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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.

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TABLE OF CONTENTS

	Page
INTRODUCTION	1
ARGUMENT	2
A. The Legislature did not intend to tax Medicare premium revenue under the B&O tax.	2
1. A proper plain-meaning analysis shows that the Legislature did not intend to impose B&O tax on Medicare premium revenue.	3
2. The Department’s plain-language analysis leads to strained results.	5
3. The Department misplaces its reliance on <i>Crown Zellerbach</i>	8
4. Nothing in the legislative history supports application of B&O tax to Medicare premium revenue.	12
5. Ambiguity cannot save the Department’s flawed theory.	14
6. The Department’s view warrants no deference.	17
B. Federal law preempts the Department’s taxation of gross Medicare premium revenue.	17
1. The Department highlights irrelevant dissimilarities between B&O tax and premiums tax.	18
2. The Department’s analysis of the savings clause lacks textual or other support.	22
3. There is no reason to interpret the preemption provisions applicable to FEHBP and Medicare Advantage differently.	23
CONCLUSION	25

TABLE OF AUTHORITIES

	Page(s)
Cases:	
<i>Citizens All. for Prop. Rights Legal Fund v. San Juan County</i> , 184 Wn.2d 428, 359 P.3d 753 (2015).....	3
<i>Crown Zellerbach Corp. v. State</i> , 45 Wn.2d 749, 278 P.2d 305 (1954).....	8, 9, 10
<i>Dep’t of Ecology v. Campbell & Gwinn, L.L.C.</i> , 146 Wn.2d 1, 43 P.3d 4 (2002).....	3, 15
<i>Grp. Health Coop. v. City of Seattle</i> , 146 Wn. App. 80, 189 P.3d 216 (2008).....	24
<i>Pierce County v. State of Washington</i> , No. 94-44, 1995 WL 379053 (Wash. B.T.A. Mar. 22, 1995).....	8
<i>Skamania County v. Columbia River Gorge Comm’n</i> , 144 Wn.2d 30, 26 P.3d 241 (2001).....	24
<i>United Parcel Serv., Inc. v. Ind. Dep’t of State Revenue</i> , No. 49T10-0704-TA-24, 2010 WL 5549039, (Ind. T.C. Dec. 29, 2010) (unpublished), <i>rev’d on other grounds</i> , 969 N.E.2d 596 (Ind. 2012).....	8
Statutes:	
5 U.S.C. § 8909(f)(1).....	25
5 U.S.C. § 8909(f)(2).....	24
42 U.S.C. § 1395w-24(g).....	17, 19, 20
Balanced Budget Act of 1997, Pub. L. No. 105-33, § 4001, 111 Stat. 251.....	11
RCW 48.14.0201.....	14
RCW 48.14.0201(1).....	6, 7, 8, 15
RCW 48.14.0201(6).....	2

TABLE OF AUTHORITIES
(continued)

	Page(s)
Statutes—continued:	
RCW 48.14.0201(6)(a)	<i>passim</i>
RCW 48.14.0201(6)(b)	16, 17
RCW 82.04.050	8
RCW 82.04.290(2)(a)	18
RCW 82.04.320	3, 5
RCW 82.04.322	<i>passim</i>
Regulations:	
42 C.F.R. § 422.404(a).....	17, 20, 25
42 C.F.R. § 422.404(b)	18, 20, 23
WAC 458-20-163(2)(a)	4
WAC 458-20-163(2)(b)	4
Miscellaneous:	
Black’s Law Dictionary (10th ed. 2014).....	19
Brief of Respondent, <i>Crown Zellerbach Corp. v. State</i> , 45 Wn.2d 749, 278 P.2d 305 (1954) (No. 32750)	10, 11
Fiscal Note, H.R. 1690 (Wash. 2005).....	16
H.R. 1690, 59th Leg., Reg. Sess. (Wash. 2005)	16
Laws of 1993, 1st Spec. Sess., ch. 25, § 203 (2d E.S.S.B. 5967).....	6
Laws of 1993, ch. 492, § 301 (2d E.S.S.B. 5304).....	4, 6
Laws of 1997, ch. 154, § 1 (S.H.B. 1219)	4, 6

TABLE OF AUTHORITIES
(continued)

	Page(s)
Miscellaneous—continued:	
Laws of 2005, ch. 405, § 1 (H.R. 1690).....	16
Medicare Program; Establishment of the Medicare+Choice Program, 63 Fed. Reg. 34968-01 (June 26, 1998).....	20, 23, 24

INTRODUCTION

This case concerns whether the Legislature intended to apply B&O tax to Medicare premium revenue when it enacted health care reform.

