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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

PHILLIP EDWARD SIFFERMAN et al,

Appellants,

v.

CHELAN COUNTY et al,

Respondents.

REPLY OF APPELLANTS

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I. ARGUMENT IN REPLY

A. Standard of Review.

Appellant taxpayers were required to pay a Real Estate Excise Tax (REET) on sublease transfers of real estate situated on Indian land. They bring this declaratory judgment proceeding challenging the validity of the tax as imposed in this case.

Respondents claim this is a refund action pursuant to RCW 82.32.180 and the taxpayers must prove the tax paid was incorrect and prove the correct amount owed. **Brief of Respondents, at page 9.** However the only case cited by either party dealing with excise tax on sale of properties on Indian land is a declaratory judgment action holding such tax invalid and enjoining collection.

Respondents cite *Bravern Residential, II, LLC v. Department of Revenue*, 183 Wash.App. 769, 776, 334 P.3d 1182(214) and *Texaco v. Department of Revenue*, 131 Wash.App. 385, 398, 127 P.3d 771 (2006). Neither cited case challenges the validity of the tax. Rather, each case challenges the applicability of a regulatory tax exemption (*Bravern*) or the category of taxation (*Texaco*).

B. State Law and Policy Are Ambiguous in Applying REET on "Sale" of Improvements on Indian Land.

1. Under state law REET applies to "sale" on assignment or transfer of improvements constructed upon leased land.

It is undisputed that absent federal preemption REET applies to a transfer of improvements constructed upon leased land. RCW 82.45.010(1). Pursuant to RCW 82.45.010(3)(c) REET does not apply to a transfer of any leasehold interest other than the "type" mentioned in RCW 82.45.010(1). The only leasehold referenced in subsection 1 is to a lease with an option to purchase real property or the transfer of improvements constructed upon leased land. The most favorable interpretation of this statute favoring Respondents is REET applies to the transfer of improvements upon leased land and not to the transfer of the land itself. Under no circumstances should the REET be applied to the total consideration for the Assignment of Sublease transactions in the present case.

2. There is no formula for calculating REET on the sublease transfer of improvements on Indian Land.

Assuming REET applies to the transfer of improvements constructed upon leased land, it is necessary to determine the consideration for the

transfer of improvements. 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 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 improvements as entered on the assessment rolls of the county assessor will be used".

It is undisputed that no assessed values for Wapato Point properties are entered on the assessment rolls of the Chelan County assessor because they are situated on Indian land. (CP 192 - 199).

Respondents assert an administrative rule cannot provide an "exemption" that is not founded in statute. Additionally, tax exemptions may not be created by implication. **Brief of Respondents, at page 13.**

Appellants are not claiming an exemption exists for improvements but rather are challenging the method of determination of REET under circumstances where improvements have no values listed on a county's assessment rolls. Neither the REET form, the statutes, nor the WAC regulations provides any instruction or method for determination of the selling price of an improvement which is not entered on the tax rolls.

WAC 458-61A-106(1)(b) provides little guidance where the selling price of an improvement is not separately stated or entered on the assessment rolls of the county. The regulation states "or cannot otherwise be reasonably determined". Respondents would require sellers in these circumstances to prove the selling prices of their improvements by obtaining fair market appraisals. **Brief of Respondents, at page 14.** Respondents apparently contend that it is "reasonable" for sellers to obtain and present an appraisal of leasehold improvements when entering into sublease assignments. Statutes and regulations provide no such requirement. The REET instructions provide no such requirement. There is no suggestion of an appraisal requirement anywhere.

3. The Department of Revenue (DOR) policy provides REET on assignments of subleases on Indian Land is 50% of the total sale price.

In 1994 DOR issued a policy letter addressing this dilemma. (CP 86 - 87). Rather than impose or even suggest a cumbersome appraisal requirement, DOR recognized the difficulty in determining "the appropriate method of valuing the improvements for real estate excise tax purposes." The letter further stated:

After a thorough analysis of the Wapato Point situation by the real estate excise tax unit, we agree that the use of 50% of the sales price as a taxable value of the improvement would be fair and equitable for the Wapato Point timeshare sales. . . . (CP 86).

