

No. 42159-3-II  
Thurston County Cause No. 10-2-00363-8

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

**DONALD R. WATTS, DONALD L. ODEGARD,  
AND STEPHEN D. BANNWORTH,**

Appellants,

v.

**WASHINGTON STATE DEPARTMENT OF REVENUE,**

Respondent.

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**OPENING BRIEF OF APPELLANTS**

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## **I. ASSIGNMENT OF ERROR**

The Appellants (hereinafter “Taxpayers”) assign error to Thurston County Superior Court’s grant of the Washington Department of Revenue’s (hereinafter “DOR”) motion for summary judgment and denial of Taxpayers’ motion for summary judgment, entered on April 29, 2011.

## **II. ISSUES PERTAINING TO ASSIGNMENT OF ERROR**

Taxpayers have carried the burden of proof by establishing that the Washington Real Estate Excise Tax (“REET”) as applied to a change of control is an invalid application of the REET and is unconstitutional as explained in the following arguments.

1. The Disputed Excise Tax<sup>1</sup> assessed under RCW §§ 82.45.010 and 82.45.030, as applied to Taxpayers, is an invalid excise tax not directly imposed on the value of real property which Taxpayers enjoyed the privilege of transferring and for which they received no consideration.
2. The Disputed Excise Tax assessed under RCW §§ 82.45.010 and 82.45.030, as applied to Taxpayers, is an

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<sup>1</sup> See definition of “Disputed Excise Tax” on page 5.

invalid excise tax imposed on the right to own or hold property.

3. The Disputed Excise Tax assessed under RCW §§ 82.45.010 and 82.45.030 as applied to Taxpayers, is an unconstitutional, nonuniform property tax under Wash. Const. art. VII § 1.
4. The Disputed Excise Tax assessed under RCW §§ 82.45.010 and 82.45.030, as applied to Taxpayers, is unconstitutional under the Equal Protection and Due Process Clauses of both the United States Constitution and the Washington State Constitution.

### **III. STATEMENT OF THE CASE**

#### **A. Factual Background**

Donald R. Watts, Donald L. Odegard and Stephen D.

Bannworth, Taxpayers, seek a refund of \$478,993.65 from the DOR, plus interest as provided by RCW § 82.32.050 (2), because the Disputed Excise Tax is either (1) an invalid excise tax not imposed to the extent of the taxable privilege enjoyed by the sale of real property by the Taxpayers; (2) an invalid excise tax because it is imposed on the form of ownership of real property through an LLC, or in other words, the Disputed Excise Tax is invalid because it is imposed on the right to own or hold the underlying real property which was not owned, sold or transferred by Taxpayers; (3) an unconstitutional, nonuniform property tax which imposed a tax on the entire value of the underlying real property of an LLC when only 50.01% of that LLC was transferred by Taxpayers or; (4) finally, it is unconstitutional under the Equal Protection and Due Process Clauses of both the United States Constitution and the Washington State Constitution because the Taxpayers were taxed but received no economic benefit for the portion not owned, sold or transferred by them.

In February 2008, Watts Brothers Farms, LLC, a Washington limited liability company (“WBF”) was owned by Taxpayers in the following percentages:

|                      |     |
|----------------------|-----|
| Donald R. Watts      | 80% |
| Donald L. Odegard    | 10% |
| Stephen D. Bannworth | 10% |

Stip. ¶ 1.

WBF owned a 50.01% interest in 100 Circles Farms, LLC (“100 Circles”), the other 49.99% of which was owned by ConAgra Lamb Weston, Inc. (“ConAgra”). Stip. ¶ 2; Ex. 2. 100 Circles directly owned certain Washington real property consisting of approximately 19,400 acres of farm land in Benton County, Washington (“Property”). Stip. ¶ 3. On February 25, 2008, Taxpayers sold WBF to ConAgra and thereby transferred, by sale, the 50.01% interest in 100 Circles owned by WBF to ConAgra. Stip. ¶ 4.

Taxpayers computed and paid the REET based on a literal reading of RCW §§ 82.45.010 and 82.45.030, which require that the entire agreed upon fair market value of the Property owned by 100 Circles, \$62,626,074.79, be included in the tax base for computation of

the REET due, even though only 50.01% of 100 Circles was actually owned, transferred and sold by the Taxpayers. Stip. ¶ 7.

The fair market value of the Property actually owned, transferred and sold by Taxpayers was only \$31,319,300, which is 50.01% of \$62,626,074.79. The remaining 49.99% of the Property's value, owned by ConAgra through its 49.99% interest in 100 Circles ("ConAgra Portion") and having a fair market value of \$31,306,774.79, was not owned, transferred or sold by WBF. ConAgra possessed all of the economic benefits of the ownership of its 49.99% interest in 100 Circles before and after the transfer. The Taxpayers paid the REET related to the ConAgra Portion, in the amount of \$478,993.65 ("Disputed Excise Tax"), under protest since Taxpayers did not own, did not transfer and received no consideration related to the ConAgra Portion. Taxpayers then filed a request for refund with the DOR on January 20, 2009. Stip. ¶¶ 8, 9, 10; Exs. 3, 4.

The DOR's Audit Division denied Taxpayers' request for refund of the Disputed Excise Tax, and Taxpayers appealed that decision to the DOR's Appeals Division. Stip. ¶¶ 11, 12; Ex. 5. A hearing was conducted on October 20, 2009, and on February 2, 2010, the Appeals Division made final its decision to deny the Taxpayers' request for

refund. Stip. ¶ 13; Ex. 6. The Taxpayers exhausted their administrative remedies before seeking judicial review in Thurston County Superior Court.

Taxpayers brought their request for refund of the Disputed Excise Tax to the Thurston County Superior Court in order to appeal Washington Department of Revenue Determination No. 10-0037 relating to Taxpayers' Excise Tax Refund Request #950020035 (Stip. Ex. 4); TRA #950 020 038, (Stip. Exs. 5, 6.), denying Taxpayers' request for refund of real estate excise taxes paid in the amount of \$478,993.65. The total REET assessed and paid by Taxpayers was \$1,320,643.60, of which Taxpayers seek a refund in the amount of \$478,993.65, plus interest as provided by RCW § 82.32.050 (2) related to the ConAgra Portion. The remaining tax paid, in the amount of \$841,649.95, is not contested.

Taxpayers' arguments made in support of their claim for refund are based on well-established Washington case law and Washington Supreme Court precedents. Stip. Ex. 4. Based on the support of this authority and case law analysis, Taxpayers object to the DOR improperly imposing an excise tax that goes beyond the extent of the taxable privilege enjoyed by Taxpayers, is imposed on the form of ownership

and thus, the right to own or hold property, and is applied in a nonuniform manner. The DOR has repeatedly failed to provide any analysis for denying each of Taxpayers' substantive arguments outlined herein and previously by Taxpayers in their application for refund. Stip. Ex. 6.