Group Health has provided the only coherent explanation of legislative intent. In 1993, the Legislature exempted premium revenue from B&O tax so that the revenue would not be subject to multiple taxation. It also created an exemption *within* the premiums tax for Medicare premium revenue to lower the cost of healthcare services for Medicare beneficiaries. That revenue was “taxable” under the premiums tax; originally, the exemption was subject to a four-year sunset provision. The Legislature never intended for B&O tax to apply.

Interpreting a single term from an unrelated case from the 1950s, the Department argues that the Legislature intended to reimpose B&O tax through the premiums-tax exemption for Medicare premium revenue. The Department’s theory is convoluted on the merits, leaving the Department to rely upon canons of construction. The problem is that the Department does not offer a reasonable construction for this Court to adopt.

The most the Department can say is that the statute is ambiguous. In that event, the legislative history and the Department’s past practices overwhelmingly support Group Health’s interpretation of legislative intent. This Court should reverse.

As for federal preemption, the Department has invented its own set of standards for what constitutes a “similar tax,” none of which find any traction in the statute, regulations, or federal guidance. The Department essentially reads “similar tax” out of the statute.

Next, citing no authority, the Department suggests that it might avoid federal preemption even though it does not satisfy the federal savings clause, which saves broad-based taxes applicable to net income or profit. Even if that was possible, the Department does not explain how the B&O tax on gross revenue at issue here would survive federal preemption.

Finally, the Department asks this Court to depart from the analytical framework employed by the Centers for Medicare & Medicaid Services, which looks to similar federal preemption regimes, as well as abandon the sound reasoning of the Court of Appeals ten years ago. Federal preemption provides a second basis for this Court to reverse.

ARGUMENT

A. The Legislature did not intend to tax Medicare premium revenue under the B&O tax.

In granting summary judgment to the Department, the Superior Court cited the plain language of the statutes at issue. RP 20:2, 11. It determined that Group Health’s Medicare Advantage premium revenues “are exempt from taxation under RCW 48.14.0201(6),” and therefore “are not *taxable* under the [premiums tax].” RP 20:5-9 (emphasis added).

Because only revenue that is “taxable” under premiums tax is exempt from B&O tax, the Superior Court determined that B&O tax applied to Group Health. RP 20:2-5, 10-12.

The Superior Court’s plain-meaning interpretation is incorrect for two related reasons. First, it does not “best advance[]” the purpose behind health care reform. *Citizens All. for Prop. Rights Legal Fund v. San Juan County*, 184 Wn.2d 428, 437, 359 P.3d 753 (2015) (citation omitted). Second, it does not consider the statutory scheme as a whole, including related provisions, which help disclose legislative intent. *Dep’t of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 11-12, 43 P.3d 4 (2002).

1. A proper plain-meaning analysis shows that the Legislature did not intend to impose B&O tax on Medicare premium revenue.

In 1993, the Legislature did not intend for Medicare premium revenue to be taxed when it enacted health care reform. That is why the Legislature exempted Medicare premium revenue from the premiums tax in RCW 48.14.0201(6)(a).

Group Health’s plain-meaning argument is textual and structural. First, the Legislature used the term “taxable” in RCW 82.04.322, not “tax . . . paid” as required for other tax exemptions, such as RCW 82.04.320. The Department tries to (Br. 28) merge the different language in the related statutes, but has distinguished between such

language in its administrative rules. *Compare* WAC 458-20-163(2)(a) (“tax . . . paid”), *with* WAC 458-20-163(2)(b) (“are taxable”).

Second, the statutory scheme as a whole shows that the Legislature did not intend to tax Medicare premium revenue under the B&O tax through the operation of RCW 82.04.322. The premiums-tax exemption for Medicare revenue in RCW 48.14.0201(6)(a) contained a sunset provision. Laws of 1993, ch. 492, § 301, at 2136 (2d E.S.S.B. 5304) (“This exemption shall expire July 1, 1997.”) (reproduced at CP 183). The Legislature revoked that sunset provision in 1997, which would have been unnecessary if the revenue was subject to B&O tax the whole time. *See* Laws of 1997, ch. 154, § 1, at 879-880 (S.H.B. 1219).

