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No. 53341-3-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

BLUE SPIRITS DISTILLING LLC,

Plaintiff/Appellant,

v.

WASHINGTON STATE LIQUOR & CANNABIS BOARD,

Defendant/Respondent.

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

The most telling aspect of the Washington State Liquor and Cannabis Board's (the "Board") response is what it does *not* contain: discussion of the Court's *rationale* in its opinion in *Washington Restaurant Association v. Washington State Liquor Board*, 200 Wn. App. 119, 401 P.3d 428 (2017), which makes abundantly clear that the Court invalidated *any* revenue-based fees imposed by the Board on licensed distillers. The Board's failure to respond to this point is an implicit admission that the *issue of law* in this case has already been decided, even if the revenue-based fee specifically at issue in that case was different than the revenue-based fee at issue here.

The bulk of the Board's brief is simply an effort to avoid this conclusion. But the incontrovertible state of the facts and law is that Blue Spirits, LLC ("Blue Spirits") is entitled to a refund, and the Board is demonstrating an unwillingness to abide by the Court's ruling as it continues to impose fees on licensed distillers under an invalid regulation. The Court should reverse the dismissal of Blue Spirits' refund action and remand this matter with instructions that judgment be entered in Blue Spirits' favor.

II. REPLY

A. **Blue Spirits Has Not Abandoned Any Part of Its Claim for a Refund.**

The Board asserts that Blue Spirits abandoned its claim for a refund of the fees the Board collected, without authority, pursuant to WAC 314-28-070(3). Board Br. at 12–13. The Board is incorrect. Abandonment occurs when a party appears in the Court but altogether fails to raise a claim or defense to a claim. *See Hilmes v. Moon*, 168 Wash. 222, 233, 11 P.2d 253 (1932) (parties appearing only as respondents held to have abandoned their claims).

Blue Spirits' appeal sufficiently raises a claim for a refund of any fees paid to the Board pursuant to WAC 314-28-070(3). Blue Spirits' notice of appeal included the trial court's order of dismissal without prejudice of Blue Spirits' Complaint, "and all matters encompassed therein," to include the trial court's denial of Blue Spirits' motion for summary judgment. *See* CP 354. The Board concedes that Blue Spirits' Complaint and motion for summary judgment included a claim for a refund of fees paid to the Board pursuant to WAC 314-28-070(3). Board Br. at 12–13 (citing CP 3, CP 12–18).

Moreover, Blue Spirits abandoned nothing in its Opening Brief. Blue Spirits asserted that the trial court erred when it refused to grant Blue

Spirits' claim for a refund of all fees unlawfully collected by the Board, which includes fees collected under WAC 314-28-070(3)(a) *and* (3).¹ The Court should reject the Board's argument and determine whether Blue Spirits is entitled to "a refund of *all* the fees the Board collected from it without authority to do so." Opening Br. at 23 (emphasis added).

B. The Board Does Not Dispute That the Court's Reasoning in *Washington Restaurant Association* Is Correct.

In its 23-page brief, the Board devotes a total of two paragraphs to this Court's opinion in *Washington Restaurant Association*, 200 Wn. App. 119, 401 P.3d 428 (2017). *See* Board Br. 13–14.

This glaring lack of any meaningful discussion of the Court's opinion can lead to only one plausible conclusion: the Board knows that the Court's analysis in *Washington Restaurant Association* is sound and the Board cannot conjure up a single reason why that analysis does not determine, on its face, the invalidity of the 17 percent fee. The Board admits Blue Spirits brought this case pursuant to this Court's opinion in *Washington Restaurant Association*. The Board also understands that

¹ The Board admits that WAC 314-28-070(3) was poorly drafted. Board Br. at 6 n.4. Afterall, (3)(a) is a subsection of WAC 314-28-070(3). Any issue with Blue Spirits' citations to this regulation in its Opening Brief are mere technicalities. The Rules of Appellate Procedure direct the Court to decide cases on the merits, disregarding mere technicalities, where possible. RAP 1.2(a); *see also State v. Reader's Digest Ass'n, Inc.*, 81 Wn.2d 259, 266, 501 P.2d 290 (1972), *holding modified on other grounds by Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 719 P.2d 531 (1986).