Taxpayers and the DOR stipulated facts and exhibits before the Thurston County Superior Court, as set forth in the Stipulation of Facts ("Stip.") and Exhibits ("Ex."), plus a Declaration of D. John Thornton, and exhibits attached thereto. The Taxpayers and the DOR filed cross motions for summary judgment and presented oral arguments on April 29, 2011. The Thurston County Superior Court entered judgment in favor of the DOR on April 29, 2011.

#### **B. Washington's REET- Technical Background**

The following background of the REET is provided in support of Taxpayers' arguments advanced below (See IV. Argument). The Disputed Excise Tax assessed under RCW §§ 82.45.010 and 82.45.030, (1) is a tax on the transfer of real property, not a tax on the transfer of the entity; (2) is valid as applied to direct transfers of real property, but invalid as applied to a change of control; and (3) results in extending the

tax base beyond the privilege enjoyed by the taxpayer in the transfer of real property.

**Not an Excise Tax on the Transfer of the Entity.** There is no Washington statute that triggers an excise tax on the sale of a controlling interest in a corporation or partnership except to the extent the entity owns real property. The sale of 50% or more of a business that does not own Washington real property is not subject to the REET. RCW §§ 82.45.010 (2) (a) and 82.45.033 (1) (a). The sole nexus for the imposition of the REET is the ownership of Washington real property. Obviously, the REET was not imposed on the transfer of the 50.01% LLC interest, but rather on the underlying real property, i.e. property that was indirectly owned by both of the owners of 100 Circles.

Accordingly, the REET was *not* properly imposed based on the privilege of selling a controlling interest in an entity that owns Washington real property. The REET, whether applied to a direct transfer of real property or to a change of control, is a transfer tax on real property and accordingly, should be limited to and computed based on the value of the real property actually transferred. RCW § 82.45.010 (1) defines “sale” as “any conveyance, grant, assignment, quitclaim, or transfer of the ownership of or title *to real property.*” (Emphasis

added.) In order to prevent taxpayers from avoiding the REET by transferring real property held in an entity, RCW § 82.45.010 (2) extends the definition of “sale” to include “the transfer or acquisition ... of a controlling interest in any entity with an interest in real property located in this state for a valuable consideration.” The REET does not in any way apply to the transfer of an interest in an entity. Rather, the REET applies to the transfer of real property; and in those cases when an entity owns Washington real property, the REET, if properly applied, would merely be imposed on the value of the share of the real property transferred.

The RCW provisions that seek to impose the REET on the sale of real property relate *only to real property*. There is no Washington statute that triggers an excise tax on the sale of a controlling interest in a corporation or partnership, except to the extent the entity owns Washington real property. If this was a sale of a 50.01% interest in a business that did not own Washington real property, there would be absolutely no basis for the state of Washington to impose the REET. The ownership of real property by an entity provides the sole nexus for imposition of the REET. In this case, the REET was imposed on not only the transfer of the 50.01% of the underlying real property, but also

on the other 49.99% of the underlying real property owned by ConAgra, which Taxpayers did not and could not have conveyed.

There is no Washington law that provides for the imposition of an excise tax – in this case, the REET – on the sale of an interest in any business entity. Rather, the REET is applied only when an entity owns Washington real property and 50% or more of that entity is transferred. In such cases, the REET is only valid to the extent of the real property transferred. (RCW §§ 82.45.010 and 82.45.030.)

**REET as Applied to Direct Transfers.** Taxpayers object to and clearly demonstrate, based on convincing legal research and analysis supported by established Washington case law, how the application of the REET to a change of control is invalid as to the portion of underlying real property which is not transferred. However, Taxpayers do not dispute the validity of the REET as applied to the direct transfer of real property. In *Mahler v. Tremper*, 20 Wn.2d 405, 406-407, 243 P.2d 627 (1952), the Washington Supreme Court upheld the REET on a direct transfer of real property as a valid excise tax. However, *Mahler* was decided in 1952 and addressed a direct transfer of real property. The court did not address the application of the REET as applied to a change of control. The change-of-control provisions were not added for another

40 years, in 1993. Accordingly, *Mahler* does not stand for the proposition that the application of the REET is valid on a change of control.

The Disputed Excise Tax is not valid in this case because the Taxpayers were taxed on the underlying value of real property not actually owned or transferred by Taxpayers and for which no consideration was received.

**Sales Tax Analogy.** Taxpayers note that sales taxes and real estate excise taxes are both excise taxes imposed on the privilege of transferring ownership, with the tax rate applied to a tax base equal to the value of the property actually transferred. The tax base for the sales tax is limited to the proceeds or amount of the sale (RCW § 82.04.070). A sales tax imposed on more than the amount of the value of property sold or transferred would result in an invalid sales tax, because the sales tax would not be imposed based on the extent the buyer enjoyed the taxable privilege of the sale. *Covell v. Seattle*, 127 Wn.2d 874, 889, 905 P.2d 324 (1995); and *Sheehan*, 123 P.3d 88 (2005).

The aspects of the change-of-control provisions make the tax in this case behave the way the tax did in *Harbour Village Apts. v.*

*Mukilteo*, 139 Wn.2d 604, 989 P.2d 542, (Wash. 2005), when an excise tax was improperly applied to rental units not actually rented.

**Extending the Tax Base Beyond the Privilege Enjoyed.** The REET, as applied to a change of control, is imposed on a tax base which includes the value of real property that is not transferred. Due to Taxpayers' ownership of the underlying real property through 100 Circles, the DOR imposed the REET on the value of not only the underlying real property transferred by Taxpayers, but also the value of the real property which was not owned or transferred by Taxpayers. As in *Harbour Village* (discussed below), to tax the value of the property not transferred is to tax the ownership of that property, and as such, is an invalid excise tax on the mere form of ownership.

The REET is a transfer tax on Washington real property. In this case, by extending the tax base to include the entire value of the underlying real property which was not transferred, is to simply impose an excise tax based on the manner of ownership of the ConAgra Portion. The only difference between a transfer of the 50.01% interest in 100 Circles and a direct transfer of the same amount of real property represented by the 50.01% of 100 Circles is the entity layer of ownership, which results in an additional tax to Taxpayers of

\$478,993.65. Accordingly, the incidents of the Disputed Excise Tax is the ownership of real property by ConAgra, which results in a nonuniform property tax that is unconstitutional under the Washington Constitution art. VII § 1.

