

COURT OF APPEALS  
DIVISION II

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

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WELLS FARGO BANK, N.A.,

Appellant,

v.

DEPARTMENT OF REVENUE, STATE OF WASHINGTON,,

Respondent.

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**BRIEF OF RESPONDENT**

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**ORIGINAL**

## TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	ASSIGNMENT OF ERROR ON CROSS-APPEAL.....	2
III.	STATEMENT OF THE ISSUES.....	2
IV.	STATEMENT OF THE CASE.....	2
V.	SUMMARY OF ARGUMENT.....	8
VI.	ARGUMENT.....	9
	A. Standard Of Review.....	9
	B. The Trial Court Erred By Denying The Department’s CR 12(B)(1) Motion To Dismiss.....	10
	1. Wells Fargo failed to properly invoke the Court’s jurisdiction under the APA.....	11
	2. The APA is the exclusive means of judicial review in this case. ....	13
	C. RCW 82.32.060(4) Does Not Require The Department To Pay Interest When It Resolves A Tax Controversy By Entering Into A Closing Agreement. ....	18
	1. A taxpayer is entitled to statutory interest on amounts paid “in excess of that properly due.”.....	19
	2. An agreement to pay a specific amount to settle a tax controversy is not equivalent to a finding or admission of a tax overpayment. ....	23
	3. The constitutional ban on giving public money to private parties has no application to a negotiated settlement of contested taxes. ....	24

4.	A closing agreement cannot reasonably be mistaken for anything other than a settlement agreement. ....	26
5.	A closing agreement is a flexible vehicle for resolving tax controversies in lieu of a factual determination. ....	28
6.	There is no basis for inferring the Department has acted or will act in bad faith in settling tax disputes. ....	29
7.	Washington decisions addressing similar interest controversies hold that the parties' agreement determines the settling party's right to interest. ....	30
8.	Federal case law addressing similar interest controversies holds that the parties' agreement determines the settling party's right to interest. ....	32
D.	The Closing Agreement Includes No Promise Of Statutory Interest.....	34
1.	Wells Fargo relies on inapposite federal authorities. ....	34
2.	The closing agreement unambiguously extinguishes Wells Fargo's right to claim statutory interest. ....	40
3.	The closing agreement resolves the contested credit assessments issued by the Audit Division. ....	42
4.	There are no "gaps" in the closing agreement. ....	43
5.	The parties' course of dealing supports the Department .....	44
6.	Wells Fargo's extrinsic evidence is inadmissible.....	45
7.	The doctrine of supplying an essential omitted term does not apply to a statutory closing agreement.....	47
8.	Wells Fargo is not entitled to any additional amount under the closing agreement. ....	48

VII. CONCLUSION .....50

## TABLE OF AUTHORITIES

### Cases

<i>American Steel &amp; Wire Co. of N.J. v. State</i> , 49 Wn.2d 419, 302 P.2d 207 (1956).....	16
<i>Anderson v. Port of Seattle</i> , 49 Wn.2d 528, 304 P.2d 705 (1956).....	31, 39
<i>Anthony v. United States</i> , 987 F.2d 670 (10 <sup>th</sup> Cir. 1993).....	37
<i>AOL, LLC v. Dep't of Revenue</i> , 149 Wn. App. 533, 205 P.3d 159 (2009).....	17, 18
<i>Banner Realty, Inc. v. Dep't of Revenue</i> , 48 Wn. App. 274, 738 P.2d 279 (1987).....	11
<i>Bock v. Bd. of Pilotage Comm'rs</i> , 91 Wn.2d 94, 586 P.2d 1173 (1978).....	12, 13
<i>Columbia Steel &amp; Shafting Co. v. United States</i> , 44 F.2d 998 (Ct. Cl. 1930).....	37
<i>Columbia Steel Co. v. State</i> , 34 Wn.2d 700, 209 P.2d 482 (1949).....	16
<i>Core-Vent Corp. v. Implant Innovations, Inc.</i> , 53 F.3d 1252 (Fed. Cir. 1995).....	48
<i>D.D.I., Inc. v. United States</i> , 467 F.2d 497 (Ct. Cl. 1972).....	27
<i>Daube v. United States</i> , 289 U.S. 367, 53 S. Ct. 597, 77 L. Ed. 1261 (1933).....	34
<i>Dep't of Corrections v. Fluor Daniel, Inc.</i> , 160 Wn.2d 786, 161 P.3d 372 (2007).....	29

<i>Dombrosky v. Farmers Ins. Co.</i> , 84 Wn. App. 245, 928 P.2d 1127 (1996).....	40, 41
<i>E. W. Scripps Co. v. United States</i> , 2002 WL 31477137 (S.D. Ohio), <i>affirmed on other grounds</i> , 420 F.3d 589 (6 <sup>th</sup> Cir. 2005) .....	38
<i>Ellinger v. United States</i> , 470 F.3d 1325 (11 <sup>th</sup> Cir. 2006) .....	46
<i>Estate of Magarian v. Comm’r</i> , 97 T.C. 1 (U.S. Tax Ct., 1991).....	36
<i>Ewing v. United States</i> , 914 F.2d 499 (4 <sup>th</sup> Cir. 1990) .....	36
<i>Forbes v. American Bldg. Maintenance Co. West</i> , __ Wn.2d __, 240 P.3d 790 (2010).....	25
<i>Girard Trust Co. v. United States</i> , 270 U.S. 163, 46 S. Ct. 229, 70 L. Ed. 524 (1926).....	33, 34
<i>Hearst Communications, Inc. v. Seattle Times Co.</i> , 154 Wn.2d 493, 115 P.3d 262 (2005) .....	44, 46
<i>Hillis v. State, Dep’t of Ecology</i> , 131 Wn.2d 373, 932 P.2d 139 (1997).....	17
<i>HomeStreet, Inc. v. Dep’t of Revenue</i> , 139 Wn. App. 835, 162 P.3d 458 (2007), <i>reversed</i> , 166 Wn.2d 444 (2009) .....	20
<i>Hurt v. United States</i> , 1995 WL 703540 (4 <sup>th</sup> Cir. 1995) .....	37
<i>In re Estate of Phillips</i> , 46 Wn.2d 1, 278 P.2d 627 (1955).....	22, 39
<i>In re Spendthrift Farms, Inc. v. United States</i> , 931 F.2d 405 (6 <sup>th</sup> Cir. 1991) .....	35, 36, 38

<i>International Business Machines Corp. v. Levin</i> , 125 Ohio St.3d 347, 928 N.E.2d 440 (2010) .....	25
<i>James v. Kitsap County</i> , 154 Wn.2d 574, 115 P.3d 286 (2005).....	18
<i>Kmart Corp. v. United States</i> , 31 Fed. Cl. 667 (1994) .....	44
<i>Larosa’s Int’l Fuel Co., Inc. v. United States</i> , 73 Fed. Cl. 625 (2006) .....	37
<i>Lewis County v. Pub. Employment Relations Comm’n</i> , 31 Wn. App. 853, 644 P.2d 1231 (1982).....	17
<i>Lloyd-Smith v. United States</i> , 44 F.2d 990 (Ct. Cl. 1930).....	37
<i>Manko v. Comm’r</i> , 126 T.C. 195 (U.S. Tax Ct., 2006).....	35
<i>Medical Consultants N.W., Inc. v. State</i> , 89 Wn. App. 39, 947 P.2d 784 (1997) .....	20
<i>Miller Tabak Hirsch &amp; Co. v. Comm’r</i> , 101 F.3d 7 (2 <sup>nd</sup> Cir. 1996).....	27
<i>Muckleshoot Indian Tribe v. Dep’t of Ecology</i> , 112 Wn. App. 712, 50 P.3d 668 (2002).....	14
<i>Musselman v. Dep’t of Social &amp; Health Servs.</i> , 132 Wn. App. 841, 134 P.3d 248 (2006).....	29
<i>National Can Corp. v. Dep’t of Revenue</i> , 105 Wn.2d 327, 732 P.2d 134 (1986).....	16
<i>Nelson-Wiggen Piano Co. v. United States</i> , 84 F.2d 47 (7 <sup>th</sup> Cir. 1936).....	39
<i>Newson v. Miller</i> , 42 Wn.2d 727, 258 P.2d 812 (1953).....	27

<i>Nishikawa v. U.S. Eagle High, LLC</i> , 138 Wn. App. 841, 158 P.3d 1265 (2007).....	10, 47
<i>Northwest Ecosystem Alliance v. Forest Practices Bd.</i> , 149 Wn.2d 67, 66 P.3d 614 (2003).....	17
<i>Parish &amp; Bingham Corp.</i> , 44 F.2d 993 (Ct. Cl. 1930).....	37
<i>Rasmussen v. Allstate Ins. Co.</i> , 45 Wn. App. 635, 726 P.2d 1251 (1986).....	22
<i>Riley Pleas, Inc. v. State</i> , 88 Wn.2d 933, 568 P.2d 780 (1977).....	20, 21, 22
<i>Safeway, Inc. v. Dep't of Revenue</i> , 96 Wn. App. 156, 978 P.2d 559 (1999).....	20
<i>Schneider v. United States</i> , 119 F.2d 215 (6 <sup>th</sup> 1941).....	39
<i>Schortmann v. United States</i> , 82 Fed. Cl. 1 (2008).....	38, 48
<i>Schortmann v. United States</i> , 92 Fed. Cl. 54 (2010).....	43, 48
<i>Smith v. United States</i> , 850 F.2d 242 (5 <sup>th</sup> Cir. 1988).....	35, 36, 38
<i>Sprint Spectrum v. Dep't of Revenue</i> , 156 Wn. App. 949, 235 P.3d 849 (2010).....	10
<i>State v. Trask</i> , 91 Wn. App. 253, 957 P.2d 781 (1998).....	29, 48
<i>Steiner v. Nelson</i> , 309 F.2d 19 (7 <sup>th</sup> Cir. 1962).....	34
<i>Todric Corp. v. Dep't of Revenue</i> , 109 Wn. App. 785, 37 P.3d 1238 (2002).....	17

<i>TracFone Wireless, Inc. v. Dep't of Revenue,</i> ___ Wn.2d ___, 242 P.3d 810 (2010).....	10
<i>Twin Bridge Marine Park, LLC v. Dep't of Ecology,</i> 162 Wn.2d 825, 175 P.3d 1050 (2008).....	17
<i>United States Steel Corp. v. State,</i> 65 Wn.2d 385, 397 P.2d 440 (1964).....	16
<i>United States v. Nat'l Steel Corp.,</i> 75 F.3d 1146 (7 <sup>th</sup> Cir. 1996) .....	46
<i>United States v. Steinberg,</i> 100 F.2d 124 (2 <sup>nd</sup> Cir. 1938).....	32, 33
<i>United States v. Steinberg,</i> 100 F.2d 405 (2 <sup>nd</sup> Cir. 1938).....	33
<i>United States v. William Cramp &amp; Sons Ship &amp; Engine Bldg. Co.,</i> 206 U.S. 118, 27 S. Ct. 676, 51 L. Ed. 983 (1907).....	22
<i>Western Maryland Ry. Co. v. United States,</i> 23 F. Supp. 554 (D.C. Md. 1938) .....	39
<i>Western Telepage, Inc. v. City of Tacoma,</i> 140 Wn.2d 599, 998 P.2d 884 (2000).....	10
<i>Yakima v. Huza,</i> 67 Wn.2d 351, 407 P.2d 815 (1965).....	24

**Statutes**

26 U.S.C. § 6611 .....	34
26 U.S.C. § 7121 .....	34
Laws of 1935, ch. 180, § 188.....	23
Laws of 1935, ch. 180, § 199.....	23
Laws of 1949, ch. 228, § 21.....	23

Laws of 1967, Ex. Sess., ch. 26, § 1 .....	23
RCW 4.92.010 .....	13
RCW 7.16.360 .....	17
RCW 7.24.146 .....	17
RCW 34.05 .....	8
RCW 34.05.010(3).....	14
RCW 34.05.510 .....	21
RCW 34.05.510(3).....	13, 15
RCW 34.05.530 .....	11
RCW 34.05.542(3).....	11
RCW 34.05.570(3).....	16
RCW 34.05.570(4).....	10, 16, 18
RCW 82.03.180 .....	16
RCW 82.32.060 .....	passim
RCW 82.32.060(1).....	15, 19, 25
RCW 82.32.060(2).....	15
RCW 82.32.060(3).....	16
RCW 82.32.060(4).....	passim
RCW 82.32.060(4)(a) .....	19, 43
RCW 82.32.060(4)(b) .....	20
RCW 82.32.060(5) .....	19, 34

RCW 82.32.060(5)(c) .....	12
RCW 82.32.170 .....	23
RCW 82.32.180 .....	9, 16, 18
RCW 82.32.350.....	passim
RCW 82.32.360 .....	passim

**Rules**

CR 12(B)(1) .....	10
Fourth Cir. R. 32.1 .....	37
GR 14.1(b) .....	39
Sixth Cir. R. 28(f) .....	39

**Regulations**

Rev. Proc. 68-16, 1968-1 C.B. 770 .....	35
WAC 458-20-100(10).....	26
WAC 458-20-100(5).....	3
WAC 458-20-100(5)(b) .....	3
WAC 458-20-100(5)(c) .....	28
WAC 458-20-100(5)(d) .....	26
WAC 458-20-228.....	26
WAC 458-20-229(3).....	26
WAC 458-20-229(3)(a) .....	26
WAC 458-20-229(3)(b)(v).....	26

WAC 458-20-229(8)..... 12

**Treatises**

14 J. Mertens, *Law of Federal Income Taxation*, § 52.09..... 35

15 C.J.S. 745, *Compromise and Settlement*, § 27 (2008) ..... 22

15A Am. Jur.2d *Compromise and Settlement* § 23 (1976) ..... 22

15A Am.Jur.2d *Compromise and Settlement* § 24 (1976) ..... 22

15A C.J.S. *Compromise & Settlement* § 32 (2008) ..... 27

Restatement (Second) of Contracts § 204 (1981) ..... 47

## I. INTRODUCTION

This dispute arises from a settlement agreement entered into by the Washington Department of Revenue (Department) and Wells Fargo Bank, N.A. (Wells Fargo) to resolve a series of tax refund requests. Although the parties' agreement neither provides for interest nor reserves the issue, Wells Fargo claims it is entitled to approximately \$1.2 million of statutory interest in addition to the \$1,997,685 the Department actually agreed to pay.

Wells Fargo first raised the issue of interest after it had executed the settlement agreement and deposited the \$1,997,685 check it received from the Department. Wells Fargo filed a petition for judicial review more than five months after the Department rejected its demand for statutory interest.

This Court need not reach the merits of Wells Fargo's appeal because Wells Fargo's failure to file a timely petition for judicial review precluded it from obtaining judicial review of the Department's refusal to pay statutory interest.

Wells Fargo's appeal fails on the merits because the statutory interest provision applicable to tax overpayments does not apply to a negotiated settlement of a tax controversy. The closing agreement makes no finding or admission of a tax overpayment and includes no promise of interest. Thus, Wells Fargo is not entitled to any additional amount.

## **II. ASSIGNMENT OF ERROR ON CROSS-APPEAL**

The trial court erred in denying the Department's motion to dismiss Wells Fargo's complaint and petition for judicial review for lack of subject matter jurisdiction.

## **III. STATEMENT OF THE ISSUES**

- A. May a taxpayer that could have obtained judicial review under the APA of the Department of Revenue's refusal to pay statutory interest on a tax settlement, but that failed to file a timely petition for judicial review nevertheless challenge the Department's decision through a common law breach of contract claim?
- B. Did the trial court correctly conclude that RCW 82.32.060(4) does not require the Department to pay refund interest when it resolves a tax refund claim by entering into a negotiated settlement that includes no provision for interest?
- C. Did the trial court correctly conclude that the closing agreement to resolve Wells Fargo's disputed tax refund claim does not include a promise to pay an additional amount of statutory interest?

## **IV. STATEMENT OF THE CASE**

Wells Fargo filed a series of tax refund requests with the Department of Revenue to recover state excise taxes paid by a bank it acquired by merger. CP 469, 484-86. After auditing Wells Fargo's financial records, the Department's Audit Division granted the refund requests in part and denied them in part. *Id.*; CP 319. Wells Fargo filed administrative appeal petitions with the Department's Appeals Division to contest the partial denials. CP 469, 484-86. The Department consolidated the petitions. CP 469.

The administrative appeals spanned six tax periods (1996-2002) and involved a number of issues relating to collateralized mortgage deductions, bad debt deductions, and tax apportionment. CP 484-86. The administrative law judge (ALJ) assigned to the appeal, Beth Anne Kreger, held a hearing in Seattle to consider the consolidated appeal petitions.<sup>1</sup> CP 469. Wells Fargo was represented by its Tax Counsel, Andrew Gardner. *Id.* At the hearing, Mr. Gardner informed Ms. Kreger that Wells Fargo wished to resolve the matter by settlement. *Id.* at ¶ 3.

Wells Fargo and the Department subsequently exchanged a series of offers and counteroffers, culminating in the execution of a closing agreement.<sup>2</sup> CP 420-32. A closing agreement is the means authorized by statute by which the Department settles tax controversies. RCW 82.32.350. The Department uses a closing agreement to effect a “full and final settlement” of the tax controversy at issue. CP 300.

The recitals to the closing agreement set forth the refund requests at

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<sup>1</sup> The Department’s administrative appeal proceedings are conducted “informally and in a nonadversarial, uncontested manner.” WAC 458-20-100(5)(b). Notwithstanding their nominal designation, the Department’s ALJs are not judges, adjudicative officers, or third-party neutrals. Rather, they are employees of the Department “trained in the interpretation of the Revenue Act and precedents established by prior rulings and court decisions.” WAC 458-20-100(5). They act on behalf of the Department, not as neutral decision makers.

<sup>2</sup> On March 26, 2007, Wells Fargo submitted a written settlement offer with an attachment that identified a “Total Settlement Amount” of \$2,470,941. CP 230. On February 15, 2008, the ALJ extended “a counteroffer proposing a total refund of \$1,840,757 to settle the currently pending appeals contesting the partial denial refund requests filed for 1996-1999 and 2001-2002.” CP 234. On February 20, 2008, Wells Fargo responded with a counteroffer, stating “we propose refunds for 1996-97 in the amounts of \$446,835 and \$807,934, respectively, and a total refund for all years in the amount of \$1,997,685.” CP 236.

issue and state:

The Department and Taxpayer acknowledge the complexity of the factual and/or legal issues underlying the assessments, as well as the expense and uncertainty of administrative and/or judicial proceedings, and agree it is in their mutual interest to compromise and settle all issues relating to these assessments.

CP 475. The recitals are followed by the “AGREEMENT,” consisting of 10 paragraphs, including the following:

1. The Department will refund \$1,997,685 to Taxpayer.
2. Execution of this agreement by the Department and Taxpayer operates as a dismissal, with prejudice, of Taxpayer’s petitions for refund now pending before the Department’s Appeals Division and as an unconditional waiver by Taxpayer of any right to further challenge the assessments or the Department to pursue collection of the assessment in any administrative or judicial proceeding.  
...
4. Each term and provision of this agreement is deemed to have been explicitly negotiated at arms’ length by the Department and Taxpayer, and in the case of any dispute will be construed and interpreted according to its fair meaning and not strictly for or against either party including, specifically, the Department, as drafting party.
5. Taxpayer represents and warrants to the Department that the decision to enter into this agreement is not based upon any representation by the Department, or by any attorney, employee, or other representative of the Department, and that Taxpayer has either obtained independent legal advice prior to executing this agreement or has chosen not to obtain such advice.  
...
8. This agreement, and the documents executed in accordance with the provisions hereof, embrace and include the entire transaction between the parties and may not be changed except upon the written assent of all parties hereto. [...].

CP 476.

Wells Fargo did not request any changes to the agreement or seek clarification of any provisions before signing and returning it . CP 367-68, 471.

On April 1, 2008, the Department issued Wells Fargo a refund check for \$1,997,685, which Wells Fargo deposited. CP 479. On April 7, 2008, Mr. Gardner emailed Ms. Kreger, asking, “is there some reason interest was not included?” CP 428.

