

FILED
COURT OF APPEALS
DIVISION II

10 MAR 16 PM 3:55

NO. 39417-1

STATE OF WASHINGTON

BY 
DEPUTY

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

TESORO REFINING & MARKETING COMPANY,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Respondent.

BRIEF OF RESPONDENT

ROBERT M. MCKENNA
Attorney General

DONALD F. COFER
Senior Counsel
WSBA #10896
PO Box 40123
Olympia, WA 98504-0123
(360) 753-7082

TABLE OF CONTENTS

I.	ISSUE PRESENTED	1
II.	STATEMENT OF THE CASE.....	1
III.	ARGUMENT	3
	A. The Phrase “In Computing Tax” Discloses Nothing About The Intended Scope Of The Deduction	4
	B. The Natural And Ordinary Meaning Of “Amounts Derived From Sales Of Fuel” Is Amounts Received From The Activity Of Selling Fuel.....	9
	C. The Former Subsection (2) Of The Statute Confirms That The Deduction Was Limited To Taxes On The Activity Of Selling	12
	D. The Legislative History Of The Statute Also Confirms That The Deduction Was Limited To Taxes On The Activity Of Selling.....	18
	E. The Contemporaneous Official Administrative Construction Of The Deduction Limited The Deduction To Taxes On The Activity Of Selling.....	22
	F. In Case Of Doubt, Ambiguous Tax Deductions Should Be Narrowly Construed	26
	G. The Court Should Refuse To Consider Any Federal Constitutional Arguments That The Taxpayer Did Not Present In The Trial Court	27
	H. The Court Should Refuse To Consider Any “Fairness,” “Equality,” or “Consistency” Arguments That The Taxpayer Did Not Present In The Trial Court	29
	I. The 2009 Clarifying Amendment Should Resolve The Case.....	33

J.	The 2009 Amendment Did Not Implicate RCW 43.135.035(1).....	37
K.	The 2009 Amendment Did Not Violate The Due Process Clause Of The Fourteenth Amendment	41
IV.	CONCLUSION	47

TABLE OF AUTHORITIES

Cases

<i>Agrilink Foods, Inc. v. Dep't of Revenue</i> , 153 Wn.2d 392, 103 P.3d 1226 (2005).....	7
<i>Anderson v. Dep't of Corrections</i> , 159 Wn.2d 849, 154 P.3d 220 (2007).....	39
<i>Andrews v. State</i> , 65 Wn. App. 734, 829 P.2d 250 (1992).....	28
<i>Astoria Fed. Sav. & Loan v. State</i> , 222 A.D.2d 36, 644 N.Y.S.2d 926 (1996), <i>cert. denied</i> , 522 U.S. 808 (1997).....	45
<i>Baker v. Tri-Mountain Res., Inc.</i> , 94 Wn. App. 849, 973 P.2d 1078 (1999).....	47
<i>Brown v. Owen</i> , 165 Wn.2d 706, 206 P.3d 310 (2009).....	40
<i>Canton R.R. Co. v. Rogan</i> , 340 U.S. 511, 71 S. Ct.447, 95 L. Ed. 488 (1951).....	13
<i>Carrington Co. v. Dep't of Revenue</i> , 84 Wn.2d 444, 527 P.2d 74 (1974), <i>cert. denied</i> , 421 U.S. 979 (1975).....	13
<i>Clark Cy. Pub. Util. Dist. 1 v. Dep't of Revenue</i> , 153 Wn. App. 737, 222 P.3d 1232 (2009).....	11, 28
<i>Coast Pac. Trading, Inc. v. Dep't of Revenue</i> , 105 Wn.2d 912, 719 P.2d 541 (1986).....	16
<i>Cornell v. Coyne</i> , 192 U.S. 418, 24 S. Ct.383, 48 L. Ed. 504 (1904).....	14
<i>Coulter v. State</i> , 93 Wn.2d 205, 608 P.2d 261 (1980).....	28

<i>Crown Zellerbach Corp. v. State</i> , 45 Wn.2d 749, 278 P.2d 305 (1954).....	21, 22
<i>Curtis v. Seattle</i> , 97 Wn.2d 59, 639 P.2d 1370 (1982).....	16
<i>Davis v. Dep't of Licensing</i> , 137 Wn.2d 957, 977 P.2d 554 (1999).....	47
<i>Dep't of Ecology v. Campbell & Gwinn, LLC</i> , 146 Wn.2d 1, 43 P.3d 4 (2002).....	7
<i>Dep't of Revenue v. Air Jamaica Ltd.</i> , 455 So.2d 324 (Fla. 1984), <i>appeal dismissed for want of a substantial federal question</i> , 477 U.S. 901(1986)	16
<i>Dep't of Revenue v. Ass'n of Wash. Stevedoring Cos.</i> , 435 U.S. 734, 98 S. Ct. 1388, 55 L. Ed. 2d 682 (1978).....	16
<i>Evergreen-Washelli Mem'l Park v. Dep't of Revenue</i> , 89 Wn.2d 660, 574 P.2d 735 (1978).....	26
<i>Group Health Co-op v. Tax Comm'n</i> , 72 Wn.2d 422, 433 P.2d 201 (1967).....	26
<i>Group Health Coop. v. City of Seattle</i> , 146 Wn. App. 80, 189 P.3d 216 (2008).....	4
<i>Hale v. Wellpinit Sch. Dist. No. 49</i> , 165 Wn.2d 494, 198 P.3d 1021 (2009).....	35, 37
<i>Hall v. Neimer</i> , 97 Wn.2d 574, 649 P.2d 98 (1982).....	28
<i>Hicks v. Miranda</i> , 422 U.S. 332, 95 S. Ct. 2281, 45 L. Ed. 2d 223 (1975).....	16
<i>Home Depot USA, Inc. v. Dep't of Revenue</i> , 151 Wn. App. 909, 215 P.3d 222 (2009), <i>review denied</i> , ____ Wn.2d ____ (2010).....	43

<i>Honeywell, Inc. v. Minnesota Life & Health Ins. Guaranty Ass'n</i> , 110 F.3d 547 (8th Cir.) (en banc), cert. denied, 522 U.S. 858 (1997).....	43
<i>Impecoven v. Dep't of Revenue</i> , 120 Wn.2d 357, 841 P.2d 752 (1992).....	27
<i>In re Detention of Strand</i> , 167 Wn.2d 180, 217 P.3d 1159 (2009).....	4
<i>In re Juvenile Director</i> , 87 Wn.2d 232, 552 P.2d 163 (1976).....	37
<i>In re Pers. Restraint of Jones</i> , 121 Wn. App. 859, 88 P.3d 424 (2004).....	36
<i>In re Sehome Park Care Ctr.</i> , 127 Wn.2d 774, 903 P.2d 443 (1995).....	4
<i>International Business Machines Corp. v. United States</i> , 170 Ct. Cl. 357, 343 F.2d 914 (1965).....	31
<i>Japan Line, Ltd v. McCaffree</i> , 88 Wn.2d 93, 558 P.2d 211 (1977).....	34
<i>King v. Campbell County</i> , 217 S.W.3d 862 (Ky. Ct. App. 2006)	45
<i>Lacey Nursing Ctr., Inc. v. Dep't of Revenue</i> , 128 Wn.2d 40, 905 P.2d 338 (1995).....	28
<i>Maples v. McDonald</i> , 668 So. 2d 790 (Ala. Civ. App. 1995).....	45
<i>McGoldrick v. Gulf Oil Corp.</i> , 309 U.S. 414, 60 S. Ct. 664, 84 L. Ed. 840 (1940).....	15
<i>Miller v. Johnson Controls, Inc.</i> , 296 S.W.3d 392 (Ky. 2009), petition for cert. filed (Feb. 22, 2010)....	45

<i>Montana Rail Link, Inc. v. United States</i> , 76 F.3d 991 (9th Cir. 1996)	45
<i>Moran Towing Corp. v. Urbach</i> , 1 A.D.3d 722, 768 N.Y.S.2d 33 (2003)	45
<i>O’Leary v. Dep’t of Revenue</i> , 105 Wn.2d 679, 717 P.2d 273 (1986).....	26
<i>Rozner v. City of Bellevue</i> , 116 Wn.2d 342, 804 P.2d 24 (1991).....	36
<i>Seatrain Shipbuilding Corp. v. Shell Oil Co.</i> , 444 U.S. 572, 100 S. Ct. 800, 63 L. Ed. 2d 36 (1980).....	36
<i>Shell Oil Co. v. State Bd. of Equalization</i> , 64 Cal.2d 713, 414 P.2d 820, 51 Cal. Rptr. 524 (1966), <i>appeal dismissed for want of a substantial federal question</i> , 386 U.S. 211(1967).....	13, 16
<i>Simpson Inv. Co. v. Dep’t of Revenue</i> , 141 Wn.2d 139, 3 P.3d 741 (2000).....	6, 7, 26
<i>Smith v. Sears, Roebuck & Co.</i> , 672 So. 2d 794 (Ala. Civ. App. 1995)	45
<i>State v. Delgado</i> , 148 Wn.2d 723, 63 P.3d 792 (2003).....	8
<i>State v. Nolan</i> , 141 Wn.2d 620, 8 P.3d 300 (2000).....	46
<i>State v. Wanrow</i> , 91 Wn.2d 301, 588 P.2d 1320 (1978).....	16
<i>Swan & Finch Co. v. United States</i> , 190 U.S. 143, 23 S. Ct. 702, 47 L. Ed. 984 (1903).....	16
<i>Texaco Ref. & Mktg., Inc v. Dep’t of Revenue</i> , 131 Wn. App. 385, 127 P.3d 771, <i>review denied</i> , 158 Wn.2d 1012 (2006).....	11

<i>Time Oil Co. v. State</i> , 79 Wn.2d 143, 483 P.2d 628 (1971).....	27
<i>Tully v. Griffin, Inc.</i> , 429 U.S. 68, 97 S. Ct. 219, 50 L. Ed. 2d 227 (1976).....	16
<i>Tyler Pipe Indus., Inc. v. Dep't of Revenue</i> , 483 U.S. 232, 107 S. Ct. 2810, 97 L. Ed. 2d 199 (1987).....	44
<i>U.S. Bancorp v. Dep't of Revenue</i> , 337 Or. 625, 103 P.3d 85 (2004), <i>cert. denied</i> , 546 U.S. 813 (2005).....	45
<i>United States v. Carlton</i> , 512 U.S. 26, 114 S. Ct. 2018, 129 L. Ed. 2d 22 (1994).....	passim
<i>United States v. Hemme</i> , 476 U.S. 558, 106 S. Ct. 2071, 90 L. Ed. 2d 538 (1986).....	41
<i>United States v. Wells Fargo Bank</i> , 485 U.S. 351, 108 S. Ct. 1179, 99 L. Ed. 2d 368 (1988).....	41
<i>Van Dyk v. Dep't of Revenue</i> , 41 Wn. App. 71, 702 P.2d 472, <i>review denied</i> , 104 Wn.2d 1014 (1985).....	7
<i>W.R. Grace & Co. v. Dep't of Revenue</i> , 137 Wn.2d 580, 973 P.2d 1011, <i>cert. denied</i> , 528 U.S. 950 (1999).....	44, 45, 46
<i>Wash. State Grange v. Locke</i> , 153 Wn.2d 475, 105 P.3d 9 (2005).....	40
<i>Washington State Farm Bureau Federation v. Gregoire</i> , 162 Wn.2d 284, 174 P.3d 1142 (2007).....	38, 39
<i>Weber v. School Dist. 7 of Yakima Cy.</i> , 185 Wash. 697, 56 P.2d 707 (1936)	28
<i>Welch v. Henry</i> , 305 U.S. 134, 59 S. Ct. 121, 83 L. Ed. 87 (1938).....	42, 45

Constitutional Provisions

Const. art. II, § 26 28
U.S. Const. art. I, § 10..... 16

Statutes

26 U.S.C. § 7805(b)..... 30, 31
Laws of 1980, ch. 37, §§ 2-18, 81 5
Laws of 1985, ch. 471, § 16..... 4
Laws of 1985, ch. 471, § 6..... 6
Laws of 2009, ch. 494..... 42
Laws of 2009, ch. 494, § 1 34
Laws of 2009, ch. 494, § 2..... 33
RCW 43.135.035(1)..... 37, 38, 39
RCW Title 82..... 12, 32
RCW 82.04 5, 8, 10, 22
RCW 82.04.010 10, 11
RCW 82.04.020 - .217..... 10, 11
RCW 82.04.220 10
RCW 82.04.240 passim
RCW 82.04.250 13
RCW 82.04.270 13
RCW 82.04.4271 8

