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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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NO. 39021-3-II

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

GARY R. PROBST, ET UX DBA DIAMOND DRIVING SCHOOL,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF
WASHINGTON, ET AL

Respondent.

BRIEF OF RESPONDENT

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employer failed to provide adequate access. *Id.* Here, the Board found that Probst “failed to present adequate records when requested by a subpoena issued by the Department . . . and otherwise failed to cooperate with the auditor pursuant to a legal audit she was conducting to determine if the firm owed industrial insurance taxes” For this reason, the Board concluded, Probst was barred under RCW 51.48.030 and RCW 51.48.040 from challenging the assessment. CABR 3 (Finding No. 6); CABR 4 (Conclusion 4).....20

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I. INTRODUCTION

For years, Gary Probst has concealed, misrepresented, and obfuscated his involvement in his driving school business in order to avoid paying taxes. In this, his latest appeal, Probst contends that Washington's procedural requirements to file a tax appeal *and* its substantive tax law which require him to cooperate with a tax audit do not apply to him. Because they do, this Court should affirm the decisions reached by every reviewing entity that has considered Probst's claims for the past decade, and uphold the Department of Labor and Industries (Department) tax assessment that Probst challenges.

The Department initiated its first audit of Probst's driving school business in 1999. *R&G Probst v. Dep't of Labor & Indus.*, 121 Wn. App. 288, 291-93, 88 P.3d 413, *review denied*, 152 Wn.2d 1034 (2004) (*Probst I*). During that audit, Probst refused to cooperate with the Department and failed to provide his business records to the Department's audit staff. He also alleged that the driving instructors who worked for him were independent contractors for whom he owed no taxes. The Board of Industrial Insurance Appeals (Board), the Thurston County Superior Court, and this Court all concluded that because Probst had failed to cooperate with the Department's audit he was barred from challenging the Department's assessment of taxes against him. *Id.* at 294-95.

In 2005, the Department again was required to conduct an audit of Probst's driving school business. As had been the case in *Probst I*, Probst refused to cooperate with the Department and failed to provide the records necessary to audit his business. Because of Probst's failure to provide records, the Department was forced to estimate the taxes due. The Department also assessed interest and penalties on the taxes that Probst owed. On September 5, 2006, the Department issued an order assessing \$953,159.26 in industrial insurance taxes, interest and penalties due and owing for the period of July 1, 2003 through June 30, 2006.

Probst appealed to the Board alleging this time that he had no business records because he had not actually been involved in the driving school, notwithstanding voluminous Department of Licensing records to the contrary. After a hearing, the Board once again ruled that pursuant to RCW 51.48.030 and .040, Probst had failed to provide his business records, which again barred him from challenging the Department's tax assessment.

Probst appealed to superior court. However, before pursuing that appeal Probst neither paid his taxes, interest and penalties nor obtained an order that payment would be an undue hardship on him. The Superior Court therefore dismissed his appeal pursuant to RCW 51.52.112, which requires such payment as a condition of appealing a Board order in an assessment case.

Probst now appeals to this Court.

II. COUNTERSTATEMENT OF THE ISSUES

1. RCW 51.52.112 requires an employer contesting a tax assessment to (a) pay the assessed taxes, interest and penalties, or (b) obtain an order from superior court that such payment would be undue hardship, prior to pursuing an appeal from the Board to Superior Court. Did the Superior Court err when it held that Probst was barred from pursuing his superior court appeal of the Board decision affirming the Department's tax assessment because he failed to either (1) make payment of taxes, interest and penalties, or (2) obtain a hardship exemption?
2. RCW 51.48.030 and .040 require an employer to provide adequate records to allow the Department to conduct an audit of the business or be barred from challenging the Department's assessment. Is the Board's finding that Probst failed to provide adequate records and otherwise failed to cooperate with the Department in an audit of his business supported by substantial evidence?
3. Assuming Probst is not barred for either of the two reasons noted in the first two issue statements, are the Board's findings that Probst continued to operate driving schools and continued to have covered workers for whom he willfully failed to pay premiums supported by substantial evidence?

III. COUNTERSTATEMENT OF FACTS

A. Introduction

Probst's recitation of the facts could more properly be termed a recitation of the evidence favorable to his position. Regardless, however, Probst does not dispute that he neither paid the taxes and penalties the Board affirmed, nor obtained an order stating that such payment would constitute an undue hardship, prior to pursuing his superior court appeal.

As explained in Part IV.B below, that fact alone disposes of this case and makes his factual statement irrelevant.

Furthermore, to whatever extent that Probst argues other facts, the question before this court is not whether there is any evidence presented in support of his position. Rather, the question is whether there is substantial evidence to support the findings of the Board. There is.

B. Facts

I. Probst I.

Gary Probst started his driving school business, Diamond Driving, in 1995. CABR G. Probst 11/6/07 44¹. By 1999, Probst had a number of driving schools across the state. *Probst I*, 121 Wn. App. at 290; CABR G. Probst 11/6/07 44-45. In setting up his schools, Probst took great pains to avoid paying Industrial Insurance taxes. *Probst I* at 290; CABR 57; (“The Board agreed with the penalties assessed in Probst 1, noting that Mr. Probst was conscientious in his efforts to avoid coverage of the Industrial Insurance Act. . .”).

