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**COURT OF APPEALS, DIVISION II
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 OF RESPONDENT

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TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	STATEMENT OF ISSUES.....	2
III.	STATEMENT OF FACTS.....	3
	A. The Businesses In This Case.....	3
	B. Background On State Taxes At Issue, The Health Services Act, And Medicare Advantage.....	3
	1. The premium tax.....	3
	2. The B&O tax	4
	3. The Health Services Act.....	6
	4. Medicare Advantage and its predecessors.....	9
	C. Procedural History	9
IV.	ARGUMENT	11
	A. The B&O Tax Exemption For Premiums “Taxable” Under The Premium Tax Does Not Include Amounts Exempt Under The Premium Tax.....	12
	1. Under a plain meaning analysis, Group Health is not “taxable” under the premium tax statute on Medicare premiums it receives.....	14
	2. The only analogous case law cited by either party supports the Department.....	17
	3. The purpose behind the Health Services Act generally, and the B&O exemption specifically, supports the Department.....	22

4.	Group Health’s structural argument related to the Health Services Act is not persuasive.	24
5.	The legislative history is of limited probative value, but is consistent with the Department’s position.....	26
6.	The canons of construction support the Department.....	29
B.	The Medicare Preemption Provision Is Limited To Premium Taxes And Other Similar Taxes Related To Insurance.....	30
1.	A strong presumption against federal preemption of state tax law exists.....	31
2.	The Medicare Advantage statute preempts only premium and other similar taxes.	33
3.	The B&O tax applies to a wide variety of business activities, and is therefore not similar to a premium tax on the insurance business.	34
4.	The exception in the regulation for net income taxes is illustrative, not exclusive.	36
V.	CONCLUSION	39

TABLE OF AUTHORITIES

Cases

<i>Avnet, Inc. v. Dep't of Rev.</i> , 187 Wn.2d 44, 384 P.3d 571 (2016).....	12
<i>Belas v. Kiga</i> , 135 Wn.2d 913, 959 P.2d 1037 (1998).....	29
<i>Budget Rent-A-Car of Washington-Oregon, Inc. v. Dep't of Rev.</i> , 81 Wn.2d 171, 500 P.2d 764 (1972).....	5
<i>California State Bd. of Equalization v. Sierra Summit, Inc.</i> , 490 U.S. 844, 109 S. Ct. 2228, 104 L. Ed. 2d 910 (1989).....	31
<i>Cerrillo v. Esparza</i> , 158 Wn.2d 194, 142 P.3d 155 (2006).....	26
<i>Crown Zellerbach Corp. v. State</i> , 45 Wn.2d 749, 278 P.2d 305 (1954).....	passim
<i>Dows v. City of Chicago</i> , 78 U.S. 108, 20 L. Ed. 65 (1870).....	32
<i>Florida Dep't of Rev. v. Piccadilly Cafeterias, Inc.</i> , 554 U.S. 33, 128 S. Ct. 2326, 171 L. Ed. 2d 203 (2008).....	32
<i>Gorre v. City of Tacoma</i> , 184 Wn.2d 30, 357 P.3d 625 (2015).....	15
<i>Grays Harbor Energy, LLC v. Grays Harbor Cty.</i> , 175 Wn. App. 578, 307 P.3d 754 (2013).....	12
<i>Group Health Coop. v. City of Seattle</i> , 146 Wn. App. 80, 189 P.3d 216 (2008).....	37, 38, 39
<i>Impecoven v. Dep't of Rev.</i> , 120 Wn.2d 357, 841 P.2d 752 (1992).....	30

<i>Nat'l Private Truck Council, Inc. v. Oklahoma Tax Comm'n</i> , 515 U.S. 582, 115 S. Ct. 2351, 132 L. Ed. 2d 509 (1995).....	31
<i>Olympic Tug & Barge, Inc. v. Dep't of Rev.</i> , 188 Wn. App. 949, 355 P.3d 1199 (2015).....	12
<i>Ski Acres, Inc. v. Kittitas Cty.</i> , 118 Wn.2d 852, 827 P.2d 1000 (1992).....	13
<i>State v. Mathers</i> , 193 Wn. App. 913, 376 P.3d 1163 (2016).....	28
<i>Steven Klein, Inc. v. Dep't of Rev.</i> , 183 Wn.2d 889, 357 P.3d 59 (2015).....	5
<i>Time Oil Co. v. State</i> , 79 Wn.2d 143, 483 P.2d 628 (1971).....	5
<i>TracFone Wireless, Inc. v. Dep't of Rev.</i> , 170 Wn.2d 273, 242 P.3d 810 (2010).....	26, 29
<i>Wash. Trucking Ass'n v. Wash. Emp't Sec. Dep't</i> , 188 Wn.2d 198, 393 P.3d 761 (2017).....	32

Statutes

42 U.S.C. § 1983.....	31
42 U.S.C. §§ 1395w-21-28.....	9
42 U.S.C.A. § 1395w-24(g).....	33
5 U.S.C. § 8909(f)(1).....	38
5 U.S.C. § 8909(f)(2).....	38
FLA. STAT. § 624.5091.....	36
Laws of 1891, ch. CXL, § 42.....	3
Laws of 1947, ch. 79, § 14.02.....	3

Laws of 1993, ch. 492.....	6
Laws of 1993, ch. 492, § 102.....	22
Laws of 1993, ch. 492, § 301(6)(a).....	7, 23
Laws of 1993, ch. 492, § 303.....	7
Laws of 1993, ch. 492, § 487.....	6
RCW 48.01.050	7
RCW 48.14.020(1).....	4, 34, 35
RCW 48.14.020(6)(a)	25
RCW 48.14.0201	8, 14, 25
RCW 48.14.0201(6).....	8
RCW 48.14.0201(6)(a)	7
RCW 48.14.040	4, 36
RCW 48.44.010(9).....	7
RCW 48.46.020(13).....	7
RCW 82.04.080(1).....	24
RCW 82.04.140	4
RCW 82.04.220	4
RCW 82.04.220(1).....	4, 13
RCW 82.04.240	5
RCW 82.04.290(2)(a)	5
RCW 82.04.310(1).....	16

RCW 82.04.320	27, 28
RCW 82.04.322	passim
RCW 82.04.440	20
RCW 82.08.145	17
RCW 82.24.080	17
RCW 82.32	34
RCW 82.32.180	10
RCW 83.100.040	17
RCW 83.100.046	17
TEX INS. CODE. ANN. § 281.004.....	36

Regulations

42 C.F.R. 423.404(a).....	33, 34
---------------------------	--------

Other Authorities

<i>Black's Law Dictionary</i> (10th ed. 2014).....	15
<i>Black's Law Dictionary</i> (3d ed. 1933).....	19
<i>Webster's Third New International Dictionary</i> (2002)	16

I. INTRODUCTION

While this case touches on two different chapters of the state tax code, federal Medicare law, and the business of health care, the case boils down to the interpretation of two discrete statutory provisions.