Blue Spirits argues that *Washington Restaurant Association* already invalidated the 17 percent fee. Yet, when given the opportunity to address the merits of the Court’s reasoning, the Board is silent.

For example, while failing to confront RCW 66.24.140’s lack of reference to a 10 percent fee *or* 17 percent fee, the Board concedes, as it must, that the 10 percent fee imposed on distillers under subsection (3) of WAC 314-28-070 (the “10 percent fee”) “matched” the fee imposed on licensed distributors in RCW 66.24.055(3)(a)(i)² and that the 17 percent fee imposed on distillers under subsection (3)(a) of WAC 314-28-070 (the “17 percent fee”) “matches” the fee imposed on licensed retailers in RCW 66.24.630(4)(a). Board Br. at 5.

For this reason alone, the Board could not possibly disagree that the Court’s *reasoning* in *Washington Restaurant Association* applies to the 17 percent fee. The Board does not dispute that RCW 66.24.140 requires a licensed in-state distiller to pay an annual licensing fee of \$2,000, and RCW 66.24.640 permits a distiller to “act as a retailer and/or distributor to retailers selling for consumption on or off the licensed premises of spirits of its own production” while not requiring distillers to pay any additional fee. 200 Wn. App. at 126–31, 401 P.3d 428 (quoting RCW

² The Board imposed on distillers the 10 percent fee from RCW 66.24.055(3)(a), but did not impose the shortfall fee from RCW 66.24.055(3)(c).

66.24.640). The Board also does not dispute the Court’s explicit language:

Moreover, although RCW 66.08.030(4) permits the Board to require a fee where no fee is prescribed in Title 66, RCW 66.24.140 imposes a \$2,000 license fee for distillers, and it does not require any additional licensing fees. ***As a result, the Board is not authorized to impose an additional fee on licensed distillers.***

Id. at 131, 401 P.3d 428 (emphasis added; citation omitted). Simply put, the Board cannot deny that the 17 percent fee is just as invalid as the ten percent fee, and thus, it did not even try.

The Board’s response also neglects to address the Supreme Court’s opinion in *Association of Washington Spirits & Wine Distributors*. In that case, the Supreme Court held that although RCW 66.24.640 and RCW 66.28.330(4) provide generally that a distillery must comply with the applicable statutes and regulations relating to distributors if it chooses to act as a distributor of its own products, those requirements do not extend to applying additional fees. The specific language of RCW 66.24.055(3)(c) assigned liability for the shortfall fee only to “persons holding spirits distributor licenses on or before March 31, 2013.” *Ass’n of Wash. Spirits & Wine Distribs.*, 182 Wn.2d 342, 356–58, 340 P.3d 849 (2015). Licensed distillers do not hold spirits distributor licenses and therefore were not required to pay the fee. *Id.*

The Supreme Court’s logic applies equally to the present case, yet the Board utterly ignores this critical ruling. The Board cannot deny that the same unambiguous statutes that authorize a distiller to act as a distributor of spirits of its own production also authorize a distiller to act as a retailer of its own spirits. *See* RCW 66.24.140; RCW 66.24.640. The Board’s silence is an implicit concession on this point.³

The Board does not argue that when the Court said the Board is not authorized to impose an additional fee” this somehow implicitly excluded the 17 percent fee. *Wash. Rest. Ass’n*, 200 Wn. App. at 131, 401 P.3d 428. Instead, the Board’s sole argument for why *Washington Restaurant Association* did not invalidate the 17 percent fee is because the opinion “neither cites nor discusses the 17 percent fee rule, nor did it order any refund. This Court explicitly invalidated only the ‘10 percent license fee rules.’” Board Br. at 14.

The Board’s sole argument is unavailing. First, it ignores this Court’s express language stating that the Board was not authorized to impose on licensed distillers *any* licensing fee in addition to the \$2,000 annual license fee. *Wash. Rest. Ass’n*, 200 Wn. App. at 131, 401 P.3d 428.

³ The Board’s citation to the commissioner’s ruling denying discretionary review is pointless. The ruling has no precedential value and does not affect Blue Spirits’ right to obtain appellate relief. *See* RAP 2.3(c).

