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STATE OF WASHINGTON

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No. 37854-0-II

DIVISION II, COURT OF APPEALS
OF THE STATE OF WASHINGTON

HOME DEPOT USA, INC.,

Plaintiff-Appellant

v.

WASHINGTON DEPARTMENT OF REVENUE,

Defendant-Respondent

ON APPEAL FROM THURSTON COUNTY SUPERIOR COURT
(Hon. Chris Wickham)

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I. INTRODUCTION

The central question in this appeal is whether the State may retain sales tax payments on credit transactions where the customer ultimately defaults. It would seem obvious that the one party not entitled to keep that money is the State, because fundamentally no sale occurred and the ultimate taxpayer—the defaulting customer—never paid the sales tax. Perhaps recognizing that its claim to these monies is both unlawful and inequitable, the State has resorted to sleight of hand, arguing that Home Depot “actually collected the sales taxes from buyers when it accepted payment by credit card” and, thus, “suffered no out-of-pocket loss . . . when its buyers defaulted” (Resp. Br. at 10, 19), and that Home Depot supposedly seeks a “sales tax refund predicated” exclusively on “the service fees” (*id.* at 24). But the factual record here supports only one conclusion: neither of those propositions is true. Indeed, Home Depot bore the economic loss of bad debts under its in-store, private-label credit card (“PLCC”) program by providing its PLCC servicers with multiple sources of income (including service fees) that fully compensated the servicers for any bad debts and that, absent a PLCC agreement with Home Depot, the servicers would not have had the opportunity to earn. These indisputable facts, which representatives from both Home Depot and the

independent servicers (the “financing companies,” or “GE”) confirmed in uniform and unambiguous testimony before the Superior Court, should compel this Court to reverse the State’s denial of Home Depot’s refund claim, and award a refund to Home Depot.

Because Home Depot fully compensated the financing companies for bad debt losses, Home Depot’s losses are cognizable under Washington’s bad debt sales tax refund statute, RCW 82.08.037. The intent of that statute is unmistakable: a refund is due to sellers who remitted sales tax to the State that customers later failed to pay because they defaulted on their credit accounts. Indeed, this is the very foundation of the provision. The State nevertheless denied Home Depot’s request for a refund on the pretext that Home Depot incurs and records bad debt losses on its books on a program-wide basis, rather than on an account-by-account basis. The State arrived at that result not only by engrafting requirements onto the statute that are nowhere to be found in its text, but also by ignoring other provisions of the statute and case law that affirmatively support Home Depot’s refund claim.

Moreover, the statutory interpretation that the State advances in order to deny a refund to sellers like Home Depot violates the U.S. and Washington Constitutions. The State’s arbitrary distinction between sellers such as Home Depot, who use financing companies to administer

their credit accounts but bear the full cost of bad debts, and sellers who issue in-store revolving credit, violates basic notions of equal protection and due process. It also unjustly enriches the State, thereby offending fundamental principles of due process, fairness, justice, and equity.

Accordingly, this Court should reject the State's brazen attempt to hold onto sales tax dollars to which it has no rightful claim, reverse the State's unjust and unreasonable decision, and order the State to issue a refund to Home Depot.

II. ARGUMENT

A. **Home Depot Fully Qualifies For A Bad Debt Tax Refund Under RCW 82.08.037.**

1. **Home Depot Satisfies The Plain Language Of The Statute.**

For the refund period in question, RCW 82.08.037 provided:

A seller is entitled to a credit or refund for sales taxes previously paid on debts which are deductible as worthless for federal income tax purposes.

Laws of 1982, 1st Ex. Sess., ch. 35, §35. According to the plain language of the statute, and as the Washington Supreme Court has held, RCW 82.08.037 "has three requirements: (1) the seller must be a person, (2) making sales at retail, and (3) entitled to a refund for sales taxes previously paid on debts which are deductible as worthless for federal income tax purposes." *Puget Sound Nat. Bank v. Dep't of Revenue*, 123 Wn.2d 284, 287, 868 P.2d 127 (1994).