Apparently this policy has been sporadically followed as evidenced by Appellants' transactions. Appellants Sifferman, Penoske and Ramels were required to pay 100% of the consideration for their Assignment of Sublease transactions. Appellants Lass/Jansen/French and Paradise Lake House paid REET based upon 50% of the transaction consideration. (CP 279 - 284).

Notably, Appellant Sifferman offered to pay REET based upon 50% but Chelan County demanded REET be paid on the total consideration for his transaction. (CP 175 - 191). DOR arbitrarily concluded that 50% of the total transaction price for timeshare real estate transfers was a reasonable determination.¹

4. No REET applies when statutes and regulations are ambiguous.

Tax statutes are strictly construed. If any doubt exists as to the meaning of a taxation statute, the statute must be construed most strongly

¹ Respondents attempt to distinguish the policy letter claiming it applies to timeshare condominium sales only. **Brief of Respondent, at page 17.** No authority is provided distinguishing condominium sales from other real property transactions subject to REET.

against the taxing power and in favor of the taxpayer. *Ski Acres, Inc. v. Kittitas County*, 118 Wash.2d 852, 857, 827 P.2d 1000 (1992); *City of Puyallup v. Pac. NW Bell Tell Co.*, 98 Wash.2d 443, 448, 656 P.2d 1035 (1982). There is no stated method for determining REET on the value of improvements which are not listed on county tax rolls. The DOR policy letter proves that the rule lacks clarity. Imposition of REET on the value of improvements in this case should result in no REET payment. Even DOR policy would limit REET to 50% of the transaction consideration. This is without consideration of federal preemption of REET.

It is misleading for Respondents to suggest the superior court "properly disregarded" the DOR policy letter and properly rejected Appellants' arguments based on state law. **Brief of Respondent, at page 17.** No such findings were made.²

² Throughout the Brief of Respondent it is stated the Superior Court "correctly" or "determined" or "concluded", or "properly disregarded" Appellants' arguments. Rather, the court provided no analysis or rationale for its rulings instead recognizing the certainty of appeal. In any event this appeal requires de novo review.

C. Federal Law Preempts REET in its Entirety on Sublease Assignments on Indian Land.

1. 25 U.S.C. § 415 of the Indian Reorganization Act applies to the subleases at issue.

Respondents claim 25 U.S.C. § 465 (now codified as 25 U.S.C. § 5108) applies only to lands and rights acquired under the Indian Reorganization Act of 1934. Respondents claim Appellant taxpayers' reliance upon § 5108 is misplaced because the Moses Allotment was established by Congress in 1884. **Brief of Respondents, at page 18.**

Respondents fail to mention 25 U.S.C. § 415 of the Indian Reorganization Act of 1934. That section specifically authorizes leasing of restricted Indian lands, and specifically references Moses Allotment 10. It is undisputed that Moses Allotment 10 is the Wapato Point property. The statute reads in part as follows:

Any restricted Indian lands, whether tribally, or individually owned, may be leased by the Indian owners, with the approval of the Secretary of the Interior, for public, religious, educational, recreational, residential, or business purposes All leases so granted shall be for a term of not to exceed twenty-five years, except . . . leases of land comprising the Moses Allotment Numbered 8 and the Moses Allotment

Numbered 10, Chelan County, Washington . . . which may be for a term of not to exceed ninety-nine years.³

It is disingenuous for Respondents to claim 25 U.S.C. § 465 (now § 5108) does not apply when the Moses Allotment 10 is specifically incorporated in the Indian Reorganization Act by means of § 415. Careful reading of § 465 (now § 5108) further confirms its applicability to the leases at issue. That section provides:

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 rights shall be exempt from State and local taxation. (emphasis added).

The "Act" clearly refers to the Indian Reorganization Act, Title 25. The lease rights held by the Wapato family were "rights" acquired pursuant to the Act. While the allotment was acquired in 1884 by the Wapato family, the right to lease the allotment property was specifically accorded by § 415. Respondents ignore § 415 in their brief because it undermines their claim that

³ Note the statute applies to "Any restricted Indian lands, whether tribally or individually owned . . .". Throughout the Brief of Respondent it is stated that no tribe is involved in this case. Yet 25 USC § 415 applies whether the land at issue is "tribally or individually owned". Similarly, § 5108 applies to land "held in trust for the Indian tribe or individual Indian."

