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

ARUP LABORATORIES, INC.,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

ARUP is one of the leading pathology testing laboratories in the United States. While located in Utah, ARUP conducts business in all 50 states and earns annual nationwide revenues of approximately $600 million. It competes with both public and private entities. ARUP's sole owner is the University of Utah (University), but it is organized as a separate, nonprofit corporation.

The issues in this case involve whether ARUP owes Washington business and occupation (B&O) tax for laboratory services it provided to Washington medical providers during the January 1, 2013 through December 31, 2016 tax period, and whether such tax violates the United States Constitution. The Court should affirm the trial court's ruling for the Department of Revenue (Department) on both issues.

First, ARUP is a taxable "person" for Washington B&O tax purposes because the applicable statutory definition includes nonprofit corporations, as it has for over 80 years. Under Washington's B&O tax, gross income is apportioned to where the customer receives the benefit of the service. In ARUP's case, its Washington customers—medical providers—received the benefit of its laboratory services in Washington,

where the providers diagnosed and treated patients. Thus, Washington's B&O tax applies to ARUP's Washington revenues.

Second, ARUP's constitutional challenges fail. ARUP is separately organized from the University, and should be treated as such for tax purposes as well. Moreover, ARUP is not an arm of the State of Utah, as the Tenth Circuit Court of Appeals has already concluded. Finally, applying Washington's B&O tax to ARUP does not result in unconstitutional discrimination because the record contains no evidence that similarly situated in-state corporations have escaped taxation. This Court should affirm the trial court's order granting summary judgment to the Department.

II. STATEMENT OF ISSUES

1. Washington B&O tax applies to every "person," which RCW 82.04.030 defines to include nonprofit corporations, but not states. As a separately organized nonprofit corporation owned by the University, is ARUP a taxable "person"?

2. ARUP tested specimen samples in Utah and then electronically transmitted the test results to Washington medical providers. Under RCW 82.04.462 and WAC 458-20-19402, did Washington medical providers receive the benefit of ARUP's services in Washington, when they obtained specimen samples from patients in Washington and utilized

the test results from ARUP in Washington to diagnose and treat those patients?

3. While owned by the University, ARUP is a nonprofit corporation that managed its own daily operations and exercised financial independence in its business. Washington tax cases have long held that a corporation is not entitled to obtain a tax benefit by asking a court to disregard its chosen corporate form. Should this Court treat ARUP as a separately organized nonprofit, rather than an arm of the State of Utah?

4. The record contains no evidence of Washington taxing ARUP differently than a similarly situated Washington entity. Without any evidence of differential treatment, should this Court reject ARUP's claims of unconstitutional discrimination?

5. The federal Commerce Clause requires a rational relationship between a tax and the in-state contact of the business. Does Washington's B&O tax satisfy that test when ARUP only paid B&O tax on its Washington revenue?

6. ARUP is a nonprofit corporation that initiated this tax refund action in Washington courts after earning millions of dollars from

Washington medical providers during the tax period. Is ARUP entitled to the protection of state sovereign immunity?

III. COUNTERSTATEMENT OF FACTS

A. ARUP's Status as a Commercial Enterprise for the University

ARUP is a pathology laboratory that has operated in Utah since 1984. CP 38, 181-82, 489-90. It was originally created and fully owned by the Associated University Pathologists, a nonprofit corporation owned by the University. CP 175. The Associated University Pathologists created ARUP as a way to earn more revenue for the University, while also providing laboratory facilities the University could use for teaching and research. CP 172-74, 302 (ARUP was the largest contributor to the increased growth of the University's sales and services revenue).

Initially, ARUP was incorporated under the laws of Utah as a for-profit corporation. CP 172. After nearly two decades of operation, the Associated University of Pathologists was dissolved and the University became the sole owner of ARUP. CP 176. Several years later, ARUP was reorganized as a Utah nonprofit corporation. CP 176.

ARUP refers to itself as a "nonprofit enterprise" of the University. CP 347. ARUP's Board of Directors consists of up to 10 directors, the majority of which, according to its bylaws, must be employees, officers, or trustees of the University. CP 426-27. During the tax period, up to four

directors were community members unaffiliated with the University. CP 187, 426-27. ARUP's bylaws allowed the Board of Directors to "delegate the management of the activities of [ARUP] to any person," provided that all such activities were exercised under the ultimate direction of the Board of Directors. CP 426.

Based on this provision, up to 12 individuals formed ARUP's executive management team. CP 449-51. ARUP's executive management consisted of its own employees, as well as University employees or officers. CP 506-07. For example, University employees typically held management roles requiring a medical degree, such as the Chief Medical Officer, while ARUP employees typically held management roles relating to business operations, such as the Vice President of Sales. CP 194-98.

Beyond ARUP's management, the vast majority of individuals working at ARUP were employed by ARUP, not the University. During the tax period, ARUP had between 2,500 and 3,500 of its own employees conducting ARUP's day-to-day operations. CP 499. Half of them were in positions relating to performing laboratory tests, and half supported the laboratory services through administrative work, sales, and marketing. CP 42, 148. Approximately 120 other individuals who worked at ARUP were University employees, residents, or fellows acting as medical directors or pathologists for the laboratory. CP 148-50, 499-500.

ARUP was financially independent from the University. ARUP maintained its own bank accounts. CP 498-99. ARUP did not receive any funding from the University, or the State of Utah. CP 153-54, 210. Instead, ARUP earned the majority of its revenue from providing laboratory services to customers outside of Utah. CP 150-53, 364. For example, based on the refund amount ARUP is requesting in this case, ARUP earned over $45 million in gross income from Washington customers during the tax period. CP 5 (calculating gross income based on $713,920.19 refund amount and 1.5 percent B&O tax rate).

A representative example of ARUP's own independently audited financial statement demonstrates ARUP's financial independence. CP 345-72 (ARUP's Annual Financial Report for 2017 fiscal year). Specifically, ARUP had operating revenues during that fiscal year of nearly $600 million. CP 359. Its total operating expenses were approximately $505 million, leaving it with net income of just under $94 million. CP 359. Of this $94 million (plus $2 million in investment income), about $61 million was distributed to the University. CP 359. ARUP's overall net position increased by $34 million. CP 359.

In addition to its own financial statement, ARUP was treated as a component unit of the University for purposes of the University's financial statement. CP 313. As the University's financial statement explains,

"[c]omponent units are entities that are legally separate from the University, but are financially accountable to the University, or whose relationships with the University are such that exclusion would cause the University's financial statements to be misleading or incomplete." CP 313. Thus, as an entity that is legally separate from the University, ARUP was audited based on GAAP (Generally Accepted Accounting Principles) rather than Government Auditing Standards. CP 156, 295.

ARUP also is independent from the University in its legal liability. According to ARUP, it is liable for its own employees, while the University would be liable only for the small number of its own employees working at ARUP. CP 253-54. Neither the University, nor the State of Utah has paid any legal settlements or judgments arising from lawsuits on behalf of ARUP. CP 233-34. In the event ARUP is dissolved, however, its Articles of Incorporation require all of its assets to be distributed to the University or the State of Utah. CP 446.

Given its independence from the University, ARUP has expressly disclaimed any status as a "governmental nonprofit" under Utah law. CP 545 (Report to the Utah Legislature on new law subjecting governmental nonprofits to certain requirements). ARUP's disclaimer is consistent with its treatment under other Utah laws applicable to state entities. ARUP was not subject to the State of Utah's procurement process, its Open and

Public Meetings Act (Utah Code §§ 52-4-101 to -305), its Government Records Access and Management Act (Utah Code §§ 63g-2-101 to -901, or its Public Records Management Act (Utah Code §§ 63a-12-100 to -111). *See* CP 227, 187, 236, 345-72 (ARUP's redacted financial statement), 562-77. ARUP also did not participate in the State of Utah's program for health or retirement benefits. CP 157-58, 185, 500.

B. ARUP's Laboratory Services to Washington Customers

As a pathology laboratory, ARUP performed testing on all types of bodily fluids and tissue samples to help diagnose and treat the patients of ARUP's customers. CP 35-38, 45-46, 374-404. During the tax period, ARUP offered more than 3,000 tests and test combinations that it could conduct for customers on a variety of samples. CP 38, 347.

Rather than individual patients, ARUP's customers were medical providers, such as hospitals, clinics, and other laboratories. CP 45-49. Initially, ARUP's primary customer was the medical center at the University. CP 174-75. By the time of the tax period however, ARUP provided laboratory services to medical providers across the United States, including medical providers in Washington. CP 45-49, 347, 490-92. ARUP marketed its testing services in all 50 states and held a license to conduct business in 14 states. CP 496-97. Given this growth, it was considered a "leading national reference laboratory" and competed with

large, publicly traded corporations in its field, including Quest Diagnostics and Laboratory Corporation of America. CP 51-52, 347.

During the tax period, ARUP performed pathology laboratory services for 55 hospitals, clinics, and laboratories in Washington. CP 453-56, 490-92. To provide such services, ARUP trained its customers on the steps necessary for requesting laboratory tests and receiving the results of the tests. CP 72-73. For example, ARUP instructed its customers on how to request a test, how to ship a specimen to be tested, and how to receive the test results. CP 72-73. ARUP also provided its customers with any equipment or supplies required for the laboratory services. CP 81.

Physicians and health providers—the direct customers of ARUP—would determine that a test was necessary and order it from ARUP through an electronic form. CP 59-61, 66-71, 74. After collecting the appropriate blood, tissue, or electronic images from the patient, the medical provider prepared the samples for shipping. CP 79. Once packaged, ARUP used a third-party courier service to collect the samples and deliver them to its laboratory facilities in Utah. CP 78-79.