Second, the Board deliberately ignores the Court’s reasoning, which plainly indicates that the ruling was not limited as the Board contends. Appellate courts are not confined by the issues framed or theories advanced by the parties, *Maynard Inv. Co. v. McCann*, 77 Wn.2d 616, 623, 465 P.2d 657 (1970), and may consider and apply “a statutory commandment, or an established precedent” not raised by the parties when “necessary for decision,” *City of Seattle v. McCready*, 123 Wn.2d 260, 269, 868 P.2d 134 (1994). Indeed, courts “frequently decide *crucial issues* which the parties themselves fail to present.” *Hall v. Am. Nat’l Plastics, Inc.*, 73 Wn.2d 203, 205, 437 P.2d 693 (1968) (emphasis added).

In *Washington Restaurant Association*, this Court exercised its inherent authority and, based on statutory language and prior caselaw, determined that the Board simply *is not authorized* to impose on licensed distillers *any* licensing fee in addition to the \$2,000 annual license fee. 200 Wn. App. at 131, 401 P.3d 428. Stated another way, the Board is limited to collection of \$2,000 and nothing more, whether a percentage of revenue, fixed fee, or otherwise. Thus, the Board acted outside its authority in mandating that Blue Spirits pay a fee in addition to the \$2,000 licensing fee. Indeed, collecting *any* revenue-based fee in addition to the annual license fee, *i.e.*, the fee of 17 percent of its gross spirits revenues on sales to consumers for off-premises consumption, is beyond the Board’s

authority. As the Board failed to advance a single plausible argument in denial of this fact, Blue Spirits is entitled to a refund of all fees paid to the Board pursuant to WAC 314-28-070(3) and (3)(a).

C. The Court Possesses Original Jurisdiction to Hear Blue Spirits' Claim for a Refund.

The Board asserts that Blue Spirits is not entitled to a refund because it must “first pursue the invalidation of the rule” under the Administrative Procedures Act (“APA”). Board Br. at 13. However, as the Board concedes, the APA only forecloses judicial review of Blue Spirits’ action if Blue Spirits “is asking the Court to apply the reasoning of *Washington Restaurant Association* to invalidate the 17 percent retail fee,” constituting judicial review of an agency rule. However, the APA does not foreclose judicial review of Blue Spirits’ claim because it is *not* a claim for judicial review of an agency rule. As discussed *supra*, the Court already held that the Board has *no authority* to enforce any additional revenue-based fee, to include the 17 percent fee. Because Blue Spirits does not seek relief governed by the APA, the court retains original jurisdiction over the claim. Wash. Const. art. IV, § 6.

For the same reason, RCW 34.05.510’s preservation of original jurisdiction of Washington courts for “litigation in which the sole issue is a claim for money damages or compensation and the agency whose action

is at issue does not have statutory authority to determine the claim” encompasses Blue Spirits’ claim. RCW 34.05.510(1). Contrary to the Board’s argument, Blue Spirits has *never* strayed from its belief that the Court already invalidated the 17 percent fee in its opinion in *Washington Restaurant Association*. See CP 2 ¶¶ 10, 12; Opening Br. at 9–12.

Moreover, the Board’s contention for why *Wells Fargo* and *Judd* are not instructive should not fool the Court. It is immaterial whether the specific causes of action in these cases differ from Blue Spirits’ cause of action. The courts’ applications of RCW 34.05.510(1) ended in the same result feared by Blue Spirits: in both cases, the presence of a claim for declaratory and/or injunctive relief *foreclosed* the party’s ability to maintain a refund claim pursuant to RCW 34.05.510(1). *Wells Fargo Bank, N.A. v. Dep’t of Revenue*, 166 Wn. App. 342, 349–53, 271 P.3d 268 (2012), *as corrected* (Apr. 18, 2012) (Wells Fargo’s amended complaint contained both a request for a declaratory judgment and a claim for a refund and thus did not fit within the APA’s exception for suits limited to money damages or compensation); *Judd v. Am. Tel. & Tel. Co.*, 152 Wn.2d 195, 204–05, 95 P.3d 337 (2004) (Judd’s complaint contained both a request for injunctive relief and a claim for money damages and thus did not fit within the APA’s exception for suits limited to money damages or compensation).

