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SUPREME COURT OF THE STATE OF WASHINGTON

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TESORO REFINING & MARKETING COMPANY,

Respondent,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Petitioner.

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DEPARTMENT OF REVENUE'S REPLY TO AMICI CURIAE  
ASSOCIATION OF WASHINGTON BUSINESS, COUNCIL ON  
STATE TAXATION, DOT FOODS, INC., AND INSTITUTE FOR  
PROFESSIONALS IN TAXATION

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ORIGINAL

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The Department of Revenue (the Department) submits this brief in response to the amici curiae briefs submitted on behalf of Association of Washington Business (AWB), Council on State Taxation (COST), Dot Foods, Inc., and Institute for Professionals in Taxation (IPT).

## I. INTRODUCTION

Among the most basic propositions of logic is that a false premise leads to an incorrect conclusion. Based upon four false premises, the amici contend that the legislature's 2009 amendment to RCW 82.04.433 violated Tesoro's right to due process. First, they contend that before 2009, RCW 82.04.433 provided taxpayers with a deduction from business and occupation (B&O) tax applicable to the *manufacture* of marine bunker fuel for amounts derived from the *selling* of bunker fuel. To the contrary, the Department's supplemental brief demonstrated, at pages 6-12, that from its inception, RCW 82.04.433 has authorized taxpayers to deduct the amounts derived from sales of bunker fuel from its B&O tax liability for the activity of *selling* bunker fuel; but the statute provided no deduction from a taxpayer's B&O tax liability for the activity of *manufacturing* bunker fuel for the amounts derived from the sale of such fuel.

In their second false premise, amici argue for an arbitrary time limit on the duration of retroactivity of a statute. This Court has already expressly rejected the notion of an arbitrary time limit on retroactive tax

legislation. *W.R. Grace & Co. v. Dep't of Revenue*, 137 Wn.2d 580, 600, 973 P.2d 1011 (1999).

Amici proceed from a third false premise that the legislature sought to apply its 2009 amendment to RCW 82.04.433 retroactively for a period of 24 years. Indeed, this false point takes on something in the nature of a mantra in all four briefs. The 2009 amendment, however, did nothing to alter the well-established rule that the State is precluded from assessing back taxes “more than four years after the close of the tax year.” RCW 82.32.050. The 2009 act did not change this limitation.

Nor, as amici postulate in their fourth false premise, has the Department recently changed its construction of RCW 82.04.433. Since its enactment, the Department has construed RCW 82.04.433 as providing a deduction only from B&O taxes imposed on *selling* bunker fuel, and not from the B&O tax imposed on *manufacturing* bunker fuel. The Department’s only authoritative construction of the statute is embodied in WAC 458-20-193C.<sup>1</sup> In assuming the contrary, the amici erroneously rely upon unpublished administrative determinations that resolve disputed assessments of individual taxpayers. Those rulings are not precedential

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<sup>1</sup> A copy of the State Register entry showing the Department’s amendments to WAC 458-20-193C, implementing RCW 82.04.433, is attached for ease of reference. Wash. St. Register 86-07-005.

and never represented the agency's official administrative construction of RCW 82.04.433.

Amicus COST raises an additional argument not raised by Tesoro, and which accordingly is not properly before the Court. COST contends that by amending RCW 82.04.433 to clarify its meaning, the legislature somehow denied Tesoro its due process right to a post-deprivation hearing on its claim for a deduction. In other words, COST claims that the 2009 act denies taxpayers a refund action after payment of the disputed tax. Even if this argument were properly before the Court, it would fail, because it is based upon inapposite case law concerning repeal of a procedure for litigating a tax dispute, and not substantive legislation, such as RCW 82.04.433, defining which deductions are allowed.

Amici's conclusions that the 2009 amendment to RCW 82.04.433 violates Tesoro's right to due process as a retroactive amendment accordingly falls by the wayside. Since the premises underlying their arguments misstate the case before the Court, the conclusions for which they argue do not logically follow.

## **II. COUNTERSTATEMENT OF THE CASE**

Various amici either adopt by reference Tesoro's statements of the case appearing in prior briefs, or set forth their own factual statements. *See, e.g.*, AWB Br. at 3 (adopting the statement of the case from Tesoro's

Answer To The Petition For Review); IPT Br. at 1-3 (setting forth its own factual summary). Each of those statements contain some incomplete, and therefore misleading, factual statements. The Department does not concur in them. *See* Suppl. Br. of Pet'r at 3-5; Pet. for Review at 1-7; Br. of Resp't at 1-3.

An examination of the statement of the case adopted by Amicus COST is illustrative. COST adopts Tesoro's statement of the case in Appellant's Opening Brief filed in the Court of Appeals. COST Br. at 5. In describing the "legal framework" of the case, Tesoro stated that the Department implemented the deduction in RCW 82.04.433 by amending "a regulation, WAC Section 458-20-175 . . . , which provides additional guidance on eligibility and qualification for the deduction." Appellant's Br. at 6. To the extent that this statement implies that WAC 458-20-175 was the only rule the Department amended to implement RCW 82.04.433, the statement would be misleading.

The Department amended both WAC 458-20-175 and WAC 458-20-193C to implement the deduction. *See* Br. of Resp't at 14-15, 19-20, 22-24; Pet. for Review at 3-4; Suppl. Br. of Pet'r at 12; Wash. State Register 86-07-005. The Department's amendment of WAC 458-20-193C unmistakably shows its contemporaneous administrative construction of RCW 82.04.433 was that only *wholesaling* and *retailing* B&O taxes

qualified for the deduction of amounts derived from sales. *See* Br. of Resp't at 22-24; Suppl. Br. of Pet'r at 12.

In its statement of the case, Tesoro also stated that it "paid B&O tax" on its "sales of bunker fuel" from December 1999 through April 2004, and that it "requested a refund of the B&O taxes" it "paid on these sales," which was "denied by the Department." Appellant's Br. at 8-9. These statements also are incomplete and misleading.

Tesoro paid *manufacturing* B&O tax on its manufacturing of bunker fuel. Tesoro also claimed the separate multiple activities tax credits under RCW 82.04.440(2) and thereby credited against its *selling* B&O tax liabilities the *manufacturing* B&O taxes it paid on the same products. Thus, Tesoro paid no B&O taxes on the activity of *selling* bunker fuel in Washington. Tesoro now seeks to deduct from its *manufacturing* B&O tax liability the same amounts that it used as a credit against its liability for *selling* B&O tax. Tesoro did this by seeking a refund of *manufacturing* B&O taxes it had paid, claiming it was entitled to take a deduction under RCW 82.04.433 against those manufacturing B&O taxes for amounts derived from sales. It was this second deduction that the Department denied.