Home Depot satisfies the plain language of the statute in all three respects. Home Depot is indisputably a “person” under the statute, *see id.* (quoting RCW 82.04.030), and a “seller” “making sales at retail” under the statute. *See* RCW 82.08.010(2) (a “seller” is any “person ... making sales at retail or retail sales to a buyer or consumer.”). For the third and final requirement of RCW 82.08.037, Home Depot even goes further than the statute requires: the statute only refers to debts “which are *deductible*” (emphasis added) — in other words, debts that a taxpayer is *permitted* to deduct under the Internal Revenue Code, and not debts that have, in fact, been deducted — yet, the financing companies that administered Home Depot’s PLCC program actually took bad debt deductions for the accounts at issue. In other words, these debts were not merely “deductible” but actually deducted as “worthless” for federal income tax purposes. CP 36 (Thorncroft Dep. at 34:1-4); *see also* CP 292-302 (federal income tax returns).

2. This Court Should Apply The Statute’s Plain Language In Home Depot’s Favor And Not Strictly Construe It Against The Taxpayer.

The State claims that the provision at issue provides a “tax preference” and, therefore, should be strictly construed against the taxpayer. Resp. Br. at 11. Neither the text nor the legislative intent underlying RCW 43.136.020 (which defines “tax preference”) supports

interpreting RCW 82.08.037 as such, nor has any judicial decision classified that provision as a “tax preference.” Indeed, the Washington Supreme Court squarely rejected strictly construing RCW 82.08.037 in *Puget Sound*, 123 Wn.2d at 290. Tax preferences subject to strict construction are typically limited, targeted “tools for the achievement of current public policy objectives.” RCW 43.136.011; *see, e.g.*, RCW 82.08.0204 (exempting certain sales of honey bees from sales tax); RCW 82.08.0253 (exempting the sale of newspapers from sales tax).

The statute at issue does not provide for an “exemption” or a “preferential state tax rate” for Home Depot or any other retailer. Moreover, there is no authority for the proposition that RCW 82.08.037 is the type of narrow and targeted “tool[] for the achievement of current public policy objectives” that characterizes a “tax preference.” RCW 43.136.011. Accordingly, RCW 82.08.037 should not be strictly construed against Home Depot.¹ Instead, this Court should apply the statute’s plain language, regardless of the State’s contrary interpretation.

¹ Even if this Court decides that RCW 82.08.037 is a tax preference, Home Depot is nevertheless entitled to a refund. A tax preference need only be construed strictly if it “creates doubt or ambiguity.” *Sacred Heart Med. Ctr. v. Dep’t of Revenue*, 88 Wn. App. 632, 637, 946 P.2d 409 (1997). As discussed below, Home Depot meets the Bad Debt statute’s unambiguous terms. Further, even if a tax statute is construed strictly, the Court must still construe it “fairly and in keeping with the ordinary meaning of its language” *Id.*

Agrilink Foods, Inc. v. Dep't of Revenue, 153 Wn.2d 392, 396, 103 P.3d 1226 (2005); see Appellant Br. at 16.

3. RCW 82.08.037 Does Not Require The Seller To Write-Off The Worthless Debts At Issue.

Notwithstanding the plain language of the statute, the State insists that the “only reasonable interpretation” of RCW 82.08.037 is that “debts” refers to “debts owed by the buyer to the seller, or the seller’s assignee, not debts owed to a third party.” Resp. Br. at 15. In urging this reading, the State ignores the Washington Supreme Court’s prohibition against engrafting requirements onto a statute that are nowhere to be found in its text. See *G-P Gypsum Corp. v. Dep’t of Revenue*, 144 Wn. App. 664, 670, 183 P.3d 1109 (2008) (reversing denial of refund and rejecting State’s interpretation of “use” taxes in holding that courts “cannot add language to an unambiguous statute even if [they] believe that the Legislature intended something other than what it expressed.”).² In addition, the State’s interpretation entirely fails to acknowledge that Home Depot and the financing companies qualify “as a unit” for purposes of RCW 82.08.037, and on that independent basis, Home Depot satisfied the statute. RCW

