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DIVISION II

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STATE OF WASHINGTON
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No. 35883-2-II

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

G-P GYPSUM CORPORATION,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Respondent.

BRIEF OF APPELLANT

Franklin G. Dinces, WSBA #13473
Geoffrey P. Knudsen, WSBA # 1324
Attorneys for Appellant
The Dinces Law Firm
9202 Glencove Road
Gig Harbor, WA 98329
(253) 884-5942

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I. Assignments of Error

Assignments of Error

1. The trial court erred in entering the order of January 26, 2007 denying Plaintiff's motion for reconsideration and reopening of judgment.

2. The trial court erred in entering the Findings of Fact and Conclusions of Law and Judgment on December 15, 2006 denying Plaintiff's, G-P Gypsum's, request for refund of Tacoma natural gas use taxes paid during the period January 1, 1996 through December 31, 2001.

3. The trial court erred in its opinion letter dated and entered on January 17, 2007 denying Plaintiff's motion for reconsideration and reopening of judgment.

4. The trial court erred in its oral ruling issued December 15, 2006 denying Plaintiff's, G-P Gypsum's, request for refund of Tacoma natural gas use taxes paid during the period January 1, 1996 through December 31, 2001.

5. The trial court erred in entering Finding of Fact 4, in the Findings of Fact and Conclusions of Law and Judgment entered on December 15, 2006, finding that G-P Gypsum's petitions for refund to the Defendant and its superior court complaint did not explain or discuss a refund of state or local natural gas taxes paid on gas transferred to

Northwest Pipeline, on gas transferred to Puget Sound Energy or on gas sold or transferred to third parties.

6. The trial court erred in entering Conclusion of Law 1, in the Findings of Fact and Conclusions of Law and Judgment entered on December 15, 2006, concluding that a taxpayer must strictly comply with the conditional waiver of sovereign immunity to pursue a tax refund under RCW 82.32.180.

7. The trial court erred in entering Conclusion of Law 3, in the Findings of Fact and Conclusions of Law and Judgment entered on December 15, 2006, concluding that the statutes at issue in this matter were not ambiguous and their meaning was understood without resort to the rules of construction.

8. The trial court erred in entering Conclusion of Law 7, in the Findings of Fact and Conclusions of Law and Judgment entered on December 15, 2006, concluding that the taxpayer must state and specify in its petition for refund to the superior court under RCW 82.32.180 the reasons why the tax should be reduced or abated.

9. The trial court erred in entering Conclusion of Law 8, in the Findings of Fact and Conclusions of Law and Judgment entered on December 15, 2006, concluding that no court action or proceeding of any

kind shall be maintained by the taxpayer to recover any tax paid or part thereof except as provided in RCW 82.32.180.

10. The trial court erred in entering Conclusion of Law 9, in the Findings of Fact and Conclusions of Law and Judgment entered on December 15, 2006, concluding that because G-P Gypsum's refund request to the Department and the superior court did not include any explanation or discussion of a refund of taxes related to gas transferred to Northwest Pipeline, to gas transferred to Puget Sound Energy or to gas transferred to third parties, any claimed relief related to these claims is barred and denied pursuant to RCW 82.32.180, RCW 82.32.060 and RCW 82.32.170.

11. The trial court erred in entering Conclusion of Law 12, in the Findings of Fact and Conclusions of Law and Judgment entered on December 15, 2006, concluding that the language in RCW 82.14.230 is not ambiguous and it can be construed without resort to rules of construction.

12. The trial court erred in entering Conclusion of Law 13, in the Findings of Fact and Conclusions of Law and Judgment entered on December 15, 2006, concluding that a harmonious reading of RCW 82.14 and corresponding statutes leads to only one reasonable conclusion – that

the natural gas use tax of RCW 82.14.230(1) is imposed upon the first use or the first exercise of dominion and control over natural gas within a city.

13. The trial court erred in entering Conclusion of Law 14, in the Findings of Fact and Conclusions of Law and Judgment entered on December 15, 2006, concluding that for local use tax purposes, G-P Gypsum first uses natural gas in Tacoma.

14. The trial court erred in entering Conclusion of Law 15, in the Findings of Fact and Conclusions of Law and Judgment entered on December 15, 2006, concluding that to read the statutes otherwise would vitiate and render ineffectual the legislative intent that cities impose a use tax to recapture revenue lost by deregulation of the gas industry.

15. The trial court erred in entering Conclusion of Law 16, in the Findings of Fact and Conclusions of Law and Judgment entered on December 15, 2006, concluding that G-P Gypsum used natural gas within the City of Tacoma as a consumer.

16. The trial court erred in entering Conclusion of Law 17, in the Findings of Fact and Conclusions of Law and Judgment entered on December 15, 2006, concluding that G-P Gypsum is subject to the City of Tacoma's natural gas use tax under RCW 82.14.230 and Tacoma Municipal Ordinance 6A.90.040 on the natural gas it uses in the City of Tacoma.

17. The trial court erred in entering Conclusion of Law 18, in the Findings of Fact and Conclusions of Law and Judgment entered on December 15, 2006, concluding that G-P Gypsum's request for a refund of Tacoma natural gas use taxes paid to the City of Tacoma under RCW 82.14.230 and Tacoma Municipal Ordinance 6A.90.040 is denied.

18. The trial court erred in entering a Judgment, contained at paragraph 22 of the Findings of Fact and Conclusions of Law and Judgment entered on December 15, 2006 denying Plaintiff's, G-P Gypsum's, request for refund of Tacoma natural gas use taxes paid during the period January 1, 1996 through December 31, 2001.

19. The trial court erred in not concluding that the state natural gas use tax is imposed at the place of first use within the State.

20. The trial court erred in not concluding that G-P Gypsum first uses natural gas within the State at the locations it purchases the gas.

21. The trial court erred in not finding that the Department of Revenue's administrative practice has been to impose state and local use taxes at the same place, and at the same time and that the above-described practice has been true for general goods and for natural gas.

22. The trial court erred in not finding that the Department of Revenue responded to G-P Gypsum's argument that "use" is defined as the first act within Washington by which the taxpayer takes dominion or

control over the article by admitting that the use tax is triggered by the first use of the goods in Washington.

23. The trial court erred in its opinion letter dated and entered on January 17, 2007 denying Plaintiff's motion for reconsideration and reopening of judgment, by concluding that the Department's administrative practice as testified to by Mr. Hammond was not persuasive.

24. The trial court erred in its opinion letter dated and entered on January 17, 2007 denying Plaintiff's motion for reconsideration and reopening of judgment, by concluding that the taxable events under the state brokered natural gas (BNG) tax provisions simply cannot be considered the same as under the local BNG tax provisions and on that basis maintained its earlier Findings of Fact, Conclusions of Law and Judgment.

Issues Pertaining to Assignments of Error

1. Is a person who first takes dominion and control over natural gas within Washington State but outside a City subject to the tax imposed pursuant to RCW 82.14.230 for the privilege of "using" natural gas in a City if the gas is subsequently burned by the taxpayer within a City? (Assignments of Error Nos. 1 – 4, 7, 11 - 24).

Subsidiary to this issue are the following issues:

- a. Is the term “using” in RCW 82.14.230 defined by RCW 82.12.010(2)?¹
 - b. May the use tax authorized by RCW 82.14.230 be imposed on an incident that is not a taxable event for purposes of RCW 82.12.022?
 - c. Does the administrative practice of the Defendant, Department of Revenue, of defining “use” uniformly for state and local use tax purposes and imposing use tax only at the time and place of first use within the State, limit the definition of “use” for local tax purposes to the first use within the State?
 - d. Is the meaning of “using” in RCW 82.14.230 ambiguous such that it should be construed in favor of the taxpayer?
2. Does a Complaint that states that taxpayer owes no local gas use tax because taxpayer did not first take possession, dominion or control of and did not otherwise first use or consume any gas in the locality adequately plead the reason for a refund of tax paid on gas sold and/or transferred by

¹ The use tax statute was amended effective 2004. The definition of “use” is now found at RCW 82.12.010(4) but the definition has not been changed. Throughout this Brief, we cite to the statutes as they existed at the times material, and we provide such statutes in the Appendix for ease of reference. Where there has been a possible substantive change to the statute, we draw the Court’s attention to the change.

taxpayer outside the locality to third parties? (Assignments of Error Nos. 5 – 11).

Subsidiary to this issue are the following issues:

a. Does such a pleading satisfy the pleading requirements of RCW 82.32.180?

b. Assuming arguendo that such a pleading somehow fails the requirements of RCW 82.32.180, would such a pleading be adequate under the Courts' constitutional authority to hear tax cases and if so, is the statute an unreasonable limitation on the Judiciary's constitutional authority?

II. Statement of the Case

Statement of Procedures

The genesis of this case was a letter dated December 22, 2000, in which Plaintiff, G-P Gypsum, claimed a refund of Tacoma natural gas use taxes imposed under RCW 82.14.230 for the period January 1, 1996, to December 31, 2000, because such taxes were paid on natural gas purchased and first used outside the city limits of Tacoma.² CP 173.

² RCW 82.14.230 authorizes cities to impose a tax for the privilege of using natural or manufactured gas within the city. Due to exemptions and credits, the tax only applies to gas bought from other than Washington gas utilities. Such sellers are sometimes called brokers or marketers, and the natural gas use tax was erroneously referred to as the "brokered natural gas" or "BNG" tax by the Defendant in its trial brief. *See e.g.*, CP 47.

On January 30, 2002, the Audit Division of the Department of Revenue³, the Defendant, denied G-P Gypsum's request for refund on the basis that in its opinion the local natural gas use tax is due at the location where the gas is burned. Ex. Plaintiff 1.

G-P Gypsum timely petitioned the Defendant to review and correct the Audit Division's denial. CP 173. Thereafter, on January 31, 2003, the Appeals Division of the Defendant rejected G-P Gypsum's refund request. CP 173. This time the Defendant's Determination, Ex. Plaintiff 2, after recognizing that "taxpayer justified its refund request on its reasoning that its first possession and use of the natural gas occurred in Sumas, not Tacoma," admitted "[t]axpayer is correct that use tax is triggered by the first use of the goods in Washington." Nevertheless, the Defendant denied the refund on its belief that the transportation of the gas had not finally ended and the gas had not become commingled with the general mass of property in the state at Sumas.

By letter dated February 26, 2003, G-P Gypsum sought reconsideration of the Department's Determination.⁴ CP 174. The

³ The natural gas use tax, like all local use taxes, is administered and paid to the Washington Department of Revenue. *See generally*, RCW 82.12 and RCW 82.32 cross referenced by RCW 82.14.230 and RCW 82.14.050.

⁴ At this time, G-P Gypsum also requested a refund of state natural gas use taxes measured by Northwest Pipeline's transportation charges. CP 174. This transportation issue was the basis for the \$37,575.99 refund awarded Plaintiff below. That refund has not been appealed, and the transportation issue is not before the Court.

Defendant again denied the refund request. This time the Defendant based its denial on its opinion that “the term delivery as used in taxpayer’s contracts is a fiction.” Ex. Plaintiff 3. Implicit in the Determination’s reasoning is the concept that if the delivery outside Tacoma was substantial, then Tacoma’s use tax would have been refunded. *See, id.* The Defendant did not contend that the tax is triggered by anything other than first use. Rather, it concluded that “the first opportunity the Department has to tax the natural gas is when it reaches Taxpayer’s plant in Tacoma, Washington.” *Id.*

After receipt of the Defendant’s Determination on reconsideration, G-P Gypsum filed a timely refund complaint in Thurston County Superior Court on November 23, 2003, seeking a refund of Tacoma use tax for the period January 1, 1996 through December 31, 2001. CP 174; CP 4. The Complaint states “G-P owed no Tacoma local natural gas use taxes because G-P did not first take possession, dominion or control of and did not otherwise first use or consume any such gas in Tacoma.” CP 6.

The Defendant failed to ever file an Answer.⁵ The Defendant filed its trial brief late⁶ and in that brief for the first time argued that the

⁵ The Department of Revenue is of the opinion that it is not required to file an Answer relying on RCW 82.32.180.

⁶ The Defendant’s trial brief was filed on October 11, 2006. CP 46. It was due October 6, 2006. CP 8 (First Amended Case Schedule Order) and CP 22 (Second Amended Case Schedule Order).

definition of “use” for state natural gas use and local natural gas use taxes was different. It argued – for the very first time – that “[u]se within the city’ triggers the local BNG [brokered natural gas use] tax, not ‘first use’ within the state.” CP 48.