The first issue concerns the meaning of the single word “taxable.” Our Legislature exempted from the business and occupation (B&O) tax certain premium income that is “taxable” under the premium tax. Most premium income is taxable under the premium tax and therefore exempt from the B&O tax under this exemption. But the Medicare premium income at issue in this case is expressly exempted from premium tax under a different statutory exemption now mandated by federal law. Group Health contends that even though it does not pay premium tax on this income, it is nevertheless “taxable” because premium income is generally subjected to the premium tax. The interpretation of “taxable” as covering amounts that have been specifically carved out from the premium tax is inconsistent with any common sense interpretation of that word. This Court should rule that, under the plain meaning of the word “taxable” and applicable canons of construction, income exempt from premium tax is not “taxable” under that tax, and therefore B&O tax is owed.

The second issue involves the scope of a federal preemption provision. Federal law prohibits states from imposing “premium tax or

similar taxes” on certain Medicare Advantage premiums received by businesses like Appellants. The B&O tax is not a premium tax. The question, therefore, is whether it is a “similar tax.” It is not. The B&O tax is imposed on virtually all business activities in the state. Premium taxes, on the other hand, are imposed only on insurers and similar types of businesses. Other differences exist as well. And if there is ambiguity, the United States Supreme Court has explained that federal interference with state taxation should only be found when preemption is expressed in clear terms. Federal law does not preempt the B&O tax in this instance.

This Court should affirm the trial court on both issues.

II. STATEMENT OF ISSUES

1. Premiums received by health care service contractors and health maintenance organizations that are “taxable” under the premium tax are exempt from B&O tax. Medicare premiums received by these types of businesses fall within an express exemption from premium tax. Is this income nevertheless “taxable” under the premium tax, and therefore exempt from B&O tax?

2. Federal law preempts states from imposing a premium tax or “similar tax” on certain Medicare premium income. Premium taxes are only imposed on insurers and similar businesses. The B&O tax, on the

other hand, is imposed on virtually all business activity in the State. Is the B&O tax a similar tax to a premium tax, and therefore preempted?

III. STATEMENT OF FACTS

A. The Businesses In This Case

The Department agrees with Appellants' recitation of the facts describing Group Health Options, Inc., a for-profit corporation licensed and registered as a health care services contractor, and Group Health Cooperative, a non-profit corporation registered and licensed as a health maintenance organization (collectively, "Group Health"). Appellants' Br. at 5-6. The Department also does not dispute that each Group Health entity contracted with the Centers for Medicare & Medicaid Services, or that those entities meet the definition of a Medicare Advantage organization. *See* Appellants' Br. at 6-7.

B. Background On State Taxes At Issue, The Health Services Act, And Medicare Advantage

An overview of the history and taxes at issue may assist the Court.

1. The premium tax

The premium tax is one of Washington's oldest taxes. Washington began imposing a premium tax on insurers in 1891. Laws of 1891, ch. CXL, § 42. Washington enacted the modern version of the statute in 1947. Laws of 1947, ch. 79, § 14.02. Washington imposes a premium tax

on each authorized insurer except title insurers based on premiums received, minus premiums returned. RCW 48.14.020(1). The current rate of the premium tax is 2%. RCW 48.14.020(1). The premium tax is imposed on insurers and similar businesses; it is not imposed on other types of business activities. Insurers are also subject to other similar taxes. For example, Washington imposes a retaliatory tax to ensure that Washington and out-of-state insurers are on equal footing. *See* RCW 48.14.040. The Health Services Act of 1993, discussed below, began taxing health care service contractors and health maintenance organizations such as appellants similarly to insurers, though they are defined differently.

2. The B&O tax

Washington's business and occupation tax is also longstanding, dating back to the 1930s. Washington imposes a gross receipts tax "for the act or privilege of engaging in business activities." RCW 82.04.220. "Business" is broadly defined as "all activities engaged in with the object of gain, benefit, or advantage to the taxpayer or to another person or class, directly or indirectly." RCW 82.04.140. "The tax is measured by the application of rates against value of products, gross proceeds of sales, or gross income of the business, as the case may be." RCW 82.04.220(1).

Washington imposes “the business and occupation tax upon virtually all business activities carried on within the state.” *Time Oil Co. v. State*, 79 Wn.2d 143, 146, 483 P.2d 628 (1971). The Legislature sought to “leave practically no business and commerce free of ... tax.” *Budget Rent-A-Car of Washington-Oregon, Inc. v. Dep’t of Rev.*, 81 Wn.2d 171, 175, 500 P.2d 764 (1972).

Gross receipts from various business activities are subject to taxation at different rates depending on classification. For example, a person engaging in business as a manufacturer pays a tax equal to the value of the products manufactured multiplied by the rate of 0.484%. RCW 82.04.240. Businesses engaging in activities not specifically enumerated are subject to a catchall classification commonly referred to as “service and other.” *Steven Klein, Inc. v. Dep’t of Rev.*, 183 Wn.2d 889, 894, 897, 357 P.3d 59 (2015). This catchall classification provides that the B&O tax applies to persons engaging in a business activity “other than or in addition to an activity taxed explicitly under another section in this chapter or subsection (1) or (3) of this section.” RCW 82.04.290(2)(a). Such persons pay at the rate of 1.5% of the gross income of the business. *Id.* Because there is no specific B&O classification for the activity of providing insurance or similar activities, those activities are subject to the service and other rate, absent an applicable exemption. The exemption at

issue in this case provides that B&O tax does not apply to HMOs or HCSCs “in respect to premiums or prepayments that are taxable” under the premium tax. RCW 82.04.322.

3. The Health Services Act

In 1993, Washington enacted health care reform known as the Health Services Act.¹ Laws of 1993, ch. 492; CP 278-300. The Act had a number of different objectives. The Legislature sought to stabilize health service costs, allow state residents to enroll in health plans of their choice, require participation in payment for such services by all residents, employees, businesses, and government, and use private service providers operating within budget limits and regulations. CP 279-80.