² In any event, the Legislature is perfectly capable of implementing its intent on matters of sophisticated tax policy. For example, when the Legislature wished to shift the burden of excise taxes from buyers onto sellers, it did so by modifying the relevant statute. See, e.g., *High Tide Seafoods v. State*, 106 Wn.2d 695, 698, 725 P.2d 411 (1986).

82.04.030. Finally, in support of its misguided interpretation, the State relies on the Washington Supreme Court's decision in *Puget Sound* when, in fact, that decision favors Home Depot's position.

a. In Referencing Federal Income Tax In The Provision At Issue, The Legislature Simply Provided A Basis For Calculating The Timing And Amount Of Bad Debt Losses.

While RCW 82.08.037 mandates that "worthless" debts be "deductible," but it does not require that the "seller" itself deduct those debts. RCW 82.08.037. The term "seller" defines the individual or entity that is entitled to a refund, while the phrase "debts which are deductible as worthless for federal income tax purposes" simply defines the circumstances under which a "refund for sales taxes previously paid" may be obtained. *See id.* The two statutory terms are not linked.

Instead, in accordance with the plain language of the statute, the reference to "federal income tax purposes" clearly serves as a basis for calculating the amount and timing of bad debt losses.³ It does not

³ As noted in Home Depot's opening brief, RCW 82.08.037 has been amended several times since its original enactment in 1982, including a reference to the provision of the Internal Revenue Code (I.R.C. § 166) that governs the amount and timing of deductions for worthless debts on federal income tax returns. *See* Laws of 2007, ch. 6, § 102; Laws of 2004, ch. 153, § 302; Laws of 2003, ch. 168, § 212. The State argues that, in so doing, Home Depot "recognize[d]" that "the legislative purpose in amending RCW 82.08.037 was to clarify rather than change the substance of the statute." Resp. Br. at 13. The State is wrong. Home

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constitute a requirement that the seller, and only the seller, take a deduction on its federal income tax returns. Indeed, the State concedes as much, noting that the “federal bad debt deduction applies only to *amounts* of a taxpayer’s accounts receivable, previously reported as income, that are actually uncollectible,” and that a “seller who sells on credit is entitled to take a bad debt deduction *when the buyer fails to pay.*” Resp. Br. at 18 (emphasis added).

b. Under The RCW, The Seller And The Financing Companies Together May (And Do) Fulfill The Statute’s Requirements.

The State conveniently omits any reference to the definitions in Chapter 82 of the RCW, which provide an independent basis for awarding Home Depot’s requested refund. In particular, for purposes of RCW 82.08.037, a “seller” is defined as a “person.” RCW 82.08.010(2). Under RCW 82.08.010(4), a “person” means:

any individual, receiver, administrator, executor, assignee, trustee in bankruptcy, trust, estate, firm, copartnership, joint venture, club, company, joint stock company, business trust, municipal corporation, political subdivision of the state of Washington, corporation, association, society, or *any group of individuals acting as a unit, whether mutual, cooperative, fraternal, nonprofit, or otherwise* and the United States or any instrumentality thereof.

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Depot stated only that “[a]ll of these amendments post-date the refund period at issue and, in any event, did not materially alter the language or meaning of the prior version of the statute.” Br. of Appellant at 16, n. 4.

RCW 82.04.030 (emphasis added); *see also Puget Sound*, 123 Wn.2d at 288-89 (interpreting RCW 82.08.037 and RCW 82.08.010(4) to apply to corporations as well as individuals).⁴

Thus, chapter 82 expressly contemplates that “any group of individuals,” whether “mutual, cooperative, fraternal, nonprofit, or otherwise,” might have been “acting as a unit,” and that such a “unit” would be considered a single “seller” for purposes of the bad debt refund statute. Such a unit existed here.