Trial was held on October 16, 2006. Only two witnesses testified. Mr. Willis, senior tax counsel for Georgia Pacific Corporation, testified to his experiences on behalf of Plaintiff where he learned Defendant’s administrative practice to impose use tax on first use within the State. RP 18, 23-24, 29-31, 48-49 (Trial transcript, Oct. 16, 2006). Mr. Willis also testified about the substance of Plaintiff’s receipt of gas at Sumas and other locations outside Tacoma. RP 32-33, 50-53, 55-57, 60 (Trial transcript, Oct. 16, 2006). Mr. Cannaday, the Plaintiff’s plant controller, also testified. His testimony was principally directed to explaining and authenticating Ex. Plaintiff 17, a summary of Plaintiff’s books and records. RP 71-127 (Trial transcript, Oct. 16, 2006).

After trial and closing arguments, the trial court, Judge Richard Strophy presiding, provided an oral ruling which concluded, inter alia, that a city may impose a local use tax on the first use or the first exercise of dominion and control of natural gas in the city even if it is not the first use or first exercise of dominion and control of the natural gas within the State. RP 65-68 (Court’s ruling, October 17, 2006). The trial court found

that G-P Gypsum takes or assumes dominion and control of the gas at locations outside Tacoma, RP 62 and 65 (Court's ruling, October 17, 2006), and understood that RCW 82.12.010 "provides that the word "use" shall have its ordinary meaning and shall also mean with respect to tangible personal property ... the first act within this State by which the taxpayer takes or assumes dominion and control over the article of tangible personal property as a consumer and includes any other act preparatory to subsequent actual use." RP 64-65 (Court's ruling, October 17, 2006). The trial court further recognized that "RCW 82.14.020(8) provides that the meaning of the words and phrases used in various tax chapters including 82.12, as they now exist or may hereafter be amended, have full force and effect with respect to taxes imposed by cities under the authority of this chapter" RP 67 (Court's ruling, October 17, 2006). Nevertheless, the trial court concluded that it defies logic to define the term "use" in its application to a City tax as first use anywhere in the State. *Id.*

Prior to providing its oral analysis of the meaning of "use" for local use tax purposes, the trial court stated that it did "not find any discussion or explanation of a request for refund based upon the Plaintiff's or taxpayer's position that it is entitled to such regarding use taxes on gas transferred to Northwest Pipeline, Puget Sound Energy, and third parties.

Accordingly, [the trial court] decline[d] to consider or award any claimed relief on those bases ... ” RP 61 (Court’s ruling, October 17, 2006).

The Defendant subsequently proposed findings, conclusions and a judgment it contended were consistent with the oral ruling. Conclusion 9, at CP 178, encapsulates the trial court’s oral ruling that because G-P Gypsum did not include any explanation or discussion of a refund of taxes related to gas transfers any claimed relief related to such taxes is barred.⁷ Conclusions of Law nos. 10 – 18⁸ encapsulates the trial court’s ruling that the natural gas use tax of RCW 82.14.230(1) is imposed on the first use or the first exercise of dominion and control over natural gas within a city. CP 178-179.⁹

Plaintiff opposed the Defendant’s proposal, and both parties filed briefs. CP 93-145 and 146-171. Plaintiff specifically requested separate findings on the Defendant’s administrative practice to impose use tax on first use within the State and on Defendant’s admission that the use tax is triggered by the first use of goods in Washington. CP 97-98. The trial court explained its decision to not make the factual finding regarding the administrative practice of the Defendant on the basis that the Court “was

⁷ This Conclusion forms the specific basis for assignments of error nos. 5 and 10, and assignments of error nos. 6, 8-9 are related to this conclusion.

⁸ These Conclusions form the specific basis for assignments of error 11–17 and assignments of error nos. 7, 19-22 and 24 are related to these conclusions.

⁹ The trial court’s rulings on both of these issues and other issues form the basis for assignments of errors nos. 1-4 and 18.

not satisfied that the person to whom the statement (of the practice) was attributed, in the context of the statement, had sufficient speaking authority to establish that was the Department's practice, as opposed to perhaps that person's personal comment or opinion on the issue ..." RP 32 (Court's ruling, December 15, 2006). The trial court did not give a specific reason for not finding that the Defendant admitted that use tax is triggered by the first use of the goods in Washington other than stating that "[i]t could be argued, as to what those, quote, admissions or responses constituted in the way of either practice of the department or how the definition of the term "use" was applied, were conclusory or subjective." RP 32 (Court's ruling December 15, 2006).¹⁰

Plaintiff also specifically requested that the trial court conclude that the state natural gas use tax is imposed at the place of first use within the State and that Plaintiff first uses natural gas within the State at the locations it purchases the gas. CP 94. The trial court did enter a finding that Plaintiff takes dominion and control over the gas at the locations it purchases gas (CP 175), but it failed to make the conclusions requested.¹¹

Subsequent to entry of the Findings of Fact, Conclusion of Law and Judgment, Plaintiff moved for reconsideration and reopening of the

¹⁰ The trial court's failure to find either fact is the basis for assignments of error nos. 21 and 22.

¹¹ This failure is the basis for assignments of error nos. 19 and 20.

judgment. CP 185. The motion was supported by the Declaration of Jerry Hammond, CP 181-182, and the December, 2006 and January, 2007 Declarations of Franklin Dinces, CP 183-184 and 209. After briefing by both parties, CP 185-186 (Plaintiff's motion), CP 188-203 (Defendant's reply to Plaintiff's motion) and CP 204-208 (Plaintiff's memorandum in support of the motion), the trial court entered a letter opinion, CP 210, and Order, CP 211, denying Plaintiff's motion. The letter opinion indicates that Mr. Hammond's testimony as to the Department's administrative practice is not "persuasive or controlling given my [the trial court's] analysis of the statutory scheme" The trial court was of the opinion that "the taxable events under the state brokered natural gas (BNG) tax provisions simply cannot be considered the same as under the local BNG tax provisions" CP 210.¹²

This appeal followed entry of the trial court's final judgment. CP 213.

Statement of Facts

During the times material, the period January 1, 1996 through December 31, 2001, G-P Gypsum purchased natural gas at two primary delivery points in Washington: (1) the Sumas station and (2) the Sumner

¹² The trial court's failure to give adequate deference to the administrative practice testified to by Mr. Hammond is the basis for assignment of error no. 23.

station. CP 174-175. These stations are located outside the city limits of their respective cities. *Id.*

When G-P Gypsum purchases natural gas at delivery points in Washington, it takes dominion and control over the gas at those delivery points. CP 175. G-P Gypsum assumes the risk of loss and risk of liability for the gas at those delivery locations. *Id.* At those locations, G-P Gypsum determines the amount of gas it will ship to its plant and the amounts of gas it will transfer and/or sell to others. *Id.*

G-P Gypsum sold and/or transferred to Northwest Pipeline (hereinafter referred to as "NWP") at Sumas 70,820 units of natural gas having a value of \$165,228.12.¹³ G-P Gypsum sold to its local distributing company (hereinafter referred to as "LDC") at Sumner 192,621 units of natural gas having a value of \$548,413.53. Ex. Plaintiff's 17. G-P Gypsum paid \$9,479.21 of Tacoma natural gas use tax on its transfers and/or sales to NWP at Sumas and it paid \$26,985.43 of Tacoma natural gas use tax on its sales to the LDC at Sumner. *Id.* There is no evidence that such gas ever entered the city limits of Tacoma. Such gas was not possessed at any time by Plaintiff within the City of Tacoma.

¹³ All of the quantifications mentioned in this Brief are for the times material, January 1, 1996 through December 31, 2001. The numbers in text are taken off of Ex. Plaintiff's 17. Such amounts are correct calculations and summaries of G-P Gypsum's business records. CP 177.

G-P Gypsum contracts with NWP to transport its gas from Sumas to Sumner and other locations. CP 175. Puget Sound Energy transports G-P Gypsum's gas from Sumner to G-P Gypsum's Tacoma manufacturing facility. *Id.* From time to time, G-P Gypsum sold gas transportation services to third parties. *Id.* G-P Gypsum satisfied its transportation obligations by directing NWP to transport the third party owned gas. *Id.* G-P Gypsum paid \$10,674.74 of Tacoma natural gas use tax on NWP transportation charges for gas transported to locations other than Sumner. Ex. Plaintiff's 17. The gas transported to locations other than Sumner never enters Tacoma. *See, id. and see*, RP 107 (Trial transcript, Oct. 16, 2006).

Defendant has a long standing administrative practice to impose state and local use taxes at the same place and at the same time. CP 181-82. *See also*, RP 18, 23-24, 29-31, 48-49 (Trial transcript, Oct. 16, 2006). This practice is equally true for general goods and for natural gas. CP 182. In all cases, the Defendant's practice is to impose use tax only at the time and place of first use within the State. *Id.*

Not only is it the long-standing practice of the Defendant to impose use taxes only at the time and place of first use but the very positions and actions of the Defendant *in this case* up until the filing of its trial brief are consistent with the practice. *See*, Ex. Plaintiff 2 (Department

of Revenue Determination dated January 31, 2003: "Taxpayer is correct that use tax is triggered by the first use of the goods in Washington.") *and see*, Ex. Plaintiff 3 (Department of Revenue Determination re: Reconsideration: contending that taxpayer does not in substance take delivery of the gas at Sumas).

Despite taking dominion and control over the gas at locations outside Tacoma and despite the Defendant's long-standing practice, Plaintiff paid a total of \$853,722.55¹⁴ of Tacoma natural gas use tax on such gas.¹⁵ Ex. Plaintiff's 17.

Summary of Argument

Washington State and its cities impose a unified use tax on the use of most tangible personal property in the State. *See generally*, RCW 82.12 and RCW 82.14. That is, the State's and cities' use taxes are imposed at the same time and place and on the same event. RCW 82.14.020, RCW 82.14.030, and RCW 82.14.070. The State and city taxes are administered by and paid to the Defendant. *See*, RCW 82.12 and RCW 82.32 cross referenced by RCW 82.14.230 and RCW 82.14.050. The State and city taxes are as uniform as possible. RCW 82.14.070. As part of their use

¹⁴ Included in this amount is the \$36,464.64 of Tacoma natural gas use tax paid on gas that was sold and/or transferred at Sumas and Sumner that never went to Tacoma and the \$10,674.74 of Tacoma natural gas use tax on NWP transportation charges for gas transported to locations other than Sumner.

¹⁵ G-P Gypsum measured its Tacoma natural gas use tax obligations by reporting the total amount charged by gas sellers plus the total amount NWP charged. CP 177.

taxes, the State and its cities impose a tax on the use of natural gas. *See*, RCW 82.12.022 and RCW 82.14.230.

“Use” is defined for State and city use tax purposes by RCW 82.12.010. *See also*, RCW 82.14.020(8) and (9). The statute, as recognized by case law, Department of Revenue practice and regulation, defines “use” as the first act by which a taxpayer takes or assumes dominion or control over tangible personal property in this State. RCW 82.12.010.

G-P Gypsum first takes dominion and control over natural gas at the locations it purchases gas outside Tacoma. CP 174-175. Thus, G-P Gypsum “uses” the natural gas outside Tacoma, and it does not “use” the natural gas in Tacoma. Therefore, G-P Gypsum does not owe any Tacoma use tax on its use of natural gas.

Argument

A. Tacoma’s Use Tax Is Only Imposed On Goods First Used Within Tacoma. Tacoma’s Use Tax Is Not Imposed On Goods First Used Within The State Outside Tacoma.

Tacoma imposes a tax for the privilege of using natural gas in the city. As explained below, “using” means “the first act by which a person takes or assumes dominion or control over an article” in Washington. Substituting the definition of “using” in for the term, Tacoma imposes a

tax for the privilege of first taking or assuming dominion or control over natural gas within the State in Tacoma. G-P Gypsum does not “use” natural gas in Tacoma. That is, it does not first take or assume dominion or control over natural gas within Washington in Tacoma. Therefore, G-P Gypsum is not subject to the Tacoma natural gas use tax.¹⁶

1. State Law Is Well Settled: State Use Tax Is Imposed On The First Act By Which A Taxpayer Takes Dominion or Control Over An Article.

a. The State Statutes Clearly Impose Use Tax on First Use, Not Actual Use.

“Use” is defined to mean the first act by which a taxpayer takes dominion or control and includes any act preparatory to actual use. RCW 82.12.010(2).