Further, the Board's argument that it has statutory authority to determine the claim (thus rendering RCW 34.05.510(1) inapplicable) is *solely* based on an Attorney General Opinion from 1966 interpreting RCW 43.88.170. Board Br. at 22. As an initial matter, opinions of the Attorney General are not controlling on the Court. *Skagit Cty. Pub. Hosp. Dist. No. 304 v. Skagit Cty. Pub. Hosp. Dist. No. 1*, 177 Wn.2d 718, 725, 305 P.3d 1079 (2013). Further, courts give less deference to attorney general opinions when they involve issues of statutory interpretation. *Skagit Cty. Pub. Hosp. Dist.*, 177 Wn.2d at 725, 305 P.3d 1079.

But principally, the attorney general opinion actually *supports* Blue Spirits' argument that RCW 43.88.170 and/or RCW 43.01.072 cannot confer authority upon the Board to make a refund in this case. In the opinion, the Attorney General concluded that a *statute*, RCW 82.44.120, provided for the collection of certain taxes but did not provide for the refund of such taxes when levied in error. Wash. Op. Att'y Gen. No. 98 (1966). The Attorney General relied on the authority codified in RCW 43.88.170 to direct a refund to certain nonresident military servicemen who paid the *statutory* motor vehicle excise tax in the state of Washington in error. *Id.* Indeed, the Attorney General stated that: "[t]his statute [RCW 43.88.170], by its terms, *only* applies when there is not a

specific provision for refunds *in the particular statute* authorizing the collection of the tax or fee.” *Id.* (emphasis added).

As Blue Spirits contended in its Opening Brief, RCW 43.01.072 and/or RCW 43.88.170 cannot confer authority upon the Board to make a refund in this case because, as determined by the Court, Title 66 contains no statute permitting the Board to collect any revenue-based fees from distillers. *See Wash. Rest. Ass’n*, 200 Wn. App. at 131, 401 P.3d 428.

The Board failed to rebut Blue Spirits’ contention that its refund claim is properly before the Court.

D. The Board Does Not Dispute That Blue Spirits Is Excused from Exhausting Administrative Remedies.

In addressing its position that Blue Spirits must have exhausted administrative remedies, the Board’s brief is again remarkable for what it lacks: it fails to address Blue Spirits’ argument that Blue Spirits is excused from exhausting administrative remedies.

The doctrine applies in cases where an agency has clearly defined mechanisms for resolving complaints by aggrieved parties and the relief sought can be obtained by resort to an exclusive or adequate administrative remedy. *See State v. Tacoma-Pierce Cty. Multiple Listing Serv.*, 95 Wn.2d 280, 284, 622 P.2d 1190 (1980); *Retail Store Emps. Union v. Wash. Surveying & Rating Bureau*, 87 Wn.2d 887, 906–07, 909,

558 P.2d 215 (1976). The Washington State Supreme Court has excused exhaustion where there was doubt as to whether the agency possessed institutional competence to resolve the particular type of issue presented. *See Rettkowski v. Dep't of Ecology*, 122 Wn.2d 219, 234, 858 P.2d 232 (1993) (exhaustion was not required where the Pollution Control Hearings Board had no authority to adjudicate water rights); *Tacoma-Pierce*, 95 Wn.2d at 284, 622 P.2d 1190 (exhaustion not required where violations of the Consumer Protection Act were not cognizable by either the Department of Licensing or the Real Estate Commission but rather by the courts); *Zylstra v. Piva*, 85 Wn.2d 743, 745, 539 P.2d 823 (1975) (excusing exhaustion when applicability of statute or contract giving remedy was at issue).

In the instant case, the Board does not contend that there was any clearly defined mechanism that Blue Spirits should have followed. Nor does it contend that the Board possesses institutional competence to resolve the refund claim, other than its citation to the inapplicable 43.01.072 and/or RCW 43.88.170 discussed *supra*. In fact, the Board clearly does *not* possess such competence, given its refusal to acknowledge the effect of the Court's clear language in *Washington Restaurant Association*. A refund claim is not cognizable by the Board, but rather by the courts. There is no authority given to the Board to hear a

refund claim. No powers to assess refunds are given either generally or with reference to invalidated regulations. There is no remedy in the Board to be exhausted; the doctrine does not apply.