Prior to the audit at issue here, the Department initiated an audit of Probst’s driving school business in 1999. *Probst I* at 290-291; CABR McNutt 11/27/07 27; CABR G. Probst 11/6/07 12. This audit covered the period from January 1, 1997 to December 31, 1999. The Department first

¹ “CABR” refers to “Certified Appeal Board Record.” Board documents are referenced as “CABR,” followed by the machine-stamped page number in the lower right hand corner of the page. Testimony of witnesses is shown as “CABR,” followed by the name of the witness, the date of testimony and the page number in the transcript. Exhibits are referenced as “CABR Exhibit” followed by the exhibit number.

requested that Probst provide his business records in spring 1999. *Probst I* at 295. In response, Probst provided exactly the following documents: one blank driver instructor contract and one signed driver instructor contract. *Id.* The Department again requested Probst's business records and advised Probst that his further refusal would subject him to penalties and interest. This time, Probst did not respond at all. *Id.* at 291.

Finally on October 28, 1999, the Department subpoenaed Probst's business records. *Probst I* at 291. Probst refused to respond to the Department's subpoena. *Id.*

Because Probst failed to provide records that would allow the Department to complete its audit, the Department followed RCW 51.16.155 and estimated Probst's taxes based upon records received from the Superintendent of Public Instruction and the Department of Licensing. Based on these documents, the Department issued an assessment in the amount of \$68,028.76. *Probst I* at 292.

Probst appealed to the Board, asserting that his driving school instructors were independent contractors who were exempt from coverage under the Industrial Insurance Act. *Probst I* at 292. The Board refused to consider this argument, finding that Probst was barred from contesting the assessment because he failed to provide adequate business records and "obstructed [L&I's] statutory obligation to administer the Industrial Insurance Act." *Probst I* at 292, citing RCW 51.48.040.

Probst appealed to superior court, which affirmed the assessment. *Id.* at 292. Probst again appealed, and this Court concluded that substantial evidence supported the Board's determination that Probst had failed to cooperate with the Department's audit. Probst was, therefore "bar[red] . . . from questioning any portion of the assessment's correctness." *Id.* at 295; CABR G. Probst 11/6/07 12. The Supreme Court denied Probst's petition for review of this Court's decision. *See, Probst I*, 152 Wn.2d 1034 (2004).

2. Probst Continued in the Driving School Business.

In 2002, while *Probst I* was still in litigation, Probst closed his Labor and Industries account. CABR McNutt 11/27/07 8. Probst, however, did not close his business and continued to operate his driving schools.² CABR 62-63, Finding of Facts No. 2, 3, 4 and 5; CABR Rouleau 7-12.

Probst's continued involvement in these schools is evidenced by the plethora of documents containing his signature. For example, the record is replete with signed Applications for a License to Operate a Commercial Driver Training School which list Probst as an owner/partner and which Probst himself signed as an "owner, partner, associate or corporate officer" certifying that the information contained in the license

² Probst did business under the Diamond Driving School and provided instruction at numerous locations throughout the state using the names: Diamond Driving Schools; America's Best Driving Schools; and Quality Driving Schools. CABR 3. For sake of clarity, they will be referred collectively to as "Probst" unless otherwise indicated.

application was true. CABR Exhibits 26, 34, 37, 49, 52 60, 71, 84, 113, 115, 119 and 121.³

In addition to the Applications for a Commercial Driver Training School, Probst's signature is also on hundreds of Student Completion Forms. CABR Exhibits 21, 28, 36, 58 and 94. Student Completion Forms report the names of students who successfully complete driver training, as well as the completion-certificate number assigned to them. CABR Cochran 11/27/07 14 -15. In addition to the student names and certificate numbers, the Student Completion Form also lists the names of the instructors who taught them. *Id.* Finally, the form is to be signed by the person completing the form. *Id.*

Probst's signature also appears on a number of leases for driving schools, several of which were notarized. For example, Probst signed a lease for America's Best driving school on September 25, 2005. CABR Exhibit 20. The term of the lease was from October 1, 2005 through September 30, 2008. *Id.* Probst also signed a lease for a Seattle location driving school on March 17, 2005. CABR Exhibit 50. The term of this Seattle lease was for one year starting on April 1, 2005. *Id.* His son, Sean Probst notarized his father's signature on this lease. *Id.* Greg Satterfield also notarized Probst's signature on a lease. CABR 62.

³ The Department of Licensing requires driving school owners to submit such applications, along with a fee, prior to opening their school, and annually thereafter. CABR Cochran 11/27/07 6, 8. Driving school owners are also required to submit an additional application anytime there is a change in the ownership, or a change in location. *Id.*

This lease was for a driving school in Everett and ran for the period of January 1, 2005 through December 31, 2007. *Id.* Other examples of leases can be found at CABR Exhibits 24, 27, 45, 67, 72, 96 and 108.

The documents that Probst signed are hardly the only evidence of his continued operation of various driving schools. This ownership interest was corroborated by Renee Rouleau who investigated Probst on behalf of the Department of Licensing. CABR Rouleau 11/27/07 4-5. The investigation was initiated because the Office of Superintendent of Public Instruction⁴ received numerous complaints from individuals alleging that Probst renewed their driving instructor license despite the fact that they were no longer working for him, that Probst had signed their name on student completions sheets, and that Probst had required that his name and not theirs be used when a student was driven. CABR Rouleau 11/27/07 4-5. When Ms. Rouleau started her investigation in 2002, she determined, through interviews with students and instructors, and by reviewing the school's business records, that Probst was actively teaching students in addition to running the schools. CABR Rouleau 11/27/05 7.