¹⁶ This straight forward analysis would be equally correct for any article of tangible personal property bought within Washington and outside Tacoma allegedly subject to Tacoma’s generally applicable use tax. More importantly, any counter argument based on statutory language would have to apply with equal force to the generally applicable city use tax. *See*, TMC 6A.70 (imposing Tacoma’s general sales and use tax “upon every taxable event as defined by RCW 82.14.020, occurring within the City”), RCW 82.14.020 (defining “taxable event” to include “any use, upon which a state tax is imposed”), *and see*, RCW 82.12.010 (defining “use” as “the first act by which a person takes or assumes dominion or control over an article in the State”). Both Tacoma’s natural gas use tax and general use tax are imposed on the privilege of first taking or assuming dominion or control over an article in the State within Tacoma. *Compare*, TMC 6A.90.040 (natural gas use tax ordinance) with TMC 6.A70.010 (generally applicable sales and use tax) *and see*, RCW 82.14.020, RCW 82.14.030, RCW 82.14.050, RCW 82.14.070 and RCW 82.14.230.

b. This Court Has Previously Held That Use Tax Is Imposed On The Taking of Dominion and Control, Not Actual Use.

Seattle Filmworks v. State, 106 Wn. App. 448, 24 P.3d 460 (2001) held, in interpreting RCW 82.12.010, that “[t]he statute does not specifically require any later actual use (in the ordinary meaning of ‘use’); it merely requires an act of dominion and control, which may include any act preparatory to subsequent actual use or consumption”. Thus, Seattle Filmworks owed use tax on order forms that were never returned to it because the company had exercised dominion and control over the forms when it sent the forms to its customers. The fact that the forms were never actually used by the company because they were not returned by the customers was not material. *See also, Mayflower Park Hotel v. Department of Revenue*, 123 Wn. App. 628, 98 P.3d 534 (2004) (hotel owes use tax on single use items, such as bars of soap and tissues, actually consumed by its customers).

c. The Defendant’s Practice Is Consistent With The Statute and This Court’s Prior Ruling.

The Defendant has long administered the use tax so that it applies only to the first act by which a taxpayer takes or assumes dominion or control over an article of tangible personal property. CP 181-182 (Hammond Declaration).

The Department of Revenue's practice is not only demonstrated by the words of the Department's "speaking agent,"¹⁷ it is also demonstrated by published Determinations of the Department. *See e.g.*, Det. No. 99-239R, 19 WTD 367 (reversing earlier determination imposing use tax on use other than first use.) In Det. No. 99-239R, the Defendant recognized that limiting the definition of use to the first act of dominion or control permitted a taxpayer who actually used an article during the statutory period to escape its tax liability because the taxpayer's untaxed first use occurred prior to the statutory period. The Defendant wrote, the statute "specifies that 'use' is the first act of dominion and control in this state, 'use' is not the second act or the third act, or any subsequent act." The statute "limits use to the first act."¹⁸ *Id.*

Department of Revenue rules also demonstrate that use tax is limited to the first use in the State. *See generally*, WAC 458-20-230(9) (a) (another example of the Department recognizing that it cannot assess use tax against a taxpayer who actually used an article during the statutory period because the taxpayer first used the article beyond the statutory period). *See also*, WAC 458-20-178(3) ("When tax liability arises: Tax

¹⁷ Mr. Hammond was the Department's speaking agent in several cases including use tax cases. CP 182.

¹⁸ Board of Tax Appeals decisions are also consistent with use tax being limited to first use. *See generally*, *Northwest Alloys, Inc. v. State of Washington*, BTA Dckt. No. 28350 (June 7, 1985).

liability imposed under the use tax arises at the time the property ... is first put to use in this state. The terms “use,” “used,” “using,” or “put to use” include any act by which a person takes or assumes dominion or control over the article Tax liability arises as to that use only which first occurs within the state and no additional liability arises with respect to any subsequent use of the same article by the same person.”)

Even the Defendant’s actions in this case demonstrate the practice. Both of the Determinations issued to G-P Gypsum presume that use tax is due on the first use of the gas in Washington. The Determinations deny the claimed refund on the basis of erroneous factual conclusions that the gas was in the stream of commerce and that the gas was not really delivered outside Tacoma. Ex. Plaintiff’s 2 and 3. Only at trial, did the Defendant abandon these erroneous factual allegations and make the novel legal argument that “use” for local tax purposes means something other than first use in the State.

d. The Use Tax On Natural Gas Is Uniform With The General Use Tax.

The state use tax on natural gas is contained within the chapter of the RCW which imposes the generally applicable use tax. RCW 82.12.020, RCW 82.12.022 and RCW 82.12.023. The introductory language of RCW 82.12.010, the statute that defines “use”, reads, “For

purposes of this chapter.” There is nothing in the statute which indicates in any manner that the definition of “use” for general use tax purposes is different in any manner from the definition of “use” for natural gas use tax purposes.

2. State and Local Use Taxes Are Uniform.

a. The Statutes Clearly Require Uniformity Between State and Local Use Taxes.

To ensure uniformity between the state and local use taxes, the statutes specifically cross reference all definitions and administrative provisions. *See*, RCW 82.14.020¹⁹ and RCW 82.14.050. In addition, the local tax is always imposed at the time of the state tax. *See, id.* and RCW 82.14.020(9), and RCW 82.14.030.

The Legislature codified its intent to have uniformity in RCW 82.14.070. During the times at issue the statute read:

¹⁹ RCW 82.14.020’s cross reference of the meaning ascribed to words and phrases within RCW 82.12 is “insofar as applicable.” The Defendant argued below that “[d]efinitions related to ‘first use’ or ‘dominion and control’ that occur outside the City of Tacoma cannot be incorporated into the local BNG tax because such definitions are not applicable in context of a logical reading of the statute.” CP 52-53. The trial court apparently agreed with this erroneous argument. RP 67 (Court’s ruling, Oct. 17, 2006).

The term “using” is applicable to Tacoma’s tax on the privilege of “using” natural gas within the City. “Use” and “using” mean the same, the first act of taking dominion or control in the State. RCW 82.12.010. The argument that the term is inapplicable is apparently because Tacoma’s tax would not apply when an item is first used outside the City. Such a syllogism presupposes that Tacoma’s use tax applies when gas or other items are first used outside Tacoma, but that is the question before the Court. The fact is the term “use” is applicable. Its definition, provided by RCW 82.12.010, makes Tacoma’s tax inapplicable to G-P Gypsum’s natural gas “used” outside Tacoma.

It is the intent of this chapter that any local sales and use tax adopted pursuant to this chapter be as consistent and uniform as possible with the state sales and use tax and with other local sales and use taxes adopted pursuant to this chapter. It is further the intent of this chapter that the local sales and use tax shall be imposed upon an individual taxable event simultaneously with the imposition of the state sales and use tax upon the same taxable event.²⁰

There is no statutory language indicating in any manner that there is a difference between the meaning of the term “use” for general local use tax purposes and the meaning of the term “use” for local natural gas use tax purposes. In both cases, the term means the first act by which a taxpayer assumes dominion or control over an article. RCW 82.12.010 cross referenced by RCW 82.14.020. *See also*, RCW 82.14.050 and RCW 82.14.070. The local tax may only be imposed simultaneously with the state tax and only on the occurrence of a taxable event (“use” as defined

²⁰ Effective July 1, 2004, this language was amended to make it even stronger. Rather than require local use taxes be as consistent as possible with state use taxes, the statute now requires that such taxes be “identical”. We doubt that this change makes a substantive difference in this case as the fact that today the statute requires the local and state use taxes to be identical must mean that it has always been possible for the term “use” to be defined uniformly for state and local natural gas use tax purposes. In addition, the second quoted sentence in text, requiring the local tax to be imposed simultaneously with the state use tax, was unchanged. To the extent this amendment is important, however, it must mean that for periods after July 1, 2004 the definition of “use” is identical.

by RCW 82.12.010) occurring within the locality. RCW 82.14.070, RCW 82.14.030 and RCW 82.14.230.²¹

b. The Department of Revenue Has Uniformly Administered State and Local Use Taxes.

The Defendant's speaking agent tells us that the Department of Revenue has always administered the state and local use taxes uniformly and that this practice is true for general goods and natural gas. CP 181-182.

The Department's Determinations and regulations make no distinction between state and local use taxes in the definition of use.²² There is no mystery as to why this is the case: RCW 82.14.030 specifically prohibits local use taxes being imposed on anything other than a taxable event for state use tax purposes. RCW 82.14.020 specifically cross references the definition of "use". RCW 82.14.050 specifically

²¹ The Legislature compels local use taxes to be imposed at the same time as the state use tax in at least three ways. First, it expressly requires the taxes to be imposed "simultaneously." RCW 82.14.070. Second, it limits local use taxes to events upon which state use taxes are imposed. RCW 82.14.020 (defining "taxable event" and applicable to RCW 82.14.230 by its own terms and by RCW 82.14.070's and RCW 82.14.030's use of the term). Third, state and local use taxes are required to be uniform. RCW 82.14.070. G-P Gypsum is subject to the state use tax on its use of natural gas at Sumas and Sumner, the places at which it first takes dominion or control over the gas. CP 175. RCW 82.12.010. Therefore, Tacoma's use tax cannot apply to G-P Gypsum's use of the gas.

²² There is absolutely no language in WAC 458-20-230 or WAC 458-20-178 that indicates that the definition of "use" for state and local use tax purposes could possibly be different. If the definitions could be different, it would be possible that the statute of limitations for state purposes could run while a taxpayer would be open for an assessment of a city tax. The example in WAC 458-20-230 and the analysis of Det. No. 99-239R do not permit such a possibility.

cross references all administrative provisions of the state use tax. RCW 82.14.070 requires the state and local use taxes to be as uniform as possible (during the times material) and requires the taxes to be identical (today).

The Defendant did not even attempt to distinguish the definition of “use” for state versus local use tax purposes while the matter was before the Department of Revenue. Only at the last minute, after G-P Gypsum had already filed its trial brief, did the Defendant argue for a position never before the law of this State. The trial court accepted the State’s position, but it did not have the benefit of Plaintiff’s briefing on the issue. Plaintiff was limited to making its response to the State’s novel position at closing argument.²³

c. No Prior Case Permits A Lack of Uniformity Between State and City Use Taxes.

If “use” meant “first use within a city” for city use tax purposes, the taxable event,²⁴ the tax measure²⁵, and the event accruing the statute of

²³ At the close of testimony, the Court and counsel had a discussion that presaged that this lack of briefing could lead to an error. Plaintiff’s counsel was left mentioning to the court authorities necessary to refute the State’s novel arguments. *See*, RP 137-141 (October 16, 2007).

²⁴ “Use” for state use tax purposes is defined by RCW 82.12.010 as the first act within the State by which a taxpayer assumes dominion or control over an article.

²⁵ Use taxes are imposed on the value of the article used. RCW 82.14.230 and RCW 82.12.020. Thus, state and city taxes would frequently have different measures because the state and city taxes would be imposed at different times on different uses and value is often a function of time and the amount of use of an article.

limitations²⁶ for state and city use taxes would be different. Multiple local taxes could also apply.²⁷ We are unaware of any case permitting a lack of uniformity between state and city use taxes. We are equally unaware of any authority of any kind indicating that a lack of uniformity between state and city use taxes would be permitted.

3. The Lure of Revenue Oriented Statutory Constructions Has Already Been Rejected.

The trial court judicially amended the statutory definition of “use” to mean “first act” within a city. RP 66-68 (Court’s ruling, Oct. 17, 2006). It justified such a definition because the statutory definition in this instance, but not all instances, results in no city tax applying. RP 66 (Court’s ruling, Oct. 17, 2006). It based its decision, not on statutory language, but on its belief that to define “use” otherwise would render ineffectual the intent of the legislature. *Id.*

Similar reasoning, seeking to amend statutory language to increase tax revenues based on legislative intent rather than statutory language, has been rejected by both the Courts and the Defendant.

²⁶ As the running of the statute of limitations is a function of when the taxable event occurs, RCW 82.32.050 and RCW 82.32.060, different taxable events (use within the State and use within the City) results in the statutes for State and City tax purposes not running simultaneously. WAC 458-20-230 and the analysis of Det. No. 99-239R do not permit such a possibility.

²⁷ Whenever an article is first used in a Washington county before being used in a city, the different purported definitions of use would result in multiple local taxes applying (the county’s and the city’s).

a. *Vita Food Products v. State* Is Instructive.

In *Vita Food Products v. State*, 91 Wn.2d 132, 587 P.2d 535 (1978), the State argued that a tax imposed on “the person first receiving, handling, dealing in or dealing with the fresh ... fish ... within the state of Washington ...” should apply to a person other than the first person doing such acts when the first person was nontaxable. The State based its argument on what it perceived was the legislative intent to have the tax apply to the first taxable person.