Ms. Kreger was taken aback by Mr. Gardner’s question because it was the first time he had made any reference to interest in any of the oral or written communications they had exchanged during the course of the settlement negotiations. CP 363, 365, 471. Mr. Gardner later affirmed in deposition that Ms. Kreger made no statement that had led him to believe Wells Fargo would receive refund interest in addition to the agreed settlement amount. CP 370.

Wells Fargo files tax returns with all 50 states, the federal government, and several foreign countries and territories. CP 347. Wells Fargo’s corporate tax department includes a “tax controversy group” composed of tax litigators who specialize in either federal or state taxation. CP 339-40. Mr. Gardner is one of four attorneys in the federal tax controversy group and he primarily handles federal tax disputes before the IRS Appeals Division. CP 340, 345-46.

Mr. Gardner testified in deposition: “I’ve never been involved in a

discussion with [IRS Appeals] over whether the settlement agreement will include interest or not.” CP 352. In Mr. Gardner’s experience as a federal tax litigator, “interest is completely automatic and totally nonnegotiable, either deficiency interest or refund interest.” *Id.* When asked whether he had ever estimated the interest associated with the amount Wells Fargo offered the Department to settle its tax refund requests, Mr. Gardner stated: “Never – I guess I would say interest never crossed my mind. I assumed interest would be automatic like it is for federal tax controversies.” CP 363-64.

Interest is a component of a tax refund that may be, and often is, negotiated by the Department. CP 379, 381, 470. During the twelve-month period preceding the date the Department entered into a settlement agreement with Wells Fargo, the Department entered into numerous settlement agreements with other taxpayers in which it agreed to refund a specific amount “plus applicable statutory interest.” CP 319-21, 323-30. Other settlement agreements, like the one in this case, include the bare promise, “The Department will refund to Taxpayer the sum of [x],” without promising to pay an additional amount of interest. CP 323-30. Each of the settlement agreements contains an integration clause providing that the agreement “embraces and includes the entire agreement between the parties.” CP 315 at ¶13. A settlement agreement that includes a bare promise to refund a specific amount is paid without an additional allowance for statutory interest. CP 318.

When either the Audit Division or the Appeals Division determines that a taxpayer is entitled to a tax refund, the Department allows interest on the amount of the allowed tax refund. *Id.* But when a tax refund claim is resolved by settlement, the Department looks to the closing agreement to determine whether, and to what extent, the taxpayer's account should be adjusted to account for statutory interest. *Id.*

These procedures were followed in this case. CP 319. When the Auditor who evaluated Wells Fargo's refund requests determined that Wells Fargo made tax overpayments, the Department credited Wells Fargo's account accordingly, with an additional allowance for statutory interest. *Id.* But when Wells Fargo's administrative appeals of the partial denials of its refund requests were resolved by settlement, the Department credited Wells Fargo's account in accordance with the closing agreement. *Id.*

On April 11, 2008, Wells Fargo sent the Department a letter protesting its refusal to pay statutory interest. CP 430-31. On April 15, 2008, the Department sent Wells Fargo a letter explaining its reasons for concluding that Wells Fargo was not entitled to any additional payment. CP 494-95. Wells Fargo's next contact with the Department occurred more than five months later, when Wells Fargo renewed its interest demand in a letter through outside counsel threatening litigation. CP 497, 989.

On January 22, 2009, Wells Fargo attempted to invoke jurisdiction

under the Administrative Procedures Act (APA), chapter 34.05 RCW. CP 3. The Department moved to dismiss Wells Fargo's complaint for lack of subject matter jurisdiction on the grounds that Wells Fargo forfeited the right to obtain judicial review under the APA by failing to file a timely petition for judicial review. CP 974. The trial court denied the Department's motion. CP 1046.

In her oral ruling, Judge Hirsch stated the APA was not the exclusive means of judicial review because this case involves "a contract dispute" and "the interpretation of this final settlement agreement is a contract issue." CP 467. Wells Fargo filed an amended complaint, alleging breach of contract. CP 11. The Department counterclaimed to recover the amount it paid Wells Fargo under the closing agreement. CP 1048-54.

The parties subsequently filed cross-motions for summary judgment. CP 12, 499. Judge McPhee granted the Department's motion for summary judgment and denied Wells Fargo's motion for summary judgment. CP 939. Wells Fargo appeals the summary judgment order. The Department cross-appeals the trial court's denial of its motion to dismiss the complaint for lack of subject matter jurisdiction.

## **V. SUMMARY OF ARGUMENT**

The trial court erred by allowing Wells Fargo to recast its interest claim as a common law breach of contract action in circumvention of the strict jurisdictional limits imposed by the Legislature. The Department's

denial of a taxpayer's request for statutory interest on a tax overpayment is subject to judicial review under RCW 82.32.180 (de novo review in superior court to recover "any tax paid, or any part thereof") and RCW 34.05.570(4) ("other agency action"). Wells Fargo waived its right to bring an action under RCW 82.32.180 when it entered into the closing agreement. Wells Fargo forfeited its right to obtain judicial review under the APA by failing to file a timely petition for judicial review. The trial court should have dismissed Wells Fargo's complaint without reaching the merits.

On the merits, the trial court correctly concluded that Wells Fargo is not entitled to statutory interest on the amount the Department agreed to pay in settlement of its administrative appeal petitions. RCW 82.32.060 entitles a taxpayer to interest on amounts paid "in excess of that properly due." It does not entitle a taxpayer to interest on amounts paid in settlement of a tax controversy, except to the extent provided in the parties' agreement. Wells Fargo is not entitled to an additional payment of statutory interest because the closing agreement in this case neither provides for interest nor reserves the issue for subsequent determination.

## **VI. ARGUMENT**

### **A. Standard Of Review**

Summary judgment orders are reviewed de novo. *Western*

*Telepage, Inc. v. City of Tacoma*, 140 Wn.2d 599, 607, 998 P.2d 884 (2000). Construction of a statute is a question of law that is reviewed de novo. *TracFone Wireless, Inc. v. Dep't of Revenue*, \_\_\_ Wn.2d \_\_\_, ¶11, 242 P.3d 810 (2010). When the material facts are undisputed, the legal effect of a contract is a question of law that this Court reviews de novo. *Nishikawa v. U.S. Eagle High, LLC*, 138 Wn. App. 841, 848-49, 158 P.3d 1265 (2007).

**B. The Trial Court Erred By Denying The Department's CR 12(B)(1) Motion To Dismiss**

It is undisputed that the Department's refusal to pay statutory interest on the settlement amount was an "agency action" subject to judicial review under the APA. In its petition for judicial review, Wells Fargo alleged that the Department "failed to fulfill its statutory duty to pay interest." CP 5. The APA authorizes judicial review of "other agency action" including "an agency's failure to perform a duty that is required by law to be performed." RCW 34.05.570(4). However, the timely filing of a petition for judicial review is a statutory precondition for the trial court's exercise of jurisdiction over a challenged agency action. *See Sprint Spectrum v. Dep't of Revenue*, 156 Wn. App. 949, 235 P.3d 849 (2010) (taxpayer's failure to timely serve BTA with a petition for judicial review precluded court from exercising subject matter jurisdiction over taxpayer's

administrative appeal); *Banner Realty, Inc. v. Dep't of Revenue*, 48 Wn. App. 274, 738 P.2d 279 (1987) (same with respect to pre-1988 APA). Wells Fargo forfeited the right to obtain judicial review by failing to file a timely petition for judicial review.

**1. Wells Fargo failed to properly invoke the Court's jurisdiction under the APA.**

A petition for judicial review of "other agency action" must be filed and served "within thirty days after the agency action," although the time is extended to account for situations where the petitioner did not know the agency action occurred or that the agency action conferred standing upon the petitioner to obtain judicial review. RCW 34.05.542(3).

Any person "aggrieved or adversely affected" by an agency action has standing to seek judicial review. RCW 34.05.530. Thus, RCW 34.05.542(3) allows additional time to seek judicial review only to the extent a person could not reasonably have discovered that it was aggrieved by the challenged agency action (or inaction).

Wells Fargo challenged the Department's failure to include statutory interest in the amount it paid under the closing agreement. CP 5. Any interest legally owed to a taxpayer is due at the time the Department issues a refund.<sup>3</sup> Thus, Wells Fargo had standing to seek judicial review

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<sup>3</sup> The applicable statutes and rules require that interest and taxes be refunded simultaneously. RCW 82.32.060(4)(a) ("interest shall be allowed...on the amount of any

of the alleged statutory violation on April 1, 2008, when the Department made the settlement payment to Wells Fargo. CP 479.

Wells Fargo's legal counsel acknowledged receipt of the refund check on April 7, 2008, and asked: "Is there some reason interest was not included?" CP 428. If Wells Fargo might have reasonably believed the Department either inadvertently failed to pay interest or would refund interest separately, the Department's April 15, 2008, letter clarified the issue. The April 15, 2008 letter unequivocally notified Wells Fargo the Department would not pay interest on the settlement amount. CP 494-95.

An agency letter provides adequate notice of finality when a reasonable person would interpret it as a denial of a right or the fixing of a legal relationship. *Bock v. Bd. of Pilotage Comm'rs*, 91 Wn.2d 94, 99, 586 P.2d 1173 (1978). In deposition testimony, Wells Fargo's tax counsel frankly acknowledged that when he received the April 15, 2008 letter, he understood the Department had rejected Wells Fargo's demand for interest and that nothing in the letter indicated the Department intended to take any further action in the matter. CP 999. Moreover, the demand letter that Wells Fargo's outside counsel sent to the Attorney General's Office more than five months after it received the April 15, 2008 letter shows that Wells

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refund, credit, or other recovery allowed" on overpaid taxes); RCW 82.32.060(5)(c) (refund interest is computed to "the date the refund is issued"); WAC 458-20-229(8) (credit notices include applicable interest to date of refund).

Fargo actually interpreted the letter as a rejection of its interest claim. CP 999 (referring to “a letter from Assistant Director Mary Barrett to Mr. Gardner of April 15, 2008, rejecting the interest claim”). *See Bock*, 91 Wn.2d at 99-100 (inferring applicant understood letter was a rejection of his application from his own briefing in a later, untimely, court action).

The 30-day period for seeking judicial review began no later than April 15, 2008. Wells Fargo’s failure to file a timely petition for judicial review precluded it from invoking this Court’s subject matter jurisdiction.

**2. The APA is the exclusive means of judicial review in this case.**

The APA is the exclusive means of judicial review of “agency action,” except where “de novo review or jury trial review of agency action is expressly authorized by provision of law.” RCW 34.05.510(3). In response to the Department’s motion to dismiss the petition for judicial review as untimely, Wells Fargo argued that the Department’s refusal to pay statutory interest was independently reviewable as a common law breach of contract claim under RCW 4.92.010 (general waiver of sovereign immunity) or as a statutory cause of action under RCW 82.32.060(4) (authorizing interest on tax overpayments). CP 1006-07. Neither RCW 4.92.010 nor RCW 82.32.060(4) provides the jurisdictional basis for an independent original cause of action in this case.

The Legislature expressly excluded from the APA a subset of

agency actions relating to contracts. The definition of “agency action” excludes state agency decisions relating to state agency contracts for goods, services, public works, real estate, and contracts embodying “proprietary” decisions relating to the management of public lands. RCW 34.05.010(3); *Muckleshoot Indian Tribe v. Dep’t of Ecology*, 112 Wn. App. 712, 718-19, 50 P.3d 668 (2002). In entering into such contracts, the State of Washington stands in the same position as a private party with respect to the rights and liabilities flowing from the contractual relationship. The Legislature’s express exclusion of a specific subset of such contracts shows legislative intent that disputes arising from other written agreements with state agencies are subject to the APA’s judicial review procedures absent some express statutory provision to the contrary.

A statutory closing agreement does not fall within the subset of contracts that are excluded from the APA’s judicial review procedures. A closing agreement is unlike contracts for construction services, personal services, or real estate transactions. Both the nature of the written agreement and its substance are uniquely governmental. Private parties do not impose taxes on each other. The taxing power is a sovereign power. *See Muckleshoot*, 112 Wn. App. at 723 (when entering into contracts concerning minimum water flow levels, Ecology is acting in a regulatory and governmental, as opposed to a proprietary, capacity). That a written

agreement is construed according to the ordinary principles of contract interpretation does not mean that a dispute arising from the agreement is legally cognizable as a “contract claim.”

Far from “expressly” authorizing de novo judicial review of disputes arising from closing agreements, RCW 34.05.510(3), the Legislature has strictly and expressly limited the allowable defenses and the scope of relief available in such disputes. *See* RCW 82.32.360 (“In any suit, action or proceeding, such agreement, or any determination, assessment, collection, payment, abatement, refund, or credit made in accordance therewith, shall not be annulled, modified, set aside, or disregarded.”). The State’s alleged “breach” of its alleged “promise” to pay interest in its closing agreement with Wells Fargo was reviewable as “other agency action” under the APA, and therefore may not be collaterally attacked under the guise of a common law contract action.

Wells Fargo also argued that RCW 82.32.060(4) creates an implied “contract right” to statutory interest. RCW 82.32.060 is the statute that creates a taxpayer’s substantive right to a tax refund. The state’s “promise” to pay interest on tax overpayments is no more a contractual right than any of the other rights created by RCW 82.32.060, including the “promise” to refund overpayments, RCW 82.32.060(1), to extend the refund period to match the assessment period, RCW 82.32.060(2), or to

pay refunds by electronic funds transfer, RCW 82.32.060(3).

Each of the substantive legal rights created by RCW 82.32.060 must be vindicated through the procedural mechanisms the Legislature has provided: RCW 82.32.180 (de novo review for an original action in superior court “to recover any tax paid, or any part thereof”),<sup>4</sup> RCW 82.03.180 (de novo review of an informal proceeding before the Board of Tax Appeals), RCW 34.05.570(3) (APA record review of a final order in a formal proceeding before the Board of Tax Appeals), or RCW 34.05.570(4) (APA review of “other agency action”).

If Wells Fargo’s administrative appeals had resulted in a determination on the merits, rather than in a closing agreement, Wells Fargo would have had 30 days to seek de novo review in superior court of the Department’s determination. *See* RCW 82.32.180. But Wells Fargo waived its right to bring an action under RCW 82.32.180 when it entered into the closing agreement.<sup>5</sup> Thus, the APA is the exclusive avenue for

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<sup>4</sup> Washington courts have addressed controversies involving disputed refund interest only in the context of actions brought under RCW 82.32.180. *See, e.g., National Can Corp. v. Dep’t of Revenue*, 105 Wn.2d 327, 732 P.2d 134 (1986); *United States Steel Corp. v. State*, 65 Wn.2d 385, 397 P.2d 440 (1964); *Columbia Steel Co. v. State*, 34 Wn.2d 700, 209 P.2d 482 (1949); *Safeway, Inc. v. Dep’t of Revenue*, 96 Wn. App. 156, 978 P.2d 559 (1999); *Medical Consultants N.W., Inc. v. State*, 89 Wn. App. 39, 48-50, 947 P.2d 784 (1997).

<sup>5</sup> Even if the closing agreement had not foreclosed a refund action under RCW 82.32.180, a refund action would have been time-barred, just as the APA claim is, by Wells Fargo’s failure to timely seek judicial review of the Department’s refusal to pay interest on the settlement amount. *See American Steel & Wire Co. of N.J. v. State*, 49 Wn.2d 419, 302 P.2d 207 (1956) (affirming State’s right to strictly limit time and manner of judicial review of tax disputes); *Todric Corp. v. Dep’t of Revenue*, 109 Wn. App. 785,

challenging the Department's refusal to pay statutory interest on settlement amount stated in the closing agreement.

A person cannot collaterally attack an agency decision that has become final by procedural default.<sup>6</sup> Wells Fargo's failure to timely seek judicial review of the Department's refusal to pay interest on the settlement amount precludes it from collaterally attacking that decision by way of any other cause of action or theory of relief.<sup>7</sup>

As this Court recently observed, the Washington State Constitution specifically reserves the right of the Legislature to regulate lawsuits against state agencies. *AOL, LLC v. Dep't of Revenue*, 149 Wn. App. 533, 555, 205 P.3d 159 (2009) (rejecting taxpayer's attempt to evade statutory requirement to pay contested taxes before bringing a tax refund suit). “[W]here statutes prescribe procedures for the resolution of a particular type of dispute, state courts have required substantial compliance or

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37 P.3d 1238 (2002) (tax refund claim time-barred for failure to seek judicial review within 30 days after Department rejected the claim).

<sup>6</sup> See *Twin Bridge Marine Park, LLC v. Dep't of Ecology*, 162 Wn.2d 825, 845, 175 P.3d 1050 (2008) (Ecology precluded from pursuing enforcement action under the SMA by its failure to timely appeal the underlying building permit); *Lewis County v. Pub. Employment Relations Comm'n*, 31 Wn. App. 853, 863, 644 P.2d 1231 (1982) (employer's failure to file a timely petition for review of a certification order precluded from challenging certification of a collective bargaining unit in a later proceeding).

<sup>7</sup> Wells Fargo alleged that the Uniform Declaratory Judgment Act (UDJA) and the court's "inherent powers" provided an alternative basis for the court's jurisdiction over this dispute. CP 3. "Agency action" reviewable under the APA is expressly excluded from the Uniform Declaratory Judgment Act and the extraordinary writ statute. RCW 7.24.146 ("This chapter does not apply to agency action reviewable under chapter 34.05 RCW"); RCW 7.16.360 (same). See *Northwest Ecosystem Alliance v. Forest Practices Bd.*, 149 Wn.2d 67, 82, 66 P.3d 614 (2003) (UDJA); *Hillis v. State, Dep't of Ecology*, 131 Wn.2d 373, 380 n.3, 932 P.2d 139 (1997) (extraordinary writ).

satisfaction of the spirit of the procedural requirements before they will exercise jurisdiction over the matter.” *Id.*, quoting *James v. Kitsap County*, 154 Wn.2d 574, 588, 115 P.3d 286 (2005).

RCW 82.32.180 and the APA are the only legislatively authorized means by which a person may vindicate the substantive right to refund interest provided by RCW 82.32.060(4). Wells Fargo forfeited its right to appeal the Department’s decision not to pay interest on the settlement amount by failing to timely seek judicial review under RCW 34.05.570(4). The superior court therefore lacked subject matter jurisdiction to consider Wells Fargo’s complaint and should have dismissed it with prejudice without reaching the merits of Wells Fargo’s arguments.

**C. RCW 82.32.060(4) Does Not Require The Department To Pay Interest When It Resolves A Tax Controversy By Entering Into A Closing Agreement.**

Wells Fargo argues that “the allowance of interest is mandatory regardless whether the refund is awarded by a court against an unwilling Department, by the Department on its own motion, or by the Department upon an agreement with the taxpayer.” App.’s Opening Br. at 6. RCW 82.32.060(4) requires the Department to pay interest on the amount it “determine[s]” was paid “in excess of that properly due.” It does not require the Department to pay interest on the amount of a negotiated settlement that was entered into for the purpose of settling a tax dispute.

**1. A taxpayer is entitled to statutory interest on amounts paid “in excess of that properly due.”**

RCW 82.32.060 is the statute that governs tax refunds. The statute has five provisions, including the following:

If, upon receipt of an application by a taxpayer for a refund or for an audit of the taxpayer's records, or upon an examination of the returns or records of any taxpayer, it is determined by the department that within the statutory period for assessment of taxes, penalties, or interest prescribed by RCW 82.32.050 any amount of tax, penalty, or interest has been paid in excess of that properly due, the excess amount paid within, or attributable to, such period must be credited to the taxpayer's account or must be refunded to the taxpayer, at the taxpayer's option.

RCW 82.32.060(1) (emphasis added).

RCW 82.32.060(4) requires the Department to issue a refund when presented with “[a]ny judgment for which a recovery is granted by any court of competent jurisdiction, not appealed from, for tax, penalties, and interest which were paid by the taxpayer.”

When either the Department or a court has determined that a taxpayer made an overpayment, the taxpayer is entitled to interest in addition to the principal amount of its monetary recovery at the rates specified in RCW 82.32.060(4), (5). RCW 82.32.060(4)(a) provides:

Interest at the rate of three percent per annum must be allowed by the department and by any court on the amount

of any refund, credit, or other recovery allowed to a taxpayer for taxes, penalties, or interest paid by the taxpayer before January 1, 1992....