RCW 82.04.4281	8
RCW 82.04.4282	8
RCW 82.04.4283	8
RCW 82.04.4284	8
RCW 82.04.4285	8
RCW 82.04.4286	8
RCW 82.04.4287	8
RCW 82.04.4288	8
RCW 82.04.4289	8
RCW 82.04.4291	8
RCW 82.04.4292	7, 8
RCW 82.04.4293	8
RCW 82.04.4294	8
RCW 82.04.4295	8
RCW 82.04.4296	8
RCW 82.04.4297	8
RCW 82.04.4298	8
RCW 82.04.430	5, 6
RCW 82.04.432	8
RCW 82.04.4322	8
RCW 82.04.4324	8

RCW 82.04.4326	8
RCW 82.04.4327	6, 7
RCW 82.04.433	passim
RCW 82.04.433(1).....	9, 12, 14, 30
RCW 82.04.433(2).....	12, 13, 14
RCW 82.04.440	21, 44
RCW 82.04.450	1, 10, 11
RCW 82.04.450(1).....	10, 11, 12
RCW 82.08.0261	14
RCW 82.32.010	28
RCW 82.32.050	34, 35
RCW 82.32.060	34, 35
RCW 82.32.180	2, 28, 29
RCW 82.32.330	25
RCW 82.32.330(3)(k)	25
RCW 82.32A.....	30, 31
RCW 82.32A.020.....	32
RCW 82.32A.020(2).....	32

Rules

RAP 2.5(a)	28
RAP 9.12.....	28

Regulations

WAC 458-20-136..... 24

WAC 458-20-175..... passim

WAC 458-20-193..... 21

WAC 458-20-193C..... passim

Other Authorities

Christopher M. Pietruszkiewicz, *Does the Internal Revenue Service
Have a Duty to Treat Similarly Situated Taxpayers Similarly?*, 74
U. Cin. L. Rev. 531 (2005) 32

House Journal, 49th Leg., Reg. Sess. (Wash. 1985)..... 18, 19

Senate Journal, 61st Leg., Reg. Sess. (Wash. 2009)..... 42

Wash. St. Reg. 86-03-043 20

Wash. St. Reg. 86-07-005 15, 20, 23, 24

Washington State Department of Revenue, *Strategic Business Plan
60* (2008)..... 25

I. ISSUE PRESENTED

Does the deduction authorized by RCW 82.04.433 extend to the manufacturing B&O tax imposed by RCW 82.04.240 on the business activity of manufacturing fuel if the manufacturer reports the value of the fuel products it manufactures based on the “gross proceeds derived from the sales thereof” as described in RCW 82.04.450?

II. STATEMENT OF THE CASE

Tesoro owns and operates a crude oil refinery near Anacortes. CP 5, 9. The refinery processes crude oil received from both domestic and foreign sources. CP 9. It also processes intermediate feedstock received from other refineries. *Id.* The primary petroleum products manufactured at the refinery are gasoline, diesel, and jet fuel, but the refinery also manufactures other petroleum products, including heavy fuel oils, propane, and asphalt. *Id.*

One of the heavy fuel oils manufactured at the refinery is marine bunker fuel (“bunker fuel”). CP 5, 9. Bunker fuel is a residual fuel oil that remains after gasoline and other distillate fuels are extracted from the crude oil. CP 9. It is used as a fuel by ships and vessels. *Id.*

For tax periods from December 1, 1999 through April 30, 2004, Tesoro reported and paid B&O taxes on its business activities in Washington. CP 10, 35, 165-189. During those periods, Tesoro reported

manufacturing B&O tax on its manufacturing activities in Washington and reported wholesaling B&O tax or retailing B&O tax on its selling activities in Washington. CP 165-189. Tesoro paid manufacturing B&O tax on its manufacturing activities in Washington, including its manufacturing of bunker fuel. CP 10, 165-189. It claimed multiple activities tax credits under RCW 82.04.440(2) against its reported selling B&O tax liabilities for manufacturing B&O taxes it also reported and paid on the same products. CP 165-167, 170-171, 174-176, 179, 180-181, 184, 185-186, 188. It did not identify any separate deduction it may have taken under RCW 82.04.433 for sales of bunker fuel on any of these tax returns. CP 168-169, 172-173, 177-178, 182-183, 187, 189.

During an audit of its records by the Department of Revenue's Audit Division, Tesoro requested a refund of manufacturing B&O taxes it had paid for manufacturing bunker fuel in Washington for the periods from December 1999 through April 2004, claiming it had been entitled to take a deduction under RCW 82.04.433 against those manufacturing B&O taxes, but did not do so. CP 5, 10, 210. The Audit Division denied the refund request. *Id.* Tesoro appealed the denial to the Department's Appeals Division, which also denied the refund request. *Id.*

In February 2008, Tesoro filed this timely refund action under RCW 82.32.180, seeking to recover those manufacturing B&O taxes it

had paid for those periods. CP 4-7. The complaint added similar refund claims for tax periods from May 2004 through December 2007. CP 6. In April 2009, Tesoro filed a motion for partial summary judgment, limited to the issue whether the deduction allowed under RCW 82.04.433 extends to manufacturing B&O taxes paid for manufacturing bunker fuel. CP 12-228. The Department responded to the motion, opposing Tesoro's request for relief and requesting a summary judgment order in favor of the Department. CP 229-284. Tesoro then replied. CP 285-314.

After hearing oral argument on May 15, 2009, the trial court denied Tesoro's motion for partial summary judgment, ruling that the deduction in RCW 82.04.433 does not extend to manufacturing B&O taxes. The court granted summary judgment to the Department. RP 44-45. A final order to that effect was entered at the conclusion of the hearing. CP 316-319. Tesoro filed a timely appeal to this Court on June 12, 2009. CP 320-325.

III. ARGUMENT

As originally enacted in 1985, RCW 82.04.433 provided:

- (1) In computing tax there may be deducted from the measure of tax amounts derived from sales of fuel for consumption outside the territorial waters of the United States, by vessels used primarily in foreign commerce.
- (2) Nothing in this section shall be construed to imply that amounts which may be deducted under this

section were taxable under Title 82 RCW prior to the enactment of this section.

Laws of 1985, ch. 471, § 16. The deduction section became effective on July 1, 1985. *Id.*, § 18.

In construing this statute, it is important to bear in mind that the goal of all statutory construction is “to ascertain and carry out the intent of the Legislature.” *In re Detention of Strand*, 167 Wn.2d 180, 188, 217 P.3d 1159 (2009). In ascertaining legislative intent, a court “must look at the whole statute, rather than the single phrase at issue.” *In re Sehome Park Care Ctr.*, 127 Wn.2d 774, 778, 903 P.2d 443 (1995). The “plain meaning” of a statute “is discerned from the ordinary meaning of the provision at issue, the context of the statute in which that provision is found, any related provisions, and the statutory scheme as a whole.” *Group Health Coop. v. City of Seattle*, 146 Wn. App. 80, 104, 189 P.3d 216 (2008).

A. The Phrase “In Computing Tax” Discloses Nothing About The Intended Scope Of The Deduction

Tesoro argues that the phrase “in computing tax” in RCW 82.04.433 somehow supports its contention that the bunker fuel deduction extends to the manufacturing B&O tax. See Appellant’s Br. at 13-18, 26-29. Contrary to Tesoro’s arguments, the phrase “in computing tax” sheds no light whatsoever on the intended scope of the deduction. The

surrounding statutory context shows conclusively that the introductory language “in computing tax there may be deducted from the measure of tax” merely signaled that the Legislature intended to enact a new deduction section in chapter 82.04 RCW—nothing more. Only the language in RCW 82.04.433 after that introductory language provides any clues as to the intended scope of the deduction the Legislature enacted.

Until 1980, virtually all of the deductions in chapter 82.04 RCW were contained in a single section, former RCW 82.04.430. That section began with the following introductory language: “In computing tax there may be deducted from the measure of tax the following items[.]” After that introductory language were separate subsections containing each of the authorized statutory deductions. For example, in 1979, there were 17 such subsections in former RCW 82.04.430. See Appendix at A-19 to A-21.

In 1980, the Legislature repealed former RCW 82.04.430 and recodified the 17 deductions in the same order as separate consecutive sections in chapter 82.04 RCW. See Laws of 1980, ch. 37, §§ 2-18, 81 (Appendix A-22 to A-25). The recodification was not intended to change the meaning of any of the existing deductions. See *id.*, § 1 (the separation “is intended to improve the readability and facilitate the future amendment of these sections” and “shall not change the meaning of” any of the

deductions); *Simpson Inv. Co. v. Dep't of Revenue*, 141 Wn.2d 139, 150 n.8, 3 P.3d 741 (2000) (recognizing limited purpose of the 1980 act). Each new section, codified as RCW 82.04.4281 through .4298, began with identical introductory language that was essentially the same as the language in former RCW 82.04.430: "In computing tax there may be deducted from the measure of tax"

In drafting the 1985 bunker fuel deduction, the Legislature used in RCW 82.04.433 the identical introductory language that appeared in the existing B&O tax deductions. Indeed, the same 1985 act also contained another new B&O tax deduction for "those amounts received by artistic or cultural organizations which represent income derived from business activities conducted by the organization." Laws of 1985, ch. 471, § 6 (codified as RCW 82.04.4327). Section 6 of the 1985 act (the artistic and cultural organization deduction) contained introductory language identical to that in section 16 (the bunker fuel deduction).

Section 6 of the 1985 act (RCW 82.04.4327) refutes Tesoro's arguments that a "plain reading" of the words "in computing tax" in RCW 82.04.433 shows that the Legislature "did not intend to limit the B&O tax classifications that qualified for the [bunker fuel] deduction" and that until 2009 the deduction "applied to all B&O taxes." See Appellant's Br. at 17-18. In contrast to RCW 82.04.4327, which authorizes a deduction for

“amounts . . . derived from *business activities* conducted by [an artistic or cultural] organization,” RCW 82.04.433 authorizes a deduction only for

“amounts derived from *sales* of [bunker] fuel[.]” (Emphasis added.)

When the Legislature uses certain language in one instance, and different language in another, there is a difference in legislative intent. *See Agrilink Foods, Inc. v. Dep’t of Revenue*, 153 Wn.2d 392, 397, 103 P.3d 1226 (2005); *Simpson Inv. Co. v. Dep’t of Revenue*, 141 Wn.2d 139, 160, 3 P.3d 741 (2000); *Van Dyk v. Dep’t of Revenue*, 41 Wn. App. 71, 77, 702 P.2d 472, *review denied*, 104 Wn.2d 1014 (1985). When the 1985 Legislature in chapter 471 authorized a deduction for amounts derived from all “business activities” conducted by the taxpayer, it intended a deduction applicable to “all B&O taxes” that taxpayer might otherwise owe; when it authorized *in that same 1985 act* a deduction for amounts derived from “sales” made by the taxpayer, it intended a deduction applicable only to B&O taxes imposed on selling activities conducted by the taxpayer.¹

Based solely on the introductory words “in computing tax,” which appears in both RCW 82.04.4327 and RCW 82.04.433 (as well as many

¹ Tesoro argues that the trial court erred in “examin[ing] the wording of other B&O tax deduction and exemption statutes in an attempt to ascertain the meaning of this statute.” Appellant’s Br. at 16 n.10. Curiously, however, only three pages later Tesoro argues that this Court should “examine the wording of” another B&O tax deduction statute, RCW 82.04.4292, enacted in 1970 by a different Legislature than the one that enacted RCW 82.04.433. Appellant’s Br. at 19-21. The trial court committed no error in using basic common sense to construe the 1985 act. *See Dep’t of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-12, 43 P.3d 4 (2002).

other deduction sections already in chapter 82.04 RCW in 1985),² Tesoro would have this Court interpret RCW 82.04.433 as if it read: “In computing tax there may be deducted from the measure of tax amounts derived from ~~((sales of))~~ any business activities related to fuel ~~((for consumption))~~ consumed outside the territorial waters of the United States, by vessels used primarily in foreign commerce.” It is Tesoro, not the trial court or the Department, that is urging this Court to “add words or clauses to an unambiguous statute when the legislature has chosen not to include that language.” *See* Appellant’s Br. at 14 (quoting *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003)).

Tesoro’s “plain meaning” arguments based on the introductory phrase “in computing tax” in RCW 82.04.433 are specious. The introductory language in RCW 82.04.433 had nothing to do with the intended scope of the deduction. The Court should give no credence to any of Tesoro’s arguments based on this language.

