on United's behalf. *See* RCW 84.68.020 (when taxes are paid under written protest the taxpayer "or their legal representatives or assigns," may bring an action to recover such tax). The Legislature used different language in RCW 84.69.030(1)(a). Under the plain language of that statute, a taxpayer's representative is not permitted to file an administrative refund claim on behalf of the taxpayer except in the limited circumstance where the person filing the claim is the taxpayer's guardian, executor or administrator.

United points out that the term "verified" is not defined in the property tax statutes, is susceptible to more than one meaning, and may not require the taxpayer to swear or affirm under oath that the information provided is correct. App. Br. at 33-34. But regardless of the intended meaning of the term "verified," the statute is clear that it is the person who paid the tax, or that person's guardian, executor or administrator, that must verify the claim. Having the taxpayer verify an administrative refund claim under RCW 84.69.030(1)(a) is important because the county official reviewing the claim must rely on the veracity of the information provided and decide the matter without a hearing or trial to determine disputed issues of fact. Requiring the person who paid the tax to verify the accuracy of the information provided (whether under oath or otherwise) is reasonable, has been part of the administrative refund chapter since its

inception, and is not burdensome. *See* Laws of 1957, ch. 120, § 3 (verification requirement was part of initial act). United simply failed to comply.

RCW 84.69.030(1) establishes the time and manner in which a taxpayer may seek an administrative refund of Washington property taxes. If the Legislature's intent regarding the required procedures for filing an administrative refund were not clear enough from the express language of RCW 84.69.030(1), the Legislature underscored that intent in another section. The Legislature expressly mandated in RCW 84.69.130 that "[n]o action shall be commenced or maintained under this chapter unless a claim for refund shall have been filed *in compliance with the provisions of this chapter*." (Emphasis added). Consequently, an action for judicial review under RCW 84.69.120 must be dismissed when the taxpayer has not complied with the statutory procedures for obtaining relief. *Coluccio v. King County*, 82 Wn. App. 45, 51-52, 917 P.2d 145 (1996) (citing *Longview Fibre Co. v. Cowlitz County*, 114 Wn.2d 691, 790 P.2d 149 (1990)). United's failure to comply with the verification requirement of RCW 84.69.030(1)(a) provides an alternative basis to uphold the trial court and deny United's refund claim. *See Blue Diamond Group, Inc. v. KB Seattle 1, Inc.*, 163 Wn. App. 449, 453, 266 P.3d 881 (2011) (on

appeal, court may affirm summary judgment on any grounds supported by the record).

D. The Trial Court Correctly Denied United's Motion To Amend Its Complaint.

United also appeals from the order issued by the superior court denying United's motion to amend its complaint. App. Br. at 36. United filed its motion nine days before the summary judgment hearing. *See* CP 747 (motion dated May 13, 2015); VRP 1 (summary judgment hearing held May 22, 2015). The proposed amended complaint did not add any new claims and did not add any new parties. *Compare* CP 1029-1034 (initial complaint) with CP 751-57 (proposed amended complaint); *see generally*, CP 826-27 (describing differences between initial complaint and proposed amended complaint). Rather, United simply added three new allegations of fact, and slightly modified several other allegations. *Id.* Although not directly stated in United's motion to amend, or in its opening brief on appeal, it appears that the purpose of United's motion was to try to find a creative way around its failure to properly verify its initial administrative refund claim.

The superior court did not err in denying United's motion. None of the new or modified allegations of fact had any material bearing on the issues raised in the cross-motions for summary judgment. Moreover, the

new allegations were already established through declarations filed in support of United's summary judgment motion. For example, United sought to add an allegation that it "filed a verified Petition for Property Tax Refund under RCW 84.60.050 and/or 84.69.020 requesting a refund of taxes paid for 2009, 2010, and 2011 as a result of a manifest error in descriptions." CP 826 (quoting paragraph 3.11 of proposed amended complaint). The verified refund claim referred to in the proposed amended complaint was filed with the King County Treasurer on April 29, 2014, and was already in the court record. CP 544-56. The letter from the King County Assessor denying that refund claim was also part of the court record. CP 558-59. United had one year from the date it filed its April 2014 refund claim to seek judicial review. *See* RCW 84.69.120 (if the county treasurer rejects the refund claim "the person who paid the taxes . . . may within one year after the date of the filing of the claim commence an action in superior court against the county to recover the taxes which the county treasurer has refused to refund"). United chose not to seek judicial review.[7] As a result, the verified refund claim and the subsequent denial of that claim were not directly at issue in the summary judgment proceedings and were not material in deciding whether the Assessor erred in denying United's prior unverified refund claim.