The interest rate for tax overpayments has been equal to that for tax underpayments since January 1, 1999. RCW 82.32.060(4)(b).

The statutory provision for interest on tax overpayments is a specific version of the prejudgment and postjudgment interest provisions ordinarily applicable to civil controversies. *See Safeway, Inc. v. Dep't of Revenue*, 96 Wn. App. 156, 165, 978 P.2d 559 (1999) (applying RCW 82.32.060(4) in lieu of general postjudgment interest statute); *Medical Consultants N.W., Inc. v. State*, 89 Wn. App. 39, 48-50, 947 P.2d 784 (1997) (prejudgment interest).

If the Department had determined that Wells Fargo was entitled to a greater recovery than had been allowed by the Auditor who initially evaluated Wells Fargo's tax refund requests, Wells Fargo would have been entitled to statutory interest on any additional refund allowed by the Department. Instead, Wells Fargo's administrative appeals were resolved by closing agreement. A closing agreement is not equivalent to a determination on the merits of the taxpayer's claims. A closing agreement is a settlement. *See Riley Pleas, Inc. v. State*, 88 Wn.2d 933, 568 P.2d 780 (1977); *HomeStreet, Inc. v. Dep't of Revenue*, 139 Wn. App. 835, n.17, 162 P.3d 458 (2007) ("DOR and Homestreet entered into a 'closing agreement' settling the assessment") (emphasis added), *reversed*, 166 Wn.2d 444 (2009).

The Department has broad authority to resolve a tax refund claim by settlement. RCW 82.32.350 provides:

The department may enter into an agreement in writing with any person relating to the liability of such person in respect of any tax imposed by any of the preceding chapters of this title for any taxable period or periods.

A closing agreement is “final and conclusive” as to the tax controversy at issue and “shall not be annulled, modified, set aside, or disregarded” in “any suit, action or proceeding.” RCW 82.32.360.

An agreement to pay a specific amount to settle a tax controversy is not equivalent to a factual finding that a person paid an amount “in excess of that properly due.” The Department is aware of only one Washington published appellate court decision concerning a statutory closing agreement. In *Riley Pleas*, the taxpayer filed a tax refund action, contesting the applicability of sales tax to certain turnkey construction projects. 88 Wn.2d 933. The taxpayer alternatively argued that the Department breached a promise contained in a settlement agreement related to the controversy. *Id.* at 936.<sup>8</sup>

In evaluating the merits of the taxpayer’s tax refund claim, the court addressed the applicable statutes and case law, but the court looked to ordinary

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<sup>8</sup> The Washington Supreme Court did not refer to the settlement agreement as a “closing agreement.” But the Department’s appellate brief identified the parties’ agreement as a closing agreement entered pursuant to RCW 82.32.350. Respondent’s Brief, at 8, 16 (“Revenue and Riley Pleas entered into a closing agreement as authorized by RCW 82.32.350”; identifying the dispute as “a species of breach of contract”). *Riley Pleas* was decided more than a decade before the Legislature overhauled the Administrative Procedure Act to make it “the exclusive means” for obtaining judicial review of a contested “agency action.” RCW 34.05.510.

principles of contract law, compromise and settlement, and the language of the parties' agreement to determine whether the taxpayer could recover under the agreement. *Id.* at 937-38, *citing* 15A Am. Jur.2d *Compromise and Settlement* 23 (1976)). The Court concluded that Riley Pleas was not entitled to recover under the settlement agreement because it “simply did not bring itself within the terms of the agreement.” *Id.* at 938.

Judge McPhee correctly concluded that RCW 82.32.060(4) does not apply when the Department resolves a tax controversy by entering into a closing agreement, except as provided therein. Once a settlement agreement is entered into, any subsequent remedy of the parties must be based on the agreement, which operates as a merger and a bar of all prior claims, unless they are reserved. *Rasmussen v. Allstate Ins. Co.*, 45 Wn. App. 635, 637, 726 P.2d 1251 (1986), *citing* 15A Am.Jur.2d *Compromise and Settlement* § 24 (1976); *In re Estate of Phillips*, 46 Wn.2d 1, 13-14, 278 P.2d 627 (1955) (*citing* 15 C.J.S. 745, *Compromise and Settlement*, § 27 (2008)). An undisclosed intention to pursue a related claim is ineffective. *See United States v. William Cramp & Sons Ship & Engine Bldg. Co.*, 206 U.S. 118, 128, 27 S. Ct. 676, 51 L. Ed. 983 (1907) (“If parties intend to leave some things open and unsettled, their intent to do so should be made manifest.”).

**2. An agreement to pay a specific amount to settle a tax controversy is not equivalent to a finding or admission of a tax overpayment.**

Wells Fargo discusses historical variations in the statutes governing tax refunds and administrative appeals in an attempt to show the statutory requirement to issue a “determination” in response to a refund claim is “unrelated” to the statutory requirement to refund amounts the Department “determine[s]” were paid in excess of that properly due.<sup>9</sup> App.’s Op. Br. at 8.

When a taxpayer petitions the Department for a refund under RCW 82.32.170, the taxpayer is entitled to receive a written decision, from which the taxpayer may appeal. The decision issued by the Department as required by RCW 82.32.170 is the Department’s unilateral decision on the merits of the taxpayer’s claim.

In contrast, a closing agreement is an agreement to settle the tax controversy. Neither the Department nor the taxpayer can force the resolution of a tax controversy by closing agreement, which is effective only when both parties to the agreement accept its terms and conditions. RCW 82.32.350, .360. As Judge McPhee stated in his oral ruling, “the

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<sup>9</sup> From 1935 to 1949, RCW 82.32.060 required the Department to issue a refund “if it...appears that a tax has been paid in excess of that properly due.” Laws of 1935, ch. 180, § 188. Since 1949, the operative language has been “if it is determined by the department.” Laws of 1949, ch. 228, § 21. Before 1967, RCW 82.32.170 required the Department to issue an “order” in response to a refund request. Laws of 1935, ch. 180, § 199. In 1967, the Legislature replaced “order” with “determination.” Laws of 1967, Ex. Sess., ch. 26, § 1.

legal relationship created by the settlement is a contract relationship.” VRP at 58. Thus, the rights and liabilities of the parties to the settlement are to be resolved by contract law principles, not by resort to extrinsic statutory provisions.

RCW 82.32.060(4) requires the payment of statutory interest when the Department or a court has found that the taxpayer paid an amount of taxes “in excess of that properly due.” RCW 82.32.060. Whether such a factual finding is in the form of an “order” or a “determination” makes no difference. An agreement to pay a specific amount in order to settle a tax controversy is not equivalent to such a factual finding.

**3. The constitutional ban on giving public money to private parties has no application to a negotiated settlement of contested taxes.**

Wells Fargo argues that the Department necessarily “determined” that the amount it agrees to pay in settlement was paid by the taxpayer “in excess of that properly due” because the Department lacks constitutional authority to refund “tax money collected validly.” App. Op. Br. at 12-13, *citing Yakima v. Huza*, 67 Wn.2d 351, 359, 407 P.2d 815 (1965).

The state constitutional ban on refunding “validly collected” taxes does not prevent the Department from refunding an amount where the validity of the tax is in doubt. *Huza*, 67 Wn.2d at 359. The public policy interest in settlement grounds the Department’s constitutional authority to

settle tax controversies. The Department settles tax controversies in lieu of making any determination of a tax overpayment. RCW 82.32.350. *See* CP 475 (reciting parties' mutual interest in settling all issues in view of "the complexity of the factual and/or legal issues" and the "expense and uncertainty" of further proceedings).

The different policies underlying RCW 82.32.060(4) (statutory interest) and RCW 82.32.350 (closing agreements) supports the distinction drawn by the Department between a finding of a tax overpayment and an agreement to pay a specific amount to settle a tax dispute. The policies underlying the payment of interest are to compensate a person for the lost use value of money that was wrongfully withheld and to prevent unjust enrichment by the person who improperly withheld it. *Forbes v. American Bldg. Maintenance Co. West*, \_\_\_ Wn.2d \_\_\_, 240 P.3d 790, ¶5 (2010). These policies are furthered by the payment of interest on amounts found to have been paid "in excess of that properly due." RCW 82.32.060(1). But the policies underlying the payment of statutory interest on tax overpayments do not apply when the Department agrees to pay a specific amount for the purpose of settling a tax controversy. *Cf. International Business Machines Corp. v. Levin*, 125 Ohio St.3d 347, 928 N.E.2d 440 (2010) (holding that statutory interest applicable to overpayments does not apply to amounts refunded under a

refund statute benefiting certain taxpayers because the statutes serve different policies).

**4. A closing agreement cannot reasonably be mistaken for anything other than a settlement agreement.**

Wells Fargo argues the word “determined” in RCW 82.32.060(4) cannot apply only to a “determination” issued by the Department’s Appeals Division because there are multiple avenues by which the Department issues tax refunds and pays interest. App’s Op. Br. at 14.

Wells Fargo is correct that the Department issues tax refunds in a variety of contexts.<sup>10</sup> See WAC 458-20-229(3) (“How do I get a refund or credit?”).<sup>11</sup> The common feature of the “multiple and informal avenues for refund” is that the Department will refund a specific amount, with applicable interest, when it has found the taxpayer made a tax overpayment. Whether memorialized in an appeal “determination,” an auditor’s “detail of differences,” a “credit assessment,” an automated electronic communication, or some other form, the Department’s unilateral decision to grant a tax refund is qualitatively different from an

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<sup>10</sup> The Department has never suggested that RCW 82.32.060(4) applies only when the Appeals Division issues a document entitled “determination.” In briefing to the superior court, the Department discussed its rule on administrative appeals only because that is the context in which Wells Fargo’s refund requests were resolved. WAC 458-20-100(5)(d) (“Determinations”); WAC 458-20-100(10) (“Settlements”). CP 507-08.

<sup>11</sup> The Department will issue a refund automatically if it finds that a taxpayer paid excess taxes when examining a taxpayer’s records. WAC 458-20-229(3)(a), (b)(v). This may occur in the context of an audit or when processing filed tax returns. WAC 458-20-228; WAC 458-20-229(3)(a).

agreement to resolve a tax controversy by settlement. *See Miller Tabak Hirsch & Co. v. Comm'r*, 101 F.3d 7, 9 (2<sup>nd</sup> Cir. 1996) (recognizing “a fundamental difference between a settlement and a judgment reached by the court on the basis of findings on disputed issues” in rejecting taxpayer’s argument that its entitlement to a deduction was an “implicit corollary” to a settlement provision); *D.D.I., Inc. v. United States*, 467 F.2d 497, 500 (Ct. Cl. 1972) (cases that otherwise would have supported a refund claim were “clearly distinguishable...because they do not entail compromise settlements”).

In contrast to situations in which the Department has found as a factual matter that the taxpayer paid an amount “in excess of that properly due,” a closing agreement makes no admission of liability or non-liability (except to the extent provided therein), but merely admits there is a tax controversy and the parties are willing to settle the dispute for an agreed amount. *See* 15A C.J.S. *Compromise & Settlement* § 32 (2008); *Newson v. Miller*, 42 Wn.2d 727, 731, 258 P.2d 812 (1953).

Wells Fargo suggests that a taxpayer may not understand the difference between a decision on the merits and a settlement agreement. While the Department may memorialize its factual determination of a tax overpayment in many forms, a closing agreement is the only form by which the Department settles a tax controversy. Everything from its title

to the signature clause makes it unmistakably clear that a closing agreement is a settlement agreement. CP 475-477.

Wells Fargo must hypothesize a taxpayer's potential confusion because the facts of this case do not support any colorable argument that Wells Fargo's tax counsel mistook the closing agreement as anything other than a settlement agreement.

**5. A closing agreement is a flexible vehicle for resolving tax controversies in lieu of a factual determination.**

Wells Fargo points to deposition testimony in which the Department's Assistant Director, Mary Barrett, explained that the Appeals Division may use a closing agreement as "a quicker means to resolve the issue" when the merits of a taxpayer's claim are clear. CP 274-75. In such cases, the closing agreement will specify an amount to be refunded and include the phrase, "plus applicable statutory interest."<sup>12</sup> *Id.* That some closing agreements may provide for statutory interest does not mean that all closing agreements must provide for statutory interest. As with any other settlement agreement, the parties to a closing agreement are free

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<sup>12</sup> The Department's authority to enter into a closing agreement is not limited to cases where the tax liability is doubtful. *See United States v. Nat'l Steel Corp.*, 75 F.3d 1146, 1151 (7<sup>th</sup> Cir. 1996) (closing agreements may be used for procedural economy or to prevent a dispute from arising). It makes sense that the Appeals Division would use a closing agreement to efficiently resolve a tax refund claim of undisputed merit. A formal determination issued by the Appeals Division is akin to a judicial opinion in that it sets forth the facts and procedural history and analyzes how the law applies to the facts. *See* WAC 458-20-100(5)(c) ("Determinations"). Because a closing agreement need not address the merits, it is a convenient vehicle for resolving an administrative appeal.

to resolve a dispute on whatever terms they see fit. *Dep't of Corrections v. Fluor Daniel, Inc.*, 160 Wn.2d 786, 795, 161 P.3d 372 (2007) (parties to arbitration may agree interest will run on arbitration award); *State v. Trask*, 91 Wn. App. 253, 266, 268-9, 957 P.2d 781 (1998) (parties to eminent domain proceeding not bound to interest provision, but are free to negotiate interest).

**6. There is no basis for inferring the Department has acted or will act in bad faith in settling tax disputes.**

According to Wells Fargo, affirming the trial court's order "will inevitably encourage the Department to reach fewer explicit judgments on the merits of refund requests." App's Op. Br. at 28. Wells Fargo's unstated assumption is that the Department will use closing agreements to resolve tax refund claims of undisputed merit in order to deprive taxpayers of statutory interest.

This Court presumes that "public officials will act within the limits of their authority and in good faith." *Musselman v. Dep't of Social & Health Servs.*, 132 Wn. App. 841, 852, 134 P.3d 248 (2006) (declining to "speculate about whether DSHS will attempt to obtain [Appellant's] home in circumvention of its administrative rule, as she suggests it might"). There is no basis for inferring the Department would act in bad faith to deprive taxpayers of their statutory right to recover interest on overpaid taxes. This Court should reject Wells Fargo's innuendo to the contrary. In

this case, a closing agreement was used to resolve an unusually complex series of consolidated refund claims involving several refund periods and multiple legal issues. CP 484-86, 492.

Moreover, the Department cannot require a taxpayer to enter into a closing agreement. Presumably, a taxpayer that reasonably expects to receive interest in addition to the specific amount stated in a closing agreement will not enter into a closing agreement that makes no provision for interest yet expressly purports to “settle all issues,” constitutes “the entire transaction between the parties,” and “operates as a dismissal, with prejudice” of the taxpayer’s administrative appeals. CP 475-76.

The Department has never suggested that Wells Fargo failed to bargain in good faith. Discovery revealed that this controversy arose because Wells Fargo’s attorney mistakenly “assumed interest would be paid automatically, as in federal tax controversies” and failed to carefully review the language of the closing agreement. CP 363. This is a classic case of a contracting party who, having failed to read the terms and conditions of its own contract, attempts to remedy its error by relying on inapposite canons of construction and inadmissible extrinsic evidence.

**7. Washington decisions addressing similar interest controversies hold that the parties’ agreement determines the settling party’s right to interest.**

No Washington court has addressed a similar interest controversy in the

context of a closing agreement. But in analogous contexts, Washington courts have held that extrinsic statutory interest provisions are inapplicable except to the extent provided by the parties' settlement agreement.

In *Anderson v. Port of Seattle*, 49 Wn.2d 528, 304 P.2d 705 (1956), the Washington Supreme Court addressed an interest dispute arising from an inverse condemnation action brought by several property owners who lived near Sea-Tac Airport. Mid-trial, the claimants sold their properties to the Port of Seattle for an agreed fair market value. The claimants subsequently sought an award of interest on the settlement amount. The Washington Supreme Court rejected the interest demand, stating:

Had the appellants pursued their suit to judgment and received an award, this argument might be appropriate. However, they elected to settle the amount of their damages by contract, and are concluded thereby. The contract contained no provision for the payment of interest, and the purchase price has been paid. The rule is well settled, that where interest is recoverable only as damages, once the principal debt has been paid, interest can not be recovered in a separate action.

*Anderson*, 49 Wn.2d at 532.

Just as a person cannot settle a takings claim and then pursue a claim for the statutory interest that would apply if the claim were resolved on the merits, a taxpayer cannot settle a tax refund claim and then pursue a claim for statutory interest absent an express reservation of the issue in the parties' agreement.

**8. Federal case law addressing similar interest controversies holds that the parties' agreement determines the settling party's right to interest.**

This principle has long been recognized by the federal courts. In *United States v. Steinberg*, 100 F.2d 124 (2<sup>nd</sup> Cir. 1938), the IRS agreed to settle a tax deficiency by accepting a bond that required the taxpayer to make monthly payments. After the taxpayer defaulted, the IRS attempted to assess interest on the unpaid balance. Although the settlement agreement made no provision for interest, the IRS claimed that the government was entitled to collect statutory interest because the agreement related only to taxes, and a separate statutory provision required the payment of interest on any tax deficiency. In rejecting the IRS's claim, the court stated:

It is true that the bond was given to compromise taxes, and that when as here the statute itself awards interest, the obligee may accept the principal and then sue for interest. *Girard Trust Co. v. United States*, 270 U.S. 163, 46 S.Ct. 229, 70 L.Ed. 524. But we do not think that the original nature of the duty compromised pervaded the bond, or colored the resulting rights and duties. The very purpose of the settlement was to release the taxes and to substitute the bond in their place. Whatever were the usual incidents of the substitute, the obligee accepted them unless it stipulated otherwise.<sup>13</sup>

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<sup>13</sup> On remand, a dispute arose over whether the IRS had knowingly "waived" its right to collect interest. The court subsequently clarified that the IRS forfeited the right to statutory interest by its failure to expressly reserve its right to interest:

We did not hold that the Commissioner 'waived' interests, if by 'waiver' is meant any conscious surrender; but we did hold that the acceptance of the principal, certainly when made without reservation, forfeited any right to interest. Thus, the only factual support necessary to the suppositious [sic] waiver was that the parties understood that the

*Id.* at 126. The court held that the ability of the IRS to claim interest was limited by the terms of the bond itself; the IRS could not rely on the statutory interest provision.

The case distinguished by the *Steinberg* court in the passage quoted above, *Girard Trust Co. v. United States*, 270 U.S. 163, 46 S. Ct. 229, 70 L. Ed. 524 (1926), held that the doctrine of accord and satisfaction does not preclude a taxpayer from bringing a separate claim for statutory interest after receiving a refund of the principal amount of a tax overpayment. The *Girard* court analogized the statutory interest provision to a contractual promise to pay interest and reasoned that just as the acceptance of the principal amount does not preclude a contracting party from suing for unpaid interest, a taxpayer's acceptance of a refunded tax overpayment does not preclude it from subsequently claiming statutory interest. *Id.*

Following the analogy in *Girard*, just as a person cannot settle a contract claim and then pursue a separate claim for the interest promised in the contract, a taxpayer cannot settle a tax refund claim and then pursue a separate claim for statutory interest.<sup>14</sup>

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payments were applicable to the installments and that the right to interest was not reserved at the time of their acceptance.

*United States v. Steinberg*, 100 F.2d 405 (2<sup>nd</sup> Cir. 1938).

<sup>14</sup> Federal courts repeatedly have distinguished *Girard* in resolving interest controversies, reasoning that its holding is limited to situations where there has been "a determination of the tax liability or of no tax liability." *Steiner v. Nelson*, 309 F.2d 19

**D. The Closing Agreement Includes No Promise Of Statutory Interest**

**1. Wells Fargo relies on inapposite federal authorities.**

Wells Fargo presents this Court with an incomplete picture of the federal authorities. App.'s Op. Br. at 17-19. Wells Fargo points to similarities in the governing statutes and ignores the different implementing regulations and policies under state and federal law. When the relevant differences are taken into account, federal case law resoundingly supports the Department's position.