In approximately 2003, Probst stopped most of his teaching responsibilities but continued to have a controlling interest in all the schools. *Id.* Ms. Rouleau found that he owned or controlled the schools'

⁴ Driving Instruction responsibility was transferred from OSPI to the Department of Licensing.

assets such as insurance, cars, leases, classroom equipment, phones, the school advertising, and the curriculum. CABR Rouleau 11/27/07 8-11.

3. The Second Audit

In December 2005, the Department of Licensing advised Labor and Industries that Probst was continuing to operate his driving school business and that he had workers for whom Industrial Insurance premiums were due. CABR McNutt 11/27/07 8. Because Probst had closed his industrial insurance account in 2002, the Department determined that an audit of Probst was warranted. *Id.*

The Department issued a subpoena to Probst to obtain the records needed to conduct the audit. CABR Exhibit 10; G. Probst 11/6/07 13-14; McNutt 11/27/07 9. On August 3, 2006, a Department investigator attempted to serve the subpoena on Probst at 9109 Veterans Dr. SW in Tacoma. *Id.* Upon arrival, the Department investigator saw Probst, whom he recognized, getting into a car. He called out Probst's name, to which Probst responded "nope not me" and left. *Id.* At the hearing, Probst admitted that the person in the parking lot was him. CABR G. Probst 11/6/07 13-14.⁵

After leaving the area, Probst called his son, Sean Probst, who was present at the building, asking what was going on. *Id.* Probst's son said

⁵ According to Probst, he was not attempting to avoid service when he drove away from the Department inspector who was calling his name. He claimed that he was merely in a rush to go to Spokane and did not have time to receive the subpoena. CABR G. Probst 11/6/07 13.

that “some individuals with L and I came by with a subpoena.” CABR G. Probst 11/6/07 14. Probst asked his son for the Department’s investigator’s phone number and called him. *Id.* The investigator told Probst that the subpoena needed to be hand-delivered to him. *Id.* However, as Probst was on his way to Spokane, he told the investigator to give it to his son and that “it would be as good as serving me.” *Id.* The subpoena was served later on Probst’s son. G. Probst 11/6/07 13-14; McNutt 11/27/07 9.

Pursuant to the subpoena, Probst was required to produce:

Time cards, time books, employee earning records, records of production, canceled checks, check registers, bank statements, contracts, payroll journals, cash disbursement journals, invoices for materials or work, IRS returns with all supporting forms and schedules including forms W-2 and 1099, reports to Washington Employment security and Department of Revenue, accountant worksheets and any other records in your possession relating to the subject business for the period 4/01/03 through 3/31/06.

CABR Exhibit 10.

Probst appeared on August 14, 2006, at the Kennewick office of the Department. CABR G. Probst 11/6/07 47; McNutt 11/27/07 10. He did not, however, bring the documents that the subpoena had identified. Instead he simply indicated that he had no ownership interest or any other involvement in any driving school. CABR McNutt 11/27/07 11. Probst did provide copies of: (1) a December 12, 2005 letter from the Department indicating that a Labor and Industries account had been opened, (2) a rate

notice dated December 15, 2005, indicating the rate was effective October 1, 2005, and (3) a rate notice dated December 15, 2005, indicating the rate was effective January 1, 2003⁶. CABR G. Probst 20, 47; McNutt 11/27/07 10-11; Exhibit 157.

After telling Department representatives that he would provide a written statement regarding his involvement with these businesses after speaking with an attorney, Probst left. CABR McNutt 11/27/07 12. Probst called back the following day, and left a message indicating that he would not be providing any further documents. *Id.*

Because Probst had again failed to provide documentation to support his contentions, and failed to provide documents for businesses he was in fact involved in, the Department pursuant to RCW 51.16.155 again estimated the premiums owed. CABR McNutt 11/27/07 13. As in *Probst I*, the assessment was calculated by estimating the number of hours instructors worked using Department of Licensing records; those records showed the names of instructors and of students who completed the driving school courses throughout the audit period. CABR McNutt 11/27/07 13.

On September 5, 2006, the Department issued to Probst the notice and order of assessment of industrial insurance premiums, penalties, and interest in the amount of \$953,159.26. CABR 8. This sum included

⁶ The account was reopened per a request of the auditor as part of the audit process. CABR McNutt 11/27/07 18-19, 29.

premiums in the amount of \$76,541.78, late filing penalties and interest of \$28,996.35, a penalty of \$53,453.33 for failure to register with the Department, a penalty of \$28,500 for failure to maintain records, a penalty of \$250 for failure to allow inspection of the firm's records, and a penalty of \$765,417.80 for misrepresentation of the amount of payroll.

4. Procedural History

On September 5, 2006, the Department issued the Notice and order of assessment of industrial insurance premiums, penalties and interest in the amount of \$953,159.26. CABR 67-69.