For purposes of clarity, Taxpayers have defined the portion of the real property, which was not actually owned or transferred by Taxpayers, as the “ConAgra Portion.” Taxpayers do not and have not claimed that ConAgra was taxed. Rather, Taxpayers were taxed based on the value of real property owned by ConAgra, which was not transferred or transferable by Taxpayers and for which Taxpayers received absolutely no consideration.

Taxpayers take issue with the improper application of the REET to a tax base that included the value of real property which was not owned or transferred by the Taxpayers and for which Taxpayers received no consideration upon the transfer. The Disputed Excise Tax is invalid because the tax was (1) not imposed to the extent of the privilege enjoyed and triggered by a voluntary act; and (2) was imposed on the right to own or hold property. In advancing these arguments, Taxpayers have pointed out that the amount of the REET was based on not only the consideration received for the value of the underlying real property

which was transferred by Taxpayers, but also the value of the real property owned by ConAgra that was not transferred and for which Taxpayers received no consideration. Similarly, in advancing the argument that the Disputed Excise Tax functions as a property tax, Taxpayers point out that because there is no actual transfer of the ConAgra Portion, to compute the REET by including the value of the ConAgra Portion is to tax the mere ownership of that real property because the ConAgra Portion was not transferred, similar to the unrented units in *Harbour Village* discussed below.

Taxing the transfer of real property on a tax base that is double the value of the underlying real property actually transferred, is similar to requiring a taxpayer to pay additional sales tax based on another shopper's items merely because the shoppers share the same shopping cart.

#### **IV. ARGUMENT**

The trial court erred in granting the DOR's motion for summary judgment. As discussed below, Taxpayers have met their burden of proof and are entitled to a refund of the Disputed Excise Tax in the amount of \$478,993.65, plus interest as provided by RCW § 82.32.050 (2). The Disputed Excise Tax is a tax on the transfer of real property

(not the entity). Accordingly, to extend the tax base to include the value of real property not owned or transferred results in an excise tax which, is (1) an invalid excise tax not directly imposed on the extent to which Taxpayers enjoyed the privilege of transferring property (*Sheehan v. Transit Auth.*, 155 Wn.2d 790, 815, 123 P.3d 88 (Wash. 2005)); (2) an invalid excise tax imposed on the right to own or hold property (*Harbour Village Apts. v. Mukilteo*, 139 Wn.2d 604, 611, 989 P.2d 542, (Wash. 1999)); (3) an unconstitutional, nonuniform property tax under Washington Constitution art. VII § 1 (*Harbour Village Apts. v. Mukilteo*); or (4) unconstitutional under the Equal Protection and Due Process Clauses of both the United States Constitution and the Washington State Constitution.

#### **A. Burden Of Proof**

A party asserting that a legislative enactment is unconstitutional bears the burden of establishing that the legislation is unconstitutional beyond a reasonable doubt. (*Washington State Grange v. Locke*, 153 Wn.2d 475, 486, 105 P.3d 9 (Wash. 2005)). The “reasonable doubt” standard, in the context of a statute being challenged as unconstitutional is not an evidentiary standard that requires a subjective state of certitude of the facts in issue. *Island County v. State*, 135 Wn.2d 141, 147, 955

P.2d 377 (1998). Rather, the one challenging a statute must, by argument, searching legal analysis and research, convince the court that there is no reasonable doubt that the statute violates the constitution. *Island County*, 135 Wn.2d at 147. Taxpayers sustain their burden of proof with the following legal analyses. Any of the following arguments, standing alone, are at least equivalent to the strength of the argument advanced by the taxpayers in *Harbour Village*. In that case, the burden of proof was a non-issue. Similarly, in this case, the Taxpayers have met their burden of proof, but have substantiated their case with significantly more legal reasoning and arguments than were set forth in *Harbour Village*.

**B. The Disputed Excise Tax is Invalid Because it is Imposed Without a Voluntary Act of a Transfer and is Not Based on the Extent to Which Taxpayers Enjoyed a Taxable Privilege of Transferring the ConAgra Portion.**

Washington State case law has stated that a valid excise tax requires two conditions: (1) the excise tax must be based on a voluntary act which affords the taxpayer the benefits of the activity which triggers the taxable event; and (2) the excise tax must be directly imposed based upon the extent to which the taxpayer enjoys the taxable privilege.

(*Covell, Black v. State*, 67 Wn.2d 97 (1965), 406 P.2d 761, *Harbour Village and Sheehan*, 155 Wn.2d 790, 799, 123 P.3d 88 (Wash. 2005)).

The REET imposed on the full value of the real estate owned by an entity when there is a mere change of control (RCW §§ 82.45.010 and 82.45.030) fails to satisfy either of the two requirements for a valid excise tax outlined by the Washington Supreme Court in *Sheehan*. The Disputed Excise Tax, which was imposed on the Taxpayers based on the value of the ConAgra Portion, is an invalid excise tax because: (1) the excise tax was imposed where there was no voluntary act by Taxpayers with respect to the transfer and sale of the ConAgra Portion, and, therefore, there was no event or nexus linking the ConAgra Portion to the excise tax; and (2) the excise tax imposed on the ConAgra Portion of 100 Circles was not directly imposed based upon the extent to which the Taxpayers received consideration for the transfer of real property and thus, was beyond the taxable privilege enjoyed by Taxpayers.

**No Voluntary Act.** The definition of a valid excise tax from *Sheehan, Black and Covell* requires the excise tax be imposed on a voluntary act, which not only affords the taxpayer the benefits of the activity, but which triggers the taxable event. In this case, the Disputed Excise Tax was not imposed on the voluntary act of transferring WBF's 50.01% interest in 100 Circles; rather, the Disputed Excise Tax was imposed on the ConAgra Portion for which there was no transfer or

voluntary act. Under Washington Supreme Court precedent, the triggering event for the imposition of a REET should be a direct or indirect transfer of real property.

Again, the Disputed Excise Tax was a tax on the transfer of real property, not a tax on the transfer of an interest in an entity.

Consequently, there was no event or nexus linking the Taxpayers to the ConAgra Portion, and the Disputed Excise Tax – the tax on the ConAgra Portion – was unrelated to the benefits to Taxpayers on transferring their interest in 100 Circles, because it was already owned by ConAgra and was not transferred. Stated another way, in a change of control, there is no voluntary act to justify the expansion of the tax base when it is the share of the underlying real property actually transferred – not the transfer of the entity – that is the proper measure of the taxable privilege. Accordingly, the first prong of *Sheehan* was not satisfied because the Disputed Excise Tax was not imposed on a voluntary act by Taxpayers which triggered a taxable event.