§ 5108 is inapplicable.⁴ The date of acquisition of the allotment has nothing to do with the lease rights acquired pursuant to § 415 of the Act. Section 5108 clearly supports Appellants' claim of federal preemption from REET.

2. Section 465 (now § 5108) preemption of REET is supported by case law.

25 U.S.C. § 465 (now § 5108) provides that lands or rights held in trust by the United States for the Indian tribe or the individual Indian "shall be exempt from State and local taxation." Courts are bound to invalidate taxes on land and rights in land covered by the statute. The REET is a tax on "rights" in land, not the land itself. Respondents agree with Washington law that REET "is a tax upon the act or incidence of transfer". *Mahler v. Tremper*, 40 Wash.2d 405, 409, 243 P.2d 627 (1952).

County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 112 S.Ct. 683, 502 U.S. 251, 116 L.Ed.2d 687 (1992) is directly on point and supports preemption of REET. It is the only case cited by either party dealing with the validity of excise tax on a sale of Indian land.

⁴ Respondents cite *Herpel v. County of Riverside*, 45 Cal.App.5th 96, 118 - 122, 258 Cal.Rptr.3d 444 (2020) for the conclusion that § 5108 does not apply to land taken into trust prior to the Indian Reorganization Act of 1934. That case is readily distinguishable because it does not deal with lease rights specifically authorized by 25 USC § 415 of the Indian Reorganization Act of 1934.

The United States Supreme Court held that the excise tax on the sale of land was a tax upon the Indian's activity of selling the land and thus void. The court stated at page 694:

The short of the matter is that the General Allotment Act explicitly authorizes only 'taxation of . . . land', not 'taxation with respect to land,' 'taxation of transactions involving land,' or 'taxation based on the value of land.' Because it is eminently reasonable to interpret that language as not including a tax upon the sale of real estate, our cases require us to apply that interpretation for the benefit of the Tribe. Accordingly, Yakima County's excise tax on sales of land cannot be sustained. *County of Yakima, Supra* at page 694.

Mescalero Apache Tribes v. Jones, 411 U.S. 145 (1973) and *Confederated Tribes of the Chehalis Reservation v. Thurston County Board of Equalization*, 724 F.3d 1153 (9th Cir. 2013) offer no support to Respondents' position on federal preemption. In *Mescalero*, the Supreme Court construed § 465 to mean that permanent improvements on land held in trust by the United States could not be taxed. *Mescalero, supra* at page 158. In *Confederated Tribes of the Chehalis Reservation*, the Ninth Circuit specified that under *Mescalero* and § 465, State and local governments did not have the power to tax permanent improvements built on land held in trust for Indians, regardless of ownership. *Confederated Tribes of the Chehalis Reservation, supra* at page 1154.

Respondents attempt to distinguish the clear holding in *County of Yakima* preempting REET upon the sale of real estate. Respondents claim the Supreme Court did not address the taxation of sales of improvements by non-Indians. **Brief of Respondents, at page 23.**

The 'non-Indians' issue was addressed and disposed of in the *Confederated Tribes of the Chehalis Reservation* case at page 1157 where the court held that "this distinction is irrelevant". Thurston County had attempted to distinguish *Mescalero* on the ground that the improvements at issue were owned by a third party, not the tribe itself. The tribe entered into a lease agreement with a non-Indian entity for a hotel, indoor water park, and convention center. Here, the Wapato family entered into a lease (CP 205-265) with a non-Indian developer of Wapato Point. Appellants are sublessees subject to the terms of the lease (CP 234).

3. Federal regulations govern the administration of leases and prohibit taxation of the leasehold and improvements on leased land.

The Department of Interior has promulgated regulations governing the administration of leases entered into pursuant to 25 U.S.C. § 415.

Specifically, 25 CFR § 162.017⁵ is entitled "What taxes apply to leases approved under this part?"