Among other objectives, the legislation expanded Washington’s Basic Health Plan by providing the option to purchase coverage to working citizens and others who lacked coverage previously. *See* CP 280-91. Additional tax revenue supported this expansion. For example, the Legislature subjected HMOs and HCSCs to the premium tax on most of their premiums received, imposed additional taxes on goods such as alcohol and cigarettes, and removed a B&O tax exemption for non-profit

¹ The Department uses the title “Health Services Act,” which appears in the enacted session law, as opposed to “Health Care Reform Act,” the nomenclature used in Group Health’s brief. *See* Laws of 1993, ch. 492, § 487 (“This act may be known and cited as the Washington Health Services Act of 1993”).

hospitals. CP 292-300. The final bill report estimated additional revenues of approximately a quarter billion dollars in the 1993-95 biennium, and one billion dollars in the 1995-97 biennium. CP 313.

Prior to 1993, there had been debate about whether HMOs and HCSCs were in fact insurers. *See* CP 173-74. While the 1993 law uses the term “insurer” separately from HMOs and HCSCs, the legislation provided that HMOs and HCSCs would pay premium tax on most premiums received.² The money received from the tax was to be deposited in the health services account. CP 292.

The 1993 legislation exempted premiums received under Medicare from the premium tax until July 1, 1997. Laws of 1993, ch. 492, § 301(6)(a) (CP 292-93). The Legislature later amended the statute to remove the sunset provision and the exemption remains today. *See* RCW 48.14.0201(6)(a). In addition, the legislation created an exemption from the B&O tax for HMOs and HCSCs “in respect to premiums or prepayments that are taxable under section 301 of this act.” Laws of 1993, ch. 492, § 303 (CP 293). In other words, though HMOs and HCSCs were previously subject to B&O tax on their premium income, they would now be exempt from B&O tax if particular premiums or prepayments were

² RCW 48 contains different definitions for “insurers,” (RCW 48.01.050), “health maintenance organizations,” (RCW 48.46.020(13)), and “health care service contractors” (RCW 48.44.010(9)).

taxable under the premium tax in the 1993 legislation. This avoided subjecting premium income to both the premium tax and the B&O tax.

Traditionally, HMOs and HCSCs were subject to the B&O tax, but not the premium tax. *See* CP 173. The 1993 legislation discussed above changed that with respect to premiums received, by subjecting the premiums and prepayments of these entities to premium tax, *except* for premiums from Medicare, which were exempted from premium tax. RCW 48.14.0201(6). RCW 82.04.322 provides that the 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 [the premium tax].”

Accordingly, if an HMO or HCSC pays the premium tax on certain premiums, it will not be subject to the B&O tax on those same premiums. Under the Department’s interpretation of the statutes, if the business does not pay the 2.0% premium tax on certain premiums (such as Medicare premiums), it will be subject to the lower 1.5% B&O tax rate for “service and other” activities on those premiums. Under Group Health’s interpretation, Medicare premiums would escape both the 2.0% premium tax and 1.5% “service and other” B&O tax. In addition, under both parties’ interpretation, HMOs and HCSCs may pay B&O tax on other

types of income received, such as gross income for provision of services.

Those other types of income are not at issue in this case.

4. Medicare Advantage and its predecessors

Medicare participants have the option to receive traditional Medicare as managed by the federal government, or they can receive insurance through private carriers. Before 1997, the private option for choosing Medicare coverage was limited to HMOs. CP 324. There was relatively little participation in such private plans. *See* CP 327.

In 1997, Congress enacted Medicare+Choice legislation, now called Medicare Advantage. *See* 42 U.S.C. §§ 1395w-21-28. This expanded the options for obtaining Medicare through private carriers. Plaintiffs are examples of such carriers. The 1997 legislation contained in it the preemption provision at issue in this case, which preempts premium taxes and similar taxes imposed by states on premium amounts received by Medicare Advantage organizations.

C. Procedural History

In 2012, Group Health Options, Inc. asked the Department for a ruling as to whether it owed B&O tax on Medicare Advantage premium payments it received. CP 8. The Department responded, consistent with its 2007 published determination on the same issue, that GHO did indeed owe B&O tax on the applicable Medicare premiums. CP 8, 190-96. GHO

alleged that after the Department's letter ruling in 2012, it began making B&O payments in accordance with the Department's ruling. GHC also alleged that beginning in 2016, it made B&O tax payments based on Medicare premium payments as well. CP 8-9.

In May 2016, Group Health filed this lawsuit for a tax refund under RCW 82.32.180, seeking refunds for certain B&O tax amounts the two entities paid between 2012 and 2016. The lawsuit did not request refunds for B&O tax that may have been paid for other activities besides the activity of receiving premiums and prepayments (such as tax based on services provided), nor did Group Health request a refund for any premium taxes paid (such as premium tax paid on premiums received unrelated to Medicare Advantage). GHO, the for-profit health care services contractor, seeks a total refund of \$1,919,653 plus statutory interest. *See* CP 8-9. GHC, the non-profit health maintenance organization, seeks a refund of \$187,256, plus statutory interest. CP 8-9.

While the Department performed a limited scope audit of GHO for the time period of January 1, 2010, through September 30, 2012, the Department has performed no audit of GHO for the October 2012 through 2016 time periods. CP 334. The Department also has performed no audit of GHC related to B&O tax on premium amounts for the applicable time period. CP 335. Group Health moved for summary judgment, and the

Department requested summary judgment as the non-moving party. The Thurston County Superior Court granted summary judgment to the Department and denied summary judgment to Group Health. CP 365-66.

IV. ARGUMENT

Exemptions from state tax law must be express. The B&O tax exemption for premium payments states that premiums and prepayments that are taxable under the premium tax are not subject to B&O tax. This exemption does not state that all premiums and prepayments are exempt from the B&O tax; only those amounts that are otherwise taxable are exempt. “Taxable” is not defined in the statute. The most natural reading of this language is that only those premiums and prepayments that are actually subject to premium tax are exempted from B&O tax. The most likely rationale behind the statute is that the Legislature sought to avoid overlapping B&O and premium taxes for the same income. It is not, as Group Health asserts, to remove all premium income from the B&O tax.

A federal intention to interfere with a state’s sovereign right to tax also must be stated in clear and unambiguous terms. Congress preempted premium taxes and similar taxes on Medicare premiums. The B&O tax, which applies to virtually all business activities in the state, is not similar to a premium tax. Because Congress has not clearly expressed its intention

to preempt Washington's B&O tax on Medicare premiums, federal law does not preempt the B&O tax here.

A. The B&O Tax Exemption For Premiums "Taxable" Under The Premium Tax Does Not Include Amounts Exempt Under The Premium Tax.