ConAgra owned 49.99% of 100 Circles, which owned \$62,626,074.79 worth of Washington real property. ConAgra possessed all of the benefits of ownership of its 49.99% interest before and after its purchase of the Taxpayers' 50.01% interest. In addition, ConAgra

shared income, expense, profits and losses equally with the Taxpayers before the sale. *See* Decl. of D. John Thornton, Ex. 1. The Taxpayers received consideration for precisely 50.01% of the assets of 100 Circles, and there was no premium received by the Taxpayers for selling a “controlling interest.” There was no voluntary act with respect to ConAgra’s 49.99% interest in 100 Circles as demonstrated by the fact that ConAgra owned this property before and after the Taxpayers’ sale to ConAgra, and Taxpayers received no consideration related to the ConAgra Portion. The DOR’s claim that there was a voluntary act with respect to the ConAgra Portion defies the facts because the REET is a tax on the transfer of real property, and the 49.99% was owned by ConAgra before and after the transaction. Yet, Taxpayers paid \$478,993.65 in excise taxes, which was based on the value of the ConAgra Portion, or 49.99% of the underlying real property owned by 100 Circles. In *Mahler v. Tremper*, 20 Wn.2d 405, 406-407, 243 P.2d 627 (1952), the voluntary act which triggered the REET was the direct transfer of real property. In *Morrow v. Henneford*, 182 Wash. 625, 47 P.2d 1016 (1935), the voluntary act which triggered the sales tax was the transfer of tangible personal property. In *Sheehan* the voluntary act which triggered the motor vehicle excise tax was the licensing of a motor

vehicle. Yet, if the motorist had been taxed on the value of some additional vehicle, there would not have been a voluntary act as far as the second vehicle. The tax rate in each of those cases was then applied to a tax base consisting of the value of the asset that was subject to a taxable privilege, such as the real estate actually transferred (*Mahler*), property actually sold (*Morrow*) and the value of the vehicle actually licensed (*Sheehan*). In any of those cases if the tax base for the excise tax included more than the value of the property transferred or licensed, there would not have been a voluntary act as to the *additional* property value.

The REET is a tax on the transfer of real property, not the entity that happens to own the underlying Washington real property. Accordingly, to tax 100% of the value of the real property owned by 100 Circles is to extend the tax base on a change of control to include the value of real property which was not transferred and for which no consideration was received. To say that the change of control as to the value of property not transferred is voluntary is to say that a vehicle excise tax which includes the value of an additional vehicle would also be voluntary. Furthermore, the tax on unrented units in *Harbour Village*

was a tax on mere ownership where there was no taxable activity or voluntary act, and was held to be invalid and unconstitutional.<sup>2</sup>

As to the ConAgra Portion, the first requirement for imposing a valid excise tax was not satisfied because Taxpayers did not transfer the ConAgra Portion.

**REET Not Directly Imposed To Extent of Privilege Enjoyed.**

The imposition of the Disputed Excise Tax was not based on the extent to which Taxpayers enjoyed the privilege or the economic benefit of transferring their interest in 100 Circles. *Sheehan v. Transit Authority* involved an excise tax imposed based on the value of the motor vehicle being licensed for use on public roadways. The Washington Supreme Court stated that since *Hansen v. Salter*, 190 Wn. 703, 705, 70 P.2d 1056 (Wash. 1937), the Court had approved of an excise tax on the privilege of relicensing a motor vehicle that is assessed against the value of that motor vehicle. In *Sheehan*, the Court found that, “the relationship between the legitimate decision to tax the privilege of relicensing a motor vehicle for use on public roadways and the method of using the value of a vehicle as the measure of that privilege is

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<sup>2</sup> The RDU fee was called a fee but was ruled to be a “tax” by the court in *Harbour Village* because of the way it behaved.

sufficient to avoid any constitutional infirmity.” A motor vehicle excise tax imposed similarly to the Disputed Excise Tax in this case would involve imposing an excise tax on not only the value of the vehicle being relicensed, but also the value of an additional vehicle that was not being relicensed.

In this case, the consideration received and thus, the extent of the privilege enjoyed, was limited to the value of the 50.01% interest in 100 Circles which was actually transferred and for which Taxpayers received consideration. To impose the REET on the value of an interest that was not transferred and for which no consideration was received, is well beyond what the Washington Supreme Court has established in *Sheehan* as a valid and constitutional application of an excise tax on the value of the underlying property.

Consider, for example, sales and use tax – sales and use tax bear similarities to the REET, both are an excise imposed on the privilege of transferring ownership of property, and the tax base for both is the value of the property transferred. In general, the sales tax is imposed on retail sales (RCW § 82.04.250) or tangible personal property (RCW § 82.04.040 and 82.04.050). The amount of the tax is limited to the proceeds of the sale (RCW § 82.04.070). Similar to the Disputed Excise

Tax, a sales tax imposed on more than the amount of the value of property sold or transferred would result in an invalid sales tax, because the sales tax would not be imposed based on the extent the buyer and seller enjoyed the taxable privilege of the sale. *Covell v. Seattle*, 127 Wn.2d 874, 889, 905 P.2d 324 (Wash. 1995) and *Sheehan*, 123 P.3d 88 (Wash. 2005).

**Precise Fit Argument from *Sheehan*.** In *Sheehan* the taxpayer argued that the value of the vehicle was not a precise measure of the taxable privilege enjoyed of using a motor vehicle on public roads. The court noted that a “precise” nexus between the activity being taxed and the measure of the tax is not required. *Sheehan* at 801. Thus, “the relationship between the legitimate decision to tax the privilege of relicensing a motor vehicle for use on public roadways and the method of using the value of a vehicle as the measure of that privilege is sufficient to avoid any constitutional infirmity.” *Id.*

In *Sheehan*, the taxpayer was arguing against the application of a motor vehicle excise tax, which was based on the value of the vehicle that was being licensed. The taxpayer in *Sheehan* argued that the excise was not adequately based on the extent to which the taxpayer enjoyed the privilege of licensing the vehicle for use on the roadways.

In the instant case, Taxpayers transferred 50.01% of 100 Circles, yet were required to pay the REET on the value of the underlying real property represented by not only the 50.01% actually transferred, but the other 49.99%, which was not owned by Taxpayers, was not transferred by Taxpayers and for which Taxpayers received no consideration. To put the facts in *Sheehan* on an equal footing with the facts in this case would result in a taxpayer relicensing a motor vehicle and being required to pay a tax based on the value of the vehicle being licensed, plus an additional vehicle. Similarly, a sales tax, which is also an excise tax, would not be imposed to the extent of the taxable privilege enjoyed in the sale if the tax was based on the value of property purchased by a shopper, plus the value of the items purchased by the next person in the same checkout line. Unlike *Sheehan*, Taxpayers do not argue for a more precise fit between the tax and privilege, rather, Taxpayers assert that they should only be required to pay the REET measured by the value of the real property they actually transferred and for which consideration was received, which is in harmony with the holding in *Sheehan*.

