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No. 54514-4-II

COURT OF APPEALS, DIVISION II

OF THE STATE OF WASHINGTON

PHILLIP EDWARD SIFFERMAN et al,

Appellants,

v.

CHELAN COUNTY et al,

Respondents.

BRIEF OF APPELLANTS

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TABLE OF CONTENTS

I. INTRODUCTION. 1

II. ASSIGNMENTS OF ERROR. 1

III. STATEMENT OF THE CASE. 2

IV. ARGUMENT. 6

A. *Standard of review..* 6

B. *Assignment of Sublease transactions on Indian land are not subject to REET...* 7

1. *State law limits REET to the value of improvements assigned by lease...* 7

2. *Federal law preempts REET in its entirety on sublease assignments on Indian land..* 9

3. *The Bracker balancing test, inapplicable here, favors preemption..* 13

C. *Chelan County's requirement that REET be paid as a condition to recording an assignment of sublease transaction on Indian land violates the U.S. and Washington Constitutions..* 15

D. *A declaratory judgment action and RCW 82.32.150 authorize injunctive relief and refund of unlawful taxes...* 19

E. *Refund actions under RCW 82.32.180 are appeals to the amount of tax required to be paid and not challenges to the validity of the tax...* 21

F. *Class Action status is appropriate for taxpayers' declaratory judgment action challenging the lawfulness of the tax..* . . . 23

V. CONCLUSION. 26

TABLE OF AUTHORITIES

Cases

Berndson v. Graystone Materials Co. 34 Wn. 2d 530, 209 P.2d 326 (1949) 19

Boeing Aircraft Co. v. Reconstruction Finance Corp. 25 Wn. 2d 652, 171 P.2d 838 (1946). 19, 23

Booker Auction Co. v. Dep't of Revenue, 158 Wn. App 84, 88, 241 P.3d, 439 (2010). 20

Carrillo v. City of Ocean Shores, 122 Wash.App. 952, 94 P.3d 961 (2004) 24

Confederated Tribes of the Chehalis Reservation v. Thurston County Bd. of Equalization, 724 F.3d 1153 (9th Cir. 2013) 10

County of Yakima v. Confederated Tribes, 502 U.S. 251 (1992) 11

Covell v. City of Seattle, 127 Wash. 874, 905 P.2d 324 (1995) 23

Johnson v. State 187 Wn 605, 60 P.2d 681 (1936) 19

Key Tronic Corp. v. Aetna (CIGNA) Fire Underwriters Ins. Co., 124 Wash.2d 618, 623 - 24, 881 P.2d 201 (1994). 6

Kirkland v. Department of Revenue, 45 Wn App. 720, 727, P.2d 254 (1986) 20, 21

Lacey Nursing Ctr, Inc. v. Department of Revenue, 128 Wash.2d 40, 905 P.2d 338 (1995). 24, 25

Lane v. City of Seattle, 164 Wash.2d 875, 194 P.3d 977 (2008) 24

McClanahan v. Arizona State Tax Commission, 411 U.S. at 174. 12

Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973) 10, 11

Montana v. Blackfeet Tribe, 471 U.S. at 766.. 12

Morrison - Knudsen Co. v. State Department of Revenue, 6 Wn. App. 306, 493 P.2d 802 (1972).. 20

Nelson v. Appleway Chevrolet, Inc., 160 Wash.2d. 173, 157 P.3d 847 (2007) 24

NewCingular Wireless v. City of Clyde Hill, 185 Wash.2d 594, 374 P.3d 151 (2016) 24

Okeson v. City of Seattle, 150 Wash.2d. 540, 778 P.3d 1279 (2003). . . . 23

Our Lady of Lourdes Hosp. v. Franklin County, 120 Wash.2d 439, 443, 842 P.2d 956 (1993). 6