² RCW 82.04.4271; RCW 82.04.4281; RCW 82.04.4282; RCW 82.04.4283; RCW 82.04.4284; RCW 82.04.4285; RCW 82.04.4286; RCW 82.04.4287; RCW 82.04.4288; RCW 82.04.4289; RCW 82.04.4291; RCW 82.04.4292; RCW 82.04.4293; RCW 82.04.4294; RCW 82.04.4295; RCW 82.04.4296; RCW 82.04.4297; RCW 82.04.4298; RCW 82.04.432; RCW 82.04.4322; RCW 82.04.4324; RCW 82.04.4326.

B. The Natural And Ordinary Meaning Of “Amounts Derived From Sales Of Fuel” Is Amounts Received From The Activity Of Selling Fuel

Tesoro next argues that the language “amounts derived from sales of fuel” was the “key” phrase in RCW 82.04.433(1). See Appellant’s Br. at 18, 20.³ For the reasons explained above, the Department agrees that the only language in RCW 82.04.433(1) shedding any significant light on the issue presented comes after the introductory language “in computing tax there may be deducted from the measure of tax.”⁴ But the natural and ordinary meaning of the language “amounts derived from sales of fuel” is amounts received from the activity of *selling* bunker fuel, not the activity of *manufacturing* bunker fuel. There is no hint in this language itself that the Legislature had the manufacturing B&O tax in mind at all when it enacted this deduction.

Rather than focusing its argument on the ordinary meaning of the language “amounts derived from sales of fuel” in RCW 82.04.433(1), Tesoro argues instead that the deduction must be construed as broadly as possible, extending to any B&O taxes that are *measured by* sales of products, because the Legislature did not explicitly list the specific B&O

³ This argument of Tesoro is hard to reconcile, however, with Tesoro’s previous argument that “in computing tax” was the “critical” phrase in the statute showing that the deduction “applied to all B&O taxes.” See Appellant’s Br. at 17-18.

⁴ For the reasons to be explained below at pages 12-18, RCW 82.04.433(2) also revealed the intended meaning of RCW 82.04.433 and reinforced the conclusion that the deduction was not intended to apply to the B&O tax imposed under RCW 82.04.240 on the activity of manufacturing bunker fuel.

taxes to which the deduction applied. See Appellant's Br. at 22, 24. Building on that dubious premise, Tesoro then argues, based on RCW 82.04.240 and RCW 82.04.450(1), that the manufacturing B&O tax is measured by "amounts derived from sales." See Appellant's Br. at 18-19, 22, 24. Those are strained interpretations of RCW 82.04.240, RCW 82.04.450, and RCW 82.04.433.

RCW 82.04.240 imposes a tax on the act of "engaging in this state in business as a manufacturer[.]" The same section plainly provides that the measure of the tax "is the value of the products . . . so manufactured[.]" Thus, the manufacturing B&O tax is imposed on the *business activity* of manufacturing and is measured by "the value of the products . . . manufactured," not "amounts derived from sales."

Tesoro argues that RCW 82.04.450(1) "*defines*" the term "value of products" to mean "gross proceeds derived from the sale thereof." See Appellant's Br. at 19, 21, 22. That is incorrect. RCW 82.04.450 does not define the phrase "the value of products" in RCW 82.04.240. The general statutory definitions in chapter 82.04 RCW are contained in RCW 82.04.020 through .217. See RCW 82.04.010 ("Unless the context clearly requires otherwise, the definitions set forth in the sections *preceding RCW 82.04.220* apply throughout this chapter.") (italics added). There is no statutory definition of "the value of the products" in RCW 82.04.020

through .217. Tesoro’s argument ignores “the plain language” of RCW 82.04.010. See *Clark Cy. Pub. Util. Dist. 1 v. Dep’t of Revenue*, 153 Wn. App. 737, ¶ 46, 222 P.3d 1232, 1240 (2009). Instead of *defining* the term “value of products,” RCW 82.04.450 merely prescribes methods for determining the value of manufactured products under various circumstances. Thus, the words “the value of the products” in RCW 82.04.240 and the words “gross proceeds derived from the sales thereof” in RCW 82.04.450(1) are not intended to be used interchangeably and are not equivalent defined terms.

To illustrate this point, RCW 82.04.450(1) requires that the value of products must include, *in addition to* the “gross proceeds derived from the sales thereof,” all “subsidies and bonuses received from the purchaser or from any other person with respect to the extraction, manufacture, or sale” of the products by the seller. Depending on how the manufacturer uses the products it manufactures, the value of the products may be determined using methods other than the “gross proceeds derived from the sales” of the products. In every instance, the goal of the statute is to determine most accurately the “value of the products . . . manufactured.” RCW 82.04.240; see *Texaco Ref. & Mktg., Inc v. Dep’t of Revenue*, 131 Wn. App. 385, 127 P.3d 771, *review denied*, 158 Wn.2d 1012 (2006).

Finally, when considered in context as explained above, the most natural reading of the phrase “amounts derived from sales of fuel” suggests that it identifies the business activity otherwise subject to B&O tax to which the deduction applies—the selling of fuel in Washington. The phrase was intended to relieve taxpayers only from B&O taxes on the *activity* of *selling* bunker fuel, not from B&O taxes on other activities the *measure* of which happens in particular instances to be determined by gross proceeds from sales of products. Thus, the basic premise of Tesoro’s argument relying on RCW 82.04.450(1) is false.

Like its first argument based on the phrase “in computing tax,” Tesoro’s alternative argument effectively reads the words “sales of” out of the statute.

C. The Former Subsection (2) Of The Statute Confirms That The Deduction Was Limited To Taxes On The Activity Of Selling

Arguing that the bunker fuel deduction extends to the manufacturing B&O tax based on isolated language in RCW 82.04.433(1), Tesoro also essentially ignores former RCW 82.04.433(2), which provided: “Nothing in this section shall be construed to imply that amounts which may be deducted under this section were taxable under Title 82 RCW prior to the enactment of this section.” This language

reinforces the conclusion that the 1985 Legislature did not intend the deduction to extend to the manufacturing B&O tax.

Former RCW 82.04.433(2) was an attempt to preserve taxpayer arguments that wholesaling or retailing B&O taxes on their business activities of selling bunker fuel for consumption outside the territorial waters of the United States, by vessels used primarily in foreign commerce, were not owed even before the enactment of RCW 82.04.433. In 1985, there were at least colorable—though ultimately unpersuasive—arguments that taxing the activity of *selling* bunker fuel in Washington under RCW 82.04.250 or RCW 82.04.270 might have been prohibited by the Import-Export Clause. *See, e.g., Carrington Co. v. Dep’t of Revenue*, 84 Wn.2d 444, 527 P.2d 74 (1974), *cert. denied*, 421 U.S. 979 (1975); *Shell Oil Co. v. State Bd. of Equalization*, 64 Cal.2d 713, 414 P.2d 820, 823-27, 51 Cal. Rptr. 524 (1966).

In contrast, it had been well-settled for many years that taxing the activity of *manufacturing* bunker fuel in Washington under RCW 82.04.240 was not prohibited by the Import-Export Clause. *See, e.g., Canton R.R. Co. v. Rogan*, 340 U.S. 511, 515, 71 S. Ct.447, 95 L. Ed. 488 (1951) (to adopt a broader interpretation of the process of exportation “would lead back to every forest, mine, and factory in the land and create a zone of tax immunity never before imagined”); *Cornell v. Coyne*, 192

U.S. 418, 426-29, 24 S. Ct.383, 48 L. Ed. 504 (1904) (“[I]t is clear that there is no constitutional objection to the imposition of the same manufacturing tax on [goods] manufactured for export and, in fact, exported, as upon other [goods].”).⁵

Tesoro’s weak attempt to explain away the clear implication of subsection (2) is unpersuasive. Tesoro’s only discussion of RCW 82.04.433(2) is confined to a single footnote. Appellant’s Br. at 12 n.7. After quoting subsection (2), Tesoro asserts that “even before RCW 82.04.433 was enacted,” sales of bunker fuel to vessels engaged in foreign commerce “were not subject to B&O tax.” Appellant’s Br. at 12 n.7.⁶

Tesoro argues first that this was so because sales of fuel to vessels engaged in foreign commerce were “entitled to the export sales exemption” (citing WAC 458-20-193C). In fact, WAC 458-20-193C directly contradicts Tesoro’s argument that sales of bunker fuel to vessels engaged in foreign commerce were “entitled to the export sales exemption” when RCW 82.04.433 was enacted in 1985. Since 1950, all previous versions of Rule 193 consistently and specifically stated that

⁵ Nor were there any existing statutory B&O tax exemptions or deductions of any kind for bunker fuel. There were, however, retail sales tax and use tax exemptions for sales or use of “tangible personal property . . . for use by the purchaser in connection with the business of operating as a common or private carrier by air, rail, or water in interstate or foreign commerce” if the property was actually used outside the state. *See* RCW 82.08.0261; WAC 458-20-175. Those exemptions extended to bunker fuel actually used by such private or common carriers outside the state. *See* WAC 458-20-175.

⁶ See also Appellant’s Br. at 4 (“The deduction is authorized by statute (RCW 82.04.433(1)) but grounded in export and foreign commerce.”).

sales “of tangible personal property, of ships stores, and of supplies to operators of steamships, etc.” were not deductible from wholesaling or retailing B&O taxes as export sales “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 carrying foreign commerce.” After RCW 82.04.433 was enacted, the Department amended this specific part of WAC 458-20-193C by adding the following sentence: “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.” State Register 86-07-005. Thus, Rule 193C applied RCW 82.04.433 *prospectively only*.

Tesoro also argues that the United States Constitution prohibited states from taxing sales of fuel to vessels engaged in foreign commerce.⁷ Tesoro’s cryptic assertion that “the U.S. Constitution” in 1985 prohibited Washington from imposing B&O taxes on “export sales or sales in foreign commerce” of bunker fuel to vessels engaged in foreign commerce is

⁷ Tesoro argues the sales were “of the type that the U.S. Constitution prohibits a state from taxing” (citing *McGoldrick v. Gulf Oil Corp.*, 309 U.S. 414, 60 S. Ct. 664, 84 L. Ed. 840 (1940)), and asserts that “nothing suggests” that “the U.S. Constitution’s prohibition on the imposition of state taxes on export sales or sales in foreign commerce” no longer exempts from B&O tax “sales of this type of fuel.” Appellant’s Br. at 12 n.7. Tesoro’s argument, *id.* at 44 n.30, that a statement of Representative Appelwick on the House floor shows that “bunker fuel has never been subject to B&O tax in Washington” and “confirms the constitutional prohibition on imposing the tax” is addressed below at page 20 in footnote 10.

baseless. The Import-Export Clause (U.S. Const. art. I, § 10) did not prohibit B&O taxes on such sales because (1) bunker fuel purchases for consumption on the high seas were not “exports,” *Swan & Finch Co. v. United States*, 190 U.S. 143, 23 S. Ct. 702, 47 L. Ed. 984 (1903); *Shell Oil Co. v. State Bd. of Equalization*, 64 Cal.2d 713, 414 P.2d 820, 823-27, 51 Cal. Rptr. 524 (1966), *appeal dismissed for want of a substantial federal question*, 386 U.S. 211(1967); *Dep’t of Revenue v. Air Jamaica Ltd.*, 455 So.2d 324 (Fla. 1984), *appeal dismissed for want of a substantial federal question*, 477 U.S. 901(1986),⁸ and (2) Washington’s non-discriminatory selling B&O taxes were neither “imposts” nor “duties,” *See Dep’t of Revenue v. Ass’n of Wash. Stevedoring Cos.*, 435 U.S. 734, 751-55, 98 S. Ct. 1388, 55 L. Ed. 2d 682 (1978); *id.* at 761-64 (Powell, J., concurring); *Coast Pac. Trading, Inc. v. Dep’t of Revenue*, 105 Wn.2d 912, 916-17, 719 P.2d 541 (1986).