In the alternative, the Board fails to rebut Blue Spirits' argument that the Court should excuse Blue Spirits from exhausting administrative remedies because it would be futile. RCW 34.05.534(3). Blue Spirits made a direct request to the Board for a refund. CP 301–03. The Board contends that it was unable to respond to this request because Blue Spirits filed the Complaint in this case on the same day that it sent a refund request letter to the Board. Board Br. at 7. However, there is no law that prevents or relieves the Board from seeking to resolve a claim for a refund where litigation has already begun.

Further, Blue Spirits was not required to wait to receive a response from the Board before filing this lawsuit and it would have been futile and harmful to do so. As discussed *supra*, the Board lacked clearly defined mechanisms for resolving complaints and has no right to demand that Blue Spirits pursue an administrative remedy that does not exist. *Tacoma-Pierce Cty. Multiple Listing Serv.*, 95 Wn.2d at 284, 622 P.2d 1190. Further, it has now been more than two years since Blue Spirits sent the refund request letter; to this day, the Board still has not responded, other than to issue audit results (discussed *infra*). Had Blue Spirits waited for a

response from the Board before beginning the lawsuit, it would have suffered serious and unnecessary financial harm, paying fees to the Board each month and watching the statute of limitations eat away at the potential refund amounts, all the while having no assurance how the Board would respond or if it would respond at all, given the absence of any clearly defined mechanism.

Moreover, the Board conveniently ignores the “response” that it did give to Blue Spirits: the Board issued audit results to Blue Spirits during the litigation. CP 325–26. In the cover letter to the audit results, the Board’s Chief Financial Officer stated that he “underst[oo]d that the validity of applying [the 17 percent] fee to distillers is being questioned” and the Board cannot “alter the audit results” (*i.e.*, issue any refund) “based on speculation about the potential for the rules to be invalidated.” *Id.* This “response” by the Board demonstrated the Board’s decision to ignore this Court’s ruling in *Washington Restaurant Association* and choose inaction in response to Blue Spirits’ claim for a refund, ending Blue Spirits’ obligation to continue pursuing a remedy in that forum. *Cost Mgmt. Servs., Inc. v. City of Lakewood*, 178 Wn.2d 635, 643–44, 310 P.3d 804 (2013).

Finally, the Board failed to dispute that because the present case presents only an issue of law, the Court may excuse exhaustion. *Credit*

Gen. Ins. Co. v. Zewdu, 82 Wn. App. 620, 628–29, 919 P.2d 93 (1996);
*see also Retail Store Emps. Union, Local 1001 Chartered by Retail Clerks
Int’l Ass’n, AFL-CIO v. Wash. Surveying & Rating Bureau, Wash. Bureau*,
87 Wn.2d 887, 907 n.7, 558 P.2d 215 (1976) (“Since the question of
whether the trustees had a duty or right to administer or operate the
Bureau was purely one of law rather than fact, we have chosen to resolve
it, and failure to exhaust administrative remedies does not necessarily
preclude such resolution.”). Adjudication of the instant dispute simply
requires the application of the most recent legal authority and does not
require the Board to exercise its fact-finding function, thus rendering
administrative proceedings unnecessary.

III. CONCLUSION

The Board does not dispute the Court’s rationale in its opinion in
Washington Restaurant Association, whereby the Court invalidated any
additional fees imposed by the Board on licensed distillers beyond the
statutory license fee. Blue Spirits’ refund claim arises solely from the
Court’s prior ruling. It is time for the Court to emphasize to the Board and
the trial court that it meant what it said when it ruled that the Board lacks
the authority to impose a fee on Blue Spirits based on gross spirits
revenues, *period*.

For the reasons stated, the Court should (a) reverse the trial court's dismissal of Blue Spirits' action, (b) rule that Blue Spirits is entitled to (i) a refund of all the fees the Board collected from it without authority to do so, (ii) prejudgment interest on the refund amount, and (iii) an award of reasonable attorneys' fees and costs, and (c) direct the trial court to enter a judgment in favor of Blue Spirits consistent with the Court's ruling.

Dated this 31st day of October, 2019.

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I hereby certify that I caused to be electronically filed with the Court of Appeals a true and correct copy of the foregoing **Appellant’s Reply Brief** and for this document to be served on the following counsel of record in the manner specified below:

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