Seminole Tribe of Florida v. Stanburg, 799 F.3d 1324 (11th Cir. 2015) 14

State ex rel. Baldwin v. Moore, 7 Wash.173, 34p461 (1893). . . . 16-18, 21

Texas Co. v. Cohn, 8 Wash.2d 360, 112 P.2d 522 (1941) 23

Wash. Imaging Servs., 171 Wash.2d 548, 555, 252 P.3d 885 (2011). 6

White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980). 14

Federal Statutes

25 U.S.C. 608.. 9

25 U.S.C. § 2. 9

25 U.S.C. § 415. . . . . 2, 9, 12

25 U.S.C. § 465. . . . . 9-11, 13

Statutes

458-61A-217 22

RCW 7.24.120. 19

RCW 7.24.190. 19

RCW 82.32.150 . . . . . 20, 21

RCW 82.32.180 . . . . . 17, 21, 22, 24, 25

RCW 82.45.010(1).. . . . . 7, 11, 16

RCW Ch. 82.45 7

RCW Ch.7.24 19

RCW Chapter 82. 23

WAC 458-20-192(2)(b)(iii). 2

WAC 458-61A-106(1)(b) 7

WAC 458-61A-200 22

WAC 458-61A-201 22

WAC 458-61A-301(12) 21

WAC 458-61A-301(7) 16

Other Authority

25 CFR Part 162.. . . . . 12, 13

77 Fed. Reg. 72440-01. 13

Article 1, §3 of the Washington Constitution 15

CR 23(a) 25

CR 57 19

I. INTRODUCTION

This is a declaratory judgment action by Appellants as taxpayers required to pay a Real Estate Excise Tax ("REET") on sublease transfers of real estate situated on Wapato Point Indian land. Taxpayers seek refunds of the unlawful tax paid and to enjoin Chelan County and the State of Washington Department of Revenue ("DOR") from further imposition of this tax on assignments of subleases on Indian land. Further, taxpayers seek class action status for taxpayers similarly situated on Wapato Point Indian land who have paid the unlawful tax.

II. ASSIGNMENTS OF ERROR

A. The trial court erred in denying Appellant taxpayers' motion for summary judgment seeking declaratory relief and a refund of the REET paid.

B. The trial court erred in granting the Department of Revenue's and Chelan County's motion for summary judgment dismissing the complaint for declaratory relief and refund of REET paid.

C. The trial court erred in denying class action status in a case alleging unlawful imposition and collection of REET on assignments of subleases of real estate situated on Indian land.

III. STATEMENT OF THE CASE

The real property known as Wapato Point on Lake Chelan in Chelan County, Washington is land held in trust by the United States of America, leased from the United States of America, and administered by the Department of the Interior, Bureau of Indian Affairs (CP 192).

The leased land is a portion of the original Indian trust allotment, Moses Agreement No. 10. (CP 253) subject to the lease restrictions found at 25 U.S.C. § 415 and the amendments thereto relative to Business Leases on restricted Indian lands which by reference are made a part of the lease. (CP 210). Washington law defines "Indian country" to include all "Indian allotments". WAC 458-20-192(2)(b)(iii).

The subject Lease and its Amendments are recorded in Chelan County. (CP 205, 324). At Article 7 the property is held in trust by the United States of America and administered by the Bureau of Indian Affairs, Department of the Interior. Further it is required that Lessee "conform to the regulations of said Bureau of Indian Affairs . . . ". (CP 218 - 219).

Article 12 of the Lease provides that building and structures erected on the demised premises "shall be deemed to be attached to the freehold and become the property of Lessor . . . and at the end or termination of the term

shall be surrendered to the Lessor . . .". (CP 227 - 228). Appellant taxpayers do not "own" the improvements situated on the Indian land.

There are no taxes paid to the taxing districts within Chelan County. The improvements constructed on the land and the Lease are all exempt from real and personal property ad valorem taxes and from the state leasehold excise tax. (CP 192 - 199).

A voluntary contribution in lieu of taxes is made to Chelan County because the Wapato Point property receives services from Chelan County. The Agreement for Voluntary Contribution in Lieu of Taxes. (CP 194 - 199) is an agreement between Wapato Point Resources and Chelan County. It provides that Wapato Point Resources agrees to pay the County an amount in lieu of taxes on an annual basis "because of the exemption of the leasehold interest held by the first party from state and local taxation by reason of the leased premises constituting Indian Trust Land . . .". (CP 195).