Wells Fargo correctly states that Washington's statutes on refund interest and closing agreements correspond to analogous federal statutes. *Compare* RCW 82.32.060(4), (5) (interest) *with* 26 U.S.C. § 6611 (interest). Both federal and state taxing authorities are authorized to "enter into an agreement in writing with any person relating to the liability of such person in respect of any tax." RCW 82.32.350, .360; 26 U.S.C. § 7121. The phrase "relating to the liability of" clearly is broad enough to encompass taxes,

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(7<sup>th</sup> Cir. 1962) (taxpayer not entitled to statutory interest where court ordered a refund of amounts illegally seized, not amounts it had determined were "overpaid"); *Daube v. United States*, 289 U.S. 367, 371, 53 S. Ct. 597, 77 L. Ed. 1261 (1933) (distinguishing *Girard* where there was "[n]o definitive adjudication in favor of this taxpayer" but only a provisional allowance); *Lloyd-Smith v. United States*, 44 F.2d 990 (Ct. Cl. 1930) (finding *Girard* inapplicable where tax controversy was resolved by closing agreement).

penalties, and interest. But the IRS has made a policy decision not to address interest in closing agreements.<sup>15</sup>

When entering into a closing agreement, the IRS reserves the issue of interest for subsequent determination unless interest is a specifically contested issue. *In re Spendthrift Farms, Inc. v. United States*, 931 F.2d 405, 407 (6<sup>th</sup> Cir. 1991) (citing 14 J. Mertens, *Law of Federal Income Taxation*, § 52.09); *Smith v. United States*, 850 F.2d 242, 245 n.6 (5<sup>th</sup> Cir. 1988) (citing Rev. Proc. 68-16, 1968-1 C.B. 770). This policy is codified by administrative rule, form closing agreements (which are the exclusive means by which tax controversies may be definitively settled), and the IRS internal manual. CP 436, 441, 453-61. *See Manko v. Comm'r*, 126 T.C. 195 (U.S. Tax Ct., 2006) (describing IRS form closing agreements).<sup>16</sup>

The Department has not adopted similar rules or forms that limit the use of closing agreements to the resolution of specific matters or that reserve the issue of interest for subsequent determination. Rather, a closing agreement

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<sup>15</sup> Interest calculations are particularly complicated under federal law because of varying rates that apply to different entities (e.g. corporate v. individual) and taxes (e.g. refunds of employment taxes are paid without interest). *See* Internal Revenue Manual, ch. 20, available at: <http://www.irs.gov/irm/part20/index.html>.

<sup>16</sup> The principal forms used by the IRS to resolve a tax controversy by closing agreement are Form 906 and Form 866. Form 906 resolves specific disputed issues that affect the ultimate determination of the tax liability, such as the taxpayer's entitlement to a particular deduction. *Manko*, 126 T.C. at 202. Form 866 effects a global resolution of the taxpayer's tax liability for the period at issue and it provides that the amount stated in the closing agreement is "exclusive of interest and penalties as provided by law." CP 461.

entered into by the Department generally constitutes “a full and final settlement” of a tax controversy. CP 300, 410.

Federal courts have concluded that closing agreements and similar tax settlements that address only specific issues do not cut off the right to statutory interest (or preclude the operation of other tax code provisions) absent a specific waiver in the agreement. Federal courts reason that the waiver of the right to statutory interest (or any other applicable provision of law) is not among the “matters agreed upon” for purposes of the statutory finality mandate (“the case shall not be reopened as to the matters agreed upon”) when the parties’ agreement is limited to the resolution of specific issues.<sup>17</sup>

When addressing closing agreements and similar tax settlements like the one at issue here, that purport to resolve the entire tax controversy rather than only specific issues affecting the determination of taxes, federal courts have concluded that such agreements preclude both the IRS and the taxpayer from subsequently claiming statutory interest absent an express reservation of

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<sup>17</sup> See *Ellinger v. United States*, 470 F.3d 1325, 1336-37 (11<sup>th</sup> Cir. 2006) (limited scope of closing agreement suggests parties’ intent “to agree to a narrow set of premises, without resolving each and every aspect of their dispute”); *Ewing v. United States*, 914 F.2d 499, 505 (4<sup>th</sup> Cir. 1990) (“The closing agreements executed by taxpayers simply agreed to the amount of income, gains, losses, deductions and credits attributable to various businesses. . . They did not agree that they would abstain from claiming any refund that might be available to them under [the tax code]”); *In re Spendthrift Farms v. United States*, 931 F.2d 405, 406 (6<sup>th</sup> Cir. 1991) (closing agreement entered “solely for purposes of determining the net operating loss carryovers” did not cut off IRS’s right to assess statutory interest); *Estate of Magarian v. Comm’r*, 97 T.C. 1, 6 (U.S. Tax Ct., 1991) (closing agreement that addressed only specific losses and credits of partnership did not preclude IRS from assessing statutory interest); *Smith v. United States*, 850 F.2d 242, 245 (5<sup>th</sup> Cir. 1988) (closing agreement “limited on its face to a determination of” specific business losses did not preclude IRS from subsequently assessing penalties and interest).

the issue. *See, e.g., Larosa's Int'l Fuel Co., Inc. v. United States*, 73 Fed. Cl. 625 (2006) (finding the parties' express intent to "finally" dispose of a tax controversy "plainly inconsistent with an interpretation in which the question of interest due is left open"); *Hurt v. United States*, 1995 WL 703540 (4<sup>th</sup> Cir. 1995)<sup>18</sup> (holding that the failure to expressly reserve the issue precluded the IRS from assessing interest in view of the "all encompassing language" of a settlement agreement); *Anthony v. United States*, 987 F.2d 670 (10<sup>th</sup> Cir. 1993) (same); *Parish & Bingham Corp.*, 44 F.2d 993 (Ct. Cl. 1930) (closing agreement precluded taxpayer from subsequently claiming interest on the agreed refund); *Lloyd-Smith v. United States*, 44 F.2d 990 (Ct. Cl. 1930) (taxpayer not entitled to interest on amount refunded under closing agreement because court lacks jurisdiction to "annul, modify, or set aside" the closing agreement); *Columbia Steel & Shafting Co. v. United States*, 44 F.2d 998 (Ct. Cl. 1930) (taxpayer not entitled to statutory interest in addition to amount refunded under a closing agreement because "neither the taxpayer nor the government can raise any further question or make any further claim" relating to the contested taxes).

The federal authorities that Wells Fargo has cited involve federal closing agreements that are limited on their face to the resolution of specific issues affecting the calculation of taxes. *In re Spendthrift Farm, Inc. v.*

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<sup>18</sup> The Fourth Circuit's court rules allow the citation of unpublished opinions in the absence of controlling published authority on the issue. Fourth Cir. R. 32.1.

*United States*, 931 F.2d 405, 406 (6<sup>th</sup> Cir. 1991) (agreement entered “[s]olely for purposes of determining the amounts of net operating loss carryovers to years after the year [1984]”); *Smith v. United States*, 850 F.2d 242, 245 (5<sup>th</sup> Cir. 1988) (“the closing agreement is limited on its face to a determination of the Smiths’ 1978 and 1979 losses from New Star Venture”); *Schortmann v. United States*, 82 Fed. Cl. 1, 11 (2008) (remanding for trial because the court was unable to “decipher” the “stick-like entries” in a form agreement entered into between the IRS and a taxpayer).

Unlike the agreements at issue in *Spendthrift Farms*, *Smith*, and *Schortmann*, the agreement here is broad rather than limited in scope. The closing agreement recites the parties’ intent to resolve “all issues relating to” the contested taxes, “operates as a dismissal, with prejudice,” of Wells Fargo’s refund claims, and “an unconditional waiver” of “any right to further challenge the assessments...in any administrative or judicial proceeding.” CP 476.

There can be no doubt that statutory interest is among the “issues relating to” the contested taxes. Interest is incidental to a tax recovery. A tax refund claim impliedly includes a claim for statutory interest. *See E.W. Scripps Co. v. United States*, 2002 WL 31477137 (S.D. Ohio) (statutory interest “should not be considered a sum separate from the initial overpayment”),

*affirmed on other grounds*, 420 F.3d 589 (6<sup>th</sup> Cir. 2005);<sup>19</sup> *Western Maryland Ry. Co. v. United States*, 23 F. Supp. 554, 556 (D.C. Md. 1938) (“a tax and resulting interest are to be treated as constituting a single liability and thus as one cause of action”). Thus, when a tax refund suit is resolved by settlement, the taxpayer’s interest claim merges into the closing agreement. *Id.* “A compromise or settlement is res judicata of all matters relating to the subject matter of the dispute.” *In re Estate of Phillips*, 46 Wn.2d 1, 13-14, 278 P.2d 627 (1955). *See also Schneider v. United States*, 119 F.2d 215 (6<sup>th</sup> 1941) (compromise of penalty precluded suit to recover tax because penalty and tax constitute a single liability); *Nelson-Wiggen Piano Co. v. United States*, 84 F.2d 47, 48 (7<sup>th</sup> Cir. 1936) (same).

The all-encompassing language of the Wells Fargo closing agreement at issue here obviously and naturally precludes a subsequent claim for statutory interest just as surely as similar language would preclude a claim for prejudgment interest if this were a settlement of any other civil controversy. *See, e.g., Anderson*, 49 Wn.2d at 532 (settlement of eminent domain proceeding cut off plaintiff’s right to statutory interest). Read otherwise, the

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<sup>19</sup> The Sixth Circuit permits the citation of unpublished opinions. Sixth Cir. R. 28(f). *See* GR 14.1(b).

closing agreement would not “settle all issues relating to these assessments” or “embrace and include the entire transaction between the parties.” CP 475-76.

Even against the backdrop of the IRS’s customary practice to reserve the issue of interest when settling tax controversies, federal courts would conclude that Wells Fargo forfeited any claim to statutory interest by failing to either reserve the issue for later determination or insist that the closing agreement provide for the payment of interest.

**2. The closing agreement unambiguously extinguishes Wells Fargo’s right to claim statutory interest.**

Wells Fargo’s argument that it did not waive its right to statutory interest begs the question whether Wells Fargo was entitled to any amount at all. “A waiver is the intentional and voluntary relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right.” App.’s Op. Br. at 19 (quoting *Dombrosky v. Farmers Ins. Co.*, 84 Wn. App. 245, 255-56, 928 P.2d 1127 (1996)). As Judge McPhee correctly recognized, the waiver doctrine simply does not apply because Wells Fargo’s refund claims were resolved by a negotiated settlement, not a decision on the merits of its claims. VRP at 65. Wells Fargo had no “right” to relinquish because its rights with respect to the contested taxes were resolved by the closing agreement itself, which makes no finding or admission of a tax overpayment and includes no promise of interest.

Even if the waiver doctrine were applicable, the facts of this case unequivocally support the conclusion that Wells Fargo waived any right to subsequently claim statutory interest. The case that Wells Fargo relies upon in support of its waiver argument supports the Department's position. In *Dombrosky*, a homeowner claimed that an insurer waived its right to enforce a policy limitation on recovery for damaged personal property by submitting disputed valuation issues to arbitration. This Court rejected the homeowner's waiver argument because the insurer "specifically reserved all rights and defenses" when it submitted to arbitration and the arbitration award itself "specifically reserved" certain issues for subsequent determination. *Dombrosky*, 84 Wn.App. at 255-56.

Here, Wells Fargo did not even mention interest, let alone "specifically reserve" the issue for subsequent determination. Rather, it entered into an agreement that, by its express terms, operates as "a dismissal, with prejudice" of Wells Fargo's refund claims and "an unconditional waiver" of the right to further challenge the contested taxes "in any administrative or judicial proceeding." CP 475-76.

Wells Fargo characterizes the Department's reliance on the closing agreement's waiver clause as an "after-the-fact attempt to find a waiver in the settlement itself." App.'s Op. Br. at 21. On the contrary, the waiver clause is an integral component of the parties' agreement and represents the

consideration Wells Fargo agreed to provide in exchange for the Department's promise to pay \$1,997,685.

**3. The closing agreement resolves the contested credit assessments issued by the Audit Division.**

Wells Fargo claims "the waiver language could not reasonably be understood to refer to interest" because it refers to "assessments" rather than "refund requests." App's Op. Br. at 21. This argument lacks merit.

The use of the term "assessment" in relation to Wells Fargo's refund claims did not occur for the first or only time in paragraph two of the closing agreement. "Assessment" is a term that applies in the context of both tax deficiencies and tax overpayments. When the Department credits a taxpayer's account for taxes, penalties, or interest, it issues a "credit assessment." CP 289, 290, 292, 294. The record includes copies of some of the credit assessments the Department issued to Wells Fargo when it granted Wells Fargo's partial refunds. *Id.*

Wells Fargo's administrative appeal arose from the Audit Division's partial denial of Wells Fargo's refund requests. CP 484. Wells Fargo claimed the credit assessments issued by Audit understated the amount it was entitled to recover. Consistently with the language used when granting the partial refunds, the recitals to the closing agreement twice characterize the disputed refund requests as "assessments." CP 475.

The prior use of the term “assessments” in reference to Wells Fargo’s refund claims, both in the parties’ previous course of dealing and in the recitals to the closing agreement itself, refutes Wells Fargo’s contention that it could not have reasonably understood that the “unconditional waiver...of any right to further challenge the assessments...in any administrative or judicial proceeding” encompassed any subsequent claim for statutory interest. CP 476 at ¶ 2.

**4. There are no “gaps” in the closing agreement.**

Wells Fargo argues that RCW 82.32.060 should be applied as a “gap filler” because “the contract makes no provision for the payment or waiver of interest,” and the statutory interest provision “was part of the statutory platform” for the parties’ negotiations. App.’s Op. Br. at 22.

As Judge McPhee correctly observed, Wells Fargo’s argument begs the question whether the statutory interest provision applies to a negotiated settlement. VRP 68. *See also Schortmann v. United States*, 92 Fed. Cl. 54 (2010) (“Both parties, to be sure, agreed that plaintiffs were entitled to whatever interest was required ‘by law.’ But, they retained very different views as to what those requirements were”; finding that an IRS settlement agreement did not include an implied promise to pay statutory interest). RCW 82.32.060(4)(a) does not apply because the amount the Department agreed to “refund” pursuant to a negotiated settlement is not

equivalent to an amount the Department “determined” was paid “in excess of that properly due” within the meaning of RCW 82.32.060(4).

It is well-established under Washington law that contracts are interpreted according to the objective manifestation of the parties. *Hearst Communications, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005). Accordingly, “the subjective intent of the parties is generally irrelevant if the intent can be determined from the actual words used.” *Id.* at 503-04. In this case, the Department agreed to refund \$1,997,685. It did not agree to refund \$1,997,685 “plus statutory interest.” *See, e.g., Kmart Corp. v. United States*, 31 Fed. Cl. 667, 681 (1994) (“what someone has not said” in a settlement agreement, “someone has not meant to say”).

**5. The parties’ course of dealing supports the Department**

Wells Fargo argues that “the parties’ course of dealing requires the payment of interest.” App.’s Op. Br. at 23-24. In support, it relies on the Department’s payment of statutory interest on the partial refunds granted by the Audit Division, from which Wells Fargo had appealed. Further, Wells Fargo points to schedules that accompanied the refund check, which state “excluding penalties and interest,” as evidence of the parties’ intent.

Wells Fargo’s course of conduct argument is not well taken. The schedules and other documents that accompanied the refund check are simply not relevant because they were issued after the closing agreement

was executed. CP 254. Thus, Wells Fargo cannot possibly have relied on the documents when it entered into the closing agreement, and cannot rely on them now as evidence that it reasonably expected to receive statutory interest. The schedules are merely papers the Department uses to document adjustments to a taxpayer's account after the fact. The only relevant document is the closing agreement itself, which by its brevity and simplicity stands in stark contrast to the narrative reports and work schedules that document the partial refunds the Department issued when it found that Wells Fargo made tax overpayments. *Compare* CP 475-477 (closing agreement) *with* CP 536-760 (audit reports and work schedules).

**6. Wells Fargo's extrinsic evidence is inadmissible.**

Wells Fargo attempts to interject ambiguity into the closing agreement by reference to email communications between the ALJ and the person tasked with the ministerial duty of processing the closing agreement. App's Op. Br. at 4, 28 (referring to ALJ's email to an employee with the Taxpayer Account Administration Division). Wells Fargo's tax counsel has testified that the ALJ made no statement to him indicating that interest would be paid in addition to the amount the Department agreed to refund. CP 370. Thus, any "ambiguity" in the ALJ's informal references to interest when discussing the issue internally

with the person tasked with a ministerial duty of adjusting the taxpayer's account is not relevant to the interpretation of the closing agreement.

A closing agreement must be "in writing," and is ineffective unless "executed by the department." RCW 82.32.350, .360. The Director of the Department has delegated authority to enter into closing agreements to certain persons. CP 304. Only the Director and the Deputy Director had authority to enter into the closing agreement at issue in this case. CP 304.

Reliance on extrinsic evidence of the ALJ's communications when interpreting the closing agreement would undermine the requirement that closing agreements must be in writing and authorized at the highest level. *See United States v. Nat'l Steel Corp.*, 75 F.3d 1146 (7<sup>th</sup> Cir. 1996) (reasoning that the analogous federal requirements "would be undermined if the taxpayer could present the testimony of the IRS agents who had negotiated the agreement that it means something different from what it says"). *See also Ellinger v. United States*, 470 F.3d 1325 (11<sup>th</sup> Cir. 2006) (refusing to consider Appeals Memorandum that was prepared by the IRS prior to settlement).

Extrinsic evidence is inadmissible to "alter, modify, or contradict any clear contract term or show intent independent of the agreement." *See Hearst Communications, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 499-500, 115 P.3d 262 (2005) (extrinsic evidence inconsistent with the express language of the parties' written contract held inadmissible); *Nishikawa v. U.S. Eagle High*,

*LLC*, 138 Wn. App. 841, 851, 158 P.3d 1265 (2007) (declining to consider extrinsic evidence of a contracting party's undisclosed intent to include environmental indemnity clause in a real estate contract).

Wells Fargo expressly warranted that it relied on no representation by the ALJ when it entered into the closing agreement, yet it now relies on her email communications as extrinsic evidence of its intent. Wells Fargo expressly agreed that the closing agreement embraces and includes “the entire transaction,” yet it now asserts it is entitled to recover an additional amount, the calculation of which requires resort to extrinsic evidence. Wells Fargo expressly promised that the parties’ execution of the agreement would operate as an “unconditional waiver” of “any right” to further challenge the contested taxes “in any administrative or judicial proceeding,” yet it now asserts it is entitled to additional compensation for the lost use value of the amount it alleges was wrongfully retained. Wells Fargo’s extrinsic evidence is inadmissible and should be disregarded.

**7. The doctrine of supplying an essential omitted term does not apply to a statutory closing agreement.**

Wells Fargo asks this Court to apply the common law doctrine of supplying an essential omitted term. App’s Op. Br. at 25, *citing* Restatement (Second) of Contracts § 204 (1981). In support, Wells Fargo cites a federal court decision that ultimately concluded it would be “both

straightforward and wrong” to apply the federal statutory interest provision to a tax settlement that did not provide for interest. *See Schortmann v. United States*, 92 Fed. Cl. 54 (2010) (decision issued following trial in *Schortmann v.*, 82 Fed. Cl. 1 (2008)).

Judge McPhee correctly ruled that interest is not an essential term of a closing agreement. VRP 68. Wells Fargo itself concedes the parties are free to negotiate interest. App.’s Op. Br. at 5. *Cf. Trask*, 91 Wn. App. at 266, 268-9) (parties to eminent domain proceeding are free to negotiate interest). If Wells Fargo wanted interest, it should have negotiated an additional amount of interest or expressly reserved its right to pursue an interest claim. Wells Fargo did neither. Nor did it seek clarification of the interest issue at any point during the settlement negotiations. In fact, Wells Fargo’s counsel testified that he did not even estimate the interest associated with the refund claims receiving the refund check. CP 363. *See Core-Vent Corp. v. Implant Innovations, Inc.*, 53 F.3d 1252 (Fed. Cir. 1995) (refusing to imply terms after the fact when the plaintiff accepted the settlement unequivocally).

