

No. 39417-1-II

DIVISION II, COURT OF APPEALS
OF THE STATE OF WASHINGTON

TESORO REFINING AND MARKETING COMPANY,

Plaintiff-Appellant

v.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,

Defendant-Respondent

ON APPEAL FROM THURSTON COUNTY SUPERIOR COURT
(Hon. Richard D. Hicks)

APPELLANT'S OPENING BRIEF

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STATE OF WASHINGTON
DEPARTMENT OF REVENUE
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DIVISION II

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ASSIGNMENTS OF ERROR

1. The Thurston County Superior Court (the “trial court”) erred when it ruled that plaintiff and appellant Tesoro Refining and Marketing Company (“Tesoro”) was not eligible to take a business and occupation (“B&O”) tax deduction under RCW 82.04.433(1) (sometimes referred to as the “Bunker Fuel Deduction”) on amounts Tesoro derived from sales of marine fuel oil for consumption outside the territorial waters of the United States, by vessels used primarily in foreign commerce. Clerk’s Papers (“CP”) 316-318.

2. The trial court erred when it ruled that the Bunker Fuel Deduction extends only to taxes paid under the Retailing or Wholesaling B&O tax classifications. CP 318.

3. The trial court erred when it compared RCW 82.04.433(1) to other deduction statutes set forth in the B&O tax chapter (82.04. RCW), and concluded that the deduction was not intended to apply to manufacturers of the fuel (like Tesoro), even though manufacturers are taxed on amounts derived from sales of the fuel and the plain language of the statute does not expressly exclude manufacturers from qualifying for the deduction. Verbatim Report of Proceedings (“VRP”) 44-45.

4. The trial court erred when it denied Tesoro’s motion for partial summary judgment, and ruled that Tesoro’s sales of bunker fuel did not qualify for the Bunker Fuel Deduction. CP 318.

5. The trial court erred when it ruled that Tesoro was not entitled to any refund of the Manufacturing B&O taxes it paid for the period December 1, 1999, through December 31, 2007, even though those taxes were paid on amounts derived from sales of marine fuel of the type eligible for deduction under the plain language of RCW 82.04.433(1). CP 318.

6. The trial court erred when it granted summary judgment to the defendant and respondent Department of Revenue (the “Department”) as the non-moving party. CP 318.

STATEMENT OF ISSUES

The following issues pertain to the above Assignments of Error:

1. Is a manufacturer of marine fuel oil sold to vessels for consumption outside the territorial waters of the United States allowed to deduct amounts derived from such sales in calculating its B&O taxes under the plain language of RCW 82.04.433(1)? Assignment of Error No. 1.

2. Did the trial court err when it ruled that the Bunker Fuel Deduction extends only to taxes paid under the Retailing and Wholesaling classifications of the B&O tax, and not the Manufacturing tax? Assignment of Error No. 2.

3. Did the trial court err when it based its decision on the language of other B&O tax deduction statutes in interpreting

RCW 82.04.433(1), rather than the plain and unambiguous language of the Bunker Fuel Deduction statute itself? Assignment of Error No. 3.

4. Did the trial court err when it ruled that Tesoro was not entitled to any refund of Manufacturing B&O taxes paid for the period December 1, 1999 through December 31, 2007, even though those taxes were paid on amounts derived from sales of fuel that qualified for deduction under the plain language of RCW 82.04.433(1)? Assignment of Error No. 5.

5. Did the trial court err when it denied Tesoro's motion for partial summary judgment and granted summary judgment to the Department as the non-moving party? Assignments of Error Nos. 4 and 6.

I.

SUMMARY INTRODUCTION

This case presents a unique opportunity for the Court. What started out as a plain meaning/statutory interpretation case has now morphed into a dispute over separation of powers, i.e., whether the legislature may enact supposedly curative legislation that not only attempts to usurp the power of the courts to interpret a statute and alter the course of current litigation, but also attempts to reach back more than 24 years, divine the intent of a previous legislature and expressly make amendments retroactive back to the enactment of the original bill.

Tesoro sought a refund from the Department of B&O taxes Tesoro paid on bunker fuel sold to vessels engaged in foreign commerce. The deduction is authorized by statute (RCW 82.04.433(1)) but grounded in export and foreign commerce. The Department denied Tesoro's entitlement to the deduction and Tesoro appealed to the Thurston County Superior Court.

Meanwhile, a bill was introduced to the 2009 Legislature, which attempted to "clarify" the original 1985 law that grants the above B&O tax deduction. That "clarification" would irrefutably deny Tesoro the deduction it sought because the 2009 bill was expressly made retroactive. The bill passed both houses of the legislature by a simple majority vote and was signed into law by the Governor on May 14, 2009 (the bill had an emergency clause tacked onto it, making it effective immediately), which was the day before the trial court heard Tesoro's motion for summary judgment on its entitlement to the deduction. The trial court all but ignored the new law and ruled that Tesoro's sales of bunker fuel were not eligible for the B&O tax deduction because the deduction was not intended to apply to manufacturers of the fuel.

On appeal, Tesoro challenges the Department's contention and the trial court's ruling that Tesoro is ineligible to take this deduction. Tesoro believes the plain language of the statute grants the deduction. The 2009 legislation, even though purportedly retroactive, does not change this

result. For one, the amendment making the changes retroactive is unconstitutional and a violation of Tesoro's due process rights, since the amendment was intended to cover a retroactive period of more than 24 years. In enacting this bill the legislature violated rules established by the United States Supreme Court. Secondly, the 2009 amendment is equally invalid and unenforceable on a going-forward (prospective) basis, because the bill did not receive the two-thirds, super-majority vote of both houses of the legislature required for passage of a bill that raises taxes.

Accordingly, this Court should reverse the trial court's grant of summary judgment to the Department and rule that the RCW 82.04.433(1) B&O tax applies to Tesoro's sales of bunker fuel. The Court should also hold that the 2009 legislation has no impact on Tesoro's refund claim and that the amendment itself is invalid, both retroactively and prospectively.

II.

STATEMENT OF THE CASE

A. The Legal Framework.

The B&O tax is levied and collected from every person "for the act or privilege of engaging in business activities" in Washington. RCW 82.04.220. The tax is "measured by the application of rates against value of products, gross proceeds of sales, or gross income of the business, as the case may be." *Id.* "In adopting Washington's B&O tax scheme, "the legislature intended to impose the [B&O] tax upon virtually all

business activities carried on within the state” and to “leave practically no business and commerce free of . . . tax.” ’ ’ Lamtec Corp. v. Dep’t of Revenue, 151 Wn. App. 451, 457, 215 P.3d 968 (2009) (citing Simpson Inv. Co. v. Dep’t of Revenue, 141 Wn.2d 139, 149, 3 P.3d 741 (2000) (alteration in original) (citations omitted) (quoting Time Oil Co. v. State, 79 Wn.2d 143, 146, 483 P.2d 628 (1971); Budget Rent-A-Car of Wash.-Or., Inc. v. Dep’t of Revenue, 81 Wn.2d 171, 175, 500 P.2d 764 (1972)).

Notwithstanding the all-encompassing nature of the B&O tax, the law contains numerous statutory exemptions, deductions and credits from tax (see, e.g., RCW 82.04.310 et seq. through RCW 82.04.4493; see also, RCW 82.04.600 through 82.04.630). One such statute is RCW 82.04.433(1), which provides a deduction from the measure of tax for “amounts derived from sales of fuel for consumption outside the territorial waters of the United States, by vessels used primarily in foreign commerce.” To implement this tax deduction, the Department has adopted a regulation, WAC Section 458-20-175 (“Rule 175”), which provides additional guidance on eligibility and qualification for the deduction. Rule 175, among other things, requires persons who sell fuel to vessels used primarily in foreign commerce for consumption outside the territorial waters of the United States to obtain a certificate from the buyer, certifying that the above statutory requirements have been met.

B. Tesoro's Business And Its Sales Of Bunker Fuel To Vessels Engaged in Foreign Commerce.

Tesoro owns and operates a refinery near Anacortes, Washington (sometimes referred to as the "Anacortes Refinery" or "Refinery"). CP 9. This Refinery processes crude oil sourced from Alaska, Canada and other foreign locations¹; it also processes intermediate feedstock, primarily heavy vacuum gas oil, which comes from other refineries. Id. The primary products produced by Tesoro at the Anacortes Refinery are gasoline, diesel, and jet fuel, but the Refinery also produces heavy fuel oils, liquefied petroleum gas (propane) and asphalt. Id.

One of the heavy fuel oils produced by Tesoro is marine bunker fuel (generally referred to as "bunker fuel"). CP 9. This product is a residual fuel oil that remains after gasoline and distillate fuel are extracted from the crude oil through the distillation process, and is sold primarily to ocean-going ships and vessels. Id. Bunker fuel is the type of product that qualifies for the RCW 82.04.433(1) B&O tax deduction. CP 10. Some bunker fuel is sold at the Anacortes Refinery, but the majority of the fuel is moved to marine terminals in Washington; nevertheless, in all cases in which the B&O tax deduction is sought on Tesoro's sales of bunker fuel,

¹ The Tesoro Refinery has been granted foreign-trade zone (FTZ) status by the United States Department of Commerce Foreign-Trade Zones Board. See 66 FR 6583 (1/22/01). Tesoro's FTZ subzone status became effective January 1, 2001.

the product was sold to ships engaged in foreign commerce outside the territorial waters of the United States. CP 10.

From December 1, 1999 to December 31, 2007 (sometimes referred to as the “Refund Period”), Tesoro’s Anacortes Refinery made more than 9,700 sales of bunker fuel to vessels engaged in foreign commerce for consumption outside the territorial waters of the United States. CP 10.² With few exceptions, Tesoro obtained the certificate required by Rule 175 on all such sales during this period and continues to maintain all of these certificates in its business records. *Id.*³

C. Tesoro’s Tax Payments And Refund Claim.

Tesoro paid B&O tax on its sales of bunker fuel during the period December 1, 1999 through April 30, 2004. CP 10.⁴ Tesoro later

² CP 36-99 includes copies of 63 invoices issued by Tesoro, each showing a sale of bunker fuel. These invoices were taken from sales occurring during the month of May 2006, and are representative of all sales of bunker fuel made by Tesoro during the Refund Period.

³ CP 100-163 are copies of 63 certificates issued by customers for their purchases of bunker fuel from Tesoro. Under Rule 175 buyers are required to furnish sellers with this certificate in order for the seller to qualify for the Bunker Fuel Deduction. The sample certificates were also from the month of May 2006, and represent the same sales as the invoices described in n.2, above. As with the invoices, these certificates are representative of all certificates obtained by Tesoro. Tesoro is not seeking a B&O tax deduction for any sale in which a certificate was not obtained.

⁴CP 164-208 includes copies of nine Combined Excise Tax Returns filed by Tesoro with the Department during the Refund Period. Tesoro filed tax returns monthly and these copies represent actual returns filed in each year of the Refund Period. Prior to January 1, 2002, Tesoro was known as Tesoro West Coast Co., but changed its name to Tesoro Refining and Manufacturing Company. At all times Tesoro filed tax returns under the same departmental registration number (601 688 778). The tax returns show that, consistent with Washington law, sales of bunker fuel were reported on both the Manufacturing line and Wholesaling or Retailing line of the return. Schedule C of the return then allowed Tesoro to take a Multiple Activities Tax Credit (*see* RCW 82.04.440)
(Footnote continued . . .)

requested a refund of the B&O taxes it paid on these sales, but that request was denied by the Department. *Id.*⁵

D. Prior Proceedings.

After the administrative refund claim described above was rejected by the Department, Tesoro filed this lawsuit under RCW 82.32.180 to recover the B&O taxes it had paid on sales of bunker fuel, alleging that the RCW 82.04.433(1) deduction applied to those sales. CP 4-7. The suit added the May 1, 2004 through December 31, 2007 period to the refund claim. CP 6.