This Court should rule that Washington has created no exemption from the B&O tax for premium amounts HCSCs and HMOs receive under the Medicare Advantage program. This Court reviews de novo the trial court's order granting summary judgment to the Department. *Olympic Tug & Barge, Inc. v. Dep't of Rev.*, 188 Wn. App. 949, 952, 355 P.3d 1199 (2015). Statutory interpretation is a question of law reviewed de novo. *Id.*

Group Health bears the burden of proving that an exemption applies. *See Avnet, Inc. v. Dep't of Rev.*, 187 Wn.2d 44, 49, 384 P.3d 571 (2016) (taxpayer must prove that an exemption exists). If an exemption statute is ambiguous, the court must strictly construe the provision against the taxpayer. *Id.* at 50. "Because taxation is the rule and exemption is the exception, a tax applies unless the legislature has expressed clear intent to provide an exemption." *Grays Harbor Energy, LLC v. Grays Harbor Cty.*, 175 Wn. App. 578, 584, 307 P.3d 754 (2013) (citations omitted). Exemptions are construed narrowly. *Id.* No such express or clear exemption exists in the B&O tax statutes for the Medicare premiums at issue. Thus, they are taxable for B&O tax purposes.

While Group Health mentions these rules of construction, it also cites a countervailing rule in *Ski Acres, Inc. v. Kittitas Cty.*, 118 Wn.2d 852, 857, 827 P.2d 1000 (1992). Appellants' Br. at 18-19. Group Health cites *Ski Acres* for a principle of "strict construction" that an ambiguous taxing statute is construed against the State. *Id.* This canon of construction has no applicability to this case.

The B&O tax is imposed on virtually all business activities in the State. The tax is imposed "for the act or privilege of engaging in business activities" and is calculated based on the "value of products, gross proceeds of sales, or gross income of the business, as the case may be." RCW 82.04.220(1). Group Health has made no argument that by engaging in the activity of providing health care and receiving Medicare premium income, it is not engaging in business activities or receiving gross income. In other words, there is no dispute that the definitions of the B&O tax apply to Group Health's activities and income in the first instance. Therefore, *Ski Acres* simply has no applicability to this case.

Rather, the only state statutory issue is whether an *exemption* from B&O tax applies. Therefore, any ambiguities are construed *against the taxpayer*, not the State.

1. Under a plain meaning analysis, Group Health is not “taxable” under the premium tax statute on Medicare premiums it receives.

The tax exemption at issue in this case turns on the meaning of the word “taxable.” The 1993 Health Services Act imposed new taxes and expanded the applicability of previous taxes on a variety of activities within the health care field, including those engaged in by health care service contractors and health maintenance organizations such as Group Health. CP 292-300. But while increasing or imposing new taxes on such businesses, the Act also created an exemption from B&O tax for business entities such as Group Health in respect to premiums or prepayments that would now be taxable under the premium tax. The full language of the statutory exemption provides:

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 RCW 48.14.0201.

RCW 82.04.322.³ “This chapter” refers to the B&O tax chapter.

RCW 48.14.0201 is the statute imposing the premium tax. Section 6(a) of the same statute, RCW 48.14.0201, creates the exemption from premium tax for Medicare premiums.

³ This is the current version of the statute, which has remained materially unchanged since 1993.

The best and most natural reading of this exemption is that premiums that are actually subject to premium tax are not also subject to B&O tax. RCW 82.04.322 does not define the word “taxable.” *Black’s Law Dictionary* defines the term “taxable” as “subject to taxation,” and “assessable.” *Black’s Law Dictionary* at 1688 (10th ed. 2014). This definition of “taxable” is the same as our Supreme Court adopted for the word in a case interpreting another B&O tax exemption with a similar rationale, *Crown Zellerbach Corp. v. State*, 45 Wn.2d 749, 753-54, 278 P.2d 305 (1954), discussed in detail in the next section. This is the definition of “taxable” that best fits the purpose behind the exemption of avoid overlapping taxation. *See Gorre v. City of Tacoma*, 184 Wn.2d 30, 357 P.3d 625 (2015) (“we must ascertain the legislature’s intent and choose the meaning that best furthers the statute’s intended purpose”).

Premiums within an express exemption are not “taxable.” They are not “subject to taxation,” but rather escape taxation under the premium tax. This is the opposite of being taxable. The most likely legislative purpose of the exemption was to avoid subjecting the same premium income to both taxes. *See Crown Zellerbach*, 45 Wn.2d at 753 (our Legislature intended “as equitable an imposition of *actual tax liability* as possible insofar as our state business and occupation tax is concerned” and

an “avoidance of an imposition of double or triple tax liability” as to particular products) (emphasis in original).

There are other similar examples in the tax law of the Legislature seeking to avoid taxing the same amounts under two tax regimes. For example, if certain gross income is subject to the public utility tax, it is exempt from the B&O tax. RCW 82.04.310(1). In these cases, the Legislature seeks to impose one tax or the other, but not both.

Group Health urges this Court to interpret “taxable” as “capable of being taxed.” Appellants’ Br. at 21. Group Health offers no case authority for this interpretation, nor does it cite any dictionary. *Webster’s Third International Dictionary* does contain the following as one of its definitions for “taxable”:

Capable of being taxed: liable by law to the assessment of taxes.

Webster’s Third New International Dictionary at 2345 (2002).

The Department would also prevail under this definition. The Medicare premium income at issue is not “capable of being taxed” under the premium tax because it is exempt from that tax. Nor is Group Health “liable by law to the assessment” of premium tax on Medicare premium.

Group Health asserts the Legislature intended to use the word “taxable” in a highly technical sense to include not only those premiums

that were subject to tax but also those subject to an exemption. There is no real evidence to suggest that the Legislature intended such a technical rather than a more common usage understanding of the word “taxable” under these circumstances. Washington’s tax statutes contain many instances of our Legislature using the word “taxable” in the sense of whether an activity is actually subject to tax, rather than in reference to activities that are theoretically subject to tax but then exempted. *See, e.g.*, RCW 83.100.040, .046 (calculating Washington estate tax based on Washington “taxable estate,” which excludes certain deductions such as property used for farming); RCW 82.08.145 (using the word “taxable” in determining delivery charges as applicable only to that personal property that is subject to tax, as opposed to other personal property that is exempt and referred to as “nontaxable”); RCW 82.24.080 (imposing cigarette tax at time of first “taxable” event, even if a prior activity would have been subject to tax but for an exemption). In this instance, our Legislature intended “taxable” to mean actually subject to taxation.