The REET is a transfer tax on real property, not a tax on the transfer of an interest in an entity. Accordingly, to impose the REET on the value of the underlying 49.99% of real property which was not

transferred or owned by Taxpayers is to tax well beyond the extent of the privilege enjoyed and is well beyond what the Washington Supreme Court has established in *Black*, *Covell* and *Sheehan* as a valid and constitutional application of an excise tax on the value of the property actually transferred. The imposition of the Disputed Excise Tax was not based on the extent to which Taxpayers enjoyed the taxable privilege or the economic benefit of transferring their interest in 100 Circles.

In a change of control the tax base is extended to include the value of real property which is not transferred and for which no consideration is received and taxes beyond the taxable privilege enjoyed. Extending the tax base to include the value of real property represented by the ConAgra Portion is virtually identical to the case in *Harbour Village* where a tax was held to be unconstitutional because it was applied to rental units which were not rented. In *Harbour Village* the tax was held invalid because it was applied to rental property for which there was no activity or taxable event, i.e. rental activity, resulting in a tax on mere ownership. Taxpayers do not dispute the validity of the REET on a direct transfer of real property, or the REET as to the 50.01% of the underlying real property actually transferred. Rather, Taxpayers challenge the application of the REET to a change of control because it

should be limited to the value of the underlying real property actually transferred.<sup>3</sup> The Disputed Excise Tax produces an anomaly similar to asking a shopper to pay sales tax, which is a form of excise tax, on items not actually purchased.

The second prong of the test of a valid excise tax set forth in *Sheehan (Covell, Black v. State*, 67 Wn.2d 97 (1965), 406 P.2d 761, *Harbour Village and Sheehan*, 155 Wn.2d 790, 799, 123 P.3d 88 (Wash. 2005)) was not satisfied because the Disputed Excise Tax was not imposed based on the extent to which the Taxpayers enjoyed the taxable privilege of transferring real property.

**The Limited Scope of *McFreeze*.** The Court of Appeals of Washington, in *McFreeze Corporation v. Dept. of Revenue*, 102 Wn. App. 196, 201, 6 P.3d 1187 (Wash. 2000), held that under the plain meaning of RCW § 82.45.030, the selling price for purposes of the REET is the full value of the real property owned by an entity where the sale is accomplished via a change of control. However, *McFreeze* only addressed the question of whether the statute is ambiguous, and the Court did not consider the constitutional implications of such a result of

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<sup>3</sup> The New York real estate transfer tax is apportioned on a change of control based on the percentage actually transferred. See pages 40-41 for a discussion of the New York statute. N.Y. Tax Law § 1401(d)(iii).

applying a nonuniform (higher) tax rate to real property transferred which is held in a business enterprise versus a transfer of real property by individuals without the entity layer of ownership. In addition, the court in *McFreeze* did not consider the argument that the REET as applied in a change of control is invalid. *McFreeze* predates the Washington Supreme Court decision in *Sheehan* 155 Wn.2d 790 (Wash. 2005), in which the *Sheehan* Court found that a valid excise tax must be based on a voluntary act, such as a transfer, and based on the extent of the taxable privilege and economic benefit enjoyed by the transferor. In addition, the taxpayer in *McFreeze* did not argue the validity of the change of control provisions based on established Washington case law, which also define a valid excise tax, such as in *Harbour Village* 139 Wn.2d 604 (Wash. 1999) or *Covell* 127 Wn.2d 874 (Wash. 1995). Therefore, the findings in *McFreeze* did not address the Washington Supreme Court standard for imposing a valid excise tax that was established in *Sheehan*, *Harbour Village* and *Covell*. Each of these cases addressed the validity of an excise tax and clearly state the test for determining the validity of an excise tax in Washington.

**C. The REET is Invalid Because it is a Tax on the Right to Own and Hold Property.**

As stated by both the United States Supreme Court and the Washington Supreme Court, an excise tax may not be imposed on the right to own and hold property. (*Dawson v. Kentucky Distilleries & Warehouse Co.*, 255 U.S. 288 (1921); *Harbour Village Apts. v. Mukilteo*, 139 Wn.2d 604 (Wash. 1999); *Jensen v. Henneford*, 185 Wash. 209, 218, 53 P.2d 607 (Wash. 1936); and *Apartment Operators Ass'n of Seattle, Inc. v. Schumacher*, 56 Wn.2d 46, 47, 351 P.2d 124 (1960)). “[T]he mere right to own and hold property cannot be made the subject of an excise tax, because to tax by reason of ownership of property is to tax the property itself.” *Jensen* at 218, citing *Dawson v. Kentucky Distilleries & Warehouse Co.*, 255 U.S. 288 (1921).

The Disputed Excise Tax at issue in this case was a tax on the right and form of ownership, because it was applied to the value of the ConAgra Portion, which was not owned or transferred by Taxpayers. In the present case, the Disputed Excise Tax was computed based on the transfer of 100% of the real property held by 100 Circles, rather than the pro rata value of the underlying real property for which the Taxpayers received consideration. The Washington Supreme Court has stated, “the character of a tax is determined by its incidents, not by its name.”

*Jensen v. Henneford*, 185 Wash. 209, 217 (Wash. 1936). Accordingly, the Disputed Excise Tax is not an excise tax merely because it is called one. An “excise tax” is an “obligation . . . based upon the voluntary action of the person taxed in performing the act, enjoying the privilege or engaging in the occupation which is the subject of the excise, and the element of absolute and unavoidable demand, as in the case of a property tax, is lacking.” *Covell v. Seattle*, 127 Wn.2d 874 (Wash. 1995).

However, in the present case there was no taxable privilege with respect to the ConAgra Portion because it was already owned by ConAgra and not transferred by the Taxpayers. Accordingly, the Disputed Excise Tax imposed on the ConAgra Portion was imposed based solely on the ownership of the underlying property by 100 Circles, not because any of the ConAgra Portion was transferred. The ConAgra Portion of 100 Circles Farms was neither owned nor transferred by Taxpayers or WBF, nor was any consideration received by Taxpayers related to the ConAgra Portion; it was taxed solely by reason of the form of ownership, and not the underlying value of the real property transferred, and was therefore an invalid excise tax sought to be imposed on property, and not the transfer of an interest in real property.