### III. ARGUMENT

#### A. Amici's Arguments Regarding The Retroactive Application Of The 2009 Amendment To RCW 82.04.433 Are Invalid Because They Are Based Upon False Premises

##### 1. The 2009 Amendment To RCW 82.04.433 Did Not Change The Meaning Of The Statute

All four amici rest their arguments regarding the retroactive application of the 2009 amendment to RCW 82.04.433 on the same premise: the unexamined assumption that the amendment changed the meaning of the statute. As demonstrated in the Department's supplemental brief, at pages 6-12, this is not so. From its original enactment, RCW 82.04.433 has authorized a deduction only of "amounts derived from *sales*" of bunker fuel. RCW 82.04.433 (emphasis added). Amici's unexamined assumption that the amendment did anything other than clarify the statute is erroneous, in light of the principle that deductions are narrowly construed in favor of the tax. *United Parcel Service, Inc. v. Dep't of Revenue*, 102 Wn.2d 355, 360, 687 P.2d 186 (1984). The statute has never authorized a deduction against B&O tax liability for the activity of *manufacturing* bunker fuel. Accordingly, this Court need not, and should not, reach Amici's constitutional arguments regarding retroactivity. *See* Br. of Resp't at 41-47.

By proceeding directly into a discussion of due process without first considering the original form of the statute, amici rest their discussion

on a false premise—an assumption that the 1985 statute provided a deduction for amounts derived from manufacturing bunker fuel, when it did not. Then amici suggest that the 2009 legislature eliminated the assumed deduction and imposed a new tax liability specifically to target Tesoro by changing “the legal consequences of transactions long closed.” Br. of Amicus IPT at 5 (quoting *E. Enters. v. Apfel*, 524 U.S. 498, 548-49, 118 S. Ct. 2131, 141 L. Ed. 2d 451 (1998) (Kennedy, J., concurring)); see also Br. of Amicus COST at 6-7 (quoting *United States v. Hemme*, 476 U.S. 558, 569, 106 S. Ct. 2071, 90 L. Ed. 2d 538 (1986), as expressing a concern for a lack of notice that a retroactive statute may affect prior transactions).

Amici’s (and Tesoro’s) due process arguments rest entirely on their assumption that a new tax liability was selectively imposed on Tesoro. That assumption is not true. As explained more fully below, at pages 14-16, the Department administratively construed RCW 82.04.433, even before the amendment, as authorizing a deduction only against B&O tax liability for *selling* bunker fuel. WAC 458-20-193C (construing the deduction as applicable only to B&O taxes on *selling* bunker fuel); CP 210-19 (the Department’s determination regarding Tesoro’s refund application). Since RCW 82.04.433 did not previously authorize the

deduction that Tesoro claimed, amici's argument that the 2009 amendment constituted an effort to impose novel tax liability on Tesoro fails.

The reliance of amici IPT and COST upon *Eastern Enterprises* and *Hemme* fails for this reason. As explained in *Eastern Enterprises*, the retroactive regulatory legislation at issue there divested the taxpayer "of property long after the company believed its liabilities under the [prior law] to have been settled." *E. Enters.*, 524 U.S. at 534 (plurality opinion). The plurality opinion in that case was based on the Takings Clause, and did not strike down the statute at issue based upon due process. *Id.* at 503-04. Similarly, in *Hemme*, the Court expressed a concern for legislation that, "without notice . . . gives a different and more oppressive legal effect to conduct undertaken before enactment of the statute." *Hemme*, 476 U.S. at 569. The Court concluded in *Hemme* that the taxpayer did not suffer such inequitable treatment when the taxpayer lacked any expectation at the time the conduct occurred that it would not result in tax consequences. *Id.* at 571.<sup>2</sup>

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<sup>2</sup> Amici AWB and Dot Foods rely to similar effect upon this Court's decision in *Japan Line, Ltd. v. McCaffree*, 88 Wn.2d 93, 558 P.2d 211 (1977). Br. of Amicus AWB at 7; Br. of Amicus Dot Foods at 8-9. In *Japan Line*, this Court recognized the legislature's "broad plenary powers in its capacity to levy taxes." *Japan Line, Ltd.*, 88 Wn.2d at 96. While the form of the tax at issue was new, the subject matter of the tax had previously been taxed. Accordingly, the retroactive application of the tax was not novel. *Id.* at 98.

Tesoro was under no illusion that the imposition of B&O tax on its activity of *manufacturing* bunker fuel was in any way novel. Indeed, Tesoro itself evidenced its understanding that it was liable for B&O tax on the manufacturing of marine bunker fuel by, in fact, paying that tax. CP at 10. Tesoro did not claim the deduction until the Department conducted an audit of the company substantially later. CP at 210.

Amici also err in contending that RCW 82.04.433 results in Tesoro paying B&O tax on its activity of manufacturing bunker fuel while its competitors did not. The Department's ability to decisively refute amici's speculation about what other taxpayers paid or did not pay is sharply limited, because state law generally precludes the Department from disclosing returns or most tax information concerning other taxpayers. RCW 82.32.330(2). However, the fiscal note accompanying the 2009 amendment to RCW 82.04.433 demonstrates that Tesoro's competitors did pay B&O taxes on their manufacturing of bunker fuel. That fiscal note explains that the bill's "retroactivity clause could prevent an estimated \$17.8 million, plus interest, in refunds of B&O taxes paid on the manufacturing of bunker fuel." Agency Fiscal Note to S.B. 6096, 61st Leg., Reg. Sess. (Wash. 2009) (prepared by Dep't of Revenue).<sup>3</sup> Tesoro sought refunds in an amount less than seven million dollars, with the

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<sup>3</sup> The fiscal note is attached, and is also available online at: <http://apps.leg.wa.gov/billinfo/summary.aspx?bill=6096&year=2009>.

difference representing B&O taxes on the manufacture of bunker fuel paid by Tesoro's competitors for shorter refund periods. CP 5-6.

This Court, accordingly, need not reach the due process issue, because even before the 2009 amendment, RCW 82.04.433 did not authorize the deduction that Tesoro claims. If it does reach the issue, however, the context and history, including Tesoro's own conduct, show that taxing the activity of manufacturing bunker fuel was hardly "novel."

**2. This Court Has Rejected The Notion Of A Specific Duration On Retroactive Tax Legislation**

Amici urge this Court to abandon, or distinguish, its own precedent rejecting the notion of an arbitrary time limit on retroactive tax legislation. *W.R. Grace*, 137 Wn.2d at 600. But they suggest no viable reason for this Court to discard its prior holding, a course of action that this Court does not take lightly. *State v. Barber*, 170 Wn.2d 854, 863, 248 P.3d 494 (2011).

Amici's arguments, like those of Tesoro, depend upon a misreading of a decision of the United States Supreme Court, a misreading that this Court has already rejected. In *United States v. Carlton*, 512 U.S. 26, 30-31, 114 S. Ct. 2018, 129 L. Ed. 2d 22 (1994), the Court established a "rational relationship" standard for reviewing the retroactive application of tax legislation. *Id.* at 30-31. Amici contend that one required element

of this standard is that the period of retroactivity at issue must be “modest.” The Supreme Court, however, has never imposed such a requirement on retroactive economic legislation, reciting the period at issue in *Carlton* only as a relevant fact and not as an element the taxing authority must satisfy. *Carlton*, 512 U.S. at 35. The Supreme Court held, rather, that a retroactive statutory amendment satisfies due process when its retroactive application is “rationally related to a legitimate legislative purpose.” *Id.* Precluding “a significant and unanticipated revenue loss” constitutes such a purpose. *Id.* at 32.