On October 5, 2006, Probst filed his appeal to the Board, and hearings were held. CABR 70-71. The industrial appeals judge who heard the case issued his proposed decision recommending that the Board affirm the Department's assessment in whole. CABR 46 – 65. Probst timely filed a petition for review by the 3-member Board. CABR 8- 39

The Board granted review. The Board issued its final decision, which, like the IAJ's proposed decision, affirmed the Department's assessment in whole. The final decision of the Board included the following pertinent findings of fact:

3. During the third and fourth quarters of 2003, all of the four quarters of 2004, 2005 and for the first and second quarters of 2006, **Gary R. Probst et ux, dba Diamond Driving School, was the owner or lessor of multiple classroom facilities, furnishings, and automobiles in the state of Washington that were used by instructors to provide instruction services by providing commercial advertising; insurance coverage, payment of leases, and**

handling bookkeeping for numerous driving schools throughout the state of Washington.

4. During the third and fourth quarters of 2003, all of the four quarters of 2004, 2005 and for the first and second quarters of 2006, **Gary R. Probst et ux, dba Diamond Driving School, contracted with various individuals to provide both classroom and driving instruction to students throughout the state of Washington, and paid those instructors an hourly rate, and those instructors were employees of his firm, and were not independent contractors because the essence of their contract with that firm was for personal labor.**

5. During the third and fourth quarters of 2003, all of the four quarters of 2004, 2005 and for the first and second quarters of 2006, **Gary R. Probst et ux, dba Diamond Driving School intended to avoid the burdens of the Industrial Insurance Act by misrepresenting his payroll and failing to pay industrial insurance premiums for its workers either at all or in a timely fashion.**

6. During the third and fourth quarters of 2003, all of the four quarters of 2004, 2005 and for the first and second quarters of 2006, **Gary R. Probst et ux, dba Diamond Driving School, failed to present adequate records when requested by a subpoena issued by the Department of Labor and Industries, and otherwise failed to cooperate with the auditor pursuant to a legal audit she was conducting to determine if the firm owed industrial insurance taxes to the State Fund.**

CABR 3-4 (emphasis added).

Probst appealed to the superior court without first either paying the affirmed assessment amount or obtaining an order that such a payment would be a hardship on Probst. CP 4-10.

The superior court after hearing arguments from the parties concluded that Probst failed to follow the requirements of RCW 52.51.112

and either to pay the assessment or to obtain a ruling that such payment would be hardship for Probst. CP 133-134. The court dismissed his appeal. *Id.*

In the alternative, the court ruled that the Board's findings were substantially supported by record, and that the Board made no error in its legal conclusion. CP 133-34.

IV. ARGUMENT

A. Standard of Review

The Administrative Procedure Act (APA) governs this Court's review of the Board's decision in an industrial insurance tax assessment case. RCW 51.48.131; *Jamison v. Dep't of Labor & Indus.*, 65 Wn. App. 125, 127, 827 P.2d 1085 (1992). This Court reviews the decision of the Board on the Board's record. *Probst I*, 121 Wn. App. at 293. Probst bears the burden of proving the invalidity of the Board's action and establishing that the assessment was incorrect. *Black Real Estate Co. Inc. v. Dep't of Labor & Indus.*, 70 Wn. App. 482, 486-87, 854 P.2d 46 (1993); *Jamison*, 65 Wn. App. at 133; RCW 34.05.570(1)(a).

On issues of fact, such as whether Probst failed to present adequate records to the Department during the audit, this Court may grant relief only if the Board's findings are "not supported by evidence that is substantial when viewed in light of the whole record before the court." RCW 34.05.570(3)(e). The substantial evidence test is "highly

deferential.” *ARCO Prods. Co. v. Utils. & Wash. Transp. Comm’n*, 125 Wn.2d 805, 812, 888 P.2d 728 (1995). The test is not whether the evidence is sufficient to persuade the reviewing court of the truth or correctness of the order; rather, the test is whether any fair-minded person could have ruled as the Board did after considering all of the evidence. *Callecod v. State Patrol*, 84 Wn. App. 663, 676 n.9, 929 P.2d 510 (1997).

Evidence may be “substantial” even if it is in conflict with other evidence in the record. *Id.* At 676. In determining whether substantial evidence exists, the Court must take the “record in the light most favorable to the party who prevailed [before the fact-finding tribunal],” here, the Department. *Harrison Memorial Hosp. v. Gagnon*, 110 Wn. App. 475, 485, 40 P.3d 1221 (2002).

The Board’s legal conclusions are reviewed *de novo*. *Wash. State Dep’t of Labor & Indus. v. Mitchell Bros. Truck Line, Inc.*, 113 Wn. App. 700, 704, 54 P.3d 711 (2002); RCW 34.05.570(3)(d). Under this standard a court may essentially substitute its judgment for that of the administrative body, though substantial weight is to be accorded the agency’s view of the law. *Franklin Cy. Sheriff’s Office v. Seller*, 97 Wn.2d 317, 325, 646 P.2d 113, *cert. denied*, 459 US 1106. On mixed questions of law and fact, the Court determines the law independently and then applies it to the facts as the agency has found them. *Hamel v. Empl. Sec. Dept.*, 93 Wn. App. 140, 145, 966 P.2d 1282 (1998).

1. Probst Is Barred From Challenging The Board's Decision Because He Failed To Either Make Payment Of The Amount Due Or Obtain A Hardship Exception From The Superior Court.