Respondents claim this regulation does not provide an "independent basis to conclude that federal law preempts the REET". **Brief of Respondents, at page 24.** Respondents cite *Desert Water Agency v. US Dep't of the Interior*, 849 F.3d 1250, 1256 (9th Cir. 2017). Respondents fail to carefully read that case which incorporates the Department of Interior's position with regard to § 162.017. According to Interior, the regulation's purpose is to "state publicly the agency's interpretation of existing law, (namely, *Bracker*), and to clarify its opinion that under *Bracker*, the federal and tribal interests at stake are strong enough to have a preemptive effect in the generality of cases." *Desert Water Agency, Supra* at 1254.

⁵ (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.

4. The *Bracker* analysis applies to transactions between non-Indians on Indian land.

Applicability of the *Bracker*⁶ balancing inquiry is not necessary in the present action. The *Confederated Tribes of the Chehalis Reservation* case, *supra*, declined to apply the *Bracker* balancing test on the grounds that the tax at issue was definitively preempted under § 465 and *Mescalero*, and thus no further preemption analysis was necessary. The same is true here applying *County of Yakima*, *Confederated Tribes*, and *Mescalero*. In any event the *Bracker* balancing test favors preemption in the present action.

Respondents claim that *Bracker* should not be applied to "off-reservation transactions between non-Indians". **Brief of Respondent, at page 24.** Respondents' reliance upon *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 126 S.Ct. 676, 163 L.Ed.2d 429 (2005) is misplaced. That case is distinguishable and deals with a motor fuel tax applied to the receipt of fuel by off-reservation non-Indian distributors who subsequently delivered to the gas station located on the Indian reservation. The case has no bearing on an assignment of sublease transaction on Indian land.

⁶ *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 1000 S.Ct. 2578, 65 L.Ed.2d 665 (1980).

Respondents attempt to nullify a *Bracker* analysis stating that the transactions at issue in this case were "off-reservation transactions between non-Indians". **Brief of Respondent, at page 26.**

Cases use "reservation" and "Indian land" interchangeably. Respondents cite no authority that *Bracker* applies to "reservations" only and not to Indian land acquired by allotment and held in trust by the United States. Respondents rely upon *Everi Payments, Inc. v. Dept. of Revenue*, 6 Wash.App.2d 580, 432 P.3d 411 (2018) for this unsupported distinction. The *Everi* court stated at 596 n.11 that "Courts utilize the *Bracker* test to analyze transactions between non-Indians on Indian land."

Respondents ignore that the *Bracker* test applies to "Indian land" without limiting the analysis to conduct on "reservations". It cannot be disputed that Wapato Point is "Indian land". The Lease at Section 43 recognizes the "Indian heritage of Wapato Point" (CP 248). Wapato Point is "Indian country" pursuant to WAC 458-20-192(2)(b)(iii).⁷

⁷ Wapato Point was in fact a part of the Columbia or Chief Moses Indian Reservation. The Dawes Act of 1887 (25 U.S.C. 9 § 331), also known as the General Allotment Act authorized the President of United States to subdivide native American tribal communal land holdings on various reservations into allotments for native American heads of families and individuals. Indians living on the Columbia Reservation (Wapato Family) were entitled to 640 acres held by the Secretary of Interior for exclusive use by the tribal family. See *Starr*

Respondents claim Appellants "concede" that the *Bracker* balancing test is inapplicable because the Wapato Point allotment is not within a "recognized reservation". **Brief of Respondents, at pages 24 - 25.** No such concession is made. As previously indicated herein, the *Bracker* balancing test is unnecessary here based on the holdings *Confederated Tribes of the Chehalis Reservation* and *Mescalero, supra* that § 465 (now § 5108) clearly preempted the taxes there. Most importantly, *County of Yakima, supra* provides clear authority that Yakima County's excise tax on sales of Indian land could not be sustained.

5. If applied, *Bracker* clearly preempts REET.

The *Bracker* decision established a test for assessing the validity of state laws taxing the conduct of non-Indians on reservation land. In balancing the competing interests at stake, the *Bracker* test first looks to the regulation by the Federal government. Here 25 U.S.C. § 5108, 25 U.S.C. § 415 and 25 C.F.R. § 162.017 set forth comprehensive regulation with regard to lease improvements on Indian land.