This Court has already construed *Carlton* as rejecting any “specific duration to the retroactive effect of tax legislation, preferring to rely on legislative decisions in this context.” *W.R. Grace*, 137 Wn.2d at 603. It has, thus, already rejected amicus AWB’s attempt to derive “a modest period of retroactivity” as a required element for retroactive legislation. Br. of Amicus AWB at 5. To the extent that older decisions, upon which amici, Tesoro, and the Court of Appeals rely<sup>4</sup> suggest otherwise, this Court has already implicitly overruled them on this point. *W.R. Grace*,

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<sup>4</sup> See *State v. Pac. Tel. & Tel.*, 9 Wn.2d 11, 113 P.2d 542 (1941); *Bates v. McLeod*, 11 Wn.2d 648, 120 P.2d 472 (1941).

137 Wn.2d at 600 (describing the reliance taxpayers in that case placed on the same older authority).<sup>5</sup>

Amici attempt to distinguish *W.R. Grace* on the basis that it related to remedial legislation, designed to cure constitutional infirmities identified in a prior case. See *W.R. Grace*, 137 Wn.2d at 600. This distinction is immaterial, because in *W.R. Grace*, the challenged statute resulted in liability for tax that the taxpayers otherwise would not have had. If the taxpayers in *W.R. Grace* had prevailed, they would have owed none of the taxes at issue in that case. *Id.* *W.R. Grace*, accordingly, cannot be distinguished in the manner amici advocate.<sup>6</sup>

### **3. The Relevant Period Of Retroactivity In This Case Is Not Twenty-Four Years**

All four amici adopt as a rhetorical device an unexamined assumption that the 2009 amendment to RCW 82.04.433 represented an effort to change Washington law retroactively for a duration of 24 years.

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<sup>5</sup> In any event, both *Pacific Telephone & Telegraph* and *Bates* construed the federal due process clause. Accordingly, the more recent decisions of the United States Supreme Court, principally *Carlton*, and not decisions of this Court from decades ago, are the controlling authorities on the meaning of the United States Constitution.

<sup>6</sup> In addition to arguing that *W.R. Grace* should be distinguished or disregarded, amici IPT and Dot Foods urge this Court to distinguish its decision in *Washington State Farm Bureau Fed'n v. Gregoire*, 162 Wn.2d 284, 174 P.3d 1142 (2007). IPT Br. at 10-11; Dot Foods, Inc. Br. at 7. In *Farm Bureau*, this Court rejected a due process challenge to the retroactive application of a statutory amendment that changed the manner in which the state's expenditure limit was calculated. *Farm Bureau*, 162 Wn.2d at 304-05. The plaintiffs in that case sought the remedy of invalidating a newly-enacted tax statute based upon the application of the expenditure limit. *Id.* at 289-90. The act at issue in *Farm Bureau* was therefore much like the one at issue here, except that in the present case the amendment merely clarified an existing statute.

Without saying so directly, they foster an image of an unfettered state tax collector visiting unexpected new tax bills upon taxpayers for manufacturing bunker fuel almost a quarter century ago.

The legal absurdity of this assumption is demonstrated by the fact that state law does not permit giving the 2009 amendment such a broad retroactive application. The 2009 act in which the legislature clarified the meaning of RCW 82.04.433<sup>7</sup> did not amend the statute that precludes assessing back taxes “more than four years after the close of the tax year.” RCW 82.32.050.<sup>8</sup> Accordingly, it makes no sense to characterize this case as one involving the retroactive application of a statute beyond that period (as well as to open claims for refunds).

In this particular case, Tesoro sought a refund of B&O taxes it paid on its activity of manufacturing bunker fuel as early as 2000, but even the limited retroactive application of the statute to that claim does not pose any spectre of 24-year retroactivity. Moreover, this Court and other courts have approved the retroactive application of tax statutes for similar periods. *W.R. Grace*, 137 Wn.2d at 586-87 (describing a claim for refund of taxes paid from January 1980 until enactment of a retroactive statutory amendment in August 1987); *see also Montana Rail Link, Inc. v. United*

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<sup>7</sup> Laws of 2009, ch. 494.

<sup>8</sup> This statute is miscited as RCW 83.32.050 at page 16 of the Department’s supplemental brief.

*States*, 76 F.3d 991, 993-95 (9th Cir. 1996) (seven year retroactivity); *Smith v. Sears, Roebuck & Co.*, 672 So. 2d 794, 796, 799 (Ala. Civ. App. 1995) (more than eight years); *Maples v. McDonald*, 668 So. 2d 790, 792-93 (Ala. Civ. App. 1995) (more than eight years); *Miller v. Johnson Controls, Inc.*, 296 S.W.3d 392, 400-01, 416 (Ky. 2009), *cert. denied*, 130 S. Ct. 3324 (2010) (at least nine years); *King v. Campbell Cnty*, 217 S.W.3d 862, 866-67, 869-70 (Ky. Ct. App. 2006) (nineteen years); *Moran Towing Corp. v. Urback*, 768 N.Y.S.2d 33, 1 A.D.3d 722 (2003) (thirteen years); *Astoria Fed. Sav. & Loan Ass'n v. State*, 644 N.Y.S.2d 926, 933-34, 222 A.D.2d 36 (1996) (seven years); *U.S. Bancorp v. Dep't of Revenue*, 103 P.3d 85, 91-93 (Or. 2004) (seven years; legislative rule).

The legislature amended RCW 82.04.433 only to avoid unanticipated pending and potential refund claims, including but not limited to Tesoro's refund claim. The amendment was not enacted to assess additional taxes against taxpayers who had no reason to believe that they owed these B&O taxes: *See* Laws of 2009, ch. 494, § 1. The prospect of the Department contending that the 2009 amendment created new liability for long-closed tax periods is simply illusory, a creation of amici's imagination and not consistent with reality.

**4. The Department Of Revenue's Only Authoritative Construction Of RCW 82.04.433 Is That The Statute Authorizes A Deduction Only From The Wholesaling and Retailing B&O Taxes On *Selling* Marine Bunker Fuel**

Similarly, amici paint an incorrect picture of the 2009 amendment as altering the Department's prior interpretation of RCW 82.04.433. This is not the case. The Department's construction of RCW 82.04.433 consistently has been set forth in WAC 458-20-193C. The Department amended that rule in 1986 to implement the enactment of RCW 82.04.433, and explained that the rule reflected "a statutory business and occupation tax deduction . . . for *sales* of fuel for consumption outside the territorial waters of the United States by vessels used primarily in foreign commerce." WAC 458-20-193C (emphasis added). This explanation appears only in a portion of the rule addressing B&O taxes on the activities of *wholesaling* and *retailing*. No comparable language has ever appeared in the portion of the rule addressing the B&O tax on the activity of *manufacturing*. WAC 458-20-193C.