The Supreme Court rejected the State’s argument. The fact that the first person in *Vita Foods* was nontaxable did not allow the State to tax a second person. The Court recognized that the statute was clear on its face and that courts do not construe unambiguous statutes. The Court held that adding words to a statute was not within its power even if it agreed that the Legislature intended something other than what the statute read. The Court added that if there was any doubt as to the meaning of the tax statute, the doubt would be construed in favor of the taxpayer.

Here again, the trial court amended the statutory definition of “use” so that it would mean “first act within a city.” Such a change was purportedly justified because in this instance, but not all instances, the city tax would not apply and on the belief that the Legislature intended the tax to apply to all gas burned within a city.

The trial court's reasoning is the same as the reasoning rejected in *Vita Foods*. The statutory definition of "use" is clear. It is the first act within the State by which a person takes or assumes dominion or control over an article. The fact that a city may not tax a first use within the State that is outside a city does not permit a city to tax a second use. As in *Vita Foods*, the courts lack the power to amend the statute even if it is perceived that the Legislature intended a result different from what the statute requires. Here too, if the definition of "use" could be something other than that provided by RCW 82.12.010, then the term must be ambiguous, and ambiguous terms are construed in favor of the taxpayer. Thus, *Vita Foods* is authority for reversing the trial court.

b. Det. No. 99-239R and WAC 458-20-230 Demonstrate That "Use" is Limited to First Use in Face of Revenue Loss.

Both the referenced determination and regulation limit "use" to the first act by which taxpayer assumes dominion or control over an article even though such a limitation in the context of the determination and regulation resulted in less tax because the first use occurred outside the statutory period. In those instances, the Defendant was able to withstand the lure of a tax oriented result. Here too, the Court needs to withstand the siren call of more tax revenue and apply the term "use" as it has always been applied.

4. If “Use” Meant Anything Other Than As Provided By RCW 82.12.010, It Would Be Ambiguous, and Ambiguous Tax Statutes Are Construed In Favor of the Taxpayer.

The trial court held the definition of “use” to be other than that provided by RCW 82.12.010 and something other than its plain meaning. It defined the term to mean the first exercise of dominion and control over natural gas within a city. CP 179 (emphasis added).

If the statutory definition applies, G-P Gypsum does not owe the City tax because it first exercises dominion and control within the State outside the City.

If the plain meaning of the term applies, multiple taxation would occur. Thus, the trial court limited the term to the first exercise of dominion or control within a city. RP 67-68 (Court’s ruling, October 17, 2006).

It is axiomatic that the term is ambiguous if it can be construed to mean “first exercise of dominion or control within a city,” in face of RCW 82.12.010’s different definition and the plain meaning of the term not being limited to first use.

It is well settled, however, that ambiguous terms within a tax statute are resolved in favor of the taxpayer. CP 178. *See also, Vita Foods v. State* and authority cited therein. Thus, even if a court was

convinced that the legislative intent was to have a definition other than that provided by RCW 82.12.010, the term would have to be defined in taxpayer's favor under the rules of statutory construction.

5. Legislative Intent is Consistent With Prohibiting City Gas Use Taxes From Applying When the First Use of the Gas Occurs Outside A City.

a. The Legislature Clearly Intended State and Local Use Taxes To Be Uniform.

RCW 82.14.070 is a clear statement of legislative intent that state and local use taxes must be uniform. The trial court concluded that the intent of the Legislature in enacting the local natural gas use tax was to recapture revenue lost by deregulation of the gas industry. RP 66 (Court's ruling, October 17, 2006).

The notes to RCW 82.12.022, demonstrating a legislative intent "to adjust the utility and use tax authority of the state and cities to maintain" a revenue source, are not inconsistent with the Legislature prohibiting cities from taxing events not subject to state use tax. The Legislature wrote:

It is further the intent of this chapter that the local sales and use tax shall be imposed upon an individual taxable event simultaneously with the imposition of the state sales and use tax upon the same taxable event.

RCW 82.14.070.²⁸

²⁸ RCW 82.14.020 defines "taxable event" as "any retail sale, or any use, upon which a state tax is imposed." Despite the statute tying local and State taxable events, the State

Thus, there are two legislative intents: (i) provide a revenue source for localities and (ii) have uniform state and local use taxes. The Legislature demonstrated the relative importance of each policy by the words of the statute. Cities may raise revenue by taxing natural gas so long as cities only tax events that are taxable by the State. RCW 82.14.030 and RCW 82.14.070. *See also*, RCW 82.14.020(9) (defining “taxable event” as events “upon which a state tax is imposed.”) Uniformity in the definition of “use” is statutorily required.

b. A City Gas Use Tax Applies When First Use Occurs

Within A City.

The Defendant argued that cities could never impose their natural gas use tax if they were prohibited from levying taxes when the first use within the State occurred outside the city (see, CP 55), but city natural gas use taxes apply whenever a taxpayer assumes dominion and control over natural gas within a city. That situation occurs whenever a taxpayer takes delivery of natural gas at its facility if the facility is within a city.

argued that the Tacoma and State natural gas use taxes are imposed on different events and therefore RCW 82.14.070’s uniformity requirement is inapplicable. CP 53. The State bases that argument on the fact that the State use tax is imposed on use within the State and the city use tax is imposed on use within the city. Such an argument makes the uniformity requirement meaningless (all local use taxes are imposed on use within a locality) and ignores the purpose and language of RCW 82.14.020 and RCW 82.14.070 (local taxes are to be imposed only on events subject to a state tax and uniform with the state tax). The fact that RCW 82.14.230 does not contain the words “taxable event” is irrelevant. Statutes necessary to administer the tax, including RCW 82.12.020 and RCW 82.12.070, contain the term.

Common experience and the evidentiary record indicate that delivery at a taxpayer's facility is the norm, not the exception. The evidence is that it would be easier for most taxpayers to take delivery where the gas is actually burned. After all, there are risks of loss and liability associated with controlling natural gas. CP 175. There are also costs of transporting the gas to where it will be burned. CP 176. G-P Gypsum goes to significant effort and risks to take delivery outside Tacoma. RP 59-60 (Trial transcript, Oct. 16, 2006). G-P Gypsum often has excess gas and excess transportation rights with which it must deal. CP 175-176 *and see* Ex. Plaintiff's 17. Thus, cities have ample opportunities to impose their use taxes.²⁹

B. G-P Gypsum Adequately Pled Its Case.

The trial court failed to award Plaintiff a refund for taxes paid on gas that never reached Tacoma and on charges for transporting gas to places other than Sumner³⁰ even though it defined the taxable incident for Tacoma's use tax to be exercising dominion or control over gas in Tacoma. It concluded that any claimed relief related to such taxes was

²⁹ There is nothing in the record to suggest that natural gas users attempt to avoid local taxes by taking delivery outside a local taxing jurisdiction. Indeed, the record reflects that G-P Gypsum did not take delivery of gas outside Tacoma to avoid taxes. It took delivery outside Tacoma for gas supply reasons. RP 20-23 (Trial transcript, Oct. 16, 2006).

³⁰ All of G-P Gypsum's gas that went to Tacoma was transported first to Sumner. *See*, CP 174-176.

barred by RCW 82.32.180³¹ because the trial court believed that G-P Gypsum's refund request to the Department and its superior court complaint did not include any explanation or discussion of such taxes. *See*, CP 177. G-P Gypsum has appealed this conclusion. Assignment of Error nos. 5 and 10.

1. Assignment of Error Nos. 5, 6, and 8-11 Are Moot If the Appellate Court Concludes "Use" Means First Use Within The State.

If this Court concludes that "use" means "the first act within the State by which a taxpayer takes or assumes dominion or control over the gas", there is no issue concerning RCW 82.32.180. The trial court found that G-P Gypsum's refund claim with the Defendant was filed because the taxes sought to be refunded were paid on natural gas purchased and first used outside Tacoma and the complaint reads, "G-P owed no Tacoma local natural gas use taxes because G-P did not first take possession, dominion or control of and did not otherwise first use or consume any such gas in Tacoma." CP 6 and CP 173. The trial court did not conclude, and the Defendant does not contend, that G-P Gypsum failed to adequately plead for a refund of taxes that were first used outside Tacoma.

³¹ The trial court's conclusion also cites RCW 82.32.060 and RCW 82.32.170, but these statutes only relate to the statute of limitations which would have barred Plaintiff from amending its complaint in 2006 to claim a refund for taxes paid during the time period at issue.

2. G-P Gypsum Satisfied the Pleading Requirements of RCW

82.32.180.

a. G-P Gypsum Stated a Reason Why the Tax at Issue Should be Reduced or Abated.

G-P Gypsum stated the tax at issue should be reduced or abated because the gas on which tax was paid was first used outside Tacoma. CP 6. Some of the factual proof that G-P Gypsum first used gas outside Tacoma is that it sold and/or transferred gas outside Tacoma and transported gas to places other than Tacoma.³² See, CP 175-176.

The gas sold and/or transferred outside Tacoma and the gas transported to places other than Tacoma is gas that was first used outside Tacoma. G-P Gypsum's stated reason that it is entitled to a refund is that the gas was first used outside Tacoma. Gas sold and or transferred outside Tacoma and gas transported to places other than Tacoma is such gas.

b. RCW 82.32.180 Requires a Taxpayer to State the Reason Why the Tax Should be Reduced or Abated.

RCW 82.32.180 requires a taxpayer to state *the reason* why the tax should be reduced or abated. RCW 82.32.180 does not require taxpayers to state *all the grounds* for a refund as is required in property tax cases.

³² G-P Gypsum owed state natural gas use tax on the gas it sells outside Tacoma because all of the gas it purchased it intended to consume. Nonetheless, some of the gas had to be sold and/or transferred. G-P Gypsum had to overcome these problems in order to take delivery outside Tacoma.

Compare, RCW 82.32.180 with RCW 84.68.020. The relevant statute only requires taxpayers to state *the reason* a refund is appropriate.

c. G-P Gypsum's Stated Reason Is Adequate For A Refund of Taxes Paid On Gas That Never Entered Tacoma and On Charges for Transporting Gas To Places Other Than Tacoma.

Here, the reason stated for a refund is that gas was first used outside Tacoma. Taxpayers are not required by RCW 82.32.180 to list every possible subset or permutation of the reason nor are they required to state the evidence supporting the reason.

A specific statement that a refund is due because some of the gas was sold and/or transferred outside Tacoma and that some of the gas was transported to places other than Tacoma would have been a statement of a subset of the reason stated by G-P Gypsum. In this instance, stating the subset of the reason would also have been a statement of some of the evidence demonstrating the reason.

One of the facts that prove that the gas was first used outside Tacoma is that some gas was sold and/or transferred outside Tacoma. Thus, gas sold and/or transferred outside Tacoma is a subset of the gas first used outside Tacoma. Another of the facts that prove that gas was first used outside Tacoma is that some gas was transported to a place other

than Tacoma. Thus, gas transported to a place other than Tacoma is a subset of the gas first used outside Tacoma.

A specific statement that a refund is due because some of the gas was sold and/or transferred outside Tacoma and that some of the gas was transported to places other than Tacoma would have also been a permutation of the reason stated by G-P Gypsum.

This issue concerning the adequacy of the reason stated arises as a result of the trial court concluding that first use outside Tacoma is not an adequate reason for a refund. It is the trial court's reading of the law that "use" means first use within a city. Applying the law as determined by the trial court ("use" means first use in a city) to the evidence properly admitted at trial (gas was sold and/or transferred outside Tacoma and gas was transported to places other than Tacoma), entitles Plaintiff to a refund for taxes paid on gas that never entered Tacoma. A permutation of G-P Gypsum's stated reason is that a refund is due because gas was not "used" in Tacoma. Such a statement is nothing more than the flipside of G-P Gypsum's actual statement that a refund is due because the gas was first used outside Tacoma.

**3. RCW 82.32.180 Would Violate The Constitution If It Was
Construed To Prohibit G-P Gypsum's Refund Of Taxes on Gas Only
Used Outside Tacoma.**

The State Constitution provides the Judiciary the right to hear tax cases. Wash. Const., Art. IV, §6. While the Legislature may place certain limits on how cases are heard, the limitations must be reasonable and they cannot defeat the Judiciary's authority to hear tax cases or exercise its inherent powers to act as justice requires. *See generally, Roon v. King Cty.*, 24 Wn.2d 519 (1946), *Casco v. Thurston Cty.*, 163 Wash. 666, 2 P.2d 677 (1931) and *O'Brien v. Johnson*, 32 Wn.2d 404, 202 P.2d 248 (1949).