Neither did the dormant Commerce Clause (U.S. Const. art. I, § 8) prohibit Washington from imposing B&O taxes on Washington businesses’ intrastate sales of bunker fuel to vessels engaged in foreign

⁸ Unlike denials of petitions for certiorari, dismissals of appeals for want of a substantial federal question are decisions by the United States Supreme Court on the merits, with binding precedential force as to all courts except the Supreme Court itself. *See, e.g., Tully v. Griffin, Inc.*, 429 U.S. 68, 74, 97 S. Ct. 219, 50 L. Ed. 2d 227 (1976); *Hicks v. Miranda*, 422 U.S. 332, 343-45, 95 S. Ct. 2281, 45 L. Ed. 2d 223 (1975); *State v. Wanrow*, 91 Wn.2d 301, 309-11, 588 P.2d 1320 (1978); *Curtis v. Seattle*, 97 Wn.2d 59, 68 n.1, 639 P.2d 1370 (1982) (Stafford, J., concurring).

commerce. A nondiscriminatory state tax on the sale of an item occurring within the state was not barred by the Commerce Clause merely because the buyer might thereafter remove the item from the state or use it in interstate or foreign commerce. *Eastern Air Transp., Inc., v. S.C. Tax Comm'n*, 285 U. S. 147, 151-53, 52 S. Ct. 340, 76 L. Ed. 673 (1932); *Int'l Harvester Co. v. Dep't of Treasury of Ind.*, 322 U.S. 340, 345-46, 64 S. Ct. 1019, 88 L. Ed. 1313 (1944); *Shell Oil Co., supra*, 414 P.2d at 826-28.

The decision Tesoro cites, *McGoldrick v. Gulf Oil Corp.*, 309 U.S. 414, 60 S. Ct. 664, 84 L. Ed. 840 (1940), held that a 2% New York City retail sales tax imposed upon sales of bunker fuel oil refined in a customs bonded manufacturing warehouse from imported crude oil was impliedly preempted by the combined effect of two former federal statutes, section 630 of the Revenue Act of 1932, Pub. L. No. 73-73, 48 Stat. 254, 256 (1933), and section 309 of the Tariff Act of 1930, Pub. L. No. 71-361, 46 Stat. 590, 690, and implementing customs regulations. 309 U.S. at 421-22, 425-29. Tesoro offers no authority proving that any federal statute or regulation in effect in 1985 would have preempted wholesaling or retailing B&O taxes on any sales of bunker fuel in Washington to vessels engaged in foreign commerce, let alone on all such sales (as Tesoro seems to suggest). See *Shell Oil Co., supra*, 414 P.2d at 828-30 (holding that

California retail sales tax imposed on seller of bunker fuel was not preempted by former federal statutes discussed in *Gulf Oil*).

D. The Legislative History Of The Statute Also Confirms That The Deduction Was Limited To Taxes On The Activity Of Selling

The legislative history of chapter 471 confirms that the 1985 Legislature intended the bunker fuel deduction to apply only to B&O taxes imposed on selling activities conducted by taxpayers.

The bill that became chapter 471, Engrossed Substitute Senate Bill 4228, was amended substantially during the course of the 1985 legislative session. The bunker fuel deduction was added to the bill in the House Ways & Means Committee after the Senate had passed the original version of the bill. House Journal, 49th Legislature (1985), at 837, 839; CP 280-283. The deduction was contained in section 4 of the striking amendment recommended by the House Ways & Means Committee. House Journal, at 1225, 1227. When the committee amendment came to the floor of the House, several amendments to the committee amendment were adopted. See House Journal, at 1522-1535. During the course of those floor amendments, the deduction in section 4 was struck from the bill, but it was reinserted into the bill without change through a floor amendment sponsored by Representatives Applewick and Todd. See

House Journal, at 1530-1531; CP 284. The deduction became section 16 of the final version of the bill enacted by the Legislature.

According to the legislative history materials contained in the Department's rulemaking file and Governor Gardner's bill file, the bunker fuel deduction was added to ESSB 4228 at the request of Pacific Northern Oil Corp. *See* CP 276-284, 289-291. Pacific Northern Oil was then involved in litigation with the Department over "the existing export deduction" issue. *See* CP 281, 283.⁹

After ESSB 4228 was enacted, the law firm that represented Pacific Northern Oil in that litigation and that lobbied the deduction through the Legislature was involved with the Department in drafting amendments of WAC 458-20-175 and WAC 458-20-193C before they were formally proposed. *See* CP 274, 276-284. The law firm argued persuasively, based on the legislative materials it provided to the Department, that the newly enacted deduction "applies to both wholesaling and retailing B&O tax, where the fuel is sold or supplied for

⁹ In seeking the enactment of RCW 82.04.433, Pacific Northern Oil did not contend that any federal statute or regulation preempted Washington's B&O taxes on its sales of bunker fuel. CP 276-284, 288-292. It argued only that such taxes on sales of fuel to vessels for consumption on the high seas were "arguably covered" under the "existing export deduction." CP 281, 283. Pacific Northern Oil's "export deduction" argument apparently was based on WAC 458-20-193C and the Import-Export Clause. *See* CP 276 (statement that applying section 16, chapter 471, Laws of 1985 to "both wholesaling and retailing B&O tax" is "consistent with the export deduction set forth in Rule 193C, which this amendment was expressly intended to clarify" and "in accord with the Washington Supreme Court's interpretation of the export deduction in City of Tacoma v. General Metals of Tacoma, Inc., 84 Wn.2d 560, 527 P.2d 1314 (1974)").

consumption outside U.S. waters.” CP 276. The Department later proposed and adopted amendments to WAC 458-20-175 and WAC 458-20-193C consistent with those arguments. See State Register 86-03-043; State Register 86-07-005.¹⁰

In all the legislative history materials relating to ESSB 4228, there is no indication that the Legislature intended to extend the bunker fuel deduction to the manufacturing B&O tax imposed on crude oil refineries. Indeed, Representative Appelwick’s explanation of the purpose of the floor amendment shows that the bunker fuel deduction was not intended to

¹⁰ As noted earlier, Tesoro quotes a statement by Representative Appelwick on the floor of the House in response to a point of inquiry indicating that there was no fiscal impact associated with the bunker fuel floor amendment because B&O tax “has not been collected in the past and would not be a reduction from current revenue.” Appellant’s Br. at 44 n.30. Tesoro claims that this statement “confirms the constitutional prohibition on imposing the tax.” *Id.* Tesoro’s claim is difficult to reconcile with: (1) Pacific Northern Oil’s letter to Representative Grimm and other members of the House Ways & Means Committee that the “current tax” on bunker fuel sellers “adds almost 20 cents per barrel to the cost of the fuel,” CP 280; (2) testimony by Pacific Northern Oil’s representative before the House Ways & Means Committee that the existing tax structure placed an “[e]xtraordinarily heavy burden on resellers of fuel/ship fuelers,” CP 281; (3) information materials Pacific Northern Oil shortly thereafter distributed in the House and the Senate arguing that “[p]etroleum product resellers” like Pacific Northern Oil needed “some relief now,” claiming that “B&O tax liability” was “nearly two times after-tax profit” and that Pacific Northern Oil’s state tax liability had “increased over 400% from 1978 through 1983,” CP 283; (4) Representative Appelwick’s statement in support of the floor amendment, indicating that testimony before the Ways & Means Committee showed that “wholesalers who are supplying fuel” to ships “can not stay in business in this state if the department collects that revenue as they are now intending to do and trying to do,” and that to vote against the floor amendment “is, in all probability, to eliminate that particular segment from the state,” CP 284; and (5) the Department’s subsequent amendment to WAC 458-20-193C, applying RCW 82.04.433 prospectively only, State Register 86-07-005. Moreover, as explained above at pages 15-18, there was no “constitutional prohibition on imposing the tax” as a matter of law.

relieve any taxpayers of manufacturing B&O tax liabilities. He stated in part:

One of the provisions of the bill as it left Ways & Means Committee provided that there would be a deduction of the amount of revenue obtained from *selling* oil to the ships that would consume that oil on the high seas. At the present time *when sales are made out of the state that revenue is deducted from gross revenues when computing the B&O tax. . . .* This amendment would treat those ships that are going on the high seas *the same way we treat those sales into other states.*

CP 284 (emphasis added). Representative Appelwick’s statement accurately described how the wholesaling B&O tax and the retailing B&O tax operated. Because Washington imposed those selling B&O taxes based on where the products were physically delivered to the buyer, it could not constitutionally impose those taxes on sales transactions occurring outside its borders. *See, e.g., Crown Zellerbach Corp. v. State*, 45 Wn.2d 749, 753-56, 278 P.2d 305 (1954); WAC 458-20-193.

However, his description did not match how the manufacturing B&O tax then operated. To the contrary, in 1985, due to the former multiple activities exemption then but no longer in RCW 82.04.440, businesses that both manufactured and sold the same products *within the state* were not taxable under the manufacturing B&O tax “with respect to . . . manufacturing the products so sold[.]” *Only* businesses that manufactured products in Washington and then sold them *outside the state*

were taxable under RCW 82.04.240, the B&O tax on the in-state activity of manufacturing. *Crown Zellerbach*, 45 Wn.2d at 753-56. Thus, if the purpose of the floor amendment was to treat sales of fuel to ships in Washington the same as “those sales into other states,” and if eliminating the existing tax on those Washington sales was necessary to keep those businesses “selling oil to the ships” from having to leave the state, then the manufacturing B&O tax could not have been a tax Representative Appelwick’s floor amendment was designed to eliminate.

E. The Contemporaneous Official Administrative Construction Of The Deduction Limited The Deduction To Taxes On The Activity Of Selling

The Department’s contemporaneous administrative construction of RCW 82.04.433 also refutes Tesoro’s argument. In March 1986, the Department amended two of its rules, WAC 458-20-193C and WAC 458-20-175, to reflect the effect of the new deduction in RCW 82.04.433 on chapter 82.04 RCW. Neither of these rules has been amended since.

When the Department amended WAC 458-20-193C, it added the following underscored language to the portion of the rule addressing B&O taxes on “wholesaling and retailing”:

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.

State Register 86-07-005. The Department added no comparable language to the portion of WAC 458-20-193C addressing the B&O tax on “extracting, manufacturing” because the enactment of RCW 82.04.433 had no effect on the manufacturing B&O tax imposed on manufacturers of bunker fuel. They were subject to the manufacturing tax only if they sold the bunker fuel “to points outside the state,” and the new deduction was not intended to apply to those “sales of fuel for consumption outside the territorial waters of the United States[.]” *See id.*

The Department added identical underscored language to the portion of WAC 458-20-175 addressing the “business and occupation tax”:

Persons selling tangible personal property to, or performing services for, others engaged in such businesses [operating as a private or common carrier in interstate or foreign commerce], 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.

State Register 86-07-005. Persons “selling tangible personal property in this state” were subject to the wholesaling B&O tax or the retailing B&O tax. WAC 458-20-175 contained no provisions addressing the manufacturing B&O tax.

These were the only two rules the Department amended in response to the enactment of RCW 82.04.433, although there was an existing rule, WAC 458-20-136, addressing the subject of manufacturing. These rule amendments show conclusively that the Department’s contemporaneous administrative construction of RCW 82.04.433 was that the deduction applied only to the wholesaling B&O tax and the retailing B&O tax. The Department never amended either rule (or WAC 458-20-136) to abandon that interpretation.

Relying on three unpublished determinations issued to other taxpayers, Tesoro nevertheless argues that the administrative law judges’ interpretations of RCW 82.04.433 in those unpublished determinations reflect the Department’s “longstanding position” on the scope of the bunker fuel deduction. See Appellant’s Br. at 25-29. In unpublished Determination No. 93-257, and apparently in the other two unpublished determinations as well, the Appeals Division’s administrative law judges failed to mention, let alone follow, either Rule 193C or Rule 175. In Determination No. 93-257, the administrative law judge, in a brief,

conclusory analysis of the issue, pronounced that “the statutory language is plain” and that it was “not necessary” to consider any arguments by the taxpayer and the Audit Division regarding legislative intent. Since the goal of all statutory construction is to carry out the intent of the Legislature, that obviously was not an adequate analysis of the issue.

The Department’s Appeals Division issues hundreds of written determinations each year.¹¹ Most such determinations are governed by RCW 82.32.330, which generally prohibits the Department from disclosing return or tax information without the consent of the taxpayer. RCW 82.32.330(3)(k) creates an exception to that general rule and does not prohibit the Department from “[p]ublishing or otherwise disclosing the text of a written determination designated by the director as a precedent pursuant to RCW 82.32.410[.]” That statute in turn authorizes the Director of the Department to “designate certain written determinations as precedents.”