Amici refer to three unpublished administrative rulings, none of which ever reflected the official agency interpretation of RCW 82.04.433. Based on those three rulings, amici insist that the Department has changed its construction of RCW 82.04.433, previously permitting taxpayers to

take a deduction against *manufacturing* B&O tax liability while now denying that deduction to Tesoro. This is not so.

Administrative determinations issued to particular taxpayers neither state Departmental policy, nor are agency precedents, unless the director of the Department designates them as precedents by publishing them. RCW 82.32.410 (authorizing director to designate certain written determinations as precedents); see *W. Ports Transp., Inc. v. Emp't Sec. Dep't*, 110 Wn. App. 440, 459, 41 P.3d 510 (2002) (“unpublished decisions [of the commissioner] have no precedential value;” citing RCW 50.32.095, which authorizes commissioner to designate certain decisions as precedent by publishing them). The director has never designated any of the unpublished determinations to which amici allude as a precedent. Only the taxpayer that sought such an administrative ruling has any right to rely on it. RCW 82.32.020(2) (taxpayers have a right to rely only on written advice and reporting instructions issued “to that taxpayer”). Much like unpublished decisions of the Court of Appeals, the three administrative determinations do not reflect the Department’s considered view of the law and have no precedential value. See GR 14.1 (“A party may not cite as an authority an unpublished opinion of the Court of Appeals.”); *State v. Fitzpatrick*, 5 Wn. App. 661, 668, 491 P.2d 262 (1971); see also Suppl. Br. of the Dep’t at 11.

**B. COST's "Bait And Switch" Procedural Due Process Argument Is Both Unsound And Not Properly Before The Court**

COST argues that the United States Supreme Court has held that legislation like the 2009 act, "made retroactive with the purpose of denying post-deprivation relief" to "taxpayers that had legitimate claims to refunds," violates the federal due process clause. COST Br. at 12-14 (citing *Reich v. Collins*, 513 U.S. 106, 115 S. Ct. 547, 130 L. Ed. 2d 454 (1994)). This procedural due process argument raises an issue that Tesoro has never argued in this case and is, therefore, not properly before this Court. *Zuver v. Airtouch Commc'ns, Inc.*, 153 Wn.2d 293, 304 n.4, 103 P.3d 753 (2004) (refusing to consider issues raised solely by amicus). Moreover, COST's "bait and switch" attack on the 2009 act is unsound.

In *Reich*, the Georgia Supreme Court had interpreted a statute authorizing a taxpayer to claim a refund of "any and all taxes or fees which are determined to have been erroneously or illegally assessed and collected from him" as inapplicable when a tax statute is declared unconstitutional. *Reich*, 513 U.S. at 109. The Georgia court therefore dismissed the refund action without addressing the merits of Reich's federal claims. *Id.* at 110. The United States Supreme Court reversed, holding that the federal due process clause did not permit Georgia to hold out a "clear and certain" post-payment procedural remedy in the form of a

refund action and then, after taxpayers had paid disputed taxes, to declare that no such procedural remedy ever existed. *Reich*, 513 U.S. at 111.

The problem in *Reich* was that Georgia removed a refund remedy, leaving only a remedy to challenge tax liability prior to payment of the tax. Thus, it was impossible to challenge taxes that had already been paid. The Washington legislature's 2009 retroactive clarifying amendment of RCW 82.04.433 did not remove the refund remedy provided in RCW 82.32.180. In sharp contrast to what occurred in *Reich*, both the Thurston County Superior Court and the Court of Appeals adjudicated the merits of Tesoro's refund claims. That is all the "process" Tesoro or any other taxpayer is "due" in this situation. There was no more a "bait and switch" here than there was in *Carlton*. See *Montana Rail Link, Inc*, 76 F.3d at 994-95 ("If [Montana Rail Link's] application of *Reich* were correct, *Reich* would reverse *Carlton* and a long line of previous cases upholding the constitutionality of retroactive tax statutes."). Tesoro and other refinery owners continue to have available precisely the post-payment procedural remedy promised by RCW 82.32.180, which Tesoro is pursuing in the refund action before this Court.

In *W.R. Grace*, this Court correctly rejected a similar "bait and switch" argument based on *Reich*, holding that the legislature's retroactive application of the 1987 two-way credit statute had not deprived the

taxpayers of “the opportunity to challenge the Washington B&O tax scheme,” since their “right to challenge the imposition of an unconstitutional tax” was “preserved both in prepayment and post-payment settings.” *W.R. Grace*, 137 Wn.2d at 598-99; *Kalama Chem., Inc. v. State*, 102 Wn. App. 577, 581-83, 9 P.3d 236 (2000). In this respect, the legislature’s 2009 retroactive clarifying amendment is no different than its 1987 retroactive two-way credit statute.<sup>9</sup>

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<sup>9</sup> See *Atchison, Topeka & Santa Fe Ry. v. U. S.*, 61 Fed. Cl. 501, 507-08 (2004) (“This is not a case in which the federal government altered the procedure by which a taxpayer may seek a refund. ATSF did not lose its procedural right to seek a refund. Rather, ATSF objects to the retroactive nature of OBRA itself.”); *Miller v. Johnson Controls, Inc.*, 296 S.W.3d 392, 403 (Ky. 2009) (“While *Reich* came out the same year as *Carlton*, the cases are on two entirely different issues. Where the state of Georgia arbitrarily took away a “clear and certain” post-deprivation *remedy* for taking undisputedly illegal taxes in *Reich*, the legislature in this case took away the *dispute*, and hence any illegality that might be claimed, by properly enacting a retroactive statute that mooted the question whether the Appellees were entitled to a refund. . . . The remedy provided by the refund statute was not affected at all; it simply no longer applies to the Appellees in this case because the underlying tax law has been changed, just as the deduction no longer applied in *Carlton*.”), *cert. denied*, 130 S. Ct. 3324 (2010).

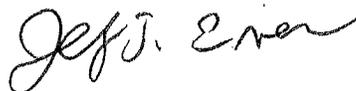
**IV. CONCLUSION**

For these reasons and for the reasons previously presented in the Department's briefing to this Court and to the Court of Appeals, this Court should reverse the Court of Appeals and reinstate the decision of the Superior Court.

RESPECTFULLY SUBMITTED this 26th day of September,  
2011.

ROBERT M. MCKENNA  
Attorney General

DONALD F. COFER  
Senior Counsel  
WSBA # 10896



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**Wash. St. Register 86-07-005**

(2) If the individual presents medical evidence to the OSO, a referral to SSA is required.)) When an individual has applied for Title II or Title XVI benefits and the SSA has denied the application solely because of a failure to meet blindness or disability criteria under Title II or Title XVI, the SSA denial shall be binding on the department, unless:

(1) The SSA denial is under appeals in the reconsideration stage, the SSA's administrative fair hearing process, the SSA's appeals council, or the federal courts; or

(2) The applicant's medical condition has changed since the SSA denial was issued.

