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COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

**GROUP HEALTH COOPERATIVE, a Washington nonprofit
corporation; and GROUP HEALTH OPTIONS, INC., a Washington
corporation,**

Appellants,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Respondent.

BRIEF FOR APPELLANTS

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INTRODUCTION

The federal government and Medicare beneficiaries pay a fixed amount each month to certain companies, in this case health maintenance organizations (“HMOs”) and health care service contractors (“HCSCs”), that provide Medicare Advantage health plans to their enrollees. Those payments are called premiums, which are recorded as revenue. In exchange, Medicare beneficiaries receive health care coverage through the companies. This appeal concerns whether the Department of Revenue (“Department”) can tax that line of Medicare Advantage premium revenue under the business and occupation tax (“B&O tax”).

In 1993, the Legislature enacted health care reform. As part of that reform, it changed the way the State taxed the premium revenue of HMOs and HCSCs. The Legislature did not intend to tax Medicare premium revenue because *any* tax leads to higher premium costs and reduced health care services for Medicare beneficiaries. While premium revenue is taxable generally under Washington law, the Legislature exempted certain lines of premium revenue from the taxation scheme, such as Medicare and Medicaid, for which the federal and state government bear responsibility. In 1997, Congress, similarly concerned with the rising costs of Medicare to the federal government, preempted state and local taxation of premium revenue for Medicare Advantage and other federally funded health plans.

The Department disrupts those legislative judgments by enforcing the B&O tax against the Medicare Advantage premium revenue of Appellants Group Health Cooperative and Group Health Options, Inc. (collectively, “Group Health”). The Department’s effort to impose B&O tax on Medicare Advantage premium revenue is inconsistent with the statutory scheme established in 1993 and is invalid under Washington law.

Even if permissible under state law, federal law preempts the imposition of the B&O tax because it is similar to a premiums tax. The B&O tax undisputedly applies to gross revenue. The B&O tax is not measured by Group Health’s net income or profit related to Group Health’s business activities generally, which would save it from preemption. The Department cannot tax Medicare Advantage premiums on a gross revenue basis by calling that tax by another name, whether the Department claims it is a premiums tax, a B&O tax, or something else.

Division One of the Court of Appeals considered a similar effort of local taxation of federally funded gross premium revenue in 2008, and concluded it was preempted because it did not apply to net income. The same reasoning controls here, and requires correction of the Superior Court’s legal error. Group Health is entitled to a refund of B&O tax paid. This Court should reverse.

ASSIGNMENT OF ERROR

The Superior Court erred as a matter of law in denying Group Health's motion for summary judgment, and correspondingly erred as a matter of law in granting the Department's request for summary judgment as the non-moving party.

ISSUES PERTAINING TO ASSIGNMENT OF ERROR

This appeal presents two questions of law decided by the Superior Court in favor of the Department on summary judgment, which this Court reviews de novo. *Qualcomm, Inc. v. Dep't of Revenue*, 171 Wn.2d 125, 131, 249 P.3d 167 (2011).

1. Group Health's premium revenue is generally subject to the premiums tax under RCW 48.14.0201(2), but its premium revenue for Medicare Advantage plans is exempt from the premiums tax under RCW 48.14.0201(6). The State Legislature never intended to exempt Medicare Advantage premium revenue from the premiums tax, only to subject the same gross revenue stream to the B&O tax. The issue is whether the Department can impose the B&O tax on Group Health's Medicare Advantage premiums.

This court reviews "questions of statutory interpretation de novo." *Wright v. Lyft, Inc.*, 406 P.3d 1149, 1151 (Wash. 2017).

2. Federal law, 42 U.S.C. § 1395w-24(g), prohibits the States from imposing a premiums tax or “similar tax” on premium revenue for Medicare Advantage plans. The Department has imposed the B&O tax on Group Health’s Medicare Advantage gross premium revenue, not Group Health’s net income or profit. The issue is whether federal law preempts the imposition of the B&O tax on Group Health’s Medicare Advantage premium revenue.

This court reviews questions of federal preemption de novo. *McKee v. AT&T Corp.*, 164 Wn.2d 372, 387, 191 P.3d 845 (2008).

STATEMENT OF THE CASE

There is no dispute between the parties that the premiums tax under RCW 48.14.0201(2) cannot be imposed on Group Health’s Medicare Advantage gross premium revenue. Washington law expressly exempts Medicare Advantage premium revenue from taxation, RCW 48.14.0201(6), and any effort to impose a premiums tax would be preempted by federal law in any event, 42 U.S.C. § 1395w-24(g).

This case is about the Department’s attempt to achieve a similarly prohibited end—taxing the exact same gross revenue of Group Health’s Medicare Advantage premiums—through the B&O tax, imposed through chapter 82.04 RCW, notwithstanding the Legislature’s intent to keep premium costs low for Medicare and avoid the risk of reduced health care

benefits because of higher costs. The parties disagree over the proper construction of Washington law and whether it allows the Department to impose the B&O tax on Group Health’s Medicare Advantage premium revenue. Even if state law permits application of the B&O tax, the parties also depart over whether federal law preempts the Department’s attempt. The facts material to those two legal issues are not contested.

A. Factual Background

1. Group Health

Appellant Group Health consists of individual Appellant Group Health Cooperative (“GHC”), a non-profit public benefit corporation, and individual Appellant Group Health Options, Inc. (“GHO”), a for-profit corporation, both of which are organized under Washington law. CP 246 (Kinzer Decl. ¶ 4). GHO is a wholly owned subsidiary of GHC.¹ CP 246 (Kinzer Decl. ¶ 4). GHC is licensed and registered with the Washington State Insurance Commissioner as a HMO as defined by RCW 48.46.020(13). CP 246 (Kinzer Decl. ¶ 6). GHO is licensed and registered with the Insurance Commissioner as a HCSC as defined by RCW 48.44.010(9). CP 246 (Kinzer Decl. ¶ 6).