As previously explained, because of burdens imposed by federal lending restrictions and the difficulty of complying with the lending laws of fifty different states, most national retailers do not extend credit themselves under PLCC programs. Instead, most national retailers such as Home Depot use third-party financial institutions authorized by federal law to issue credit cards on a nationwide basis to finance and manage their PLCC programs. Pursuant to such an arrangement, Home Depot provides the customers and the merchandise and paid sales tax, while the financing company exercises the discretion as to whether to issue a Home Depot PLCC to a customer and deducts bad debts on its federal income tax return. These circumstances make clear that Home Depot and the

⁴ Pursuant to RCW 82.08.010(4), this definition of “person,” which is set forth in Chapter 82.04, “Business and Occupation Tax,” applies to Chapter 82.08, “Retail Sales Tax,” including the refund provision at issue.

financing companies intended to “act . . . as a unit,” and did, in fact, “act . . . as a unit” — as a “seller” — for purposes of effectuating sales. Any other interpretation would render the language that includes “any group of individuals acting as a unit” in the definition of “person” a nullity.

c. The Washington Supreme Court’s Decision In *Puget Sound* Supports Home Depot’s Reading Of The Statute.

The State claims that the Washington Supreme Court’s decision in *Puget Sound* favors its position that only sellers who deducted worthless debts on their own federal income tax returns are entitled to a sales tax refund. Resp. Br. at 16-17. In fact, *Puget Sound* stands for just the opposite.

In *Puget Sound*, a financing company that had purchased installment contracts from an automobile dealer who assigned all of its rights under those contracts sought a sales tax refund under RCW 82.08.037. The Court readily determined that the financing company satisfied the first requirement of the statute because the financing company, as assignee, is a person. 123 Wn.2d at 287 (“unraveled, RCW 82.08.037 has three requirements: (1) the seller must be a person . . .”). The Court then observed that, “in order for the Bank to . . . be eligible for a sales tax refund,” the “assignment of the installment contracts must satisfy the ‘making sales at retail’ requirement.” *Id.* at 288. Ultimately,

the Court held that, under general assignment law, the financing company satisfied that requirement as well. In short, by virtue of standing in the shoes of the seller, the financing company fulfilled two of the statute's three requirements.

With respect to the third requirement, however — that the sales taxes were “previously paid on debts which are deductible as worthless for federal income tax purposes” — the financing company did not stand in the seller's shoes. Instead, as the Court noted, “the *Bank*”—that is, the financing company itself, separate and apart from its role as assignee—“took a worthless debt deduction for federal income tax purposes relating to the installment contracts.” *Id.* at 287 (emphasis added). In other words, the financing company satisfied this prong of the statute completely independently — not by virtue of any assignment of tax attributes or assumption of the seller's legal position. The Court nevertheless awarded the financing company its requested refund. This decision, where the requirements of RCW 82.08.037 were fulfilled only collectively by the seller and the financing company, not only fails to support the State's argument that the seller itself must write off the worthless debts, but it also affirmatively favors Home Depot's position that RCW 82.08.037 does *not* require the seller to write-off such debts.

4. Home Depot Bore All Losses Relating To Bad Debt.

The record before the Superior Court demonstrated that Home Depot, and Home Depot alone, bore all PLCC program expenses, including losses relating to its customers' worthless debts. As previously explained, under the terms of its PLCC agreements, Home Depot fully compensated the financing companies on a portfolio-wide basis for the costs of the PLCC program, including all administrative and bad debt costs. Specifically, Home Depot provided the financing companies with benefits that Home Depot itself would have enjoyed (and which the financing companies would not have obtained) had Home Depot been able to operate its own PLCC program, including (1) an "income stream," consisting of the right to collect interest and late fees, (2) access to Home Depot's customer database, which the financing companies could use to market other products or financial services to Home Depot customers, and (3) "fees" on certain PLCC transactions. *See* CP 35 (Thorncroft Dep. at 30:22-30:24).