**8. Wells Fargo is not entitled to any additional amount under the closing agreement.**

Wells Fargo asserts “[t]he Department was at least negligent in this case.” App.’s Op. Br. at 28. The Department followed its own policies and procedures in negotiating the settlement of Wells Fargo’s

administrative appeal petitions and in processing the closing agreement. CP 319, 470. In contrast, the record shows that Wells Fargo handled its own administrative appeals in a careless manner.

Wells Fargo's tax counsel, Mr. Gardner, Mr. Gardner was assigned to take over this matter when the attorney in the state tax controversy group who was originally assigned abruptly resigned. CP 342 ("I was volunteered to help out"), CP 355. He testified that he did not even consider the interest issue; he never calculated interest; he merely assumed the Department handled interest in the same way as the IRS. Mr. Gardner testified that he spent perhaps "15 minutes" reviewing the agreement before walking into his supervisor's office to get it signed. CP 366-67. As far as he recalls, the executive who signed the agreement did not read it. CP 366. Mr. Gardner is not sure whether he reviewed the draft, though he states he had a member of the state tax controversy group "look" at it. CP 367-68. Mr. Gardner returned the closing agreement on the same day or the day after receiving it. CP 366.

Wells Fargo is responsible for the consequences of its own negligence in failing to raise the interest issue at any stage during the settlement negotiations, in assuming the Department's policies mirrored those of the IRS, and in signing the closing agreement without equivocation even though it included no provision for the payment of

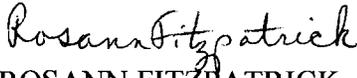
statutory interest. Having failed to exercise due care in negotiating terms that it now claims it intended to include in the closing agreement, Wells Fargo seeks to avoid the consequences of its negligence under the guise of judicial construction of a settlement agreement that is plain on its face.

## VII. CONCLUSION

This Court need not reach the merits of Wells Fargo's appeal because Wells Fargo forfeited its right to obtain judicial review of the Department's refusal to pay statutory interest on the settlement amount by failing to file a timely petition for judicial review. Wells Fargo's appeal fails on the merits because the closing agreement makes no finding or admission of a tax overpayment and includes no promise of interest. Thus, this Court should affirm the trial court's summary judgment order.

RESPECTFULLY SUBMITTED this 27<sup>th</sup> day of December, 2010.

ROBERT M. MCKENNA  
Attorney General

  
ROSANN FITZPATRICK  
Assistant Attorney General  
WSBA No. 37092

# APPENDIX

## A

200603-0044  
200604-0039  
200702-0008  
DEC

CLOSING AGREEMENT NO. 5190

Wells Fargo Bank NA  
Registration No. 601 742 563  
Document No.s 200609679,200609680,200609681,200611432,200703422,200703977  
Audit No.s 136531-02,136531-03,136531-04,136531-05,13959-02,13959-00  
Docket No.s 200603-0044,200604-0039, 200702-0008  
Tax Periods: 6/1/96-12/31/97 & 1/1/01-12/31/02  
Type of Tax Protested: B&O  
Amount Protested: \$4,383,658  
Amount to be Refunded \$1,997,685

THIS AGREEMENT is entered into this 12<sup>th</sup> day of March, 2008, by and between the State of Washington Department of Revenue (the "Department") and the above-reference Taxpayer ("Taxpayer").

RECITALS

Taxpayer is corporation engaged in banking and financial services in Washington.

The Department has denied portions of refund requests submitted by the Taxpayer for taxes paid between June 1, 1996 and December 31, 2002 seeking the refund of business and occupation tax remitted by the Taxpayer.

<u>Document No.</u>	<u>Refund Period - Type of Tax</u>	<u>Amount at Issue</u>
200609679	6/1/96-12/31/96 --B&O	\$814,116
200609680	1/1/97-12/31/97 - B&O	\$1,607,197
200609681	1/1/98-11/31/98 - B&O	\$1,407,894
200611432	1/1/99-12/31/99 - B&O	\$299,543
200703422	1/1/01-12/31/01 - B&O	\$136,435
200703977	1/1/02-12/31/02 - B&O	\$118,473

Taxpayer asserts that it is entitled to refund of the amounts at issue listed above and timely filed appeal petitions for these periods. Those appeals are currently pending before the Department's Appeals Division;

The Department and Taxpayer acknowledge the complexity of the factual and/or legal issues underlying the assessments, as well as the expense and uncertainty of administrative and/or judicial proceedings, and agree it is in their mutual interest to compromise and settle all issues relating to these assessments.

In consideration of the mutual promises set forth herein, and other good and valuable consideration, the Department and Taxpayer agree as follows:

APPEALS  
MAR 17 2008  
DEPT. OF REVENUE

APPENDIX A

AGREEMENT

1. The Department will refund \$1,997,685 to Taxpayer.
2. Execution of this agreement by the Department and Taxpayer operates as a dismissal, with prejudice, of Taxpayer's petitions for refund now pending before the Department's Appeals Division and as an unconditional waiver by Taxpayer of any right to further challenge the assessments or the Department to pursue collection of the assessment in any administrative or judicial proceeding.
3. The signatories hereto each represent and warrant that all necessary signatures and/or consents to enter into this agreement and to assume and perform the obligations hereunder have been duly and properly obtained.
4. Each term and provision of this agreement is deemed to have been explicitly negotiated at arms' length by the Department and Taxpayer, and in the case of any dispute will be construed and interpreted according to its fair meaning and not strictly for or against either party including, specifically, the Department, as drafting party.
5. Taxpayer represents and warrants to the Department that the decision to enter into this agreement is not based upon any representation by the Department, or by any attorney, employee, or other representative of the Department, and that Taxpayer has either obtained independent legal advice prior to executing this agreement or has chosen not to obtain such advice.
6. No suit, action or proceeding of any kind, type, or nature whatsoever arising out of or in any way relating to this agreement will be commenced by Taxpayer other than in the Superior Court of Thurston County, Washington.
7. This agreement is being entered into and will be construed and interpreted in accordance with the laws of the state of Washington.
8. This agreement, and the documents executed in accordance with the provisions hereof, embrace and include the entire transaction between the parties and may not be changed except upon the written assent of all parties hereto.
9. In the event any term or provision of this agreement, or its application to any party, circumstance, tax liability or tax immunity, is annulled, modified, set aside, or disregarded by a court of competent jurisdiction, the remainder of this agreement, and/or the application of any term or provision hereof to any other circumstance, tax liability, or tax immunity, will not be affected.
10. Unless specifically set forth herein, this agreement will not bind the Department to a particular future treatment of any tax liability or immunity of Taxpayer.

Closing Agreement No. 5190

3

Registration No. 601 895 797

IN WITNESS WHEREOF, the Department and Taxpayer have duly executed the foregoing agreement on the day and year first above written.

TAXPAYER:

By: James A. Horton  
Its: V.P.

Date: 3/12/2008

Name of Signatory (print) James A. Horton

DEPARTMENT OF REVENUE

By: Leslie Cushman  
Cindi Holmstrom, Director

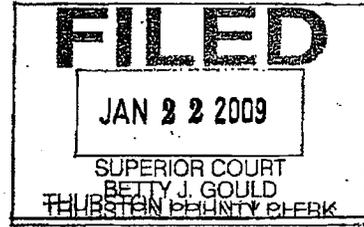
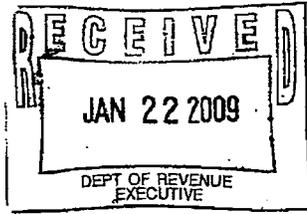
Date: 3-21-08

**OR**

Leslie Cushman, Deputy Director

# APPENDIX

## B



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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF THURSTON

WELLS FARGO BANK, N.A.,  
Plaintiff,  
v.  
DEPARTMENT OF REVENUE, STATE OF  
WASHINGTON,  
Defendant.

No. **09-2-00140-2**

PETITION FOR REVIEW AND  
COMPLAINT FOR INTEREST ON  
TAX REFUND AND DECLARATORY  
JUDGMENT

**I. PARTIES**

1. **Plaintiff.** Plaintiff Wells Fargo Bank, N.A. ("Wells Fargo"), is engaged in a banking and other financial services business in Washington.

2. **Defendant.** Defendant Department of Revenue, State of Washington (the "Department"), is the administrative department of the State charged with administration of the State's excise taxes.

**II. JURISDICTION AND VENUE**

3. **Jurisdiction.** This Court has jurisdiction over the subject matter of this complaint under RCW 2.08.010, RCW 7.24.010, RCW 34.05.570 and pursuant to its inherent powers.

PETITION AND COMPLAINT - 1

DWT 12326731v1 0003126-000031

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003



<u>Year</u>	<u>Tax Refund</u>	<u>Interest</u>
1996	\$446,835	\$304,585.27
1997	807,934	494,858.75
1998	443,374	244,587.45
1999	<u>299,543</u>	<u>144,279.88</u>
Total	\$1,997,685	\$1,188,311.35

15. Interest on the unpaid interest obligation continues to accrue at the rates provided by law.

#### IV. CLAIMS FOR RELIEF

16. The Department has violated RCW 82.32.060(4) by failing to pay the required interest on the tax refund allowed to Wells Fargo.

17. The Department's failure to perform its statutory duty to pay interest on Wells Fargo's tax refund is arbitrary and capricious and contrary to law.

18. Wells Fargo is entitled to a declaratory judgment that interest is due on the tax refund that was allowed and paid by the Department.

**WHEREFORE**, having stating its allegations, Wells Fargo now requests from the Court the following relief:

A. Issuance of a judgment ordering the Department to pay interest on Wells Fargo's tax refund in the amount of \$1,188,311.35 through April 1, 2008, or such other amounts as may be proved at trial, plus interest as provided by law;

B. Issuance of a declaratory judgment that interest is due on the tax refund allowed and paid by the Department;

C. Issuance of a judgment ordering payment of Wells Fargo's costs in this action;

and

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D. Such other relief as the Court deems just, legal, or equitable.

DATED this 22 day of January, 2009.

DAVIS WRIGHT TREMAINE LLP  
Attorneys for Plaintiff

By   
Dirk Giseburt  
WSBA #13949  
Michele Radosevich  
WSBA #24282

PETITION AND COMPLAINT - 4

DWT 12326731v1 0003126-000031

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# APPENDIX

## C

for the armed conflict. The department may not waive or cancel interest and penalties under this section for a taxpayer for more than twenty-four months.

(4) During any period of armed conflict, for any notice sent to a taxpayer that requires a payment of interest, penalties, or both, the notice must clearly indicate on or in the notice that interest and penalties may be waived under this section for qualifying taxpayers. [2008 c 184 § 1.]

**82.32.060 Excess payment of tax, penalty, or interest—Credit or refund—Payment of judgments for refund.** (1) If, upon receipt of an application by a taxpayer for a refund or for an audit of the taxpayer's records, or upon an examination of the returns or records of any taxpayer, it is determined by the department that within the statutory period for assessment of taxes, penalties, or interest prescribed by RCW 82.32.050 any amount of tax, penalty, or interest has been paid in excess of that properly due, the excess amount paid within, or attributable to, such period shall be credited to the taxpayer's account or shall be refunded to the taxpayer, at the taxpayer's option. Except as provided in subsection (2) of this section, no refund or credit shall be made for taxes, penalties, or interest paid more than four years prior to the beginning of the calendar year in which the refund application is made or examination of records is completed.

(2)(a) The execution of a written waiver under RCW 82.32.050 or 82.32.100 shall extend the time for making a refund or credit of any taxes paid during, or attributable to, the years covered by the waiver if, prior to the expiration of the waiver period, an application for refund of such taxes is made by the taxpayer or the department discovers a refund or credit is due.

(b) A refund or credit shall be allowed for an excess payment resulting from the failure to claim a bad debt deduction, credit, or refund under RCW 82.04.4284, 82.08.037, 82.12.037, 82.14B.150, or 82.16.050(5) for debts that became bad debts under 26 U.S.C. Sec. 166, as amended or renumbered as of January 1, 2003, less than four years prior to the beginning of the calendar year in which the refund application is made or examination of records is completed.

(3) Any such refunds shall be made by means of vouchers approved by the department and by the issuance of state warrants drawn upon and payable from such funds as the legislature may provide. However, taxpayers who are required to pay taxes by electronic funds transfer under RCW 82.32.080 shall have any refunds paid by electronic funds transfer.

(4) Any judgment for which a recovery is granted by any court of competent jurisdiction, not appealed from, for tax, penalties, and interest which were paid by the taxpayer, and costs, in a suit by any taxpayer shall be paid in the same manner, as provided in subsection (3) of this section, upon the filing with the department of a certified copy of the order or judgment of the court.

(a) Interest at the rate of three percent per annum shall be allowed by the department and by any court on the amount of any refund, credit, or other recovery allowed to a taxpayer for taxes, penalties, or interest paid by the taxpayer before January 1, 1992. This rate of interest shall apply for all interest allowed through December 31, 1998. Interest allowed after December 31, 1998, shall be computed at the rate as com-

puted under RCW 82.32.050(2). The rate so computed shall be adjusted on the first day of January of each year for use in computing interest for that calendar year.

(b) For refunds or credits of amounts paid or other recovery allowed to a taxpayer after December 31, 1991, the rate of interest shall be the rate as computed for assessments under RCW 82.32.050(2) less one percent. This rate of interest shall apply for all interest allowed through December 31, 1998. Interest allowed after December 31, 1998, shall be computed at the rate as computed under RCW 82.32.050(2). The rate so computed shall be adjusted on the first day of January of each year for use in computing interest for that calendar year.

(5) Interest allowed on a credit notice or refund issued after December 31, 2003, shall be computed as follows:

(a) If all overpayments for each calendar year and all reporting periods ending with the final month included in a notice or refund were made on or before the due date of the final return for each calendar year or the final reporting period included in the notice or refund:

(i) Interest shall be computed from January 31st following each calendar year included in a notice or refund; or

(ii) Interest shall be computed from the last day of the month following the final month included in a notice or refund.

(b) If the taxpayer has not made all overpayments for each calendar year and all reporting periods ending with the final month included in a notice or refund on or before the dates specified by RCW 82.32.045 for the final return for each calendar year or the final month included in the notice or refund, interest shall be computed from the last day of the month following the date on which payment in full of the liabilities was made for each calendar year included in a notice or refund, and the last day of the month following the date on which payment in full of the liabilities was made if the final month included in a notice or refund is not the end of a calendar year.

(c) Interest included in a credit notice shall accrue up to the date the taxpayer could reasonably be expected to use the credit notice, as defined by the department's rules. If a credit notice is converted to a refund, interest shall be recomputed to the date the refund is issued, but not to exceed the amount of interest that would have been allowed with the credit notice. [2004 c 153 § 306; 2003 c 73 § 2; 1999 c 358 § 13; 1997 c 157 § 2; 1992 c 169 § 2; 1991 c 142 § 10; 1990 c 69 § 1; 1989 c 378 § 20; 1979 ex.s. c 95 § 4; 1971 ex.s. c 299 § 17; 1965 ex.s. c 173 § 27; 1963 c 22 § 1; 1961 c 15 § 82.32.060. Prior: 1951 1st ex.s. c 9 § 6; 1949 c 228 § 21; 1935 c 180 § 189; Rem. Supp. 1949 § 8370-189.]

**Retroactive effective date—Effective date—2004 c 153:** See note following RCW 82.08.0293.

**Effective date—2003 c 73 § 2:** "Section 2 of this act takes effect January 1, 2004." [2003 c 73 § 3.]

**Effective date—1999 c 358 §§ 1 and 3-21:** See note following RCW 82.04.3651.

**Effective date—Applicability—1992 c 169:** See note following RCW 82.32.050.

**Effective date—1991 c 142 §§ 9-11:** See note following RCW 82.32.050.

**Severability—1991 c 142:** See RCW 82.32A.900.

# APPENDIX

## D

(4) Any person having been issued a notice of assessment under this section is entitled to the appeal procedures under RCW 82.32.160, 82.32.170, 82.32.180, 82.32.190, and 82.32.200.

(5) This section applies only in situations where the department has determined that there is no reasonable means of collecting the retail sales tax funds held in trust directly from the corporation.

(6) This section does not relieve the corporation or limited liability company of other tax liabilities or otherwise impair other tax collection remedies afforded by law.

(7) Collection authority and procedures prescribed in this chapter apply to collections under this section. [1995 c 318 § 2; 1987 c 245 § 1.]

**Effective date—1995 c 318:** See note following RCW 82.04.030.

**82.32.150 Contest of tax—Prepayment required—Restraining orders and injunctions barred.** All taxes, penalties, and interest shall be paid in full before any action may be instituted in any court to contest all or any part of such taxes, penalties, or interest. No restraining order or injunction shall be granted or issued by any court or judge to restrain or enjoin the collection of any tax or penalty or any part thereof, except upon the ground that the assessment thereof was in violation of the Constitution of the United States or that of the state. [1961 c 15 § 82.32.150. Prior: 1935 c 180 § 198; RRS § 8370-198.]

**82.32.160 Correction of tax—Administrative procedure—Conference—Determination by department.** Any person having been issued a notice of additional taxes, delinquent taxes, interest, or penalties assessed by the department, may within thirty days after the issuance of the original notice of the amount thereof or within the period covered by any extension of the due date thereof granted by the department petition the department in writing for a correction of the amount of the assessment, and a conference for examination and review of the assessment. The petition shall set forth the reasons why the correction should be granted and the amount of the tax, interest, or penalties, which the petitioner believes to be due. The department shall promptly consider the petition and may grant or deny it. If denied, the petitioner shall be notified by mail, or electronically as provided in RCW 82.32.135, thereof forthwith. If a conference is granted, the department shall fix the time and place therefor and notify the petitioner thereof by mail or electronically as provided in RCW 82.32.135. After the conference the department may make such determination as may appear to it to be just and lawful and shall mail a copy of its determination to the petitioner, or provide a copy of its determination electronically as provided in RCW 82.32.135. If no such petition is filed within the thirty-day period the assessment covered by the notice shall become final.

The procedures provided for herein shall apply also to a notice denying, in whole or in part, an application for a pollution control tax exemption and credit certificate, with such modifications to such procedures established by departmental rules and regulations as may be necessary to accommodate a claim for exemption or credit. [2007 c 111 § 110; 1989 c 378 § 22; 1975 1st ex.s. c 158 § 4; 1967 ex.s. c 26 § 49;

(2008 Ed.)

1963 ex.s. c 28 § 8; 1961 c 15 § 82.32.160. Prior: 1939 c 225 § 29, part; 1935 c 180 § 199, part; RRS § 8370-199, part.]

**Part headings not law—2007 c 111:** See note following RCW 82.16.120.

**Effective date—1975 1st ex.s. c 158:** See note following RCW 82.34.050.

**Effective date—1967 ex.s. c 26:** See note following RCW 82.01.050.

**82.32.170 Reduction of tax after payment—Petition—Conference—Determination by department.** Any person, having paid any tax, original assessment, additional assessment, or corrected assessment of any tax, may apply to the department within the time limitation for refund provided in this chapter, by petition in writing for a correction of the amount paid, and a conference for examination and review of the tax liability, in which petition he shall set forth the reasons why the conference should be granted, and the amount in which the tax, interest, or penalty, should be refunded. The department shall promptly consider the petition, and may grant or deny it. If denied, the petitioner shall be notified by mail, or electronically as provided in RCW 82.32.135, thereof forthwith. If a conference is granted, the department shall notify the petitioner by mail, or electronically as provided in RCW 82.32.135, of the time and place fixed therefor. After the hearing the department may make such determination as may appear to it just and lawful, and shall mail a copy of its determination to the petitioner, or provide a copy of its determination electronically as provided in RCW 82.32.135. [2007 c 111 § 111; 1967 ex.s. c 26 § 50; 1961 c 15 § 82.32.170. Prior: 1951 1st ex.s. c 9 § 11; 1939 c 225 § 29, part; 1935 c 180 § 199, part; RRS § 8370-199, part.]