Upon receipt, ARUP performed the requested tests and transmitted the results to the customer electronically. CP 82, 85, 90-91, 380-404. In certain circumstances, an ARUP pathologist also shared an interpretation of the test results with the requesting medical provider. CP 87-88. Based

on the test results and any consultation with ARUP, the Washington medical provider diagnosed and treated the patient. CP 492-93. Thus, it was important for ARUP to provide test results to its customers quickly so patients could be diagnosed and treated as soon as possible. CP 53 (stating that turnaround time is very important in the treatment of patients). ARUP did not return the samples to its customers, and instead stored them, in case follow-up testing was necessary. CP 83-84, 94-95.

C. ARUP's Failed Challenges Before the Board of Tax Appeals and Trial Court

In 2012, the Department issued an assessment against ARUP for B&O taxes based on the laboratory services it provided to Washington customers during a prior tax period. *Associated Reg'l and Univ. Pathologists v. Dep't of Revenue*, BTA Dkt. 13-124, 2016 WL 3262421 at *3 (2016) (Attached as Appendix A). ARUP challenged the assessment before the Board of Tax Appeals, arguing that its income should be apportioned to Utah because the samples it tests for Washington customers remain at its laboratory in Utah.[1] *Id.* at *4. The Board of Tax Appeals rejected ARUP's argument, explaining that the benefit of ARUP's

[1] ARUP asserted several constitutional arguments before the Board as well, but the Board refused to address the arguments because ARUP had not included any constitutional issues in its notice of appeal. *Associated Reg'l and Univ. Pathologists*, 2016 WL 3262421 at *6.

laboratory services was received in Washington, where the Washington customers used the information from such services to diagnose and treat their patients. *Id.* at *4-*5. Accordingly, the Board concluded the Department properly apportioned ARUP's income to Washington under RCW 82.04.462(3)(b)(i). *Id.* ARUP did not appeal the Board's decision.

In 2016, ARUP filed this action seeking a refund of $713,920.19 in B&O taxes for a later tax period, January 1, 2013 to December 31, 2016. CP 4-5. ARUP again claimed that the income it earned from providing testing services to Washington customers should be apportioned to Utah, not Washington. CP 8-9. In addition, ARUP asserted that even if the Department properly apportioned its income, it cannot be subject to Washington's B&O tax because it is an arm of the State of Utah, and taxation of ARUP would violate various constitutional principles. CP 10-14. On cross motions for summary judgment, the trial court denied summary judgment to ARUP, and granted summary judgement to the Department. CP 811. ARUP now appeals.

IV. ARGUMENT

This Court reviews appeals from a summary judgment order de novo. *Aventis Pharm., Inc. v. Dep't of Revenue*, 5 Wn. App.2d 637, 641, 428 P.3d 389 (2018). While this Court's review is de novo, it must presume taxes are valid. *Avnet, Inc. v. Dep't of Revenue*, 187 Wn.2d 44,

49, 384 P.3d 571 (2016). Accordingly, ARUP bears the burden of proving that the taxes at issue are incorrect and that it is entitled to a refund. *Wash. Imaging Servs., LLC v. Dep't of Revenue*, 171 Wn.2d 548, 555, 252 P.3d 885 (2011) (citing RCW 82.32.180).

ARUP fails to meet that burden in this case. Washington imposes B&O tax on every "person" engaging in business within this state. RCW 82.04.220(1). Nonprofit corporations like ARUP fall within the definition of "person" under RCW 82.04.030. Thus, a straightforward application of the statute to the undisputed facts demonstrates that ARUP was subject to taxation in Washington. Because ARUP is subject to tax, the Department properly apportioned the income ARUP earned from Washington customers to this state. No constitutional provision prohibited such taxation. This Court should affirm.

A. ARUP's Income from Providing Laboratory Services to Washington Customers is Taxable Under Washington Law

Washington's B&O tax is "extremely broad." *Steven Klein, Inc. v. Dep't of Revenue*, 183 Wn.2d 889, 896, 357 P.3d 59 (2015). Under RCW 82.04.220(1), "There is levied and collected from every person that has a substantial nexus with this state . . . a tax for the act or privilege of engaging in business activities." Thus, the "[L]egislature intended to impose the [B&O] tax upon virtually all business activities carried on

within the state." *Steven Klein, Inc.*, 183 Wn.2d at 896 (internal quotations omitted).

Consistent with this broad scope, the Legislature defines the measure of the B&O tax by applying various rates against the "gross income of the business." RCW 82.04.220(1). Here, ARUP's laboratory services fell within the "service and other" activities classification. *See* RCW 82.04.290(2)(a). This is a "catchall" classification for activities not otherwise classified. *Steven Klein, Inc.*, 183 Wn.2d at 897. During most of the tax period at issue here, the rate for the "service and other" classification was 1.5 percent of a taxpayer's gross income. RCW 82.04.290(2)(a). ARUP does not dispute that its laboratory services were properly classified under the "service and other" rate.

While Washington's B&O tax is broad, the United States Constitution imposes certain limitations on a state's taxing powers. Specifically, the federal Commerce Clause requires that a state's taxation of interstate commerce be "fairly apportioned." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279, 97 S. Ct. 1076, 51 L. Ed. 2d 326 (1977). Fair apportionment is meant "to ensure that each State taxes only its fair share of an interstate transaction." *Goldberg v. Sweet*, 488 U.S. 252, 260-61, 109 S. Ct. 582, 102 L. Ed. 2d 607 (1989). To comply with the

Commerce Clause's fair apportionment requirement, Washington has adopted its own apportionment statutes. RCW 82.04.460; RCW 82.04.462.

On appeal, ARUP challenges whether it should be subject to Washington's broad B&O tax at all. If it is, ARUP argues its income from laboratory services should be "fairly apportioned" to Utah, not Washington. This Court should reject ARUP's challenges, and affirm the trial court's summary judgment for the Department.

1. ARUP is a "person" subject to B&O tax

As ARUP acknowledges, Washington's B&O tax applies to "every person" engaging in business activities within the state. RCW 82.04.220(1). ARUP fits squarely within the Legislature's definition of "person." RCW 82.04.030 defines "person" broadly:

> "Person" or "company", herein used interchangeably, means *any* individual, receiver, administrator, executor, assignee, trustee in bankruptcy, trust, estate, firm, copartnership, joint venture, club, *company*, joint stock company, business trust, municipal corporation, political subdivision of the state of Washington, *corporation*, limited liability company, association, society, or any group of individuals acting as a unit, whether mutual, cooperative, fraternal, *nonprofit*, or otherwise and the United States or any instrumentality thereof.

(Emphasis added). As a nonprofit corporation, ARUP meets the plain language definition of a "person" subject to B&O tax. *See, e.g., Yakima Fruit Growers Ass'n v. Henneford*, 187 Wash. 252, 256, 60 P.2d 62 (1936)

(B&O tax statute "clearly indicates that non-profit co-operative companies or associations were intended to be included in the word 'person'").

ARUP fails to set forth the definition of "person" at all. Instead, ARUP insists it is an "arm of Utah," and therefore, a "state" that is not within the definition of "person." App. Br. at 21. ARUP's argument ignores the undisputed, material fact that the University chose to organize ARUP as a nonprofit corporation, and it was not created as an agency of the State of Utah. CP 443-47. Thus, as a matter of law, ARUP is a "person" subject to B&O tax under the plain language of the statute. This Court should affirm the trial court based on this plain application of RCW 82.04.030 to the undisputed, material facts in this case.

2. ARUP's income from providing laboratory services to Washington medical providers should be apportioned to Washington

Because ARUP is a "person" subject to B&O tax, this Court must determine whether the Department "fairly apportioned" part of ARUP's total income to Washington under Washington's apportionment statutes. A question of statutory interpretation is a matter of law that this Court reviews de novo. *Cashmere Valley Bank v. Dep't of Revenue*, 181 Wn.2d 622, 631, 334 P.3d 1100 (2014).

Under Washington law, a person earning "apportionable income" that is taxable both in Washington and another state must apportion to

Washington the amount that person derived from business activities performed within Washington. RCW 82.04.460(1). Here, ARUP does not dispute that it earned "apportionable income" when it provided laboratory services to Washington customers. *See* RCW 82.04.460(4)(a)(vi) ("apportionable income" includes gross income that a taxpayer earns from activities falling within the service and other B&O tax classification).

For businesses like ARUP that have earned "apportionable income," the Legislature adopted the "single factor apportionment formula" to apportion their income. In doing so, the Legislature explained that the "single factor apportionment formula" was necessary because many out-of-state businesses without a physical presence in Washington "earn significant income" from providing services to Washington residents. Laws of 2010, 1st Spec. Sess., ch. 23, § 101(1). According to the Legislature, such businesses "receive significant benefits and opportunities" from Washington, including:

> Laws providing protection of business interests or regulating consumer credit; access to courts and judicial process to enforce business rights, including debt collection and intellectual property rights; an orderly and regulated marketplace; and police and fire protection and a transportation system benefiting in-state agents and other representatives of out-of-state businesses.

Id. Thus, with the "single factor apportionment formula," the Legislature intended to require out-of-state businesses earning significant income from

Washington residents to "pay their fair share of the cost" to Washington for the services and infrastructure that Washington provides. *Id.*

To achieve this purpose, the "single factor apportionment formula" multiplies a person's "apportionable income" by its "receipts factor." RCW 82.04.462(1). The "receipts factor" is a fraction where the numerator is the gross income of the business attributed to Washington during the tax year, and the denominator is the total gross income of the business worldwide during the tax year. RCW 82.04.462(3)(a).