The Legislature ensured that HMO and HCSC premium revenue was not subject to multiple taxation under premiums and B&O tax through RCW 82.04.322. That does not mean that it intended to resuscitate B&O tax for Medicare premium revenue exempt from premiums tax. It was error for the Superior Court to presume that the Legislature intended to tax Medicare premium revenue under either B&O or premiums tax, and then interpret “taxable” to that end. However plausible a dictionary definition may appear for a statutory term, it must fit with the statutory scheme as a whole and advance the legislative purpose. Here, the most specific articulation of the Legislature’s purpose is the exemption in RCW

48.14.0201(6)(a) itself. The Court should construe RCW 82.04.322 harmoniously with that exemption and the statutory scheme as a whole, including RCW 82.04.320 and the Legislature's creation and repeal of the sunset provision applicable to RCW 48.14.0201(6)(a).

2. The Department's plain-language analysis leads to strained results.

The Department repeats the error of the Superior Court, honing in (Br. 14-16) on the word "taxable" in RCW 82.04.322 without considering that term in the context of the statutory scheme enacted through health care reform. The Department argues (Br. 15) that "taxable" means "assessable" or "subject to taxation," such that "premiums that are actually subject to premium tax are not also subject to B&O tax." The Department further claims (Br. 15) that such definitions best advance "the purpose behind the exemption of avoid[ing] overlapping taxation."

Group Health does not object to the phrase "subject to taxation," but disagrees that "taxable" means "paid tax." The Department's alleged purpose may be true as far as it goes for RCW 82.04.322, but does not explain why the Legislature created an exemption *within* the premiums tax in RCW 48.14.0201(6)(a). The Department has not identified that purpose.

Adopting the Department's definition of "taxable" in RCW 82.04.322 to mean "paid tax" leads to absurd results when construing

RCW 48.14.0201(6)(a). The Legislature could not have classified HMO and HCSC premium revenue under the premiums tax in RCW 48.14.0201(1), excluded that revenue from assessment under B&O tax in RCW 82.04.322, and created an exemption from premiums tax for Medicare premium revenue in RCW 48.14.0201(6)(a), all to assess B&O tax that existed in the first instance against Medicare premium revenue specifically but not against premium revenue generally. The Department has provided no legislative justification behind that bifurcation.

Taking the Department's theory further, taxing Medicare premium revenue under B&O tax defeats the entire purpose of exempting the Medicare premiums from premiums tax. In 1993, the rates for premiums tax and B&O tax were the *same*: two percent. *See* Laws of 1993, ch. 492, § 301, at 2135 (2d E.S.S.B. 5304) (premiums tax); Laws of 1993, 1st Spec. Sess., ch. 25, § 203, at 3025-3026 (2d E.S.S.B. 5967) (B&O tax). The Department's view means that the Legislature exempted Medicare premium revenue from a single two percent tax just to impose a different two percent tax. That interpretation does not add up.

On top of all that, accepting the Department's interpretation of "taxable" to mean "paid tax" requires assigning a meaningless act to the Legislature when it removed the sunset provision for the premiums-tax exemption in 1997. Laws of 1997, ch. 154, § 1, at 879-880 (S.H.B. 1219).

If Medicare premium revenue had been subject to B&O tax all along, there would not have been any concern to allow the sunset provision to take effect. *See* CP 201-203.

The Legislature could not have intended such a strained scheme. Instead, a measured analysis of legislative intent begins with the premiums-tax exemption. The exemption provides that “[t]he taxes imposed” through the premiums tax “do not apply to” Medicare premium revenue. RCW 48.14.0201(6)(a); *see* RCW 48.14.0201(1). Within the premiums tax regime, such revenue is exempt from premiums tax.

Of course, HMOs and HCSCs have all sorts of other revenue that does not fall under the premiums tax regime. That explains the purpose of RCW 82.04.322, which protects against multiple taxation of premium revenue, as the Department acknowledges throughout its brief. That does not, in turn, mean that Medicare premium revenue is not “taxable” for purposes of premiums tax. It must have been taxable—there was a sunset provision for the premiums-tax exemption when the provision was enacted in 1993. That is why Group Health’s definition of “taxable” as “capable of being taxed” or “subject to tax”—but not “paid tax”—makes sense.