¹ On February 1, 2017, Kaiser Foundation Health Plan of Washington completed its acquisition of GHC and GHO. As of February 15, 2017, GHC’s name was changed to Kaiser Foundation Health Plan of Washington, and GHO’s name was changed to Kaiser Foundation Health Plan of Washington Options, Inc. For consistency in the proceeding below and in this appeal, the briefing continues to refer to the entities as GHC and GHO individually, and collectively as Group Health.

Group Health and its affiliates provide health care coverage to over 600,000 members in Washington and Idaho. CP 23; CP 246 (Shust Decl. ¶ 5; Kinzer Decl. ¶ 7). Members receive health care services under the terms of the health benefit plans provided by Group Health. CP 23; CP 246 (Shust Decl. ¶ 5; Kinzer Decl. ¶ 7). Group Health offers a wide range of health benefit plans to its members, including individual and family plans, commercial group plans, Medicaid plans, the State Basic Health Plan, plans under the Federal Employees Health Benefits Program (“FEHBP”), and Medicare Advantage plans. CP 23; CP 246 (Shust Decl. ¶ 4; Kinzer Decl. ¶ 5). For each of those health benefit plans, Group Health receives premium payments, which are made by Group Health’s members or on behalf of its members. CP 23; CP 247 (Shust Decl. ¶ 6; Kinzer Decl. ¶ 8).

2. Medicare Advantage Health Benefit Plans

This case specifically concerns taxation of premium revenue associated with Group Health’s Medicare Advantage health benefit plans. The premium revenue at issue is funded by the Centers for Medicare & Medicaid Services (“CMS”), a federal agency that is part of the federal Department of Health and Human Services, and by Group Health’s members, for all health care services typically covered under Medicare.

For the premium revenue at issue, GHC and GHO each contracted with CMS to provide Medicare Advantage plans to eligible members. CP 23-24 (Shust Decl. ¶ 7). In exchange, GHC and GHO received premium payments from CMS and their members who signed up for the Medicare Advantage plans. CP 23-24 (Shust Decl. ¶ 7). Under those contracts with CMS, GHC and GHO qualify as the “MA Organization,” which is the “entity which has been determined to be an eligible Medicare Advantage Organization by the Administrator of the Centers of Medicare & Medicaid Services under 42 CFR §422.503.” CP 24 (Shust Decl. ¶ 7).

3. Premiums Tax Under RCW 48.14.0201(2)

GHC and GHO each meet the definition of a “taxpayer” for purposes of the premiums tax, RCW 48.14.0201(1). For the relevant time periods at issue, GHC and GHO paid the premiums tax under RCW 48.14.0201(2) on premium payments it received, with the exception of: (i) premium amounts received from the federal government and members for FEHBP and Medicare Advantage plans, and (ii) premium amounts received from the State for the subsidized Basic Health Plan. CP 247 (Kinzer Decl. ¶ 9). GHC and GHO also paid the premiums tax on Medicare Advantage premium amounts received from their members, but Group Health subsequently claimed and received refunds of such taxes on the basis of 42 U.S.C. § 1395w-24. CP 247 (Kinzer Decl. ¶ 9).

In sum, Group Health did not pay the premiums tax under RCW 48.14.0201(2) for Medicare Advantage premium revenue received from the federal government, and it ultimately received a refund for the premiums tax it paid on the Medicare Advantage premium revenue it received from its members. Group Health is not claiming a refund for any premiums tax paid under RCW 48.14.0201(2), and no party claims that such premiums tax is owing for Medicare Advantage premium revenue.

4. B&O Tax Under Chapter 82.04 RCW

For the relevant time periods at issue, GHC and GHO paid B&O tax on Medicare Advantage premium revenue as follows:

B&O Tax Paid On Medicare Advantage Premium Amounts				
	GHO		GHC	
Year Tax Paid	B&O Tax Paid On Premium Amounts Received From CMS (\$)	B&O Tax Paid On Premium Amounts Received From Members (\$)	B&O Tax Paid On Premium Amounts Received From Members (\$)	Total (\$)
2012	1,003,946			1,003,946
2013	416,070			416,070
2014	389,446			389,446
2015	102,096			102,096
2016	6,318	1,777	187,256	195,351
Total	\$1,917,876²	\$1,777³	\$187,256⁴	\$2,106,909

² Relates to amounts recorded as income for the period spanning January 2010 through December 2015. CP 247 (Kinzer Decl. ¶ 11).

³ Relates to amounts recorded as income for the month of December 2015. CP 247 (Kinzer Decl. ¶ 11).

⁴ Relates to amounts recorded as income for the month of February 2016. CP 247 (Kinzer Decl. ¶ 11).

CP 247 (Kinzer Decl. ¶ 10). The tax rate used to compute the B&O tax that Group Health paid for 2010 through 2016 varied from 1.5% to 1.8%. CP 248 (Kinzer Decl. ¶ 13).

All of the B&O tax that Group Health has paid—and for which Group Health seeks a refund—relates to Medicare Advantage premium payments (premiums or prepayments) it has received from CMS and Group Health members for Group Health’s provision of health care coverage under Medicare Advantage health benefit plans. CP 248 (Kinzer Decl. ¶ 12). Those premium payments that Group Health received from CMS and Group Health’s members were not co-payments, deductibles, coinsurance, or other forms of payment for the direct provision of medical services (direct fees for medical services). CP 248 (Kinzer Decl. ¶ 12).

All of the B&O tax paid at issue—and for which Group Health seeks a refund—corresponds directly to the gross premium amounts that Group Health received from CMS and Group Health’s members for health care coverage under Medicare Advantage health benefit plans. CP 247-248 (Kinzer Decl. ¶¶ 10-13); CP 349-350 (Second Kinzer Decl. ¶¶ 13-16).