**Tax on Mere Ownership is a Property Tax – *Harbour Village*.**

In *Harbour Village Apts. v. Mukilteo*, 139 Wn.2d 604 (1999), residential apartment owners challenged a tax<sup>4</sup> which was applied to certain rental property for which there was no rental activity. In analyzing the question of whether the fee was an excise tax or property tax, the Court looked to the “character of the tax” which is “determined by its incidents, not by its name.” In *Harbour Village*, the “incident” or measure of the tax was the mere ownership of the subclass of real property defined by its use. Each unit of rental property was taxed regardless of whether it was actually rented, the number of transactions associated with the given unit, or any other factors usually associated with business activity, such as income. The tax at issue was not an excise on the mere privilege to conduct a rental business. In *Harbour Village*, if the tax at issue had been associated with the units actually rented, the number of transactions associated with each unit or other factor associated with the business activity, it could have been characterized as an excise tax. But to tax the rental property where no activity occurred was to tax by reason of ownership. Similarly, in this

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<sup>4</sup> The RDU fee was called a fee but was ruled to be a “tax” by the court in *Harbour Village* because of the way it behaved.

case, to tax the value of the 49.99% of 100 Circles, which was not owned or transferred by Taxpayers, is similar to the application of the tax in *Harbour Village* to the rental units which were not actually rented. There was no activity with respect to the ConAgra Portion, no transfer occurred. ConAgra did not pay and Taxpayers did not receive more consideration than the value of 50.01% of the underlying real property. Taxpayers were taxed on the value of the ConAgra Portion based merely on the form of ownership of the real property, or in other words, based on their right to own or hold real property in an LLC, rather than as tenants in common.

The Washington Supreme Court held that the fee in *Harbour Village* was not an excise on the mere privilege of doing business; rather “the incident of [the] tax [was] on rental property as such and a tax on rental property is no less a tax on property.” The Washington Supreme Court noted that, “the mere right to own and hold property cannot be made the subject of an excise tax, because to tax by reason of ownership of property is to tax the property itself.” *Harbour Village at 608, Jensen at 218 and Dawson at 275.*

Similarly, in this case the Disputed Excise Tax is an invalid excise tax because it was actually a property tax applied to the ownership

of an LLC interest, and not the transfer of real property. In *Harbour Village*, the fee at issue was not an excise tax because the incidence of the tax was the ownership of property. In this case, the tax imposed on the value of the underlying real property of the ConAgra Portion was the form of ownership of the underlying real property and thus, it is an invalid excise tax on the ownership of property. Notwithstanding the invalidity of an excise tax on the right to own property, assuming the tax can be properly categorized as a property tax, it must survive constitutional and statutory restrictions on the imposition of property taxes. As a property tax, the tax must be a uniform tax as discussed below in section D.

**Excise Tax Versus Property Tax.** Because “the character of a tax is determined by its incidents, not by its name” *Jensen v. Henneford*, 185 Wash. at 217, the Disputed Excise Tax is not an excise tax merely because it is called one. In *Harbour Village*, the fee or tax at issue was held to be an invalid tax because it was applied to certain rental units which were not being rented and thus, was a tax on ownership. Similarly, the Disputed Excise Tax is a tax on the right of ownership, because it was a tax applied to the value of the ConAgra Portion, which was not owned or transferred by Taxpayers.

An “excise tax” is an “obligation . . . based upon the voluntary action of the person taxed in performing the act, enjoying the privilege or engaging in the occupation which is the subject of the excise, and the element of absolute and unavoidable demand, as in the case of a property tax, is lacking.” *Covell v. Seattle*, 127 Wn.2d 874 (1995). The City of Mukilteo in *Harbour Village* could not justify taxing the unrented units merely because the taxpayers were renting other units; nor did the fact that some units were rented save the tax from being other than a tax on property or property ownership because it was applied to unrented units. Similarly, the Taxpayers made no voluntary act and exercised no taxable privilege with respect to the ConAgra Portion to justify including the value of that underlying real property in the tax base. The fact that Taxpayers transferred 50.01% of 100 Circles does not make the tax on the ConAgra Portion an excise tax on a transfer, just as the rented units in *Harbour Village* did not make the tax on unrented units in *Harbour Village* a proper excise tax.

**Taxing Mere Ownership.** In *Harbour Village* the “incident” or measure of the tax was the mere ownership of property defined by its use. The tax at issue in *Harbour Village* was not an excise on the mere privilege to conduct a rental business. In *Harbour Village*, if the fee or

tax at issue had been associated with business activity, it could have been properly characterized as an excise tax. But to tax the rental property where no activity occurred was to tax by reason of ownership and was held to be invalid by the Washington Supreme Court. (*Harbour Village* at 607). In this case, to apply the REET to the value of the ConAgra Portion is similar to the application of the invalid and unconstitutional excise tax in *Harbour Village* to the rental units which were not actually rented. There was no activity with respect to the ConAgra Portion; no transfer occurred.

The ConAgra Portion of 100 Circles Farms was not owned or transferred by Taxpayers or WBF, nor was any consideration received by Taxpayers related to the ConAgra Portion. The excise tax was calculated on the value of the ConAgra Portion, which was improperly included in the tax base because of the form of ownership – or the right to own – of the underlying real property, not because any of the ConAgra Portion was transferred.

**D. The Disputed Excise Tax is an Unconstitutional  
Nonuniform Property Tax Under Washington  
Constitution article VII § 1.**

A property tax is based on the value of property and is imposed on the mere ownership of tangible property, while an excise tax is levied

against the exercise of a particular aspect of ownership. (*Harbour Village Apts. v. Mukilteo*, 139 Wn.2d 604 (1999); and *Covell v. Seattle*, 127 Wn.2d 874 (1995)). The Disputed Excise Tax in this case is not a valid excise tax because it was imposed on the mere ownership of property, which is invalid (*Jensen v. Henneford*, 185 Wash. 209, 218 (1936)). None of the aspects of ownership associated with either the 49.99% interest owned by ConAgra in 100 Circles, or 49.99% of the underlying value of 100 Circles' real property, were exercised by Taxpayers to justify the imposition of the Disputed Excise Tax. No consideration changed hands related to the ConAgra Portion, and the ownership of that 49.99% was the same before and after the sale. Because the "character of a tax is determined by its incidents, and not by its name" (*Jensen* at 217), the Disputed Excise Tax was imposed on the mere ownership of the ConAgra Portion, and thus, this tax should be properly characterized as a property tax. As such, this tax is either invalid because an excise tax may not be imposed on the ownership of property (*Harbour Village Apts. v. Mukilteo* and *Jensen v. Henneford*), or it must conform to the Washington Constitutional requirement of uniformity for property taxes (Wash. Const. art. VII § 1). As discussed below, the REET imposed on the full value of all real property owned by

an entity upon a change of control is nonuniform when compared to the tax imposed on a direct transfer of real property. In this case, the DOR imposed the REET on the entire value of real property owned by 100 Circles when a mere 50.01 % interest was transferred and sold by WBF. Had WBF owned a 50.01 % interest in the real property as a tenant in common, the REET for the transfer of real property would have been imposed only on the 50.01 % interest transferred.