If RCW 82.32.180 is construed as prohibiting the trial court from awarding G-P Gypsum a refund of taxes paid on gas that was used only outside Tacoma, on the basis that G-P Gypsum did not explain or discuss in its complaint how the gas was used outside Tacoma, then RCW 82.32.180 would be an unreasonable limitation on the Judiciary's constitutional authority.

After all, G-P Gypsum claimed refund of all taxes paid on gas used outside Tacoma. The gas sold and/or transferred outside Tacoma and the gas transported to places other than Tacoma are just examples of how G-P Gypsum used gas outside of Tacoma. It would be an unreasonable

limitation on the Judiciary's authority to prohibit it from awarding refunds in cases where a taxpayer stated a reason for a refund but failed to file a statement that explained or discussed all possible subsets -- in this case, evidence -- of the stated reason, first use outside of Tacoma.

It is also unreasonable to prohibit the Judiciary from applying the law to the facts before it. Here, the evidence supporting the refund was properly admitted into the record. With the evidence supporting a refund in the record, there is no basis for denying the Courts their constitutional power to do as justice requires.³³

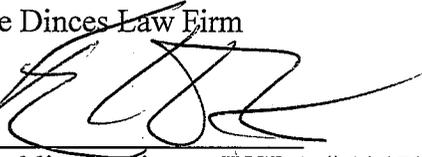
³³ Protection of the public fisc is not an adequate reason for denying the Judiciary the power to apply the facts before it to the law in this case. Here, the claimed refund far exceeds the amount to be refunded under the law as determined by the trial court. By granting the Judiciary the right to hear tax cases, the Constitution has already decided the balance between protecting the public fisc and justice in particular tax cases. The Legislature cannot change the constitutional balance.

Conclusion

For the reasons expressed above, the Judgment of the trial court denying G-P Gypsum a refund of all Tacoma natural gas use taxes paid between January 1, 1996 and December 31, 2001 should be reversed and remanded for entry of Judgment awarding Plaintiff a refund of all such taxes together with refund interest at the statutory rate from the dates of payment until the date of refund.

Respectfully submitted, this 17 day of April, 2007.

The Dinces Law Firm

By 

Franklin G. Dinces, WSBA # 13473
Geoffrey P. Knudsen, WSBA # 1324
Attorneys For Appellant
9202 Glencove Road
Gig Harbor, WA 98329
(253) 884-5942

Relevant Portions of RCW 82.12

- 82.12.02569 Exemptions—Use of tangible personal property related to a building or structure that is an integral part of a laser interferometer gravitational wave observatory.
- 82.12.0257 Exemptions—Use of tangible personal property of the operating property of a public utility by state or political subdivision.
- 82.12.0258 Exemptions—Use of tangible personal property previously used in farming and purchased from farmer at auction.
- 82.12.0259 Exemptions—Use of tangible personal property by federal corporations providing aid and relief.
- 82.12.02595 Exemption—Use of donated tangible personal property by nonprofit organization or governmental entity.
- 82.12.0261 Exemptions—Use of purebred livestock for breeding—Cattle and milk cows.
- 82.12.0262 Exemptions—Use of poultry for producing poultry and poultry products for sale.
- 82.12.0263 Exemptions—Use of fuel by extractor or manufacturer thereof.
- 82.12.0264 Exemptions—Use of dual-controlled motor vehicles by school for driver training.
- 82.12.0265 Exemptions—Use by bailee of tangible personal property consumed in research, development, etc., activities.
- 82.12.0266 Exemptions—Use by residents of motor vehicles and trailers acquired and used while members of the armed services and stationed outside the state.
- 82.12.0267 Exemptions—Use of semen in artificial insemination of livestock.
- 82.12.0268 Exemptions—Use of form lumber by persons engaged in constructing, repairing, etc., structures for consumers.
- 82.12.02685 Exemptions—Use of tangible personal property related to agricultural employee housing.
- 82.12.0269 Exemptions—Use of sand, gravel, or rock to extent of labor and service charges for mining, sorting, crushing, etc., thereof from county or city quarry for public road purposes.
- 82.12.0271 Exemptions—Use of wearing apparel only as a sample for display for sale.
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- 82.12.060 Installment sales, leases, bailments.
- 82.12.070 Tax may be paid on cash receipts basis if books are so kept—Exemption for debts deductible as worthless.
- 82.12.080 Administration.

82.12.010 Definitions. For the purposes of this chapter:

(1)(a) "Value of the article used" shall mean the consideration, whether money, credit, rights, or other property except trade-in property of like kind, expressed in terms of money, paid or given or contracted to be paid or given by the purchaser to the seller for the article of tangible personal property, the use of which is taxable under this chapter. The term includes, in addition to the consideration paid or given or contracted to be paid or given, the amount of any tariff or duty paid with respect to the importation of the article used. In case the article used is acquired by lease or by gift or is extracted, produced, or manufactured by the person using the same or is sold under conditions wherein the purchase price does not represent the true value thereof, the value of the article used shall be determined as nearly as possible according to the retail selling price at place of use of similar products of like quality and character under such rules as the department of revenue may prescribe.

(b) In case the articles used are acquired by bailment, the value of the use of the articles so used shall be in an amount representing a reasonable rental for the use of the articles so bailed, determined as nearly as possible according to the value of such use at the places of use of similar products of like quality and character under such rules as the department of revenue may prescribe. In case any such articles of tangible personal property are used in respect to the construction, repairing, decorating, or improving of, and which become or are to become an ingredient or component of, new or existing buildings or other structures under, upon, or above real property of or for the United States, any instrumentality thereof, or a county or city housing authority created pursuant to chapter 35.82 RCW, including the installing or attaching of any such articles therein or thereto, whether or not such personal property becomes a part of the realty by virtue of installation, then the value of the use of such articles so used shall be determined according to the retail selling price of such articles, or in the absence of such a selling price, as nearly as possible according to the retail selling price at place of use of similar products of like quality and character or, in the absence of either of these

selling price measures, such value may be determined upon a cost basis, in any event under such rules as the department of revenue may prescribe.

(c) In the case of articles owned by a user engaged in business outside the state which are brought into the state for no more than one hundred eighty days in any period of three hundred sixty-five consecutive days and which are temporarily used for business purposes by the person in this state, the value of the article used shall be an amount representing a reasonable rental for the use of the articles, unless the person has paid tax under this chapter or chapter 82.08 RCW upon the full value of the article used, as defined in (a) of this subsection.

(d) In the case of articles manufactured or produced by the user and used in the manufacture or production of products sold or to be sold to the department of defense of the United States, the value of the articles used shall be determined according to the value of the ingredients of such articles.

(e) In the case of an article manufactured or produced for purposes of serving as a prototype for the development of a new or improved product, the value of the article used shall be determined by: (i) The retail selling price of such new or improved product when first offered for sale; or (ii) the value of materials incorporated into the prototype in cases in which the new or improved product is not offered for sale;

(2) "Use," "used," "using," or "put to use" shall have their ordinary meaning, and shall mean the first act within this state by which the taxpayer takes or assumes dominion or control over the article of tangible personal property (as a consumer), and include installation, storage, withdrawal from storage, or any other act preparatory to subsequent actual use or consumption within this state;

(3) "Taxpayer" and "purchaser" include all persons included within the meaning of the word "buyer" and the word "consumer" as defined in chapters 82.04 and 82.08 RCW;

(4) "Retailer" means every seller as defined in RCW 82.08.010 and every person engaged in the business of selling tangible personal property at retail and every person required to collect from purchasers the tax imposed under this chapter;

(5) The meaning ascribed to words and phrases in chapters 82.04 and 82.08 RCW, insofar as applicable, shall have full force and effect with respect to taxes imposed under the provisions of this chapter. "Consumer," in addition to the meaning ascribed to it in chapters 82.04 and 82.08 RCW insofar as applicable, shall also mean any person who distributes or displays, or causes to be distributed or displayed, any article of tangible personal property, except newspapers, the primary purpose of which is to promote the sale of products or services. [1994 c 93 § 1. Prior: 1985 c 222 § 1; 1985 c 132 § 1; 1983 1st ex.s. c 55 § 2; 1975-'76 2nd ex.s. c 1 § 1; 1975 1st ex.s. c 278 § 52; 1965 ex.s. c 173 § 17; 1961 c 293 § 15; 1961 c 15 § 82.12.010; prior: 1955 c 389 § 24; 1951 1st ex.s. c 9 § 3; 1949 c 228 § 9; 1945 c 249 § 8; 1943 c 156 § 10; 1939 c 225 § 18; 1937 c 191 § 4; 1935 c 180 § 35; Rem. Supp. 1949 § 8370-35.]

Effective date—1994 c 93: "This act shall take effect July 1, 1994." [1994 c 93 § 3.]

Effective dates—1983 1st ex.s. c 55: See note following RCW 82.08.010.

Application to preexisting contracts—1975-'76 2nd ex.s. c 1; 1975 1st ex.s. c 90: "In the event any person has entered into a contract prior to July 1, 1975 or has bid upon a contract prior to July 1, 1975 and has been awarded the contract after July 1, 1975, the additional taxes imposed by chapter 90, Laws of 1975 1st ex. sess., section 5, chapter 291, Laws of 1975 1st ex. sess. and this 1975 amendatory act shall not be required to be paid by such person in carrying on activities in the fulfillment of such contract." [1975-'76 2nd ex.s. c 1 § 3; 1975 1st ex.s. c 90 § 4.]

Severability—1975-'76 2nd ex.s. c 1: "If any provision of this 1975 amendatory act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1975-'76 2nd ex.s. c 1 § 4.]

Construction—Severability—1975 1st ex.s. c 278: See notes following RCW 11.08.160.

Effective date—1965 ex.s. c 173: See note following RCW 82.04.050.

82.12.020 Use tax imposed. (1) There is hereby levied and there shall be collected from every person in this state a tax or excise for the privilege of using within this state as a consumer any article of tangible personal property purchased at retail, or acquired by lease, gift, repossession, or bailment, or extracted or produced or manufactured by the person so using the same, or otherwise furnished to a person engaged in any business taxable under RCW 82.04.280 (2) or (7), or any amusement or recreation service defined as a retail sale in RCW 82.04.050(3)(a).

(2) This tax shall apply to the use of every service defined as a retail sale in RCW 82.04.050(3)(a) and the use of every article of tangible personal property, including property acquired at a casual or isolated sale, and including byproducts used by the manufacturer thereof, except as hereinafter provided, irrespective of whether the article or similar articles are manufactured or are available for purchase within this state.

(3) Except as provided in RCW 82.12.0252, payment by one purchaser or user of tangible personal property or service of the tax imposed by chapter 82.08 or 82.12 RCW shall not have the effect of exempting any other purchaser or user of the same property or service from the taxes imposed by such chapters.

(4) The tax shall be levied and collected in an amount equal to the value of the article used by the taxpayer multiplied by the rate in effect for the retail sales tax under RCW 82.08.020. [1996 c 148 § 5; 1994 c 93 § 2; 1983 c 7 § 7; 1981 2nd ex.s. c 8 § 2; 1980 c 37 § 79; 1977 ex.s. c 324 § 3; 1975-'76 2nd ex.s. c 130 § 2; 1975-'76 2nd ex.s. c 1 § 2; 1971 ex.s. c 281 § 10; 1969 ex.s. c 262 § 32; 1967 ex.s. c 149 § 22; 1965 ex.s. c 173 § 18; 1961 c 293 § 9; 1961 c 15 § 82.12.020. Prior: 1959 ex.s. c 3 § 10; 1955 ex.s. c 10 § 3; 1955 c 389 § 25; 1949 c 228 § 7; 1943 c 156 § 8; 1941 c 76 § 6; 1939 c 225 § 14; 1937 c 191 § 1; 1935 c 180 § 31; Rem. Supp. 1949 § 8370-31.]

Severability—Effective date—1996 c 148: See notes following RCW 82.04.050.

Effective date—1994 c 93: See note following RCW 82.12.010.

Construction—Severability—Effective dates—1983 c 7: See notes following RCW 82.08.020.

Intent—1980 c 37: See note following RCW 82.04.4281.

Effective date—1975-'76 2nd ex.s. c 130: See note following RCW 82.08.020.

Application to preexisting contracts—1975-'76 2nd ex.s. c 1: See note following RCW 82.12.010.

Severability—1975-'76 2nd ex.s. c 1: See note following RCW 82.12.010.

82.12.022 Natural or manufactured gas—Use tax imposed—Exemption. (1) There is hereby levied and there shall be collected from every person in this state a use tax for the privilege of using natural gas or manufactured gas within this state as a consumer.