On April 17, 2009, Tesoro moved for partial summary judgment on the question of its entitlement to the B&O tax deduction on sales of marine bunker fuel as described above. CP 12-228.⁶ On May 4, 2009, the Department responded to Tesoro's motion, opposing Tesoro's eligibility for the deduction and asking the trial court to grant summary judgment to the Department. CP 229-284. On May 11, 2009, Tesoro replied. CP 285-314.

(Footnote cont'd. . .)

(sometimes referred to as "MATC") for the Wholesaling and Retailing B&O taxes that were otherwise payable. The MATC will be explained in more detail below.

⁵ CP 209-219 is a copy of the final administrative determination issued to Tesoro, in which the Department ruled that the Bunker Fuel Deduction (RCW 82.04.433(1)) did not apply to Tesoro's sales of marine bunker fuel. In this determination, Tesoro's refund claim was also denied.

⁶ Since the Department had not yet fully verified Tesoro's refund claim, the total amount of the refund was left for further proceedings. CP 19.

On May 15, 2009, the trial court heard argument on Tesoro's motion. CP 315. At the conclusion of the hearing, the court orally ruled that the Bunker Fuel Deduction did not apply to taxes paid under the Manufacturing B&O classification; the court denied Tesoro's refund claim; and the court granted summary judgment to the Department. VRP 44-45. An Order Granting Defendant Summary Judgment As The Non-Moving Party was entered at the conclusion of the hearing. CP 316-319. On June 12, 2009, this appeal was filed. CP 320-325.

III.

STANDARD OF REVIEW

The question before the Court is one of statutory interpretation: Are amounts Tesoro derived from sales of marine bunker fuel under the facts of this case eligible for the B&O tax deduction set forth in RCW 82.04.433(1)?

Statutory interpretation is a question of law that the court reviews de novo. See City of Seattle v. Burlington N. R.R., 145 Wn.2d 661, 665, 41 P.3d 1169 (2002); see also, Dot Foods, Inc. v. Dep't of Revenue, 166 Wn.2d 912, 919, 215 P.3d 185 (2009) (citing State v. J.P., 149 Wn.2d 444, 449, 69 P.3d 318 (2003)) (the court "review[s] questions of statutory interpretation de novo"). The "primary objective of any statutory construction inquiry is 'to ascertain and carry out the intent of the Legislature.'" HomeStreet, Inc. v. Dep't of Revenue, 166 Wn.2d 444,

451, 210 P.3d 297 (2009) (quoting Rozner v. City of Bellevue, 116 Wn.2d 342, 347, 804 P.2d 24 (1991)). Courts look to the statute's plain meaning in order to fulfill their obligation to give effect to legislative intent. See Lacey Nursing Ctr., Inc. v. Dep't of Revenue, 128 Wn.2d 40, 53, 905 P.2d 338 (1995); see also, Dot Foods, at 919 supra ("In reviewing a statute, we give effect to the legislature's intent, primarily derived from the statutory language. Where statutory language is plain and unambiguous, we ascertain the meaning of the statute solely from its language"). The Court may "neither add language to nor construe an unambiguous statute." Bowie v. Dep't of Revenue, 150 Wn. App. 17, 21, 206 P.3d 675 (2009) (citing Cerrillo v. Esparza, 158 Wn.2d 194, 201, 142 P.3d 155 (2006)).

Thus, when interpreting a statute the court must first look to the statute's plain language. See State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). "Where statutory language is plain and unambiguous, courts will not construe the statute but will glean the legislative intent from the words of the statute itself, regardless of contrary interpretation by an administrative agency." Agrilink Foods, Inc. v. Dep't of Revenue, 153 Wn.2d 392, 396, 103 P.3d 1226 (2005) (emphasis added) (citations omitted). The court "is required to assume the legislature meant exactly what is said and apply the statute as written." Duke v. Boyd, 133 Wn.2d 80, 87, 942 P.2d 351 (1997). If the plain language of the statute is subject to only one interpretation the court's inquiry ends there, since the

plain language of a statute does not require construction. State v. Armendariz, supra; see State v. Thorton, 119 Wn.2d 578, 580, 835 P.2d 216 (1992).

IV.

ARGUMENT

A. **The Language Of The Bunker Fuel Deduction Statute (RCW 82.04.433(1)) Is Plain And Unambiguous And Its Meaning Must Be Derived From The Wording Alone.**

RCW 82.04.433(1) consists of one sentence:

In computing tax there may be deducted from the measure of tax . . . amounts derived from sales of fuel for consumption outside the territorial waters of the United States, by vessels used primarily in foreign commerce.

RCW 82.04.433(1).⁷

This B&O tax deduction statute contains four requirements and a taxpayer is eligible for the deduction when all four are present:

1. The tax otherwise payable is the B&O tax;

⁷ Subsection (2) is also one sentence in length:

Nothing in this section shall be construed to imply that amounts which may be deducted under this section were taxable under Title 82 RCW prior to the enactment of this section.

RCW 82.04.433(2). In fact, even before RCW 82.04.433 was enacted, sales of bunker fuel to vessels engaged in foreign commerce were not subject to B&O tax. There was so on account of either, the sales of fuel to the vessels engaged in foreign commerce were entitled to the export sales exemption (see WAC 458-20-193C) or the sales were of the type that the U.S. Constitution prohibits a state from taxing (see McGoldrick v. Gulf Oil Corporation, 309 U.S. 414, 60 S.Ct. 664, 84 L.Ed. 840 (1940)). In either case, the B&O tax was not paid on sales of bunker fuel before or after the enactment of RCW 82.04.433. And, notwithstanding the enactment of this statute, nothing suggests that there no longer exists an exemption from B&O tax for sales of this type of fuel under the parameters of the U.S. Constitution's prohibition on the imposition of state taxes on export sales or sales in foreign commerce.

2. The amount deducted is derived from sales of fuel;
3. The fuel is for consumption outside the territorial waters of the United States; and
4. The fuel is sold to vessels used primarily in foreign commerce.

The third and fourth requirements are not in dispute; only the first and second elements are disputed. The key questions before this Court are: (1) What B&O taxes are deductible? (2) What does “amounts derived from sales” mean in the statute? (3) Does Tesoro qualify for this deduction? To answer these questions, each clause of the statute must be examined to ascertain its plain meaning.

1. **The “In computing tax” Language Encompasses All B&O Taxes.**

The introductory words to RCW 82.04.433(1)—“[i]n computing tax”—contain the first critical phrase in ascertaining the statute’s proper meaning. There is no question that the word “tax” in this phrase refers to the B&O tax, because the statute itself appears in the B&O tax chapter, 82.04 RCW (titled “Business and Occupation Tax”); the only question is whether the deduction applies to all, or just specific, B&O taxes.

The Department will argue that the B&O taxes referred to in the phrase “[i]n computing tax” are the Wholesaling and Retailing B&O taxes imposed by RCW 82.04.270 and RCW 82.04.250.⁸ But, nothing in the

⁸ Because Tesoro both manufactured and sold the bunker fuel, Tesoro was required to report its sales on tax returns filed with the Department under both the Manufacturing
(Footnote continued . . .)

plain language of RCW 82.04.433(1) suggests that the deduction applies only to those sales that were reported and paid under the Wholesaling or Retailing B&O tax classification. On the contrary, the legislature used the word “tax” in this phrase generically and without limitation, suggesting a broad reading of what B&O taxes qualified for the deduction.

A fundamental principle of statutory construction is that courts “should not and do not construe an unambiguous statute.” Vita Food Products, Inc. v. State, 91 Wn.2d 132, 134, 587 P.2d 535 (1978). Courts have repeatedly held that “plain language does not require construction.” See State v. Wilson, 125 Wn.2d 212, 217, 883 P.2d 320 (1994) (citation omitted). Courts also “cannot add words or clauses to an unambiguous statute when the legislature has chosen not to include that language.” State v. Delgado, 148 Wn.2d 723, 727, 63 P.3d 792 (2003).

Yet, that is precisely what both the trial court and Department did when they created a new requirement: That RCW 82.04.433(1) limits the deduction to taxpayers paying B&O tax under the Wholesaling or Retailing classification. See CP 318; VRP 44-45. There is no authority—statutory or otherwise—for the Department or trial court to add requirements or conditions to the phrase “[i]n computing tax.” Indeed,

(Footnote cont'd . . .)

B&O tax classification (see RCW 82.04.240) and the Wholesaling (RCW 82.04.270) or Retailing (RCW 82.04.250) B&O tax classification (depending on whether a wholesale or retail sale was being made). See RCW 82.04.440. Then, Tesoro would receive a credit under the MATC for the latter taxes. See CP 165-208.

courts have rejected attempts by the Department to add requirements or conditions for tax exemptions that are not contained in the statute. See Lone Star Industries, Inc. v. Department of Revenue, 97 Wn.2d 630, 647 P.2d 1013 (1982); see also, Van Dyk v. Department of Revenue, 41 Wn. App. 71, 702 P.2d 472 (1985). Obviously, the Department has not learned its lesson from these cases.

In Lone Star, the Supreme Court held that the Department's attempt to impose a "primary purpose test" as an additional requirement for the "ingredient" exemption from sales tax was invalid:

RCW 82.04.050 does not require that the tangible personal property so purchased be acquired primarily for the purpose of such consumption in order to avoid taxation as a "retail sale." . . . In short, in determining the applicability of the tax, there is no "primary purpose test" required for property that becomes an ingredient or component of the new article.

Lone Star, 97 Wn.2d at 634-35.

Likewise, RCW 82.04.433(1) does not require that B&O taxes be payable under the Wholesaling or Retailing category in order to be deductible. In other words, the determining fact is that a B&O tax is payable on the "amounts derived," not that a specific B&O tax is payable.

Furthermore, if the legislature wanted to limit the RCW 82.04.433(1) deduction to taxes paid only under the Wholesaling and Retailing B&O tax classifications it could have easily done so. For example, to limit the deduction in the manner contended by the Department (and accepted by the trial court), the statute would have had to

read, “In computing Wholesaling or Retailing tax under RCW 82.04.270 or 82.04.250 . . .” (added language underscored)—or words to that effect.⁹ But the statute during the Refund Period (and up to the effective date of the amendment (May 14, 2009)) included no such limiting language. The trial court read language into the statute during the Refund Period (1999 to 2007), something the court was not allowed to do. See Qwest Corp. v. City of Kent, 157 Wn.2d 545, 553, 139 P.3d 1091 (2006) (citing State v. Cooper, 156 Wn.2d 475, 480, 128 P.3d 1234 (2006)).¹⁰ This Court should read the statute as it was written during the Refund Period, not as the

⁹ In fact, during the 2009 session the legislature did amend RCW 82.04.433(1) to do just that—limit the deduction to B&O taxes paid under the Retailing and Wholesaling classifications. This is the language the 2009 Legislature used:

In computing tax there may be deducted from the measure of tax imposed under RCW 82.04.250 [Retailing B&O tax] and 82.04.270 [Wholesaling B&O tax] amounts derived from sales of fuel for consumption outside the territorial waters of the United States, by vessels used primarily in foreign commerce.

Laws of 2009, Ch. 494, § 2(1) (new language underscored; bracketed inclusions added).