Indeed, if the sunset provision had not been revoked in 1997, the premiums-tax exemption for Medicare premium revenue would have expired and premiums tax would have applied. Nothing in the statutory

scheme evidences legislative intent to compel application of B&O tax in the absence of actual tax liability for premiums tax.¹

3. The Department misplaces its reliance on *Crown Zellerbach*.

The root of the Department’s problematic definition of “taxable” is its staunch analogy (Br. 17-22) of health care reform in 1993 to the statutory scheme analyzed in *Crown Zellerbach Corp. v. State*, 45 Wn.2d 749, 278 P.2d 305 (1954). That case concerned three tax classifications within B&O tax, in the context of an existing federal prohibition against assessment of tax for one of the classifications. The case best serves to illuminate the faulty assumption that lies at the core of the Department’s analysis (Br. 16), which is that “the Legislature seeks to impose one tax or

¹ Many states, including Indiana, have both a general business tax and a premiums tax. Indiana imposes a tax on the adjusted gross income of corporations, but there is no tax on such income of insurance companies “subject to” the premiums tax. *See United Parcel Serv., Inc. v. Ind. Dep’t of State Revenue*, No. 49T10-0704-TA-24, 2010 WL 5549039, at *3 (Ind. T.C. Dec. 29, 2010) (unpublished), *rev’d on other grounds*, 969 N.E.2d 596 (Ind. 2012). In that case, the taxpayer, UPS, asserted that it owed no tax on adjusted gross income because it was “subject to” the premiums tax, even though it owed no tax by reason of a deduction that offset its premium revenue. The Tax Court held that “to be ‘subject to’ the premiums tax under [Indiana law] does not mean that one must ‘pay’ the premiums tax; rather, it simply means that one is ‘placed under the authority, dominion, control, or influence’ of the premiums tax.” *Id.*

Similarly, the existence of an exemption under RCW 48.14.0201(6)(a) does not change the fact that Group Health’s premium revenues are all subject to the imposition provision. RCW 48.14.0201(1). The Department has not taken a position to the contrary. *See Pierce County v. State of Washington*, No. 94-44, 1995 WL 379053, at *4 (Wash. B.T.A. Mar. 22, 1995) (“[RCW 82.04.050](2) . . . is general language imposing the sales tax Such general language is properly viewed as imposition language. Paragraph (6) excepts out from the general imposition language transactions involving the construction or repair of local roads. Where an exception is made to general language imposing the sales tax, the exception should be regarded—and construed—as an exemption from the tax.”).

the other, but not both.” That full premise may have been true in *Crown Zellerbach*, 45 Wn.2d at 754, but only the second half has relevance here.

First, the Department recognizes (Br. 18) that *Crown Zellerbach* “interpreted a different statute that does not directly control the outcome of this case.” The Department nevertheless argues (Br. 18, 20) that the case is helpful because it involved “a similar purpose to the B&O tax exemption at issue in this case: to avoid subjecting the same activities to multiple taxation.” The Department’s suggestion of a “common” legislative purpose between health care reform and the B&O tax scheme in *Crown Zellerbach* is pure assumption. The Department does not explain why the Legislature made Medicare premium revenue exempt from premiums tax under RCW 48.14.0201(6)(a). There was no analogous tax exemption under *state law* considered by the Court in *Crown Zellerbach*. The legislative intent here is clearly different.

Second, there are structural differences in the statutory schemes that the Department overlooks, especially in urging (Br. 19) that a part of the legislative purpose is to impose at least one tax on a given activity. The Department recognizes (Br. 18) that the taxpayer’s activities in *Crown Zellerbach* were “subject to different classifications under the B&O tax.” The Department also acknowledges (Br. 19) that the Legislature “sought to avoid subjecting the same product to taxation under multiple

classifications” of B&O tax, yet sought to impose B&O tax under one classification. *See Crown Zellerbach*, 45 Wn.2d at 754. That is fair as far it goes for different classifications *within* the B&O tax. But this case presents an exemption *from* B&O tax for premiums tax *alongside* an exemption *within* premiums tax for Medicare premium revenue. It is not the same statutory structure.

The State’s briefing in *Crown Zellerbach* highlights the historical differences between the statutory schemes. Brief of Respondent at 15-34, *Crown Zellerbach Corp. v. State*, 45 Wn.2d 749, 278 P.2d 305 (1954) (No. 32750). The State explained how the “history of judicial construction, and of administrative and legislative actions disclose the legislative intent to have all persons doing business in this state pay tax at one general basic uniform rate.” *Id.* at 34. Accepting the taxpayer’s argument would have disrupted that legislative judgment of uniformity. *Id.* Based on that extensive history and authority, the Supreme Court concluded that there was a legislative policy underlying the B&O tax “to impose *actual liability* for payment of tax only once.” *Crown Zellerbach*, 45 Wn.2d at 753-754. That policy required that “business and occupation tax *be imposed on at least one activity.*” *Id.* at 754.