2. The only analogous case law cited by either party supports the Department.

While no appellate court has interpreted the phrase “taxable” in the context of RCW 82.04.322, our Supreme Court has interpreted the same term under another provision in the B&O tax statute referred to as the

multiple activities tax credit. *Crown Zellerbach Corp. v. State*, 45 Wn.2d 749, 753-54, 278 P.2d 305 (1954). While the Court in *Crown Zellerbach* interpreted a different statute that does not directly control the outcome of this case, that case's rationale is nevertheless instructive here and strongly supports the Department's position. The multiple activities credit seeks to achieve a similar purpose to the B&O tax exemption at issue in this case: to avoid subjecting the same activities to multiple taxation. More importantly, however, the taxpayer in *Crown Zellerbach* made a structural argument very similar to that which Group Health makes here, and the Supreme Court rejected it.

Crown Zellerbach manufactured and sold pulp and paper products. The company engaged in activities subject to different classifications under the B&O tax, including extracting, manufacturing, and wholesaling. *Id.* at 753. However, some of the company's wholesale sales were exempt from B&O tax under an exemption for sales in interstate commerce. *Id.* at 754. This exemption existed because Supreme Court case law at the time prohibited the taxation of interstate commerce. For companies engaged in multiple activities, the B&O tax contained a provision stating that "persons taxable" under the retailing and wholesaling classifications shall not be taxable under the extracting or manufacturing classifications with respect to extracting or manufacturing the products so sold. *Id.* at 753.

The company made a similar argument to Group Health's argument here. It argued that even though it was not actually subject to tax on some of its wholesale sales due to the interstate exemption, it was a person taxable through its wholesaling activities. The company asserted that it should not be subject to extracting or manufacturing B&O tax for the products involved in these exempt wholesale sales. The Supreme Court rejected this argument. The Legislature was seeking to provide for as equitable as possible an imposition of actual tax liability under the B&O tax. *Id.* The policy was to impose actual liability for payment of tax only once on either extracting, manufacturing, or wholesaling. Similar to Group Health here, the company asserted that it was of no consequence that it escaped tax on some sales due to a separate tax exemption. *Id.* at 754. But this was not the purpose of the Legislature, which sought to avoid subjecting the same product to taxation under multiple classifications. The corollary of the policy was that the B&O tax would "be imposed on at least one activity." *Id.* (emphasis omitted).

The Court interpreted "taxable" as "subject to taxation." *Id.* at 755 (citing *Black's Law Dictionary* at 1706 (3d ed. 1933)). The natural result of the multiple activities exemption was to exempt only the particular products that had been subject to the wholesaling tax. *Id.* at 756. It would have been an "unreasonable result" to find some of the company's

products exempt from manufacturing or extracting B&O tax, even if the later sales were exempt, in the “absence of language clearly indicating such an intent.” *Id.*

The same is true in this case. The purpose of the multiple activities statute at issue in *Crown Zellerbach* and the B&O tax exemption in the Health Services Act is essentially the same: to avoid subjecting the same activities to multiple taxation. In both cases, federal law proscribed certain taxation of activities. In *Crown Zellerbach*, it was the taxation of interstate sales; in Group Health’s case, it is the imposition of the premium tax on Medicare premiums. In both cases, the natural reading of the word “taxable” is “subject to taxation.”

In fact, Group Health has an even weaker argument than *Crown Zellerbach* because the multiple activities exemption applied to “persons taxable,” while the exemption in this case applies only to “premiums or prepayments that are taxable.” *Compare Former RCW 82.04.440 and RCW 82.04.322.* Group Health was not subject to taxation on its Medicare premium income under the premium tax, and therefore is subject to B&O tax with respect to those amounts.

Group Health offers a number of reasons to downplay *Crown Zellerbach*, but none is sufficiently persuasive to reach a different outcome here.

First, Group Health notes that *Crown Zellerbach* involves two classifications within the B&O tax, while this case involves the interplay between two separate taxes, the B&O tax and the premium tax. Appellants' Br. at 22. While this is true, Group Health offers no reason why this is a material distinction. Just as the Legislature sought to avoid multiple taxation under two classifications of the B&O tax with the multiple activities credit, the Legislature sought to avoid multiple taxation under both the B&O tax and the premium tax.

Next, Group Health would distinguish *Crown Zellerbach* on the ground that the exemption at issue in that case was under federal law. Appellants' Br. at 22. Again, it is not clear why Group Health believes this distinction is material. In both cases, a company that owes tax under one tax (or classification of the same tax) does not owe a different tax based on the same activity. In both cases, the Legislature seeks to avoid multiple taxation. And even if there were something to the distinction, the exemption at issue here also has root in federal law. Both parties agree that federal law prohibits Washington from imposing premium tax on Group Health's Medicare premium receipts. Group Health makes much of the fact that this preemption provision was not yet enacted at the time of the Health Services Act. But some form of federal legislation was apparently on the horizon and our Legislature may well have known about the

potential for preemption when enacting the B&O tax language. CP 202 (explaining that the Legislature was anticipating federal legislation permitting it to tax Medicare premiums under the premium tax, even though this did not eventually come to pass). *Crown Zellerbach* remains persuasive case authority for this Court in interpreting RCW 82.04.322.

3. The purpose behind the Health Services Act generally, and the B&O exemption specifically, supports the Department.

One of the stated purposes of the Health Services Act was “to require participation in payment for [health] services by all residents, employees, businesses, and government” Laws of 1993, ch. 492, § 102. The phrase “require participation in payment” appears to be a euphemism for taxes. Indeed, sections 301 through 312 of the bill imposed various taxes. These provisions subjected HMOs and HCSCs to premium tax on most premiums received, imposed taxes on goods such as alcohol and cigarettes, and removed a B&O tax exemption for non-profit hospitals, among other things. While this Court need not necessarily reach the legislative history to resolve this case, the Final Bill report provides a good summary of the revenue raising component of the bill:

Increased taxes on cigarettes, tobacco products, spirits, beer (except micro-breweries), prepayments for health care received by health maintenance organizations (HMOs), health care service contractors (HCSCs), certified health plans (CHPs), and hospitals will raise an estimated \$251.4

million during the 1993-95 biennium, which will be deposited in the health services trust account. These tax rates are increased in future biennia to levels estimated to generate some \$1.04 billion in the 1997-1999 biennium, and will also be deposited in the health services trust account.

CP 313 (emphasis added). In addition, the exemption from premium tax for Medicare receipts was originally limited only until July 1, 1997. Laws of 1993, ch. 492, § 301(6)(a). 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.