[7] The time limit for appealing the denial of the refund claim ran on April 29, 2015, one year from the date United filed the claim with the King County Treasurer.

An order granting or denying a motion to amend a complaint is reviewed for abuse of discretion. *McDonald v. State Farm Fire and Cas. Co.*, 119 Wn.2d 724, 737, 837 P.2d 1000 (1992); *Nw. Animal Rights Network v. State*, 158 Wn. App. 237, 247, 242 P.3d 891 (2010). It is not an abuse of discretion to deny a motion to amend when new claims raised in the proposed amended complaint are futile. *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 142, 937 P.2d 154 (1997). A new claim is futile if, among other reasons, it adds nothing of substance to the initial complaint. *Cf. Deschamps v. Mason County Sheriff's Office*, 123 Wn. App. 551, 563, 96 P.3d 413 (2004) (claim is futile if it merely restates the same issues raised in the original complaint).

Here, United raised no new claims in its proposed amended complaint. Moreover, the allegations of fact set out in the proposed amended complaint were already in the court record. *Compare* CP 755 (paragraphs 3.11 and 3.12 of proposed amended complaint) *with* CP 454-55 (paragraphs 23 and 24 of declaration of David Perkins in support of United's motion for summary judgment). So too were the documents referred to in the proposed amended complaint. *Compare* CP 767-82 (Exhibits C and D of proposed amended complaint) *with* CP 544-59 (Exhibits D and E of the Perkins declaration). While those documents were not material and made no difference to the outcome of the summary

judgment proceeding, they were in the record and known to the trial court. *See* CP 839-40 (listing pleadings considered by the trial court, including the Perkins declaration). Under these circumstances, the motion to amend was futile and was properly denied.

Finally, United's discussion of CR 15(c) and the relation back doctrine is inapposite. *See* App. Br. at 38-39. CR 15(c) governs the relation back of amendments in pleadings. It provides in part that a claim or defense asserted in an amended pleading relates back to the date of the original pleading if the new claim or defense arose out of the conduct, transaction or occurrence "set forth or attempted to be set forth in the original pleading." CR 15(c). The rule also describes the more stringent test employed when an amendment adds or changes a party against whom a claim is asserted. *Id.*; *Stansfield v. Douglas County*, 146 Wn.2d 116, 123, 43 P.3d 498 (2002). The overarching purpose for the relation back doctrine is to avoid manifest injustice that could result from the strict application of a statute of limitation provision where the original pleading was filed within the limitation period. Thus, new claims in an amended complaint that would otherwise be barred under an applicable limitation period "are timely if they relate back [to the date of the original complaint], but time-barred if they do not." *Stansfield*, 146 Wn.2d at 120.

The relation back doctrine set out in CR 15(c) is not applicable here because United's proposed amended complaint raised no new claim or defense, and named no new party. United was quite candid on this point, stating with absolute clarity that the proposed amended complaint added "[n]o new substantive claims" and "no new parties." CP 831.[8] Thus, there was nothing within the proposed amended complaint that must "relate back to the date of the original pleading" in order to be considered timely under some statute of limitation period. United simply asserted additional facts that were already in the record and that were considered by the trial court when it ruled on the parties' cross-motions for summary judgment. CP 454-55; CP 840. Under these circumstances, there was no need for United to amend its complaint, and the trial court did not err in denying United's motion. This Court should affirm.

V. CONCLUSION

For all the foregoing reasons, the Court should affirm the trial court's order granting summary judgment to King County and the Department of Revenue, and should affirm the trial court's denial of United's motion to amend its complaint.

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[8] United characterized the motion as "a simple procedural housekeeping measure." CP 832. In addition, United did not address CR 15(c) or the relation back doctrine in its motion to amend. *See* CP 745-47 (no reference to CR 15(c) in motion to amend complaint). United's efforts to employ the relation back doctrine appeared to be an afterthought. *See* CP 831-37 (discussing CR 15(c) for the first time it reply brief).

RESPECTFULLY SUBMITTED this 25th day of November, 2015.

ROBERT W. FERGUSON
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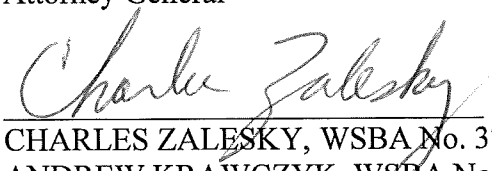

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 25th day of November, 2015, at Tumwater, WA.

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