B. Thurston County Proceedings Below

1. Group Health’s Complaint

Group Health filed this lawsuit on May 11, 2016, alleging two claims supporting its request for a refund of B&O tax paid on its Medicare

Advantage premium revenue: (1) that Washington law does not permit imposition of the B&O tax on Group Health's Medicare Advantage premium revenue; and (2) that imposition of the B&O tax on Group Health's Medicare Advantage premium revenue is preempted under federal law. CP 9-13.

Group Health requested a refund of B&O tax paid for Medicare Advantage premiums received from CMS and Group Health's members for the period of January 1, 2010, through February 29, 2016. CP 6; CP 13. The amount of overpaid B&O tax totaled \$2,106,909. CP 8-9; CP 13.

2. Summary Judgment Proceedings

The case proceeded to resolution on summary judgment for those two legal issues. In August 2017, Group Health filed its motion for summary judgment, to which the Department filed opposition papers requesting summary judgment as the non-moving party.

On state law, Group Health argued that the plain meaning of the provisions at issue and the statutory scheme established that Medicare Advantage premium revenue was exempt from B&O tax because it was "taxable" under the premiums tax. CP 157-159. The scheme established in 1993 did not require premiums tax to be actually paid for an exemption from B&O tax to apply to premium revenue. CP 157-159. Group Health

also argued that legislative history and the Department's historical exemption studies supported Group Health's position that B&O tax did not apply to Medicare Advantage premium revenue. CP 160-162.

In response, the Department claimed that Group Health's Medicare Advantage premium revenue was not "taxable" under the premiums tax because it was exempt and tax was not paid, and therefore B&O tax applied instead. CP 257-260. The statutory "plain language" was "unambiguous" according to the Department. CP 260. The Department also claimed that legislative history supported its position in any event. CP 261-265.

As to federal preemption, Group Health contended that the Department's imposition of B&O tax was preempted because it taxed Group Health's Medicare Advantage gross premium revenues, a "similar tax" to a premiums tax. The savings clause in the relevant federal regulation did not apply because the B&O tax was not measured by Group Health's net income or profit corresponding to a broad range of business activities. CP 164-165. To that end, Group Health noted how the savings clause at issue was the same as that in the FEHBP statute, and that Division One of the Court of Appeals held in 2008 that the savings clause did not prevent a local B&O tax from federal preemption. CP 165.

In response, the Department admitted that the B&O tax did not fit within the savings clause of the federal regulation, CP 268, but nevertheless argued that the federal preemption provision did not specifically address B&O tax and that it was not a “similar tax” for purposes of federal preemption, CP 268-270. The Department further argued that the preemption provision in the FEHBP statute was more broad than that applicable to Medicare Advantage. CP 269.

3. Judge Skinder’s Summary Judgment Decision

The Superior Court heard the parties’ summary judgment arguments on September 1, 2017. RP 1. On the first legal issue concerning the interpretation of Washington law, the Superior Court concluded that the B&O tax applied to Group Health’s Medicare Advantage premium revenue under the text of the statutes at issue, without resort to analyzing legislative history:

The plain language of RCW 82.04.322 expresses that the B&O tax does not apply in respect to premiums or prepayments that are taxable under RCW 48.14.0201, but the premiums at issue here are not taxable under RCW 48.14.0201. Rather, the taxes imposed in the statute do not apply to premiums paid by the federal government. Premiums that are exempt from taxation under RCW 48.14.0201(6) are not taxable under that statute.

To the court in its review of these two statutes the plain language of both of them

explains that these premiums are not exempt from the B&O tax. The court is finding that this is a plain language reading. The court is aware and appreciates the briefing of both parties regarding if there were ambiguities. I'm not going to make any ruling there because I'm not finding that there are ambiguities.

RP 20:2-16.

On the second legal issue concerning federal preemption, the Superior Court concluded that the B&O tax was not foreclosed by federal law because the “the B&O tax is not a similar tax to the premium tax.”

RP 20:25-RP 21:1.

The Superior Court also noted its understanding that the federal preemption provision “was the motivation . . . for Washington to exempt these payments from the [Department’s] premium[s] tax.” RP 20:18-21. When Group Health’s counsel inquired further about the Superior Court’s understanding of the interaction between the state and federal laws, the Superior Court clarified:

The federal law clearly states that “No state may impose a premium tax or similar tax with respect to payments to Medicare Choice organizations under Section 1395w-23 of this title or the premiums paid to such organizations under this part,” citing to the 42 USC 1395w-24(g). This law clearly applies to premium taxes. And perhaps this is not particularly germane to the ruling, but what I was expressing was my thought that

this law would appear to the court to be clearly the motivation for Washington exempting these payments from the premium tax.

RP 24:2-19. Group Health's counsel observed that the federal preemption provision at issue was passed by Congress in 1997 *after* the Washington State Legislature passed the law establishing the premiums tax and exempting government-funded premium revenue therefrom. RP 24:20-24. In any event, the Superior Court reiterated that its understanding of the federal preemption provision as a motivating factor behind the Washington law governing the premiums tax was not "particularly germane" to the Superior Court's ruling that there was no federal preemption. RP 24:25-RP 25:2.

On those two legal grounds, the Superior Court denied Group Health's motion for summary judgment, and granted the Department's request for summary judgment as the non-moving party. RP 25:11; CP 365-366. The Superior Court's summary judgment order was entered on September 1, 2017. CP 366. Group Health filed its notice of appeal on September 29, 2017, which was timely under RAP 5.2(a).

ARGUMENT

This appeal requires the Court to interpret Washington's statutory scheme for taxing premium revenue of HMOs and HCSCs. That regime, which was revamped by the State Legislature through the Health Care

Reform Act in 1993, exempts Group Health's premium revenue from the B&O tax because it is taxable under the premiums tax. If certain subsets of premium revenue are also exempt from the premiums tax—such as Group Health's Medicare Advantage premium revenue—that does not, in turn, render the revenue subject to B&O tax. Under state law, Group Health is entitled to a refund of B&O tax paid.