The rationale of the exemption at issue, when viewed more specifically, also supports the Department. Similar to the statute discussed above in the *Crown Zellerbach* case, the Legislature likely sought to avoid overlapping taxation of amounts to both the premium tax and the B&O tax. The exemption in RCW 82.04.322 is not specifically tailored to Medicare—rather it is a general statement that premiums or prepayments are not to be subject to both taxes. It does not say that all premiums and prepayments are exempt from the B&O tax. Nor does it say that any business that pays the premium tax on some of its premium income will be exempt from B&O tax on all of its premium income. The language and purpose of the statute evidence an intent to avoid overlapping or multiple taxation. This supports the Department's interpretation.

4. Group Health’s structural argument related to the Health Services Act is not persuasive.

Group Health’s primary argument appears to be a structural one: it just makes more sense to tax all premium income under the premium tax, rather than to tax some of the income under the premium tax and some under the B&O tax. *See* Appellants’ Br. at 24. However, the purpose of statutory construction is not to determine whether Group Health’s desired scheme of taxation would have been more logical, but to determine the Legislature’s intent.

Group Health never directly argues that Medicare premium income it receives is not “gross income of the business” subject to the B&O tax absent a statutory exemption. *See* Appellants’ Br. at 3 (stating issues in terms of the exemption in RCW 82.04.322). Nor could it. It is beyond dispute that the income is “gross income of the business.”⁴

Instead, Group Health argues that the 1993 Washington Legislature “carved out” all HMO premium income from B&O tax, removing the income from the “orbit” or “umbrella” of the B&O statute.

⁴ Under RCW 82.04.080(1), “gross income of the business” means “the value proceeding or accruing by reason of the transaction of the business engaged in and includes gross proceeds of sales, compensation for the rendition of services, gains realized from trading in stocks, bonds, or other evidences of indebtedness, interest, discount, rents, royalties, fees, commissions, dividends, and other emoluments however designated, all without any deduction on account of the cost of tangible property sold, the cost of materials used, labor costs, interest, discount, delivery costs, taxes, or any other expense whatsoever paid or accrued and without any deduction on account of losses.”

Appellants' Br. at 16, 24. Appellants' expansive characterization of the exemption stands in contrast to the much more measured language of the actual statute, RCW 82.04.322, which only exempts premiums and prepayments taxable under the premium tax. Group Health's argument also presumes the answer: that the Legislature intended to create a B&O tax exemption for all premium income. But that is not what the statute actually says.

The Department has the more natural reading of the statutory language. Group Health's interpretation requires "taxable" to include amounts that are expressly exempt from tax. In addition, the word "taxable" directly modifies the phrase "premiums or prepayments." RCW 82.04.322. In other words, the Legislature did not say that we determine whether the health maintenance organization or health care service contractor generally is subject to premium tax, but rather we determine whether the B&O exemption applies "in respect to premiums or prepayments that are taxable under RCW 48.14.0201." The Medicare premiums at issue are not taxable under that statute because there is an express exemption for Medicare premium income in RCW 48.14.020(6)(a).

Group Health's argument about the changes accomplished by the Health Services Act are too speculative to override the plain language of

RCW 82.04.322. This Court should not infer a B&O tax exemption for Medicare premiums expressly exempted from the premium tax in the absence of a clear expression of such intent. *See TracFone Wireless, Inc. v. Dep't of Rev.*, 170 Wn.2d 273, 297, 242 P.3d 810 (2010) (because taxation is the rule and exemption is the exception, an intention to create an exemption should be expressed in unambiguous terms).

5. The legislative history is of limited probative value, but is consistent with the Department's position.

Because the statutory language is unambiguous, the Court need not resort to legislative history. *Cerrillo v. Esparza*, 158 Wn.2d 194, 201, 142 P.3d 155 (2006). In any event, to the extent the legislative history provides guidance, it supports the Department.

Appellants rely on testimony in a House Bill Report from 1997, claiming it suggests that Medicare premiums were not subjected to B&O tax after the Health Services Act was enacted in 1993. *See* Appellants' Br. at 27-28 (citing testimony from unknown source that "These payments have never been taxed").⁵ Earlier testimony from the same document, however, suggests otherwise. The sentence immediately preceding the "never taxed" language refers to the premium tax: "The exemption from

⁵ Little credence should be put in testimony about tax obligations from an unknown source. Washington taxes are primarily self-reported, and it is wholly possible that someone thought taxes were not owed that in fact were.

premium taxes for Medicare premiums will expire without the bill.” CP 202. And even earlier, the summary of testimony states that “[t]he exemption for Medicare services in the 1993 Health Services Act was intended to provide equality in the taxation of Medicare revenues and premiums.” CP 202. One could interpret this testimony to mean that the 1993 Act, by imposing a 2.0% B&O tax to Medicare premiums, was intended to equal the 2.0% premium tax for other premiums.⁶ Without additional context, the testimony is simply too difficult to interpret to reliably contradict the language of the statute at issue.

Group Health also refers to a draft of 1993 legislation that stated the B&O tax exemption in terms of taxes “paid to the state” rather than premiums that were “taxable.” Appellants’ Br. at 26-27. Group Health goes on to surmise that this subtle drafting change may have been with the intent to exempt Medicare premiums from B&O tax, despite the lack of any reference to Medicare at all. To infer a tax exemption based on a change in legislative drafting that does not even mention the specific income stream at issue is too great an analytical leap.

Group Health makes a similar argument by comparing RCW 82.04.320, which uses the term “paid,” to the term “taxable” in

⁶ The B&O tax rate has since changed.

RCW 82.04.322. Subsection .320 applies to insurance businesses generally, while the exemption in RCW 82.04.322 applies to health maintenance organizations and health care service contractors specifically. The exemption in RCW 82.04.320 was enacted 58 years earlier, in 1935. It is not surprising that the two statutes use slightly different language. *See State v. Mathers*, 193 Wn. App. 913, 919, 376 P.3d 1163 (2016) (use of different language in different statutes is not necessarily indicative of different meanings). The later Legislature may also have intended to be more precise, by determining the appropriate tax not by whether a tax mechanically was paid, but whether transactions or amounts were subject to tax. A taxpayer might make a mistake in paying or not paying tax, but this error should not affect whether it is “taxable” under a particular statute. The distinctions between the two statutes should not be outcome determinative here. And as discussed above, the Legislature frequently uses the word “taxable” to mean actually subject to tax, rather than theoretically subject to tax if an exemption did not apply. *See supra* at 17.