Jayne Severyns, controller for Wright-Wapato, Inc. affirms that no taxes to Chelan County and Chelan County taxing districts are paid by Wapato Point. In order to obtain services from Chelan County and the Manson School District, Wright-Wapato, Inc. pays for services which are denominated as in-lieu tax payments. Ms. Severyn's Declaration contains a

table showing the in-lieu payments made to Chelan County and the Manson School District from calendar years 2008 - 2018. (CP 200 - 201).

Taxpayers held their property and improvements thereon pursuant to subleases. A transfer of the property to another is made by an Assignment of Sublease. For example, Appellant Sifferman assigned his sublease for a total consideration of $1,022,500.00. The transaction required payment to Wright-Wapato, Inc., a tribal fee of 3.5% of the transaction price totaling $35,638.23. Additionally, Sifferman was required to pay REET in the sum of $18,200.50 or 1.78% for a total transfer tax obligation of 5.28% of the transaction price. Sifferman challenged the REET but Chelan County demanded Real Estate Excise Tax be paid on the total consideration for his transaction. (CP 175 - 191).

Each of the Appellant taxpayers was required to pay a REET based on either 100% of the consideration for the transaction (plaintiffs Sifferman, Penoske and Ramels) or 50% of the consideration for the transaction (plaintiffs Lass/Jansen/French and Paradise Lake House) based upon the Real Estate Excise Tax Affidavits for each transaction. (CP 279 - 284).

The Chelan County Treasurer acknowledges that 50% of the total amount paid has been charged as REET on certain assignments of subleases and sale of improvements. (CP 84 - 87).

The foregoing facts are undisputed. The issues before the court in this de novo review are as follows:

1. Is imposition of a REET on Assignment of Sublease transactions on Wapato Point Indian land unlawful under Federal law?

2. Should declaratory judgment enter prohibiting imposition of REET under the circumstances presented here?

3. Should Appellant taxpayers receive a refund of REET paid?

4. Should DOR and Chelan County be prohibited from imposing REET on Assignment of Sublease transactions on Wapato Point Indian land?

5. If imposition of a REET on Assignment of Sublease transactions on Indian land is deemed lawful under Federal law, shouldn't REET be limited to the value of improvements under State law?

6. Should class action status be available for taxpayers similarly situated to Appellant taxpayers?

The varying REETs charged plaintiffs illustrate the conflicting nature of Chelan County's application of REET to Assignment of Sublease transactions on Wapato Point.

IV. ARGUMENT

A. Standard of review.

On appeal from a summary judgment order, the appellate court engages in the same inquiry as the trial court. *Key Tronic Corp. v. Aetna (CIGNA) Fire Underwriters Ins. Co.*, 124 Wash.2d 618, 623 - 24, 881 P.2d 201 (1994). The issues in this case pertain to statutory authority and constitutional limitations, and thus are issues of law to be determined de novo by this court. *Our Lady of Lourdes Hosp. v. Franklin County*, 120 Wash.2d 439, 443, 842 P.2d 956 (1993).

When reviewing a grant of summary judgment, the court must consider all facts and make all reasonable, factual inferences in the light most favorable to the nonmoving party. *Wash. Imaging Servs.,* 171 Wash.2d 548, 555, 252 P.3d 885 (2011).

B. Assignment of Sublease transactions on Indian land are not subject to REET.

1. State law limits REET to the value of improvements assigned by lease.

RCW Ch. 82.45 imposes an excise tax on "every sale of real estate in the state of Washington". All sales of real property in this state are subject to the real estate excise tax unless specifically exempted. RCW 82.45.010(1) provides that "sale" includes assignment or transfer of improvements constructed upon leased land. RCW 82.45.010(3)(c) provides that "sale" does not include the "transfer of any leasehold interest", other than a lease with an option to purchase real property.