None of the three unpublished determinations discussed by Tesoro have been so designated by the Director. As reflected in Determination No. 08-0007E, issued to Tesoro in this dispute, unpublished determinations apply only to the taxpayer named in the determination and “may not be relied on by any other taxpayer.” See CP 210. Thus, these

¹¹ See Washington State Department of Revenue, *Strategic Business Plan 60* (2008), available at http://dor.wa.gov/docs/pubs/misc/strategicbusplan_web.pdf.

unpublished determinations, which were not designated as precedents, did not ever reflect the official position of the Department on the scope of the bunker fuel deduction. Tesoro cannot base its refund claim on three erroneous unpublished determinations issued to other taxpayers, or contend that they reflect the Department's "longstanding position" on the scope of the bunker fuel deduction, when they were in direct conflict with the Department's published rules on this subject.

F. In Case Of Doubt, Ambiguous Tax Deductions Should Be Narrowly Construed

If this Court remains uncertain of the Legislature's likely intent in enacting RCW 82.04.433 in 1985 after considering the overall statutory context discussed above, it should bear in mind the principle that tax deductions and exemptions are to be narrowly construed. *See, e.g., O'Leary v. Dep't of Revenue*, 105 Wn.2d 679, 682, 717 P.2d 273 (1986); *Evergreen-Washelli Mem'l Park v. Dep't of Revenue*, 89 Wn.2d 660, 663, 574 P.2d 735 (1978); *Group Health Co-op v. Tax Comm'n*, 72 Wn.2d 422, 429, 433 P.2d 201 (1967). In adopting the B&O tax system, the Legislature intended to impose a tax upon "virtually all" business activities within the state. *Simpson Inv. Co. v. Dep't of Revenue*, 141 Wn.2d 139, 149, 3 P.3d 741 (1999); *Impecoven v. Dep't of Revenue*, 120

Wn.2d 357, 363, 841 P.2d 752 (1992); *Time Oil Co. v. State*, 79 Wn.2d 143, 146, 483 P.2d 628 (1971).

Tesoro acknowledges these principles but argues they are inapplicable here because the “plain language” of RCW 82.04.433 unambiguously extends to the manufacturing B&O tax. Appellant’s Br. at 5-6, 23-25. For the reasons explained above, that is unpersuasive. The only reasonable conclusion is that the Legislature in 1985 intended the deduction in RCW 82.04.433 to be narrowly confined to B&O taxes imposed on selling activities in Washington. At best, Tesoro’s arguments merely show that the 1985 act possibly was ambiguous. If so, the deduction statute should be narrowly construed in favor of taxation.

G. The Court Should Refuse To Consider Any Federal Constitutional Arguments That The Taxpayer Did Not Present In The Trial Court

If the cryptic footnotes in Tesoro’s opening brief are veiled attempts to present for the first time on appeal an argument that all or part of the manufacturing B&O taxes it paid during the tax periods at issue (December 1999 through December 2007) violated either the Import-Export Clause, the dormant Commerce Clause, or the Supremacy Clause of the United States Constitution, this Court should refuse to consider any such federal constitutional issue in this case. Tesoro brought none of those federal constitutional issues to the attention of the trial court. *See*

RAP 2.5(a); RAP 9.12. This Court also should refuse to consider any of those issues “because placing an argument of this nature in a footnote is ‘at best, ambiguous or equivocal as to whether the issue is truly intended to be part of the appeal.’” *Clark Cy. Pub. Util. Dist. 1 v. Dep’t of Revenue*, 153 Wn. App. 737, ¶ 58, 222 P.3d 1232, 1242 (2009).

Moreover, for this Court to allow Tesoro to introduce any of those issues into this case for the first time on appeal would violate the fundamental principle of sovereign immunity reflected in article II, § 26 of the Washington Constitution, which provides: “The legislature shall direct by law, in what manner, and in what courts, suits may be brought against the state.” *See Hall v. Neimer*, 97 Wn.2d 574, 579-82, 649 P.2d 98 (1982); *Coulter v. State*, 93 Wn.2d 205, 206-07, 608 P.2d 261 (1980); *Andrews v. State*, 65 Wn. App. 734, 736-38, 829 P.2d 250 (1992). The Legislature has exercised its authority under this constitutional provision with regard to litigation over most state excise taxes (including B&O taxes) by enacting RCW 82.32.180, under which Tesoro brought this action. CP 5; *see Lacey Nursing Ctr., Inc. v. Dep’t of Revenue*, 128 Wn.2d 40, 48-54, 905 P.2d 338 (1995); *Weber v. School Dist. 7 of Yakima Cy.*, 185 Wash. 697, 700-05, 56 P.2d 707 (1936); RCW 82.32.010. RCW 82.32.180 requires that *all reasons* for the refund claim be set forth in the notice of appeal to the superior court:

Any person . . . having paid any tax as required and feeling aggrieved by the amount of the tax may appeal to the superior court of Thurston county, within the time limitation for a refund provided in chapter 82.32 RCW or, if an application for refund has been made to the department within that time limitation, then within thirty days after rejection of the application, whichever time limitation is later. *In the appeal the taxpayer shall set forth the amount of the tax imposed upon the taxpayer which the taxpayer concedes to be the correct tax and the reason why the tax should be reduced or abated. . . .*

(Italics added). There was no mention of any federal constitutional provision or federal statute or regulation in the notice of appeal Tesoro filed in the superior court. CP 4-7. Tesoro never moved to amend the notice of appeal in the superior court. Moreover, Tesoro presented no argument based on the Import-Export Clause, the dormant Commerce Clause, or the Supremacy Clause in any of the other papers it submitted in the superior court. CP 12-33, 296-309. Therefore, Tesoro cannot now raise those issues in this Court. If Tesoro wishes to challenge the manufacturing B&O taxes it paid for any tax periods after December 2007 based on any of those federal constitutional provisions, it is free to do so in another refund action filed under RCW 82.32.180.

H. The Court Should Refuse To Consider Any “Fairness,” “Equality,” or “Consistency” Arguments That The Taxpayer Did Not Present In The Trial Court

For the same reasons, this Court also should refuse to consider any new legal theories Tesoro now attempts to raise on appeal that Tesoro argues independently support its refund claims, such as “principles of

fairness, equality and consistency,” Appellant’s Br. at 28, 30, 33-34, rights granted to taxpayers under chapter 82.32A RCW, Appellant’s Br. at 28 n.17, 30, 33-34, or a “duty of consistency,” grounded in 26 U.S.C. § 7805(b), that the Federal Court of Claims allegedly has imposed on the Internal Revenue Service, Appellant’s Br. at 30-34 & n.21.

Like the Import-Export Clause, Commerce Clause, and Supremacy Clause issues discussed above, neither the trial court nor the Department were given proper notice below that Tesoro intended to pursue any such legal theories in this case. There was no indication in the notice of appeal Tesoro filed in the trial court that Tesoro was basing its refund claim on any legal theory other than RCW 82.04.433(1) and WAC 458-20-175. CP 4-7. Tesoro never moved to amend the notice of appeal in the trial court.

Although Tesoro quoted at length from unpublished Determination No. 93-257 in its motion for partial summary judgment below, CP 26-30, the Department understood this “well-reasoned” determination was being improperly offered only to show that Tesoro’s proposed interpretation of RCW 82.04.433(1) must be correct, supposedly because the unpublished determination evidenced the Department’s own “longstanding position on the scope of this B&O tax deduction statute,” CP 26, 29, 229-231, 240-

245.¹² See Appellant’s Br. at 25-29. Neither the trial court nor the Department understood Tesoro to be asserting belatedly any additional legal theory in support of its refund claim that was both independent of and inconsistent with RCW 82.04.240 and RCW 82.04.433. CP 322-325. Tesoro reinforced those views with its reply brief, in which it again used the unpublished determination to argue that the Department’s “longstanding interpretation of RCW 82.04.433 is reflected in the 1993 U.S. Oil determination plus two others” and to attack section 1 of Senate Bill 6096 as “an obvious attempt by the DOR and/or the Legislature to manipulate the facts and this litigation.” CP 305-307.¹³

Even if it were proper for this Court to consider these vague new theories now presented on appeal, they are unsound in any event. As for Tesoro’s new argument based on *International Business Machines Corp. v. United States*, 170 Ct. Cl. 357, 343 F.2d 914 (1965), Tesoro recognizes that decision was based entirely on the court’s review of an exercise of discretionary authority granted to the Secretary of Treasury in a former version of 26 U.S.C. § 7805(b) to “prescribe the extent, if any, to which

¹² At the conclusion of that section of its motion, Tesoro added a footnote in which it also made vague references to “fairness and consistency in the . . . application of tax law” and a statutory right to “fair and equitable treatment” supposedly granted by chapter 82.32A RCW. CP 30.

¹³ Tesoro again made only vague references in a footnote to “fairness and consistency in the application of tax law” and a “right to fair and equitable treatment” supposedly granted by chapter 82.32A RCW. CP 306.

any ruling or regulation, relating to the internal revenue laws, shall be applied without retroactive effect.” See Christopher M. Pietruszkiewicz, *Does the Internal Revenue Service Have a Duty to Treat Similarly Situated Taxpayers Similarly?*, 74 U. Cin. L. Rev. 531 (2005). Tesoro also implicitly admits there is no statutory counterpart in Title 82 RCW. See Appellant’s Br. at 33.

RCW 82.32A.020 grants no vague statutory right to “fair and equitable treatment.”¹⁴ Tesoro can point to no actual right described in that statute that either the trial court or the Department failed to honor in this tax dispute. Indeed, RCW 82.32A.020(2) demonstrates why Tesoro cannot properly base its refund claims in this case on any unpublished determinations involving other taxpayers. It grants to taxpayers a right “to rely on specific, official written advice and written tax reporting instructions *from the department of revenue to that taxpayer*,” and “to have interest, penalties, and *in some instances, tax deficiency assessments waived where the taxpayer has so relied*” to the taxpayer’s “*proven detriment*.” *Id.* (emphasis added). The clear negative implication in this statute is that no taxpayer has the right to base a *refund claim* on a unpublished written determination of tax liability issued *only to another*

¹⁴ Tesoro quotes not from any statute, but from a loose description of “taxpayer rights and responsibilities” appearing on the Department’s website. Next to the description is a short publication in which the Department reminds taxpayers that it “must administer the tax laws as they are written by the Legislature.”

taxpayer, and particularly so when the taxpayer seeking a refund did not *rely* on the determination in voluntarily reporting and paying its taxes.

I. The 2009 Clarifying Amendment Should Resolve The Case

One day before the trial court hearing on Tesoro's motion for partial summary judgment, the Governor signed into law Senate Bill 6096. See Appendix at A-31 to A-32. The 2009 act clarified RCW 82.04.433 by amending the section as follows:

(1) In computing tax there may be deducted from the measure of tax imposed under RCW 82.04.250 and 82.04.270 amounts derived from sales of fuel for consumption outside the territorial waters of the United States, by vessels used primarily in foreign commerce.

(2) ~~((Nothing in this section shall be construed to imply that amounts which may be deducted under this section were taxable under Title 82 RCW prior to the enactment of this section.))~~ The deduction in subsection (1) of this section does not apply with respect to the tax imposed under RCW 82.04.240, whether the value of the fuel under that tax is measured by the gross proceeds derived from the sale thereof or otherwise under RCW 82.04.450.

Laws of 2009, ch. 494, § 2. Section 4 of the 2009 act provided: "This act applies both prospectively and retroactively." In section 1 of the 2009 act, the Legislature explained its purposes in enacting this law:

(1) Through this act the legislature intends to address the taxation of persons manufacturing and/or selling bunker fuel. Bunker fuel is fuel intended for consumption outside the waters of the United States by vessels in foreign commerce. Although the state has historically collected tax from bunker fuel manufacturers,

recently questions have arisen whether the manufacture of bunker fuel is subject to business and occupation tax under RCW 82.04.240. Pursuant to this act, the activity is taxable under RCW 82.04.240.

(2) The legislature finds that at the time the deduction allowed under RCW 82.04.433 was enacted in 1985, it was intended to apply only to the wholesaling or retailing of bunker fuel. In 1987 the legislature enacted the multiple activities tax credit in RCW 82.04.440. Enactment of the multiple activities tax credit resulted in changed tax liability for certain taxpayers. In particular, some taxpayers that engaged in activities that had been exempt under the prior multiple activities exemption became subject to tax on manufacturing activities upon enactment of the multiple activities tax credit in its place. The manufacturing of bunker fuel is one such activity.

Laws of 2009, ch. 494, § 1.