If the Court does review the legislative history, the most compelling piece with respect to the 1993 Act is contained in the final bill report and cited in the background section above. One of the major purposes of the legislation was to expand access to health care, and the Legislature accomplished this by raising revenue. The final bill report

estimated that over \$250 million in new tax revenue would be raised in the next biennium, and four times that amount in the subsequent biennium. This revenue included “[i]ncreased taxes on [various goods], prepayments for health care received by health maintenance organizations (HMOs), health care service contractors,” and others. CP 313. In short, the bill sought to raise revenue, not lower taxes on HMOs, HCSCs, or hospitals.

6. The canons of construction support the Department.

Group Health’s interpretation also fails a cardinal rule for interpreting tax exemptions: an exemption from tax must be clear and express. “Exemptions may not be created by implication.” *TracFone Wireless, Inc. v. Dep’t of Rev.*, 170 Wn.2d 273, 297, 242 P.3d 810 (2010) (quoting *Belas v. Kiga*, 135 Wn.2d 913, 934, 959 P.2d 1037 (1998)). If Group Health’s interpretation of the Legislature’s intent were correct, one can imagine a number of ways the Legislature could have accomplished it. It could have specifically referenced the B&O tax in the specific premium tax exemption for Medicare premiums and created an exemption from B&O tax as well. Or it could have expressly referenced Medicare premiums in the B&O tax exemption in RCW 82.04.322 and stated that B&O tax does not apply to them. The Legislature did neither of these things. The trial court correctly ruled that RCW 82.04.322 is unambiguous and creates no B&O tax exemption for Medicare premiums.

But even if this Court were to rule that this exemption is ambiguous, that ambiguity is construed in favor of the State. If 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. But it has not done so in any express manner thus far.

Lastly, while the ultimate authority to interpret statutes resides in this Court, courts often “grant considerable judicial deference to the interpretation of the provision by those charged with its enforcement.” *Impeccoven v. Dep’t of Rev.*, 120 Wn.2d 357, 363, 841 P.2d 752 (1992). The Department of Revenue issued published guidance interpreting RCW 82.04.322 in 2007 that concluded Medicare premiums are taxable under the B&O tax. CP 190-196. Group Health offers no compelling reason to ignore the administrative agency deference canon in this case.⁷

B. The Medicare Preemption Provision Is Limited To Premium Taxes And Other Similar Taxes Related To Insurance.

Federal law preempts state taxation only when it states a clear and unambiguous Congressional intent to do so. A federal statute that preempts premium and similar taxes on Medicare receipts hardly

⁷ Group Health points to studies by the Department of Revenue’s research division that the taxpayer asserts show an underlying assumption that B&O tax was not currently being collected on Medicare premiums. Appellants’ Br. at 29-30. But even if Group Health has correctly interpreted these studies, the Department’s published guidance about a specific legal issue controls over underlying assumptions in tax exemption studies provided to the Legislature about the cost of particular exemptions.

evidences a Congressional intent to preempt a generally applicable business activities tax such as the B&O tax.

1. A strong presumption against federal preemption of state tax law exists.

The United States Supreme Court has declared that a strong presumption exists in federal law against federal interference with state taxation. *See Nat'l Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, 515 U.S. 582, 590, 115 S. Ct. 2351, 132 L. Ed. 2d 509 (1995); *California State Bd. of Equalization v. Sierra Summit, Inc.*, 490 U.S. 844, 851-52, 109 S. Ct. 2228, 104 L. Ed. 2d 910 (1989) (“[a] court must proceed carefully when asked to recognize an exemption from state taxation that Congress has not clearly expressed”).

The Supreme Court explained the rationale for this principle in *National Private Truck Council*. In that case, plaintiffs challenged certain Oklahoma taxes imposed on motor carriers. *Nat'l Private Truck Council*, 515 U.S. at 584. In rejecting the challengers' argument that they were entitled to declaratory or injunctive relief under 42 U.S.C. § 1983, the Court articulated state sovereignty concerns that generally counsel a “hands-off approach” to state tax administration:

It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the

modes adopted to enforce the taxes levied should be interfered with as little as possible.

Id. (quoting *Dows v. City of Chicago*, 78 U.S. 108, 110, 20 L. Ed. 65 (1870)). Because state law remedies existed, the Court declined to interpret the federal statute at issue to cover the relief sought by taxpayer plaintiffs. *Id.* at 592.

Courts have applied this principle in a variety of contexts. *See, e.g., Florida Dep't of Rev. v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 35-36, 128 S. Ct. 2326, 171 L. Ed. 2d 203 (2008) (federal bankruptcy code providing state stamp tax exemption for asset transfer “under a plan confirmed” did not exempt tax on transfer that occurred after bankruptcy filing but before confirmation of Chapter 11 plan); *Wash. Trucking Ass'n v. Wash. Emp't Sec. Dep't*, 188 Wn.2d 198, 207-13, 393 P.3d 761 (2017) (federal law and comity principles did not permit tort suit against Washington State Employment Security Department for claims related to administration of unemployment taxes). Accordingly, this Court should be reluctant to interpret federal law as preempting Washington's B&O tax without a clear indication that Congress intended that result. In this case, that clear intention is lacking.

2. The Medicare Advantage statute preempts only premium and other similar taxes.

The federal statute at issue is part of the Medicare Advantage program discussed above, which expanded the options for those enrolling in Medicare. The specific statute requires participating organizations to submit various types of information to the Secretary of Health and Human Services related to the plan that will be offered. It also sets forth guidelines for premium amounts. Part (g) of the statute is entitled “Prohibition of State imposition of *premium taxes*.” (Emphasis added.) It provides:

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.A. § 1395w-24(g) (emphasis added).

The federal regulation is similar. The basic rule provides that “No premium tax, fee, or other similar assessment may be imposed by any state” for any payment CMS makes on behalf of MA enrollees under this Part. 42 C.F.R. 423.404(a). The regulation provides additional explanation of what constitutes a premium tax or similar tax by providing an example of what does not constitute a similar tax:

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 . . . 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. 423.404(a). However, neither the statute nor regulation specifically address B&O taxes, nor do they address broad-based gross receipts taxes that apply to a wide variety of business activities.

3. The B&O tax applies to a wide variety of business activities, and is therefore not similar to a premium tax on the insurance business.

The B&O tax and premium tax are not similar. Most significantly, the B&O tax applies to virtually all business activities; the premium tax applies only to the business of insurance. The B&O tax applies at different rates to different business activities, including a current rate of 1.5% for “service and other” activities. The premium tax applies at a single rate of 2%. The Department of Revenue administers the B&O tax, while the Insurance Commissioner administers the premium tax. *See* RCW 82.32; RCW 48.14.020(1). The B&O tax is paid after taxable activities occur; the premium tax is pre-paid. The B&O tax is deposited into the general fund; the premium tax is deposited into multiple funds.