WAC 458-61A-106(1)(b) provides that the transfer of a lessee's interest in a leasehold for valuable consideration is taxable to the extent the transfer includes any improvements constructed on leased land. If the selling price of an improvement is not separately stated, or cannot otherwise be reasonably determined, the assessed value of the improvement as entered on the assessment roles of the county assessor will be used. Appellant taxpayers' properties are not entered on the assessment roles of the county assessor because they are situated on Indian land. (CP 192 - 199).

In 1994 DOR acknowledged that in applying REET to the transfer of improvements at Wapato Point, the amount paid for the leasehold itself is excluded from the taxable value. The policy letter agreed that the use of 50% of the sales price as the taxable value of improvements was fair since there was no "appropriate method" of valuing improvements for real estate excise tax purposes. (CP 86 - 87).

Based upon the foregoing statutes, regulations, and the DOR policy letter, it is clear that under no circumstances could the REET be applied to the entire Assignment of Sublease transactions. At most, Washington statutes would permit REET on the value of improvements transferred as determined by the county assessment roles. Here, there is no county property tax and no county determination of the value of the land or improvements. Appellant taxpayers Sifferman, Penoske, and Ramels, who were required to pay REET on 100% of the lease transfer consideration, should at least be entitled to a 50% refund of REET paid pursuant to Washington law and DOR policy.

This analysis does not account for the fact that the Assignments of Sublease transactions here were on Indian land and no REET can be charged under Federal law on Assignments of Subleases on Indian land.

2. Federal law preempts REET in its entirety on sublease assignments on Indian land.

The United States Department of the Interior ("Interior") is an executive department charged, among other duties, with managing and administering Indian lands. The Bureau of Indian Affairs ("BIA") is an agency within Interior that oversees programs, activities, and operations relating to Indian lands and affairs pursuant to 25 U.S.C. § 2. The Wapato Point Indian land at issue in this case is restricted Indian lands under the jurisdiction of BIA. 25 U.S.C. § 415. (CP 218 - 219).

Section 5 of the Indian Reorganization Act, 25 U.S.C. § 465 preempts state taxes on land owned by the United States and held in trust for an Indian tribe[1]. Where a state or local government assesses a tax on land or

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[1] 25 U.S.C. § 465 states, in pertinent part:

> The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.
>
> . . . .
>
> Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.) shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or

improvements covered by 25 U.S.C. § 465, courts are bound to invalidate such taxes. See *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973) which held that pursuant to 25 U.S.C. § 465, land acquired for tribes is to be held in trust for the tribe by the United States Department of the Interior and is exempt from state property taxes, including those that New Mexico sought for improvements to the land. The court concluded that "use of permanent improvements upon the land is so intimately connected with use of the land itself that an explicit provision relieving the latter of state tax burdens must be construed to encompass an exception for the former." *Mescalero*, supra at 158.

In *Confederated Tribes of the Chehalis Reservation v. Thurston County Bd. of Equalization*, 724 F.3d 1153 (9th Cir. 2013) the issue was whether state and local governments have the power to tax permanent improvements built on non-reservation land owned by the United States and held in trust for an Indian tribe. The Tribe entered into a lease agreement with a non-Indian entity for a hotel, indoor water park, and convention center. As in the present case, all buildings and improvements on the land must

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rights shall be exempt from State and local taxation.

remain on the property after the termination of the lease as property of the Tribe. (CP 227 - 228).

Thurston County began assessing property taxes on the development claiming the structures on the land were not tax exempt. On appeal the court concluded that the exemption of trust lands from state and local taxation under § 465 extends to permanent improvements on such lands. The court held the ruling in *Mescalero*, supra, was dispositive of the issues. *Mescalero* makes it clear that where the United States owns land covered by § 465 and holds it in trust for the use of a tribe, § 465 exempts permanent improvements on that land from state and local taxation.

The Chehalis decision is controlling in this action. DOR may argue that under State law (RCW 82.45.010) the value of improvements transfered is subject to REET. This argument ignores federal preemption by § 465.