**i. Washington State Constitutional Prohibition of Nonuniform Taxation.**

The Washington Constitutional provision governing property taxes states that, “[a]ll taxes shall be uniform upon the same class of property within the territorial limits of the authority levying the tax and shall be levied and collected for public purposes only.” Wash. Const. art. VII § 1. Because the application of the REET to the ConAgra Portion functioned as a tax on the ownership of property, it is a property tax (*Jensen* at 217), and therefore must conform to the Washington state constitutional constraints on nonuniform property taxes.

RCW § 82.45.010 (1) defines “sale” in general, with RCW § 82.45.010 (2) defining “sale” to include a change of control “within a twelve-month period of a controlling interest in any entity with an interest in real property located in” Washington. RCW § 82.45.030 (1)

defines “selling price” as the “true and fair value of the property conveyed.” However, under RCW § 82.45.030 (2), “If the sale is a transfer of a controlling interest in an entity with an interest in real property located in this state, the selling price shall be the true and fair value of the real property owned by the entity and located in this state.”

**ii. Nonuniform Rate, Nonuniform Measure.**

The REET imposed on a change of control is not imposed at a uniform rate or on a uniform measure. The tax rate of the REET on a direct transfer is approximately 1.53%. In this case, the effective rate of the REET was 3.06% (\$958,178.94 total tax on 100% of the value of 100 Circles real property divided by 50.01% of the value of the underlying 100 Circles real property or \$31,319,300). The measure of the tax, or tax base, in a direct transfer is the value of the real property actually transferred; in this case that amount *should be* \$31,319,300.

The measure of the REET on a change of control is 100% of the value of the Washington real property held by an entity in which 50% or more of the ownership is transferred; in this case that amount is \$62,626,074.79.

Taxpayers note that the Washington Constitution provides that “[a]ll real estate shall constitute one class” except as modified in the next sentence of article 7 § 1 for mines and reforestation land. This case does

not involve differences in tax treatment between separate classes of property, because the farm property owned by 100 Circles was not made a separate class of property for purposes of the Washington Constitution based merely on the way it was owned. Furthermore, farm land is not one of the exceptions to the article 7 § 1 general rule that all real property shall constitute one class.

The application of the REET to the ConAgra Portion resulted in a taxpayer, who holds a fractional interest in real property via a business entity being taxed at virtually twice the tax rate that a taxpayer who holds the same fractional interest directly, would pay as a tenant in common. Accordingly, the tax on the ConAgra Portion was a nonuniform property tax when compared to other forms of ownership. This nonuniform treatment based on the form of ownership is unconstitutional because taxing the ConAgra Portion, which was not actually transferred, was effectively an excise tax on the right of someone, other than the transferor, to own that property, and therefore was a property tax rather than an excise tax.

Compare two alternative forms of ownership of Blackacre (worth \$100), (1) owned by A and B individually as tenants in common in which A sells his 50% interest to B for \$50 and (2) Blackacre owned by

AB partnership (50/50) in which A sells B his 50% ownership in AB partnership for \$50. In the case of a sale by A individually, under RCW § 82.45.030 (1) the selling price is \$50. B owned the other half before and after the sale, and no transfer was made of B's interest. In the case of a change of control, partners A and B each own 50% of Blackacre, which is worth \$100. Under RCW § 82.45.030 (2) and *McFreeze*, the selling price for purposes of the real estate excise tax is \$100. B owned 50% in AB, and indirectly owned 50% of the real property in AB, before and after the transfer. Under both scenarios, the percentage interest and value of real property actually transferred is identical, yet under the change-of-control rules, the tax is twice what it would be under tenant-in-common ownership. In the latter scenario, the tax as applied to the portion of Blackacre owned by partner B is a tax imposed on B's ownership of Blackacre and is (1) an invalid excise tax under *Sheehan*; (2) an improper application of an excise tax to the mere ownership of property; and/or (3) the tax is subject to the Washington Constitutional prohibition on nonuniform taxation because the incidence of the tax is the ownership of property.

### **iii. The New York Real Estate Transfer Tax.**

A tax on transfers of real property in Washington dates back to 1935. The State of Washington became concerned over the practices of transferring interests in an entity rather than a direct interest in real property to avoid the REET. In an attempt to address this problem, the State of Washington adopted the change-of-control provisions of RCW §§ 82.45.010, 82.45.030 and 82.45.033, which impose the REET on real property where there is a change of control of an entity which owns Washington real property. (See Det. No. 96-006, 16 WTD 61 (1996) and Det. No. 98-083, 17 WTD 271 (1998)). A similar statute in New York was used as the model for Washington's change-of-control provisions (see Det. No. 96-006, 16 WTD 61 (1996) footnote 2). However, the New York statute apportions the tax based on the amount of the entity which is actually transferred. N.Y. Tax Law § 1401(d)(iii)). The Washington statute intentionally omits any such apportionment. (RCW § 82.45.010 (2), RCW § 82.45.030 (2), WAC 458-61A-101(4) and Det. No. 98-083, 17 WTD 271 (1998)). It should be noted that the New York statute incorporates an apportionment provision which applies the excise tax only on the portion of the entity transferred, and thus avoids the kinds of validity and constitutional

defects present in the Washington statute which seek to improperly impose the REET on the ConAgra Portion.

In *Sheehan*, the Washington Supreme Court pointed out that if the motor vehicle tax were a true property tax there would be no exception from licensing for those residents who own but elect not to use their vehicles on the public roadways. Thus the motor vehicle tax was limited to the value of the vehicle at issue and was voluntary because the owner was not required to license the vehicle. Yet Washington's REET provides no pro ration for the portion of the entity, and thus the underlying real property which is not owned or transferred by the seller. In addition, there is no voluntary action with respect to that portion of the entity not transferred. Accordingly, the Disputed Excise Tax is not voluntary and is not limited to the value of property actually transferred.

The Disputed Excise Tax applied to the ConAgra Portion functions as a property tax because its incidence was the ownership of real property through 100 Circles. Accordingly, the Disputed Excise Tax applied in the context of a change of control under RCW §§ 82.45.010 and 82.45.030 (2) is a nonuniform property tax.