If this Court concludes otherwise, it should hold that the Department's attempt to impose B&O tax on Group Health's Medicare Advantage premium revenue is preempted under federal law. Application of the B&O tax here is similar to a premiums tax. The B&O tax is measured by Group Health's Medicare Advantage premium revenue on a gross basis, and does not apply to Group Health's net income or the profit of its business activities generally. The B&O tax is therefore not subject to the savings clause in the federal regulation, and is preempted.

A. The Department's imposition of B&O tax on Medicare Advantage premium revenue is contrary to legislative intent behind the statutory scheme.

In imposing the B&O tax on Group Health's Medicare Advantage premium revenue, the Department starts from a false statutory premise: that because entities like Group Health were historically subject to B&O tax but not the premiums tax before 1993, B&O tax must still be paid on any premium revenue that is exempt from the premiums tax. CP 256. The

Department thereby concludes that if Medicare Advantage premium revenue is expressly exempt from taxation under the premiums tax, then the B&O tax must apply instead. The Department presumes that tax must be actually paid under one regime or the other for premium revenue. There is no statutory justification for the Department's presumption.

In 1993, the State Legislature carved out HMO premium revenue from the State's B&O tax by making it taxable separately under the State's premiums tax. Concurrently, the Legislature exempted certain premium revenue related to Medicare from the State's premiums tax. Those actions do not bring Group Health's Medicare Advantage premium revenue back within the orbit of the B&O tax. That outcome would defeat the purpose of exempting the Medicare Advantage premiums from the premiums tax in the first instance. Then the Medicare premiums would be taxed, which the Legislature was seeking to avoid. At the time, the premiums tax and the B&O tax were the same: two percent. *See* Laws of 1993, Reg. Sess., ch. 492, § 301 (E.S.S.B. 5304), at 2135 (premiums tax); Laws of 1993, 1st Spec. Sess., ch. 25, § 203 (2d E.S.S.B. 5967), at 3025-3026 (B&O tax). The Department's interpretation leads to a strained result that does not advance the Legislature's purpose.

1. When construing a statutory regime, Washington courts adopt an interpretation that best advances the Legislature’s intent.

The Court is well familiar with the general approach to statutory interpretation: “[t]he main object . . . is to ascertain and give effect to the Legislature’s intent.” *Ski Acres, Inc. v. Kittitas County*, 118 Wn.2d 852, 856, 827 P.2d 1000 (1992). This process “begins with the statute’s plain meaning.” *Lake v. Woodcreek Homeowners Ass’n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010). Washington courts determine plain meaning by “considering the text of the provision in question, the context of the statute in which the provision is found, related provisions, amendments to the provision, and the statutory scheme as a whole.” *Columbia Riverkeeper v. Port of Vancouver*, 188 Wn.2d 421, 432, 395 P.3d 1031 (2017). “It is an elementary rule that where certain language is used in one instance, and different language in another, there is a difference in legislative intent.” *Seeber v. Wash. State Pub. Disclosure Comm’n*, 96 Wn.2d 135, 139, 634 P.2d 303 (1981).

When a term is not defined in a statute, Washington courts “consider the statute as a whole and provide such meaning to the term as is in harmony with other statutory provisions.” *Citizens All. for Prop. Rights Legal Fund v. San Juan County*, 184 Wn.2d 428, 437, 359 P.3d 753 (2015) (quoting *Heinsma v. City of Vancouver*, 144 Wn.2d 556, 564, 29

P.3d 709 (2001)); *see State v. Lilyblad*, 163 Wn.2d 1, 9, 177 P.3d 686 (2008) (“All words must be read in the context of the statute in which they appear, not in isolation[.]”). “[I]f, after this inquiry, the statute remains susceptible to more than one reasonable meaning, the statute is ambiguous and it is appropriate to resort to aids to construction, including legislative history.” *Dep’t of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 12, 43 P.3d 4 (2002).

Ultimately, “[t]he purpose of an enactment should prevail over express but inept wording.” *Whatcom County v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996). The Washington Supreme Court has made clear that when it construes a statute, it “will adopt the interpretation which best advances the legislative purpose.” *Citizens All.*, 184 Wn.2d at 437 (quoting *Bennett v. Hardy*, 113 Wn.2d 912, 928, 784 P.2d 1258 (1990)).

2. Washington courts apply a rule of strict construction to taxation statutes and avoid absurd consequences.

Tax statutes, however, require the Court to follow “a rule of strict construction,” under which “[i]f any doubt exists as to the meaning of a taxation statute, the statute must be construed most strongly against the taxing power and in favor of the taxpayer.” *Ski Acres*, 118 Wn.2d at 857. When interpreting tax statutes, courts avoid an overly literal reading that

leads to “unlikely, absurd or strained consequences,” and instead seek to “effect their purpose.” *Id.*; *Bowie v. Wash. Dep’t of Revenue*, 171 Wn.2d 1, 14, 248 P.3d 504 (2011).

Notwithstanding those fundamental standards for analyzing taxation regimes, when a dispute is limited to the application of a specific tax exemption to a taxpayer, the taxpayer bears the burden of establishing the exemption. *Avnet, Inc. v. Wash. Dep’t of Revenue*, 187 Wn.2d 44, 50, 384 P.3d 571 (2016).

3. In 1993, the Legislature passed health care reform.

In 1993, the State Legislature enacted the Health Care Reform Act, including two statutory provisions relevant to this appeal—one relating to the premiums tax and the other to the B&O tax. *See* Laws of 1993, Reg. Sess., ch. 492, §§ 301, 303 (E.S.S.B. 5304), at 2135-2136 (reproduced at CP 181-183). The statutory language is materially the same today. The first provision contains an exemption from the B&O tax for HMO and HCSC premium revenue that is “taxable” under the premiums tax:

This [B&O tax] chapter does not apply to any health maintenance organization, health care service contractor, or certified health plan in respect to premiums or prepayments that are *taxable* under RCW 48.14.0201.