To determine the numerator of the receipts factor, i.e., the amount of gross income to attribute to Washington, the Legislature provides that the "gross income of the business generated from each apportionable activity is attributable to the state . . . [w]here the customer received the benefit of the taxpayer's service." RCW 82.04.462(3)(b)(i). In turn, the "customer" is the "person or entity to whom the taxpayer makes a sale or renders services or from whom the taxpayer otherwise receives gross income of the business." RCW 82.04.462(3)(b)(viii). Thus, the touchstone of the single factor apportionment formula is where the customer received the benefit of the service at issue.[2]

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[2] Prior to the tax period, Washington had a statute that considered other factors beyond where the customer received the benefit of the taxpayer's service, including payroll and ownership of property.

In this case, ARUP's customers are hospitals, clinics, and other laboratories. CP 45-49. ARUP enters into contracts with these medical providers to provide its laboratory services in all 50 states, including Washington. CP 45-49, 490-92. RCW 82.04.462 and the Department's implementing rule demonstrate that ARUP's Washington customers received the benefit of ARUP's laboratory services in Washington.

a. ARUP's laboratory services helped Washington hospitals, clinics, and laboratories diagnose and treat their patients in Washington

When interpreting a statute, a court's primary purpose should be to carry out the Legislature's intent as embodied in the statute's plain language. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). In discerning legislative intent, "the interpretation of a statute's plain language is guided by the common and ordinary meaning of its words." *Bowie v. Dep't of Revenue*, 171 Wn.2d 1, 11, 248 P.3d 504 (2011). A court may determine the ordinary meaning of undefined terms in a statute by referring to the dictionary. *Am. Cont'l Ins. Co. v. Steen*, 151 Wn.2d 512, 519-20, 91 P.3d 864 (2004).

RCW 82.04.462(3)(b)(i) requires a taxpayer's apportionable income to be attributed to the state "where the customer received the benefit of the taxpayer's services." While the statute itself does not further define "benefit" for apportionment purposes, the dictionary defines the

term as "something that guards, aids, or promotes well-being: ADVANTAGE, GOOD" or a "useful aid: HELP, MEANS, AGENCY." *Webster's Third New International* 204 (2002). "Benefit" also is defined as an "[a]dvantage; privilege," or a "profit or gain; esp., the consideration that moves to the promisee." *Black's Law Dictionary* 166 (8th ed. 1999). Thus, based on the ordinary meaning of "benefit," this Court should apportion ARUP's income to the location where its laboratory services provided advantages, help, or gains to the customer.

Here, the undisputed facts demonstrate that Washington hospitals, clinics, and laboratories received the benefit of ARUP's services in Washington. During the tax period, Washington medical providers requested ARUP's laboratory services when necessary to care for a patient. CP 59, 74. The medical provider obtained the required sample from the patient, and a third party courier delivered the sample to ARUP's laboratory in Utah. CP 60-61, 78-79. ARUP then performed the requested testing on the sample, provided any necessary consultation, and transmitted the test results electronically to the Washington customers. CP 82, 85, 87-88, 90-91, 380-404. Health providers used the test results to diagnose and treat patients in Washington. CP 492-93. Accordingly, the advantage or gain ARUP's laboratory services provided to these medical

providers was in Washington where physicians utilized the test results to help patients.

ARUP defies this common sense view of benefits and argues that its Washington customers received the benefit of its services *in Utah*, where it performed the testing. App. Br. at 13. While ARUP conducts the tests in Utah, ARUP's Washington customers obtain benefits from the services in Washington, not Utah. ARUP's laboratory services only become advantageous or gainful in Washington where the tests results enable physicians to provide medical care to patients in Washington. Under the plain language of RCW 82.04.462, ARUP's income from Washington customers should be apportioned to Washington.

The Legislature's intent in adopting the single factor apportionment formula supports this conclusion. *See Quinault Indian Nation v. Imperium Terminal Servs., LLC*, 187 Wn.2d 460, 470, 387 P.3d 670 (2017) ("The purpose of statutory interpretation is to give effect to the intent of the [L]egislature."). ARUP is an out-of-state business that earned more than $45 million from contracting with Washington hospitals, clinics, and laboratories during the tax period. *See* CP 5. ARUP relies upon infrastructure and services provided by Washington to provide laboratory services for Washington customers. For example, ARUP utilizes Washington transportation systems to ensure the safe delivery of

samples from Washington customers to its laboratory for testing. *See* CP 78-79. Accordingly, the apportionment formula intends ARUP to pay its "fair share of the cost" for such benefits as it earns millions of dollars from Washington medical providers.

b. The Department's apportionment rule confirms Washington customers received the benefit of ARUP's laboratory services in Washington

ARUP barely mentions RCW 82.04.462 and instead focuses almost entirely on the Department's apportionment rule, WAC 458-20-19402. App. Br. at 13-21. That rule, however, also supports the apportionment of ARUP's income to Washington, not Utah.

The Department adopted WAC 458-20-19402(303) to provide guidance on how to determine where a customer received the benefit of a taxpayer's service under RCW 82.04.462. Specifically, section (303) establishes a framework that examines the nature of the taxpayer's service and the type of customer to determine where the benefit of a service is received. Based on this framework, WAC 458-20-19402(303)(c) states that "[i]f the taxpayer's service does not relate to real or tangible personal property, the service is provided to a customer engaged in business, and the service relates to the customer's business activities, then the benefit is received where the customer's related business activities occur."

WAC 458-20-19402(303)(c) applies to ARUP's laboratory services. During the tax period, ARUP provided laboratory services to Washington hospitals, clinics, and laboratories that were also engaged in business. CP 490-92. Rather than real or tangible personal property, ARUP's laboratory services related to the business activities of these medical providers, which was providing medical care and treatment to patients. CP 492-93. In fact, this was the main purpose of ARUP's service. CP 492-93 (describing how customers used test results from ARUP to diagnose and treat patients). Thus, because ARUP's laboratory services related to the business activities of its customers, the benefit of ARUP's services was received where those business activities occurred. *See* WAC 458-20-19402(303)(c). In this case, ARUP performed its laboratory services for medical providers that were located and serving patients in Washington. CP 490-93. Accordingly, the undisputed, material facts demonstrate that ARUP's income should be apportioned to Washington.

Rather than addressing subsection (303)(c), ARUP argues that subsection (303)(b) of the rule applies and requires its income from Washington customers to be apportioned to Utah. App. Br. at 13-14. Subsection (303)(b) states that "if the taxpayer's service relates to tangible personal property, then the benefit is received where the tangible personal property is located or intended/expected to be located." According to

ARUP, its laboratory services related to tangible personal property because it performed tests on tangible property, i.e. medical samples. App. Br. at 13-14. Because ARUP tested and stored the samples in Utah, ARUP asserts that Washington customers received the benefit of its laboratory services in Utah. App. Br. at 13-15.

ARUP's argument conflates what is necessary to perform its laboratory services (samples) with the benefit gained from its laboratory services (the treatment and diagnosis of patients). CP 60-61, 492-93. Simply because the specimen samples are a necessary part of ARUP's laboratory services does not mean that those services "relate to tangible personal property" under WAC 458-20-19402(303)(b). *See* App. Br. at 16 (calling ARUP's services "meaningless" if unrelated to the specimen sample). Rather, the services are meaningless if they did not provide benefits to doctors and patients in Washington. ARUP's approach would make any service that requires the use of tangible personal property "relate to tangible personal property," even if the advantage received from the service is not the tangible personal property itself. The Court should reject ARUP's interpretation because it would undermine RCW 82.04.462's requirement that income be apportioned to the state where the customer received the benefit of the taxpayer's services. *See Wash. Pub. Ports Ass'n v. Dep't of Revenue*, 148 Wn.2d 637, 646, 62 P.3d 462 (2003)

("Administrative agencies do not have the power to promulgate rules that would amend or change legislative enactment.").

To support its incorrect reading of WAC 458-20-19402, ARUP resorts to a principle of statutory construction that does not apply in this case. *See* App. Br. at 16 (referring to the maxim that a specific statute will supersede a general one when both apply). When referring to the general-specific rule, courts typically have relied upon this maxim only when the statutes at issue cannot otherwise be harmonized. *See Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Coun.*, 165 Wn.2d 275, 309, 197 P.3d 1153 (2008) (applying general-specific rule when the two acts presented "an apparent contradiction"). That is not the situation here. When considered in the proper context of RCW 82.04.462, the provisions of WAC 458-20-19402(303) can be read together in a consistent manner. Furthermore, even if this Court were to apply the general-specific rule for which ARUP advocates, WAC 458-20-19402(303)(c) is more specific than (303)(b) because (303)(c) applies only when a service does not otherwise relate to real property or tangible personal property. Accordingly, under ARUP's theory, this Court still should apply section (303)(c).

The Board of Tax appeals has recognized that WAC 458-20-19402(303)(c) applies over (303)(b) with respect to ARUP's laboratory

services in a prior tax period.[3] *Associated Reg'l and Univ. Pathologists*, 2016 WL 3262421 at *5. In its decision, the Board rejected ARUP's interpretation for "placing unwarranted emphasis on the test material itself." *Id.* Instead, it agreed with the Department that ARUP's customers sought the test results from ARUP's laboratory services, rather than the actual specimen sample. *Id.* As the Board put it, the tangible personal property ARUP uses to perform its laboratory services is simply the "material from which [ARUP] extracts information to be forwarded for beneficial use in Washington." *Id.* Because ARUP's laboratory services enabled Washington customers to provide better medical care and treatment to their patients, the Board correctly concluded the services related to the customer's business activities, and therefore, WAC 458-20-19402(303)(c) applied. This Court should do the same here.