¹⁰ In interpreting RCW 82.04.433(1), the trial court also examined the wording of other B&O tax deduction and exemption statutes in an attempt to ascertain the meaning of this statute. VRP 44. This was error and similar to a mistake the same trial court made in Bowie v. Dep’t of Revenue, 150 Wn. App. 17, 206 P.3d 675 (2009). In Bowie this Court made clear that the court’s duty is to “look to the statute’s plain meaning in order to fulfill [its] obligation to give effect to legislative intent.” Id. at 21 (citing Lacey Nursing Ctr., Inc. v. Dep’t of Revenue, 128 Wn.2d 40, 53, 905 P.2d 338 (1995)). This Court followed the rule that it will “neither add language to nor construe an unambiguous statute” (Bowie, at 21 (citing Cerrillo v. Esparza, 158 Wn.2d 194, 201, 142 P.3d 155 (2006))) and rejected the trial court’s attempt “to examine the legislative history and intent behind the statute” as well as the court’s conclusion “that ‘the legislature passed legislation that does more than [it] intended to do’” (Bowie, supra).

Department wished, or the trial court believed it had been written during that timeframe.¹¹

RCW 82.04.433 was enacted in 1985. See Laws of 1985, ch. 471, § 16. Until 2009 the statute had not been amended in the nearly 24 years of its existence. A plain reading of the statute shows that the legislature did not intend to limit the B&O tax classifications that qualified for the deduction. This is confirmed by the 2009 legislation (ch. 494, § 2). If the 1985 Legislature did intend to limit who may take, or what B&O tax classifications qualify for, the deduction statute would have included those limitations. It did not, at least for the first 24 years the deduction was in effect (and including the Refund Period). Instead, the legislature used three simple words, “[i]n computing tax,” evidencing a clear intent that any of the B&O taxes imposed under Chapter 82.04 RCW qualified for this deduction, regardless whether the classification was Wholesaling, Retailing, Manufacturing or any other category for that matter, so long as the B&O tax that was otherwise imposed was imposed on “amounts derived from sales of fuel” sold to ships conducting foreign commerce.

¹¹ The trial court was aware of the 2009 amendment to RCW 82.04.433 but tried “very hard not to be influenced by that bill” on the basis that taxpayers and courts “have a right to . . . not be influenced after the fact.” VRP 45. The amendment contained what the court described as “retroactivity language.” *Id.* This was a reference to Section 4 of the bill and to a statement of intent in the bill that “at the time the deduction allowed under RCW 82.04.433 was enacted in 1985, it was intended to apply only to the wholesaling or retailing of bunker fuel.” Laws of 2009, Ch. 494, § 1(2). The court went on to acknowledge that the legislature “certainly has made a can of worms one way or the other.” VRP 45. The 2009 legislation will be discussed in detail below. See Argument, Sections C-E, infra.

In short, the RCW 82.04.433(1) deduction in effect during the Refund Period applied to all B&O taxes, including the Manufacturing tax paid by Tesoro in this case, and the “[i]n computing tax” language confirms this reading of the statute. The trial court erred when it ruled that the deduction applied only to taxes paid under the Wholesaling and Retailing classifications, because this qualification is not contained in the statute.¹²

2. The Revenues In Question Are “amounts derived from sales of fuel.”

The second key phrase in the statute is “amounts derived from sales of fuel.” As noted, Tesoro is both a manufacturer and seller of the bunker fuel. And, but for the deduction allowed by RCW 82.04.433(1), Tesoro would pay the B&O tax on sales of bunker fuel under the Manufacturing classification (after the MATC credit (RCW 82.04.440) is taken for the Wholesaling or Retailing B&O tax otherwise payable). The “tax on manufacturers” is imposed upon “every person engaging within this state . . . as a manufacturer” measured by the “value of the products . .

¹² The next phrase in the statute reads, “there may be deducted from the measure of tax.” This identifies RCW 82.04.433(1) as a deduction, as opposed to an exemption or credit, statute. While both tax deduction and tax exemption statutes have the same net effect—exclusion from tax—they do go about it differently, including reporting on tax returns. With a deduction statute the taxpayer is required to report the income and then subtract—take a deduction—for that portion of income that is not taxable. With an exemption statute, the income is generally not even reportable on the tax return. The language of RCW 82.04.433(1) indicates that this statute is a deduction, so taxpayers are required to report the income and then deduct the appropriate “amounts derived” on their tax returns. The “there may be deducted from” language does not resolve the question whether Tesoro is eligible for the deduction on its sales of bunker fuel, as additional language is required to be examined in order to make that determination.

. manufactured.” RCW 82.04.240(1) (emphasis added). The term “value of products” is, in turn, defined to mean “gross proceeds derived from the sale thereof.” RCW 82.04.450(1). Thus, the measure of the B&O tax on manufacturers is the gross proceeds or amounts derived from sales. This taxable measure applies regardless whether the manufacturer’s sales are at wholesale or at retail.

At the time Tesoro made this appeal to this Court, the Supreme Court had the opportunity to interpret the phrase “amounts derived from” in HomeStreet, Inc. v. Department of Revenue, 166 Wn.2d 444, 210 P.3d 297 (2009). There, the Court addressed whether a residential mortgage lender was eligible to deduct certain “amounts” the lender claimed were “derived from interest” received on secured loans used for the purchase of non-transient residential property. The statute at issue in HomeStreet was RCW 82.04.4292, which was structured much like the Bunker Fuel Deduction statute here:

In computing tax there may be deducted from the measure of tax by those engaged in banking, loan, security or other financial businesses, *amounts derived from interest* received on investments or loans primarily secured by first mortgages or trust deeds on nontransient residential properties.

See HomeStreet, 166 Wn.2d at 449 (quoting RCW 82.04.4292) (court’s italic emphasis).

The question in HomeStreet was whether certain revenues received by a lender were interest and therefore deductible under RCW 82.04.4292.

The resolution of this issue boiled down to the meaning of the phrase “amounts derived from interest.” The court began its analysis by defining the word “interest,” noting the word was not defined in the B&O tax statutes (166 Wn.2d at 452-53),¹³ and then turned its attention to the words “derived from” in the phrase “amounts derived from”:

“Derived from” is not defined in the B&O tax statutes either. “Derived” is defined as “to take or receive esp. from a source.” WEBSTER’S [THIRD NEW INTERNATIONAL DICTIONARY (2002)], at 608. The Court of Appeals states the revenue at issue “is, in the broadest sense, ‘derived from interest’ because HomeStreet deducts it directly from the interest stream the loans generate.” *HomeStreet*, 139 Wn. App. at 843. The State’s expert witness, Earl Baldwin, said the income is “‘derivative’ of mortgage interest because the fee is deducted from the interest portion of the loan as provided by the agency-seller contract.” CP at 748.

The revenue at issue here is received from a source, and the source is interest. The revenue is therefore “derived from interest” because it is taken from the interest the borrowers pay on their loans. When DOR argues the revenue is taken from the interest by HomeStreet as a servicing fee, it goes too far. Under the statute it is not essential to determine why the money is received or taken from a source. *See* RCW 82.04.4292. The statute requires that the amount only be “*derived* from interest.” RCW 82.04.4292 (emphasis added). The statute does not say the amount must not be used for a servicing fee either. The plain meaning of the statute allows deductions for amounts received from interest, and HomeStreet qualifies for this deduction because it receives interest from the loans.

HomeStreet, 166 Wn.2d at 453-54.

Similar to RCW 82.04.4292 the key language in RCW 82.04.433(1) is “derived from sales.” As noted in HomeStreet, the

¹³ The court looked to both cases and the dictionary to define the word. *Id.*

word “derived” means “to take or receive . . . from a source.” HomeStreet at 453 (quoting WEBSTER’S at 608). Like in HomeStreet, the amounts at issue in Tesoro were derived from a source, and the source here was sales. This is undisputed, as Tesoro paid the B&O tax measured by sales of bunker fuel, which is compelled by RCW 82.04.450(1). This statute defines the term “value of products” (the measure of the Manufacturing B&O tax) to mean the “gross proceeds derived from the sale thereof.”¹⁴ When the Department argues that the tax must be paid under the Wholesaling or Retailing B&O tax classification to be eligible for deduction, the Department “goes too far.” Under RCW 82.04.433(1) it is not necessary to determine what classification the revenues may be taxable under to qualify for the deduction; instead, the statute only requires that the deductible amounts be “derived from sales.” RCW 82.04.433(1). As the court reasoned in HomeStreet, the plain meaning of the statute allows deductions for amounts derived from sales; Tesoro qualifies for this deduction because it pays the B&O tax on amounts derived from sales.

The measure of the Manufacturing B&O tax thus fits squarely within the third phrase of the deduction statute (RCW 82.04.433(1)), that

¹⁴ CP 37-99 are examples of the sales Tesoro made during the Refund Period and these sales are the “amounts derived” upon which the B&O tax was paid. There are thousands more invoices in Tesoro’s business records, all of which revenues were “derived from sales” and reported on Tesoro’s tax return in measuring the Manufacturing B&O tax.

“amounts derived” be “from sales of fuel.” For purposes of this critical third phrase in the statute, the tax on manufacturers is measured by “proceeds derived from sales.” See RCW 82.04.450(1). Because the legislature did not list specific tax classifications to which the RCW 82.04.433(1) deduction applied—nor did the legislature exclude any classifications either—the statute must be read to include any and all B&O tax classifications that are measured by “amounts derived from sales.” And, because the Manufacturing B&O (RCW 82.04.240(1)) tax is imposed on the value of products, defined as gross proceeds or amounts derived from sales, the RCW 82.04.433(1) deduction is applicable to these sales.

Thus, RCW 82.04.433(1) is unambiguous and subject to only one interpretation. It is not necessary—as the Department will urge—to look any further than the plain language of the statute. In mandating that only taxes paid under the Wholesaling or Retailing B&O classifications are deductible, the Department is adding words to the statute to suit the meaning it wishes to convey. “The legislature wrote the statute as it did, and [the Court has] no power to change it ‘even if [the Court] believe[s] the legislature intended something else but failed to express it adequately.’” HomeStreet, 166 Wn.2d at 455 (quoting Vita Food Products, Inc. v. State, 91 Wn.2d 132, 134, 587 P.2d 535 (1978)). As shown (see n.9, supra), when the legislature amended RCW 82.04.433 in

2009 it added additional words limiting the deduction to specific B&O taxes. But, those words were not in the statute during the Refund Period and this Court is not obliged to give any effect to the amendment. In fact, the 2009 amendment confirms Tesoro's reading of the statute.

Further, there is no reason for this Court to give the statute a narrow construction, as the Department will urge. Tesoro is mindful of the following rules for tax deductions:

Tax exemptions and deductions must be narrowly construed. *Dep't of Revenue v. Schaaque Packing Co.*, 100 Wn.2d 79, 83-84, 666 P.2d 367 (1983). Taxation is generally the rule and deductions or exemptions are the exceptions. *Budget Rent-a-Car of Wash.-Or., Inc. v. Dep't of Revenue*, 81 Wn.2d 171, 174, 500 P.2d 764 (1972) (citing *Fibreboard Paper Prods. Corp. v. State*, 66 Wn.2d 87, 401 P.2d 623 (1965)). The burden is on the party asserting the deduction to show it qualifies for a tax deduction. *Group Health Coop. of Puget Sound, Inc. v. Wash. State Tax Comm'n*, 72 Wn.2d 422, 433 P.2d 201 (1968).

HomeStreet, 166 Wn.2d at 455.