RCW 82.04.322 (emphasis added). The second provision requires HMOs and HCSCs to pay the premiums tax:

(1) As used in this section, “taxpayer” means a *health maintenance organization* as defined in RCW 48.46.020, a *health care service contractor* as defined in chapter 48.44 RCW

(2) *Each taxpayer must pay a tax on or before the first day of March of each year to the state treasurer through the insurance commissioner’s office. The tax must be equal to the total amount of all premiums and prepayments for health care services collected or received by the taxpayer under RCW 48.14.090 during the preceding calendar year multiplied by the rate of two percent. For tax purposes, the reporting of premiums and prepayments must be on a written basis or on a paid-for basis consistent with the basis required by the annual statement.*

RCW 48.14.0201(1), (2) (emphasis added). That provision also contains

an exemption from the premiums tax for Medicare premium revenue:

(6) The taxes imposed in this section do not apply to:

(a) Amounts received by any taxpayer from the United States or any instrumentality thereof as prepayments for health care services provided under Title XVIII (medicare) of the federal social security act.

RCW 48.14.0201(6)(a).

4. The statutory scheme does not permit the Department to apply B&O tax to premium revenue in any event.

The term “taxable” is not defined in the statutory exemption to B&O tax created in 1993. RCW 82.04.322. In the proceedings below, the

Department argued that because Medicare Advantage premium revenue is exempt from the premiums tax under RCW 48.14.0201(6)(a), it is therefore not exempt from B&O tax because it is not “taxable” under the premiums tax. CP 257. The Superior Court adopted that approach as a “plain language” interpretation. RP 20:2-16.

Yet ascertaining the plain meaning of a statute is not limited to interpreting a term in isolation: the text of the provision matters, as does the context in which the provisions are located, any related provisions, as well as the statutory scheme as a whole. All of those elements inform plain meaning. What they reveal here is that the Legislature intended “taxable” to mean “capable of being taxed” under the premiums tax, not ultimately that the tax is paid. Because Medicare Advantage premium revenue is capable of being taxed under the premiums tax, it is exempt from B&O tax. The exemption for Medicare Advantage premium revenue *within* the premiums tax does not render that line of revenue “untaxable.” It remains “taxable” under the premiums tax, but subject to an exemption.

First, the term “taxable” is not defined in the statute and there is scant Washington authority that helps explain what it means in the context of health care reform. The Department argued below that “taxable” means “subject to taxation” under *Crown Zellerbach Corp. v. State*, 45 Wn.2d 749, 753-754, 278 P.2d 305 (1954). CP 259. In the Department’s view,

“subject to taxation” requires that “actual liability for business and occupation tax be imposed” at least once when there are multiple tax classifications. CP 259-260 (citing *Crown Zellerbach*, 45 Wn.2d at 754 (emphasis omitted)). Of course, *Crown Zellerbach* tells this Court little about the Legislature’s intent behind the Health Care Reform Act in 1993. Moreover, the most that *Crown Zellerbach* stands for is that the Legislature intended different classifications *within* the B&O tax to be exclusive of one another and to apply only once:

The legislative purpose, or tax policy, of the above-quoted statutes is to provide for as equitable an imposition of actual tax liability as possible insofar as our state business and occupation tax is concerned. Implicit in this policy is the avoidance of an imposition of double or triple tax liability as to particular products.

45 Wn.2d at 753 (emphasis omitted). The case did not concern the allocation of tax responsibility between two separate tax regimes, such as a premiums tax and a B&O tax.

Crown Zellerbach is also distinguishable because the proposition that there must be B&O tax liability was established in light of a claimed exemption *under federal law* from any B&O tax. *Id.* at 754 (“Appellant acknowledges it is immune from state tax respecting its wholesaling activities in interstate commerce because of Federal constitutional

provisions.”). The court reasonably concluded that when the Legislature established that a taxpayer only had to pay B&O tax once for extracting, manufacturing, or wholesaling, it did not intend to exempt a taxpayer entirely if it was immune from taxation under federal law for one of those activities. *Id.*

As discussed further below, the key difference here is that the exemption from B&O tax for revenue taxable under the premiums tax was set up by the Legislature *at the same time* as it set up an exemption within the premiums tax for certain subclasses of premium revenue (Medicare and Medicaid). When the Legislature passed health care reform in 1993, there was no pre-existing federal exemption that caused an anomaly in the way B&O tax applied at the state level, as in *Crown Zellerbach*. The Legislature’s separation of premiums tax from B&O tax was intentional, as was the exemption established within the premiums tax. The statutory regime is entirely different from what the Supreme Court considered in *Crown Zellerbach*, and there is no reason that “taxable” should be interpreted the same way here as it was then.

Second, the structure of the statutory scheme implemented in 1993 is most informative here as to plain meaning. The Legislature established a separate tax for HMO premium revenue, at a rate of two percent. *See* E.S.S.B. 5304, § 301, at 2135 (reproduced at CP 182). HMO premium

revenue that was “taxable” under the premiums tax was exempt from B&O tax. *See* E.S.S.B. 5304, § 303, at 2136 (reproduced at CP 183). The Legislature also exempted Medicare premium revenue from the premiums tax regime for HMOs. *See* E.S.S.B. 5304, § 301, at 2135-36 (reproduced at CP 182-183). At that time, the B&O tax was also two percent. *See* 2d E.S.S.B. 5967, § 203, at 3025-3026.