**E. The REET is an Unconstitutional Violation of the Equal Protection Clause.**

Imposition of the Disputed Excise Tax on the ConAgra Portion for no other reason than that the real property was owned by an entity in which WBF was a member violates the Equal Protection Clause of the United States and Washington Constitutions, since it creates a separate category which penalizes land owners who choose to hold real property within a business enterprise. Land owners should be taxed the same on the transfer of similar or even the same property, whether that property is held individually or in undivided interests (in which case the REET is imposed solely on the value of the land transferred) or within an entity (in which case the REET triggered by a change of control is imposed on the entire value, despite the fact that only a partial interest is actually transferred).

**V. CONCLUSION**

The “reasonable doubt” standard used when a statute is challenged as unconstitutional requires a searching legal analysis to convince the court that the statute violates the constitution. *Island County*, 135 Wn.2d at 147. Taxpayers have clearly sustained this burden with the legal analysis above which articulates that the Disputed Excise Tax is invalid because it does not fit the definition of a valid

excise tax, is technically invalid because ownership of property may not be made the subject of an excise tax or is unconstitutional because the Disputed Excise Tax functions as a property tax which is nonuniform. Each of these arguments is distinct and provides a separate example of how the Taxpayers carry the burden of proof by articulating clear legal arguments of how and why the statute is technically invalid. Taxpayers go well beyond the arguments and rationale provided by the taxpayers in *Harbour Village*, who were successful in their challenge of a statute.

In *Harbour Village*, the Washington Supreme Court held that the tax at issue was an unconstitutional property tax based on the legal arguments articulated by the taxpayers. Similarly, in the present case, Taxpayers have clearly set forth the reasons which establish the unconstitutionality of the Disputed Excise Tax and have supported these arguments with relevant Washington judicial precedents. In addition, Taxpayers have shown that they have in fact paid more tax than they would have paid on a direct transfer of 50.01% of the underlying real property.

Taxpayers have demonstrated that based on the definition of a valid excise tax, as articulated in *Sheehan*, the Disputed Excise Tax is an invalid excise tax because it requires that Taxpayers pay tax beyond the

extent to which Taxpayers enjoyed the privilege of transferring property (*Sheehan v. Transit Auth.*, 155 Wn.2d 790, 815, 123 P.3d 88 (Wash. 2005)). In addition, Taxpayers have demonstrated that the Disputed Excise Tax is an invalid excise tax imposed on the right to own or hold property (*Harbour Village Apts. v. Mukilteo*, 139 Wn.2d 604, 611, 989 P.2d 542, (Wash. 1999)). The Disputed Excise Tax was imposed based on the manner in which the real property was owned and accordingly, is a tax on the ownership of real property, just as it was in *Harbour Village*. Taxpayers have provided more legal reasoning and arguments than the taxpayers in *Harbour Village*, who prevailed against a similar invalid and unconstitutional excise tax. Further, Taxpayers have demonstrated that the Disputed Excise Tax is an unconstitutional, nonuniform property tax under Washington Constitution art. VII § 1 (*Harbour Village Apts. v. Mukilteo*).

The “reasonable doubt” standard does not mean that the burden is not met merely because the DOR disagrees. Taxpayers have met the burden of proof by clearly demonstrating through legal analysis how and why the Disputed Excise Tax is invalid and unconstitutional. Taxpayers have provided the requisite legal analysis to demonstrate the invalidity and unconstitutionality of the Disputed Excise Tax. In so doing,

Taxpayers have made it impossible for the DOR, in the proceedings before the Thurston County Superior Court, to respond with their own searching analysis without taking cases out of context or misrepresenting the holdings of others.<sup>5</sup> While Taxpayers have met the burden, the DOR is unable to explain how, given the analysis of *Harbour Village* and *Sheehan*, the REET as applied to a change of control is valid (by RCW §§ 82.45.010 and 82.45.030). In addition, the DOR is unable to explain why the REET, as applied to a change of control, is something other than a nonuniform property tax.

The interests of the state of Washington are to ensure that transfers that involve Washington real property are subject to the REET, rather than taxes imposed on the ownership of stock, limited partnership interests or other entities representing 50% or more of the entity.

Comments in the legislative history state, “The tax is imposed on the value of the real property transferred,” which is inconsistent with the

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<sup>5</sup> For DOR’s misuse of *Mahler* see Def. Mot. For Summ. J. 2:15-18, 13:22-14:15, Apr. 1, 2011. *Mahler* addressed a direct transfer of real property, not a change of control and was therefore irrelevant and misleading as used by DOR. For DOR’s misapplication of *Morrow* see Def. Mot. For Summ. J. 13:24. The DOR advanced that the REET is indistinguishable from a sales tax, however *Morrow* dealt with a direct transfer or sale. For DOR’s misuse of *Sheehan* see Def. Mot. For Summ. J. 9: 13-20. DOR advanced the Court’s response to the precise fit argument, which, here again, is misleading because in *Sheehan* the taxpayer was arguing the value of a vehicle is not the measure of the taxable privilege. A change of control involves the value of the underlying property plus additional property which is not being transferred. See IV. B. above for Taxpayers’ discussion of the precise fit arguments from *Sheehan*.

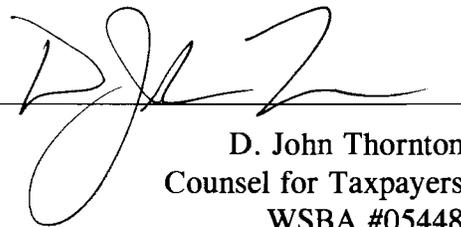
imposition of the REET in this case. Def. Mot. for Summ. J., App. A. p. 326. The state of Washington has received real estate excise tax on the value of the underlying real property actually transferred by the 50.01% interest in 100 Circles sold to ConAgra. Taxpayers are entitled to a refund of the Disputed Excise Tax in the amount of \$478,993.65, plus interest as provided by RCW § 83.32.050 (2).

For the reasons stated above, Taxpayers respectfully request that the Court find that the Disputed Excise Tax at issue in this case was improperly assessed and collected from the Taxpayers and award the Taxpayers a refund of \$478,993.65, plus interest as provided by RCW § 82.32.050 (2), of the tax collected.

RESPECTFULLY SUBMITTED this 22nd day of July, 2011.

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By: \_\_\_\_\_



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STATE OF WASHINGTON  
BY [Signature]  
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**PROOF OF SERVICE**

I HEREBY CERTIFY that I served a copy of this Taxpayers  
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I HEREBY CERTIFY under penalty of perjury under the laws of the  
State of Washington that the foregoing is true and correct.

Dated this 22<sup>nd</sup> day of July, 2011, at Boise, Idaho.

[Signature]  
Tessa A. O'Donnell