The Department will no doubt trumpet these rules to the Court. However, the Department's narrow construction of the statute is only possible if words are improperly added to RCW 82.04.433(1). In HomeStreet the Department attempted "to narrowly construe the statute, improperly delet[ing] words from [RCW 82.04.4292]." Id. The Department attempts the opposite here—adding words to RCW 82.04.433(1)—but is still attempting to narrow the scope of the statute. The result is the same: an improper reading of the statute that ignores its plain language. The Supreme Court condemned the

Department's approach in HomeStreet; this Court should do the same here. Tesoro has met its burden to show it qualifies for the Bunker Fuel tax deduction because the revenues Tesoro received were derived from sales of the fuel.¹⁵

In summary, the plain language of RCW 82.04.433(1) allows a deduction from the measure of the B&O tax for sales of fuel that is to be used outside the United States by vessels primarily engaged in foreign commerce. Tesoro met each and every requirement of this statute to deduct amounts derived from sales of bunker fuel, for which it has properly completed certificates. The sales were made to qualified vessels and it is irrelevant whether the B&O taxes paid on such sales by Tesoro were under the Manufacturing classification, or some other category. The plain and unambiguous language of RCW 82.04.433(1) grants the tax deduction to any B&O tax measured by sales, and the Manufacturing tax meets this qualification because it is measured by amounts derived from sales. See RCW 82.04.450(1). This interpretation of the phrase "amounts derived from" is confirmed by the recent HomeStreet decision of the

¹⁵ The final and longest phrase in the deduction statute is, "for consumption outside the territorial waters of the United States, by vessels used primarily in foreign commerce." This part of the statute describes the purchaser to whom a seller of bunker fuel must sell in order to claim the RCW 82.04.433(1) deduction for the sale proceeds or "amounts derived." Tesoro's sales of bunker fuel made during the Refund Period, for which it has properly executed certificates, qualify as sales made to eligible vessels. Tesoro has obtained over 9,700 certificates, received in good faith under Rule 175, attesting to the fact that the sales were made to qualified vessels. Because these certificates are complete and were taken in good faith, they meet the requirements of the statute and rule. The Department does not dispute these facts.

Supreme Court. This Court should reverse the trial court because the amounts derived by Tesoro and in question here were from sales, which entitle it to take the RCW 82.04.433(1) B&O tax deduction under the plain language of the statute.

B. The Department's Longstanding Interpretation Of RCW 82.04.433(1) Allowed A B&O Tax Deduction To Manufacturers On Their Sales Of Fuel To Vessels Engaged In Foreign Commerce.

The Department's longstanding position on the scope of RCW 82.04.433(1) has always¹⁶ been to allow manufacturers of bunker fuel to take the deduction. In a determination dated September 27, 1993 and issued to U.S. Oil & Refining Co. ("U.S. Oil") (CP 221-225), the Department ruled that a manufacturer of bunker fuel was entitled to deduct amounts derived from sales to vessels engaged in foreign commerce pursuant to RCW 82.04.433(1).

The facts addressed in the U.S. Oil determination are identical to the facts presented here by Tesoro. There, U.S. Oil manufactured marine fuel in Washington. (CP 222.) U.S. Oil sold and delivered the fuel in this state to customers who would consume the fuel outside the territorial waters of the United States by vessels used primarily in foreign commerce. Id. The Department imposed the B&O tax under the Manufacturing classification on these sales. Id. U.S. Oil appealed and contended that

¹⁶ Always, that is, until now.

these sales may be deducted from the measure of its B&O tax liability under RCW 82.04.433(1). Id.

The Department held a hearing in July 1993, and issued Determination No. 93-257 later that same year. (CP 221, 225.) The issue presented was whether the RCW 82.04.433(1) deduction applied “to all measures of business and occupation tax, or is limited to those taxpayers who fall under the wholesaling or retailing classification.” (CP 223.) The determination sustained U.S. Oil’s appeal. (CP 225.) The Department ruled that the deduction statute specifically applied to manufacturers of bunker fuel. The following is an excerpt from the U.S. Oil determination:

The business and occupation tax is imposed under RCW 82.04.220 which states:

There is levied and shall be collected from every person a tax for the act or privilege of engaging in business activities. Such tax shall be measured by the application of rates against value of products, gross proceeds of sales, or gross income of the business, as the case may be.

This section imposes the tax. Its measure and rate vary depending upon the activity of the taxpayer. In this case the taxpayer is a manufacturer. RCW 82.04.240 sets the rate and provides that the measure of tax is the value of products manufactured. RCW 82.04.433 does not specify the activity or type of measure. It begins by merely providing, “In computing tax there may be deducted from the measure of tax . . .” Since the taxpayer is a manufacturer, the measure is the value of products.

Once the applicable measure of tax is determined, the second part of RCW 82.04.433(1) provides what may be deducted stating, “. . . amounts derived from sales of fuel for consumption outside the territorial waters of the United States, by vessels used primarily in foreign commerce.” The taxpayer derived amounts from sales of

fuel for consumption outside the territorial waters of the United States, by vessels used primarily in foreign commerce. Unlike other deduction or exemption sections, there is no stated limit upon who may take the deduction, or from what measure of tax.

Where the legislature uses certain statutory language in one instance and different language in another, there is a difference in legislative intent. Van Dyk v. Department of Rev., 41 Wn. App. 71, 77 (1985). Therefore, provided the taxpayer derived amounts from qualified sales [of] bunker fuel, we may not limit the deduction to wholesalers or retailers. When construing a statute, we cannot modify it. See Anderson v. Seattle, 78 Wn.2d 201, 202 (1970).

Both the taxpayer and the Audit Division have presented arguments regarding the legislative intent. In this case, the statutory language is plain. When the statutory language is plain, the statute is not open to construction or interpretation. N.W. Steel v. Department of Rev., 40 Wn. App. 237, 240 (1985). Therefore, it is not necessary to consider those arguments.

CP 224 (emphasis added).

Thus, the determination issued to U.S. Oil addressed the same underlying facts and the same statutory language that are at issue in this case. In the U.S. Oil determination, the Department found the statute to be clear and unambiguous, holding that a manufacturer deriving amounts from sales of bunker fuel for consumption outside the territorial waters of the United States, by vessels used primarily in foreign commerce, was entitled to take the RCW 82.04.433(1) B&O tax deduction. This was true regardless that U.S. Oil paid the tax under the Manufacturing B&O classification. Determination No. 93-257 held that “there is no stated limit upon who may take the deduction, or from what measure of tax.” (CP 224.) It rejected the audit position in that case—the same position the

Department takes in this appeal—that the RCW 82.04.433(1) deduction was limited to taxpayers paying B&O tax under the Wholesaling or Retailing classification, and ruled that the deduction applied equally to taxpayers paying the tax under the Manufacturing classification.

There is nothing unclear or ambiguous about this determination and the Department cannot disregard or ignore the ruling it made more than 15 years ago. By granting the B&O tax deduction to U.S. Oil and then denying it to Tesoro, the Department violates principles of fairness, equality and consistency. The U.S. Oil determination allows the deduction to manufacturers, in its words, under the “plain” language of RCW 82.04.433(1). (CP 224.) U.S. Oil was granted the B&O tax deduction on its sales of bunker fuel in a well-reasoned determination, and Tesoro asks this Court to apply that holding to this case, because it is a correct reading of RCW 82.04.433(1).¹⁷

The Department will contend the U.S. Oil determination was the result of a rogue ALJ, but the record reflects it was not the only

¹⁷ Among the published “missions” of the Department is “[t]o fairly . . . collect revenues and . . . advocate sound tax policy.” See <http://dor.wa.gov/Content/AboutUs/mission.aspx>. One of the Department’s “goals” is to “[p]romote fairness and consistency in the . . . application of tax law.” *Id.* Under the so-called “taxpayer bill of rights” (see Chapter 82.32A RCW) the “taxpayers of the State of Washington have the right to: . . . fair and equitable treatment.” See <http://dor.wa.gov/Content/AboutUs/TaxpayerRights.aspx>. To deny Tesoro the RCW 82.04.433(1) tax deduction after ruling that the deduction applied to U.S. Oil’s sales of bunker fuel under identical facts is the antithesis of “fairness,” “consistency in the . . . application of tax law,” “sound tax policy” and “equitable treatment.” In other words, the Department is in violation of its own stated mission and goals, and rights granted to taxpayers by the legislature.

departmental ruling that granted the RCW 82.04.433 deduction to bunker fuel manufacturers. The evidence discloses that since RCW 82.04.433 was enacted in 1985, the Department has issued two other determinations on the application and scope of RCW 82.04.433(1). And, these rulings came to the same conclusion as the U.S. Oil determination, that the statute does not specify a particular B&O tax as deductible, concluding that “it does not make any difference if the tax is Retailing B&O, Wholesaling B&O, Manufacturing B&O, or whatever.” (CP 294.)¹⁸

The first ruling was issued to Sound Refining, Inc. in 1988 (Det. No. 88-259). (CP 294.) This determination applied to the period July 1, 1985 through January 31, 1986, i.e., which covered the period beginning with the original enactment of the deduction statute. The Department then issued two more determinations, both in 1993, one to U.S. Oil (see CP 221-225, discussed above), and then later in the same year, to Pacific Northern Oil Corporation (Det. No. 93-275). All three determinations came to the same conclusion: “RCW 82.04.433 was intended to be a deduction against any B&O tax” (emphasis added). (CP 295.)

These facts demonstrate that a total of three other similarly—indeed, identically—situated taxpayers have received binding determinations, granting the RCW 82.04.433(1) deduction. How many

¹⁸ CP 294-295 is an internal Department memorandum that describes the three determinations. The language Tesoro quotes is out of one of the determinations, as quoted in the memorandum.

rulings must be given to Tesoro's competitors before Tesoro can expect the same treatment from the Department? How do the rulings issued to U.S. Oil, Sound Refining, and Pacific Northern Oil versus the Department's litigation position in this case square up with the Department's mission to promote fairness and consistency in the application of tax law, or with the taxpayer bill of rights (Chapter 82.32A RCW), which gives taxpayers the right to fair and equitable treatment? See, n.17, supra. It is unseemly for the Department to deny Tesoro a deduction that other, identically-situated taxpayers otherwise received. Nor is this a case of "what you don't know won't hurt you," as these other three companies are Tesoro's competitors and they have enjoyed a competitive advantage over the Tesoro refinery, which can only be remedied by the refund Tesoro seeks in this action.

In United States v. Kaiser, 363 U.S. 299, 308, 80 S. Ct. 1204, 4 L. Ed. 2d 1233 (1963), Justice Frankfurter in a concurring opinion said that equal treatment for taxpayers by the Internal Revenue Service (IRS) is an "overriding principle," because the "Commissioner cannot tax one and not tax another without some rational basis for the difference." Justice Frankfurter went on to state that inequality can be an "independent ground of decision that the [IRS] has been inconsistent." Id. Five years later in International Business Machines Corp. v. United States, 170 Ct. Cl. 357, 343 F.2d 914 (1965), the Court of Claims followed Justice Frankfurter's

reasoning. In that case, Remington Rand, an IBM competitor, requested a ruling from the IRS that certain of its computing devices be exempt from excise taxes. Id. at 915-916. Rand received a favorable private letter ruling two days later (id. at 916), prompting IBM to seek a similar private ruling for its competing computer devices, which were identical in all significant respects to the Rand computer. Id. Notwithstanding IBM's request for an expedited review, the IRS did not act on the request for more than two years, during which time IBM continued to pay excise taxes. Id. During this period, Rand was exempt from the tax and even received a refund for previous years in which it had paid taxes. Id.

Subsequently, the IRS informed both Rand and IBM that excise taxes would be imposed on their devices. Id. Rand was notified of the revocation of its ruling on May 1, 1957, but the IRS delayed its effective date for nine more months, to February 1, 1958. Id. Rand was thus exempt from excise taxes from January 1952 through January 1958, a six-year period. Id.