Under the Department’s interpretation, the Legislature divided up HMO premiums tax from B&O tax, exempted Medicare premium revenue from premiums tax, then brought Medicare premium revenue back under the B&O tax umbrella, even though both taxes were imposed at the same rate of two percent. That is quite a convoluted view of the statutory scheme established by the Legislature’s health care reform. The Department’s position fails to explain why the Legislature intended B&O tax to apply to Medicare Advantage premium revenue, while carving out premium revenue generally from B&O tax.

More reasonable is the view that the Legislature intended to establish two separate regimes of taxation: one for HMO premiums and one for B&O tax. Applied here, Group Health’s Medicare Advantage premium revenue was exempt from the B&O tax under RCW 82.04.322 because it was *taxable* under the premiums tax, RCW 48.14.0201(2). That the Legislature chose to make a specific line of premium revenue

completely exempt from actual tax liability by also exempting it from the premiums tax under RCW 48.14.0201(6) is irrelevant for evaluating whether the B&O tax applies because B&O tax *never* applies to revenue that is taxable under the premiums tax regime. The statutory scheme set up two separate systems of taxation.

Third, statutory language existing in the B&O tax statute at the time of health care reform in 1993 informs the meaning of the term “taxable” for purposes of the B&O tax exemption here. In another B&O tax exemption for “insurance business” that predated the B&O tax exemption in RCW 82.04.322, the Legislature used strikingly different language: “This chapter shall not apply to any person in respect to insurance business *upon which a tax based on gross premiums is paid to the state*” RCW 82.04.320 (emphasis added). It is a fundamental principle of statutory construction that the Legislature intended a different meaning when it used the word “paid” in one B&O tax exemption and used the word “taxable” in a different B&O tax exemption post-dating the first. *See Seeber*, 96 Wn.2d at 139.

In light of the statutory scheme, the Court should harmonize the statutory provisions as a whole, and conclude that “taxable” under RCW 82.04.322 does not require that tax is paid for the exemption from B&O tax to apply to Group Health. *See Citizens All.*, 184 Wn.2d at 437.

5. If needed, legislative history supports Group Health's interpretation of the statutory scheme.

First, the exemption from B&O tax that was introduced through the 1993 health care reform initially applied to premiums tax *paid*, similar to existing language in RCW 82.04.320:

NEW SECTION. **Sec. 258.** A new section is added to chapter 82.04 RCW to read as follows:

This chapter does not apply to any person in respect to a health maintenance organization or health care service contractor *upon which a tax* based on the total amount of prepayments received for health care services *is paid to the state*.

S.B. 5304, Reg. Sess., § 258 (Wash. Jan. 22, 1993) (reproduced at CP 207-208) (emphasis added). That language differs sharply from the text that made it into the final bill:

NEW SECTION. **Sec. 303.** A new section is added to chapter 82.04 RCW to read as follows:

EXEMPTION FROM BUSINESS AND OCCUPATION TAX. This chapter does not apply to any health maintenance organization, health care service contractor, or certified health plan in respect to premiums or prepayments that are *taxable* under section 301 of this act.

See E.S.S.B. 5304, § 303, at 2136 (reproduced at CP 183) (emphasis added). The Legislature's change in the final version of the bill to provide

a B&O tax exemption when premiums are “taxable,” as opposed to requiring that premiums tax is “paid,” evidences that the Legislature intended a different meaning from the original Senate Bill, which appeared to borrow the “tax . . . is paid” language from a different provision of the statutory scheme, RCW 82.04.320. Based on that language change, it is reasonable to conclude that the Legislature meant for the B&O tax exemption to apply to premium revenue—including Medicare premium revenue—because it was taxable under the premiums tax, regardless of whether premiums tax is actually paid to the State.

Second, legislative history underlying the Legislature’s consideration of the “sunset” provision of the premiums tax exemption in 1997 shows that the Legislature believed that Medicare premiums had never been subject to tax.

As part of health care reform in 1993, the premiums tax exemption for Medicare premiums in RCW 48.14.0201(6)(a) was set to expire after four years. *See* E.S.S.B. 5304, § 301, at 2135-2136 (reproduced at CP 182-183). In 1997, the Legislature passed an emergency repeal of the sunset of the exemption in the premiums tax. Laws of 1997, Reg. Sess., ch. 154, § 1 (S.H.B 1219), at 879. Testimony in favor of repeal shows that the Legislature feared that the tax increases would be passed along to Medicare beneficiaries:

These payments have never been taxed. Managed care carriers will have to pass the premium tax on to senior citizens in the form of higher premiums or reduced benefits. The increase in cost would be about \$100 per year, which would be hard on senior citizens. This would appear as a new tax without justification.

H.R. Bill Rep. No. 1219, at 2-3 (1997) (emphasis added) (reproduced at CP 203). There was no testimony against the bill. If the B&O tax applied to Medicare Advantage premium revenue all along, then the State Legislature would have had no reason to be concerned about the sunset of the premiums tax exemption because those payments would have already been taxed. Instead, the Legislature passed an emergency bill to remove the sunset provision in the premiums tax. The legislative history shows that the Legislature worried that the costs of taxing Medicare premiums would be passed along to Medicare beneficiaries, either through higher premiums or reduced services. That concern would be a nullity if B&O tax applied, as the Department now urges. The Legislature does not engage in meaningless acts. *State v. McCullum*, 98 Wn.2d 484, 493, 656 P.2d 1064 (1983). Adopting the Department's position here requires that assumption.

Either under the plain meaning of the statutory scheme as a whole, or with the aid of legislative history, the Court should hold that Group

Health's Medicare Advantage premium revenue is exempt from taxation under the B&O tax.

6. The Department is not entitled to deference because it has historically recognized that repeal of the premiums tax exemption would boost the State's tax revenue.

“An agency's interpretation that is not plausible or that is contrary to legislative intent is not entitled to deference.” *In re Estate of Bracken*, 175 Wn.2d 549, 575, 290 P.3d 99 (2012). Washington courts have also recognized that deference is inappropriate when an agency interprets the law inconsistently with prior agency practice. *Skamania County v. Columbia River Gorge Comm'n*, 144 Wn.2d 30, 43, 26 P.3d 241 (2001) (citing *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212, 109 S. Ct. 468, 102 L. Ed. 2d 493 (1988)).