In *County of Yakima v. Confederated Tribes*, 502 U.S. 251 (1992) the tribe brought a suit for declaratory and injunctive relief. Yakima County imposed an ad valorem levy on taxable real property on Indian land and an excise tax on sales of such land. The court held that the excise tax is a tax on the Indian's activity of selling the land and is void. "Statutes are to be construed liberally in favor of the Indians, with ambiguous provisions

interpreted to their benefit." *Montana v. Blackfeet Tribe*, 471 U.S. at 766; *McClanahan v. Arizona State Tax Commission*, 411 U.S. at 174.

One of Interior's responsibilities is to approve the leasing of Indian land to third parties. 25 U.S.C. § 415. Interior has promulgated a host of regulations governing the administration of such leases, codified at 25 CFR Part 162. Beginning in 2011, Interior overhauled such regulations through notice and comment rule-making; the new rules became effective January 4, 2013.

Among the 2013 regulations is 25 CFR § 162.017 entitled, "What taxes apply to leases approved under this part?" Pertinent subsections of this regulation are as follows:

> (a) Subject only to applicable Federal law, permanent improvements on the leased land, without regard to ownership of those improvements, are not subject to any fee, tax, assessment, levy, or other charge imposed by any State or political subdivision of a State. Improvements may be subject to taxation by the Indian tribe with jurisdiction.
>
> . . .
>
> (c) Subject only to applicable Federal law, the leasehold or possessory interest is not subject to any fee, tax, assessment, levy, or other charge imposed by any State or political subdivision of a State. Leasehold or possessory interests may be subject to taxation by the Indian tribe with jurisdiction.

The preamble to 25 CFR § 162.017 published in the Federal Register states that "(t)his section now addresses not only taxation of improvements on leased Indian land, but also taxation of the leasehold or possessory interest, and taxation of activity (e.g., excise or severance taxes) occurring or services performed on leased Indian land. 77 Fed. Reg. 72440-01 (Dec. 5, 2012). The Preamble specifically mentions excise taxes.

Pursuant to the foregoing federal regulation and case law, the Appellant taxpayers' Assignment of Sublease transactions should not have been subject to *any* Washington State real estate excise tax. Each transaction was subjected to "taxation" by the Indian tribe (3.5%), which was assessed and paid. (CP 176, 187, 284).

3. The Bracker balancing test, inapplicable here, favors preemption.

While *Chehalis*, supra, stands for the proposition that ownership (Indian or non-Indian) is irrelevant for purposes of analysis under § 465, other courts have indicated that the *Bracker* balancing test is a proper standard when assessing federal preemption of a state or local tax on the commercial activity of non-Indians on Indian land. The *Bracker* analysis is derived from

White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980).

The *Bracker* balancing test has been used to analyze various taxes around the country on Indian Land. In *Seminole Tribe of Florida v. Stanburg*, 799 F.3d 1324 (11th Cir. 2015) the court applied the analysis to determine the validity of two taxes charged by the State of Florida, a "Rental Tax" and a "Utility Tax". In applying *Bracker* the court stated at page 1337 "A state's interests in a particular tax can outweigh federal and tribal interests, but to do so, the state's tax must relate to services it provides in connection with the entity and activity being taxed and not merely serve as a generalized interest in raising revenue." The analysis would essentially require the court to look at the reasons the tax is raised, and the services the state or locality provide within the Indian land.

In the present action the REET goes directly into the state and county general funds. Services on the Wapato Point Indian land are paid for in lieu of taxes. (CP 192 - 199, 200 - 201). No property tax is paid by taxpayers. Taxpayers pay HOA assessments, a portion of which is allotted to Wright-Wapato, Inc. (CP 186 - 187).

The Agreement for Voluntary Contribution in Lieu of Taxes (CP 194-199) between Chelan County and Wapato Point Resources, Inc. acknowledges that the leased premises and improvements constructed thereon are exempt from real and personal property ad valorem taxes and from the state leasehold excise tax because the leased premises constitute Indian Trust Land. (CP 194 - 195). The parties to the agreement further acknowledge that contributions provided in lieu of taxes are a "fair contribution to cover all local governmental services;". (CP 195).

C. Chelan County's requirement that REET be paid as a condition to recording an assignment of sublease transaction on Indian land violates the U.S. and Washington Constitutions.