In enacting Senate Bill 6096, the Legislature was simultaneously exercising two of its constitutional powers. First, and most importantly, the 2009 act was an exercise of the Legislature's plenary power of taxation, which is limited only by the federal and state constitutions. *See Japan Line, Ltd v. McCaffree*, 88 Wn.2d 93, 558 P.2d 211 (1977) ("The Legislature has broad plenary powers in its capacity to levy taxes."). In sections 2 and 4 of the 2009 act, the Legislature exercised this plenary power to establish with greater clarity the scope of the deduction in RCW 82.04.433, to be applied both prospectively and retroactively for any tax periods still open for refunds or deficiency assessments.¹⁵ In Tesoro's

¹⁵ The limitation periods for excise tax deficiency assessments and excise tax refunds are contained in RCW 82.32.050 and RCW 82.32.060. The Legislature did not

pending refund action, the open refund periods were from 2000 through 2007.

Unless there is some constitutional impediment to applying Senate Bill 6096 retroactively, this Court is obligated to apply it in this pending case and in any others involving this deduction that might later come before it. *See Hale v. Wellpinit Sch. Dist. No. 49*, 165 Wn.2d 494, 507, 198 P.3d 1021 (2009) (“[W]here no constitutional prohibition applies, an amendment may act retroactively if the Legislature so intended or if it is curative.”). The Legislature’s intent to apply the 2009 act retroactively is clear and so is the meaning of section 2 of the 2009 act. Tesoro apparently concedes that the 2009 act “made it clear” that the deduction does not apply to the manufacturing B&O tax under RCW 82.04.240. *See Appellant’s Br.* at 35. That should resolve this case, and the trial court’s judgment should be affirmed.

In addition, the 2009 act was an official expression by the Legislature of its intent in enacting the bunker fuel deduction statute in

amend either of these statutes in the 2009 act. Under the normal limitation period specified in RCW 82.32.050, no assessment for additional taxes may be made by the Department more than four years after the close of the tax year. Thus, when the 2009 act was signed, open assessment periods generally would have been limited to 2005 forward. Similarly, under the normal limitation period specified in RCW 82.32.060, no refund may be made by the Department for taxes paid more than four years prior to the beginning of the calendar year in which the taxpayer makes the refund application. Thus, when the 2009 act was signed, open refund periods generally would have been limited to taxes paid from 2005 forward, unless the taxpayer, like Tesoro, had preserved a refund claim for taxes earlier paid by making a refund application to the Department before 2009.

1985. Section 1 of the 2009 act plainly states that when the deduction allowed under RCW 82.04.433 was enacted in 1985, it was intended to apply only to the wholesaling or retailing of bunker fuel. Thus, the Legislature stated that its amendment of RCW 82.04.433 in section 2 of the 2009 act only clarified the existing statute, which has always authorized a deduction only against wholesaling and retailing B&O taxes imposed on sales of bunker fuel in Washington. Subsequent legislation that “declares the intent of an earlier law is not, of course, conclusive” in determining what the previous legislative body meant, but “the later law is entitled to weight when it comes to the problem of construction.” *In re Pers. Restraint of Jones*, 121 Wn. App. 859, 866, 88 P.3d 424 (2004).¹⁶ If for any reason the Court concludes it must determine the intended meaning of the 1985 act, this legislative declaration of the intent of the 1985 act should be given great weight by the Court.¹⁷

¹⁶ See also *Rozner v. City of Bellevue*, 116 Wn.2d 342, 347, 804 P.2d 24 (1991) (rejecting argument that subsequent legislative views are irrelevant to establish legislative intent and stating that such views “are entitled to significant weight”) (quoting *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 596, 100 S. Ct. 800, 63 L. Ed. 2d 36 (1980)).

¹⁷ Tesoro asks rhetorically, “[H]ow can the 2009 Legislature know what the 1985 Legislature intended?” Appellant’s Br. at 43. To give “significant weight” to the 2009 clarifying act passed by a constitutional majority in both houses of the Legislature and approved by the Governor, see *Rozner*, 116 Wn.2d at 347, is hardly the equivalent of relying on an affidavit by the Senate sponsor of the 2009 bill concerning his knowledge of the subjective intent of the members of the 1985 Legislature, as Tesoro argues dismissively. See Appellant’s Br. at 44 (“How did Senator Tom in the year 2009 divine the intent of the 1985 Legislature—through a séance?”). Instead, the statutory construction principle is based on a proper respect for the considered views of two other coequal branches of government. Cf. *Brown v. Owen*, 165 Wn.2d 706, 722-24, 206 P.3d

J. The 2009 Amendment Did Not Implicate RCW 43.135.035(1)

Although the 2009 act should conclusively resolve this case, it is unnecessary for this Court to base its analysis on the language of the 2009 act to affirm the summary judgment dismissing Tesoro's refund claim, as the trial court demonstrated. The 2009 act merely confirmed and clarified what the 1985 act creating the bunker fuel deduction already meant—that RCW 82.04.433 authorized a deduction only against wholesaling and retailing B&O taxes imposed on sales of bunker fuel in Washington.

Based on the erroneous premise that Senate Bill 6096 “imposed a tax increase” on the activity of manufacturing bunker fuel in Washington, however, Tesoro argues that Senate Bill 6096 “was not properly enacted” and “is invalid and unenforceable,” both retroactively and prospectively, because it was passed by less than “a two-thirds vote of each house of the legislature,” citing RCW 43.135.035(1). Appellant's Br. at 4-5, 47-48.

As explained above, Tesoro's first premise is incorrect. Senate Bill 6096 did not “raise taxes” as used in RCW 43.135.035(1) because it did not change the meaning of RCW 82.04.433 and was merely a proper retroactive amendment clarifying any possible ambiguity that taxpayers

310 (2009) (discussing enrolled bill doctrine, which is grounded in respect for the Legislature's role as a coequal branch of government “in no way inferior to the judicial branch”); *Hale v. Wellpinit Sch. Dist. No. 49*, 165 Wn.2d 494, 507, 198 P.3d 1021 (2009) (describing history of cooperation and harmony among the three branches of Washington state government, in which each branch “has given deference to the others”); *In re Juvenile Director*, 87 Wn.2d 232, 237-43, 552 P.2d 163 (1976) (discussing doctrines of separation of powers and checks and balances).

might point to in the existing statute. Therefore, Senate Bill 6096, passed by constitutional majority vote in both houses of the Legislature, did not implicate RCW 43.135.035(1).

Tesoro's argument rests on a second erroneous premise: that a prior statute can invalidate a subsequent statute. The Washington Supreme Court emphatically rejected that premise in *Washington State Farm Bureau Federation v. Gregoire*, 162 Wn.2d 284, 174 P.3d 1142 (2007). In *Farm Bureau*, the plaintiffs argued that a bill enacted by the 2005 Legislature exceeded the fiscal year expenditure limit established under the terms of Initiative 601 (1993) and therefore was invalid until it complied with a voter approval requirement adopted in the initiative. The 2006 Legislature adopted legislation, directly amending a statute enacted as part of Initiative 601. The Court upheld the 2006 legislation, which was dispositive of the case. The Court summarized the basis for its holding as follows:

It is a fundamental principle of our system of government that the legislature has plenary power to enact laws, except as limited by our state and federal constitutions. Each duly elected legislature is fully vested with this plenary power. No legislature can enact a statute that prevents a future legislature from exercising its law-making power. That which a prior legislature has enacted, the current legislature can amend or repeal. Like all previous legislatures, it is limited only by the constitutions. To reason otherwise would elevate enactments of prior

legislatures to constitutional status and reduce the current legislature to a second-class representative of the people.

What is true of statutes enacted by the legislature is likewise true of initiatives, for when the people pass an initiative, they exercise legislative power that is coextensive with that of the legislature. A law passed by initiative is no less a law than one enacted by the legislature. Nor is it more. A previously passed initiative can no more bind a current legislature than a previously enacted statute.

Farm Bureau, 162 Wn.2d at 290-91 (footnotes omitted).

The Court in *Farm Bureau* was explicit: a prior statute (whether enacted by the Legislature or by initiative) cannot prospectively invalidate a later-enacted statute. Senate Bill 6096 therefore cannot be said to “violate” the supermajority requirement in RCW 43.135.035(1). The two statutes are separate legislative actions, of equal rank in the constitutional scheme, and the constitution does not establish the courts as an arbiter of legislative preference:

It is neither the prerogative nor the function of this court to substitute our judgment for that of the legislature or the people with respect to which laws are given effect. If a statute is constitutional, we will not invalidate it.

Farm Bureau, 162 Wn.2d at 291. As explained above, the statutes do not conflict; but if they were to appear to be in conflict, the Court’s duty is to reconcile them, not to invalidate one in favor of the other. *See Anderson v. Dep’t of Corrections*, 159 Wn.2d 849, 861, 154 P.3d 220 (2007) (citing

cases). The Court would reconcile them using the usual principles of statutory construction (for example, giving effect to a specific statute over a general statute, or a later-enacted statute over an earlier-enacted statute). *Id.*

As the Supreme Court did in *Brown v. Owen*, 165 Wn.2d 706, 206 P.3d 310 (2009), this Court should refuse to inquire into the legislative procedures preceding enactment of a statute “to determine the method, the procedure, the means, or the manner by which it was passed in the houses of the legislature.” *Brown*, 165 Wn.2d at 723 (quoting *Wash. State Grange v. Locke*, 153 Wn.2d 475, 499-500, 105 P.3d 9 (2005)). As explained in *Brown*, the Court has declined to examine the history of a bill even where a petitioner claimed that constitutionally mandated procedures were not followed. *Id.* The same rule should apply where, as here, a litigant is claiming that one statute did not follow a procedure allegedly required by another statute. Tesoro’s claim must fail.¹⁸

¹⁸ The fact that a statute enacted by initiative does not legally preclude subsequent legislation does not mean it lacks effect. Members of both houses of the Legislature frequently refer to statutes adopted by initiative as arguments for or against particular proposals. Initiative sponsors threaten to circulate new initiative petitions if legislators are not responsive to their issues. Enacted initiatives and the threat of future initiatives have proven to be potent political tools in the Legislature and in the elections of legislators.

K. The 2009 Amendment Did Not Violate The Due Process Clause Of The Fourteenth Amendment

Tesoro argues that the 2009 clarifying amendment to RCW 82.04.433 cannot be applied retroactively to defeat its refund claims for taxes paid from January 2000 through January 2008, contending that to do so would constitute “a gross violation of Tesoro’s substantive due process rights under the Fourteenth Amendment of the United States Constitution.” *See* Appellant’s Br. at 35-47. There is no merit in that argument. The argument is inconsistent with controlling precedent.

Because the 2009 act made no change in the meaning of RCW 82.04.433, it cannot possibly have violated the Due Process Clause. Obviously, if a statutory amendment would result “in no greater tax” than “would have been owed under the old law,” applying the amendment retroactively “could not be said to be oppressive or inequitable.” *United States v. Hemme*, 476 U.S. 558, 571, 106 S. Ct. 2071, 90 L. Ed. 2d 538 (1986). The Court should hold that the 2009 act merely confirmed and clarified what the 1985 act already meant. Therefore, the Court need not consider the constitutionality of the 2009 act. *See United States v. Wells Fargo Bank*, 485 U.S. 351, 354, 359, 108 S. Ct. 1179, 99 L. Ed. 2d 368 (1988) (due process issue need not be reached if case can be resolved on the basis of statutory construction).

Even if the 2009 act had retroactively increased the manufacturing B&O tax liability of Tesoro by eliminating a deduction for manufacturing bunker fuel later consumed on the high seas, the 2009 act would not have violated the Due Process Clause. Contrary to Tesoro's arguments, modern due process precedents of the United States Supreme Court involving retroactive taxation, the most recent of which is *United States v. Carlton*, 512 U.S. 26, 114 S. Ct. 2018, 129 L. Ed. 2d 22 (1994), refute any notion that the Due Process Clause imposes any fixed limit on the retroactive reach of tax statutes.¹⁹

In *Carlton*, after noting it “repeatedly has upheld retroactive tax legislation against a due process challenge,” the Supreme Court clarified that the “harsh and oppressive” substantive due process standard appearing in decisions such as *Welch v. Henry*, 305 U.S. 134, 146-48, 59 S. Ct. 121, 83 L. Ed. 87 (1938), “does not differ from the prohibition

¹⁹ Tesoro characterizes Senate Bill 6096 as reaching back more than 20 years. See Appellant's Br. at 36, 47. Under the facts of this case, however, only taxes Tesoro paid from 15 months to slightly more than nine years before the bill was enacted are at issue, and those are the time periods to be considered under the Due Process Clause. Tesoro filed this refund action on February 11, 2008. CP 4. Tesoro seeks a refund of B&O taxes it voluntarily reported and paid for tax periods from December 1999 through December 2007. CP 6. Tesoro made the last such payment for the December 2007 tax period on January 25, 2008. CP 204-208. Senate Bill 6096 was introduced to first reading on February 25, 2009. Senate Journal, 61st Legislature (2009), at 409. The Governor signed the 2009 act into law on May 14, 2009. Laws of 2009, ch. 494. Even if there were some possible applications of Senate Bill 6096 that might extend so far back in time as to be constitutionally infirm, section 5 of the 2009 act states that if any provision of the act is held invalid in “its application to any person or circumstance,” the application of the provision “to any other persons or circumstances is not affected.” See Appendix at A-31. The severability clause precludes facial invalidation of the act on the grounds Tesoro argues.

against arbitrary and irrational legislation' that applies generally to enactments in the sphere of economic policy." 512 U.S. at 30.²⁰ If a statute's retroactive application "is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches." *Id.* at 30-31.