RCW 51.52.112 requires that an employer who is appealing from a Board order regarding industrial insurance taxes either (1) pay the taxes, interest and penalties or (2) obtain a court order that finds that such a payment would be a hardship for the employer:

All taxes, penalties, and interest shall be paid in full before any action may be instituted in any court to contest all or any part of such taxes, penalties, or interest unless the court determines that there would be an undue hardship to the employer.

RCW 51.52.112

It is undisputed that Probst neither paid the assessment nor obtained a hardship order. Instead, Probst argues that RCW 51.52.112 does not apply to him because it somehow denies him reasonable access to the courts. Alternatively, Probst maintains that RCW 51.52.112 was implicitly repealed by RCW 51.52.110. He is mistaken on both counts.

2. Probst had reasonable access to the courts.

In a single sentence in his brief, for the first time in this case, Probst suggests that to apply RCW 51.52.112 the way it is written “is to deny Probst a reasonable access to the courts to redress an injustice.” Appellant’s Brief at 24. However, as this argument is supported by neither reference to the record nor any citation of authority, it should not

be considered by this Court. RAP 10.3(a)(5); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).⁷ Moreover, Probst waived this argument by not raising it at superior court. RAP 2.5(a).

Furthermore, even if this court were to consider this argument, it is clear that Probst has reasonable access to the courts. First and most obviously, Probst was able to pursue his Board appeal without paying the assessment. Probst thus had his “day in court” before the Board; it is only after losing at that level and appealing that Probst is required to pay the assessment that the Board upheld. Second, Probst could have requested a

⁷ To the extent Probst’s “access to the courts” argument is constitutional in nature, his claim is nothing more than a “naked casting[] in the constitutional sea” that is “not sufficient to commend judicial consideration and discussion.” *State v. Billie*, 132 Wn.2d 484, 493 n.2, 939 P.2d 691 (1997) (internal citations omitted). See also *1519-1525 Lakeview Blvd. Condominium Ass’n v. Apartment Sales Corp.*, 144 Wn.2d 570, 582, 29 P.3d 1249 (2001) (legislature may limit access to courts in exercise of police power).

In any event, Probst lacks standing to challenge the constitutionality of RCW 51.52.112. This is because he made no attempt to avail himself of the hardship exemption that the statute provides and therefore cannot show that it denies him of anything at all. Cf. *Farris v. Munro*, 99 Wn.2d 326, 329, 662 P.2d 821 (1983) (absent a showing that such a request would be futile, taxpayer lacks standing to challenge constitutionality of tax statute unless he first requests that proper public official bring suit on behalf of all taxpayers); *Galvin v. Tax Comm’n.*, 56 Wn. 2d 738, 740, 355 P.2d 362 (1960) (out-of-state parties lack standing to challenge validity of tax “as they do not pay it, and no attempt is being made to collect it from them”); see generally *MacLean v. First Northwest Indus. of America*, 96 Wn.2d 338, 347, 635 P.2d 683 (1981) (“one who seeks to challenge the constitutionality of a law . . . must show that the particular action complained of has operated to his prejudice”).

Because the record contains no information at all regarding Probst’s assets, he cannot show that a request for a hardship exemption would have been denied. He therefore cannot now argue that the unknown response to a request that he never made would have been unconstitutional.

hardship exemption, which could have alleviated or eliminated altogether the pre-payment requirement⁸.

Third, Probst could have paid the assessment, which would have allowed him to pursue his appeal. As he neither paid the assessment nor obtained a hardship order, the superior court lacked jurisdiction to hear his appeal.

3. RCW 51.52.110 is inapplicable in premium assessment cases and does not implicitly repeal RCW 51.52.112.

Probst also argues, in attempting to escape the requirements of RCW 51.52.112, that the statute conflicts with and therefore was implicitly repealed by RCW 51.52.110. Appellant's Brief at page 24-25. But because RCW 51.52.110 is inapplicable to tax assessment cases, it is not in conflict with RCW 51.52.112.

Repeal by implication can occur in two ways. *Amalgamated Transit Union Legislative Council of Wash. State v. State*, 145 Wn.2d 544, 552, 40 P.3d 656 (2002). First, and not at issue here, a statute may be impliedly repealed if the subject matter of subsequent legislation covers the entire scope of the earlier legislation and is evidently intended to supersede the prior legislation. *Id.* Second, repeal by implication may occur if the two acts are so clearly inconsistent with each other that they

⁸ As noted above, the record contains no evidence of Probst's financial condition. It is thus impossible to determine what the outcome might have been had Probst chosen to seek a hardship exemption. This is another reason why Probst cannot now argue that the qualified requirement that he pay his assessment before pursuing his second appeal is unjust or unlawful.

cannot by a fair and reasonable construction be reconciled and both be given effect. *Id.* However, as noted in the appellant's brief, repeal by implication is strongly disfavored. *Amalgamated*, 145 Wn. 2d at 552; *Tollycraft Yachts Corp. v McCoy*, 122 Wn. 2d 426, 439, 858 P.2d 503 (1993).

RCW 51.52.110 establishes the procedure to appeal from an adverse Board decision in most types of cases. RCW 51.52.110. As part of that appeal procedure, RCW 51.52.110 notes that a "bond" is not required to appeal except in the case of appeals arising under the now repealed statute RCW 51.48.070. In the part that is pertinent to Probst's argument, RCW 51.52.110 provides that:

No bond shall be required on appeals to the superior court or on review by the supreme court or the court of appeals, except that an appeal by the employer from a decision and order of the board under RCW 51.48.070, shall be ineffectual unless, within five days following the service of notice thereof, a bond, with surety satisfactory to the court, shall be filed, conditioned to perform the judgment of the court.