ARUP also ignores how the Department has a separate apportionment rule addressing services relating to intangible personal property. *See* WAC 458-20-19403(106)(a) (defining apportionable royalty receipts as "all compensation for the use of intangible personal property"). Instead, WAC 458-20-19402(303)(c) plainly states that it applies to

[3] Below, the Department argued that issue preclusion prohibited ARUP from re-litigating an identical issue. The trial court disagreed with the Department. The Department does not challenge this ruling on appeal. However, the Board's decision is still persuasive based on its own logical force and correct analysis.

services relating to a customer's business activities and gives examples of such services, including "[l]egal and accounting services not specific to real or tangible personal property." These activities involve the use of tangible personal property, i.e., business records, but the benefit a customer receives is from the advice the attorney or accountant provides based on the records. Likewise, the medical providers purchasing ARUP's laboratory services benefit from the information, not the medical samples.

ARUP makes much of the example in section 303(b) that specifically lists "testing of tangible personal property" as a service relating to tangible personal property. App. Br. at 17 (citing WAC 458-20-19402(303)(b)(iii)(D)). ARUP even insists that if its laboratory services do not qualify under this example, section (303)(b) could never apply to a service involving testing. App. Br. at 19. Once again, ARUP fails to consider this example in the context of RCW 82.04.462.

In light of RCW 82.04.462, the Department meant for the "testing of tangible personal property" example to describe services where the benefit the customer receives is the use or enjoyment of the tangible personal property being tested. *See* WAC 458-20-19402(304)(b) (more detailed examples of services related to tangible personal property that describe where tools, widgets, or equipment will be delivered or used). The use or enjoyment of the tangible personal property is not the point of

ARUP's laboratory services. Indeed, ARUP does not even return the sample to its Washington customers. CP 83-84, 94-95. Thus, Washington hospitals, clinics, and laboratories received the benefit of ARUP's laboratory services in Washington where they diagnose and treat patients.

The Department, trial court, and Board of Tax Appeals, all have reached the correct conclusion. Under RCW 82.04.462 and WAC 458-20-19402(303)(c), ARUP's customers received the benefit of its laboratory services in Washington. Accordingly, this Court should affirm the trial court's decision apportioning ARUP's income from Washington customers to Washington.

B. ARUP's Constitutional Arguments Fail for Multiple Reasons

ARUP also offers several constitutional challenges against Washington's B&O tax. App. Br. at 11. This Court reviews such challenges de novo. *City of Seattle v. Evans*, 182 Wn. App. 188, 191, 327 P.3d 1303 (2014). This Court also must presume a statute is constitutional unless ARUP demonstrates its unconstitutionality beyond a reasonable doubt. *Auto. United Trades Org. v. State*, 175 Wn.2d 537, 545, 286 P.3d 377 (2012). In this case, each of ARUP's constitutional challenges lack merit when applied to the record.

ARUP's constitutional arguments rest on a two-part foundation, but neither part demonstrates that subjecting ARUP to Washington B&O

tax is unconstitutional. First, ARUP posits that it is sufficiently related to the State of Utah to be treated as an arm of the state for tax purposes. App. Br. at 21-24, 41-45. ARUP's argument assumes, with virtually no explanation, that this Court should engage in an arm-of-the-state analysis that mirrors other contexts, such as tort lawsuits. App. Br. at 25-29. But ARUP offers no citation from this state or any other state, nor any reasoned argument, that supports applying this analysis to a tax case. Furthermore, even if this Court were to apply the analysis that ARUP advocates, the Tenth Circuit Court of Appeals has already concluded that ARUP was *not* an arm of the state for purposes of the Federal False Claims Act. *See U.S. ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah*, 472 F.3d 702, 716-22 (10th Cir. 2006). The Tenth Circuit's decision still is persuasive today.

The second part of ARUP's argument rests on the assertion that if ARUP is equivalent to the State of Utah, it must be permitted to deliver services to Washington customers tax-free because Washington does not subject its own government agencies to B&O tax. App. Br. at 29-41. While certain constitutional principles prohibit states from discriminating against businesses based in other states, the record in this case contains a conspicuous absence of any proof of discrimination. There is no evidence, for example, that Washington would not impose B&O tax on a corporation

owned by a Washington state agency similarly situated to ARUP. In other words, even if this Court concludes that ARUP is an arm of the State of Utah, this conclusion does not demonstrate constitutional infirmity.

Given ARUP's approach, this Court can resolve the constitutional issues in two ways. The Court can conclude that ARUP is not an arm of the State of Utah, and therefore, ARUP's constitutional arguments fail. Alternatively, the Court could conclude that the record lacks proof of discrimination, and reject ARUP's other constitutional arguments without deciding the arm-of-the-state question. Either way, this Court ultimately should affirm the trial court.

1. This Court should not disregard the separateness between Utah and ARUP

In tax cases, Washington courts have long applied the general rule that a court will not disregard a corporation's chosen form to permit that corporation to obtain a tax benefit. *See, e.g., Simpson Inv. Co. v. Dep't of Revenue*, 141 Wn.2d 139, 154, 3 P.3d 741 (2000) (corporation "may not reap the benefits of separate corporate existence . . . and then discard its very own corporate identity when it is advantageous to do so"); *Wash. Sav-Mor Oil Co. v. Tax Comm'n*, 58 Wn.2d 518, 521-23, 364 P.2d 440 (1961) (refusing to disregard separateness of parent corporation and wholly owned subsidiary); *Dep't of Revenue v. Nord Nw. Corp.*, 164 Wn.

App. 215, 229-31, 264 P.3d 259 (2011) (reversing Board of Tax Appeals ruling ignoring the separateness of a corporation and two LLCs in which it owned an interest). This Court should follow the same general rule here.

ARUP will likely argue that the cases above do not address the context of a corporation owned by or affiliated with a state. This distinction, however, is an insufficient reason to depart from the general rule that courts should not ignore an entity's chosen form. The same rationale underlying the rule applies in this context where a state, as opposed to a private entity, opts to create a separate corporate entity.

The State of Utah reaped various benefits by making ARUP a separate legal entity. Such benefits included not exposing state funds to liability, avoiding state public records and open meeting laws, not being regulated or controlled as extensively as state agencies and institutions, and higher salaries for employees. CP 173-74, 187, 227, 233-36, 345-72, 545. Now, when it comes to taxes, ARUP asks to be treated as though it is an agency of the State of Utah when it is not. When private corporations can create affiliates or subsidiaries for various purposes, Washington courts do not disregard the separateness between such entities, because the corporations or entities are in control of their own corporate structure. Similarly, states may own private corporations, assuming their state law

permits them to do so, but Washington law does not disregard the tax consequences of that separate formation.

To avoid its own identity, ARUP asks this Court to import into this tax case an arm-of-the-state analysis applied in other contexts, such as tort cases. App. Br. at 25-29. In doing so, ARUP fails to cite a single tax case from this jurisdiction or any other that does so. Nor does ARUP provide any argument for applying the analysis in this context. *See Collins v. Clark Cty. Fire Dist. No. 5*, 155 Wn. App. 48, 96, 231 P.3d 1211 (2010) (brief must be supported by argument and citations to legal authority). For that reason, this Court should reject ARUP's invitation to engage in an arm-of-the-state analysis in tax cases, at least under the facts presented here.

2. ARUP is not an arm of the State of Utah

Even if this Court examines ARUP's strained reliance on arm-of-the-state cases, it should reject the application of those cases to ARUP. Relying on two Washington cases involving tort-like claims, ARUP argues for an arm-of-the-state analysis that looks at whether ARUP is "operated and managed" by the State of Utah. App. Br. at 25-29 (citing *Hontz v. State*, 105 Wn.2d 302, 714 P.2d 1176 (1986) and *Hyde v. Univ. of Wash. Med. Ctr.*, 186 Wn. App. 926, 347 P.3d 918 (2015)). Applying this

test, or a similar test, ARUP contends that it should be able to avoid its legal identity and claim to be an arm of the State of Utah.[4]

As a threshold matter, the United States Court of Appeals for the Tenth Circuit has rejected a claim that would make ARUP an arm-of-the-state. Edyth Sikkenga filed a False Claims Act case against ARUP and others for allegedly presenting false Medicare claims. *See Sikkenga*, 472 F.3d at 706. The district court dismissed the claims against ARUP, after ruling that ARUP "was sufficiently tied to the University to be considered an arm of the state" and therefore not a "person" as defined by the False Claims Act. *Id.* at 716. The Tenth Circuit reversed this ruling.

The Tenth Circuit followed a three-part test in its arm-of-the-state analysis. The Court analyzed: "(1) the state's legal liability for a judgment, (2) the degree of autonomy from the state—both as a matter of law and the amount of guidance and control exercised by the state, and (3) the extent of financing the entity at issue receives independent of the state treasury

[4] Curiously, ARUP does not ask this Court to apply Utah law in determining its connection to the state. The Utah Government Immunity Act is a "comprehensive chapter" that in part retains and waives sovereign immunity for "the state and its political subdivisions." Utah Code § 63G-7-101(2), (4), § 63G-7-102(4). It defines "state" as "the state of Utah, and includes each office, department, division, agency, authority, commission, board, institution, hospital, college, university, Children's Justice Center, or other instrumentality of the state." Utah Code § 63G-7-102(10). It does not appear that ARUP meets this definition. *See GeoMetWatch Corp. v. Utah State Univ. Research Found.*, 428 P.3d 1064, 1074 (Utah S. Ct. 2018) (the term "other instrumentality of the state" should be interpreted to have specific commonalities with the preceding 12 terms).

and the entity's ability to provide for its own financing." *Id.* at 718. Each factor counseled against finding ARUP an arm of the State of Utah.