WSR 86-07-005  
ADOPTED RULES  
DEPARTMENT OF REVENUE  
(Order ET 86-3—Filed March 6, 1986)

I, Matthew J. Coyle, acting director of the Department of Revenue, do promulgate and adopt at Olympia, Washington, the annexed rules relating to:

- Amd WAC 458-20-210 Sales of agricultural products by persons producing the same.
- Amd WAC 458-20-175 Persons engaged in the business of operating as a private or common carrier by air, rail or water in interstate or foreign commerce.
- Amd WAC 458-20-193C Imports and exports—Sales of goods from or to persons in foreign countries.

This action is taken pursuant to Notice No. WSR 86-03-043 filed with the code reviser on January 14, 1986. These rules shall take effect thirty days after they are filed with the code reviser pursuant to RCW 34.04.040(2).

This rule is promulgated under the general rule-making authority of the Department of Revenue as authorized in RCW 82.32.300.

The undersigned hereby declares that the agency has complied with the provisions of the Open Public Meetings Act (chapter 42.30 RCW), the Administrative Procedure Act (chapter 34.04 RCW) and the State Register Act (chapter 34.08 RCW) in the adoption of these rules.

APPROVED AND ADOPTED March 6, 1986.

By Matthew J. Coyle  
Acting Director

AMENDATORY SECTION (Amending Order ET 83-1, filed 3/30/83)

WAC 458-20-210 SALES OF ((FARM)) AGRICULTURAL PRODUCTS BY ((FARMERS)) PERSONS PRODUCING THE SAME. The term "((farm)) agricultural products" as used herein means ((all farm products such as poultry, livestock, fruit, vegetables and grains)) any agricultural or horticultural produce or crop, including any animal, bird, fish, or insect, or the milk, eggs, wool, fur, meat, honey, or other substance obtained therefrom; PROVIDED, That "fish" as used herein means fish which are cultivated and raised entirely within confined rearing areas on land owned by the person so raising the same or on land in which the person has a present right of possession.

((All farmers)) Persons engaging in the business of making retail sales of ((farm)) agricultural products produced by them are required to apply for and obtain a certificate of registration. The certificate shall remain valid as long as the ((taxpayer)) person remains in business.

BUSINESS AND OCCUPATION TAX

((Farmers are not subject to tax under the wholesaling classification of the business and occupation tax upon)) Persons making wholesale sales of ((farm)) agricultural products ((which have been raised)) produced by them upon land owned by or leased to them are not subject to the business and occupation tax. This exemption does not extend to sales of manufactured or extracted products (see WAC 458-20-135 and 458-20-136)((nor to the taking, cultivating, or raising of Christmas trees or timber)).

((Farmers)) Retail sales of agricultural products by persons producing the same are subject to tax under the retailing classification of the business and occupation tax ((upon sales of farm products when the farmer)). Thus, tax is due by any such person who holds himself out to the public as a seller by:

- (1) Conducting a roadside stand or a stand displaying ((farm)) agricultural products for sale at retail;
- (2) Posting signs on his premises, or through other forms of advertising soliciting sales at retail;
- (3) Operating a regular delivery route from which ((farm)) agricultural products are sold from door to door; or
- (4) Maintaining an established place of business for the purpose of making retail sales of ((farm)) agricultural products.

((Farmers)) Persons selling ((farm)) agricultural products not ((raised)) produced by them, should obtain information from the department of revenue with respect to their tax liability.

RETAIL SALES TAX

((All farmers)) Persons selling agricultural products produced by them are required to collect the retail sales tax upon all retail sales made by them, except sales of food products exempt under WAC 458-20-244((when the farmer holds himself out to the public as a seller in any of the ways described above)).

AMENDATORY SECTION (Amending Order ET 83-16, filed 3/15/83)

WAC 458-20-175 PERSONS ENGAGED IN THE BUSINESS OF OPERATING AS A PRIVATE OR COMMON CARRIER BY AIR, RAIL OR WATER IN INTERSTATE OR FOREIGN COMMERCE. The term "private carrier" means every carrier, other than a common carrier, engaged in the business of transporting persons or property for hire.

The term "watercraft" includes every type of floating equipment which is designed for the purpose of carrying therein or therewith persons or cargo. It includes tow boats, but it does not include floating dry docks, dredges or pile drivers, or any other similar equipment.

The term "carrier property" means airplanes, locomotives, railroad cars or water craft, and component parts of the same.

The term "component part" includes all tangible personal property which is attached to and a part of carrier property. It also includes spare parts which are designed for ultimate attachment to carrier property. The said term does not include furnishings of any kind which are not attached to the carrier property nor does it include consumable supplies. For example, it does not include, among other things, bedding, linen, table and kitchen ware, tables, chairs, ice for icing perishables or refrigerator cars or cooling systems, fuel or lubricants.

"Such persons," and "such businesses" mean the persons and businesses described in the title of this rule.

**BUSINESS AND OCCUPATION TAX, PUBLIC UTILITY TAX**

Persons engaged in such businesses are not subject to business tax or utility tax with respect to operating income received for transporting persons or property in interstate or foreign commerce. (See WAC 458-20-193.)

When such persons also engage in intrastate business activities they become taxable at the rates and in the manner stated in WAC 458-20-179, 458-20-181 and 458-20-193. For example, such persons are taxable under the retailing business tax classification upon the gross proceeds of sales of tangible personal property, including sales of meals, when such sales are made within this state.

Persons selling tangible personal property to, or performing services for, others engaged in such businesses, are taxable to the same extent as they are taxable with respect to sales of property or services made to other persons in this state. However, on July 1, 1985, a statutory business and occupation tax deduction became effective for sales of fuel for consumption outside the territorial waters of the United States by vessels used primarily in foreign commerce. In order to qualify for this deduction sellers must take a certificate signed by the buyer or the buyer's agent stating: The name of the vessel for which the fuel is purchased; that the vessel is primarily used in foreign commerce; and, the amount of fuel purchased which will be consumed outside of the territorial waters of the United States. Sellers must exercise good faith in accepting such certificates and are required to add their own signed statement to the certificate to the effect that to the best of their knowledge the information contained in the certificate is correct. The following is an acceptable certificate form:

**FOREIGN FUEL EXEMPTION CERTIFICATE**

SELLER: \_\_\_\_\_ VESSEL: \_\_\_\_\_

WE HEREBY CERTIFY that this purchase of (kind and amount of product) from (seller) will be consumed as fuel outside the territorial waters of the United States by the above-named vessel. We further certify that said vessel is used primarily in foreign commerce and that none of the fuel purchased will be consumed within the territorial boundaries of the State of Washington.