The IRS did not inform IBM that its computing systems were subject to excise taxes until November 26, 1957, and wrote that "the manufacturer of the machines which compete with and are similar to the taxable machines herein involved (i.e., Remington Rand) . . . is being appropriately advised by us regarding the taxability of such machines of its manufacture." Id. at 916-917. The IRS denied IBM's claims for a

refund for excise taxes paid from June 1, 1955, through January 31, 1958, which was roughly the same period that Rand was exempt from excise taxes. Id.

The IRS claimed it made the ruling prospective for Rand because its private letter ruling concluded that its devices were not subject to excise tax. Id. at 916. Yet, the Commissioner denied the claim by IBM for a refund of the excise taxes that it paid during the same period in which Rand did not have to pay taxes. Id. at 916-17. The effect of the prospective revocation of Rand's ruling, combined with the delayed effective date of the prospective ruling, allowed Rand to avoid paying federal excise taxes on the sale of its computer systems for six years. During this same period, IBM was required to pay the tax on sales of its identical computer systems.

IBM sued in the Federal Court of Claims to recover the excise taxes it paid during the period that Rand was exempt from those taxes. Id. at 917. IBM claimed that the treatment Rand received with identical computers invalidated the taxes IBM paid during the same period Rand was exempt from the taxes. Id. The court agreed, finding that the IRS had a duty of consistency.

The court held that the IRS "cannot tax one and not tax another." Id. at 920 (citing United States v. Kaiser, 363 U.S. 299, 308 (1960))

(Frankfurter, J., concurring)).¹⁹ The court further noted that “[e]quality of treatment is so dominant in our understanding of justice that discretion, where it is allowed a role, must pay the strictest heed.” IBM, 343 F.2d at 920. The court concluded that “[f]or all tax rulings, it is important that there be like treatment to those who should be dealt with on the same basis” (id. at 923 (citing Auto. Club of Mich., 353 U.S. at 186)), and that “[p]arity in the levying [of] a manufacturers’ excises is peculiarly essential to free and fair competition.” Id. at 323 (citing Exch. Parts., 279 F.2d at 253; H. Rep. No. 72-708, at 31, 32). While the decision in IBM is grounded in Section 7805(b)²⁰ of the Internal Revenue Code, there is no reason to limit its persuasive reach to rights granted by Congress. Tesoro and other Washington taxpayers have both a common law and statutory right (grounded in the taxpayer bill of rights (chapter 82.32A RCW)) to be treated with fairness.

This Court should follow the lead of Kaiser and IBM. U.S. Oil, Sound Refining, and Pacific Northern Oil were all granted the deduction

¹⁹ The court also cited Auto. Club of Mich. v. Comm’r, 353 U.S. 180, 185-86 (1957); Exch. Parts Co. v. United States, 279 F.2d 251, 254 (Ct. Cl. 1960); Conn. Ry. & Lighting Co. v. United States, 142 F. Supp. 907, 908-09 (Ct. Cl. 1956); Wolinsky v. United States, 271 F.2d 865, 868 (2d Cir. 1959); Weller v. Comm’r, 270 F.2d 294, 299 (3d Cir. 1959); Goodstein v. Comm’r, 267 F.2d 127, 132 (1st Cir. 1959); City Loan & Sav. Co. v. United States, 177 F. Supp. 843, 851 (N.D. Ohio, 1959); aff’d 287 F.2d 612, 616 (6th Cir. 1961).

²⁰ Section 7805(b) addressed the retroactivity of regulations or rulings of the IRS. It stated that, “The Secretary or his delegate may prescribe the extent, if any, to which any ruling or regulation, relating to the internal revenue laws, shall be applied without retroactive effect.” See IBM, 343 F.2d at 919.

that Tesoro was denied here. Each of these three taxpayers obtained rulings from the Department that their sales of bunker fuel were entitled to deduction under RCW 82.04.433(1). They received that tax benefit for many years, including during the Refund Period claimed by Tesoro, and presumably up to the time the deduction was purportedly taken away on May 14, 2009 (when the 2009 amendments to RCW 82.04.433 became law).²¹ These three taxpayers were exempt from the B&O tax on their sales of bunker fuel during the entire time Tesoro paid the tax.

Based on these facts this Court should hold, as the court held in IBM, that the Department cannot tax Tesoro differently or inconsistently from the way other identically situated taxpayers were taxed. Equal treatment is a paramount, “overriding principle.” U.S. v. Kaiser, 360 U.S. at 308 (Frankfurter J., concurring). It is so important that it is part of the Department’s mission statement and the taxpayer bill of rights. Now, it is clear the Department is paying only lip service to these principles; nevertheless, this Court should hold the Department to its word. As the court stated in IBM, “[p]arity in the levying of a manufacturers’ [tax] is peculiarly essential to free and fair competition.” 343 F.2d at 923. The trial court should be reversed on the basis of equity and fair play alone.

²¹ In fact, U.S. Oil did not begin to pay Manufacturing B&O tax on its sales of bunker fuel until May 2009, after the amendments became effective. This is confirmed by a recent complaint filed on September 4, 2009, by U.S. Oil against the State in Thurston County Superior Court. A copy of this complaint is attached as Exhibit A in the Appendix attached to this brief.

C. The Legislature's Attempt To Make The 2009 Amendments Retroactive Is Unconstitutional.

As noted, the legislature amended RCW 82.04.433 during the session completed earlier this year. Laws of 2009 ch. 494; see n.9, supra. That amendment limited the deduction to taxes “imposed under RCW 82.04.250 and 82.04.270” (the Retailing and Wholesaling B&O taxes). Laws of 2009, ch. 494, § 2, codified as RCW 82.04.433(1). The bill (known as Senate Bill (SB) 6096) made it clear that the deduction “does not apply with respect to the tax imposed under RCW 82.04.240 [i.e., to manufacturers], whether the value of the fuel under that tax is measured by the gross proceeds derived from the sale thereof or otherwise under RCW 82.04.450.” Laws of 2009, ch. 494, § 2 (again codified as RCW 82.04.433(1)); see Appendix, Exhibit B. More importantly, the legislature made the new act apply “both prospectively and retroactively.” Laws of 2009, ch. 494, § 4.²²

The Department will assert that SB 6096, signed into law by the Governor on May 14, 2009 and effective immediately (Laws of 2009, ch. 494, § 6), moots Tesoro’s refund petition by retroactively limiting RCW 82.04.433’s deduction to sales by non-manufacturers. While Tesoro does not dispute that SB 6096 purports to retroactively limit the deduction,

²² The trial court expressly declined to consider the enactment of SB 6096 into law as part of its ruling (see VRP 45), but as the Department can be expected to urge the 2009 act as an alternative ground for affirmance, Tesoro will address it now.

SB 6096's attempt to reach back more than 20 years is unconstitutional and constitutes a gross violation of Tesoro's substantive due process rights under the Fourteenth Amendment to the United States Constitution. Consequently, the retroactivity provision in SB 6096 (Laws of 2009, ch. 494, § 4) is invalid and unenforceable, and the amended statute is not a bar to this Court granting summary judgment in favor of Tesoro on its refund claim.²³

Tesoro also does not dispute that under certain circumstances the legislature may enact retroactive tax legislation consistent with due process. In United States v. Carlton, 512 U.S. 26, 114 S. Ct. 2018, 129 L. Ed. 2d 22 (1994), the Supreme Court explained that "the validity of a retroactive tax provision under the Due Process Clause depends upon whether 'retroactive application is so harsh and oppressive as to transgress the constitutional limitation.'" Id. at 30 (quoting Welch v. Henry, 305 U.S. 134, 147, 59 S. Ct. 121, 83 L. Ed. 87 (1938)). There, Congress had enacted a tax deduction that had far broader application than Congress had contemplated, having an estimated revenue impact approximately 20 times greater than planned. See id. at 31-32. The following year, Congress

²³ Tesoro does not dispute the legislature's authority to prospectively limit RCW 82.04.433's exemption to non-manufacturer sellers. However, as will be shown below, even that action by the 2009 Legislature was invalid. See Argument, Section E, infra.

enacted an amendment narrowing the scope of the original deduction. See id. at 29, 31.

Under these circumstances, the Supreme Court held that the retroactive elimination of the deduction was constitutional. See id. at 32. First, the retroactivity was “neither illegitimate nor arbitrary,” because “Congress acted to correct what it reasonably viewed as a mistake in the original 1986 provision that would have created a significant and unanticipated revenue loss.” Id. Second, there was “only a modest period of retroactivity” of approximately one year, and the “curative” amendment followed the original statute’s enactment by only a few months. Id. at 31-32. Thus, Carlton “defined the parameters of the government’s retroactive taxation power” and “clarified the [two-part] test to apply in determining whether retroactive tax legislation violates due process.” Rivers v. South Carolina, 327 S.C. 271, 490 S.E.2d 261, 264 (1997). As the Rivers court explained:

First, the legislation must be “supported by a legitimate legislative purpose furthered by rational means.” [Carlton] at 30-31, 114 S.Ct. at 2022, 129 L.Ed.2d at 28 (quoting *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729, 104 S.Ct. 2709, 2718, 81 L.Ed.2d 601, 611 (1984)). Second, the period of retroactivity must be “modest.” Id. at 32, 114 S.Ct. at 2023, 129 L.Ed.2d at 29.

Rivers, 490 S.E.2d at 264²⁴; see also City of Modesto v. National Med. Inc., 128 Cal. App. 4th 518, 27 Cal. Rptr. 3d 215 (2005) (a retroactivity period of up to eight years found to violate due process).

Here, SB 6096 cannot, unlike the tax provision at issue in Carlton, be considered a “curative” measure justifying retroactivity over an extended period of time.²⁵ On the contrary, the 2009 amendments were both “illegitimate” and “arbitrary,” enacted for the sole purpose of defeating Tesoro’s refund claim. The amendments also went far beyond “a modest period of retroactivity.”

The 2009 Legislature purports to know the 1985 Legislature’s intent, stating that “at the time the deduction allowed under RCW 82.04.433 was enacted in 1985, it was intended to apply only to the wholesaling or retailing of bunker fuel” but that the multiple activities tax credit enacted in 1987 “resulted in changed tax liability for certain taxpayers” and limited the scope of the deduction so as not to apply to manufacturer-sellers such as Tesoro. Laws of 2009, ch. 494, § 1(1). Whether or not the 2009 Legislature may purport to “divine” the 1985 Legislature’s intent, the controlling evidence of the 1985 Legislature’s intent in enacting RCW 82.04.433 is the plain and unambiguous language

²⁴ In Rivers, the retroactivity period was, depending on how it was calculated, two or three years, which “far exceeds one year.” Id.

²⁵ Even if SB 6096 was arguably “curative,” reaching back over a more than 24-year period to retroactively eliminate a deduction is too harsh and oppressive to survive a due process challenge.

of the statute. See Dep't of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 9-11, 43 P.3d 4 (2002) (explaining that legislative history is only relevant if the statute at issue is ambiguous).

What matters is that the legislature was well aware that since the RCW 82.04.433 deduction was enacted in 1985 it has applied to manufacturer-sellers of bunker fuel. See Laws of 2009, ch. 494, § 1(2). The Department has interpreted the deduction to apply to manufacturers three times since 1988, which is after the multiple activities tax credit was enacted in 1987. The legislature is presumed to know this history. If the legislature had wanted to “cure” the effect it now claims the multiple activities credit had on RCW 82.04.433, it could have and would have done so within a year or two of 1987. It did not. Instead, the legislature let that deduction, as well as the multiple activities tax credit, stand for 22 more years. And, the Department interpreted the deduction in favor of manufacturers throughout those years. Retroactively repealing a deduction that has been in place for at least 24 years is not a “cure”; it is harsh and oppressive and constitutes a gross violation of due process. SB 6096’s retroactivity provision violates both prongs of the two-part Carlton test and should be struck down as unconstitutional and unenforceable.