25 C.F.R. § 162 expressly clarifies the Bureau of Indian Affairs' interpretation of federal interest at stake. Section 162.017(a) and (c) are not

v. Long Jim, 227 U.S. 613, 618 (1913). See also the lower court decision at 59 Wash. 190, 109 Pac 810 (1910).

ambiguous in proclaiming that the leaseholder's possessory interest in permanent improvements is not subject to any state tax.

Under *Bracker* a state or county's interest in a tax must outweigh strong tribal and federal interests. The tax must be "narrowly tailored" to funding the services it provides to the tribe and the activity being taxed. It is clear from the evidence before this court that the REET is not "narrowly tailored" to support any services provided by the county. *Montana v. Crow Tribe of Indians*, 484 U.S. 997 (1988). Rather, the state and county's interest in REET is a generalized interest in raising revenue which is not sufficient under *Bracker*. See *Bracker, supra* at 150.

Respondents claim the *Bracker* balancing test would tip overwhelmingly in favor of imposing REET. **Brief of Respondent, at page 26.** Yet they cite Business and Occupation (B&O) tax cases which have nothing to do with the Federal statutes and regulations at issue here. None of the *Bracker* cases cited by Respondents have anything to do with Federal preemption of lease transactions on Indian land. None of the cases cited address the pervasive Federal statutes and regulatory scheme found at 25 U.S.C. § 415, 25 U.S.C. § 5108, and 25 C.F.R. § 162.017.

The federal statutory and regulatory scheme governing the leases of Indian land is detailed and comprehensive. The imposition of REET would threaten federal policy and ignore the clear holding in *County of Yakima, supra* that the Yakima County excise tax on sales of land could not be sustained.⁸

Each element of the *Bracker* test favors preemption in the present case. Respondents rely on *Everi, supra* to preclude the *Bracker* balancing test. *Everi* involved B&O taxes assessed against a vendor providing ATM services at tribal casinos in Washington. It is unfathomable how this case has anything to do with the preemption issues in the present action which involve REET tax on sublease transfers on Indian land. The issue in *Everi*, was whether the B&O tax was preempted by the Indian Trader Statutes (IGRA) and the *Bracker* balancing test. *Everi* had entered into a contract with Indian tribes which provided that *Everi* was not exempt from Federal and state taxes based on income or receipts. *Everi, supra* at 588. The tribe had specifically disclaimed tax liability and stated that *Everi* was responsible for any taxes. *Everi, supra* at 603.

⁸ It is undisputed that under Washington law "sale" for REET purposes includes the transfers of improvements upon leased land. RCW 82.45.010(1).

Additionally, the *Everi* court noted the state's interests are strongest when non-Indians are taxed and "those taxes are used to provide those non-Indians with government services." *Everi*, at 604. The glaring differences in the present action are evident. The assignment of subleases of Indian land are regulated by federal statutes and regulations. Respondents can provide no evidence of government services provided to Wapato Point.

The payment by the tribe lessee to the county for services pursuant to the Agreement for Voluntary Contribution in Lieu of Taxes (CP 194 - 199) evidences this point. By its terms, the Agreement provides the annual payment by Wapato Point Resources is a "fair contribution to cover all local governmental services". (CP 195).

D. Requiring Payment of an Unlawful Tax as Condition to Recording a Real Estate Transaction Violates Due Process.

It is undisputed that the Chelan County Treasurer refused to record Appellant Sifferman's Assignment of Sublease transaction unless he paid REET on the total consideration for his transaction. (CP 176). As previously discussed herein, absent federal preemption, RCW 82.45.010(1) and RCW 82.45.010(3)(c) impose REET upon transfer of improvements construed upon leased land, not the leasehold interest itself.

Requiring payment of REET in violation of state law and federal preemption as a condition to recording the real estate transactions violates due process rights afforded Appellants. *Baldwin v. Moore*, 7 Wash. 173, 34 P. 461 (1893) is directly on point. Respondents attempt to distinguish this case asserting the taxpayers had ample opportunity to challenge the tax under RCW 82.32.170 or RCW 82.32.180. Both statutes contemplate challenges *after* payment of the tax. The same argument by the State was rejected by *Baldwin* where the court stated ". . . if it is an illegal or void demand the state has no right to collect it in the first instance." *Baldwin*, at page 176.