Absent the same legislative policy found in the history, the same presumption does not apply here. The Legislature created an exemption

from premiums tax for Medicare revenue in RCW 48.14.0201(6)(a). There was no substantive tax exemption in *Crown Zellerbach*. It is inconsistent with the premiums-tax exemption to assume that the Legislature intended to bring that revenue back under B&O tax based on *Crown Zellerbach*.

Third, the Department mischaracterizes (Br. 20-22) federal law existing in the background of the statutory regime at issue here in an effort to shoehorn health care reform into the mold of *Crown Zellerbach*. It is not true that “[i]n both cases, federal law proscribed certain taxation of activities.” Dep’t Br. 20. Federal law did not preempt a state’s imposition of premiums tax on Medicare premium revenue until 1997. *See* Balanced Budget Act of 1997, Pub. L. No. 105-33, § 4001, 111 Stat. 251. There was no federal prohibition in 1993 when the Legislature passed health care reform. That distinguishes health care reform from the B&O tax considered in *Crown Zellerbach*, as the State well understood at the time. *See* Brief of Respondent at 21 (No. 32750) (“The reason that no wholesaling tax is paid on such sales is clear. Such sales are not ‘taxable’ by Washington because of the Federal Constitution.”).

That distinction disposes of any tenuous comparison to *Crown Zellerbach*. Here, the Legislature itself has created the exemption for Medicare premium revenue at the same time it ensured that there was no multiple taxation. That embodies a different legislative judgment: that

Medicare premium revenue not be taxed at all. There is no basis to assume that the legislature intended that tax “be imposed on at least one activity,” as in *Crown Zellerbach*. It is reasonable to view the Legislature’s intent as not only protecting against multiple taxation between premiums and B&O tax through RCW 82.04.322, but also ensuring that Medicare premium revenue was not taxed at all by exempting that revenue from premiums tax through RCW 48.14.0201(6)(a).

4. Nothing in the legislative history supports application of B&O tax to Medicare premium revenue.

In its discussion of the legislative purpose, the Department makes an admission that highlights its flawed view of the structure of the statutory scheme. The Department recognizes (Br. 23) that there was a sunset provision for the premiums-tax exemption for Medicare premium revenue. That exemption from premiums tax “was originally limited only until July 1, 1997.” Dep’t Br. 23. After noting the obvious intent to raise revenue through taxes, the Department concludes that the “thrust of the legislation was to raise tax on health providers to pool resources to provide services, not to carve out revenue sources from taxation altogether.” Dep’t Br. 23; *see id.* at 29. Even taking that argument as presented, all it means is that tax might be assessed against Medicare premium revenue *under the premiums tax*. The Final Bill Report quoted (Br. 23) by the Department is

clear: the bill was intended to raise taxes for the “health services trust account,” not the general fund to which B&O taxes are deposited. CP 313. The sunset provision for the premiums-tax exemption does not support imposition of B&O tax. It supports the opposite conclusion: that Medicare premium revenue was capable of being taxed, and therefore taxable, under the premiums tax.

That is a structural issue with the statutory scheme that does not require any analysis of legislative history, though the history reinforces Group Health’s position that the Legislature’s removal of the sunset provision in 1997 was necessary to avoid imposing a *new* premiums tax. CP 202. B&O tax never applied since 1993—that is why the premiums tax on Medicare premium revenue was considered to be new.

The Department’s limited review of the legislative purpose again cites *Crown Zellerbach* (Br. 23), noting an intent to “avoid overlapping or multiple taxation.” That is fair enough, but it does not answer whether the Legislature ever intended for *B&O tax* to apply to Medicare premium revenue. The Legislature clearly considered Medicare premium revenue to be taxable under the premiums tax—there is a sunset provision for the exemption from premiums tax, which the Legislature eventually removed—there is no evidence in the legislative history that the Legislature intended B&O tax to apply to Medicare premium revenue.

5. Ambiguity cannot save the Department’s flawed theory.

The Department ultimately resorts (Br. 29-30) to an alleged presumption in its favor: that any ambiguity in a tax exemption must be construed in its favor. The Department suggests that “[i]f the Legislature wants to create an exemption from B&O tax for Medicare premium income that is exempt from the premium tax, it can do so.” Dep’t Br. 30.