SB 6096 is also plainly distinguishable from the retroactive statute in Carlson because the retroactivity period here is far longer. Tesoro has

not located a single instance of a court upholding a tax statute imposing a retroactivity period anywhere approaching 24 years.²⁶ Indeed, other courts have noted that “[r]etroactivity provisions in tax statutes, if for a short period, are generally valid.” Replan Dev., Inc. v. Dep’t of Housing Preservation & Dev., 70 N.Y.2d 451, 517 N.E.2d 200, 522 N.Y.S.2d 485 (1988) (citing cases) (emphasis added); see also Moran Towing Corp. v. Urbach, 1 A.D.3d 722, 723, 768 N.Y.S.2d 33 (2003) (“The retroactivity provisions of a tax statute will generally be upheld if they are imposed for a short period” (citing cases) (emphasis added)).

Justice O’Connor explained in her concurrence in Carlton that “[t]he governmental interest in revising the tax laws must at some point give way to the taxpayer’s interest in finality and repose.” Carlton, 512 U.S. at 37-38 (O’Connor, J., concurring). In her view, “[a] period of retroactivity longer than the year preceding the legislative session in which the law was enacted would raise . . . serious constitutional questions.” Id.²⁷ As noted in Rivers v. State, 490 S.E.2d 261, 264, (1997), the South

²⁶ See, e.g., Carlton, 512 U.S. at 38 (O’Connor, J., concurring) (“In every case in which we have upheld a retroactive federal tax statute against due process challenge, however, the law applied retroactively for only a relatively short period prior to enactment.”) (citing cases); People ex rel. Beck v. Graves, 280 N.Y. 405, 409, 21 N.E.2d 371 (1939) (“No case has ever held such a statute to be valid which attempted to permit a retroactive assessment of a tax for as long a period as sixteen years”).

²⁷ In Welch, the Supreme Court upheld a tax enacted in 1935 as retroactive to 1933. See Welch, 305 U.S. at 151. However, both the Welch Court and Justice O’Connor noted that the Wisconsin State Legislature, the legislative body at issue in Welch, only met biannually and applied the two-year retroactive tax “at the first opportunity after the tax year in which the income was received.” Id.; Carlton, 512 U.S. at 38 (O’Connor, J.,
(Footnote continued . . .)

Carolina Supreme Court held that a retroactive tax statute reaching back between two and three years was unconstitutional. That court, paraphrasing Justice O'Connor's cautioning statement, noted that "[a]t some point . . . the government's interest in meeting its revenue requirements must yield to taxpayers' interest in finality regarding tax liabilities and credits" and held that "[t]hat point had been reached" with the two-to-three year retroactivity period at issue. *Id.* The 24-year retroactivity period in SB 6096 is unprecedented. Sanctioning the legislature's effort to cancel a tax deduction over a period stretching back more than two decades would go far beyond what any court has previously permitted. In short, there is no authority for, and this Court should not, take that step.

Finally, if anything, SB 6096 more plainly establishes that Tesoro's interpretation of the 1985-2009 version of RCW 82.04.433, is correct. If the legislature agreed with the strained interpretation of the deduction the Department is seeking to apply to Tesoro, SB 6096 would be redundant and unnecessary, both prospectively and retroactively. It is obvious SB 6096 attempts to change the application of RCW 82.04.433's historic deduction by preventing taxpayers that both manufacture and sell fuel (such as Tesoro) from claiming the deduction previously available to

(Footnote cont'd . . .)

concurring). Justice O'Connor would clearly have found a retroactivity period of 24 years to be a gross due process violation.

all sellers. The legislature's decision to enact SB 6096 demonstrates that it believes SB 6096 is necessary to make RCW 82.04.433 function the way the Department insists it functioned before SB 6096 was enacted. Faced with this conflict between the legislature's interpretation of the 1985-2009 version of RCW 82.04.433 and the Department's current interpretation of that same statute, this Court should accept the legislature's understanding of its own statute, notwithstanding the intent section of SB 6096, which is discussed next.²⁸

D. The 2009 Legislature's Attempt To Divine The Intent Of The 1985 Legislature Is Not Credible And Defies Logic.

Section 1 of SB 6096 purports to express the legislature's intent in enacting the bill. In its entirety, Section 1 states:

NEW SECTION. Sec. 1. (1) Through this act the legislature intends to address the taxation of persons manufacturing and/or selling bunker fuel. Bunker fuel is fuel intended for consumption outside the waters of the United States by vessels in foreign commerce. Although the state has historically collected tax from bunker fuel manufacturers, recently questions have arisen whether the manufacture of bunker fuel is subject to business and occupation tax under RCW 82.04.240. Pursuant to this act, the activity is taxable under RCW 82.04.240.

(2) The legislature finds that at the time the deduction allowed under RCW 82.04.433 was enacted in 1985, it was intended to apply only to the wholesaling or retailing of bunker fuel. In 1987 the legislature enacted the multiple activities tax credit in RCW 82.04.440. Enactment of the multiple activities tax credit resulted

²⁸ In Japan Line, Ltd. v. McCaffree, 88 Wn.2d 93, 558 P.2d 211 (1977), the Supreme Court upheld the retroactive imposition of the leasehold excise tax. This tax was enacted effective on March 1, 1976, and made retroactive to January 1, 1976—a period of only two months. Id. at 94-95.

in changed tax liability for certain taxpayers. In particular, some taxpayers that engaged in activities that had been exempt under the prior multiple activities exemption became subject to tax on manufacturing activities upon enactment of the multiple activities tax credit in its place. The manufacturing of bunker fuel is one such activity.

Laws of 2009, ch. 494, § 1.

There are several things wrong with this purported statement of legislative intent. First, the legislature claims “the state has historically collected tax from bunker fuel manufacturers.” § 1(1). This statement is true only if one were to consider the B&O taxes voluntarily paid on sales of bunker fuel by Tesoro; but it is false in all other respects. It is particularly false as to at least three other manufacturers of bunker fuel (U.S. Oil, Sound Refining, and Pacific Northwest Oil). The evidence shows that, up until very recently, whenever the Department was asked whether the deduction applied to manufacturers of bunker fuel, the Department in every known case opined that the deduction did apply. So, while the state may have historically collected the tax from a bunker fuel manufacturer (Tesoro), it has categorically not collected the tax from other manufacturers. And this latter non-payment of B&O taxes was at the direction of the Department itself.

Second, the 2009 Legislature purports to find “that at the time the deduction allowed was enacted in 1985, it was intended to apply only to the wholesaling or retailing of bunker fuel.” § 1(2). One has to ask, how can the 2009 Legislature know what the 1985 Legislature intended? There

were 24 intervening years and 16 intervening legislative sessions between the original enactment and the amendment. Only a handful of legislators who were in the legislature in 1985 and who were still there in 2009.²⁹ The sponsor of the 1985 bill, who appears to have been Senator Jim McDermott, is no longer in the State Legislature but serves as a member of the U.S. House of Representatives.³⁰ Further, the sponsor of the 2009 bill (SB 6096), Senator Rodney Tom, himself was not even in the legislature in 1985. Instead, he was still in college, having graduated from the University of Washington in 1985. See Appendix, Exhibit C.³¹ How did Senator Tom in the year 2009 divine the intent of the 1985 Legislature—through a séance? The idea that Senator Tom or anyone in the 2009 Legislature could possibly know the 1985 Legislature’s intent in enacting RCW 82.04.433 is both ludicrous and ridiculous.

Third, the 2009 Legislature claims that “[e]nactment of the multiple activities tax credit resulted in changed tax liability for certain

²⁹ Tesoro’s research showed there were only five people in the legislature in 1985 who were still there in 2009. They are Senators McCaslin, Hargrove, Jacobsen, Haugen and Brad Owen, who was a senator in 1985 and is now the Lt. Governor and President of the Senate.

³⁰ The bill enacting the Bunker Fuel Deduction statute in 1985 was known as Engrossed Substitute Senate Bill (ESSB) 4228. The section that eventually became RCW 82.04.433 was proposed as a floor amendment in the House of Representatives by Representatives Appelwick and Todd. In a point of inquiry Representative Appelwick stated that there was no fiscal impact associated with the bunker fuel deduction amendment because the B&O tax “has not been collected in the past and would not be a reduction from current revenue.” Journal of the House, Ninety-Sixth Day, April 19, 1985 (pp. 1530-31). This is additional evidence that bunker fuel has never been subject to B&O tax in Washington and confirms the constitutional prohibition on imposing the tax. See n.7, supra.

³¹ Senator Tom was first elected to the legislature in 2003.

taxpayers” and “[i]n particular, some taxpayers that engaged in activities that had been exempt under the prior multiple activities exemption became subject to tax on manufacturing activities upon enactment of the multiple activities tax credit in its place” and “[t]he manufacturing of bunker fuel is one such activity.” Laws of 2009, ch. 494, § 1(2). There are at least two things problematic with these particular statements of intent. One is the conclusion that the enactment of the multiple activities tax credit in 1987 changed a manufacturer’s eligibility for the bunker fuel deduction, an unrelated statute. What evidence does the 2009 Legislature point to, substantiating this claim? In fact, there is no evidence that the multiple activities tax credit law was intended to change any taxpayers’ eligibility for the bunker fuel deduction, other than the belated justification advanced by the Department more than 20 years later and then channeled to the legislature earlier this year.³²

³² The assertion also flatly disregards the presumption against repeal or amendment by implication. See U.S. Oil & Refining Company v. Dep’t of Ecology, 96 Wn.2d 85, 88, 633 P.2d 1329 (1981) (“Implied repeals are disfavored”). The only circumstances where an implied repeal will be found is where:

- (1) the latter act covers the entire subject matter of the earlier legislation, is complete in itself, and is evidently intended to supersede prior legislation on the subject; or
- (2) the two acts are so clearly inconsistent with, and repugnant to, each other that they cannot be reconciled and both given effect by a fair and reasonable construction.

U.S. Oil, *supra* (quoting In re Chi-Dooh Li, 79 Wn.2d 561, 563, 488 P.2d 259 (1971)); see Bellevue School District No. 405 v. Brazier Construction Co., 103 Wn.2d 111, 122, 691 P.2d 178 (1984). There is no indication that the 1987 MATC statute was intended to supersede any aspect of the B&O tax deduction granted by RCW 82.04.433(1). The legislature must be presumed to have been aware of the Bunker Fuel Deduction statute in 1987 and if there was any attempt to change it the legislature would have done so. Therefore, RCW 82.04.433(1) must be given the same meaning after the MATC was
(Footnote continued . . .)

Two, if the 1987 multiple activities tax credit law somehow was thought to impact the existing Bunker Fuel Deduction statute the legislature should have acted within a year or two of the enactment of the MATC. It did not; instead, it waited more than 22 years to effect a change. Even believing this to be the case, under Carlton it would be

(Footnote cont'd . . .)

enacted. Nor can it be clearly shown that the MATC was intended to supersede a manufacturer's entitlement to the tax deduction, the only way the latter could be repealed as to manufacturers by the former, under the second part of the above test ("the two acts are so clearly inconsistent with, and repugnant to, each other that they cannot be reconciled and both given effect by a fair and reasonable construction" (U.S. Oil, 96 Wn.2d at 88)). The two statutes are neither inconsistent with, nor repugnant to, each other. In fact, the evidence is just the opposite. First, the Department ruled three times after the MATC was enacted, that RCW 82.04.433(1) still applied to manufacturers. Second, when the Department promulgated the MATC rule (WAC 458-20-19301) in 1987 (87-23-008 (filed 11/6/87)) it included this provision:

Effective August 12, 1987, with the enactment of the MATC system, the liability for actual payment of tax by persons who extract, manufacture, and sell products in this state was shifted from the selling activity (wholesaling or retailing) to the production activity (extracting and/or manufacturing). As explained, the payment of the production taxes may now be credited against the liability for selling taxes on the same products. However, the deductions from tax provided by chapter 82.04 RCW (business and occupation tax deductions) may still be taken before tax credits are computed and used, with noted exceptions. In order for the MATC system to result in the correct computation of tax liabilities and credit applications, the tax deductions which may apply for any reporting period must be taken equally against both levels of tax liability reported, i.e., at both the production and selling levels. Failure to report tax deductions in this manner will result in overreporting tax due and may result in overpayment of tax. Thus, with the exception noted below, tax deductions formerly reported only against selling activities should now be reported against production activities as well. All such deductions, the result of which is to reduce the measure of tax reported, should be taken against both the production taxes (extracting or manufacturing) and the selling taxes (wholesaling and/or retailing) equally.