Plaintiffs have identified one similarity: as applied to the premium amounts at issue, they are, in a sense, measured by the same gross

premium income.⁸ But this is insufficient to say that the B&O tax is a “similar tax” to the premium tax.

The taxes, viewed as a whole, are not similar. The following chart addresses the two taxes’ similarities and differences:

Characteristic	B&O Tax	Premium Tax
Type of Activities	Virtually all business activities, including retail and wholesale sales, manufacturing, and services, among other activities	Insurance and similar business activities
Rate of Tax	Depends on classification, 1.5% for services	2.0%
Tax Base	Value of products, gross proceeds of sales, or gross income of the business	Total premiums received minus premiums returned
Agency Administering	Department of Revenue; codified in RCW 82.04	Insurance Commissioner; codified in RCW 48.14
Date of Enactment	1933	1891; applied to HMOs and HCSCs in 1993
Timing of Payment	Paid after taxable activity occurs	Prepayments may be required
Fund Where Deposited	General fund	General fund, Health Care Exchange, Volunteer Fire Fighters’ Relief and Pension Fund, Cities with full-time fire departments, fire service training accounts

⁸ While premium tax is measured by premiums received, without deductions for expenses or claims paid, amounts returned to policyholders are excluded from the measure of tax. *See* RCW 48.14.020(1).

It is much more likely that when Congress referred to similar taxes, it meant other taxes related to the insurance business. For example, Washington and many other states impose a “retaliatory tax” on insurance premiums to ensure a level playing field between Washington and out-of-state insurers.⁹ RCW 48.14.040. This is likely the type of “similar tax” to which Congress referred.

Group Health also suggests, without support in the record, that imposing B&O tax on Medicare premiums increases the cost of providing Medicare services. Appellants’ Br. at 31. But *any tax* imposed on a business could potentially be passed on indirectly in whole or part to customers of the business through higher prices. And Congress preempted only premium taxes and similar taxes, not all taxes. Particularly when applying the narrow construction principles discussed above, this Court should conclude that Congress did not intend to preempt generally applicable gross receipts taxes such as Washington’s B&O tax.

4. The exception in the regulation for net income taxes is illustrative, not exclusive.

The Department acknowledges that the B&O tax is not a net income tax or a tax on profit. The B&O tax therefore does not fit within

⁹ See, e.g., TEX INS. CODE. ANN. § 281.004; FLA. STAT. § 624.5091.

the express exception to the preemption provision in the federal regulation. But merely because the Secretary clarified that net income taxes are not included within the preemption provision does not mean that broadly applicable gross receipts taxes are “similar taxes” to premium taxes. It is a logical fallacy to suppose that because the regulation’s exception does not cover the B&O tax, the B&O tax therefore meets the definition of what is preempted—a “premium tax or similar tax.” Rather, the Secretary addressed the most common state tax about which there might be a question as to whether it was considered a “similar tax.”¹⁰

Group Health relies on a decision of Division One of this Court involving the Federal Employee Health Benefits Act (FEHBA). But the federal law interpreted in that decision actually illustrates that when Congress wants to preempt a wide array of taxes imposed on a particular type of entity, it knows how to do so. In *Group Health Coop. v. City of Seattle*, 146 Wn. App. 80, 189 P.3d 216 (2008), Division One considered whether the FEHBA preempted the city’s B&O tax. But that statute did not preempt just premium taxes or similar taxes. Rather, it preempted taxes imposed, directly or indirectly, on carriers:

No tax, fee, or other monetary payment may be imposed, directly or indirectly, on a carrier or an underwriting or

¹⁰ While most states have net income taxes, only a few have a state-wide gross receipts tax. Depending on how one defines a state-wide gross receipts tax, there are only approximately three to five states with such a tax.

plan administration subcontractor of an approved health benefits plan by any State, the District of Columbia, or the Commonwealth of Puerto Rico, or by any political subdivision or other governmental authority thereof, with respect to any payment made from the Fund.

5 U.S.C. § 8909(f)(1) (emphasis added). Congress then excepted from this preemption provision taxes on net income or profit. 5 U.S.C. § 8909(f)(2).

Like the Medicare Advantage regulation in this case, the FEHBA statute provided that net income taxes on carriers were not preempted.¹¹ Division One reasoned that because the B&O tax was a tax measured by gross income, rather than net income, it was preempted. *Group Health Coop.*, 146 Wn. App. at 96.

But the language in the FEHBA and Medicare Advantage statutes differs sharply. The FEHBA statute preempts *any tax, fee, or other payment* imposed on a carrier from the applicable fund. Had Congress sought to impose a similarly broad preemption provision to Medicare Advantage organizations, it could have used the same language. Instead, it preempted only *premium taxes or similar taxes*. Therefore, *Group Health* actually illustrates the broader scope of the FEHBA preemption provision compared to the narrow Medicare Advantage provision.

¹¹ This Court first had to determine that *Group Health* was, in fact, a “carrier” under the FEHBA statute. *Group Health Coop.*, 146 Wn. App. at 95.

Group Health also relies on comments in the federal register it asserts support similar treatment for Medicare Advantage premiums and FEHBA premiums. Appellants' Br. at 36. Those comments, however, only address the general principle that *premium* taxes are preempted for each statute. CP 244 ("federal preemption of state premiums tax . . . will be extended" to Medicare). The comments cited by Group Health do not address the issue here: does preemption extend to other taxes? The differences in the statutory language between FEHBA and Medicare are significant and support a different result. Neither the regulation nor the sub-regulatory guidance change the fact that the statute simply does not preempt B&O or gross receipts taxes in any express way.

V. CONCLUSION

Neither the state law B&O tax exemption to avoid overlapping B&O and premium taxes, nor the federal preemption provision of premium and similar taxes, expressly prohibit imposition of the B&O tax on Medicare premiums. If our Legislature or Congress want to preclude Washington from imposing this tax on these premiums, they are at liberty to do so. But neither has taken such action in any clear way. Therefore, the trial court correctly granted summary judgment to the Department, and this Court should affirm.

RESPECTFULLY SUBMITTED this 13th day of April, 2018.

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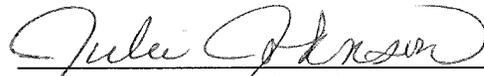
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I certify under penalty of perjury under the laws of the State of
Washington that the foregoing is true and correct.

DATED this 13th day of April, 2018, at Tumwater, WA.


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