That canon of construction might bear some weight if the Department’s theory could stand on its own. But the Department has provided no plausible formulation of the Legislature’s intent to tax Medicare premium revenue under B&O tax through health care reform. Its interpretation of “taxable” is not consistent with the statutory scheme, and its analogy to *Crown Zellerbach* fails on multiple grounds. All that the Department has shown in its briefing is that RCW 82.04.322 evidences a legislative purpose not to subject premium revenue to multiple taxation.

There is no ambiguity: the Legislature created an exemption from B&O tax by classifying premium revenue separately under RCW 48.14.0201, and ensuring that multiple taxation would not occur through RCW 82.04.322. That the Legislature further exempted Medicare premium revenue from the premiums tax in RCW 48.14.0201(6)(a) does not transform that line of revenue into the *only* premium revenue subject to B&O tax. The Department’s speculation (Br. 29) about how the

Legislature might have written the statute differently does not change that outcome, especially in the absence of a cogent explanation of legislative intent by the Department. The scheme enacted through health care reform is hardly as ambiguous as the Department makes it out to be. The imposition of premiums tax through RCW 48.14.0201(1) and the exemption therefrom in RCW 48.14.0201(6)(a) is clear.

In any event, the Department asks the Court to construe an express exemption in the premiums-tax regime as bringing that revenue back into play for B&O tax. That task requires construing the statutory scheme as a whole, and is not properly viewed as the narrow examination of a tax exemption, as the Department suggests. *See* Dep't Br. 12-13, 29-30.

But if there is any ambiguity in the statutory scheme, it is not resolved by a canon favoring the Department. Instead, it is overcome by the landslide of legislative history supporting Group Health's interpretation. If, after any inquiry into the plain language, "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). In this case, the only legislative history (the change from "tax . . . paid" to "taxable" in the original legislation, the

testimony in support of the repeal of the sunset, and the fiscal note in 1993) supports Group Health.

Further, the legislative history underlying a parallel exemption supports Group Health's interpretation. In 2005, the Legislature exempted state-funded health care programs from premiums tax under RCW 48.14.0201(6)(b). Laws of 2005, ch. 405, § 1, at 1731-1732 (H.R. 1690). If the Department were correct, amounts received from the State, which are exempt from premiums tax under RCW 48.14.0201(6)(b), would not be "taxable" under RCW 82.04.322 and therefore would be subject to B&O tax. Yet the history of RCW 48.14.0201(6)(b) shows that the only subject of the legislation was the premiums-tax exemption. *See* H.R. 1690, 59th Leg., Reg. Sess., at 1-2 (Wash. 2005) (discussing exemption from premiums tax deposited into Health Services Account). There is no discussion of the B&O tax applying should the premium tax exemption be enacted.

Moreover, the fiscal note associated with the bill only shows a reduction of the Health Services Account (premium tax)—it does not show a corresponding increase for B&O tax, which would be required under the Department's theory. *See* Fiscal Note, H.R. 1690 (Wash. 2005).

Group Health's interpretation of health care reform in 1993 is consistent with the Legislature's acts in 2005. It accords a consistent tax

application for all health care programs, including the state-funded ones, exempt from premiums tax under RCW 48.14.0201(6)(a) and (b).

6. The Department's view warrants no deference.

The Department has admitted (Br. 30 n.7) that it did not collect B&O tax on Medicare premium revenue historically. It argues (Br. 30) that it changed course in 2007 through published guidance, but there is no dispute that the Department's current position is at odds with years' worth of collection practices, as evidenced by the Department's own exemption studies. CP 210-212. This Court's review is de novo in any event, as the Department acknowledges (Br. 30).

B. Federal law preempts the Department's taxation of gross Medicare premium revenue.

The Superior Court concluded that "the B&O tax is not a similar tax to the premium tax," and was not preempted. RP 20:25-21:1; *see* 42 U.S.C. § 1395w-24(g) ("No State may impose a premium tax or similar tax" for Medicare Advantage premiums.); 42 C.F.R. § 422.404(a) ("No premium tax, fee, or other similar assessment may be imposed by any State . . . with respect to any payment CMS makes on behalf of MA enrollees . . . , 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."). That was error because the Department assesses B&O tax

against the gross amount of premium revenue, RCW 82.04.290(2)(a), the legally relevant similarity to a premiums tax.