Article 1, §3 of the Washington Constitution provides that "no person shall be deprived of life, liberty, or property, without due process of law". Similarly, the U.S. Constitution 14th Amendment provides a similar proscription.

The Chelan County Treasurer refused to record Appellant Sifferman's Assignment of Sublease transaction unless and until he paid REET in the sum of $18,205.50. Sifferman requested proof of legal authority for this excise tax which request was ignored. (CP 176 - 177, 190 - 191).

The REET demanded from Sifferman was based upon 1.78% of the total consideration in the sum of $1,220,500.00 for the assignment of sublease transaction which included the improvements on the leased Indian land. RCW 82.45.010(3)(c) precludes REET on the transfer of any leasehold interest other than a lease with an option to purchase the real property. Chelan County violated this statute by demanding an unauthorized REET. Under no circumstances should REET have been assessed on the total transaction consideration. Even state law would only compel REET on the value of improvements, not the total consideration paid by the sublease assignee.

WAC 458-61A-301(7) provides that the county auditor will not file or record the instrument of conveyance or sale until all taxes due under the rule have been paid or the transfer is determined to be exempt from tax as indicated by a stamped document. There is no statute or regulation authorizing the withholding of payment of REET in order to proceed with the real estate closing.

The coercion imposed by Chelan County and DOR is an unconstitutional deprivation of property without due process of law. An early Washington case is directly on point. See *State ex rel. Baldwin v. Moore,* 7

Wash.173, 34p461 (1893). In that case a statute required county auditors to refuse to record any deed of real property unless accompanied by a certificate of the county treasurer that all taxes levied against the property had been fully paid and discharged. The court stated that "No matter how illegal or unwarranted the tax may have been, even if void, it must be paid before the grantee can have his instrument recorded".

The Supreme Court of Washington affirmed the trial court's ruling finding the requirement unconstitutional. The court determined that the right to alienate property is essential to its use and enjoyment, as well as the right to acquire it. Both are constitutional rights.

DOR will likely claim in the present case that if the tax is illegal as applied, in whole or in part, the party can pay it and then bring a refund action pursuant to RCW 82.32.180 to recover amounts paid. That argument was made and rejected in the *Baldwin* case. The court stated "It is no answer or justification if an action will lie to recover it back after payment, for if it is an illegal or void demand the state has no right to collect it in the first instance". *Baldwin* supra, at pg. 176.

The constitutional provision declaring that no person shall be deprived of life, liberty, or property without due process of law was held not

to be limited to judicial proceedings, but extended to every proceeding which may interfere with those rights, whether judicial, administrative, or executive. In the case of an illegal tax, payment is virtually compelled by the situation as a choice of evils, and the money is turned into the public fund for public purposes.

The court stated in *Baldwin* on page 176: "In the case of small illegal charges, the act in question practically inaugurates a system of petty robbery by the state, for the cost of a suit to recover small sums paid would prevent the parties from bringing them." The *Baldwin* case, dated as it may be, is good law applicable to the present action. Taxpayers faced an untenable choice at the time of closing their Assignment of Sublease transactions. Each was required to pay not only the tribal tax of 3.5% but also the REET 1.78%. Failure to pay the REET would have resulted in loss of the transaction due to the refusal of the Chelan County Treasurer to record the assignment of sublease document absent a full REET payment. The actions of Chelan County violate constitutional mandates set forth in the *Baldwin* case.

D. A declaratory judgment action and RCW 82.32.150 authorize injunctive relief and refund of unlawful taxes.

The Uniform Declaratory Judgments Act codified at RCW Ch.7.24 is remedial and its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations. It is to be liberally construed and administered. See RCW 7.24.120.

The court, in its discretion may restrain parties involved in order to secure the benefits and preserve and protect the right of all parties to the court proceeding. See RCW 7.24.190.

Declaratory judgment proceedings may be used to determine the validity of a tax assessment. See *Boeing Aircraft Co. v. Reconstruction Finance Corp*. 25 Wn. 2d 652, 171 P.2d 838 (1946). A declaratory judgment action may be used to restrain enforcement of an unconstitutional statute or a statute not yet operative. See *Johnson v. State* 187 Wn 605, 60 P.2d 681 (1936) and *Berndson v. Graystone Materials Co.* 34 Wn. 2d 530, 209 P.2d 326 (1949).