Relevant here is that the Department has published exemption studies every four years since 1984, including for the years 2000 through 2016, in which it discloses estimated taxpayer savings from tax exemptions in the state tax code, along with corresponding revenue that the State would realize if those exemptions were repealed. *See, e.g.*, CP 210-212 (2000 Tax Exemption Report). For the premiums tax exemption for Medicare premium revenue in RCW 48.14.0201(6)(a), the Department reported in 2000 that if that exemption was repealed, the State would fully realize the taxpayers' savings as revenue. CP 212. If it was the

case that Medicare premiums were actually taxable under the B&O tax, as the Department now claims, and the exemption to the premiums tax was repealed, the State would not fully realize the taxpayers' savings as revenue. (The only change to the State's income would be the marginal difference between the B&O tax rate and the premiums tax rate over the years.) In short, the Department's current interpretation conflicts with past studies it has published, and it is not entitled to deference. Given the lack of foundation of the Department's approach in the statutory scheme, the Court owed the Department little deference in any event.

B. Federal law preempts the Department's imposition of the B&O tax because it is a similar tax to a premiums tax.

If the Department is right about state law, that means that the Legislature intended in 1993 to remove Medicare premiums from the premiums tax only to subject them to the B&O tax, which, at the time, was implemented at the same rate of two percent as the premiums tax. *See* 2d E.S.S.B. 5967, § 203, at 3025-3026.

In any event, the B&O tax shares a more fundamental similarity to the premiums tax: the B&O tax is measured on a *gross* basis. *See* RCW 82.04.290(2)(a). Applying the B&O tax here to gross premium revenue does not get the Department any closer to imposing a valid tax because four years later in 1997, Congress preempted state and local premiums tax

or *similar* tax. The B&O tax is similar to a premiums tax because it is measured by gross revenue, and imposition of the tax creates the same problem as a premiums tax for the federal government: it raises the cost of providing Medicare services. The Department seeks a construction of Washington law that is now federally preempted.

1. Federal law prohibits premiums tax or similar tax.

Congress enacted a preemption provision applicable to Medicare Advantage premium revenue as part of the Balanced Budget Act of 1997, Pub. L. No. 105-33, § 4001, 111 Stat. 251:

(g) Prohibition of State imposition of premium taxes

No State may impose a premium tax or similar tax with respect to payments to Medicare+Choice organizations under section 1395w-23 of this title or premiums paid to such organizations under this part.

42 U.S.C. § 1395w-24(g). The statutory term “Medicare+Choice” includes Medicare Advantage health benefit plans. *See* 42 U.S.C. § 1395w-21(a)(2). The applicable federal regulation provides:

Basic rule. No premium tax, fee, or other similar assessment may be imposed by any State . . . or any of [its] political subdivisions . . . *with respect to any payment CMS makes on behalf of MA enrollees* under subpart G of this part, or *with respect to any payment made to MA plans by beneficiaries*, or payment to MA plans by a third party on a beneficiary’s behalf.

42 C.F.R. § 422.404(a) (emphasis added). The regulation also contains a “savings clause” that exempts certain taxes from preemption:

Construction. Nothing in this section shall be construed to exempt any MA organization from taxes, fees, or other monetary assessments related to the net income or profit that accrues to, or is realized by, the organization from business conducted under this part, if that tax, fee, or payment is applicable to a broad range of business activity.

42 C.F.R. § 422.404(b) (emphasis added).

2. The B&O tax is similar to a premiums tax because it is measured against gross premium revenue.

The Department suggested below that because B&O tax is broadly applicable to Group Health’s business activities, B&O tax is not similar to premiums tax and there is no preemption. CP 268. The Department’s position is inconsistent with the text of the savings clause and federal guidance establishing what constitutes a “similar tax” to a premiums tax. What matters is whether the tax applies to gross premium revenue.

First, the text of the federal regulation makes clear that taxes “related to the net income or profit . . . applicable to a broad range of business activity” are saved from preemption. Under the plain language of the regulation, the phrase “applicable to a broad range of business activity” modifies “net income or profit.” It does not stand alone. State taxes applicable to a broad range of business activities, if they are not

assessed against net income or profit, are not saved. 42 C.F.R. § 422.404(b).

Second, that a state tax may be broadly applicable to business activities does not make it dissimilar to a premiums tax for purposes of preemption. CMS issued sub-regulatory guidance in 1998 noting that the only defining characteristic in the preemption statute is that it referred to premium revenue:

The [Balanced Budget Act] does not define the phrase “premium tax or other similar tax,” *other than by reference to the applicability of such a tax to revenue received from the Federal Government for health plan enrollees.*

Medicare Program; Establishment of the Medicare+Choice Program, 63 Fed. Reg. 34,968-01, 35,014 (June 26, 1998) (emphasis added). So it is clear that CMS views “premium tax or similar tax” to mean a tax measured against premium revenue, and that is no surprise given the language in the savings clause. CMS discussed the basis for the savings clause in 42 C.F.R. § 422.404(b), observing that it should operate in the same way as that in the FEHBP statute, which permits state taxation on profits, not revenue:

Relying again on the FEHBP statute, we have included a provision in the regulations (§ 422.404(b)[]) that serves to clarify the scope of what constitutes a prohibited

premium tax. The FEHBP statute expressly permits States to impose taxes on the profits arising from participation as an FEHBP plan, to the extent that the tax on profits, or other taxes or fees, are general business taxes.