The savings clause in the regulation preserves a state’s ability to tax an entity’s “net income or profit” if the tax “is applicable to a broad range of business activity.” 42 C.F.R. § 422.404(b). But there is nothing in the regulation that saves a broad-based tax on gross premium revenue, as the Department claims (Br. 34-36) here. The reason is straightforward: B&O tax assessed against gross premium revenue is effectively the same as a premiums tax, and is therefore preempted under federal law.

1. The Department highlights irrelevant dissimilarities between B&O tax and premiums tax.

The Department offers (Br. 34-36) an array of factors that it believes distinguishes B&O tax from premiums tax. Conspicuously absent from the Department’s analysis is a single citation to federal law or other federal authority. It has invented alleged dissimilarities that no court or federal agency has recognized as legally relevant, all to the exclusion of what the text of the statute, the applicable regulation and the savings clause, and the sub-regulatory guidance provide.

The Department argues (Br. 34) that a premium tax is one targeted selectively at insurance companies or premiums. But a “premium tax” is commonly understood to be a “state tax paid by an insurer on premiums

paid by the insured.” *Premium Tax*, Black’s Law Dictionary (10th ed. 2014). The B&O tax may be just that, and even if not, it is a similar tax.

Group Health has identified the legally significant similarity between B&O tax and premiums tax, which derives from the text of the preemption regulation and its savings clause: both taxes are assessed against the gross amount of the premium revenue, not the net income of the business that reflects a wide variety of business activities.

Group Health’s argument that B&O tax is preempted has two textual foundations. The first is that the federal statute clearly preempts more than a state’s attempt to impose a premiums tax. By its plain terms, the statute preempts “a premium tax or similar tax.” 42 U.S.C. § 1395w-24(g). It is therefore unreasonable to interpret “similar” in the granular manner proposed (Br. 35) by the Department, which suggests that differences in the timing of the payment, the fund holding the tax payment, or even the date of enactment is legally significant. The Department provides no authority that any of those dissimilarities matter. No tax would ever be “similar” under the Department’s approach, which reads that term entirely out the statute.

The source of Group Health’s second textual argument is the savings clause in the regulation, which saves a tax on “net income or profit” that is “applicable to a broad range of business activity” from

preemption. 42 C.F.R. § 422.404(b). Group Health interprets the statutory and regulatory term “similar” in light of that savings clause. Broad-based taxes on net income or profit are not preempted, and therefore are not “similar” to premiums taxes under 42 C.F.R. § 422.404(a) and 42 U.S.C. § 1395w-24(g). But a tax on the *gross* amount of premium revenue would be preempted as a “similar tax” because, like a premiums tax, it applies on a gross basis. The gross versus net distinction is the legally relevant dissimilarity discernible in the federal regulations.

The Centers for Medicare & Medicaid Services (“CMS”) has issued sub-regulatory guidance validating Group Health’s interpretive approach. CMS adopted the savings clause in 42 C.F.R. § 422.404(b) to “clarify the scope of what constitutes a prohibited premium tax.” Medicare Program; Establishment of the Medicare+Choice Program, 63 Fed. Reg. 34,968-01, 35,014 (June 26, 1998). In doing so, CMS looked to how the same language was applied in the context of the Federal Employees Health Benefits Program (“FEHBP”) statute. CMS noted that the “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.” *Id.* CMS guidance therefore confirms Group Health’s position: that a general business tax on net income or profits is not preempted. But there is no support for the

Department's argument (Br. 34-36) that a general business tax on gross premium revenue is permissible. That is directly contrary to CMS guidance and the regulatory text. If CMS thought that any generally applicable business tax was permitted, it would not have limited the savings clause to "net income or profits."

Stranded without any textual mooring for its interpretation of a "similar tax," the Department claims (Br. 36) that "[i]t is much more likely that when Congress referred to similar taxes, it meant other taxes related to the insurance business." But that conflicts with the meaning of a "premium tax." The Department provides no authority for that proposition, much less why it should override what is stated plainly in the text of the preemption regulation and the savings clause carving out taxes on net income from preemption.