CR 57 applies to declaratory judgments and provides that the existence of another adequate remedy does *not* preclude a declaratory judgment. For taxpayers and other similarly situated sublessees of Wapato

Point Indian land, prospective declaratory relief against Chelan County is appropriate.

RCW 82.32.150 provides the remedy of a refund law suit to a taxpayer. The first sentence of that statute reads "All taxes, penalties, and interests shall be paid in full before any action may be instituted in any court to contest all or any part of such taxes, penalties, or interest". Access to the courts under this section is denied a taxpayer unless the tax assessment is paid to DOR. See *Morrison - Knudsen Co. v. State Department of Revenue,* 6 Wn. App. 306, 493 P.2d 802 (1972).

The plain language of RCW 82.32.150 allows for a restraining order or injunction issued by any court or judge to restrain or enjoin the collection of any tax assessment which violates the U.S. or Washington Constitution. *Booker Auction Co. v. Dep't of Revenue,* 158 Wn. App 84, 88, 241 P.3d, 439 (2010).

In *Kirkland v. Department of Revenue*, 45 Wn App. 720, 727, P.2d 254 (1986), plaintiff challenged a DOR tax assessment in Spokane County Superior Court. Citing RCW 82.32.150 and the *Morrison - Knudsen* case, the court stated "RCW 82.32.150, which provides the remedy of a refund suit to the tax payer, also limits the court's equitable power to issue injunctions".

Kirkland, supra at pg. 726. Citing the second sentence of RCW 82.32.150, the court noted that no restraining order or injunction enjoining the collection of any tax is allowed except upon the ground that the assessment was in violation of the state or federal constitution.

In the present action, Chelan County violated state and federal constitutions by its illegal demand that REET be collected on sublease assignment transactions on Indian land. *Baldwin*, supra at pg. 176.

E. Refund actions under RCW 82.32.180 are appeals to the amount of tax required to be paid and not challenges to the validity of the tax.

RCW 82.32.180 provides that any person "having paid any tax as required and feeling aggrieved by the amount of the tax may appeal to the Superior Court of Thurston County...". No pleadings are required other than the notice of appeal. Evidence may be presented to "determine the correct amount of the tax that should be paid by the tax payer".

WAC 458-61A-301(12) specifies that under "certain circumstances" tax payers may request a refund of real estate excise tax paid. 458-61A-301(12)(d) specifies the circumstances under which refunds are authorized. None of the circumstances set forth in (d) apply to the circumstances

presented in this case. The closest circumstances are subsection (viii) Over payment of the tax through error of computation; or (ix) Real estate excise tax paid when the tax payer was entitled to claim a valid exemption from the tax but failed to do so at the time of transfer.

Clearly there was no mathematical error of computing taxpayers tax in the present action. Additionally, the exemptions from the tax are listed at WAC 458-61A-200 through 217. WAC 458-61A-200 states there are "limited exemptions or exclusions from the real estate excise tax provided by law." Further, WAC 458-61A-201 through 458-61A-217 "must be followed to qualify for an exemption".

None of the exemptions and exclusions listed apply to a claim of an illegal exaction of the tax. The REET is not an unconstitutional tax. However, the REET as applied in the present action is an unlawful taking under federal preemption. At a minimum assessment of the full REET violates state law.

Taxpayers' claims against Chelan County and DOR are beyond the specific limitations imposed by RCW 82.32.180. Contrary to assertions of DOR, this is not a simple tax refund action involving an error of computation or an unclaimed real estate excise tax exemption.

F. Class Action status is appropriate for taxpayers' declaratory judgment action challenging the lawfulness of the tax.

The trial court erred in dismissing taxpayers' class action claims. (CP 68).

DOR and the trial court ignore taxpayers' Amended Complaint (CP 8 - 10) seeking class action status for declaratory relief challenging the validity of the REET under the circumstances presented in this case. DOR consistently ignores taxpayers' declaratory judgment cause of action and limits its focus to RCW Chapter 82. (CP 69 - 81).