The State nevertheless would have this Court ignore the economic reality behind the PLCC program and deny Home Depot a refund on sales tax overpayments on the ground that Home Depot seeks a "sales tax refund predicated" exclusively on "the service fees." Resp. Br. at 24. In pressing its position, the State also speciously argues that Home Depot

(1) “actually collected the sales taxes from buyers when it accepted payment by credit card” and, thus, “suffered no out-of-pocket loss on the sales taxes when its buyers defaulted” (Resp. Br. at 10, 19); (2) “paid no service fees on ‘regular’ consumer purchases not exceeding \$2,000” (*id.* at 28)⁵; (3) seeks “a refund of service fees it paid” (*id.* at 25); and (4) has failed to present “evidence showing what portion of credit sales GE Capital charged off as worthless related to consumer purchases for which it paid no service fees” (*id.* at 28).⁶

⁵ This argument betrays the State’s ignorance of the compensation arrangement under the PLCC program. The service fees were, in fact, negotiated in advance, and they differed from customer to customer depending on such variables as increased credit risk due to extended payment terms and the type of transactions. The actual schedule of service fees is set forth in the agreements between Home Depot and the financing companies and is far more detailed than the State would have this Court believe. *See* CP 0253-254; *see also* CP 0126, 0190.

⁶ Of note, the State claims for the first time on appeal that Home Depot’s refund claim must be denied because Home Depot cannot prove the amount of the refund to which it is entitled. Resp. Br. at 26-28. While “a ground for affirming a trial court decision which was not presented to the trial court” may be presented on appeal, a party may only present such a ground “if the record has been sufficiently developed to fairly consider” it. RAP 2.5. The State cannot meet that standard. In the trial court, the State’s summary judgment papers addressed only the pure legal issue of whether RCW 82.08.037 requires the seller itself to deduct the worthless debts, and the factual question of whether Home Depot actually incurred the loss resulting from those debts. *See, e.g.*, CP-10 (“Statement of Issue” in State’s Motion for Summary Judgment); CP-360-61 (State’s “Reply in Support of its Motion for Summary Judgment.”). Accordingly, Home Depot was not on notice to address computation issues below, and the State’s arguments in this regard should not be considered here. In any event, this new argument by the State only highlights that questions of
(continued . . .)

These arguments are nothing but red herrings. According to Vice President of Risk Management for GE Customer Finance Eugene Thorncroft, who oversaw all of the financing companies in this PLCC program, Home Depot and GE “incorporated the anticipated bad debt expenses,” on a portfolio basis, “into the pricing [they] created as [they] negotiated the agreement.” CP 35; CP 41-42 (Thorncroft Dep. at 74:2-74:4); *see also* CP 71-72 (Ryser Dep. at 41:1-6: Q. “You understood that the fee charged by [GE] included reimbursement to [GE] for customer bad debt?” A. “. . . , yes.”). Thorncroft also explained that the “fees and [the] income stream that [was] . . . generated by the portfolio covered [GE’s] costs and bad debt losses.” CP 35 (Thorncroft Dep. at 30:22-30:24). In addition, Thorncroft testified that GE’s total compensation from Home Depot exceeded its write-offs of worthless debt for the refund period (as well as all other costs of running the PLCC program), and that this profit demonstrates that Home Depot, not GE, “bore the costs” and paid for the bad debt. CP 33-34, 36, 41 (Thorncroft Dep.)