(2) The tax shall be levied and collected in an amount equal to the value of the article used by the taxpayer multiplied by the rate in effect for the public utility tax on gas distribution businesses under RCW 82.16.020. The "value of the article used" does not include any amounts that are paid for the hire or use of a gas distribution business as defined in RCW 82.16.010(7) in transporting the gas subject to tax under this subsection if those amounts are subject to tax under that chapter.

(3) The tax levied in this section shall not apply to the use of natural or manufactured gas delivered to the consumer by other means than through a pipeline.

(4) The tax levied in this section shall not apply to the use of natural or manufactured gas if the person who sold the gas to the consumer has paid a tax under RCW 82.16.020 with respect to the gas for which exemption is sought under this subsection.

(5) There shall be a credit against the tax levied under this section in an amount equal to any tax paid by:

(a) The person who sold the gas to the consumer when that tax is a gross receipts tax similar to that imposed pursuant to RCW 82.16.020 by another state with respect to the gas for which a credit is sought under this subsection; or

(b) The person consuming the gas upon which a use tax similar to the tax imposed by this section was paid to another state with respect to the gas for which a credit is sought under this subsection.

(6) The use tax hereby imposed shall be paid by the consumer to the department.

(7) There is imposed a reporting requirement on the person who delivered the gas to the consumer to make a quarterly report to the department. Such report shall contain the volume of gas delivered, name of the consumer to whom delivered, and such other information as the department shall require by rule.

(8) The department may adopt rules under chapter 34.05 RCW for the administration and enforcement of sections 1 through 6, chapter 384, Laws of 1989. [1994 c 124 § 9; 1989 c 384 § 3.]

Intent—1989 c 384: "Due to a change in the federal regulations governing the sale of brokered natural gas, cities have lost significant revenues from the utility tax on natural gas. It is therefore the intent of the legislature to adjust the utility and use tax authority of the state and cities to maintain this revenue source for the municipalities and provide equality of taxation between intrastate and interstate transactions." [1989 c 384 § 1.]

Effective date—1989 c 384: "This act shall take effect July 1, 1990." [1989 c 384 § 7.]

82.12.023 Natural or manufactured gas, exempt from use tax imposed by RCW 82.12.020. The tax levied by RCW 82.12.020 shall not apply in respect to the use of natural or manufactured gas that is taxable under RCW 82.12.022. [1994 c 124 § 10; 1989 c 384 § 5.]

Intent—Effective date—1989 c 384: See notes following RCW 82.12.022.

82.12.0251 Exemptions—Use by nonresident while temporarily within Washington of tangible personal property brought into Washington—Use by nonresident of motor vehicle or trailer licensed in another state—Use by resident or nonresident member of armed forces of household goods, personal effects, and private automobiles acquired in another state while a resident—"State" defined. The provisions of this chapter shall not apply in respect to the use of any article of tangible personal property brought into the state of Washington by a nonresident thereof for his or her use or enjoyment while temporarily within the state of Washington unless such property is used in conducting a nontransitory business activity within the state of Washington; or in respect to the use by a nonresident of Washington of a motor vehicle or trailer which is registered or licensed under the laws of the state of his or her residence, and which is not required to be registered or licensed under the laws of Washington, including motor vehicles or trailers exempt pursuant to a declaration issued by the department of licensing under RCW 46.85.060; or in respect to the use of household goods, personal effects, and private automobiles by a bona fide resident of Washington or nonresident members of the armed forces who are stationed in Washington pursuant to military orders, if such articles were acquired and used by such person in another state while a bona fide resident thereof and such acquisition and use occurred more than ninety days prior to the time he or she entered Washington.

For purposes of this section, "state" means a state of the United States, any political subdivision thereof, the District of Columbia, and any foreign country or political subdivision thereof. [1987 c 27 § 1; 1985 c 353 § 4; 1983 c 26 § 2; 1980 c 37 § 51. Formerly RCW 82.12.030(1).]

Intent—1980 c 37: See note following RCW 82.04.4281.

82.12.0252 Exemptions—Use of tangible personal property upon which tax has been paid—Use of tangible personal property acquired by a previous bailee from same bailor before June 9, 1961. The provisions of this chapter shall not apply in respect to the use of any article of tangible personal property purchased at retail or acquired by lease, gift or bailment if the sale thereof to, or the use thereof by, the present user or his bailor or donor has already been subjected to the tax under chapter 82.08 or 82.12 RCW and such tax has been paid by the present user or by his bailor or donor; or in respect to the use of property acquired by bailment and such tax has once been paid based on reasonable rental as determined by RCW 82.12.060 measured by the value of the article at time of first use multiplied by the tax rate imposed by chapter 82.08 or 82.12 RCW as of the time of first use; or in respect to the use of any article of tangible personal property acquired by bailment, if the property was acquired by a previous bailee from the same bailor for use in the same general activity and such original bailment was prior to June 9, 1961. [1980 c 37 § 52. Formerly RCW 82.12.030(2).]

Intent—1980 c 37: See note following RCW 82.04.4281.

Relevant Portions of RCW 82.14

Findings—Intent—Effective date—1996 c 149: See notes following RCW 82.32.050.

82.12.060 Installment sales, leases, bailments. In the case of installment sales and leases of personal property, the department, by regulation, may provide for the collection of taxes upon the installments of the purchase price, or amount of rental, as of the time the same fall due.

In the case of property acquired by bailment, the department, by regulation, may provide for payment of the tax due in installments based on the reasonable rental for the property as determined under RCW 82.12.010(1). [1975 1st ex.s. c 278 § 54; 1961 c 293 § 16; 1961 c 15 § 82.12.060. Prior: 1959 ex.s. c 3 § 13; 1959 c 197 § 8; prior: 1941 c 178 § 11, part; Rem. Supp. 1941 § 8370-34a, part.]

Construction—Severability—1975 1st ex.s. c 278: See notes following RCW 11.08.160.

82.12.070 Tax may be paid on cash receipts basis if books are so kept—Exemption for debts deductible as worthless. The department of revenue, by general regulation, shall provide that a taxpayer whose regular books of account are kept on a cash receipts basis may file returns based upon his cash receipts for each reporting period and pay the tax herein provided upon such basis in lieu of reporting and paying the tax on all sales made during such period. A taxpayer filing returns on a cash receipts basis is not required to pay such tax on debts which are deductible as worthless for federal income tax purposes. [1982 1st ex.s. c 35 § 38; 1975 1st ex.s. c 278 § 55; 1961 c 15 § 82.12.070. Prior: 1959 ex.s. c 3 § 14; 1959 c 197 § 9; prior: 1941 c 178 § 11, part; Rem. Supp. 1941 § 8370-34a, part.]

Severability—Effective dates—1982 1st ex.s. c 35: See notes following RCW 82.08.020.

Construction—Severability—1975 1st ex.s. c 278: See notes following RCW 11.08.160.

82.12.080 Administration. The provisions of chapter 82.32 RCW, insofar as applicable, shall have full force and application with respect to taxes imposed under the provisions of this chapter. [1961 c 15 § 82.12.080. Prior: 1949 c 228 § 9, part; 1945 c 249 § 8, part; 1943 c 156 § 10, part; 1939 c 225 § 18, part; 1937 c 191 § 4, part; 1935 c 180 § 35, part; Rem. Supp. 1949 § 8470-35, part.]

Chapter 82.14

LOCAL RETAIL SALES AND USE TAXES

Sections

- 82.14.010 Legislative finding—Purpose.
- 82.14.020 Definitions—Where retail sale occurs.
- 82.14.030 Sales and use taxes authorized—Additional taxes authorized—Maximum rates.
- 82.14.032 Alteration of tax rate pursuant to government service agreement.
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- 82.14.350 Sales and use tax for juvenile detention facilities and jails—Colocation.
- 82.14.360 Special stadium sales and use taxes.
- 82.14.900 Severability—1970 ex.s. c 94.

82.14.010 Legislative finding—Purpose. The legislature finds that the several counties and cities of the state lack adequate sources of revenue to carry out essential county and municipal purposes. The legislature further finds that the most efficient and appropriate methods of deriving revenues for such purposes is to vest additional taxing powers in the governing bodies of counties and cities which they may or may not implement. The legislature intends, by enacting this chapter, to provide the means by which essential county and municipal purposes can be financially served should they choose to employ them. [1970 ex.s. c 94 § 1.]

82.14.020 Definitions—Where retail sale occurs. For purposes of this chapter:

(1) A retail sale consisting solely of the sale of tangible personal property shall be deemed to have occurred at the retail outlet at or from which delivery is made to the consumer;

(2) A retail sale consisting essentially of the performance of personal business or professional services shall be deemed to have occurred at the place at which such services were primarily performed;

(3) A retail sale consisting of the rental of tangible personal property shall be deemed to have occurred (a) in the case of a rental involving periodic rental payments, at the primary place of use by the lessee during the period covered by each payment, or (b) in all other cases, at the place of first use by the lessee;

(4) A retail sale within the scope of the second paragraph of RCW 82.04.050, and a retail sale of taxable personal property to be installed by the seller shall be deemed to have occurred at the place where the labor and services involved were primarily performed;

(5) A retail sale consisting of the providing to a consumer of telephone service, as defined in RCW 82.04.065, other than a sale of tangible personal property under subsection (1) of this section or a rental of tangible personal property under subsection (3) of this section, shall be deemed to have occurred at the situs of the telephone or other instrument through which the telephone service is rendered;

(6) "City" means a city or town;

(7) The meaning ascribed to words and phrases in chapters 82.04, 82.08 and 82.12 RCW, as now or hereafter amended, insofar as applicable, shall have full force and effect with respect to taxes imposed under authority of this chapter;

(8) "Taxable event" shall mean any retail sale, or any use of an article of tangible personal property, upon which a state tax is imposed pursuant to chapter 82.08 or 82.12 RCW, as they now exist or may hereafter be amended: PROVIDED, HOWEVER, That the term shall not include a retail sale taxable pursuant to RCW 82.08.150, as now or hereafter amended;

(9) "Treasurer or other legal depository" shall mean the treasurer or legal depository of a county or city. [1983 2nd ex.s. c 3 § 31; 1982 c 211 § 1; 1981 c 144 § 4; 1970 ex.s. c 94 § 3.]

Construction—Severability—Effective dates—1983 2nd ex.s. c 3: See notes following RCW 82.04.255.

Intent—Severability—Effective date—1981 c 144: See notes following RCW 82.16.010.

82.14.030 Sales and use taxes authorized—Additional taxes authorized—Maximum rates. (1) The governing body of any county or city while not required by legislative mandate to do so, may, by resolution or ordinance for the purposes authorized by this chapter, fix and impose a sales and use tax in accordance with the terms of this chapter. Such tax shall be collected from those persons who are taxable by the state pursuant to chapters 82.08 and 82.12 RCW, upon the occurrence of any taxable event within the county or city as the case may be: PROVIDED, That except as provided in RCW 82.14.230, this sales and use tax shall not apply to natural or manufactured gas. The rate of such tax imposed by a county shall be five-tenths of one percent of the selling price (in the case of a sales tax) or value of the article used (in the case of a use tax). The rate of such tax imposed by a city shall not exceed five-tenths of one percent of the selling price (in the case of a sales tax) or value of the article used (in the case of a use tax): PROVIDED, HOWEVER, That in the event a county shall impose a sales and use tax under this subsection, the rate of such tax imposed under this subsection by any city therein shall not exceed

four hundred and twenty-five one-thousandths of one percent.

(2) Subject to the enactment into law of the 1982 amendment to RCW 82.02.020 by section 5, chapter 49, Laws of 1982 1st ex. sess., in addition to the tax authorized in subsection (1) of this section, the governing body of any county or city may by resolution or ordinance impose an additional sales and use tax in accordance with the terms of this chapter. Such additional tax shall be collected upon the same taxable events upon which the tax imposed under subsection (1) of this section is levied. The rate of such additional tax imposed by a county shall be up to five-tenths of one percent of the selling price (in the case of a sales tax) or value of the article used (in the case of a use tax). The rate of such additional tax imposed by a city shall be up to five-tenths of one percent of the selling price (in the case of a sales tax) or value of the article used (in the case of a use tax): PROVIDED HOWEVER, That in the event a county shall impose a sales and use tax under this subsection at a rate equal to or greater than the rate imposed under this subsection by a city within the county, the county shall receive fifteen percent of the city tax: PROVIDED FURTHER, That in the event that the county shall impose a sales and use tax under this subsection at a rate which is less than the rate imposed under this subsection by a city within the county, the county shall receive that amount of revenues from the city tax equal to fifteen percent of the rate of tax imposed by the county under this subsection. The authority to impose a tax under this subsection is intended in part to compensate local government for any losses from the phase-out of the property tax on business inventories. [1989 c 384 § 6; 1982 1st ex.s. c 49 § 17; 1970 ex.s. c 94 § 4.]