First, it was "clear" that the State of Utah's treasury was not legally liable for a judgment against ARUP. *Id.* at 718. Second, ARUP retained "substantial autonomy" in its operations, and had little, if any, guidance or interference from the University or the State of Utah. *Id.* at 719-21. Third, ARUP was self-sustaining and generated operating funds through its commercial activity. *Id.* at 721. "[C]ommon sense and the rationale of the Eleventh Amendment" did not require sovereign immunity to attach. *Id.* The Court summed up the rationale for why it would not treat ARUP as an arm-of-the-state:

> When a state forms an ordinary corporation, with anticipated and actual financial independence, to enter the private sector and compete as a commercial entity, even though the income may be devoted to support some public function or use, that entity is not an arm-of-the-state. We are convinced from our review of the record that ARUP was designed to operate as a commercial enterprise, not as the alter ego of the State of Utah.

Id. at 721.

Nothing material has changed since the Tenth Circuit's decision. While ARUP is now a nonprofit corporation rather than a for-profit corporation, it is still operated in much the same way. CP 177 (ARUP's operations did not change at all when it was restructured as a nonprofit).

Each of the three factors analyzed in *Sikkenga* still tip the same way. With respect to legal liability, ARUP has admitted that Utah has never paid any judgment or settlement on its behalf and that it would be liable for the actions of its own employees. CP 233-36, 253-54. With respect to its degree of autonomy from the State of Utah, ARUP employees run the daily operations of the laboratory, not the University. CP 42, 194-98. And finally, for the financing factor, ARUP remained completely self-funded through its own operations. It receives no financial support from the State of Utah. CP 153-54, 210. Therefore, this Court should conclude that ARUP is not an arm of the State of Utah.

The Tenth Circuit's analysis in *Sikkenga* is not significantly different from the analysis Washington courts have applied in *Hontz* and *Hyde*, the cases relied on by ARUP. App. Br. at 25-29.

In *Hontz*, our Supreme Court decided that Harborview Medical Center was not a "person" subject to suit for damages under 42 U.S.C. § 1983. 105 Wn.2d at 308-10. Under section 1983, a state is not a "person" that can be named as a defendant, nor is it vicariously liable for the acts of its agents. *Id.* at 309. The Court cited uncontroverted evidence that Harborview was "operated and managed by the University of Washington and all of its employees are employees of the University." *Id.* at 310. Claims against operations at Harborview also were paid from a fund of the

State Treasurer. *Id.* Thus, the Court concluded that Harborview Medical Center was an arm of the State of Washington for § 1983 claims. *Id.*

None of the key facts in *Hontz* exist for ARUP. Unlike Harborview, ARUP is not "operated and managed" by the University. ARUP has over 3,000 of its own employees, while only 80 University employees work at its laboratory. CP 148-50, 499-500. ARUP's management team consists of its own employees, as well as University employees or officers. Thus, the University is not running ARUP's day-to-day operations. CP 42, 194-98, 426, 445, 499. In addition, ARUP has paid any legal settlements through its own funds, not the State of Utah's funds. CP 233-34, 253. ARUP has not cited any statute demonstrating that a judgment or settlement against it has been or would be paid out of state funds. In fact, ARUP admits that it "covers the general medical liability" for its employees. CP 253. According to ARUP, the State of Utah only would cover the liability for the University employees who happen to work at ARUP. CP 253-54.

ARUP also relies on another tort case, *Hyde v. University of Washington Medical Center*. That case concluded that a plaintiff must follow the state notice requirements prior to filing a lawsuit against the Association of University Physicians for tort claims. 186 Wn. App. at 928. Like the Harborview Medical Center, the Association of University

Physicians is significantly different from ARUP. All members of the entity were University of Washington faculty members and University of Washington employees. *Id.* at 932. This is not the case with ARUP.

In addition, and probably most importantly, University of Washington funds were exposed to liability in a lawsuit against the Association of University Physicians. *Id.* at 934. Accordingly, the Court's application of the notice requirements for a tort suit that could impact such funds was logical. *See id.* With ARUP, there is no evidence that any settlement or judgment has been paid with state funds, nor has ARUP cited any statute permitting such liability. Because ARUP's circumstances are much different from the facts in the *Hontz* and *Hyde* cases, this Court should conclude ARUP is not an arm of the State of Utah.[5]

3. There is no evidence of discrimination

Even if this Court were to treat ARUP as equivalent to the State of Utah, the record lacks evidence of discrimination to support ARUP's constitutional theories. To prove discrimination, ARUP relies only on Washington law, including the definition of a "person" in the B&O tax

[5] In support of its arm-of-the state argument, ARUP also asserts that the Congressional Joint Committee on Taxation and the IRS issued a joint ruling treating it as an "'integral part of the State of Utah,'" for federal tax purposes. App. Br. at 33. Despite this assertion, the record does not contain the joint ruling allegedly reaching this conclusion. Even if it did, however, such facts are not material to this case because ARUP's treatment under federal tax law is not necessarily the same under Washington tax law. *Compare* RCW 82.04.030 (nonprofits are "persons" subject to B&O tax) *with* 26 U.S.C. § 501(a) & (c)(3) (certain nonprofit corporations exempt from taxation).

statutes, and the Department's rules explaining how the B&O tax applies to state institutions. App. Br. at 29-41. Neither of these legal citations address the specific issue presented here: the taxation of a corporation owned by a state agency or institution. ARUP's theory therefore rests on the assumption that a corporation owned by a Washington agency or institution would be immune from tax, without any factual evidence in the record supporting such an assumption.

WAC 458-20-189 generally explains how a variety of Washington taxes apply to Washington government entities. It specifically states, "The state of Washington and its departments and institutions are not subject to the provisions of the B&O tax under RCW 82.04.030." WAC 458-20-189(3)(b). This rule, however, does not address the circumstances in this case where a state university owns a separately incorporated entity that is conducting business nationwide and earning nearly $600 million in a fiscal year. CP 45-46, 359, 443-47.

ARUP points to the Department's rule regarding the taxation of Washington educational institutions to support its argument that it is not subject to B&O tax, but this rule does not address the taxation of entities like ARUP. *See* App. Br. at 29-30 (citing WAC 458-20-167). Instead, WAC 458-20-167 merely reiterates that the departments or institutions of the State of Washington are not subject to B&O tax. The examples in the

rule do not support ARUP's position either. ARUP specifically relies upon the example in WAC 458-20-167(7)(a), which states in relevant part:

> MN University is an educational institution created by the state of Washington. MN University operates a book store at which it sells text books, school supplies, and apparel to students and nonstudents. As an institution of the state of Washington, MN University is exempt from the B&O tax with respect to all sales, irrespective that sales are made to nonstudents.

App. Br. at 30. This example, however, does not describe the university book store as a separately organized corporation like ARUP. Accordingly, the Department's conclusion that ARUP is subject to B&O tax is consistent with WAC 458-20-167 and its examples.

To prove its discrimination argument, ARUP needed evidence demonstrating that Washington does not impose tax on similarly situated entities to ARUP. ARUP conducted no such discovery, nor does any such evidence exist in the record. ARUP therefore cannot meet its burden of proof to show a constitutional violation.

ARUP may point out in reply that the tax confidentiality statute would have prevented the Department from disclosing tax information of other taxpayers. RCW 82.32.330. But this statute did not foreclose the discovery of evidence. The statute does not prohibit the disclosure of tax information from third parties (i.e. other taxpayers themselves). ARUP also may have been able to obtain general information from the

Department about how it treats similar taxpayers, without the disclosure of specific tax information. In any event, ARUP did not meet its burden of proof to show discriminatory treatment as compared to similarly situated Washington businesses.

4. Each of ARUP's constitutional theories fails

The three reasons above cover most of the constitutional theories that ARUP advances. However, because analysis of each issue is not identical, the Department addresses each theory in turn.

a. ARUP demonstrates no differential treatment under the Full Faith and Credit Clause

Without any proof of discrimination, this Court should reject ARUP's Full Faith and Credit Clause claim. The Full Faith and Credit Clause states, "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." U.S. Const. art. IV, § 1. Under this clause, the United States Supreme Court has distinguished between "credit owed to laws (legislative measures and common law) and to judgments." *Franchise Tax Bd. of Cal. v. Hyatt (Hyatt I)*, 538 U.S. 488, 494, 123 S. Ct. 1683, 155 L. Ed. 2d 702 (2003). ARUP asserts its Full Faith and Credit Clause claim based on the application Washington's B&O tax. App. Br. at 33-37.