RCW 51.52.110

Probst alleges a conflict between the more general "no bond language" of RCW 51.52.110 and the specific assessment-payment language of RCW 51.52.112. However, RCW 51.52.110 is not applicable to tax assessment cases. *Etco v. Dep't of Labor & Indus.*, 66 Wn. App. 302, 304-08, 831 P.2d 1133 (1992). *Etco* holds that RCW 51.48.131, not RCW 51.52.110, governs appeals to superior court from the Board in tax

assessment cases. *Id.* That is because RCW 51.48.131 is the specific statute governing tax assessment appeals, while RCW 51.52.110 is the general statute for appeals from the Board to superior court in other types of cases.⁹ *Id.*

Likewise, RCW 51.52.112 is a specific statute governing employer appeals from Board decisions in assessment cases. Nothing in RCW 51.52.112's pre-payment requirement conflicts with RCW 51.48.131's incorporation of APA judicial review provisions. RCW 51.52.112 and RCW 51.48.131 therefore govern Probst's appeal. *See General Telephone Co. of the Northwest, Inc. v. Washington Utilities & Transp. Com'n*, 104 Wn.2d 460, 464, 706 P.2d 625 (1985) (“[t]he specific statute supersedes a general statute when both apply”).¹⁰

B. Because Substantial Evidence Supports The Board Finding That Probst Failed To Present Adequate Records And Failed To Cooperate With The Department, Probst Is Barred From Challenging The Department's Assessment.

- 1. RCW 51.52.030 and RCW 51.52.040 Require Employers to Keep, Preserve and Provide Records for an Audit or to be Forever Barred from Challenging an Assessment.**
- 2. An employer is obligated to keep, to preserve, and to provide the Department with access to its business**

⁹ RCW 51.48.131 provides that in tax assessment cases, appeals from the Board to superior court “are governed by the provisions relating to judicial review of administrative decisions contained in RCW 34.05.510 through RCW 34.05.598.”

¹⁰ Even if the “no bond” language of RCW 51.52.110 were applicable to assessment cases, which it is not, no conflict would exist. RCW 51.52.112 does not require an employer to post a bond. Instead, RCW 51.52.112 requires full payment of the assessment or the obtaining of an exemption before proceeding with the appeal. A bond does not require full payment, but rather guarantees a party is able to pay the amount in the event an appeal is unsuccessful. *Black's Law Dictionary*, 169 (7th Ed. 1999).

records. RCW 51.48.030; RCW 51.48.040; *Probst I* 121 Wn. App. at 293. The records must be sufficient for the Department to determine the industrial insurance taxes due. *Id.* Failure to satisfy these requirements forever bars the employer from challenging any assessment for the period that records were not kept preserved or for which the employer failed to provide adequate access. *Id.* Here, the Board found that Probst “failed to present adequate records when requested by a subpoena issued by the Department . . . and otherwise failed to cooperate with the auditor pursuant to a legal audit she was conducting to determine if the firm owed industrial insurance taxes” For this reason, the Board concluded, Probst was barred under RCW 51.48.030 and RCW 51.48.040 from challenging the assessment. CABR 3 (Finding No. 6); CABR 4 (Conclusion 4).

In *Probst I*, this very employer was barred from challenging an earlier assessment because of his failure to cooperate. Like the case at hand, the Department subpoenaed business records and Probst failed to cooperate and to provide the Department access to his business records. This Court held that Probst’s failure to cooperate at the time of the audit barred him from any challenge to the Department assessment. *Probst I* at 295.

3. Substantial Evidence Supports that Probst Was Engaged in Business and Was Required to Keep, Preserve and Provide Records.

Probst argues that he was not associated with nor did he have any connection to these schools and therefore was not obligated – or even able – to provide records. According to Probst, since he had no access to the records the Department sought, he cannot be liable for any premiums.

Appellant's Brief 14. The Department of Licensing records, as well as Probst's own admissions and his witnesses' testimony clearly refute this allegation.

In this case, the record contains numerous Applications for a Commercial Driver Training School which identify Probst as an owner/partner in these businesses. CABR Exhibits 26, 34, 37, 49, 52 60, 71, 84, 113, 115, 119 and 121. These applications span both the audit period as well as the width and breadth of the State of Washington. *Id.* Not only do these records list him as an owner/partner in these schools, but Probst himself signed the applications as an "owner, partner, associate or corporate officer" and certified that the information contained in the license application was true. *Id.*

In addition to the Applications to Operate a Commercial Driving School, the record contains hundreds of student completion sheets from many different schools and for many different time periods which were all signed by Probst. CABR Exhibits 21, 28, 36, 58 and 94.

The record also contained several leases for schools, some of which contain a notarized signature of Probst, correspondence with the Department of Licensing, and several other documentary pieces of evidence that establish that Probst remained actively in control of his driving school business. CABR Exhibits 20, 24, 27, 50, 62, 72, 96, and 108. These documents provide substantial evidence to support the

Board's findings that Probst was engaged in the driving school business during the audit period and was able and obligated to provide the subpoenaed records.