Applying that "minimal rationality" due process standard, the Court upheld the retroactive application of the estate tax statutory amendment before it. *Id.* at 35.²¹ The Court explained the basis for its holding as follows:

In focusing exclusively on the taxpayer's notice and reliance, the Court of Appeals held the congressional enactment to an unduly strict standard. *Because we conclude that retroactive application of the 1987 amendment to § 2057 is rationally related to a legitimate*

²⁰ See *W.R. Grace & Co. v. Dep't of Revenue*, 137 Wn.2d 580, 602-03, 973 P.2d 1011, cert. denied, 528 U.S. 950 (1999) (discussed below); *Home Depot USA, Inc. v. Dep't of Revenue*, 151 Wn. App. 909, 926, 215 P.3d 222 (2009) (state tax statute does not violate substantive due process unless it is "arbitrary and irrational," citing *Carlton*), review denied, ___ Wn.2d ___ (2010).

²¹ The facts in *Carlton* were compelling because the taxpayer had detrimentally relied on the previous version of the statute to engage in stock transactions that resulted in a substantial loss. Nevertheless, the Supreme Court rejected *Carlton*'s argument that the retroactive amendment violated due process: "Although *Carlton*'s reliance is uncontested—and the reading of the original statute on which he relied appears to have been correct—his reliance alone is insufficient to establish a constitutional violation. Tax legislation is not a promise, and a taxpayer has no vested right in the Internal Revenue Code." *Id.* at 33. The Court also explained that the Court of Appeals had mistakenly relied on three decisions from the 1920s invalidating retroactive gift or estate taxes. The Court explained that "[t]hose cases were decided during an era characterized by exacting review of economic legislation under an approach that 'has long since been discarded.'" *Id.* at 34. *Accord Honeywell, Inc. v. Minnesota Life & Health Ins. Guaranty Ass'n*, 110 F.3d 547, 553-56 (8th Cir.) (en banc), cert. denied, 522 U.S. 858 (1997).

: 1

legislative purpose, we conclude that the amendment as applied to Carlton’s 1986 transactions is consistent with the Due Process Clause.

Id. (italics added). Thus, the Court clarified that a retroactive statute increasing taxes violates substantive due process only if its intended application to the past periods at issue is wholly unrelated to any legitimate legislative purpose. *See id.* at 40 (Scalia, J., joined by Thomas, J., concurring in the judgment) (“The reasoning the Court applies to uphold the statute in this case guarantees that all retroactive tax laws will henceforth be valid. . . . I welcome this recognition that the Due Process Clause does not prevent retroactive taxes[.]”).

In *W.R. Grace & Co. v. Dep’t of Revenue*, 137 Wn.2d 580, 602-03, 973 P.2d 1011, *cert. denied*, 528 U.S. 950 (1999), a group of corporate taxpayers made a substantive due process argument similar to Tesoro’s in challenging the Legislature’s retroactive application of the system of multiple activities credits in RCW 82.04.440 as a remedy for the invalidation of the former multiple activities exemption in *Tyler Pipe Indus., Inc. v. Dep’t of Revenue*, 483 U.S. 232, 107 S. Ct. 2810, 97 L. Ed. 2d 199 (1987). The taxpayers had filed actions seeking full refunds of taxes they had paid as early as in January 1980. 137 Wn.2d at 588-89. The Legislature had enacted the amendment to RCW 82.04.440 in August 1987. *Id.* at 586. The taxpayers argued that retroactive application of the

1987 amendment constituted a substantive due process violation because it “reach[ed] back too far in time.” *Id.* at 600.

The Court in *W.R. Grace* squarely rejected the taxpayers’ argument. Discussing *Welch v. Henry, supra*, and *United States v. Carlton, supra*, the Court concluded that the applicable due process test requires only a “showing that the retroactive application of the legislation is itself justified by a rational legislative purpose.” Since it had “previously approved the motives of the legislature as proper in enacting the 1987 credit law,” the Court held that “the rational legislative purpose which *Carlton* requires is present.” *Id.* at 603. The Court further held that the United States Supreme Court “has not set a specific duration to the retroactive effect of tax legislation, preferring to rely on legislative decisions in this context.” *Id.*²²

²² In addition to the retroactive application period of more than seven years the Court upheld in *W.R. Grace*, numerous federal and state decisions in recent years, including one cited by Tesoro, have refused to strike down tax statutes or legislative tax rules with retroactive application periods comparable to maximum period at issue in this case. *See, e.g., Montana Rail Link, Inc. v. United States*, 76 F.3d 991, 993-95 (9th Cir. 1996) (seven years); *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, 400-401, 416 (Ky. 2009) (at least nine years), *petition for cert. filed* (Feb. 22, 2010) (No. 09-981); *King v. Campbell County*, 217 S.W.3d 862, 866-67, 869-70 (Ky. Ct. App. 2006) (nineteen years); *Moran Towing Corp. v. Urbach*, 1 A.D.3d 722, 768 N.Y.S.2d 33 (2003) (thirteen years); *Astoria Fed. Sav. & Loan v. State*, 222 A.D.2d 36, 644 N.Y.S.2d 926, 933-34 (1996) (seven years), *cert. denied*, 522 U.S. 808 (1997); *U.S. Bancorp v. Dep’t of Revenue*, 337 Or. 625, 103 P.3d 85, 91-93 (2004) (seven years; legislative rule), *cert. denied*, 546 U.S. 813 (2005).

Here, even if the 2009 act had actually changed the meaning of the 1985 act—which it did not—the Legislature’s decision to apply the 2009 act both prospectively and retroactively would be rationally related to legitimate legislative purposes. As in *Carlton* and *W.R. Grace*, enacting a curative amendment to prevent a potential revenue loss that is significant and unanticipated is a rational means to further a legitimate legislative objective. In contrast to the facts in *Carlton*, here there is not the slightest suggestion in the record that Tesoro detrimentally relied in any manner on the language of the 1985 act. Tesoro was seeking in this action to exploit a possible ambiguity in the language of RCW 82.04.433 to obtain a windfall recovery of manufacturing B&O taxes it voluntarily reported and paid over many years and that both the Legislature and the Governor reasonably believed were properly due when paid. The fiscal note prepared for Senate Bill 6096 estimated that if the possible ambiguity in RCW 82.04.433 were fully exploited, total potential refunds for all taxpayers that had paid manufacturing B&O taxes on the act of manufacturing of bunker fuel during then open periods was approximately \$17.8 million, plus interest.²³ Indeed, in this action alone, Tesoro is

²³ The Court may take judicial notice of this fiscal note for purposes of determining whether the Legislature’s decision to apply Senate Bill 6096 retroactively was “‘illegitimate’ and ‘arbitrary,’” see Appellant’s Br. at 38, under the applicable “‘minimal rationality’” due process standard of review. *See, e.g., State v. Nolan*, 141 Wn.2d 620, 628 n.3, 8 P.3d 300 (2000); *Davis v. Dep’t of Licensing*, 137 Wn.2d 957,

seeking a refund of \$6,679,864, plus interest, it allegedly paid from January 2000 through January 2008. CP 5-6.

Tesoro's substantive due process argument thus fails under controlling precedent from both the United States Supreme Court and the Washington Supreme Court.

IV. CONCLUSION

The Court should affirm the judgment of the superior court.

RESPECTFULLY SUBMITTED this 16th day of March, 2010.

ROBERT M. MCKENNA
Attorney General



DONALD F. COFER
Senior Counsel
WSBA #10896
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

969-70, 977 P.2d 554 (1999); *Baker v. Tri-Mountain Res., Inc.*, 94 Wn. App. 849, 853-54 & n.3, 973 P.2d 1078 (1999).

create a separate, single-purpose state agency governed by a new board for this purpose. The functions should properly be located within the executive branch in an agency responsible to the Governor.

Since I believe the purposes of this measure are worthwhile, I am approving it with several exceptions. I am vetoing the following:

Section 3: establishes the terms of the Board.

Section 5: says the Governor selects one member to serve as chairperson.

Section 9: authorizes the Board to employ an Executive Director.

Section 40: as to the portion requiring the Board and Director to be appointed by October 1, 1985.

By vetoing these sections, a board will be established which may later act in an advisory capacity to the fire protection unit. The board will not, however, be able to proceed to implement the substantive provisions of this act until the legislature passes new legislation.

I intend to ask the next regular session of the legislature to perfect this measure by placing the functions of the board in an existing executive agency and making the board advisory to that agency.

For these reasons, I have vetoed Sections 3, 5, 9 and a part of Section 40 of Engrossed Substitute Senate Bill No. 3856.

CHAPTER 471

[Engrossed Substitute Senate Bill No. 4228]

BUSINESS AND OCCUPATION TAX—MEAT PROCESSOR RATE REDUCED—
METAL BULLION SALES RECLASSIFIED, EXEMPTION CREATED—
NONPROFIT ARTISTIC OR CULTURAL ORGANIZATIONS INCOME EXEMPT—
FUEL CONSUMED ON THE HIGH SEAS TAX EXEMPT—PUBLIC WORKS
ASSISTANCE ACCOUNT CREATED—PUBLIC UTILITY TAX AND
CONVEYANCE TAX MODIFIED

AN ACT Relating to revenue and excise taxation; amending RCW 82.04.260, 82.04.330, 82.04.100, 82.04.4328, 82.02.030, 82.16.020, and 82.20.010; adding new sections to chapter 82.04 RCW; creating new sections; repealing RCW 43.63A.200, 43.79.450, and 43.79.452; providing an effective date; and declaring an emergency.

Be it enacted by the Legislature of the State of Washington:

Sec. 1. Section 5, chapter 3, Laws of 1983 2nd ex. sess. and RCW 82.04.260 are each amended to read as follows:

(1) Upon every person engaging within this state in the business of buying wheat, oats, dry peas, dry beans, lentils, triticale, corn, rye and barley, but not including any manufactured or processed products thereof, and selling the same at wholesale; the tax imposed shall be equal to the gross proceeds derived from such sales multiplied by the rate of one one-hundredth of one percent.

(2) Upon every person engaging within this state in the business of manufacturing wheat into flour, soybeans into soybean oil, or sunflower seeds into sunflower oil; as to such persons the amount of tax with respect to such business shall be equal to the value of the flour or oil manufactured, multiplied by the rate of one-eighth of one percent.

(3) Upon every person engaging within this state in the business of splitting or processing dried peas; as to such persons the amount of tax with respect to such business shall be equal to the value of the peas split or processed, multiplied by the rate of one-quarter of one percent.

(4) Upon every person engaging within this state in the business of manufacturing seafood products which remain in a raw, raw frozen, or raw salted state at the completion of the manufacturing by that person; as to such persons the amount of tax with respect to such business shall be equal to the value of the products manufactured, multiplied by the rate of one-eighth of one percent.

(5) Upon every person engaging within this state in the business of manufacturing by canning, preserving, freezing or dehydrating fresh fruits and vegetables; as to such persons the amount of tax with respect to such business shall be equal to the value of the products canned, preserved, frozen or dehydrated multiplied by the rate of three-tenths of one percent.

(6) Upon every nonprofit corporation and nonprofit association engaging within this state in research and development, as to such corporations and associations, the amount of tax with respect to such activities shall be equal to the gross income derived from such activities multiplied by the rate of forty-four one-hundredths of one percent.

(7) Upon every person engaging within this state in the business of slaughtering, breaking and/or processing perishable meat products and/or selling the same at wholesale only and not at retail; as to such persons the tax imposed shall be equal to the gross proceeds derived from such sales multiplied by the rate of ~~((thirty-three))~~ twenty-five one-hundredths of one percent through June 30, 1986, and one-eighth of one percent thereafter.