**Part headings not law—2007 c 111:** See note following RCW 82.16.120.

**Effective date—1967 ex.s. c 26:** See note following RCW 82.01.050.

**82.32.180 Court appeal—Procedure.** Any person, except one who has failed to keep and preserve books, records, and invoices as required in this chapter and chapter 82.24 RCW, having paid any tax as required and feeling aggrieved by the amount of the tax may appeal to the superior court of Thurston county, within the time limitation for a refund provided in chapter 82.32 RCW or, if an application for refund has been made to the department within that time limitation, then within thirty days after rejection of the application, whichever time limitation is later. In the appeal the taxpayer shall set forth the amount of the tax imposed upon the taxpayer which the taxpayer concedes to be the correct tax and the reason why the tax should be reduced or abated. The appeal shall be perfected by serving a copy of the notice of appeal upon the department within the time herein specified and by filing the original thereof with proof of service with the clerk of the superior court of Thurston county.

The trial in the superior court on appeal shall be de novo and without the necessity of any pleadings other than the notice of appeal. At trial, the burden shall rest upon the taxpayer to prove that the tax as paid by the taxpayer is incorrect, either in whole or in part, and to establish the correct amount of the tax. In such proceeding the taxpayer shall be deemed the plaintiff, and the state, the defendant; and both parties shall be entitled to subpoena the attendance of witnesses as in other civil actions and to produce evidence that is competent,

[Title 82 RCW—page 229]

# APPENDIX

## E

(4) Any person having been issued a notice of assessment under this section is entitled to the appeal procedures under RCW 82.32.160, 82.32.170, 82.32.180, 82.32.190, and 82.32.200.

(5) This section applies only in situations where the department has determined that there is no reasonable means of collecting the retail sales tax funds held in trust directly from the corporation.

(6) This section does not relieve the corporation or limited liability company of other tax liabilities or otherwise impair other tax collection remedies afforded by law.

(7) Collection authority and procedures prescribed in this chapter apply to collections under this section. [1995 c 318 § 2; 1987 c 245 § 1.]

**Effective date**—1995 c 318: See note following RCW 82.04.030.

**82.32.150 Contest of tax—Prepayment required—Restraining orders and injunctions barred.** All taxes, penalties, and interest shall be paid in full before any action may be instituted in any court to contest all or any part of such taxes, penalties, or interest. No restraining order or injunction shall be granted or issued by any court or judge to restrain or enjoin the collection of any tax or penalty or any part thereof, except upon the ground that the assessment thereof was in violation of the Constitution of the United States or that of the state. [1961 c 15 § 82.32.150. Prior: 1935 c 180 § 198; RRS § 8370-198.]

**82.32.160 Correction of tax—Administrative procedure—Conference—Determination by department.** Any person having been issued a notice of additional taxes, delinquent taxes, interest, or penalties assessed by the department, may within thirty days after the issuance of the original notice of the amount thereof or within the period covered by any extension of the due date thereof granted by the department petition the department in writing for a correction of the amount of the assessment, and a conference for examination and review of the assessment. The petition shall set forth the reasons why the correction should be granted and the amount of the tax, interest, or penalties, which the petitioner believes to be due. The department shall promptly consider the petition and may grant or deny it. If denied, the petitioner shall be notified by mail, or electronically as provided in RCW 82.32.135, thereof forthwith. If a conference is granted, the department shall fix the time and place therefor and notify the petitioner thereof by mail or electronically as provided in RCW 82.32.135. After the conference the department may make such determination as may appear to it to be just and lawful and shall mail a copy of its determination to the petitioner, or provide a copy of its determination electronically as provided in RCW 82.32.135. If no such petition is filed within the thirty-day period the assessment covered by the notice shall become final.

The procedures provided for herein shall apply also to a notice denying, in whole or in part, an application for a pollution control tax exemption and credit certificate, with such modifications to such procedures established by departmental rules and regulations as may be necessary to accommodate a claim for exemption or credit. [2007 c 111 § 110; 1989 c 378 § 22; 1975 1st ex.s. c 158 § 4; 1967 ex.s. c 26 § 49;

(2008 Ed.)

1963 ex.s. c 28 § 8; 1961 c 15 § 82.32.160. Prior: 1939 c 225 § 29, part; 1935 c 180 § 199, part; RRS § 8370-199, part.]

**Part headings not law**—2007 c 111: See note following RCW 82.16.120.

**Effective date**—1975 1st ex.s. c 158: See note following RCW 82.34.050.

**Effective date**—1967 ex.s. c 26: See note following RCW 82.01.050.

**82.32.170 Reduction of tax after payment—Petition—Conference—Determination by department.** Any person, having paid any tax, original assessment, additional assessment, or corrected assessment of any tax, may apply to the department within the time limitation for refund provided in this chapter, by petition in writing for a correction of the amount paid, and a conference for examination and review of the tax liability, in which petition he shall set forth the reasons why the conference should be granted, and the amount in which the tax, interest, or penalty, should be refunded. The department shall promptly consider the petition, and may grant or deny it. If denied, the petitioner shall be notified by mail, or electronically as provided in RCW 82.32.135, thereof forthwith. If a conference is granted, the department shall notify the petitioner by mail, or electronically as provided in RCW 82.32.135, of the time and place fixed therefor. After the hearing the department may make such determination as may appear to it just and lawful, and shall mail a copy of its determination to the petitioner, or provide a copy of its determination electronically as provided in RCW 82.32.135. [2007 c 111 § 111; 1967 ex.s. c 26 § 50; 1961 c 15 § 82.32.170. Prior: 1951 1st ex.s. c 9 § 11; 1939 c 225 § 29, part; 1935 c 180 § 199, part; RRS § 8370-199, part.]

**Part headings not law**—2007 c 111: See note following RCW 82.16.120.

**Effective date**—1967 ex.s. c 26: See note following RCW 82.01.050.

**82.32.180 Court appeal—Procedure.** Any person, except one who has failed to keep and preserve books, records, and invoices as required in this chapter and chapter 82.24 RCW, having paid any tax as required and feeling aggrieved by the amount of the tax may appeal to the superior court of Thurston county, within the time limitation for a refund provided in chapter 82.32 RCW or, if an application for refund has been made to the department within that time limitation, then within thirty days after rejection of the application, whichever time limitation is later. In the appeal the taxpayer shall set forth the amount of the tax imposed upon the taxpayer which the taxpayer concedes to be the correct tax and the reason why the tax should be reduced or abated. The appeal shall be perfected by serving a copy of the notice of appeal upon the department within the time herein specified and by filing the original thereof with proof of service with the clerk of the superior court of Thurston county.

The trial in the superior court on appeal shall be de novo and without the necessity of any pleadings other than the notice of appeal. At trial, the burden shall rest upon the taxpayer to prove that the tax as paid by the taxpayer is incorrect, either in whole or in part, and to establish the correct amount of the tax. In such proceeding the taxpayer shall be deemed the plaintiff, and the state, the defendant; and both parties shall be entitled to subpoena the attendance of witnesses as in other civil actions and to produce evidence that is competent,

[Title 82 RCW—page 229]

relevant, and material to determine the correct amount of the tax that should be paid by the taxpayer. Either party may seek appellate review in the same manner as other civil actions are appealed to the appellate courts.

It shall not be necessary for the taxpayer to protest against the payment of any tax or to make any demand to have the same refunded or to petition the director for a hearing in order to appeal to the superior court, but no court action or proceeding of any kind shall be maintained by the taxpayer to recover any tax paid, or any part thereof, except as herein provided.

The provisions of this section shall not apply to any tax payment which has been the subject of an appeal to the board of tax appeals with respect to which appeal a formal hearing has been elected. [1997 c 156 § 4; 1992 c 206 § 4; 1989 c 378 § 23; 1988 c 202 § 67; 1971 c 81 § 148; 1967 ex.s. c 26 § 51; 1965 ex.s. c 141 § 5; 1963 ex.s. c 28 § 9; 1961 c 15 § 82.32.180. Prior: 1951 1st ex.s. c 9 § 12; 1939 c 225 § 29, part; 1935 c 180 § 199, part; RRS § 8370-199, part.]

**Effective date—1992 c 206:** See note following RCW 82.04.170.

**Severability—1988 c 202:** See note following RCW 2.24.050.

*Appeal to board of tax appeals, formal hearing:* RCW 82.03.160.

#### **82.32.190 Stay of collection pending suit—Interest.**

(1) The department, by its order, may hold in abeyance the collection of tax from any taxpayer or any group of taxpayers when a question bearing on their liability for tax hereunder is pending before the courts. The department may impose such conditions as may be deemed just and equitable and shall require the payment of interest at the rate of three-quarters of one percent of the amount of the tax for each thirty days or portion thereof from the date upon which such tax became due until the date of payment.

(2) Interest imposed under this section for periods after January 1, 1997, shall be computed on a daily basis at the rate as computed under RCW 82.32.050(2). The rate so computed shall be adjusted on the first day of January of each year. Interest for taxes held in abeyance under this section before January 1, 1997, but outstanding after January 1, 1997, shall not be recalculated but shall remain at three-quarters of one percent per each thirty days or portion thereof. [1996 c 149 § 3; 1971 ex.s. c 299 § 21; 1965 ex.s. c 141 § 6; 1961 c 15 § 82.32.190. Prior: 1937 c 227 § 19; 1935 c 180 § 200; RRS § 8370-200.]

**Findings—Intent—Effective date—1996 c 149:** See notes following RCW 82.32.050.

**Effective dates—Severability—1971 ex.s. c 299:** See notes following RCW 82.04.050.

#### **82.32.200 Stay of collection—Bond—Interest.**

(1) When any assessment or additional assessment has been made, the taxpayer may obtain a stay of collection, under such circumstances and for such periods as the department of revenue may by general regulation provide, of the whole or any part thereof, by filing with the department a bond in an amount, not exceeding twice the amount on which stay is desired, and with sureties as the department deems necessary, conditioned for the payment of the amount of the assessments, collection of which is stayed by the bond, together with the interest thereon at the rate of one percent of the amount of such assessment for each thirty days or portion

thereof from the date the bond is filed until the date of payment.

(2) Interest imposed under this section after January 1, 1997, shall be computed on a daily basis on the amount of tax at the rate as computed under RCW 82.32.050(2). The rate so computed shall be adjusted on the first day of January of each year. Interest for bonds filed before January 1, 1997, but outstanding after January 1, 1997, shall not be recalculated but shall remain at one percent per each thirty days or portion thereof. [1996 c 149 § 4; 1975 1st ex.s. c 278 § 83; 1961 c 15 § 82.32.200. Prior: 1935 c 180 § 201; RRS § 8370-201.]

**Findings—Intent—Effective date—1996 c 149:** See notes following RCW 82.32.050.

**Construction—Severability—1975 1st ex.s. c 278:** See notes following RCW 11.08.160.

**82.32.210 Tax warrant—Filing—Lien—Effect.** (1) If any fee, tax, increase, or penalty or any portion thereof is not paid within fifteen days after it becomes due, the department of revenue may issue a warrant in the amount of such unpaid sums, together with interest thereon from the date the warrant is issued until the date of payment. If, however, the department of revenue believes that a taxpayer is about to cease business, leave the state, or remove or dissipate the assets out of which fees, taxes or penalties might be satisfied and that any tax or penalty will not be paid when due, it may declare the fee, tax or penalty to be immediately due and payable and may issue a warrant immediately.

(a) Interest imposed before January 1, 1999, shall be computed at the rate of one percent of the amount of the warrant for each thirty days or portion thereof.

(b) Interest imposed after December 31, 1998, shall be computed on a daily basis on the amount of outstanding tax or fee at the rate as computed under RCW 82.32.050(2). The rate so computed shall be adjusted on the first day of January of each year for use in computing interest for that calendar year. As used in this subsection, "fee" does not include an administrative filing fee such as a court filing fee and warrant fee.

(2) The department shall file a copy of the warrant with the clerk of the superior court of any county of the state in which real and/or personal property of the taxpayer may be found. The clerk is entitled to a filing fee under RCW 36.18.012(10). Upon filing, the clerk shall enter in the judgment docket, the name of the taxpayer mentioned in the warrant and in appropriate columns the amount of the fee, tax or portion thereof and any increases and penalties for which the warrant is issued and the date when the copy is filed, and thereupon the amount of the warrant so docketed shall become a specific lien upon all goods, wares, merchandise, fixtures, equipment, or other personal property used in the conduct of the business of the taxpayer against whom the warrant is issued, including property owned by third persons who have a beneficial interest, direct or indirect, in the operation of the business, and no sale or transfer of the personal property in any way affects the lien.

(3) The lien shall not be superior, however, to bona fide interests of third persons which had vested prior to the filing of the warrant when the third persons do not have a beneficial interest, direct or indirect, in the operation of the business, other than the securing of the payment of a debt or the receiv-

# APPENDIX

## F

in this state for a period of two years thereafter. [2010 c 112 § 13; 2010 c 106 § 104. Prior: 2009 c 563 § 213; 2009 c 309 § 2; 2008 c 81 § 11; 2007 c 6 § 1502; 2006 c 177 § 7; prior: 2005 c 326 § 1; 2005 c 274 § 361; prior: 2000 c 173 § 1; 2000 c 106 § 1; 1998 c 234 § 1; 1996 c 184 § 5; 1995 c 197 § 1; 1991 c 330 § 1; 1990 c 67 § 1; 1985 c 414 § 9; 1984 c 138 § 12; 1969 ex.s. c 104 § 1; 1963 ex.s. c 28 § 10; 1961 c 15 § 82.32.330; prior: 1943 c 156 § 12; 1935 c 180 § 210; Rem. Supp. 1943 § 8370-210.]

**Reviser's note:** This section was amended by 2010 c 106 § 104 and by 2010 c 112 § 13, each without reference to the other. Both amendments are incorporated in the publication of this section under RCW 1.12.025(2). For rule of construction, see RCW 1.12.025(1).

**Retroactive application—2010 c 112:** See note following RCW 82.32.780.

**Application—2010 c 106 §§ 104 and 111:** "Sections 104(3) (a)(i) and (s) and 111 of this act apply to return or tax information in respect to the tax imposed under chapter 83.100 RCW in the possession of the department of revenue on or after July 1, 2010." [2010 c 106 § 403.]

**Effective date—2010 c 106:** See note following RCW 35.102.145.

**Finding—Intent—Construction—Effective date—Reports and recommendations—2009 c 563:** See notes following RCW 82.32.780.

**Findings—Savings—Effective date—2008 c 81:** See notes following RCW 82.08.975.

**Part headings not law—Savings—Effective date—Severability—2007 c 6:** See notes following RCW 82.32.020.

**Findings—Intent—2007 c 6:** See note following RCW 82.14.495.

**Effective date—2006 c 177 §§ 1-9:** See note following RCW 82.04.250.

**Part headings not law—Effective date—2005 c 274:** See RCW 42.56.901 and 42.56.902.

**Effective date—2000 c 173:** "This act takes effect July 1, 2000." [2000 c 173 § 2.]

**Effective date—2000 c 106:** "This act takes effect July 1, 2000." [2000 c 106 § 13.]

Additional notes found at [www.leg.wa.gov](http://www.leg.wa.gov)

**82.32.340 Chargeoff of uncollectible taxes—Destruction of files and records.** (1) Any tax or penalty which the department of revenue deems to be uncollectible may be transferred from accounts receivable to a suspense account and cease to be accounted an asset. Any item transferred shall continue to be a debt due the state from the taxpayer and may at any time within twelve years from the filing of a warrant covering such amount with the clerk of the superior court be transferred back to accounts receivable for the purpose of collection. The department of revenue may charge off as finally uncollectible any tax or penalty which it deems uncollectible at any time after twelve years from the date that the last tax return for the delinquent taxpayer was or should have been filed if the department of revenue is satisfied that there are no cost-effective means of collecting the tax or penalty.

After any tax or penalty has been charged off as finally uncollectible under the provisions of this section, the department of revenue may destroy any or all files and records pertaining to the liability of any taxpayer for such tax or penalty.

The department of revenue, subject to the approval of the state records committee, may at the expiration of five years after the close of any taxable year, destroy any or all files and records pertaining to the tax liability of any taxpayer for such taxable year, who has fully paid all taxes, penalties and interest for such taxable year, or any preceding taxable year for

[Title 82 RCW—page 270]

which such taxes, penalties and interest have been fully paid. In the event that such files and records are reproduced on film pursuant to RCW 40.20.020 for use in accordance with RCW 40.20.030, the original files and records may be destroyed immediately after reproduction and such reproductions may be destroyed at the expiration of the above five-year period, subject to the approval of the state records committee.

(2) Notwithstanding subsection (1) of this section, the department may charge off any tax within its jurisdiction to collect that is owed by a taxpayer, including any penalty or interest thereon, if the department ascertains that the cost of collecting that tax would be greater than the total amount which is owed or likely in the near future to be owed by, and collectible from, the taxpayer. [1989 c 78 § 3; 1985 c 414 § 1; 1979 1st ex.s. c 95 § 3; 1979 c 151 § 184; 1967 ex.s. c 89 § 4; 1965 ex.s. c 141 § 7; 1961 c 15 § 82.32.340. Prior: 1955 c 389 § 40; 1939 c 225 § 30; 1937 c 227 § 21; 1935 c 180 § 210(a); RRS § 8370-210a.]

**82.32.350 Closing agreements authorized.** The department may enter into an agreement in writing with any person relating to the liability of such person in respect of any tax imposed by any of the preceding chapters of this title for any taxable period or periods. [1971 ex.s. c 299 § 23; 1961 c 15 § 82.32.350. Prior: 1945 c 251 § 1; Rem. Supp. 1945 § 8370-225.]

Additional notes found at [www.leg.wa.gov](http://www.leg.wa.gov)

**82.32.360 Conclusive effect of agreements.** Upon approval of such agreement, evidenced by execution thereof by the department of revenue and the person so agreeing, the agreement shall be final and conclusive as to tax liability or tax immunity covered thereby, and, except upon a showing of fraud or malfeasance, or of misrepresentation of a material fact:

(1) The case shall not be reopened as to the matters agreed upon, or the agreement modified, by any officer, employee, or agent of the state, or the taxpayer, and

(2) In any suit, action or proceeding, such agreement, or any determination, assessment, collection, payment, abatement, refund, or credit made in accordance therewith, shall not be annulled, modified, set aside, or disregarded. [1975 1st ex.s. c 278 § 93; 1961 c 15 § 82.32.360. Prior: 1945 c 251 § 2; Rem. Supp. 1945 § 8370-226.]

Additional notes found at [www.leg.wa.gov](http://www.leg.wa.gov)

**82.32.380 Revenues to be deposited in general fund.** The state treasurer, upon receipt of any payments of tax, penalty, interest, or fees collected hereunder shall deposit them to the credit of the state general fund or such other fund as may be provided by law. [1961 c 15 § 82.32.380. Prior: 1945 c 249 § 10; 1943 c 156 § 12A, 1941 c 178 § 19(a); 1939 c 225 § 31; 1937 c 227 § 32; 1935 c 180 § 211; Rem. Supp. 1945 § 8370-211.]

**82.32.392 Certain revenues to be deposited in sulfur dioxide abatement account.** An amount equal to all sales and use taxes paid under chapters 82.08, 82.12, and 82.14 RCW, that were obtained from the sales of coal to, or use of coal by, a business for use at a generation facility, and that

(2010 Ed.)

# APPENDIX

# G

in this state for a period of two years thereafter. [2010 c 112 § 13; 2010 c 106 § 104. Prior: 2009 c 563 § 213; 2009 c 309 § 2; 2008 c 81 § 11; 2007 c 6 § 1502; 2006 c 177 § 7; prior: 2005 c 326 § 1; 2005 c 274 § 361; prior: 2000 c 173 § 1; 2000 c 106 § 1; 1998 c 234 § 1; 1996 c 184 § 5; 1995 c 197 § 1; 1991 c 330 § 1; 1990 c 67 § 1; 1985 c 414 § 9; 1984 c 138 § 12; 1969 ex.s. c 104 § 1; 1963 ex.s. c 28 § 10; 1961 c 15 § 82.32.330; prior: 1943 c 156 § 12; 1935 c 180 § 210; Rem. Supp. 1943 § 8370-210.]