The State attempts to cast further doubt upon the economic loss incurred by Home Depot by citing a single line in Home Depot’s lengthy agreement with GE to the effect that credit losses “shall be solely borne at

(. . . continued)

material fact exist in this case and that the trial court’s grant of summary judgment to the State was therefore inappropriate.

the expense” of the financing company. CP 15. *See* Resp. Br. at 5. The independent testimony of GE witness Eugene Thorncroft, however, confirmed that Home Depot’s arrangement with its financing companies was structured to — and did, in fact — more than fully compensate the financing companies for any bad debt losses. The provision highlighted by the State merely prevented GE from recovering those costs twice. Thus, it does not in any way nullify the economic loss incurred by Home Depot from fully compensating the financing companies for such bad debt losses on a program-wide basis.⁷

Finally, in a misguided effort to persuade the Court of the merits of its position, the State resorts to quoting snippets of bad debt sales tax decisions by tribunals in various other states out of context. Of course, judicial decisions regarding the applicability of the sales tax refund statutes of other states have no relevance here. Even if they did, the State conveniently fails to mention that *all* of the decisions relating to Home Depot that it references are currently on appeal. In any event,

⁷ In any event, a contract cannot be interpreted in a way that violates the understanding of its own signatories. In construing a contract, “the intention of the parties must control . . . and the interpretation which the parties to a contract have placed on it will be given great, if not controlling, weight.” *Kennedy v. Weyerhaeuser Timber Co.*, 54 Wn.2d 766, 768, 344 P.2d 1025 (1959); *see also* Restatement (Second) of Contracts § 201(1) (1981) (“Where the parties have attached the same meaning to a promise or agreement or a term thereof, it is interpreted in accordance with that meaning.”).

unsurprisingly, the State also fails to note that *twenty* states have granted Home Depot's sales tax refund claims, or allowed credits, without any opposition (*i.e.*, Colorado, the District of Columbia, Hawaii, Idaho, Iowa, Louisiana, Maine, Massachusetts, Minnesota, Missouri, Nebraska, New Mexico, South Dakota, Vermont, Virginia, West Virginia, and Wisconsin).

B. The State's Proffered Interpretation Of RCW 82.08.037 Violates Equal Protection And Due Process.

The State's denial of Home Depot's refund claim is so irrational that it violates equal protection, *see Williams v. Vermont*, 472 U.S. 14, 22-23 (1985), and so arbitrary that it violates due process. *See United States v. Carlton*, 512 U.S. 26, 30 (1994). Responding to these arguments, the State attacks their factual predicate—that Home Depot bears all of the expenses of the PLCC program, including the bad debt losses. As demonstrated above, however, this factual predicate is sound, and it therefore inexorably follows that the State's interpretation of RCW 82.08.037 and its refusal to refund taxes erroneously paid thereunder violates both the U.S. and Washington Constitutions.

1. Denying Home Depot A Sales Tax Refund Violates Equal Protection.

Equal protection disallows legislative classifications that “rest . . . on grounds wholly irrelevant to the achievement of legitimate state objectives.” *State v. Coria*, 120 Wn.2d 156, 171-72, 146 P.2d 543 (1992)

(citation and internal quotation marks omitted). Denying Home Depot a sales tax refund because it records bad debt losses in a different manner than a seller who issues in-store revolving credit violates equal protection.

The State argues that Home Depot is not similarly situated as a seller who issues in-store revolving credit because Home Depot “shifts the risk of loss to a third-party lender in exchange for a service fee.” Resp. Br. at 36. But as noted repeatedly in this brief, the record clearly demonstrates that Home Depot fully compensated the financing companies for bad debt losses under the PLCC program on a portfolio basis. *See supra* at 14-15. Thus, the only distinction between Home Depot and a seller who issues in-store revolving credit is that the latter records its bad debt losses on an account-by-account basis while Home Depot accounts for its bad debt losses in a bundled manner with other administrative costs. For that reason, whether a seller owns its own credit accounts or, as Home Depot did, uses a financing company to service and administer the accounts, is not by itself a rational basis for imposing differing tax obligations under RCW 82.08.037. Both sellers suffer a loss when accounts go uncollected, and both deserve a refund for sales taxes remitted to the State that are never paid by customers. *See Associated Grocers, Inc. v. State*, 114 Wn.2d 182, 188, 787 P.2d 22 (1990) (“Where,

as here, there is but one class, and the members of it are taxed differently, the statute[’s] [interpretation] must be declared unconstitutional.”).