WAC 458-20-19301(6) (emphasis added). Thus, the enactment of the MATC had no impact on RCW 82.04.433(1) and the Department's own MATC regulation explained that the B&O tax deductions in the law (including the Bunker Fuel Deduction) were still fully applicable to production or manufacturing activities even after the enactment of the MATC.

unconstitutional for the legislature to enact an amendment that reaches back more than two decades.

In short, the legislature's attempt to make SB 6096 retroactive must fail. Tesoro is entitled to a full refund of the B&O taxes it paid on sales of bunker fuel for consumption outside the territorial waters of the U.S., by vessels used primarily in foreign commerce under RCW 82.04.433(1), and for which it has certificates under Rule 175. This includes the Refund Period at issue in this appeal.

E. The Enactment Of SB 6096 Violated Initiative 601, So The Entire 2009 Act Must Fail.

Finally, SB 6096 is not only invalid retroactively it is equally invalid prospectively. Despite its attempt to “clarify” the law (see Appendix, Exhibit B, p. 2), SB 6096 changed the way manufacturers are to pay B&O tax on their sales of bunker fuel to vessels engaged in foreign commerce. The bill thus imposed a tax increase.

Under Initiative Measure 601 (“I-601” (Laws of 1994, ch. 2)), “any action or combination of actions by the legislature that raises taxes may be taken only if approved by a two-thirds vote of each house of the legislature.” RCW 43.135.035(1).³³ The term “raises taxes” is defined to mean “any action or combination of actions by the legislature that

³³ For a complete history of I-601, see Brown v. Owen, 165 Wn.2d 706, 711-14, 206 P.3d 310 (2009). Although amended and suspended several times, the two-thirds majority requirement remains in the law and was in effect during the legislature's consideration of SB 6096.

increases state tax revenue deposited in any fund, budget, or account, regardless of whether the revenues are deposited into the general fund.” RCW 43.135.035(6).

Tesoro has previously demonstrated that Sections 1 (statement of intent) and 4 (retroactivity) of SB 6096 are invalid. SB 6096 contains a savings clause:

If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

Laws of 2009, ch. 494, § 5.

Section 2 of SB 6096 contains the substantive amendments to RCW 82.04.433. These amendments may apply prospectively, but “only if approved by a two-thirds vote of each house of the legislature.” RCW 43.135.035(1). SB 6096 passed the Senate on April 26, 2009 by a vote of 29 to 19. The bill passed House on the same day by a vote of 51 to 45. Neither house of the legislature passed the bill by a two-thirds majority. Therefore, despite the savings clause (§ 5) SB 6096 was not properly enacted and Laws of 2009, ch. 494 is invalid and unenforceable, not only retroactively as discussed above, but prospectively, as well.

V.

CONCLUSION

This Court should rule that the plain language of RCW 82.04.433(1) entitled Tesoro to a B&O tax deduction on its sales of bunker

fuel during the Refund Period, and reverse the trial court. The Court should further affirm the Department's longstanding interpretation of the deduction as applied to U.S. Oil, Sound Refining and Pacific Northwest Oil. That interpretation should be extended to Tesoro now because it not only comports with the unambiguous language of the statute, but treats all sellers of bunker fuel in this state alike for B&O tax purposes.

The Court should also declare unconstitutional as a matter of law the legislature's attempt to make the 2009 amendments to RCW 82.04.433 retroactive, because the retroactive application of the amendments violates due process. And, the Court should hold the entire act (Laws of 2009, ch. 494) invalid and unenforceable since it did not get the necessary two-thirds vote of both houses of the legislature under I-601 to become law.

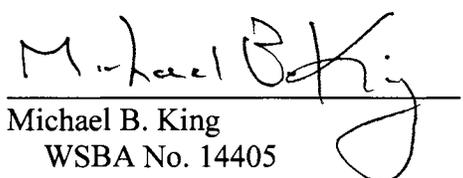
Finally, Tesoro asks the Court to remand the case to the trial court for the calculation and determination of the refund owed to Tesoro.

RESPECTFULLY SUBMITTED, this 14th day of December,

2009.


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APPENDIX

EXHIBIT A

FILED
SUPERIOR COURT
THURSTON COUNTY, WASH.

09 SEP -4 AM 9:19

BETTY J. GOULD, CLERK

BY _____
DEPUTY

7

IN THE SUPERIOR COURT OF WASHINGTON
FOR THURSTON COUNTY

09 - 2 - 02148 - 9

U.S. OIL TRADING, LLC.

Plaintiff,

v.

STATE OF WASHINGTON,
OFFICE OF FINANCIAL MANAGEMENT, and
DEPARTMENT OF REVENUE

Defendant.

No.

Complaint

Plaintiff alleges:

Parties

1. U.S. Oil Trading LLC (hereinafter referred to as "Trading") is a limited liability company domiciled in the State of Delaware and it has paid all fees and dues necessary to legally conduct business in Washington State.

2. The Department of Revenue (hereinafter referred to as "DOR") and the Office of Financial Management (hereinafter referred to as "OFM") are administrative agencies of the State of Washington.

Jurisdiction and Standing

3. This action contains both a tort claim and a refund claim.

1 4. Trading more than sixty days prior to commencing this action presented the tort claim to the
2 risk management division of OFM.

3 5. The tort claim is authorized by RCW 4.92.090.

4 6. Trading paid the tax sought to be refunded prior to commencing this action.

5 7. The refund claim is authorized by RCW 82.32.180.

6 8. Jurisdiction of all claims brought by this action is appropriate under Wash. Const. Art. IV,
7 Sec. 6.

8 **Plaintiff's Business Activities**

9 9. Trading sells in Washington certain fuels for consumption outside the territorial waters of the
10 United States by vessels used primarily in foreign commerce.

11 10. Trading obtains such fuels under a contract with its parent, U.S. Oil & Refining Co.
12 (hereinafter referred to as "Manufacturing").

13 11. Under the contract with Manufacturing, Trading supplies Manufacturing the materials
14 necessary for the fuels to be produced, Manufacturing creates the fuels and Trading pays
15 Manufacturing a fee for its manufacturing services.

16 12. Trading does no manufacturing within the State of Washington.

17 **Background**

18 13. In 1985, the Washington Legislature adopted RCW 82.04.433. The statute created a
19 deduction from the measure of the business and occupation tax for amounts derived from sales of
20 fuel for consumption outside the territorial waters of the United States, by vessels used primarily
21 in foreign commerce.
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23
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25
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1 14. At that time and from that time through the start of its performance of the above-referenced
2 contract with Trading, Manufacturing manufactured and sold fuel for consumption outside the
3 territorial waters of the United States, by vessels used primarily in foreign commerce.

4 15. At all times, Manufacturing took the deduction permitted by RCW 82.04.433.

5 16. On April 16, 1993, the audit division of the DOR assessed Manufacturing manufacturing
6 business and occupation tax on the amounts Manufacturing derived, between July 1, 1988
7 through September 30, 1992, from sales of fuel for consumption outside the territorial waters of
8 the United States by vessels used primarily in foreign commerce.

9 17. Based on the plain meaning of the legislative language, on September 27, 1993, the DOR
10 reversed its audit division assessment against Manufacturing by issuing a Determination holding
11 that the deduction allowed by RCW 82.04.433 applied to the measure of the business and
12 occupation tax including the measure of the manufacturing business and occupation tax.

13 18. Manufacturing was subsequently audited by the DOR in 1997 for the time period January 1,
14 1993 through June 30, 1996, in 2000 for the time period July 1, 1998 through March 31, 1999
15 and in 2008 for the time period January 1, 2003 through June 30, 2006. In each and every of
16 those audits, the DOR permitted Manufacturing to deduct from the measure of its manufacturing
17 tax the amounts Manufacturing derived from sales of fuel for consumption outside the territorial
18 waters of the United States, by vessels used primarily in foreign commerce.

19 19. Sometime after the third audit permitting Manufacturing a deduction to its manufacturing
20 business and occupation tax under RCW 82.04.433 but before the conclusion of the fourth audit
21 permitting Manufacturing a deduction to its manufacturing business and occupation tax under
22 RCW 82.04.433, a different taxpayer sought a substantial refund of manufacturing business and
23 occupation tax for taxes it paid that were measured by amounts it derived from sales of fuel for
24
25
26

1 consumption outside the territorial waters of the United States, by vessels used primarily in
2 foreign commerce.

3 20. In response to that third party taxpayer's claim for refund, the DOR claimed its interpretation
4 of RCW 82.04.433 permitted the deduction to only be taken against the wholesaling or retailing
5 business and occupation taxes and not to the manufacturing business and occupation tax.

6 21. Also in response to that third party taxpayer's claim for refund, Senate Bill 6096 was
7 introduced in the 2009 legislative session. Senate Bill 6096 attempted to amend RCW
8 82.04.433, on both a retroactive and prospective basis, such that the statutory deduction no
9 longer would apply to the manufacturing business and occupation tax.

10
11 **Tortious Conduct**

12 22. On or about February 27, 2009, the DOR and the OFM jointly and severally prepared a
13 fiscal note to Senate Bill 6096.

14 23. That note indicated that there was no revenue impact as a result of the legislation.

15 24. DOR and OFM both should have known that Senate Bill 6096 if it became valid law would
16 "raise taxes" as that term is used in RCW 43.135.035.

17 25. RCW 43.135.031 creates a duty on OFM to expeditiously determine the cost of legislative
18 action to taxpayers.

19 26. RCW 43.135.031 creates a duty on OFM to perform a thorough independent analysis of any
20 proposed increase in taxes.

21 27. RCW 43.135.031 creates a duty on OFM to provide notices to the public and the legislature
22 regarding any bill that would raise taxes as that term is used in RCW 43.135.035.

23 28. RCW 43.41.110 and RCW 43.88A create a duty on OFM to provide a fiscal note depicting
24 the expected fiscal impact of proposed legislation.
25
26

1 29. The DOR has a duty to prepare accurate fiscal notes and a duty to assist OFM in its
2 preparation of fiscal notes.

3 30. The DOR has a duty to fully inform OFM of the revenue impact of proposed legislation.

4 31. OFM breached its above-referenced duties.

5 32. DOR breached its above-referenced duties.

6 33. If the DOR and OFM had fulfilled their above-referenced duties, both Houses of the
7 Legislature would not have approved Senate Bill 6096 unless the Bill was approved by a two-
8 thirds vote of each House.

9 34. The DOR and OFM knew or should have known that an accurate fiscal note would have
10 resulted in each House requiring a two-thirds vote to approve Senate Bill 6096.

11 34. The failure of DOR and OFM to fulfill their duties, allowed Senate Bill 6096 to be approved
12 by simple majority vote. Neither House approved the Bill with a two-thirds vote.