DATED \_\_\_\_\_, 19\_\_\_\_

\_\_\_\_\_  
Purchaser

\_\_\_\_\_  
Purchaser's Agent

By: \_\_\_\_\_

\_\_\_\_\_  
Title or Office

When a completed certification such as this is taken in good faith by the seller, the sale is exempt of business and occupation tax, whether made at wholesale or retail, and even though the fuel is delivered to the buyer in this state.

**RETAIL SALES TAX**

Sales of meals (including those sold to employees, see WAC 458-20-119) and retail sales of other tangible personal property, made by such persons, are subject to the retail sales tax when such sales are made within this state.

By reason of specific exemptions contained in RCW 82.08.0261 and 82.08.0262 the retail sales tax does not apply upon the following sales:

- (1) Sales of airplanes, locomotives, railroad cars, or watercraft for use in conducting interstate or foreign commerce by transporting therein or therewith property and persons for hire;
- (2) Sales of tangible personal property which becomes a component part of such carrier property in the course of constructing, repairing, cleaning, altering or improving the same;
- (3) Sales of or charges made for labor or services rendered with respect to the constructing, repairing, cleaning, altering or improving of such carrier property;
- (4) Sales of any tangible personal property other than the type referred to in 1 and 2 above, for use by the purchaser in connection with such businesses, provided that any actual use thereof in this state shall, at the time of actual use, be subject to the use tax.

Except as to sales of or charges made for labor or services rendered with respect to the constructing, repairing, cleaning, altering or improving of carrier property, the foregoing exemptions are limited to sales of tangible personal property. Hence the retail sales tax applies upon the sales of or charges made for labor or services rendered in respect to (1) the installing, repairing, cleaning, altering, imprinting or improving of any other type of tangible personal property; and in respect to (2) the constructing, repairing, decorating or improving of new or existing buildings or other structures. Thus the retail sales tax applies upon the charge made for repairing within this state of such things as switches, frogs, office equipment, or any other property which is not carrier property. It also applies upon the charge made for laundering linen and bedding. The tax also applies upon the charge made for constructing buildings, such as depots, wharves and hangars, or for repairing, decorating or improving the same.

However, the cost of installing, repairing, cleaning, altering, imprinting or improving of tangible personal

property prior to its initial use by the carrier is considered as part of the initial cost of the property involved and therefore exempt from the sales tax. Thus, for example, the treating of railroad ties prior to their initial use is considered as part of the original cost of the ties and therefore exempt from the sales tax under RCW 82.08.0261.

EXEMPTION CERTIFICATES REQUIRED. Persons selling tangible personal property or performing services which come within any of the foregoing exemptions are required to obtain from the purchaser, or his authorized agent, a certificate evidencing the exempt nature of the transaction. This certificate must identify the operator of the carrier by name and by its department of revenue registration number, if registered, and if not registered, by address.

The certificate may be in blanket form—that is, may certify as to all future purchases, or individual certificates may be made for each purchase. Also the certificate may be incorporated in or stamped upon the purchase order.

The certificate should be in substantially the following form:

EXEMPTION CERTIFICATE

WE HEREBY CERTIFY that all the tangible personal property to be purchased from you will be for use in connection with our business of operating as a (private or common) carrier by (air, rail or water) in (interstate or foreign) commerce; that all (airplanes, locomotives, railroad cars or water craft) or component parts thereof, to be constructed, repaired, cleaned, altered or improved by you, will be used in conducting (interstate or foreign) commerce; and that all such sales are entitled to exemption from the Retail Sales Tax under the provisions of RCW 82.08.0261 and 82.08.0262.

Dated ..... 19...  
.....  
(Purchaser)  
By .....  
(Title—Officer or Agent)  
Address .....

Department of Revenue Registration No.  
.....

USE TAX

The use tax does not apply upon the use of airplanes, locomotives, railroad cars or watercraft, including component parts thereof, which are used primarily in conducting such businesses.

"Actual use within this state," as used in RCW 82.08.0261 does not include use of durable goods aboard carrier property while engaged in interstate or foreign commerce. Thus the use tax does not apply upon the use of furnishings and equipment (whether attached to the carrier or not) intended for use aboard carrier property while operating partly within and partly without this state. Included herein are such items as bedding, table

linen and wares, kitchen equipment, tables and chairs, hand tools, hawsers, life preservers, parachutes, and other durable goods which are necessary, convenient or desirable for the proper operation of such carrier property.

The use tax does apply upon the actual use within this state of all other types of tangible personal property purchased at retail and upon which the sales tax has not been paid. Included herein are all consumable goods for use on and placed aboard carrier property while within this state, but only to the extent of that portion consumed herein. Thus the tax applies upon the use of the amount consumed in this state of ice, fuel and lubricants which are placed aboard in this state, and upon food supplies or catered meals placed aboard carrier property in this state and served to customers in this state by transportation companies when the meals so served are included in the charge for transportation. (The retail sales tax must be collected upon separate sales within this state of meals or other tangible personal property.) The tax does not apply upon the use within this state of any part of consumable goods for use on carrier property and placed aboard outside this state.

Liability for the use tax arises at the time of actual use thereof in this state.

Due to the difficulty in many cases of determining at the time of purchase whether or not the property purchased or a part thereof will be put to use in this state and due to the resulting accounting problems involved, persons engaged in the business of operating as private or common carriers by air, rail or water in interstate or foreign commerce will be permitted to pay the use tax directly to the department of revenue rather than to the seller, and such sellers are relieved of the liability for the collection of such tax. This permission is limited, however, to persons duly registered with the department. The registration number given on the certificate which will be furnished to the seller ordinarily will be sufficient evidence that the purchaser is properly registered.

As to persons operating in interstate or foreign commerce as carriers by air, rail or water who are not registered with the department and who, therefore, are not regularly filing tax returns with the department, sellers of durable goods must either collect the use tax at the time of the sale or require from such purchasers a further certificate to the effect that no part of the subject matter of the sale is for actual use in this state.

Similarly, where consumable goods, such as ice, bunker fuel, or lubricants are purchased by or for carriers not registered with the department, and delivered on board a carrier regularly engaged in interstate or foreign commerce for consumption while both within and without the territorial boundaries of the state of Washington, the seller is required to collect from the buyer the amount of use tax applicable to that portion of the products sold which will be consumed within this state.

It will be presumed that the entire amount of the goods purchased will be consumed within this state unless the seller obtains from the buyer a certificate certifying as to the amount thereof which will be consumed while within the territorial boundaries hereof.

The certificate shall be made by the master or chief engineer of the carrier, or by some other person known

by the seller to be competent to make the same, and shall be substantially in the following form:

CERTIFICATE

..... Seller .....	..... Purchaser .....
..... Name of Carrier .....	..... Name of Owner or Agent .....

The undersigned does hereby certify as follows:

(1) The purchaser has this day purchased from the seller in the State of Washington certain amounts of (type of goods purchased) and has taken delivery thereof aboard said carrier for its exclusive use while regularly engaged in transporting persons or property for profit in interstate or foreign commerce.