**Reviser's note:** This section was amended by 2010 c 106 § 104 and by 2010 c 112 § 13, each without reference to the other. Both amendments are incorporated in the publication of this section under RCW 1.12.025(2). For rule of construction, see RCW 1.12.025(1).

**Retroactive application—2010 c 112:** See note following RCW 82.32.780.

**Application—2010 c 106 §§ 104 and 111:** "Sections 104(3) (a)(i) and (s) and 111 of this act apply to return or tax information in respect to the tax imposed under chapter 83.100 RCW in the possession of the department of revenue on or after July 1, 2010." [2010 c 106 § 403.]

**Effective date—2010 c 106:** See note following RCW 35.102.145.

**Finding—Intent—Construction—Effective date—Reports and recommendations—2009 c 563:** See notes following RCW 82.32.780.

**Findings—Savings—Effective date—2008 c 81:** See notes following RCW 82.08.975.

**Part headings not law—Savings—Effective date—Severability—2007 c 6:** See notes following RCW 82.32.020.

**Findings—Intent—2007 c 6:** See note following RCW 82.14.495.

**Effective date—2006 c 177 §§ 1-9:** See note following RCW 82.04.250.

**Part headings not law—Effective date—2005 c 274:** See RCW 42.56.901 and 42.56.902.

**Effective date—2000 c 173:** "This act takes effect July 1, 2000." [2000 c 173 § 2.]

**Effective date—2000 c 106:** "This act takes effect July 1, 2000." [2000 c 106 § 13.]

Additional notes found at [www.leg.wa.gov](http://www.leg.wa.gov)

**82.32.340 Chargeoff of uncollectible taxes—Destruction of files and records.** (1) Any tax or penalty which the department of revenue deems to be uncollectible may be transferred from accounts receivable to a suspense account and cease to be accounted an asset. Any item transferred shall continue to be a debt due the state from the taxpayer and may at any time within twelve years from the filing of a warrant covering such amount with the clerk of the superior court be transferred back to accounts receivable for the purpose of collection. The department of revenue may charge off as finally uncollectible any tax or penalty which it deems uncollectible at any time after twelve years from the date that the last tax return for the delinquent taxpayer was or should have been filed if the department of revenue is satisfied that there are no cost-effective means of collecting the tax or penalty.

After any tax or penalty has been charged off as finally uncollectible under the provisions of this section, the department of revenue may destroy any or all files and records pertaining to the liability of any taxpayer for such tax or penalty.

The department of revenue, subject to the approval of the state records committee, may at the expiration of five years after the close of any taxable year, destroy any or all files and records pertaining to the tax liability of any taxpayer for such taxable year, who has fully paid all taxes, penalties and interest for such taxable year, or any preceding taxable year for

[Title 82 RCW—page 270]

which such taxes, penalties and interest have been fully paid. In the event that such files and records are reproduced on film pursuant to RCW 40.20.020 for use in accordance with RCW 40.20.030, the original files and records may be destroyed immediately after reproduction and such reproductions may be destroyed at the expiration of the above five-year period, subject to the approval of the state records committee.

(2) Notwithstanding subsection (1) of this section, the department may charge off any tax within its jurisdiction to collect that is owed by a taxpayer, including any penalty or interest thereon, if the department ascertains that the cost of collecting that tax would be greater than the total amount which is owed or likely in the near future to be owed by, and collectible from, the taxpayer. [1989 c 78 § 3; 1985 c 414 § 1; 1979 1st ex.s. c 95 § 3; 1979 c 151 § 184; 1967 ex.s. c 89 § 4; 1965 ex.s. c 141 § 7; 1961 c 15 § 82.32.340. Prior: 1955 c 389 § 40; 1939 c 225 § 30; 1937 c 227 § 21; 1935 c 180 § 210(a); RRS § 8370-210a.]

**82.32.350 Closing agreements authorized.** The department may enter into an agreement in writing with any person relating to the liability of such person in respect of any tax imposed by any of the preceding chapters of this title for any taxable period or periods. [1971 ex.s. c 299 § 23; 1961 c 15 § 82.32.350. Prior: 1945 c 251 § 1; Rem. Supp. 1945 § 8370-225.]

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**82.32.360 Conclusive effect of agreements.** Upon approval of such agreement, evidenced by execution thereof by the department of revenue and the person so agreeing, the agreement shall be final and conclusive as to tax liability or tax immunity covered thereby, and, except upon a showing of fraud or malfeasance, or of misrepresentation of a material fact:

(1) The case shall not be reopened as to the matters agreed upon, or the agreement modified, by any officer, employee, or agent of the state, or the taxpayer, and

(2) In any suit, action or proceeding, such agreement, or any determination, assessment, collection, payment, abatement, refund, or credit made in accordance therewith, shall not be annulled, modified, set aside, or disregarded. [1975 1st ex.s. c 278 § 93; 1961 c 15 § 82.32.360. Prior: 1945 c 251 § 2; Rem. Supp. 1945 § 8370-226.]

Additional notes found at [www.leg.wa.gov](http://www.leg.wa.gov)

**82.32.380 Revenues to be deposited in general fund.** The state treasurer, upon receipt of any payments of tax, penalty, interest, or fees collected hereunder shall deposit them to the credit of the state general fund or such other fund as may be provided by law. [1961 c 15 § 82.32.380. Prior: 1945 c 249 § 10; 1943 c 156 § 12A, 1941 c 178 § 19(a); 1939 c 225 § 31; 1937 c 227 § 32; 1935 c 180 § 211; Rem. Supp. 1945 § 8370-211.]

**82.32.392 Certain revenues to be deposited in sulfur dioxide abatement account.** An amount equal to all sales and use taxes paid under chapters 82.08, 82.12, and 82.14 RCW, that were obtained from the sales of coal to, or use of coal by, a business for use at a generation facility, and that

(2010 Ed.)

# APPENDIX

## H

WAC 458-20-100  
Appeals.

(1) **Introduction.**

(a) This rule explains the procedures for administrative review of actions of the department or of its officers and employees in the assessment or collection of taxes, as provided in RCW 82.01.060(4), including, but not limited to:

- (i) An assessment of tax, interest, or penalties;
- (ii) The denial of a refund, credit, or deferral request;
- (iii) The issuance of a balance due notice or a notice of delinquent taxes, including a notice of collection action; and
- (iv) The issuance of an adverse ruling on future liability from the taxpayer information and education section.

(b) Persons seeking administrative review of a business license revocation, a cigarette license revocation or suspension, a log export enforcement action, or orders to county officials under Title 84 RCW should refer to the following rules:

(i) WAC 458-20-10001 for information on the revocation of a certificate of registration or the revocation or suspension of a cigarette license; or

(ii) WAC 458-20-10002 for information on log export enforcement actions and orders to county officials issued under RCW 84.08.120 and 84.41.120.

(2) **Preappeal supervisor's conference and preappeal rulings on future liability.**

(a) **Supervisor's conferences.** Taxpayers are encouraged to request a supervisor's conference when they disagree with an action proposed by the department. Taxpayers should make their request for the conference with the division of the department that proposes to issue an assessment or take some other action in dispute. Supervisor's conferences provide an opportunity to resolve issues prior to the review provided in this rule.

(b) **Rulings.** Taxpayers may request an opinion on future reporting instructions and tax liability from the department's taxpayer information and education section of the taxpayer services division. The request must be in writing, contain all pertinent facts concerning the question presented, and may contain a statement of the taxpayer's views concerning the correct application of the law. The department will advise the taxpayer in writing of its opinion in a tax ruling. The tax ruling must state all pertinent facts upon which the opinion is based and, if the taxpayer's name has been disclosed, is binding upon both the taxpayer and the department under the facts stated. It will remain binding until the facts change, the applicable statute or rule changes, a published appellate court decision not subject to review changes a prior interpretation of law, the department publicly announces a change in the policy upon which this ruling is based, or the taxpayer is notified in writing that the ruling is no longer valid. Any change in the ruling will have prospective application only. Rulings on future tax liability are subject to review as provided in this rule.

(3) **How are appeals started?** A taxpayer starts a review of a departmental action by filing a written petition. Petitions should be addressed to:

Appeals Division

Washington State Department of Revenue

P.O. Box 47460

Olympia, Washington 98504-7460

A form petition is available on the department's web site at <http://dor.wa.gov> or upon request from the appeals division. Taxpayers may use the form petition or prepare one of their own. The taxpayer or its authorized representative must sign the petition, which must contain the following information:

- (a) The taxpayer's name, address, registration/UBI number, telephone number, fax number, e-mail address, and contact person;
- (b) If represented, the representative's name, address, telephone number, fax number, and e-mail address;
- (c) Identifying information from the assessment notice, balance due notice, or other document being appealed;
- (d) The amount of tax, interest, or penalties in controversy, and the time period at issue;

(e) The type of appeal requested (see subsection (6) of this section);

(f) Whether an in-person hearing in Olympia or Seattle, a telephone hearing, or no hearing is requested; and

(g) A brief explanation of each issue or area of dispute and an explanation why each issue or area of dispute should be decided in the taxpayer's favor. To the extent known or available, taxpayers should cite applicable rules, statutes, or supporting case law and provide copies of records that support the taxpayer's position.

If a petition does not provide the required information, the department will notify the taxpayer in writing that the petition is not accepted for review. The notice will provide a period of time for the taxpayer to cure the defects in the petition. If a taxpayer is represented, the taxpayer should also have on file with the department a confidential tax information authorization.

**(4) To be timely, when must a petition be filed or extensions requested?** A taxpayer must file a petition with the department within thirty days after the date the departmental action has occurred.

(a) The appeals division may grant an extension of time to file a petition if the taxpayer's request is made within the thirty-day filing period. Requests for extensions may be in writing or by telephone, and must be directed to the department's appeals division.

(b) A petition or request for extension is timely if it is postmarked or received within the thirty-day filing period.

(c) The appeals division may not grant an extension of time to file a petition for refund that would exceed the time limits in WAC 458-20-229 (Refunds). A request for a refund of taxes paid must be filed within four years after the close of the tax year in which the taxes were paid. See WAC 458-20-229 for procedures on seeking a refund.

(d) The appeals division will notify taxpayers in writing when a petition is rejected as not timely.

**(5) How are appeals scheduled, heard, and decided?** The appeals division will acknowledge receipt of the petition and identify the administrative law judge (ALJ) assigned to the appeal. ALJs are attorneys trained in the interpretation of the Revenue Act and precedents established by prior rulings and court decisions. They are employed by the department to provide an informal, final review of agency actions.

(a) **Scheduling.** The ALJ will notify parties of the time when any additional documents or arguments must be submitted. If a party fails to comply with a scheduling letter or established timelines, the ALJ may decline to consider arguments or documents submitted after the scheduled timelines. A status conference in complex cases may be scheduled to provide for the orderly resolution of the case and to narrow issues and arguments for hearing.

(b) **Hearings.** Hearings may be by telephone or in-person. The ALJ may decide the case without a hearing if legal or factual issues are not in dispute, the taxpayer does not request a hearing, or the taxpayer fails to appear at a scheduled hearing or otherwise fails to respond to inquiries from the department. The appeals division will notify the taxpayer by mail whether a hearing will be held, whether the hearing will be in-person or by telephone, the location of any in-person hearing, and the date and time for any hearing in the case. The date and time for a hearing may be continued at the ALJ's discretion. Other departmental employees may attend a hearing, and the ALJ will notify the taxpayer when other departmental employees are attending. The taxpayer may appear personally or may be represented by an attorney, accountant, or any other authorized person. All hearings before an ALJ are conducted informally and in a nonadversarial, uncontested manner.

(c) **Hearing and posthearing submissions.** If a taxpayer asks to submit additional records or documents at a hearing, the taxpayer must explain why they were not submitted under the deadlines established in the scheduling letter. The ALJ has the discretion to allow late submissions by the taxpayer or the department and, if allowed, will provide the other party with additional time to respond. If additional document production or additional briefing is allowed by the ALJ, posthearing, such briefing or documents usually must be submitted within thirty days after the hearing, unless good cause is shown for additional time. ALJs have the discretion to allow additional time for further fact-finding, including scheduling an additional hearing, as necessary in a particular case.

(d) **Determinations.** Following the hearing, if any, and review of all submissions, the ALJ will issue a determination consistent with the applicable statutes, rules, case law, and department precedents. The appeals division will notify the taxpayer in writing of the decision. The determination of the ALJ is the final decision of the department and is binding upon the taxpayer unless a petition for reconsideration is timely filed by the taxpayer and accepted by the department.

**(6) Are all appeals the same?** No, in addition to regular appeals, called mainstream appeals, an appeal may also be assigned as a small claims or executive level appeal based on the amount at issue or the complexity of the issues. In addition, an appeal may be expedited under certain urgent circumstances.

(a) **Small claims appeals.** Except as set forth in (a)(i), (ii), or (iii) of this subsection, when the tax at issue in the appeal is twenty-five thousand dollars or less and the total amount of the tax plus penalties and interest at issue in the appeal is fifty thousand dollars or less, the appeal will be heard as a small claims appeal.

(i) The department may decline to hear an appeal as a small claims appeal if the department finds the appeal is not suitable for small claims resolution. Appeals with multiple or complex issues, issues of first impression, issues of industry-wide application, or constitutional issues are generally not suitable for small claims resolution.

(ii) The appeals division will notify the taxpayer in writing when an appeal is to be heard as a small claims appeal. The taxpayer may request in writing that the matter not be heard as a small claims appeal. Such requests will be granted if received or postmarked within fifteen days following the date of the notice.

(iii) In the petition the taxpayer may affirmatively request that the petition not be heard as a small claims appeal. Such requests will be granted.

Taxpayers should provide all evidence and supporting authority prior to or during the small claims hearing. Within ten working days of a small claims hearing, the department will issue an abbreviated written decision (determination) containing only the department's conclusions. The determination in a small claims appeal is the final action of the department.

(b) **Executive level appeals.** If an appeal involves an issue of first impression (one for which no agency precedent has been established) or an issue that has industry-wide significance or impact, a taxpayer may request that the petition be heard at the executive level. The request must specify the reasons why an executive level appeal is appropriate. The appeals division will grant or deny the request and will notify the taxpayer of that decision in writing. If granted, the director or the director's designee and an ALJ will hear the matter. The appeals division, on its own initiative, may also choose to hear an appeal at the executive level. The appeals division will notify the taxpayer if the department chooses to hear an appeal at the executive level.

Following the executive level hearing, the appeals division will issue a proposed determination, which becomes final thirty days from the date of issuance unless the taxpayer or another division of the department timely files an objection to the proposed determination. Objections must identify specific errors of law or fact. Unless an extension is granted, objections must be postmarked or received by the appeals division within thirty days from the date the proposed determination was issued. The taxpayer or operating division filing objections must also provide the other party with a copy of its objections. The ALJ will issue the final determination, which may or may not reflect changes based on the objections. Although rare, the ALJ and the director's designee, in consultation with the director, may grant a second hearing to hear argument on the objections. The determination in an executive level appeal is the final action of the department.

(c) **Expedited appeals.** On a very limited basis it may be necessary to expedite the review of a petition. Taxpayers or other divisions in the department requesting expedited review must make the request in writing to the appeals division, with a copy supplied to the other party. The appeals division will grant or deny such requests solely at its discretion. The appeals division will advise the taxpayer and the affected division of its decision pertaining to the expedited review request. This decision is not subject to appeal. Expedited review will be limited to appeals where it is clear that:

- (i) There is a particular and extraordinary business necessity;
- (ii) Document review is the only issue;
- (iii) Only a legal issue remains in an appeal following a remand to an operating division;
- (iv) A jeopardy warrant or bankruptcy is likely; or
- (v) Urgent review is necessary within the department.

If expedited review is at the taxpayer's request, the determination in an expedited appeal is the final action of the department. If expedited review is requested by the department, the taxpayer may petition for reconsideration as provided in subsection (7) of this section.

(7) **Request for reconsideration.** If a taxpayer believes that an error has been made in a determination, the taxpayer may, within thirty days of the issuance of the determination, petition in writing for reconsideration of the decision. Small claim appeals, executive appeals, and appeals expedited at the request of the taxpayer are not subject to reconsideration. The request for reconsideration must specify mistakes in law or fact contained in the determination and should also provide legal authority as to why those mistakes necessitate the reconsideration of the determination. A taxpayer may request an executive level reconsideration when the determination decided an issue of first impression or an issue that has industry-wide impact or significance. The request for executive reconsideration must also specify the reasons why executive level review is appropriate.

The appeals division may, without a hearing, grant or deny the request for reconsideration. If the request is denied, the department will mail to the taxpayer written notice of the denial and the reason for the denial. The denial is then the final action of the department. If the request is granted, a hearing on reconsideration may be conducted or a determination may be issued without a hearing. A reconsideration determination is the final action of the department.

(8) **Appeals to board of tax appeals.** A taxpayer may appeal a denial of a petition for correction of an assessment under RCW 82.32.160 or a denial of a petition for refund under RCW 82.32.170 to the board of tax appeals. The board of tax

appeals also has jurisdiction to hear appeals taken from department decisions rendered under RCW 82.34.110 (relating to pollution control facilities tax exemptions and credits) and 82.49.060 (relating to watercraft excise tax). The board of tax appeals does not have jurisdiction to hear appeals from determinations involving rulings of future tax liability issued by the taxpayer information and education section. See RCW 82.03.130 (1)(a) and 82.03.190. A taxpayer filing an appeal with the board of tax appeals must pay the tax by the due date, unless arrangements are made with the department for a stay of collection under RCW 82.32.200. See WAC 458-20-228 (Returns, remittances, penalties, extensions, interest, stay of collection).

(9) **Thurston County superior court.** A taxpayer may also pay the tax in dispute and petition for a refund in Thurston County superior court. The taxpayer must comply with the requirements of RCW 82.32.180.

(10) **Settlements.** At any time during the appeal process, the taxpayer or the department may propose to compromise the matter by settlement. Taxpayers interested in settling a dispute should submit a written offer to the ALJ. The offer should identify the amount in dispute, why the dispute should be settled, the amount offered in settlement, and why the amount being offered is reasonable.

(a) Settlement may be appropriate when:

(i) The issue is nonrecurring. An issue is nonrecurring when the law has changed so future periods are treated differently than the periods under appeal; or the taxpayer's position or business activity has changed so that in future periods the issue under consideration is changed or does not exist; or the taxpayer agrees to a prospective change;

(ii) A conflict exists between precedents, such as statutes, rules, excise tax bulletins, or specific written instructions to the taxpayer;

(iii) A strict application of the law would have unduly harsh consequences which may be only relieved by an equitable doctrine; or

(iv) There is uncertainty of the outcome of the appeal if it were presented to a court. Factors to be considered include the relative degrees of certainty and the costs for both the taxpayer and the state. This category includes cases which involve factual issues that might require extensive expert testimony to resolve.

(b) Settlement is not appropriate when:

(i) The same issue in the taxpayer's appeal is being litigated by the department;

(ii) The taxpayer challenges a long-standing departmental policy or a rule that the department will not change unless the policy or rule is declared invalid by a court of record;

(iii) The taxpayer presents issues that have no basis upon which relief for the taxpayer can be granted or given. Settlement will not be considered if the taxpayer's offer of settlement is simply to eliminate the inconvenience or cost of further negotiation or litigation, and is not based upon the merits of the case;

(iv) The taxpayer's only argument is that a statute is unconstitutional; or

(v) The taxpayer's only argument is financial hardship. Financial hardship issues are properly discussed with the department's compliance division.

(c) Each settlement is concluded by a closing agreement signed by both the department and the taxpayer as provided by RCW 82.32.350 and is binding on both parties as provided in RCW 82.32.360. A closing agreement has no precedential value.

[Statutory Authority: RCW 82.32.300, 82.01.060 (2) and (4), 05-20-036, § 458-20-100, filed 9/29/05, effective 11/1/05. Statutory Authority: RCW 82.32.300, 90-24-049, § 458-20-100, filed 11/30/90, effective 1/1/91; 83-07-032 (Order ET 83-15), § 458-20-100, filed 3/15/83; Order ET 75-1, § 458-20-100, filed 5/2/75; Order ET 70-3, § 458-20-100 (Rule 100), filed 5/29/70, effective 7/1/70.]