Confronted with these documents, Probst argues that *none* of them contain his signature. CABR G. Probst 11/6/07 48-159; G. Probst 11/9/07 57, 72, 159. They are instead, Probst effectively maintains, a series of forgeries. Probst offers no reasonable explanation as to how or why anyone would have signed his name to these documents or why the signature, especially those notarized, would appear to be signed by the same person. CABR G. Probst 60, 155.

The apparent forgery ring is apparent a wide one, as Probst testified that a settlement agreement that was also signed by his attorney¹¹; his drivers' license and *his own declarations filed in this case* do not contain his signature. CABR G. Probst 11/6/07 164-166; CABR G. Probst 11/9/07 69, 74, 75 Putting aside the facial absurdity of these claims, even a lay comparison of these signatures shows that they are the same.

Further undermining Probst's conspiracy theory is that in prior litigation, he affirmatively testified that the signatures he now denies were in fact his. CABR G. Probst 11/9/07 71. Now that it is no longer advantageous, Probst insists that that he committed perjury in his earlier

¹¹ This agreement resolved a Department of Licensing matter in which Probst was charged with filing false information. As part of the agreement, Probst agreed to divest all financial interest in all driving schools no later than February 17, 2007. CABR Exhibit 123.

testimony and that those documents do not bear his signature. CABR G. Probst 11/9/07 72. To say the very least, Probst's admission of perjury requires this Court to highly question all of his testimony.

Probst's daughter, Malia Probst – who also signed many of these documents – testified that she could recognize her father's signature and that the application-to-operate documents appeared to have his signature, but as she did not physically see him sign she could not be certain. CABR M. Probst 11/26/07 39; 45 - 46. She did testify though that, prior to signing she had reviewed each document to be sure that the information contained in the document was accurate. CABR M. Probst 1/26/07 40. Further when she signed it she understood that her father was listed as a partner in her driving schools and signed the document certifying that the information on the document was accurate. *Id.* Like her father, she had no explanation as to who other than her father may have signed the documents. CABR M. Probst 35.

Sean Probst, who notarized his father's signature on several of the leases, claimed that, while his notary stamp and signature were authentic, the signature that he attested watching his father sign was, in fact, someone else's and not his father's. CABR S. Probst 11/9/07 14 -17. Not surprisingly, Sean Probst could offer no plausible explanation as to how this apparent mix-up occurred. *Id.*

Sean Probst further testified that he was never in business with his father and yet, he sent several documents to the Department of Licensing acknowledging his father as his business partner. CABR 11/9/07 17; exhibits 125, 126, 127.

Two other alleged owners of Probst's driving schools, Troy Stewart and Bruce Richey indicated that they were paid only an hourly wage. Richey 11/9/07 24- 25, 45; CABR Stewart 11/26/07 9. Both men indicated that all the money collected from their respective schools was sent to 9109 Veterans Drive, which is the address is the historic center of the Probst's driving school business. CABR Richey 11/9/07 31, 46; CABR Stewart 11/26/07 9, 11 12-13 Although both men assumed that the money was used to pay bills associated with their "independent" business, no one made an accounting to them of where the money went and what bills were paid, and what happened to any profit. CABR Stewart 11/26/07 9 -10, 12 -13; Richey 11/9/07 24- 25, 45.

Further, in 2006, Probst entered into a Stipulated Findings of Fact, Conclusion of Law and Agreed Order with the Department of Licensing. CABR G. Probst 11/6/07 164-166.¹² In this agreement, Probst admits that he was an owner in 41 licensed training schools (including branches). CABR Exhibit 123. As part of the agreed order, Probst agreed to sell or

¹² This settlement resolved a statement of charges against Probst for certifying documents to the Department of Licensing that had untruthful information in them and that he had failed to provide timely records to the Department of Licensing.

otherwise dispose of all ownership or financial interest in any driving school. CABR Exhibit 123. If, as Probst alleges, he had no ownership interest in any schools, there would have been no need for such a directive in the agreed order. Further, there would have been purchase and sale agreements detailing the sale of at least some of these schools if Probst had sold them in order to comply with the agreement he signed. He provided no purchase and sales agreements, either to the Department in response to its subpoena, or at the hearing.

The testimony of Renee Rouleau sets out a much different and more plausible description of Probst's business dealings. Ms. Rouleau investigated Probst on behalf of the Department of Licensing. CABR Rouleau 11/27/07 4-5. During her investigation, she determined that he controlled and ran these driving schools. CABR Rouleau 11/27/07 7-8 The cars, leases, phones, insurance and other assets were all in Probst's name. *Id.* Ms. Rouleau testified that Probst ran these schools, testimony that, unlike Probst's, is consistent with the documentary evidence in this case. CABR Rouleau 11/27/07 8.

The evidence in this case is clear – Probst was actively involved in the driving school business during the audit period. Because of his involvement, he had access to the schools' business records and was required to provide them to the Department in answer to its validly served subpoena. He failed to do so. Because of his prior audit, Probst knew the

consequences of his actions and still chose not to provide his business records. Pursuant to RCW 51.48.040, Probst is barred from challenging this assessment.

Thus, even if Probst were not barred from disputing his assessment – which, as shown above, he is – there is substantial evidence to establish that he was actively engaged in the driving school business and employed driving school instructors. Because these instructors brought nothing other than their personal labor, they were covered workers. *White v. Dep't of Labor and Indus.*, 48 Wn.2d 470, 474, 294 P.2d 650 (1956). And because Probst failed to report any hours for workers, and affirmatively closed his Labor and Industries employer accounts alleging he had no workers, he materially misrepresented his payroll to the Department.