(2) While the said carrier is within the territorial boundaries of the state of Washington, it will consume the following amounts of the commodities purchased:

- ..... barrels of fuel oil
- ..... gallons of lubricants
- ..... pounds of grease
- ..... other consumable goods

Dated ....., 19...

.....  
Name  
.....  
Office or Title

AMENDATORY SECTION (Amending Order ET 83-16, filed 3/15/83)

WAC 458-20-193C IMPORTS AND EXPORTS—SALES OF GOODS FROM OR TO PERSONS IN FOREIGN COUNTRIES.

((Rule 193-f)) WAC 458-20-193((f)) deals with interstate and foreign commerce and is published in four separate parts:

- Part A. Sales of goods originating in Washington to persons in other states.
- Part B. Sales of goods originating in other states to persons in Washington.
- Part C. Imports and exports; Sales of goods from or to persons in foreign countries.
- Part D. Transportation, communication, public utility activities, or other services in interstate or foreign commerce.

Part C.

FOREIGN COMMERCE

Foreign commerce means that commerce which involves the purchase, sale or exchange of property and its transportation from a state or territory of the United States to a foreign country, or from a foreign country to a state or territory of the United States.

IMPORTS. An import is an article which comes from a foreign country (not from a state, territory or possession of the United States) for the first time into the taxing jurisdiction of a state.

Taxation of such goods is impermissible while the goods are still in the process of importation, i.e., while they are still in import transportation. Further, such goods are not subject to taxation if the imports are merely flowing through this state on their way to a destination in some other state.

EXPORTS. An export is an article which originates within the taxing jurisdiction of the state destined for a purchaser in a foreign country. Thus ships stores and supplies are not exports.

BUSINESS AND OCCUPATION TAX

WHOLESALE AND RETAILING.

IMPORTS. Sales of imports by an importer or his agent are not taxable and a deduction will be allowed with respect to the sales of such goods, if at the time of sale such goods are still in the process of import transportation. Immunity from tax does not extend: (1) To the sale of imports to Washington customers by the importer thereof or by any person after completion of importation whether or not the goods are in the original unbroken package or container; nor (2) to the sale of imports subsequent to the time they have been placed in use in this state for the purpose for which they were imported; nor (3) to sales of products which, although imports, have been processed or handled within this state or its territorial waters.

EXPORTS. A deduction is allowed with respect to export sales when as a necessary incident to the contract of sale the seller agrees to, and does deliver the goods (1) to the buyer at a foreign destination; or (2) to a carrier consigned to and for transportation to a foreign destination; or (3) to the buyer at shipside or aboard the buyer's vessel or other vehicle of transportation under circumstances where it is clear that the process of exportation of the goods has begun, and such exportation will not necessarily be deemed to have begun if the goods are merely in storage awaiting shipment, even though there is reasonable certainty that the goods will be exported. The intention to export, as evidenced for example, by financial and contractual relationships does not indicate "certainty of export" if the goods have not commenced their journey abroad; there must be an actual entrance of the goods into the export stream.

In all circumstances there must be (a) a certainty of export and (b) the process of export must have started.

It is of no importance that title and/or possession of the goods pass in this state so long as delivery is made directly into the export channel. To be tax exempt upon export sales, the seller must document the fact that he placed the goods into the export process. That may be shown by the seller obtaining and keeping in his files any one of the following documentary evidence:

- (1) A bona fide bill of lading in which, the seller is shipper/consignor and by which the carrier agrees to transport the goods sold to the foreign buyer/consignee at a foreign destination; or
- (2) A copy of the shipper's export declaration, showing that the seller was the exporter of the goods sold; or
- (3) Documents consisting of:

(a) Purchase orders or contracts of sale which show that the seller is required to get the goods into the export stream, e.g., "f.a.s. vessel;" and

(b) Local delivery receipts, tripsheets, waybills, warehouse releases, etc., reflecting flow and when the goods were delivered into the export stream; and

(c) When available, United States export or customs clearance documents showing that the goods were actually exported; and

(d) When available, records showing that the goods were packaged, numbered, or otherwise handled in a way which is exclusively attributable to goods for export.

Thus, where the seller actually delivers the goods into the export stream and retains such records as above set forth, the tax does not apply. It is not sufficient to show that the goods ultimately reached a foreign destination; but rather, the seller must show that he was required to, and did put the goods into the export process.

Sales of tangible personal property, of ships stores, and supplies to operators of steamships, etc., are not deductible irrespective of the fact that the property will be consumed on the high seas, or outside the territorial jurisdiction of this state, or by a vessel engaged in conducting foreign commerce. However, on July 1, 1985, a statutory business and occupation tax deduction became effective for sales of fuel for consumption outside the territorial waters of the United States by vessels used primarily in foreign commerce. In order to qualify for this deduction sellers must take a certificate signed by the buyer or the buyer's agent stating: The name of the vessel for which the fuel is purchased; that the vessel is primarily used in foreign commerce; and, the amount of fuel purchased which will be consumed outside of the territorial waters of the United States. Sellers must exercise good faith in accepting such certificates and are required to add their own signed statement to the certificate to the effect that to best of their knowledge the information contained in the certificate is correct. The following is an acceptable certificate form:

FOREIGN FUEL EXEMPTION CERTIFICATE

SELLER: \_\_\_\_\_ VESSEL: \_\_\_\_\_

WE HEREBY CERTIFY that this purchase of (kind and amount of product) from (seller) will be consumed as fuel outside the territorial waters of the United States by the above-named vessel. We further certify that said vessel is used primarily in foreign commerce and that none of the fuel purchased will be consumed within the territorial boundaries of the State of Washington,

DATED \_\_\_\_\_, 19 \_\_\_\_\_

\_\_\_\_\_  
Purchaser

\_\_\_\_\_  
Purchaser's Agent

By: \_\_\_\_\_

\_\_\_\_\_  
Title or Office

When a completed certification such as this is taken in good faith by the seller, the sale is exempt of business and occupation tax, whether made at wholesale or retail,

and even though the fuel is delivered to the buyer in this state,

EXTRACTING, MANUFACTURING. Persons engaged in these activities in Washington and who transfer or make delivery of articles produced to points outside the state are subject to business tax under the extracting or manufacturing classification and are not subject to business tax under the retailing or wholesaling classification. See also (~~Rules 135 and 136-f~~)WAC 458-20-135 and 458-20-136(~~f~~). The activities taxed occur entirely within the state, are inherently local, and are conducted prior to the commercial journey. The tax is measured by the value of products as determined by the selling price. See (~~Rule 112-f~~)WAC 458-20-112(~~f~~). It is immaterial that the value so determined includes an additional increment of value because the sale occurs outside the state.

RETAIL SALES TAX

The same principles apply to the retail sales tax as are set forth for business and occupation tax above, except that certain statutory exemptions may apply. (See (~~Rules 174, 175, 176, 177, 238 and 239-f~~)WAC 458-20-174, 458-20-175, 458-20-176, 458-20-177, 458-20-238 and 458-20-239(~~f~~)).