# APPENDIX

## I

WAC 458-20-229  
Refunds.

(1) **Introduction.** This section explains the procedures relating to refunds or credits for the overpayment of taxes, penalties, or interest. It describes the statutory time limits for refunds and the interest rates that apply to those refunds.

References to a "refund application" in this section include a request for a credit against future tax liability as well as a refund to the taxpayer.

Examples provided in this section should be used only as a general guide. The tax results of other situations must be determined after a review of all facts and circumstances.

(2) **What are the time limits for a tax refund or credit?**

(a) **Time limits.** No refund or credit may be made for taxes, penalties, or interest paid more than four years before the beginning of the calendar year in which a refund application is made or examination of records by the department is completed. See RCW 82.32.060. This is a nonclaim statute rather than a statute of limitations. This means a valid application must be filed within the statutory period, which may not be extended or tolled, unless a waiver extending the time for assessment has been entered into as described in (c) of this subsection.

For example, a refund or credit may be granted for any overpayment made in a shaded year in the following chart:

Year 1	Year 2	Year 3	Year 4	Year 5	Year 6
					Refund application is filed no later than December 31 <sup>st</sup>

(b) **Relation back to date paid.** Because the time limits relate to the date the taxes, penalties, or interest is paid, a refund application can be timely even though the payment concerned liabilities for a tax year normally outside the time limits. For example, Taxpayer P owes \$1,000 in B&O tax for activity undertaken in December 2000. In January 2001, Taxpayer P makes an arithmetic error and submits a payment of \$1,500 with its December 2000 tax return. In December 2005, Taxpayer P requests a refund of \$500 for the overpayment of taxes for the December 2000 period. This request is timely because the overpayment occurred within the time limits, even though the payment concerned tax liabilities incurred (December 2000) outside the time limits.

Fact situations can be complicated. For example, Taxpayer P pays B&O taxes in Years 1 through 4. The department subsequently conducts an audit of Taxpayer P that includes Years 1-4. The audit is completed in Year 5. As a result of the audit, the department issues an assessment in Year 5 for \$50,000 in additional retail sales taxes that were due from Years 1-4. Taxpayer P pays the assessment in full in Year 6. In Year 10, Taxpayer P files an application requesting a refund of B&O taxes. Taxpayer P's application is timely because it relates to a payment (payment of the assessment in Year 6) made no more than four years before the year in which the application is filed. It does not matter that the taxes relate to years outside the time limits; the actual payment occurred within four years before the refund application. Nor does it matter that the refund is based on an overpayment of B&O taxes while the assessment involved retail sales taxes, because both taxes relate to the same tax years. However, the amount of any refund is limited to \$50,000 - the amount of the payment that occurred within the time limits.

Assume the same facts as described above. When the department reviews Taxpayer P's refund application, it determines that the refund is valid. After reviewing the new information, however, the department also determines that Taxpayer P should have paid \$20,000 in additional B&O taxes during Years 1-4. Because Taxpayer P paid \$30,000 more than the amount properly due (\$50,000 overpayment less \$20,000 underpayment), the amount of the refund will be \$30,000.

(c) **Waiver.** Under RCW 82.32.050 or 82.32.100, a taxpayer may agree to waive the time limits and extend the time for the assessment of taxes, penalties and interest. If the taxpayer executes such a waiver, the time limits for a refund or credit are extended for the same period.

(3) **How do I get a refund or credit?**

(a) **Departmental examination of returns.** If the department performs an examination of the taxpayer's records and determines that the taxpayer has overpaid taxes, penalties, or interest, the department will issue a refund or a credit, at the taxpayer's option. In this situation, the taxpayer does not need to apply for a refund.

(b) **Taxpayer application.**

(i) If a taxpayer discovers that it has overpaid taxes, penalties, or interest, it may apply for a refund or credit. Refund application forms are available from the following sources:

- The department's internet web site at <http://dor.wa.gov>
- By facsimile by calling Fast Fax at 360-705-6705 or 800-647-7706 (using menu options)
- By writing to:

Taxpayer Services

Washington State Department of Revenue

P.O. Box 47478

Olympia, WA 98504-7478.

The application form should be submitted to the department at the following location:

Taxpayer Account Administration

P.O. Box 47476

Olympia, WA 98504-7476.

Taxpayers are encouraged to use the department's refund application form to ensure that all necessary information is provided for a timely valid application. However, while use of the department's application form is encouraged, it is not mandatory and any written request for refund or credit meeting the requirements of this section shall constitute a valid application. Filing an amended return showing an overpayment will also constitute an application for refund or credit, provided that the taxpayer also specifically identifies the basis for the refund or credit.

(ii) A taxpayer must submit a refund application within the time limits described in subsection (2)(a) of this section. An application must contain the following five elements:

(A) The taxpayer's name and UBI/TRA number must be on the application.

(B) The amount of the claim must be stated. Where the exact amount of the claim cannot be specifically ascertained at time of filing, the taxpayer may submit an application containing an estimated claim amount. Taxpayers must explain why the amount of the claim cannot be stated with specificity and how the estimated amount of the claim was determined.

(C) The tax type and taxable period must be on the application.

(D) The specific basis for the claim must be on the application. Any basis for a refund or credit not specifically identified in the initial refund application will be considered untimely, except that an application may be refiled to add additional bases at any time before the time limits in subsection (2) of this section expire.

(E) The signature of the taxpayer or the taxpayer's representative must be on the application. If the taxpayer is represented, the confidential taxpayer information waiver signed by the taxpayer specifically for that refund claim must be received by the department by the date the substantiation documents are first required, without regard to any extensions. If the signed confidential taxpayer information waiver for the refund claim lists the representative as an entity, every member or employee of that entity is authorized to represent the taxpayer. If the signed confidential taxpayer information waiver for the refund claim lists the representative as an individual, only that individual is authorized to represent the taxpayer.

(iii) If the nonclaim statute has run prior to the filing of the application, the department will deny the application and notify the taxpayer.

(iv) If the department determines that the taxpayer is not entitled to a refund as a matter of law, the application may be denied without requiring substantiation. The taxpayer shall be responsible for maintaining substantiation as may eventually be needed should taxpayer appeal.

(v) The taxpayer is encouraged to file substantiation documents at the time of filing the application. However, once an application is filed, the taxpayer must submit sufficient substantiation to support the claim for refund or credit before the department can determine whether the claim is valid. The department will notify the taxpayer if additional substantiation is

required. The taxpayer must provide the necessary substantiation within ninety days after such notice is sent, unless the documentation is under the control of a third party, not affiliated with or under the control of the taxpayer, in which case the taxpayer will have one hundred eighty days to provide the documentation. The department may request any other books, records, invoices or electronic equivalents and, where appropriate, federal and state tax returns to determine whether to accept or deny the claimed refund and to assess an existing deficiency.

(vi) In its discretion and upon good cause shown, the department may extend the period for providing substantiation upon its own or the taxpayer's request, which may not be unreasonably denied.

(vii) If the department does not receive the necessary substantiation within the applicable time period, the department shall deny the claim for lack of adequate substantiation and shall so notify the taxpayer. Any application denied for lack of adequate substantiation may be filed again with additional substantiation at any time before the time limits in subsection (2) of this section expire. Once the department determines that substantiation is sufficient, the department shall process the refund claim within ninety days, except that the department may extend the time of processing such claim upon notice to the taxpayer and explanation of why the claim cannot be completed within such time.

(viii) The following examples illustrate the refund application process:

(A) A taxpayer discovers in January 2005 that its June 2004 excise tax return was prepared using incorrect figures that overstated its sales, resulting in an overpayment of tax. The taxpayer files an amended June 2004 tax return with the department's taxpayer account administration division. The department will treat the taxpayer's amended June 2004 tax return as an application for a refund or credit of the amounts overpaid during that tax period, except that the taxpayer must also specifically identify the basis for the refund or credit and provide sufficient substantiation to support the claim for refund or credit. The taxpayer may satisfy this obligation by submitting a completed refund application form with its amended return or providing the additional required substantiation by other means.

(B) On December 31, 2005, a taxpayer files an amended return for the 2001 calendar year. The return includes changed figures indicating that an overpayment occurred, but does not provide any supporting substantiation. No written waiver of the time limits, under subsection (2)(c) of this section, for this time period exists. The department sends a letter notifying the taxpayer that the taxpayer's application is not complete and substantiation must be provided within ninety days or the application will be denied. If the taxpayer does not provide the necessary substantiation by the stated date, the claim will be denied and, if refiled, will not be granted because it is then past the nonclaim limit of the statute.

(C) Taxpayer submits a refund application on December 31, 2004, claiming that taxpayer overpaid use tax in 2000 on certain machinery and equipment obtained by the taxpayer at that time. No substantiation is provided with the application and no written waiver of the time limit, under subsection (2)(c) of this section, for this taxable period exists. The department sends a letter notifying the taxpayer that the taxpayer's application is not complete and substantiation must be provided within ninety days or the application will be denied. The taxpayer does not respond by the stated date. The claim will be denied and, if refiled, will not be granted since it is then past the nonclaim limit of the statute.

(D) Assume the same facts as in (b)(viii)(B) and (C) of this subsection, except that within ninety days from the date the department sent the letter the taxpayer submits substantiation, which the department deems sufficient. The taxpayer's claim is valid, notwithstanding that the substantiation was provided after the nonclaim limit expired.

(E) Assume the same facts as in (b)(viii)(B) and (C) of this subsection, except that before the ninety-day period expires, the taxpayer requests an additional fifteen days in which to respond, explaining why the substantiation will require the additional time to assemble. The department agrees to the extended deadline. If the taxpayer submits the requested substantiation within the resulting one hundred five-day period, the department will not deny the claim for failure to provide timely substantiation.

(F) Assume the same facts as in (b)(iii)(B) and (C) of this subsection, except that the taxpayer submits substantiation within ninety days. The department reviews the substantiation and finds that it is still insufficient. The department, in its discretion, may extend the deadline and request additional substantiation from the taxpayer or may deny the refund claim as not substantiated.

**(4) May I get a refund of retail sales tax paid in error?**

(a) **Refund from seller.** Except as provided for in RCW 82.08.130 regarding deductions for tax paid at source, if a buyer pays retail sales tax on a transaction that the buyer later believes was not taxable, the buyer should request a refund or credit directly from the seller from whom the purchase was made. If the seller determines the tax was not due and issues a refund or credit to the buyer, the seller may seek its own refund from the department. It is better for a buyer to seek a retail sales tax refund directly from the seller. This is because the seller has the records to know if retail sales tax was collected on the original sale, knows the buyer, knows the circumstances surrounding the original sale, is aware of any disputes between itself and the buyer concerning the product, and may already be aware of the circumstances as to why a refund of sales tax is or is not appropriate. If a seller questions whether he or she should refund sales tax to a buyer, the seller may request advice from the department's telephone information center at 1-800-647-7706.

(b) **Refund from department.** In certain situations where the buyer has not received a refund from the seller, the

**APPENDIX I**

department will refund retail sales tax directly to a buyer. The buyer must file a complete refund application as described in subsection (3)(b) of this section and either a seller's declaration or a buyer's declaration, under penalty of perjury, must be provided for each seller.

(i) If the buyer is able to obtain a waiver from the seller of the seller's right to claim the refund, the buyer should file a seller's declaration, under penalty of perjury, with the refund application. A seller's declaration substantiates that:

- (A) Retail sales tax was collected and paid to the department on the purchase for which a refund is sought;
- (B) The seller has not refunded the retail sales tax to the buyer or claimed a refund from the department; and
- (C) The seller will not seek a refund of the sales tax from the department.

(ii) If the seller no longer exists, the seller refuses to sign the declaration, under penalty of perjury, or the buyer is unable to locate the seller, the buyer should file a buyer's declaration, under penalty of perjury, with the refund application. The buyer's declaration explains why the buyer is unable to obtain a seller's declaration and provides information about the seller and declares that the buyer has not obtained and will not in the future seek a refund from the seller for that claim.

(iii) Seller's declaration, under penalty of perjury, and buyer's declaration, under penalty of perjury, forms are available from the following sources:

- The department's internet web site at <http://dor.wa.gov>
- By facsimile by calling Fast Fax at 360-705-6705 or 800-647-7706 (using menu options)
- By writing to:

Taxpayer Services

Washington State Department of Revenue

P.O. Box 47478

Olympia, WA 98504-7478.

**(5) May I use statistical sampling to substantiate a refund?** Sampling will only be used when a detailed audit is not possible. However, if your applications for refund or credit involve voluminous documents, the preferred method for substantiating your application is the use of statistical sampling. Alternative methods of sampling, including but not limited to, random sampling, time period sampling, transaction sampling, and block sampling, may be used when the department agrees that such methods are appropriate.

When using statistical sampling or an alternative method to substantiate an application for refund or credit, the applicant must contact the department prior to preparing the sampling to obtain the department's approval of the sampling plan. The sampling plan will describe the following:

- Population and sampling frame;
- Sampling unit;
- Source of the random numbers;
- Who will physically locate the sample units and how and where they will be presented for review;
- Any special instructions to those who were involved in reviewing the sample units;
- Special valuation guidelines to any of the sample units selected in the sample;
- How the sample will be evaluated, including the precision and confidence levels; and
- The applicant must obtain a seller's declaration from those sellers identified in the sample and separately certify, under penalty of perjury, that applicant will not otherwise request or accept a refund or credit for sales or deferred sales tax paid to any seller or any use tax remitted during the taxable period covered by the audit.

Failure to contact the department before preparing the sampling may result in the department rejecting the application on the grounds that the results are not statistically valid.

Contact the department prior to performing a statistical sampling at these locations:

- The department's internet web site at <http://dor.wa.gov>
- By facsimile by calling Fast Fax at 360-705-6705 or 800-647-7706 (using menu options)
- By writing to:

Taxpayer Services

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P.O. Box 47478

Olympia, WA 98504-7478.

(6) **Is my refund final?** The department may review a refund or credit provided on the basis of a taxpayer application without an examination by audit. If the refund or credit is granted and the department subsequently determines that the refund or credit exceeded the amount properly due the taxpayer, the department may issue an assessment to recover the excess amount. This assessment must be made within the time limits of RCW 82.32.050.

(7) **Refunds made as a result of a court decision.** The department will grant refunds or credits required by a court or Board of Tax Appeals decision, if the decision is not under appeal.

If the court action requires the refund or credit of retail sales taxes, the department will not require that buyers attempt to obtain a refund directly from the seller if it would be unreasonable and an undue burden on the buyer. In such a case, the department may refund the retail sales tax directly to the buyer and may use the public media to notify persons that they may be entitled to refunds or credits. The department will make available special refund application forms that buyers must use for these situations. The application will request the appropriate information needed to identify the buyer, item purchased, amount of sales tax to be refunded, and the seller. The department may, at its discretion, request additional documentation that the buyer could reasonably be expected to retain, based on the particular circumstances and value of the transaction. The department will approve or deny such refund requests within ninety days after the buyer has submitted all documentation.

(8) **What interest is due on my refund?** Interest is due on a refund or credit granted to a taxpayer as provided in this subsection.

(a) **Rate for overpayments made between 1992 through 1998.** For amounts overpaid by a taxpayer between January 31, 1991 and December 31, 1998, the rate of interest on refunds and credits is:

- (i) Computed the same way as the rate provided under (b) of this subsection minus one percent, for interest allowed through December 31, 1998; and
- (ii) Computed the same way as the rate provided under (b) of this subsection, for interest allowed after December 31, 1998.

(b) **Rate for overpayments after 1998.** For amounts overpaid by a taxpayer after December 31, 1998, the rate of interest on refunds and credits is the average of the federal short-term rate as defined in 26 U.S.C. Sec. 1274(d) plus two percentage points. The rate is adjusted on the first day of January of each year by taking an arithmetical average to the nearest percentage point of the federal short-term rate, compounded annually, for the months of January, April and July of the immediately preceding calendar year and October of the previous preceding year, as published by the United States Secretary of Treasury.

(c) **Start date for the calculation of interest.** If the taxpayer made all overpayments for each calendar year and all reporting periods ending with the final month included in a credit notice or refund on or before the due date of the final return for each calendar year or the final reporting period included in the notice or refund, interest is computed from either:

- (i) January 31st following each calendar year included in a notice or refund; or
- (ii) The last day of the month following the final month included in a notice or refund.

If the taxpayer did not make all overpayments for each calendar year and all reporting periods ending with the final month included in the notice or refund, interest is computed from the last day of the month following the date on which payment in full of the liabilities was made for each calendar year included in a notice or refund, and the last day of the month following the date on which payment in full of the liabilities was made if the final month included in a notice or refund is not the end of a calendar year.

(d) **Calculation of interest on credits.** The department will include interest on credit notices with the interest computed to

## APPENDIX I

the date the taxpayer could reasonably be expected to use the credit notice, generally the due date of the next tax return. If a taxpayer requests that a credit notice be converted to a refund, interest is recomputed to the date the refund (warrant) is issued, but not to exceed the interest that would have been granted through the credit notice.

**(9) May the department apply my refund against other taxes I owe?** The department may apply overpayments against existing deficiencies and/or future assessments for the same legal entity. However, if preliminary schedules have not been issued regarding existing deficiencies or future assessments and the taxpayer is not presently under audit, the refund of an overpayment may not be delayed when the department determines a refund is due. The following examples illustrate the application of overpayments against existing deficiencies:

(a) The taxpayer's records are audited for the period Year 1 through Year 4. The audit disclosed underpayments in Year 2 and overpayments in Year 4. The department will apply the overpayments in Year 4 to the deficiencies in Year 2. The resulting amount will indicate whether a refund or credit is owed the taxpayer or whether the taxpayer owes additional tax.

(b) The department has determined that the taxpayer has overpaid its real estate excise tax. The department believes that the taxpayer may owe additional B&O taxes, but this has yet to be established. The department will not delay the refund of the real estate excise tax while it schedules and performs an audit for the B&O taxes.

(c) The department simultaneously performed a timber tax audit and a B&O tax audit of a taxpayer. The audit disclosed underpayments of B&O tax and overpayments of timber tax. Separate assessments were issued on the same date, one showing additional taxes due and the other overpayments. The department may apply the overpayment against the tax deficiency assessment since both the underpayment and overpayment have been established.

**(10) How do I appeal the department's decision?** The taxpayer may appeal the denial of: A refund claim (or any part thereof, including tax, penalties, or interest overpayments), a request for an extension for providing substantiation, or a request to use a specific sampling technique. Taxpayer may appeal to either:

- (a) The department as provided in WAC 458-20-100, Appeals, small claims and settlements; or
- (b) Directly to Thurston County superior court.

**(11) Application.** This section applies to refund applications or amended returns showing overpayments, where the taxpayer has also specifically identified the basis for the refund or credit, that are received by the department on or after the effective date of this section.

[Statutory Authority: RCW 82.01.060(2) and 82.32.300. 08-14-038, § 458-20-229, filed 6/23/08, effective 7/24/08; 07-17-065, § 458-20-229, filed 8/13/07, effective 9/13/07. Statutory Authority: RCW 82.32.300. 93-04-077, § 458-20-229, filed 2/1/93, effective 3/4/93; 83-08-026 (Order ET 83-1), § 458-20-229, filed 3/30/83; Order ET 70-3, § 458-20-229 (Rule 229), filed 5/29/70, effective 7/1/70.]

COURT OF APPEALS  
DIVISION II

NO. 40923-2-II

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

STATE OF WASHINGTON  
BY Candy Zilinskas  
DEPUTY

WELLS FARGO BANK, N.A.,

Appellant,

v.

DEPARTMENT OF REVENUE,  
STATE OF WASHINGTON

Respondent.

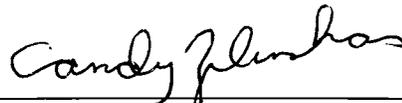
CERTIFICATE OF  
SERVICE

I certify that I served a true and correct copy of the Brief of Respondent, via Electronic mail and U.S. Mail, postage prepaid, through Consolidated Mail Services, on the following:

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

DATED this 27th day of December, 2010, at Tumwater, WA.



CANDY ZILINSKAS, Legal Assistant

**ORIGINAL**