In this context, claims under the Full Faith and Credit Clause typically arise when one party asks a court to apply the laws of another state to the case at issue. *See, e.g., Hyatt I*, 538 U.S. at 490 (Full Faith and Credit Clause did not require Nevada courts to apply California's sovereign immunity law, rather than Nevada's sovereign immunity law); *Carroll v. Lanza*, 349 U.S. 408, 75 S. Ct. 804, 99 L. Ed 1183 (1955) (Full Faith and Credit Clause did not require Arkansas courts to apply a time limitation contained in Missouri workers' compensation law, but not in Arkansas' workers' compensation law). In such cases, the United States Supreme Court has explained that the Full Faith and Credit Clause "does not require a State to substitute for its own statute, applicable to persons and events within it, the statute of another State reflecting a conflicting and opposed policy." *Franchise Tax Bd. of Cal. v. Hyatt (Hyatt II)*, ___ U.S. ___, 136 S. Ct. 1277, 1281, 194 L. Ed. 2d 431 (2016) (internal quotations omitted). When applying its own statute, however, a state's choice of law cannot exhibit a "policy of hostility" to the public acts of another state. *Id.*

ARUP cites *Hyatt II* for its holding that Nevada could not permit damages against California agencies that exceeded damages permissible against Nevada agencies. App. Br. at 31. Based on this differential treatment, the Court concluded that Nevada had created a "special—and

hostile—rule." *Hyatt II*, 136 S. Ct. at 1283. Unlike in *Hyatt II*, no "policy of hostility" or differential treatment exists here. As described above, ARUP has failed to direct the Court to any evidence that Washington would tax a similarly situated entity differently. ARUP is not the University, but a distinct nonprofit corporation. Accordingly, it should be treated as separate for tax purposes and not as an arm of the State of Utah. Thus, applying Washington's B&O tax to ARUP does not violate the Full Faith and Credit Clause.

b. ARUP cannot demonstrate a violation of the Commerce Clause

The United States Constitution permits Congress to regulate interstate commerce. U.S. Const. art. I, § 8, cl. 3. However, this authority is not exclusive. States retain certain authority to regulate and impose taxes on interstate commerce. A state tax imposed on interstate commerce is permissible if it (1) applies to an activity with substantial nexus to the state, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to the services provided by the state. *Complete Auto Transit*, 430 U.S. at 279. While the Department has already address the "fairly apportioned" requirement above, ARUP also argues that Washington's B&O tax violates the discrimination and fair

relationship requirements of the Commerce Clause. App. Br. at 37-41. Both of these arguments fail as well.

To prove discrimination against interstate commerce, ARUP must demonstrate that Washington taxes out-of-state entities differently than similarly situated in-state entities. *See Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 298, 117 S. Ct. 811, 136 L. Ed. 2d 761 (1997) ("Conceptually, of course, any notion of discrimination assumes a comparison of substantially similar entities."). As described above, ARUP has failed to present any evidence whatsoever of Washington taxing a similarly situated in-state entity differently than ARUP. Without such evidence, this Court can reject ARUP's discrimination argument under the Commerce Clause.

ARUP also challenges Washington's B&O tax based on the fourth Commerce Clause factor, which requires a fair relationship between the tax imposed and the benefits of the taxing state. App. Br. at 39-41. Unlike ARUP's other arguments, this issue is not controlled by whether ARUP is treated as equivalent to the State of Utah.

As interpreted by the Supreme Court, the fourth factor of the Commerce Clause places a minimal limitation on states' abilities to tax interstate commerce. ARUP asserts that Washington educational institutions receive more government funds and services from the State of

Washington than it does. App. Br. at 40-41. Therefore, according to ARUP, it should pay less tax. *See* App. Br. at 40-41.

ARUP's argument miscomprehends the test set forth in *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 101 S. Ct. 2946, 69 L. Ed. 2d 884 (1981). The fourth Commerce Clause factor requires only that the measure of tax be reasonably related to the extent of in-state contact. *Id.* at 626. It does not require a comparison of the amount of tax and the value of benefits provided to the taxpayer. *Id.* at 627-28. The taxpayer is only entitled to the advantages of a civilized society.

The B&O tax as applied to ARUP meets these standards. There is a rational relationship between the tax and the in-state contact. Washington imposes a 1.5 percent tax on the gross receipts ARUP earns from *Washington* customers. By doing business with Washington medical providers, ARUP benefits from the civilized society provided by Washington government, including freeways, airports, police, and courts. ARUP is not entitled to the same amount of government services as a business based in Washington, or the same amount of services as any other particular taxpayer.

ARUP appears to be making a veiled attack against single factor apportionment generally. But the Supreme Court has upheld this concept in another case. *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 98 S. Ct. 2340,

57 L. Ed. 2d 197 (1978). Moorman was an Illinois corporation that manufactured animal feeds in Illinois. It sold about 20 percent of its products in Iowa, and also had salespeople in Iowa. *Id.* at 269. The United States Supreme Court upheld Iowa's single factor sales apportionment for income tax against a due process and Commerce Clause challenge. According to the Court, the mere fact that other states might have used a different formula or that there was a risk of double taxation did not render the formula unconstitutional. *Id.* at 276-78.

The Court reached this conclusion even though Moorman made an argument very similar to the one ARUP makes in this case: a corporation doing business in more than one state shoulders a tax burden not shared by those operating entirely within one state. *Id.* at 277. The United States Supreme Court rejected this argument. *Moorman*, 437 U.S. at 280-81. In doing so, the Court relied on a case interpreting Washington's B&O tax, which upheld the application of the tax to a taxpayer's entire gross receipts from sales into Washington. *See id.* (referring to *Standard Pressed Steel Co. v. Dep't of Revenue*, 419 U.S. 560, 95 S. Ct. 706, 42 L. Ed. 2d 719 (1975)). Because the Supreme Court has already upheld single factor apportionment in the face of a Commerce Clause challenge, ARUP's argument fails. Nothing in the Commerce Clause prohibits ARUP from being subject to Washington B&O tax.

c. ARUP paying Washington B&O tax does not infringe upon the State of Utah's sovereign immunity

The sovereign immunity of states is rooted in the inherent sovereignty the states enjoyed before, and retained after, the ratification of the Constitution. *Alden v. Maine*, 527 U.S. 706, 713, 119 S. Ct. 2240, 144 L. Ed. 2d 636 (1999). While the sovereign immunity of states is not derived from or limited by the Eleventh Amendment, that amendment makes explicit reference to states' immunity from suits "'commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.'" *Id.* (citing U.S. Const. amend. XI.). Sovereign immunity serves the important function of shielding state treasuries and thus preserving states' ability to govern. *Id.* at 750-51.

While ARUP asserts an affront to Utah's sovereign immunity, Washington's sovereign interests are at stake as well. As the Supreme Court has explained: "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." *Nat'l Private Truck Coun., Inc. v. Oklahoma Tax Comm'n*, 515 U.S. 582, 586, 115 S. Ct. 2351, 132 L. Ed. 2d 509 (1995) (holding that 42 U.S.C. § 1983 does

not permit declaratory or injunctive relief against state tax departments) (internal quotations omitted).

At its core, sovereign immunity protects states from suits without their consent. In this context, sovereign immunity applies only to *states*. Because ARUP is a nonprofit corporation and not an arm of the State of Utah, ARUP's sovereign immunity argument fails. This case does not jeopardize the treasury of the State of Utah; rather, it concerns the finances of a private corporation. The Court need go no further.

In addition, ARUP's sovereign immunity argument rests largely on the hope that the United States Supreme Court will reverse *Nevada v. Hall*, which permits a state to be a defendant in the courts of another state. App. Br. at 44-46 (citing 440 U.S. 410, 99 S. Ct. 1182, 59 L. Ed. 2d 416 (1979)). The Supreme Court recently granted review in *Franchise Tax Bd. of Cal. v. Hyatt (Hyatt III)*, No. 17-1299 to address whether to overrule *Hall*. As of the writing of this brief, no decision has been issued. Thus, under current law, ARUP's argument fails for this reason as well.

Even if ARUP were an arm of the State of Utah, and even if the Supreme Court reverses *Hall*, ARUP's sovereign immunity argument is without merit. There is an important distinction between hailing a state agency into the court of a separate state as a tort defendant, and filing suit in a separate state as ARUP has done. ARUP offers no authority

supporting its contention that sovereign immunity should be expanded to protect it from this opposite posture.

ARUP instead argues that by issuing a tax assessment, ARUP was "coerced" into bringing offensive litigation in Washington courts. While ARUP was required to file its tax refund suit in Washington, it was not coerced into marketing and engaging in business activities in Washington, or earning millions of dollars in gross revenues from over 50 Washington customers. By voluntarily engaging in business activities in Washington, ARUP can hardly assert that being required to pay B&O tax on such activities is an affront to Utah's sovereignty.[6]

ARUP offers no legal authority demonstrating that sovereign immunity was meant to protect a state's ability to conduct business activities across the country without being subject to tax. The argument takes ARUP far afield of typical sovereign immunity cases, which involve state agencies defending tort or contract suits for their conduct.

Furthermore, Washington also has a compelling interest in its sovereign authority to collect taxes for activities conducted within or

---

[6] While sovereign immunity of states does extend to commercial activities, the United States Supreme Court decisions reaching this conclusion involve state agencies, not private corporations owned by states, and also involve states defending suits, rather than offensively bringing suits in another state's court. *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 120 S. Ct. 631, 145 L. Ed. 2d 522 (2000); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 119 S. Ct. 2199, 144 L. Ed. 2d 575 (1999); *Bd. of Trs. of Univ. of Alabama v. Garrett*, 531 U.S. 356, 121 S. Ct. 955, 148 L. Ed. 2d 866 (2001).

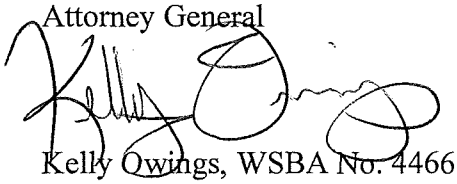
connected to its borders. *See M'Culloch v. Maryland*, 17 U.S. 316, 428-30, 4 L. Ed. 579 (1819) (power to tax undeniably aligns with a sovereign's boundaries). For these multiple reasons, ARUP's sovereign immunity argument is without merit.

V. CONCLUSION

Washington's B&O tax applies to the laboratory services ARUP provided to Washington medical providers. Imposition of the tax is constitutional. This Court should affirm the trial court's summary judgment ruling in favor of the Department.