The Department then suggests (Br. 36) that "*any tax* imposed on a business could potentially be passed on indirectly in whole or in part to customers of the business through higher prices." The Department fails to acknowledge that the tax must be on Medicare premiums. And even accepting the Department's premise, any increase in prices due to a tax on net income would be distributed among *all of the customers* of the business, not a subset of the customer base, because the net income tax could not be tied to a specific line of revenue. Applied here, if tax was

assessed against Group Health’s net income, as opposed to its gross premium revenue, then Group Health’s Medicare Advantage beneficiaries—and equally importantly for preemption purposes, the federal government—would not be isolated to bear any potential increase in prices due to the tax, because any such increase could not be tied to the premiums that those beneficiaries pay. Instead, any price increase caused by B&O tax would be distributed across the customer base for all of Group Health’s customers. That is why the preemption provision exists, and that is why the only legally significant similarity is whether a tax is assessed against gross premium revenue. That is what makes it similar.

The Department has conceded (Br. 36) that B&O tax does not apply to Group Health’s net income, and does not fit within the savings clause. The Department’s attempt to impose B&O tax on Group Health’s Medicare Advantage premium revenue is therefore preempted.

2. The Department’s analysis of the savings clause lacks textual or other support.

The Department claims (Br. 37) that it is “a logical fallacy to suppose that because the regulation’s exception does not cover B&O tax, the B&O tax therefore meets the definition of what is preempted—a ‘premium tax or similar tax.’” That is strong language considering that the federal agency administering the statutory scheme engaged in exactly that

analysis to determine what taxes were prohibited. 63 Fed. Reg. at 35,014 (discussing 42 C.F.R. § 422.404(b)). In any event, it is far from illogical to determine the scope of preemption in light of the express language in the regulatory savings clause. It is also consistent with well-established principles of statutory construction to examine the regulatory scheme as a whole to determine the scope of preemption.

The Department has provided no legal support for its proposition (Br. 37) that there that there is some class of taxes that are not saved from preemption by the regulation, but nevertheless are not preempted as a “similar” tax. But even assuming the Department’s position is viable in theory, the Department has provided no legal basis why a broad-based tax on gross premium revenue might be saved. It has not articulated a legal standard for what makes a tax dissimilar from a premium tax, nor has it applied any such standard to explain why B&O tax assessed against gross premium revenue—which is exactly how premiums tax is measured—is different in a legally cognizable way.

3. There is no reason to interpret the preemption provisions applicable to FEHBP and Medicare Advantage differently.

The Department also offers (Br. 37-38) an anomalous view of the FEHBP and Medicare Advantage preemption regulations that departs sharply from CMS guidance. The Department claims (Br. 38) the statutory

language “differs sharply.” CMS disagrees, looking to the FEHBP statute for guidance in interpreting the preemption regulations at issue here. 63 Fed. Reg. at 35,014. The Department’s preferred approach runs directly contrary to the federal agency that administers the regulations. This Court defers to the federal agency’s expertise concerning its own statutes, not the Department’s guesswork. *Skamania County v. Columbia River Gorge Comm’n*, 144 Wn.2d 30, 43, 26 P.3d 241 (2001).

The Department resists any comparison between the two federal preemption regimes because there is existing appellate authority in Washington holding that the FEHBP statute preempts application of local B&O tax on gross premium revenue. *Grp. Health Coop. v. City of Seattle*, 146 Wn. App. 80, 96, 189 P.3d 216 (2008). The court analyzed the preemption provisions of the FEHBP statute and concluded 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)). A general business tax on gross proceeds or gross income—like the B&O tax the Department seeks to impose here—was preempted under the FEHBP statute. *Id.* at 96.

The Department attempts to distinguish that compelling Washington authority by arguing (Br. 37-38) that the FEHBP statute has a

“broader scope” applicable to “carriers.” As to alleged differences in breadth, the Department is wrong. The FEHBP statute provides that “[n]o tax, fee, or other monetary payment may be imposed”; the Medicare Advantage regulations provide that “[n]o premium tax, fee, or other similar assessment may be imposed.” *Compare* 5 U.S.C. § 8909(f)(1), *with* 42 C.F.R. § 422.404(a). There is no difference in scope. It is not clear what distinction the Department raises about “carriers” in the FEHBP statute, but it cannot be legally significant here. The prohibition against premium or similar taxes applies 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.” 42 C.F.R. § 422.404(a). The Department cannot contend that such payments are not at issue.

The Department’s federal preemption argument lacks substance. The Department has not provided this Court with any legal standards supporting its ability to impose a broad-based tax on gross premium revenue. Federal law preempts the Department’s imposition of B&O tax.

CONCLUSION

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

Respectfully submitted.

June 13, 2018.

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CERTIFICATE OF SERVICE

On June 13, 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 June 13, 2018.

s/ Vicki Lynn Babani

Vicki Lynn Babani, Legal Practice Assistant

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