Intent—Effective date—1989 c 384: See notes following RCW 82.12.022.

Intent—Construction—Effective date—Fire district funding—1982 1st ex.s. c 49: See notes following RCW 35.21.710.

Additional tax for high capacity transportation service: RCW 81.104.170.
Imposition of additional tax on sale of real property in lieu of tax under RCW 82.14.030(2): RCW 82.46.010(3).

82.14.032 Alteration of tax rate pursuant to government service agreement. The rate of sales and use tax imposed by a city under RCW 82.14.030 (1) and (2) may be altered pursuant to a government service agreement as provided in RCW 36.115.040 and 36.115.050. [1994 c 266 § 11.]

82.14.034 Alteration of county's share of city's tax receipts pursuant to government service agreement. The percentage of a city's sales and use tax receipts that a county receives under RCW 82.14.030 (1) and (2) may be altered pursuant to a government service agreement as provided in RCW 36.115.040 and 36.115.050. [1994 c 266 § 12.]

82.14.036 Imposition or alteration of additional taxes—Referendum petition to repeal—Procedure—Exclusive method. Any referendum petition to repeal a county or city ordinance imposing a tax or altering the rate of the tax authorized under RCW 82.14.030(2) shall be filed with a filing officer, as identified in the ordinance, within seven days of passage of the ordinance. Within ten days, the filing officer shall confer with the petitioner concerning form

taxable event within the county. The rate of tax shall not exceed 0.017 percent of the selling price in the case of a sales tax or value of the article used in the case of a use tax.

(2) The tax imposed under subsection (1) of this section shall be deducted from the amount of tax otherwise required to be collected or paid over to the department of revenue under chapter 82.08 or 82.12 RCW. The department of revenue shall perform the collection of such taxes on behalf of the county at no cost to the county.

(3) Moneys collected under this section shall only be used for the purpose of paying the principal and interest payments on bonds issued by a county to construct a baseball stadium.

(4) No tax may be collected under this section before January 1, 1996, and no tax may be collected under this section unless the taxes under RCW 82.14.360 are being collected. The tax imposed in this section shall expire when the bonds issued for the construction of the baseball stadium are retired, but not more than twenty years after the tax is first collected.

(5) As used in this section, "baseball stadium" means a baseball stadium with natural turf and a retractable roof or canopy, together with associated parking facilities, constructed in the largest city in a county with a population of one million or more. [1995 3rd sp.s. c 1 § 101.]

Part headings not law—1995 3rd sp.s. c 1: "Part headings as used in this act constitute no part of the law." [1995 3rd sp.s. c 1 § 309.]

Effective date—1995 3rd sp.s. c 1: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and shall take effect immediately [October 17, 1995]." [1995 3rd sp.s. c 1 § 310.]

Baseball stadium construction agreement: RCW 36.100.037.

State contribution for baseball stadium limited: RCW 82.14.0486.

82.14.0486 State contribution for baseball stadium limited. Sections 101 through 105, chapter 1, Laws of 1995 3rd sp. sess. constitute the entire state contribution for a baseball stadium, as defined in RCW 82.14.0485. The state will not make any additional contributions based on revised cost or revenue estimates, cost overruns, unforeseen circumstances, or any other reason. [1995 3rd sp.s. c 1 § 106.]

Part headings not law—Effective date—1995 3rd sp.s. c 1: See notes following RCW 82.14.0485.

82.14.049 Sales and use tax for public sports facilities—Tax upon retail rental car rentals. The legislative authority of any county may impose a sales and use tax, in addition to the tax authorized by RCW 82.14.030, upon retail car rentals within the county that are taxable by the state under chapters 82.08 and 82.12 RCW. The rate of tax shall be one percent of the selling price in the case of a sales tax or rental value of the vehicle in the case of a use tax. Proceeds of the tax shall not be used to subsidize any professional sports team and shall be used solely for the following purposes:

- (1) Acquiring, constructing, maintaining, or operating public sports stadium facilities;
- (2) Engineering, planning, financial, legal, or professional services incidental to public sports stadium facilities;
- (3) Youth or amateur sport activities or facilities; or
- (4) Debt or refinancing debt issued for the purposes of subsection (1) of this section.

At least seventy-five percent of the tax imposed under this section shall be used for the purposes of subsections (1), (2), and (4) of this section. [1997 c 220 § 502 (Referendum Bill No. 48, approved June 17, 1997); 1992 c 194 § 3.]

Referendum—Other legislation limited—Legislators' personal intent not indicated—Reimbursements for election—Voters' pamphlet, election requirements—1997 c 220: See RCW 36.102.800 through 36.102.803.

Part headings not law—Severability—1997 c 220: See RCW 36.102.900 and 36.102.901.

Legislative intent—1992 c 194: See note following RCW 82.08.020.

Effective dates—1992 c 194: See note following RCW 46.04.466.

82.14.0494 Sales and use tax for stadium and exhibition center—Deduction from tax otherwise required—Transfer and deposit of revenues. (Contingent expiration date.) (1) The legislative authority of a county that has created a public stadium authority to develop a stadium and exhibition center under RCW 36.102.050 may impose a sales and use tax in accordance with this chapter. The tax is in addition to other taxes authorized by law and shall be collected from those persons who are taxable by the state under chapters 82.08 and 82.12 RCW upon the occurrence of any taxable event within the county. The rate of tax shall be 0.016 percent of the selling price in the case of a sales tax or value of the article used in the case of a use tax.

(2) The tax imposed under subsection (1) of this section shall be deducted from the amount of tax otherwise required to be collected or paid over to the department of revenue under chapter 82.08 or 82.12 RCW. The department of revenue shall perform the collection of such taxes on behalf of the county at no cost to the county.

(3) Before the issuance of bonds in RCW 43.99N.020, all revenues collected on behalf of the county under this section shall be transferred to the public stadium authority. After bonds are issued under RCW 43.99N.020, all revenues collected on behalf of the county under this section shall be deposited in the stadium and exhibition center account under RCW 43.99N.060.

(4) The definitions in RCW 36.102.010 apply to this section.

(5) This section expires on the earliest of the following dates:

(a) December 31, 1999, if the conditions for issuance of bonds under RCW 43.99N.020 have not been met before that date;

(b) The date on which all bonds issued under RCW 43.99N.020 have been retired; or

(c) Twenty-three years after the date the tax under this section is first imposed. [1997 c 220 § 204 (Referendum Bill No. 48, approved June 17, 1997).]

Referendum—Other legislation limited—Legislators' personal intent not indicated—Reimbursements for election—Voters' pamphlet, election requirements—1997 c 220: See RCW 36.102.800 through 36.102.803.

Part headings not law—Severability—1997 c 220: See RCW 36.102.900 and 36.102.901.

82.14.050 Administration and collection—Local sales and use tax account. (Effective until July 1, 2004.) The counties, cities, and transportation authorities under RCW 82.14.045, public facilities districts under chapters

36.100 and 35.57 RCW, public transportation benefit areas under RCW 82.14.440, and regional transportation investment districts shall contract, prior to the effective date of a resolution or ordinance imposing a sales and use tax, the administration and collection to the state department of revenue, which shall deduct a percentage amount, as provided by contract, not to exceed two percent of the taxes collected for administration and collection expenses incurred by the department. The remainder of any portion of any tax authorized by this chapter that is collected by the department of revenue shall be deposited by the state department of revenue in the local sales and use tax account hereby created in the state treasury. Moneys in the local sales and use tax account may be spent only for distribution to counties, cities, transportation authorities, public facilities districts, public transportation benefit areas, and regional transportation investment districts imposing a sales and use tax. All administrative provisions in chapters 82.03, 82.08, 82.12, and 82.32 RCW, as they now exist or may hereafter be amended, shall, insofar as they are applicable to state sales and use taxes, be applicable to taxes imposed pursuant to this chapter. Except as provided in RCW 43.08.190, all earnings of investments of balances in the local sales and use tax account shall be credited to the local sales and use tax account and distributed to the counties, cities, transportation authorities, public facilities districts, public transportation benefit areas, and regional transportation investment districts monthly. [2003 c 83 § 208; 2002 c 56 § 406; 1999 c 165 § 14; 1991 sp.s. c 13 § 34; 1991 c 207 § 2; 1990 2nd ex.s. c 1 § 201; 1985 c 57 § 81; 1981 2nd ex.s. c 4 § 10; 1971 ex.s. c 296 § 3; 1970 ex.s. c 94 § 6.]

Findings—Intent—Captions, part headings not law—Severability—Effective date—2003 c 83: See notes following RCW 36.57A.200.

Captions and subheadings not law—Severability—2002 c 56: See RCW 36.120.900 and 36.120.901.

Severability—1999 c 164: See RCW 35.57.900.

Effective dates—Severability—1991 sp.s. c 13: See notes following RCW 18.08.240.

Applicability—1990 2nd ex.s. c 1 §§ 201-204: "Sections 201 through 204 of this act shall not be effective for earnings on balances prior to July 1, 1990, regardless of when a distribution is made." [1990 2nd ex.s. c 1 § 205.]

Severability—1990 2nd ex.s. c 1: See note following RCW 82.14.300.

Effective date—1985 c 57: See note following RCW 18.04.105.

Severability—1981 2nd ex.s. c 4: See note following RCW 43.30.325.

Legislative finding, declaration—Severability—1971 ex.s. c 296: See notes following RCW 82.14.045.

82.14.050 Administration and collection—Local sales and use tax account. (Effective July 1, 2004.) The counties, cities, and transportation authorities under RCW 82.14.045, public facilities districts under chapters 36.100 and 35.57 RCW, public transportation benefit areas under RCW 82.14.440, and regional transportation investment districts shall contract, prior to the effective date of a resolution or ordinance imposing a sales and use tax, the administration and collection to the state department of revenue, which shall deduct a percentage amount, as provided by contract, not to exceed two percent of the taxes collected for administration and collection expenses incurred by the department. The remainder of any portion of any tax authorized by this chapter that is collected by the department of revenue shall be depos-

ited by the state department of revenue in the local sales and use tax account hereby created in the state treasury. Moneys in the local sales and use tax account may be spent only for distribution to counties, cities, transportation authorities, public facilities districts, public transportation benefit areas, and regional transportation investment districts imposing a sales and use tax. All administrative provisions in chapters 82.03, 82.08, 82.12, and 82.32 RCW, as they now exist or may hereafter be amended, shall, insofar as they are applicable to state sales and use taxes, be applicable to taxes imposed pursuant to this chapter. Counties, cities, transportation authorities, public facilities districts, and regional transportation investment districts may not conduct independent sales or use tax audits of sellers registered under the streamlined sales tax agreement. Except as provided in RCW 43.08.190, all earnings of investments of balances in the local sales and use tax account shall be credited to the local sales and use tax account and distributed to the counties, cities, transportation authorities, public facilities districts, public transportation benefit areas, and regional transportation investment districts monthly. [2003 c 168 § 201; 2003 c 83 § 208; 2002 c 56 § 406; 1999 c 165 § 14; 1991 sp.s. c 13 § 34; 1991 c 207 § 2; 1990 2nd ex.s. c 1 § 201; 1985 c 57 § 81; 1981 2nd ex.s. c 4 § 10; 1971 ex.s. c 296 § 3; 1970 ex.s. c 94 § 6.]

Reviser's note: This section was amended by 2003 c 83 § 208 and by 2003 c 168 § 201, each without reference to the other. Both amendments are incorporated in the publication of this section under RCW 1.12.025(2). For rule of construction, see RCW 1.12.025(1).

Effective dates—Part headings not law—2003 c 168: See notes following RCW 82.08.010.

Findings—Intent—Captions, part headings not law—Severability—Effective date—2003 c 83: See notes following RCW 36.57A.200.

Captions and subheadings not law—Severability—2002 c 56: See RCW 36.120.900 and 36.120.901.

Severability—1999 c 164: See RCW 35.57.900.

Effective dates—Severability—1991 sp.s. c 13: See notes following RCW 18.08.240.

Applicability—1990 2nd ex.s. c 1 §§ 201-204: "Sections 201 through 204 of this act shall not be effective for earnings on balances prior to July 1, 1990, regardless of when a distribution is made." [1990 2nd ex.s. c 1 § 205.]