Respondents cite cases holding due process is satisfied even if the opportunity to be heard is not available until after collection of the tax. **Brief of Respondent, at page 32.** *Peters v. Sjolholm*, 95 Wash.2d 871, 631 P.2d 937 (1981) is readily distinguishable. In that case DOR seized a taxpayer's bank account as payment for delinquent taxes *after* he was afforded an opportunity to challenge the tax liability. The court stated:

Due process was satisfied, however, in that it followed the procedures established under RCW 82.32, and gave Peters notice of the tax assessed against him, and afforded Peters an administrative hearing on the matter of his tax liability.

Respondents' reliance on *Peters* is misplaced. Similarly, Respondents misrepresent the "prepayment requirement" in *Booker Auction Co. v. State*,

Dept of Revenue, 158 Wash.App. 84, 241 P.3d 439 (2010). That case did not involve a constitutional challenge to a tax. The court stated at page 89:

In sum, a taxpayer filing an action in court to contest an excise tax, penalty, or interest, including a petition for judicial review of a formal Board decision, must first pay the tax in full. A possible exception is when an excise tax, penalty, or interest has been assessed and the taxpayer challenges the constitutionality of the tax. But that requirement is not present here; . . .

The foregoing quote from *Booker* is in line with Appellants' position and the *Baldwin* case where taxpayers are challenging the constitutionality of the tax.⁹

E. Declaratory Judgment Proceedings May Determine the Validity of a Tax.

Appellants invoke the Uniform Declaratory Judgments Act, RCW Ch. 7.24 and RCW 82.32.150 to declare the REET invalid as applied in the present action by DOR and Chelan County. Respondents persistently attempt to narrow Appellants' cause of action to a refund proceeding governed by RCW 82.32.180. Respondents cite cases which do not challenge the validity

⁹ Respondents cite out of state cases which lend no support to their argument. In *Barry v. AT&T Co.*, 563 A.2d 1069, 1070 (DC 1989) the court was barred from addressing constitutional issues. *California v. Superior Court*, 48 Cal.App.5th 922 (2020) did not involve a constitutional challenge to the validity of the tax at issue.

or constitutionality of the tax. *Lacey Nursing Ctr., Inc. v. Dept. of Revenue*, 128 Wash.2d 40, 905 P.2d 388 (1995) was a business and occupation tax refund case. *Guy F. Atkinson Co. v. State*, 66 Wash.2d 570, 403 P.2d 880 (1965) was a refund action barred by the statute of limitations.

Booker Auction, supra at page 89 supports Appellants in its holding that prepayment of tax may not be required when the taxpayer challenges the constitutionality of the tax.

Respondents claim that Appellants are limited to a refund action under RCW 82.32.180 because it is an adequate remedy at law. **Brief of Respondents, at page 37.** Respondents cite *Seattle - King County Counsel of Campfire v. Dept. of Revenue*, 105 Wash.2d 55, 711 P.2d 300 (1985) and *Hawkins v. Empres Healthcare Mgmt., LLC*, 193 Wash.App 84, 371 P.3d 84 (2016). Those cases, like others cited by Respondents, do not involve a challenge to the validity of a tax. *Campfire* sought refund a rollback tax which the taxpayer had elected to pay. *Hawkins* sought rescission of a tort settlement release.

Most importantly Respondents ignore that *County of Yakima, supra* was a declaratory judgment proceeding originating in federal court and ultimately concluded by the U.S. Supreme Court decision. That case was a

declaratory judgment action challenging ad valorem taxes and real estate excise taxes imposed upon members of the Yakima Nation. The district court granted summary judgment. The Ninth Circuit and the U.S. Supreme Court affirmed the district court's summary judgment in favor of the Yakima Nation declaring invalid the real estate excise taxes sought to be imposed by Yakima County. The Ninth Circuit opinion states:

The State of Washington's statutory scheme, which provides for satisfaction of real property excise sales taxes through ultimate recourse to the land, *see* Wash.Rev.Code chs. 82.45.070 and 82.46.040 (1962 and Supp.1989), suggests that the excise tax at issue here qualifies as "taxation of said land" within the meaning of 25 U.S.C. § 349. Nevertheless, the Washington Supreme Court has stated that "a tax upon the sales of property is not a tax upon the subject matter of that sale." *Mahler v. Tremper*, 40 Wash.2d 405, 409, 243 P.2d 627, 629 (1952). *Confederated Tribes v. County of Yakima*, 903 F.2d 1207, 1219 (9th Cir. 1990).