Medicare Program; Establishment of the Medicare+Choice Program, 63 Fed. Reg. at 35,014. That sub-regulatory guidance reinforces the plain language of the savings clause in 42 C.F.R. § 422.404(b), which only saves taxes “related to the net income or profit . . . if that tax . . . is applicable to a broad range of business activity.” The CMS guidance does not support the Department’s position that B&O tax on gross premium revenue is saved from preemption because it is a general business tax. That is necessary, but not sufficient, to save the tax from preemption.

The CMS regulation, savings clause, and sub-regulatory guidance establish that what makes a state tax “similar” to a premiums tax is whether it is assessed against premium revenue. When state taxes are taxed against net income or profit as general business taxes, they are saved from preemption. It is not a complicated preemption scheme to determine what kind of tax is similar to a premiums tax.

Preemption of taxes against gross premium revenue makes sense in light of the purpose behind the 1997 legislation:

The creation of the M+C program allows beneficiaries access to a much wider array

of private health plan choices than the existing alternatives to the original Medicare program. Moreover, this new program will enable Medicare to use innovations from the commercial sector that have helped the private market contain costs and expand health care delivery options.

Medicare Program; Establishment of the Medicare+Choice Program, 63 Fed. Reg. at 34,974. If states could directly tax gross premium revenues, then Medicare costs would increase and health care services would decrease—privatization through Medicare Advantage was designed to effect the opposite. Under federal law, a state tax is saved from preemption if it applies to *net* income or profit attributable to the entity’s business activities generally. That makes economic sense because taxes on net income do not directly correlate to the provision of a line of service, and therefore do not run the risk of increasing the cost of that line of service or leading to a reduction in that line of service. Preemption arises when state taxes raise the cost of Medicare premiums, which get passed along to the federal government and Medicare beneficiaries. There is a reason that Congress did not just preempt premiums tax. It also foreclosed “similar tax” that would lead to similar negative effects of raising costs and reducing services.

Here, it is undisputable that the Department’s B&O tax applies to gross revenue, RCW 82.04.290(2)(a), and that the paid tax at issue was

made on Group Health's gross premium revenue for Medicare Advantage health benefit plans. CP 248 (Kinzer Decl. ¶ 12). The federal savings clause in 42 C.F.R. § 422.404(b) has no application. The Department's B&O tax is preempted because it directly correlates to gross premium revenue and is therefore a "similar tax" to a premiums tax. *See* 42 U.S.C. § 1395w-24(g). No other alleged distinctions between the two taxes are legally relevant.

3. Division One has concluded that the FEHBP statute preempted a local B&O tax on gross premium revenue.

In a Senate Finance Committee summary, it stated that "[t]he current law on federal preemption of state premiums tax or fees on Federal payments from the FEHBP to health plans will be extended to Federal payments to" Medicare. Medicare Program; Establishment of the Medicare+Choice Program, 63 Fed. Reg. at 35,014. Consequently, CMS expressly referred to preemption for the FEHBP when construing federal preemption for Medicare Advantage and tailoring an appropriate savings clause in the Medicare Advantage regulation, which CMS based on the comparable clause in the FEHBP. *Id.*; *compare* 42 C.F.R. § 422.404(b) (Medicare Advantage savings clause), *with* 5 U.S.C. § 8909(f)(2) (FEHBP savings clause). Given that Congressional history and express sub-regulatory guidance from CMS, this Court should defer to the federal

agency's expertise concerning its own statutes and construe the preemption provisions and their savings clauses interpreted similarly. *Skamania County*, 144 Wn.2d at 43 (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984)).

The similarity of the two federal statutory regimes is helpful here because there is Washington precedent interpreting the FEHBP to preempt the application of local B&O tax on gross premium revenue. Ten years ago, Division One of the Court of Appeals rejected the City of Seattle's attempt to impose its B&O tax against FEHBP premium revenue. *Grp. Health Coop. v. City of Seattle*, 146 Wn. App. 80, 96, 189 P.3d 216 (2008). The court examined the savings clause in 5 U.S.C. § 8909(f)(2) and determined that the "only instance in which such taxes are not barred is when they *both* are on the 'net income or profit' of the carrier and are 'applicable to a broad range of business activity.'" *Grp. Health Coop.*, 146 Wn. App. at 94 (emphasis added) (quoting 5 U.S.C. § 8909(f)(2)). In that case, it was "undisputed that the City's B & O audit determination seeks to impose B & O taxes on *revenue* obtained by Group Health in the form of payments from the [Federal Employee Health Benefits Fund]." *Id.* at 95 (emphasis added). The Court had no difficulty in concluding that the City of Seattle's B&O tax was preempted:

[T]he City’s B & O tax is not a tax on “net income or profit.” 5 U.S.C. § 8909(f)(2). Nor is it even *measured* by net income or profit. Rather, it is expressly a tax on the “privilege of *engaging in business* activities within the City,” and is “determined by application of rates against *gross proceeds* of sale, *gross income* of business, or value of products.” SEATTLE MUNICIPAL CODE (SMC) 5.45.050 (emphasis added). The [Federal Employee Health Benefits Fund] revenue taxed in the City’s audit determination falls squarely within the category of taxes expressly preempted by [the FEHBP statute], and as such was assessed in violation of federal law.

Id. at 96 (emphasis in original). There is no meaningful distinction between the City of Seattle’s attempt to impose B&O tax on FEHBP premium revenue and the Department’s attempt to impose B&O tax on Medicare Advantage premium revenue. In both instances, the tax applies to a broad range of business activity, but that is not sufficient to save the tax from preemption because it must be measured against net income. *Id.*

CONCLUSION

This Court should reverse the Superior Court’s summary judgment order and direct entry of judgment for Group Health.

Respectfully submitted.

February 12, 2018.

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CERTIFICATE OF SERVICE

On February 12, 2018, I caused to be served upon the below named counsel of record, at the address stated below, via the method of service indicated, a true and correct copy of the foregoing document.

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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.

EXECUTED at Seattle, Washington, on February 12, 2018.

s/ Betty Kawagoe

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