RESPECTFULLY SUBMITTED this 6th day of March, 2019.

ROBERT W. FERGUSON
Attorney General



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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 6th day of March, 2019, at Tumwater, WA.

Kyleen N. Inman

Kyleen Inman, Legal Assistant

APPENDIX A

2016 WL 3262421 (Wash.Bd.Tax.App.)

Board of Tax Appeals

State of Washington

ASSOCIATED REGIONAL AND UNIVERSITY PATHOLOGISTS, INC., APPELLANT
v.
STATE OF WASHINGTON DEPARTMENT OF REVENUE, RESPONDENT

Docket No. 13-124
May 6, 2016

***1 RE: Excise Tax Appeal**

ORDER DENYING PETITION FOR RECONSIDERATION

The Appellant filed a Petition for Reconsideration of the Final Decision issued on March 25, 2016. Under WAC 456-09-955 and 456-09-120, the petition for reconsideration must be filed with the Board before 5:00 p.m. of tenth business day of the mailing of the Final Decision.

By electronic means, the Petition for Reconsideration was filed on April 8, 2016 at 8:37 p.m. Consequently, the petition is untimely and not considered.

DATED this 6th day of May, 2016.

FINAL DECISION: ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

This matter came before the Board of Tax Appeals (the Board), with Marta B. Powell, Chair, presiding, on December 3, 2015, for a hearing on the parties' cross-motions for summary judgment, filed pursuant to WAC 456-09-545 and the Board's Second Prehearing Order Establishing Procedural Dates, issued on August 26, 2015. Glenn R. Bartholomew, CPA, State Tax Consultants, LLC, represented the Appellant, [1] Associated Regional and University Pathologists, Inc. (the Taxpayer). Assistant Attorneys General Kelly Owings and Joshua Weissman represented the Respondent, State of Washington Department of Revenue (the Department).

The Board heard the oral arguments of counsel and considered the written materials filed in this matter, including the following:

1. [Appellant's] Motion for Summary Judgment and Legal Brief;

2. Declaration of Glenn Bartholomew, attaching a total of 25 exhibits, identified as Petitioner's Exhibits (PE) 1 through 10 (with subparts);

2. Department of Revenue's Motion for Summary Judgment, with attachments A and B;

3. Declaration of Kelly Owings, attaching Exhibits R1-R22;

4. Appellant's Rebuttal to Respondent's Motion for Summary Judgment, attaching eight additional exhibits, identified as PE 11 and PE 12 (with subparts);

5. Department of Revenue's Opposition to [Appellant's] Motion for Summary Judgment and Legal Brief;

6. Declaration of Steve Reitcheck, attaching Exhibits R23 and R24; and

5. Department of Revenue's Reply in Support of Its Motion for Summary Judgment.

Based on the parties' written submissions and oral arguments, the Board concludes "that there is no genuine issue as to any material fact and that the [[Department] is entitled to judgment as a matter of law." [2] The Board grants the Department's motion for summary judgment and denies the Taxpayer's motion for summary judgment, dismissing the Taxpayer's appeal.

FACTUAL AND PROCEDURAL BACKGROUND

Powell. The Taxpayer is located in Utah and owned by the University of Utah. The Taxpayer provides laboratory testing services to the University of Utah and to hospitals, clinics, and laboratories in all 50 states. The Taxpayer has employees who travel throughout the United States to solicit business; one employee is assigned to Washington and resides in either Washington or Oregon. During the tax period at issue in the present appeal (January 1, 2008, through December 31, 2011), the Taxpayer contracted with more than 55 customers in Washington and earned a total of more than $12 million from those customers.

***2** The Taxpayer's typical services may be briefly described. The Taxpayer offers its customers more than 3,000 test options, in such areas as allergy, immunology, chemistry, genetics, and infectious diseases, with pricing based on the mix of tests requested by each customer. After the Taxpayer and customer enter into a contract, the Taxpayer provides the customer with the instruction, training, equipment, and supplies necessary for submitting the test samples (which may be physical samples, such as blood or tissue, or electronic images). The customer typically orders the test by completing an electronic form, and the Taxpayer uses a third-party courier service to collect the physical samples and ship them to the Taxpayer's Utah laboratory. Upon receiving the test samples, the Taxpayer completes the ordered tests and transmits the test results to the customer electronically. In some circumstances, a pathologist at the Taxpayer's laboratory may call the physician who requested the test. Based on the Taxpayer's test report and on any consultation with the Taxpayer, the customer a physician at a hospital, clinic, or laboratory then proceeds to treat the patient. The Taxpayer does not return the physical sample to the customer but stores it for a certain period of time, permitting any required follow-up testing.

In 2008, the Department notified the Taxpayer of its tax reporting responsibilities in Washington. In response to the Taxpayer's subsequent inquiry about the proper method for apportioning its gross income, the Department issued the Taxpayer a ruling on August 13, 2009, advising the Taxpayer to apportion its income on a "cost basis." The ruling referenced the versions of RCW 82.04.460 and WAC 458-20-194(4) then in effect, but the ruling included a clearly stated disclaimer: "This ruling is binding upon both [[the Taxpayer] and [the Department] under the facts presented. It will remain binding *until*: the facts change; *the law (either by statute or court decision) changes*; the applicable rule(s) change; [the Department] publicly announces a change in the policy upon which this ruling is based; or [the Taxpayer] is notified in writing that this ruling is not valid." [3]

In 2010, the law did, in fact, change:
On June 1, 2010, the Legislature changed Washington's requirements for apportionment. Rather than applying apportionment on a "cost basis," the Legislature adopted a single factor receipts apportionment methodology. The Legislature intended this new methodology to "require businesses earning significant income from Washington residents ... to pay their fair share of the costs" to Washington for the services the state renders and infrastructure the

state provides. To provide immediate guidance on this significant change in the law, the Department issued emergency rule WAC 458-20-19402. The Department issued several more substantially similar versions of emergency rule WAC 458-20-19402 while it was in the process of adopting a permanent rule. On October 18, 2012, the Department adopted permanent rule WAC 458-20-19402. [4]

*3 The Department's audit of the Taxpayer (for the period January 1, 2008, through December 31, 2011) resulted in an assessment of $238,811 in service and other business and occupation (B&O) tax, penalties, and interest. Most of the assessment was attributable to the portion of the tax period following the June 1, 2010, changes in Washington's apportionment law.

The Taxpayer petitioned the Department's Appeals Division for review of the assessment. After the Appeals Division issued a determination on May 23, 2013, denying the petition, the Taxpayer timely filed a Notice of Appeal with this Board. In its Notice of Appeal, the Taxpayer identified, as the sole error in the Department's determination, the Department's conclusion that the Taxpayer's services were not, as required under WAC 458-20-19402(303)(b), "relate[d] to tangible personal property." In an amended Notice of Appeal filed a month later, the Taxpayer raised a second issue, whether the tax ruling the Department provided to the Taxpayer in August 2009 was binding on the Department throughout the tax period at issue.

The Board held a prehearing teleconference with the parties on March 6, 2015. During the teleconference, the Taxpayer expressed an interest in pursuing an additional theory, which appeared to be that Washington could not impose a tax on the Taxpayer because the Taxpayer was indistinguishable from the state of Utah, Utah is an extension of the federal government, and a state cannot tax the federal government. The Board noted that the Taxpayer had not raised such an issue in its original or amended Notice of Appeal and that any concerns about inappropriately raised issues could be raised in motions or briefing.

Prior to the scheduled hearing date of December 3, 2015, the parties filed cross-motions for summary judgment, briefing their motions as set forth on pages 1 and 2, above. At the hearing, the Department's attorneys appeared in person, and the Taxpayer's representative participated by telephone.

ISSUES

(1) Under former RCW 82.04.462(3) and WAC 458-20-19402, did the Department properly apportion the Taxpayer's income to Washington?

(2) For the portion of the tax period following the June 1, 2010, change in Washington's apportionment law, was the Department bound by the tax ruling it provided the Taxpayer in August 2009?

ANALYSIS AND CONCLUSIONS

Summary Judgment Standard. Summary judgment is appropriate where "the written record shows [1] that there is no genuine issue as to any material fact and [2] that the moving party is entitled to judgment as a matter of law." [5] The material facts are those upon which the resolution of the appeal depends. [6] In the present appeal, the facts necessary for deciding the issues are not in dispute. The Board's role is to decide the legal issues in the appeal.

Burden of Proof. The Taxpayer's burden is to prove the challenged assessment erroneous and to establish the correct amount owed. [7]

*4 *Apportionment of the Taxpayer's Income.* The Taxpayer contends that the Department misapplied the apportionment formula to the Taxpayer during the portion of the tax period when the new law was in effect—that is, from June 1, 2010, to December 31, 2011. A key component of the formula is "the total gross income of the business of the taxpayer attributable to this state during the tax year from engaging in an apportionable activity." [8] The statute explains that a taxpayer's "apportionable activity is attributable to the state ... *[w]here the customer received the benefit of the taxpayer's service.*" [9] The term *customer* is defined as the "person or entity to whom the taxpayer makes a sale or renders services or from whom the taxpayer otherwise receives gross income of the business." [10] At issue, then, is where the Taxpayer's customers— Washington hospitals, clinics, and other laboratories—"receive[d] the benefit of the Taxpayer's testing and consulting services. [11]

Guidance on "where the taxpayer's customer receives the benefit of the service" is provided in WAC 458-20-19402:
(303) Benefit of the service explained. The first two steps (subsection (301)(a)(i) and (ii) of this rule) used to attribute apportionable receipts to a state are based on *where the taxpayer's customer receives the benefit of the service. This subsection explains the framework for determining where the benefit of a service is received.*

...