In *Boeing Aircraft Co.*, supra, plaintiff brought an action under the Uniform Declaratory Judgments Act to determine the validity of taxes assessed against certain real property leased by plaintiff. In *Texas Co. v. Cohn*, 8 Wash.2d 360, 112 P.2d 522 (1941) our court held that a declaratory judgment action is proper to determine taxpayer rights.

Additionally, Washington courts have consistently allowed class action status in declaratory judgment proceedings challenging the validity of a tax. *Covell v. City of Seattle*, 127 Wash. 874, 905 P.2d 324 (1995) was a class action for declaratory judgment invalidating the City of Seattle residential street utility tax. *Okeson v. City of Seattle*, 150 Wash.2d. 540, 778

P.3d 1279 (2003) was a class action for declaratory and injunctive relief in refunds of rate payer charges. *Carrillo v. City of Ocean Shores*, 122 Wash.App. 952, 94 P.3d 961 (2004) was a class action for refund of unlawful property taxes. *Nelson v. Appleway Chevrolet, Inc.*, 160 Wash.2d. 173, 157 P.3d 847 (2007) was a class action for declaratory judgment that a business and occupation tax on the sale price of vehicles was illegal. *Lane v. City of Seattle*, 164 Wash.2d 875, 194 P.3d 977 (2008) was a class action by rate payers challenging a utility tax. *NewCingular Wireless v. City of Clyde Hill*, 185 Wash.2d 594, 374 P.3d 151 (2016) was a taxpayer declaratory judgment to determine the appropriate method to resolve the validity of a fine.

In its effort to limit taxpayers' claims to a tax refund action pursuant to RCW 82.32.180, DOR cites *Lacey Nursing Ctr, Inc. v. Department of Revenue*, 128 Wash.2d 40, 905 P.2d 338 (1995). Such reliance is misplaced and ignores taxpayers' class action declaratory judgment claim.

The *Lacey* case, supra, is not a blanket prohibition on class action for refunds and has limited applicability in refund actions against the State pursuant to RCW 82.32.180. In the present action, Clelan County is also a defendant and the REET refund is also sought against it. RCW 82.32.180 applies to refund actions against the State only. *Lacey*, supra is readily

distinguishable. In that case nursing homes demanded refunds of state business and occupation taxes. Judge William Strophy on motion of the plaintiffs certified a class. The certification of the class was challenged by DOR. The State Supreme Court found that the CR 23(a) requirements for a class action "was generally satisfied." *Lacey*, supra at 51. However, RCW 82.32.180 imposes specific requirements which were not met by the plaintiffs. Excise tax refunds may properly be appealed by a taxpayer only if the taxpayer satisfies the conditions specified under the statute. Under the statute taxpayers must (1) identify themselves, (2) state that the correct amount of tax each concedes to be the true amount, (3) state reasons why the tax should be reduced or abated, and then (4) prove that the tax paid by the taxpayer is incorrect. See *Lacey*, supra at page 50.

Lacey was not a case challenging the validity of the business and occupation tax. The *Lacey* taxpayers limited their claim to a refund action under RCW 82.32.180.

In the present action all taxpayers paying REET on subleases on Indian land in Chelan County are easily identifiable. The amount of the taxes are liquidated amounts evidenced by the Real Estate Excise Tax Affidavit.

The taxpayers represent numerous potential claimants who were improperly charged REET for their transactions on Indian land.

V. CONCLUSION

Based upon the foregoing the orders of the trial court should be reversed. The court should rule that imposition of REET upon assignment of subleased transactions on Wapato Point Indian land is unlawful. A declaratory judgment should enter prohibiting imposition of REET under the circumstances presented in this case. Appellant taxpayers should receive a refund of REET paid based upon federal preemption or, at a minimum, 50% of REET based upon state law. On remand, the trial court should be required to consider declaratory judgment class action certification.

Respectfully submitted this 5th day of June, 2020.

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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.

SIGNED AT Seattle, Washington, this 5th day of June, 2020.

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