USE TAX

The use tax is imposed upon the use, including storage, of all tangible personal property acquired for any use or consumption in this state unless specifically exempt by statute.

WSR 86-07-006

ADOPTED RULES

DEPARTMENT OF REVENUE

[Order ET 86-4--Filed March 6, 1986]

I, Matthew J. Coyle, acting director of the Department of Revenue, do promulgate and adopt at Olympia, Washington, the annexed rules relating to artistic or cultural organizations, new section WAC 458-20-249.

This action is taken pursuant to Notice No. WSR 86-03-042 filed with the code reviser on January 14, 1986. These rules shall take effect thirty days after they are filed with the code reviser pursuant to RCW 34.04.040(2).

This rule is promulgated under the general rule-making authority of the Department of Revenue as authorized in RCW 82.32.300.

The undersigned hereby declares that the agency has complied with the provisions of the Open Public Meetings Act (chapter 42.30 RCW), the Administrative Procedure Act (chapter 34.04 RCW) and the State Register Act (chapter 34.08 RCW) in the adoption of these rules. APPROVED AND ADOPTED March 6, 1986.

By Matthew J. Coyle  
Acting Director

**Agency Fiscal Note to S.B. 6096**

# Department of Revenue Fiscal Note

Bill Number: 6096 SB	Title: Vessels in foreign commerce	Agency: 140-Department of Revenue
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**Part I: Estimates**

No Fiscal Impact

Estimated Cash Receipts to:

FUND					
Total \$					

Estimated Expenditures from:

	FY 2010	FY 2011	2009-11	2011-13	2013-15
FTE Staff Years	0.1		0.0		
<b>Fund</b>					
GF-STATE-State 001-1	5,000		5,000		
Total \$	5,000		5,000		

*The cash receipts and expenditure estimates on this page represent the most likely fiscal impact. Factors impacting the precision of these estimates, and alternate ranges (if appropriate), are explained in Part II.*

Check applicable boxes and follow corresponding instructions:

- If fiscal impact is greater than \$50,000 per fiscal year in the current biennium or in subsequent biennia, complete entire fiscal note form Parts I-V.
- If fiscal impact is less than \$50,000 per fiscal year in the current biennium or in subsequent biennia, complete this page only (Part I).
- Capital budget impact, complete Part IV.
- Requires new rule making, complete Part V.

Legislative Contact: Dianne Criswell	Phone: (360) 786-7433	Date: 02/27/2009
Agency Preparation: Gerald Saylor	Phone: 360-570-6088	Date: 02/27/2009
Agency Approval: Don Gutmann	Phone: 360-570-6073	Date: 02/27/2009
OFM Review: Ryan Black	Phone: 360-902-0417	Date: 02/27/2009

Request # 6096-1-1

## Part II: Narrative Explanation

### II. A - Brief Description Of What The Measure Does That Has Fiscal Impact

*Briefly describe, by section number, the significant provisions of the bill, and any related workload or policy assumptions, that have revenue or expenditure impact on the responding agency.*

Bunker fuel is fuel oil used for the propulsion of ships. RCW 82.04.433 provides a business and occupation (B&O) tax deduction for amounts derived from the sale of bunker fuel for consumption outside the territorial waters of the United States by vessels used primarily in foreign commerce. The Department of Revenue (Department) interprets this deduction as applying only to B&O taxes imposed on wholesale and retail sales of bunker fuel and not to B&O taxes imposed on the manufacturing of bunker fuel. A manufacturer of bunker fuel has brought a refund lawsuit against the Department, contending that the bunker fuel deduction may be claimed against its manufacturing B&O tax liability for manufacturing the bunker fuel. The lawsuit is currently pending in Thurston County Superior Court.

This legislation amends RCW 82.04.433 to clarify that the bunker fuel B&O tax deduction only applies to wholesale and retail sales of bunker fuel and does not apply to the manufacturing of bunker fuel.

This bill will take effect immediately and applies both prospectively and retroactively.

### II. B - Cash receipts Impact

*Briefly describe and quantify the cash receipts impact of the legislation on the responding agency, identifying the cash receipts provisions by section number and when appropriate the detail of the revenue sources. Briefly describe the factual basis of the assumptions and the method by which the cash receipts impact is derived. Explain how workload assumptions translate into estimates. Distinguish between one time and ongoing functions.*

#### REVENUE ESTIMATES

This bill is consistent with the Department's administration of the bunker fuel B&O tax deduction in RCW 82.04.433. Therefore, there is no revenue impact as a result of this legislation.

The bill's retroactivity clause could prevent an estimated \$17.8 million, plus interest, in refunds of B&O taxes paid on the manufacturing of bunker fuel. While this bill confirms the Department's interpretation of the bunker fuel deduction, it does not entirely eliminate litigation risk.

If the pending lawsuit is resolved in favor of the taxpayer, enactment of this bill will prevent a potential ongoing estimated revenue loss of \$4.75 million in the biennium ending in Fiscal Year 2011, \$5.7 million in the biennium ending in Fiscal Year 2103, and \$5.8 million in the biennium ending in Fiscal Year 2015.

### II. C - Expenditures

*Briefly describe the agency expenditures necessary to implement this legislation (or savings resulting from this legislation), identifying by section number the provisions of the legislation that result in the expenditures (or savings). Briefly describe the factual basis of the assumptions and the method by which the expenditure impact is derived. Explain how workload assumptions translate into cost estimates. Distinguish between one time and ongoing*

To implement this legislation, the Department will incur costs of approximately \$5,000 in Fiscal Year 2010. These costs are for amending one administrative rule.

**Part III: Expenditure Detail**

**III. A - Expenditures by Object Or Purpose**

	FY 2010	FY 2011	2009-11	2011-13	2013-15
FTE Staff Years	0.1		0.0		
A-Salaries and Wages	3,200		3,200		
B-Employee Benefits	800		800		
E-Goods and Services	700		700		
J-Capital Outlays	300		300		
<b>Total \$</b>	<b>\$5,000</b>		<b>\$5,000</b>		

**III. B - Detail:** *List FTEs by classification and corresponding annual compensation. Totals need to agree with total FTEs in Part I and Part IIIA*

Job Classification	Salary	FY 2010	FY 2011	2009-11	2011-13	2013-15
HEARINGS SCHEDULER	32,688	0.0		0.0		
TAX POLICY SP 3	69,756	0.0		0.0		
WMS BAND 3	88,546	0.0		0.0		
<b>Total FTE's</b>	<b>190,990</b>	<b>0.1</b>		<b>0.0</b>		

**Part IV: Capital Budget Impact**

NONE.

**Part V: New Rule Making Required**

*Identify provisions of the measure that require the agency to adopt new administrative rules or repeal/revise existing rules.*

Should this legislation become law, the Department will use the expedited process to amend WAC 458-20-19301- Multiple activities tax credits. Persons affected by this rule-making would include manufacturers and sellers of bunker fuel.