Severability—1990 2nd ex.s. c 1: See note following RCW 82.14.300.

Effective date—1985 c 57: See note following RCW 18.04.105.

Severability—1981 2nd ex.s. c 4: See note following RCW 43.30.325.

Legislative finding, declaration—Severability—1971 ex.s. c 296: See notes following RCW 82.14.045.

82.14.055 Tax changes. (Effective until July 1, 2004.)

(1) Except as provided in subsection (2) of this section, a local sales and use tax change shall take effect (a) no sooner than seventy-five days after the department receives notice of the change and (b) only on the first day of January, April, July, or October.

(2) In the case of a local sales and use tax that is a credit against the state sales tax or use tax, a local sales and use tax change shall take effect (a) no sooner than thirty days after the department receives notice of the change and (b) only on the first day of a month.

(3) For the purposes of this section, "local sales and use tax change" means enactment or revision of local sales and use taxes under this chapter or any other statute, including changes resulting from referendum or annexation. [2001 c 320 § 7; 2000 c 104 § 2.]

chapter which is collected by the department of revenue shall be deposited by the state department of revenue in the local sales and use tax account hereby created in the state treasury. Moneys in the local sales and use tax account may be spent only for distribution to counties, cities, transportation authorities, and public facilities districts imposing a sales and use tax. All administrative provisions in chapters 82.03, 82.08, 82.12, and 82.32 RCW, as they now exist or may hereafter be amended, shall, insofar as they are applicable to state sales and use taxes, be applicable to taxes imposed pursuant to this chapter. Except as provided in RCW 43.08.190, all earnings of investments of balances in the local sales and use tax account shall be credited to the local sales and use tax account and distributed to the counties, cities, transportation authorities, and public facilities districts monthly. [1991 sp.s. c 13 § 34; 1991 c 207 § 2; 1990 2nd ex.s. c 1 § 201; 1985 c 57 § 81; 1981 2nd ex.s. c 4 § 10; 1971 ex.s. c 296 § 3; 1970 ex.s. c 94 § 6.]

Effective dates—Severability—1991 sp.s. c 13: See notes following RCW 18.08.240.

Applicability—1990 2nd ex.s. c 1 §§ 201-204: "Sections 201 through 204 of this act shall not be effective for earnings on balances prior to July 1, 1990, regardless of when a distribution is made." [1990 2nd ex.s. c 1 § 205.]

Severability—1990 2nd ex.s. c 1: See note following RCW 82.14.300.

Effective date—1985 c 57: See note following RCW 18.04.105.

Severability—1981 2nd ex.s. c 4: See note following RCW 43.85.130.

Legislative finding, declaration—Severability—1971 ex.s. c 296: See notes following RCW 82.14.045.

82.14.060 Distributions to counties, cities, transportation authorities, and public facilities districts—Imposition at excess rates, effect. Monthly the state treasurer shall make distribution from the local sales and use tax account to the counties, cities, transportation authorities, and public facilities districts the amount of tax collected on behalf of each taxing authority, less the deduction provided for in RCW 82.14.050. The state treasurer shall make the distribution under this section without appropriation.

In the event that any ordinance or resolution imposes a sales and use tax at a rate in excess of the applicable limits contained herein, such ordinance or resolution shall not be considered void in toto, but only with respect to that portion of the rate which is in excess of the applicable limits contained herein. [1991 c 207 § 3; 1990 2nd ex.s. c 1 § 202; 1981 2nd ex.s. c 4 § 11; 1971 ex.s. c 296 § 4; 1970 ex.s. c 94 § 7.]

Applicability—1990 2nd ex.s. c 1: See note following RCW 82.14.050.

Severability—1990 2nd ex.s. c 1: See note following RCW 82.14.300.

Severability—1981 2nd ex.s. c 4: See note following RCW 43.85.130.

Legislative finding, declaration—Severability—1971 ex.s. c 296: See notes following RCW 82.14.045.

82.14.070 Consistency and uniformity with other taxes—Rules—Ordinances—Effective dates. It is the intent of this chapter that any local sales and use tax adopted pursuant to this chapter be as consistent and uniform as possible with the state sales and use tax and with other local

sales and use taxes adopted pursuant to this chapter. It is further the intent of this chapter that the local sales and use tax shall be imposed upon an individual taxable event simultaneously with the imposition of the state sales or use tax upon the same taxable event. The rule making powers of the state department of revenue contained in RCW 82.08.060 and 82.32.300 shall be applicable to this chapter. The department shall, as soon as practicable, and with the assistance of the appropriate associations of county prosecutors and city attorneys, draft a model resolution and ordinance. No resolution or ordinance or any amendment thereto adopted pursuant to this chapter shall be effective, except upon the first day of a calendar month. [1970 ex.s. c 94 § 10.]

82.14.080 Deposit of tax prior to due date—Credit against future tax or assessment—When fund designation permitted—Use of tax revenues received in connection with large construction projects. The taxes provided by this chapter may be deposited by any taxpayer prior to the due date thereof with the treasurer or other legal depository for the benefit of the funds to which they belong to be credited against any future tax or assessment that may be levied or become due from the taxpayer: PROVIDED, That the taxpayer may with the concurrence of the legislative authority designate a particular fund of such county or city against which such prepayment of tax or assessment is made. Such prepayment of taxes or assessments shall not be considered to be a debt for the purpose of the limitation of indebtedness imposed by law on a county or city.

By agreement made pursuant to chapter 39.34 RCW, counties or cities may utilize tax revenues received under the authority of this chapter in connection with large construction projects, including energy facilities as defined in RCW 80.50.020, for any purpose within their power or powers, privileges or authority exercised or capable of exercise by such counties or cities including, but not limited to, the purpose of the mitigation of socioeconomic impacts that may be caused by such large construction projects: PROVIDED, That the taxable event need not take place within the jurisdiction where the socioeconomic impact occurs if an intergovernmental agreement provides for redistribution. [1982 c 211 § 2.]

82.14.090 Payment of tax prior to taxable event—When permitted—Deposit with treasurer—Credit against future tax—When fund designation permitted. When permitted by resolution or ordinance, any tax authorized by this chapter may be paid prior to the taxable event to which it may be attributable. Such prepayment shall be made by deposit with the treasurer or other legal depository for the benefit of the funds to which they belong. They shall be credited by any county or city against any future tax that may become due from a taxpayer: PROVIDED, That the taxpayer with the concurrence of the legislative authority may designate a particular fund of such county or city against which such prepayment of tax is made. Prepayment of taxes under this section shall not relieve any taxpayer from remitting the full amount of any tax imposed under the authority of this chapter upon the occurrence of the taxable event. [1982 c 211 § 3.]

the number of months the city imposes the tax authorized under RCW 82.14.030(2) at the full rate.

(d) The department of revenue shall advise the state treasurer of the amounts calculated under (b) and (c) of this subsection and the state treasurer shall distribute these amounts to the new city from the municipal sales and use tax equalization account subject to the limitations imposed in subsection (6) of this section.

(e) Revenues estimated under this subsection shall not affect the calculation of the state-wide weighted average per capita level of revenues for all cities made under subsection (1) of this section.

(6) If inadequate revenues exist in the municipal sales and use tax equalization account to make the distributions under subsection (3), (4), or (5) of this section, then the distributions under subsections (3), (4), and (5) of this section shall be reduced ratably among the qualifying cities. At such time during the year as additional funds accrue to the municipal sales and use tax equalization account, additional distributions shall be made under subsections (3), (4), and (5) of this section to the cities.

(7) If the level of revenues in the municipal sales and use tax equalization account exceeds the amount necessary to make the distributions under subsections (2) through (5) of this section, then the additional revenues shall be apportioned among the several cities within the state ratably on the basis of population as last determined by the office of financial management: PROVIDED, That no such distribution shall be made to those cities receiving a distribution under subsection (2) of this section. [1996 c 64 § 1; 1991 sp.s. c 13 § 16; 1990 2nd ex.s. c 1 § 701; 1990 c 42 § 314; 1985 c 57 § 83; 1984 c 225 § 2; 1982 1st ex.s. c 49 § 22.]

Effective date—1996 c 64: "This act shall take effect July 1, 1996." [1996 c 64 § 2.]

Effective dates—Severability—1991 sp.s. c 13: See notes following RCW 18.08.240.

Effective dates—1990 2nd ex.s. c 1: See note following RCW 84.52.010.

Severability—1990 2nd ex.s. c 1: See note following RCW 82.14.300.

Purpose—Headings—Severability—Effective dates—Application—Implementation—1990 c 42: See notes following RCW 82.36.025.

Effective date—1985 c 57: See note following RCW 18.04.105.

Intent—1984 c 225: "It is the intent of the legislature to provide for the allocation of moneys by the department of revenue from the municipal sales and use tax equalization account to cities and towns initially incorporated on or after January 1, 1983." [1984 c 225 § 1.]

Applicability—1984 c 225: "Sections 1 and 2 of this act apply to distributions for calendar year 1984 and thereafter which are made to cities and towns that were initially incorporated on or after January 1, 1983, and that impose the tax authorized by RCW 82.14.030(1)." [1984 c 225 § 3.] "Sections 1 and 2 of this act" consist of the intent section footnoted above and the 1984 c 225 amendment to RCW 82.14.210.

Rules—1984 c 225: "The department of revenue shall adopt rules as necessary to implement this act." [1984 c 225 § 7.]

Intent—Construction—Effective date—Fire district funding—1982 1st ex.s. c 49: See notes following RCW 35.21.710.

82.14.212 Transfer of funds pursuant to government service agreement. Funds that are distributed to counties or cities pursuant to RCW 82.14.200 or 82.14.210 may be transferred by the recipient county or city to another unit of local government pursuant to a government service

agreement as provided in RCW 36.115.040 and 36.115.050. [1994 c 266 § 13.]

82.14.215 Apportionment and distribution—Withholding revenue for noncompliance. The governor may notify and direct the state treasurer to withhold the revenues to which the county or city is entitled under this chapter if a county or city is found to be in noncompliance pursuant to RCW 36.70A.340. [1991 sp.s. c 32 § 35.]

Section headings not law—1991 sp.s. c 32: See RCW 36.70A.902.

82.14.220 Figures for apportionments and distributions under RCW 82.14.200 and 82.14.210. The apportionments and distributions by the state treasurer under RCW 82.14.200 and 82.14.210 shall be based on figures supplied by the department of revenue. [1984 c 225 § 4.]

Rules—1984 c 225: See note following RCW 82.14.210.

82.14.230 Natural or manufactured gas—Cities may impose use tax. (1) The governing body of any city, while not required by legislative mandate to do so, may, by resolution or ordinance for the purposes authorized by this chapter, fix and impose on every person a use tax for the privilege of using natural gas or manufactured gas in the city as a consumer.

(2) The tax shall be imposed in an amount equal to the value of the article used by the taxpayer multiplied by the rate in effect for the tax on natural gas businesses under RCW 35.21.870 in the city in which the article is used. The "value of the article used," does not include any amounts that are paid for the hire or use of a natural gas business in transporting the gas subject to tax under this subsection if those amounts are subject to tax under RCW 35.21.870.

(3) The tax imposed under this section shall not apply to the use of natural or manufactured gas if the person who sold the gas to the consumer has paid a tax under RCW 35.21.870 with respect to the gas for which exemption is sought under this subsection.

(4) There shall be a credit against the tax levied under this section in an amount equal to any tax paid by:

(a) The person who sold the gas to the consumer when that tax is a gross receipts tax similar to that imposed pursuant to RCW 35.21.870 by another state with respect to the gas for which a credit is sought under this subsection; or

(b) The person consuming the gas upon which a use tax similar to the tax imposed by this section was paid to another state with respect to the gas for which a credit is sought under this subsection.

(5) The use tax hereby imposed shall be paid by the consumer. The administration and collection of the tax hereby imposed shall be pursuant to RCW 82.14.050. [1989 c 384 § 2.]

Intent—Effective date—1989 c 384: See notes following RCW 82.12.022.

82.14.300 Local government criminal justice assistance—Finding. The legislature finds and declares that local government criminal justice systems are in need of assistance. Many counties and cities are unable to provide sufficient funding for additional police protection, mitigation

Certificate of Service

I, Franklin G. Dinces, do hereby certify that on this the 17th day of April 2007, I placed in the United States mail, postage prepaid, a copy of Brief of Appellant, addressed to:

Peter Gonick, Assistant Attorney General
Attorney General's Office – Revenue Division
7141 Cleanwater Drive SW
PO Box 40123
Olympia, WA 98504-0123



Franklin G. Dinces

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