(b) *If the taxpayer's service relates to tangible personal property*, then the benefit is received where the tangible personal property is located or intended/expected to be located.
(i) *Tangible personal property is generally treated as located where the place of principal use occurs ....*; or

(ii) If the tangible personal property will be created or delivered in the future, the principal place of use is where it is expected to be used or delivered.

(iii) The following is a nonexclusive list of services that relate to tangible personal property:
(A) Designing specific/unique tangible personal property;

(B) Appraisals;

(C) Inspections of the tangible personal property;

(D) *Testing of the tangible personal property*;

(E) Veterinary services; and

(F) Commission sales of tangible personal property.

(c) If the taxpayer's service does not relate to real or tangible personal property, the service is provided to a customer engaged in business, and the service relates to the customer's business activities, then *the benefit is received where the customer's related business activities occur.* [12]

In the Taxpayer's view, its Washington customers "received the benefit of the Taxpayer's testing services in Utah, [13] the actual site of the testing and the source of any related consultations. The Taxpayer argues that, to understand what is meant by "where the benefit is received," the applicable subsection of WAC 458-20-19402 is (303)(b) because the Taxpayer's services relate to "tangible personal property." Subsection (b) includes, in its "nonexclusive list of services

that relate to tangible personal property," "[t] esting of the tangible personal property." [14] Under subsection (b), the benefit is received where the "tangible personal property" is located, and the location, in turn, is the tangible personal property's "principal place of use." The Taxpayer thus maintains that the "principal place of use" is Utah, where the samples are received and tested.

***5** The Department argues, however, that the Taxpayer's testing and consulting services provide no "benefit" until the results are received by the Washington customers, who may then use the results to diagnose and treat patients. Noting that, by its plain language, the word "benefit" in former RCW 82.04.462(3)(b)(i) means "an '[a]dvantage"D' or "a 'useful aid, help,"D' [15] the Department argues that the testing becomes advantageous and helpful only when the test results are received in Washington; in other words, neither the Washington hospital or other entity, nor the patient whose test sample was shipped to Utah, receives any advantage, aid, or help from the testing until the test results are received in Washington.

The Department, accordingly, asserts that it is subsection (303)(c) of WAC 458-20-19402—not subsection (b), as the Taxpayer claims—that applies to the Taxpayer's services. Under subsection (c), if the Taxpayer's "service relates to the [Washington] customer's business activities, then the benefit is received where the customer's related business activities occur." The Department explains that the Taxpayer's services are directly related to the activities of the Washington hospitals, clinics, and laboratories that the Taxpayer serves: the Taxpayer's "testing and consulting services further the mission of their customers by enabling them to provide better medical care and treatment to patients." [16] The benefit of the Taxpayer's services is, therefore, received in Washington, where the Washington customers' business activities (diagnosing and treating patients) occur.

Rejecting the Taxpayer's claim that subsection (303)(b) of WAC 458-20-19402 governs the understanding of "where the benefit is received," the Department asserts that the Taxpayer is placing unwarranted emphasis on the test material itself. As the Department explains, "[i]t is *information* that [the Taxpayer's] customers seek, not some adjustment or service being applied to the personal property." [17] The purpose of the Taxpayer's service is not to repair and return a patient's tissue or fluid sample. The tangible personal property at issue is not a chair that the Taxpayer is refurbishing in Utah and returning to Washington; rather, it is material from which the Taxpayer extracts information to be forwarded for beneficial use in Washington.

Having considered the parties' arguments, the Board finds no factual disputes and concludes as a matter of law that the Department properly apportioned the Taxpayer's income under RCW 82.04.462(3)(b)(i). The language of the statute is plain and is supported by the relevant subsection of WAC 458-20-19402, subsection (303)(c).

Effect of the Department's August 2009 Tax Ruling. Under Washington law, taxpayers generally have "[t]he right to rely on specific, official written advice and written tax reporting instructions from the department of revenue to that taxpayer." [18] Taxpayers, however, are not granted the right to rely indefinitely on a tax ruling. Rather, as set forth in WAC 458-20-100(2)(b), a tax ruling

***6** will remain binding until the facts change, *the applicable statute or rule changes*, a published appellate decision not subject to review changes a prior interpretation of the law, the department publicly announces a change in the policy upon which the ruling is based, or the taxpayer is notified in writing that the ruling is no longer valid. [19]

In its amended Notice of Appeal, the Taxpayer claims that the Department should be bound by the tax ruling it provided the Taxpayer in August 2009, regardless of the June 2010 changes in Washington's apportionment law. [20] The Taxpayer, however, provides no argument on this issue in its initial brief and states, in its response brief, that it "withdraws any claims under Issue 2." [21] The Board acknowledges the Taxpayer's abandonment of the meritless issue. In light of the

clear statement in WAC 458-20-100(2)(b), as well as the explicit disclaimer in the tax ruling itself,[22] the Taxpayer could not bind the Department to a tax ruling predating the changes in the apportionment law.

Taxpayer's Additional Issue. In its brief in support of summary judgment, the Taxpayer includes the following issue statement:

> Is the State of Washington permitted [sic] under Washington statute, federal law, or U.S. Constitutional principle [sic] from imposing a direct tax upon the State of Utah for activities performed within Utah for the performance of essential governmental functions?[23]

In response, the Department notes that the Taxpayer failed to raise this issue in its original or amended Notice of Appeal,[24] and the Department fairly characterizes the Taxpayer's arguments on the issue as "passing arguments or queries pondering whether [the Taxpayer] is taxable under various principles."[25] The Department asserts that "[n]either the Department nor the Board should have to answer [the Taxpayer's] musings about what rule, statute, or constitutional provision might apply."[26]

The Board notes that this additional issue was not raised in the Taxpayer's original or amended Notice of Appeal and that the Taxpayer made no attempt, as permitted in WAC 456-09-330, to further amend its Notice of Appeal. The Board also observes that the Taxpayer's inadequate, incoherent briefing left to the Department the task of formulating the Taxpayer's shifting arguments. The Board concludes that the Taxpayer's additional issue statement and random arguments in support provide no basis for granting the Taxpayer's motion for summary judgment or denying the Department's motion.

DECISION

Pursuant to WAC 456-09-545, the Board hereby grants the Department's motion for summary judgment and denies the Taxpayer's motion for summary judgment, dismissing the Taxpayer's appeal.

*7 DATED this 25th day of March, 2016.

Marta B. Powell
Chair
Mark J. Maxwell
Vice Chair
Carol A. Lien
Member

Footnotes

1 Mr. Bartholomew, a CPA licensed in Utah, appears before the Board pursuant to WAC 456-09-210(6).

2 WAC 456-09-545.

3 Exhibit R18-3.

4 Department of Revenue's Motion for Summary Judgment, p. 6 (citations omitted).

5 WAC 456-09-545; CR 56(c).

6 *See Capitol Hill Methodist Church of Seattle v. Seattle*, 52 Wn.2d 359, 364, 324 P.2d 1113 (1958).

7 *Jersey's All American Sportsbar, Inc. v. Dep't of Revenue*, BTA Docket No. 99-015 (2001), at 7 (stating that "[t]he Taxpayer bears the burden of showing that the Department's assessment is incorrect, *i.e.*, that its actual tax liability for the audit period is less than that estimated by the Department"). *See also* RCW 82.32.180 (providing that, in taxpayer refund actions in superior

court, "the burden shall rest upon the taxpayer to prove that the tax as paid by the taxpayer is incorrect, either in whole or in part, and to establish the correct amount of the tax").

8 Former RCW 82.04.462(3)(a).

9 *Id.* at (3)(b)(i) (emphasis added).

10 *Id.* at (3)(b)(viii).

11 *Id.* at (3)(b)(i).

12 The relevant portions of current rule WAC 458-20-19402 are nearly identical to the versions of Emergency Rule 19402 that were effective during the tax period. *See* Determination No. 13-0153 (issued on May 23, 2013), p. 4, n.8; and Department of Revenue's Motion for Summary Judgment, p. 4, n.11; pp. 14-15; and Appendix B. Given the substantially similar language in all versions of the emergency rule, the Taxpayer's claim that the Department upheld the assessment based upon an inapplicable version of the rule is meritless.

13 *Id.* at (3)(b)(i).

14 WAC 458-20-19402(303)(b)(iii)(D).

15 Department of Revenue's Motion for Summary Judgment, p. 10 (citing BLACK'S LAW DICTIONARY 166 (8th ed. 1999) and WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 204 (2002)).

16 *Id.* at 12.

17 *Id.* at 13 (emphasis added).

18 RCW 83.32A.020(2).

19 WAC 458-20-100(2)(b).

20 The Taxpayer presented the issue in its amended Notice of Appeal.

21 Appellant's Rebuttal to Respondent's Motion for Summary Judgment, p. 2.

22 *See* Exhibit R18-3 (stating that the ruling "will remain binding until... the law (either by statute or court decision) changes").

23 [Appellant's] Motion for Summary Judgment and Legal Brief, pp. 1-2.

24 *Id.* at 15 (citing WAC 456-09-310(l)(e)-(f)). *See also* WAC 456-09-330.

25 Department of Revenue's Opposition to [Appellant's] Motion for Summary Judgment and Legal Brief, p. 14.

26 *Id.; see also id.* at 16 (citing *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 416, 120 P.3d 56 (2005) (confirming that courts "'will not review issues for which inadequate argument has been briefed or only passing treatment has been made'")).

2016 WL 3262421 (Wash.Bd.Tax.App.)

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ATTORNEY GENERAL'S OFFICE - REVENUE & FINANCE DIVISION

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