13 35. Trading was damaged by the failure of OFM and DOR to fulfill their duties in the amounts
14 described below.

15 36. Trading's damage was a reasonably foreseeable consequence of the failure of the DOR and
16 OFM to fulfill their duties.

17 37. Trading is within the class of persons intended to be protected by the duties required of and
18 breached by DOR and OFM.
19

20 **Tortious Damages**

21 36. If Senate Bill 6096 has become valid law, Trading has been damaged by the failure of OFM
22 and DOR to fulfill their duties in the amount of \$11,275,000, the estimated present value of the
23 future taxes Trading will have to pay as a result of Senate Bill 6096 becoming valid law.
24

1 37. If Senate Bill 6096 has not become valid law, Trading has been damaged by the failure of
2 OFM and DOR to fulfill their duties in an amount in excess of \$76,000, the exact amount to be
3 proven at trial.

4 **Refund Action**

5 38. Senate Bill 6096 "raised taxes" as that term is used in RCW 43.135.035.

6 39. To become valid law, Senate Bill 6096 needed to be approved by a two-thirds vote of each
7 House of the Legislature. Senate Bill 6096 failed to be approved by a two-thirds vote of either
8 House.

9 40. Senate Bill 6096 failed to become law despite being approved by a majority of both houses
10 of the Legislature and being signed by the Governor.

11 41. Trading is not required to include in the measure of its manufacturing or other business and
12 occupation taxes any of the amounts it derives from sales of fuel for consumption outside the
13 territorial waters of the United States, by vessels used primarily in foreign commerce.

14 42. Trading has paid \$35,848.11 in manufacturing business and occupation tax on amounts it
15 derived from sales of fuel for consumption outside the territorial waters of the United States, by
16 vessels used primarily in foreign commerce. Such amounts were paid on May 27, 2009.

17 43. Trading is entitled to a refund of the \$35,848.11.
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PRAYER FOR RELIEF

44. For the reasons stated above, Plaintiff, U.S. Oil Trading LLC prays for Judgment ordering Defendant to refund the \$35,848.11 plus prejudgment interest on such amounts at the statutory rate and to pay its fees and costs associated with this action as damages or in the alternative to pay \$11,275,000 as damages together with such other relief as the Court deems just and equitable.

DATED this 2nd day of September, 2009.

THE DINCES LAW FIRM



Franklin G. Dinces, WSBA #13473
Attorney for Plaintiffs

EXHIBIT B

CERTIFICATION OF ENROLLMENT

SENATE BILL 6096

Chapter 494, Laws of 2009

61st Legislature
2009 Regular Session

BUSINESS AND OCCUPATION TAX--BUNKER FUEL

EFFECTIVE DATE: 05/14/09

Passed by the Senate April 26, 2009
YEAS 29 NAYS 19

BRAD OWEN

President of the Senate

Passed by the House April 26, 2009
YEAS 51 NAYS 45

FRANK CHOPP

Speaker of the House of Representatives

Approved May 14, 2009, 12:14 p.m.

CHRISTINE GREGOIRE

Governor of the State of Washington

CERTIFICATE

I, Thomas Hoemann, Secretary of the Senate of the State of Washington, do hereby certify that the attached is **SENATE BILL 6096** as passed by the Senate and the House of Representatives on the dates hereon set forth.

THOMAS HOEMANN

Secretary

FILED

May 18, 2009

Secretary of State
State of Washington

SENATE BILL 6096

Passed Legislature - 2009 Regular Session

State of Washington

61st Legislature

2009 Regular Session

By Senator Tom

Read first time 02/25/09. Referred to Committee on Ways & Means.

1 AN ACT Relating to the taxation of the manufacturing and selling of
2 fuel for consumption outside the waters of the United States by vessels
3 in foreign commerce; amending RCW 82.04.433; creating new sections; and
4 declaring an emergency.

5 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

6 NEW SECTION. **Sec. 1.** (1) Through this act the legislature intends
7 to address the taxation of persons manufacturing and/or selling bunker
8 fuel. Bunker fuel is fuel intended for consumption outside the waters
9 of the United States by vessels in foreign commerce. Although the
10 state has historically collected tax from bunker fuel manufacturers,
11 recently questions have arisen whether the manufacture of bunker fuel
12 is subject to business and occupation tax under RCW 82.04.240.
13 Pursuant to this act, the activity is taxable under RCW 82.04.240.

14 (2) The legislature finds that at the time the deduction allowed
15 under RCW 82.04.433 was enacted in 1985, it was intended to apply only
16 to the wholesaling or retailing of bunker fuel. In 1987 the
17 legislature enacted the multiple activities tax credit in RCW
18 82.04.440. Enactment of the multiple activities tax credit resulted in
19 changed tax liability for certain taxpayers. In particular, some

1 taxpayers that engaged in activities that had been exempt under the
2 prior multiple activities exemption became subject to tax on
3 manufacturing activities upon enactment of the multiple activities tax
4 credit in its place. The manufacturing of bunker fuel is one such
5 activity.

6 **Sec. 2.** RCW 82.04.433 and 1985 c 471 s 16 are each amended to read
7 as follows:

8 (1) In computing tax there may be deducted from the measure of tax
9 imposed under RCW 82.04.250 and 82.04.270 amounts derived from sales of
10 fuel for consumption outside the territorial waters of the United
11 States, by vessels used primarily in foreign commerce.

12 (2) (~~Nothing in this section shall be construed to imply that~~
13 ~~amounts which may be deducted under this section were taxable under~~
14 ~~Title 82 RCW prior to the enactment of this section.~~) The deduction in
15 subsection (1) of this section does not apply with respect to the tax
16 imposed under RCW 82.04.240, whether the value of the fuel under that
17 tax is measured by the gross proceeds derived from the sale thereof or
18 otherwise under RCW 82.04.450.

19 NEW SECTION. **Sec. 3.** The department of revenue must take any
20 actions that are necessary to ensure that its rules and other
21 interpretive statements are consistent with this act.

22 NEW SECTION. **Sec. 4.** This act applies both prospectively and
23 retroactively.

24 NEW SECTION. **Sec. 5.** If any provision of this act or its
25 application to any person or circumstance is held invalid, the
26 remainder of the act or the application of the provision to other
27 persons or circumstances is not affected.

28 NEW SECTION. **Sec. 6.** This act is necessary for the immediate
29 preservation of the public peace, health, or safety, or support of the
30 state government and its existing public institutions, and takes effect
31 immediately.

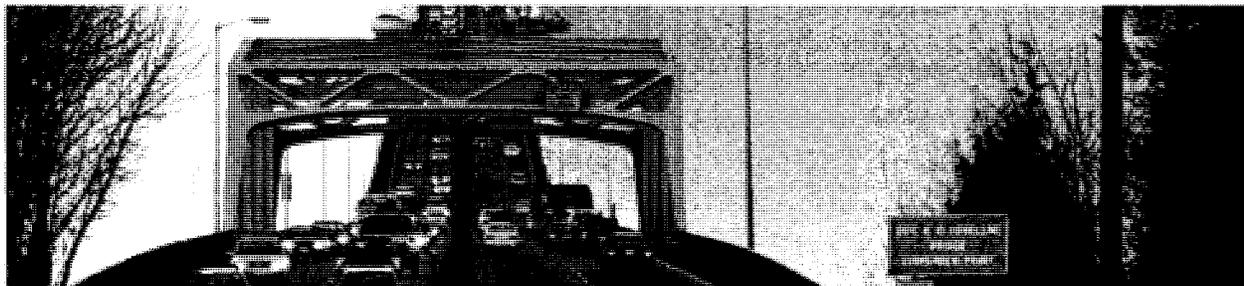
Passed by the Senate April 26, 2009.

Passed by the House April 26, 2009.

Approved by the Governor May 14, 2009.

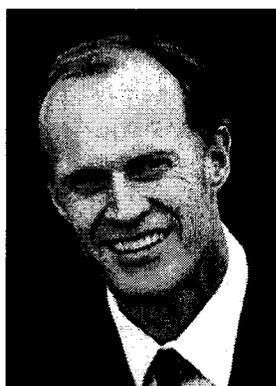
Filed in Office of Secretary of State May 18, 2009.

EXHIBIT C



SENATOR
Rodney Tom
48th District, Bellevue

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Biography

Sen. Rodney Tom is serving his first term in the Senate after serving two terms in the House for constituents of the 48th District. The district is sandwiched between Lake Washington and Lake Sammamish and includes Redmond and parts of Bellevue and Kirkland.

Sen. Tom is serving as the Ways and Means Committee's vice chair for the operating budget. He also sits on the Early Learning and K-12 Education Committee and the Judiciary Committee.

A graduate of Newport High School in Bellevue, Tom got his undergraduate degree from the University of Washington and a graduate degree from the University of Southern California.

A Realtor, Tom is active with the March of Dimes Seattle.

He is an avid outdoorsman who has climbed all of Washington's five volcanoes, competed in four marathons and has ridden in the Seattle to Portland bike ride. Tom and his wife Deborah live in Medina with their daughter Nicole, 13, and son Dylan, 11.

[Back to Sen. Tom's homepage](#)

COMMITTEES

- Ways & Means (Vice Chair Operating Budget)
- Early Learning & K-12 Education
- Judiciary

OLYMPIA OFFICE

220 Cherberg Building
Olympia, WA 98504-0448
(360) 786-7694

LOCAL GOVERNMENTS

- City of Clyde Hill
- City of Medina
- Town of Hunts Point
- City of Bellevue
- City of Redmond
- Town of Yarrow Point
- City of Kirkland
- Bridle Trails State Park
- Bellevue Community College

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ABOUT

The Senate Democratic Caucus is comprised of 31 Democratic Senators from Washington State.

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Log In

Senator Rodney Tom (WA)

Current Office: State Senate
Current District: 48
Party: Democratic

Background Information

Gender: Male
Family: Wife: Deborah
2 Children, Nicole, Dylan.
Birth Date:
Birthplace: Eastgate, WA
Home City: Medina, WA
Religion:

Education:

MBA, University of Southern California, 1988
BA, University of Washington, 1985.

Professional Experience:

Realtor, Windermere Real Estate.

Political Experience:

Senator, Washington State Senate, 2007-present
Representative, Washington State House of Representatives, 2003-2005
Switched party affiliation from Republican to Democratic, March 2006.

Organizations:

Member, Bellevue Chamber of Commerce
Member, Bellevue Rotary
Board Member, March of Dimes Seattle
Former Board of Directors, Mainstream Republicans.

Caucuses/Non-Legislative Committees:

Vice Chair, Operating Budget, Senate Ways and Means Committee
Board Member, Washington State Arts Commission.

Committees:

Early Learning and K-12 Education, Member
Judiciary, Member
Ways and Means, Vice Chair

Print Share



Biographical

Voting Record

Issue Positions (Political Courage Test)

Interest Group Ratings

Campaign Finances

Contact Information

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Capitol Webmail:

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http://senatedemocrats.wa.gov/...

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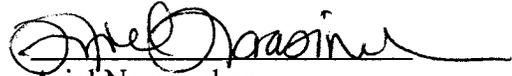
DECLARATION OF SERVICE

I certify that I served a copy of the foregoing Appellant's Opening Brief on the date set forth below via United States Mail, postage prepaid, on the Respondent's counsel of record, as follows:

Donald F. Cofer
Senior Counsel
Attorney General/Revenue Division
P.O. Box 40123
Olympia, WA 98504-0123

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

DATED this 14th day of December, 2009 at Seattle, Washington.


Ariel Narasimhan

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COURT OF APPEALS
DIVISION II
09 DEC 16 PM 12:57
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