In addressing Home Depot’s equal protection arguments, the State studiously avoids discussing or even citing the Washington Supreme Court’s landmark decision in *Associated Grocers, Inc.*, relying instead on cases that came down as many as 60 years earlier. *See, e.g.*, Resp. Br. at 36 (citing *State Bd. of Tax Comm’rs v. Jackson*, 283 U.S. 527, 536 (1931)). In *Associated Grocers, Inc.*, which strongly supports Home Depot’s position, the Washington Supreme Court struck down a business and occupation tax exemption for food distributors because it did not allow a similar exemption for food wholesalers. Under the relevant statute, large food distributors with vertically-integrated wholesale and retail functions, such as Safeway, were exempt from a wholesaler tax because they did not make sales to retailers. 114 Wn.2d at 185-187. Independent food wholesalers, on the other hand, did make sales to food retailers, and those sales were subject to tax. Thus, even though food distributors and wholesalers performed the same economic function, only the wholesalers were required to pay the taxes at issue, which put them at a competitive disadvantage. *Id.* On this basis, the Washington Supreme Court held that the State’s distinction denied equal protection to the

wholesalers, who had not integrated (or did not wish to integrate) their wholesaler functions with any retail operations. *Id.* at 188.

The decision in *Associated Grocers, Inc.* compels the same result here. Under RCW 82.08.037, the designated classification is retail sellers who remit sales taxes and then request a refund of any such taxes that ultimately were not paid by buyers. The State reads an unwritten distinction into the statute between sellers who finance buyers' sales tax payments themselves, and sellers who contract with third parties to administer such financing. Home Depot's position is akin to that of the wholesalers in *Associated Grocers, Inc.*, who did not vertically integrate their operations to bring their wholesale and retail functions "in-house." Home Depot has not integrated, and is effectively not able to integrate its retail and customer credit financing "in-house." Home Depot's relationship with GE accomplishes the same economic function, and Home Depot bears the same economic costs, as retailers who keep their financing "in-house." These "economically and functionally equivalent transactions" must be "treated similarly." Jerome R. & Walter Hellerstein, STATE TAXATION, ¶ 12.08[3], at 12-95 (3d ed. 2007).⁸

⁸ Moreover, when a legislature has not spoken clearly on a tax matter, this normative principle should apply. *Id.*

The State also argues that this Court should ignore the privileges and immunities clause of the Washington Constitution, even though its safeguards apply. Resp. Br. at 34 n.7. The Washington Supreme Court has held that Article I, Section 12 of the Washington State Constitution “provides greater protection than the equal protection clause of the United States Constitution when the threat is not of majoritarian tyranny but of a special benefit to a minority and when the issue concerns favoritism rather than discrimination.” *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake*, 145 Wn.2d 702, 731, 42 P.3d 394 (2002), *overruled on other grounds*, 150 Wn.2d 791, 813-14, 83 P.3d 419 (2004). Here, the State confers upon Washington’s retailers who finance customer sales “in-house” a favored status that it declines to provide to Home Depot. Accordingly, the State’s interpretation of RCW 82.08.037 violates the Washington Constitution in addition to the U.S. Constitution.