C. The Department Estimate Was Reasonable.

Because Probst failed to provide even the most basic business records, the Department was forced to estimate the amount of premiums owed. RCW 51.16.155; *R&G Probst v. Dept of Labor & Indust*, 121 Wn. App 288, 88 P.3d 413 (2004); *In re: NAO Enterprises*, BIIA Dec., 89 1832 (1990). In estimating the premiums owed, the Department Auditor, Ms. McNutt, used the Department of Licensing student completion forms. CABR McNutt 11/27/07 19-20. These forms listed the instructors who taught the classes and the students who were taught. Because each form contained information about multiple classes and she had no way to

determine the size of each class, Ms. McNutt estimated the premiums as if each student had been individually taught. CABR McNutt 11/27/07 22 - 24. Given Probst's failure to provide records, such an estimate is not unreasonable.

Having refused to provide Ms. McNutt with the records that would have allowed her to perform a complete audit, Probst now asserts that Ms. McNutt's estimate was biased. To support this after-the-fact claim Probst alleges that students attended class together, that there were always at least three students in the car, and that Ms. McNutt should have known. Appellant's Brief at 21. However, Probst failed to provide any evidence to support his assumptions, and he failed to keep track of the hours the instructors actually worked. Without records, Ms. McNutt could do nothing other than assume individual instruction. Probst could have easily eliminated the need for such an estimate by keeping records and providing them to the Department. He cannot now complain about the consequences of his own failure.

Probst also asserts, without authority, that the Department had an affirmative duty to audit other businesses or attempt to track down the records that he failed to provide. Appellant's Brief 14-15, 18. Not surprisingly, nothing in Title 51 RCW requires the Department to guess where records might be that an employer refuses to provide. Rather, the

statute makes clear it is the employer's responsibility to provide these records to the Department. RCW 51.48.030; RCW 51.48.040

Probst failed to provide any records at the time of the audit which indicated that he was not involved in these schools. If his allegations about selling these businesses were correct, he should have been able to produce purchase-and-sale agreements, or statements filed with Department of Licensing releasing his interest, or *any* other documents which would establish he was not involved. To this day Probst has provided not one single record to support his claim that he was not an owner of these schools during the audit period.

Probst also argues that all the premiums for all the schools in questions were paid under Diamond Driving of Pierce County, a company allegedly owned and run by his daughter Malia Probst-Orbino and Sean Probst¹³. Appellant's Brief 16-18, 22. They were not. At the time of this audit, Diamond Driving of Pierce County had closed its account and had failed to pay any premiums during the period in question here. CABR McNutt 11/27/07 13 -15. It was not until *after* this audit, that the account was reopened and that a fraction of the assessed premiums were paid. *Id.* This amount would not have been sufficient to include the instructors listed in the Department of Licensing records for these schools. CABR McNutt 11/27/07 14-15.

¹³ Diamond Driving of Pierce County was not included in the schools audited here.

Probst also alleges that the fact that Ms. McNutt did not deduct these payments from the assessment raises “serious questions about the objectivity of McNutt’s investigation.” Appellant’s Brief at 18. Even if this payment were for the same workers that Probst had been assessed for, and there is no evidence it was, Ms. McNutt could not have adjusted her audit. Because Malia Orbino-Probst failed to pay these taxes timely, there was no record of the payment at the time of the assessment. CABR McNutt 11/27/07 44. Diamond Driving of Pierce County was closed and not reporting any hours during the period of the 2006 audit. CABR McNutt 11/27/07 17.

Finally, it would have been inappropriate for Diamond Driving of Pierce County to pay the premiums of other businesses under its own account. CABR McNutt 11/27/07 17-18. If, as Probst alleges these business were separately owned and run, each owner was obligated to file and pay premiums in a timely manner. *Id.* Had payment been made under a single umbrella account, there would be no way to confirm the correct hours for each business. *Id.* Nor, as rates are individual to each account, would the amount of premiums be correct. *Id.*

The estimated premiums are reasonable and should be affirmed.

V. CONCLUSION

For the foregoing reasons, this Court should affirm the superior court's dismissal of Probst's appeal under RCW 51.52.112, or this Court should affirm the superior court's alternative ruling affirming the Board's decision on the merits.

RESPECTFULLY SUBMITTED this 26th day of July, 2009.

ROBERT M. MCKENNA
Attorney General

A handwritten signature in black ink, appearing to read "P. Allen", written over the typed name of Penny L. Allen.

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**COURT OF APPEALS FOR DIVISION II
STATE OF WASHINGTON**

GARY R. PROBST & ET US,
D/B/A DIAMOND DRIVING
SCHOOL,

Appellants,

vs.

DEPT OF LABOR AND
INDUSTRIES OF THE STATE
OF WASHINGTON, ET AL,

Respondents.

DECLARATION OF
MAILING

COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY _____
DEPUTY

DATED at Tumwater, Washington:

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, I mailed the Department's Brief of Respondent to counsel for all parties on the record by depositing a postage prepaid envelope in the U.S. mail addressed as follows:

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PO Box 187
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DATED this 20th day of July, 2009.



CYNTHIA RAVES
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