Respondents claim RCW 82.32.150 does not authorize refund lawsuits. They acknowledge the statute "merely grants an exception to the usual pre-payment requirement". **Brief of Respondents, at page 39.**

Respondents struggle to distinguish *Kirkland v. Dept. of Revenue*, 45 Wash.App. 720, 727 P.2d 254 (1986) which holds that a restraining order injunction enjoining the collection of any tax is allowed if the assessment violates due process requirements. *Kirkland, supra* at 726.

In its effort to distinguish *Kirkland* respondents claim the court in *Kirkland* "twice used erroneous and unnecessary language" and "erred in citing" *Morrison-Knudsen Co. v. Dept. of Revenue*, 6 Wash.App. 306, 493 P.2d 802 (1972). **Brief of Respondents, at page 40.**

In its continuing effort to limit this case to a refund action under RCW 82.32.180, Respondents claim WAC 458-61A-301(12) applies to "administrative refund claims" and does not limit the claims that may be raised in court under RCW 82.32.180. No authority is cited. WAC 458-61A-301(12) is the only regulation which provides "certain circumstances" that taxpayers may request a refund of REET. None of the circumstances apply. WAC 458-61A-200 states there are "limited exemptions or exclusions from the real estate excise tax".

The cases cited by Respondents at **Brief of Respondents, at page 43** are commerce clause challenges to the B&O or sales tax. None of the cases are analogous to the claim of Appellants. This is not a simple tax refund action involving an error of computation or an unclaimed real estate excise tax exemption.

F. Washington Courts Consistently Allow Class Action Status in Cases Challenging the Validity of a Tax.

Appellants' Amended Complaint (CP 8 - 10) seeks class action status for declaratory relief challenging the validity of the REET under the circumstances presented in this case.

Respondents ignore the substantial body of cases cited by Appellants where our courts have consistently allowed class action status in declaratory judgment proceedings challenging the validity of a tax. Respondents fail to address *Covell v. City of Seattle*, 127 Wash. 874, 905 P.2d 324 (1995); *Okeson v. City of Seattle*, 150 Wash.2d 540, 778 P.3d 1279 (2003); *Carrillo v. City of Ocean Shores*, 122 Wash.App. 952, 94 P.3d 961 (2004); *Nelson v. Appleway Chevrolet, Inc.*, 160 Wash.2d 173, 157 P.2d 847 (2007); *Lane v. City of Seattle*, 164 Wash.2d 875, 194 P.3d 977 (2008); and *NewCingular Wireless v. City of Clyde Hill*, 185 Wash.2d 594, 374 P.3d 151 (2016).

The only authority relied upon by Respondents for their opposition to class action claims is *Lacey Nursing Ctr. Inc. v. Department of Revenue*, 128 Wash.2d 40, 905 P.2d 338 (1995). *Lacey* was an action by nursing homes demanding refunds of state B&O tax. *Lacey* was not a case challenging the validity of the tax. The *Lacey* taxpayers limited their claim to a refund action under RCW 82.32.180. *Lacey* does not present a blanket prohibition on class action, even under RCW 82.32.180. The *Lacey* taxpayers were claiming

overpayment of B&O taxes requiring a calculation by each nursing home establishing the correctness or incorrectness of the B&O tax imposed.

In the present action potential class members would be easily identifiable based upon DOR records. The amount of the REET tax payment at issues is readily available. Under these circumstances *Lacey* is distinguishable and consideration of class action status would be generally satisfied.

II. 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 land 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 and policy. On remand, the trial court should be required to consider class action certification.

Respectfully submitted this 4th day of September, 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 4th day of September, 2020.

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