2. The State’s Unjust Enrichment From Retaining Sales Tax Payments On Defaulted Sales Transactions Violates Due Process.

The State argues that its retention of sales tax payments on uncollected PLCC accounts does not violate due process because RCW 82.08.037 “entitles a seller to recover only taxes it paid out-of-pocket on behalf of the buyer, not amounts it received from a third party lender, on behalf of the buyer, and held as the State’s trustee.” Resp. Br. at 32. Of

course, the State's claim ignores the economic substance of the PLCC program, under which Home Depot and the financing companies negotiated a compensation structure ensuring that Home Depot would bear all of the expenses of GE, including the economic loss of defaulted sales transactions. *See supra* at 14-15.⁹

Incredibly, the State also asserts that it is not unjustly enriched because “the legislature . . . has not authorized a sales tax refund for credit card companies that incur bad debt losses.” Resp. Br. at 33. Yet as the State itself has acknowledged, when courts “undertak[e] . . . a plain language analysis,” they “avoid interpreting a statute in a manner that leads to unlikely, strained, or absurd results” such as this. *Burns v. City of Seattle*, 161 Wn.2d 129, 151, 164 P.3d 475 (2007). Under the plain language of RCW 82.08.037, Home Depot qualifies for a refund. In addition, as previously explained, the RCW expressly contemplates a refund for “any group of individuals acting as a unit.” RCW 82.04.030 (emphasis added); *see also Puget Sound*, 123 Wn.2d at 288-89. Here,

⁹ For the same reason, the State's charge that *Home Depot* seeks a financial windfall by recovering sales taxes twice, once from the State and once from GE, falls flat. Resp. Br. at 20. Home Depot never truly “recovered” the sale taxes on defaulted accounts, since the terms the PLCC program were designed to ensure that Home Depot bore all of GE's expenses, including its bad debts. The current refund claim represents Home Depot's only chance to recover the sales taxes that Home Depot paid to the State with respect to defaulting customers.

Home Depot and its financing companies did, in fact, “act . . . as a unit” in effectuating sales. *Id.* For these reasons, the State’s interpretation of RCW 82.08.037 unjustly enriches the State, leaving it with exactly the type of “financial windfall” that the Washington Supreme Court disallowed in *Puget Sound*. See 123 Wn.2d at 290 (holding that financing company that had purchased installment contracts and was assigned all rights thereunder by automobile dealer was entitled to sales tax refund, and observing that “any other rule is inequitable and entitles the State to a financial windfall”). This windfall flowing to the State from ill-begotten “sales” tax payments collected on consumer defaults is wholly arbitrary and violates due process.¹⁰

¹⁰ The State’s decision also independently violates longstanding equitable principles protecting against unjust enrichment. Under Washington law, “unjust enrichment” results from a person having “and retain[ing] money or benefits which in justice and equity belong to another.” *Bailie Commc’ns, Ltd. v. Trend Bus. Sys., Inc.*, 61 Wn. App. 151, 160, 810 P.2d 12 (1991) (citation and internal quotation marks omitted). Here, the “money” in question is in the hands of the one party that, “in justice and equity,” is surely not entitled to keep it – the State, which is “retaining” dollars as “sales tax” on sales that never occurred. *Id.* Indeed, RCW 82.08.037 demonstrates recognition on the Legislature’s part that the State may be unjustly enriched through the retention of taxes erroneously paid. The remedy for such unjust enrichment is restitution, which is the “underlying objective” to “prevent unjust enrichment by either party.” *Seattle Prof’l Eng’g Employees Ass’n v. Boeing Co.*, 139 Wn.2d 824, 838, 991 P.2d 1126 (2000) (internal citations omitted). For this separate and independent reason, the Court should reverse the State’s decision and order that a refund be awarded to Home Depot.

III. CONCLUSION

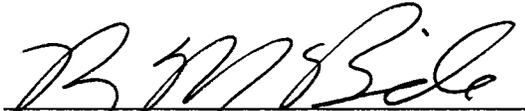
For the foregoing reasons, Home Depot respectfully requests that this Court reverse the decision of the Superior Court and order the State to grant Home Depot the refund that it is rightfully owed.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 19, 2008, I caused the original the foregoing **REPLY BRIEF OF APPELLANT** to be filed with Washington Court of Appeals, Division II and a copy of the foregoing to be served on the following person(s) in the manner indicated below at the following address(es):

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