(8) Upon every person engaging within this state in the business of making sales, at retail or wholesale, of nuclear fuel assemblies manufactured by that person, as to such persons the amount of tax with respect to such business shall be equal to the gross proceeds of sales of the assemblies multiplied by the rate of twenty-five one-hundredths of one percent.

(9) Upon every person engaging within this state in the business of manufacturing nuclear fuel assemblies, as to such persons the amount of tax with respect to such business shall be equal to the value of the products manufactured multiplied by the rate of twenty-five one-hundredths of one percent.

(10) Upon every person engaging within this state in the business of acting as a travel agent; as to such persons the amount of the tax with respect to such activities shall be equal to the gross income derived from such activities multiplied by the rate of twenty-five one-hundredths of one percent.

(11) Upon every person engaging within this state in business as an international steamship agent, international customs house broker, international freight forwarder, vessel and/or cargo charter broker in foreign commerce, and/or international air cargo agent; as to such persons the amount of the tax with respect to only international activities shall be equal to the gross income derived from such activities multiplied by the rate of thirty-three one-hundredths of one percent.

(12) Upon every person engaging within this state in the business of stevedoring and associated activities pertinent to the movement of goods and commodities in waterborne interstate or foreign commerce; as to such persons the amount of tax with respect to such business shall be equal to the gross proceeds derived from such activities multiplied by the rate of thirty-three one hundredths of one percent. Persons subject to taxation under this subsection shall be exempt from payment of taxes imposed by chapter 82.16 RCW for that portion of their business subject to taxation under this subsection. Stevedoring and associated activities pertinent to the conduct of goods and commodities in waterborne interstate or foreign commerce are defined as all activities of a labor, service or transportation nature whereby cargo may be loaded or unloaded to or from vessels or barges, passing over onto or under a wharf, pier, or similar structure; cargo may be moved to a warehouse or similar holding or storage yard or area to await further movement in import or export or may move to a consolidation freight station and be stuffed, unstuffed, containerized, separated or otherwise segregated or aggregated for delivery or loaded on any mode of transportation for delivery to its consignee. Specific activities included in this definition are: wharfage, handling, loading, unloading, moving of cargo to a convenient place of delivery to the consignee or a convenient place for further movement to export mode; documentation services in connection with the receipt, delivery, checking, care, custody and control of cargo required in the transfer of cargo; imported automobile handling prior to delivery to consignee; terminal stevedoring and incidental vessel services, including but not limited to plugging and unplugging refrigerator service to containers, trailers, and other refrigerated cargo receptacles, and securing ship hatch covers.

(13) Upon every person engaging within this state in the business of disposing of low-level waste, as defined in RCW 43.145.010; as to such persons the amount of the tax with respect to such business shall be equal to the gross income of the business, excluding any fees imposed under chapter 43.21F RCW, multiplied by the rate of thirty percent.

If the gross income of the taxpayer is attributable to activities both within and without this state, the gross income attributable to this state shall be determined in accordance with the methods of apportionment required under RCW 82.04.460.

(14) Upon every person engaging within this state as an insurance agent, insurance broker, or insurance solicitor licensed under chapter 48.17 RCW; as to such persons, the amount of the tax with respect to such licensed activities shall be equal to the gross income of such business multiplied by the rate of one percent.

**Sec. 2. Section 82.04.330, chapter 15, Laws of 1961 as amended by section 7, chapter 173, Laws of 1965 ex. sess. and RCW 82.04.330 are each amended to read as follows:*

This chapter shall not apply to any person in respect to the business of growing or producing for sale upon ~~(his)~~ the person's own lands or upon land in which ~~(he)~~ the person has a present right of possession, any agricultural or horticultural produce or crop, including the raising for sale of any animal, bird, fish, or insect, or the milk, eggs, wool, fur, meat, honey, or other substance obtained therefrom, or in respect to the sale of such products at wholesale by such grower, producer, or raiser thereof. This exemption shall not apply to any person selling such products at retail or using such products as ingredients in a manufacturing process, nor to the sale of any animal or substance obtained therefrom by a person in connection with ~~(his)~~ the person's business of operating a stockyard or a slaughter or packing house, nor to any person in respect to the business of taking, cultivating, or raising Christmas trees or timber, nor to any association of persons whatever, whether mutual, cooperative or otherwise, engaging in any business activity with respect to which tax liability is imposed under the provisions of this chapter.

**Sec. 2 was vetoed, see message at end of chapter.*

**Sec. 3. Section 82.04.100, chapter 15, Laws of 1961 as amended by section 2, chapter 173, Laws of 1965 ex. sess. and RCW 82.04.100 are each amended to read as follows:*

"Extractor" means every person who from ~~(his)~~ the person's own land or from the land of another under a right or license granted by lease or contract, either directly or by contracting with others for the necessary labor or mechanical services, for sale or for commercial or industrial use mines, quarries, takes or produces coal, oil, natural gas, ore, stone, sand, gravel, clay, mineral or other natural resource product, or fells, cuts or takes timber, Christmas trees or other natural products, or takes ~~(-cultivates, or raises)~~ fish, or takes, cultivates, or raises shellfish, or other sea or inland water foods or products. ~~(It)~~ "Extractor" does not include persons performing under contract the necessary labor or mechanical services for others or persons cultivating or raising fish entirely within confined rearing areas on the person's own land or on land in which the person has a present right of possession.

**Sec. 3 was vetoed, see message at end of chapter.*

***NEW SECTION. Sec. 4.** *Nothing in sections 2 and 3 of this act shall be construed to imply that a person, sale, or use made exempt from tax under sections 2 and 3 of this act was taxable under Title 82 RCW prior to the enactment of sections 2 and 3 of this act.*

*Sec. 4 was vetoed, see message at end of chapter.

NEW SECTION. Sec. 5. A new section is added to chapter 82.04 RCW to read as follows:

(1) For purposes of this chapter, "wholesale sale," "sale at wholesale," "retail sale," and "sale at retail" do not include the sale of precious metal bullion or monetized bullion.

(2) In computing tax under this chapter on the business of making sales of precious metal bullion or monetized bullion, the tax shall be imposed on the amounts received as commissions upon transactions for the accounts of customers over and above the amount paid to other dealers associated in such transactions, but no deduction or offset is allowed on account of salaries or commissions paid to salesmen or other employees.

(3) For purposes of this section, "precious metal bullion" means any precious metal which has been put through a process of smelting or refining, including, but not limited to, gold, silver, platinum, rhodium, and palladium, and which is in such state or condition that its value depends upon its contents and not upon its form. For purposes of this section, "monetized bullion" means coins or other forms of money manufactured from gold, silver, or other metals and heretofore, now, or hereafter used as a medium of exchange under the laws of this state, the United States, or any foreign nation, but does not include coins or money sold to be manufactured into jewelry or works of art.

NEW SECTION. Sec. 6. A new section is added to chapter 82.04 RCW to read as follows:

In computing tax there may be deducted from the measure of tax those amounts received by artistic or cultural organizations which represent income derived from business activities conducted by the organization.

Sec. 7. Section 6, chapter 140, Laws of 1981 and RCW 82.04.4328 are each amended to read as follows:

(1) For the purposes of RCW 82.04.4322, 82.04.4324, 82.04.4326, section 6 of this 1985 act, 82.08.031, and 82.12.031, the term "artistic or cultural organization" means an organization which is organized and operated exclusively for the purpose of providing artistic or cultural exhibitions, presentations, or performances or cultural or art education programs, as defined in subsection (2) of this section, for viewing or attendance by the general public. The organization must be a not-for-profit corporation under chapter 24.03 RCW and managed by a governing board of not less than eight individuals none of whom is a paid employee of the organization or by a corporation sole under chapter 24.12 RCW. In addition, to qualify for

deduction or exemption from taxation under RCW 82.04.4322, 82.04.4324, 82.04.4326, section 6 of this 1985 act, 82.08.031, and 82.12.031, the corporation shall satisfy the following conditions:

(a) No part of its income may be paid directly or indirectly to its members, stockholders, officers, directors, or trustees except in the form of services rendered by the corporation in accordance with its purposes and bylaws;

(b) Salary or compensation paid to its officers and executives must be only for actual services rendered, and at levels comparable to the salary or compensation of like positions within the state;

(c) Assets of the corporation must be irrevocably dedicated to the activities for which the exemption is granted and, on the liquidation, dissolution, or abandonment by the corporation, may not inure directly or indirectly to the benefit of any member or individual except a nonprofit organization, association, or corporation which also would be entitled to the exemption;

(d) The corporation must be duly licensed or certified when licensing or certification is required by law or regulation;

(e) The amounts received that qualify for exemption must be used for the activities for which the exemption is granted;

(f) Services must be available regardless of race, color, national origin, or ancestry; and

(g) The director of revenue shall have access to its books in order to determine whether the corporation is exempt from taxes.

(2) The term "artistic or cultural exhibitions, presentations, or performances or cultural or art education programs" includes and is limited to:

(a) An exhibition or presentation of works of art or objects of cultural or historical significance, such as those commonly displayed in art or history museums;

(b) A musical or dramatic performance or series of performances; or

(c) An educational seminar or program, or series of such programs, offered by the organization to the general public on an artistic, cultural, or historical subject.

NEW SECTION. Sec. 8. The public works assistance account is hereby established in the state treasury. Money may be placed in the public works assistance account from the proceeds of bonds when authorized by the legislature or from any other lawful source. Money in the public works assistance account shall be used to make loans and to give financial guarantees to local governments for public works projects.

Sec. 9. Section 31, chapter 35, Laws of 1982 1st ex. sess. as last amended by section 6, chapter 3, Laws of 1983 2nd ex. sess. and RCW 82.02.030 are each amended to read as follows:

(1) The rate of the additional taxes under RCW 54.28.020(2), 54.28.025(2), 66.24.210(2), 66.24.290(2), 82.04.2901, 82.16.020(2),

~~((82.20.010(2);))~~ 82.26.020(2), 82.27.020(5), 82.29A.030(2), 82.44.020(5), and 82.45.060(2) shall be seven percent;

(2) The rate of the additional taxes under RCW 82.08.150(4) shall be fourteen percent;

(3) The rate of the additional taxes under RCW 82.24.020(2) shall be fifteen percent; and

(4) The rate of the additional taxes under RCW 48.14.020(3) shall be four percent.

Sec. 10. Section 82.16.020, chapter 15, Laws of 1961 as last amended by section 13, chapter 3, Laws of 1983 2nd ex. sess. and RCW 82.16.020 are each amended to read as follows:

(1) There is levied and there shall be collected from every person a tax for the act or privilege of engaging within this state in any one or more of the businesses herein mentioned. The tax shall be equal to the gross income of the business, multiplied by the rate set out after the business, as follows:

(a) Railroad, express, railroad car, ~~((water distribution)) sewerage collection~~, light and power, and telegraph businesses: Three and six-tenths percent;

(b) Gas distribution business: Three and six-tenths percent;

(c) Urban transportation business: Six-tenths of one percent;

(d) Vessels under sixty-five feet in length, except tugboats, operating upon the waters within the state: Six-tenths of one percent;

(e) Motor transportation and tugboat businesses, and all public service businesses other than ones mentioned above: One and eight-tenths of one percent;

(f) Water distribution and refuse collection businesses: Four and seven-tenths percent.

(2) An additional tax is imposed equal to the rate specified in RCW 82.02.030 multiplied by the tax payable under subsection (1) of this section.

(3) Twenty percent of the moneys collected under subsection (1) of this section on water distribution businesses, seventy percent of the moneys collected under subsection (1) of this section on refuse collection businesses, and sixty percent of the moneys collected under subsection (1) of this section on sewerage collection businesses shall be deposited in the public works assistance account created in section 8 of this 1985 act.

Sec. 11. Section 82.20.010, chapter 15, Laws of 1961 as last amended by section 14, chapter 3, Laws of 1983 2nd ex. sess. and RCW 82.20.010 are each amended to read as follows:

(1) There is levied and there shall be collected a tax upon conveyances as follows: On any deed, instrument, or writing (unless deposited in escrow before May 1, 1935), whereby any lands, tenements, or other realty sold shall be granted, assigned, transferred, or otherwise conveyed to, or vested in, the purchaser, or any other person by his direction, when the consideration or value of the interest or property conveyed, exclusive of the value of

any lien or encumbrance remaining thereon at the time of sale, exceeds one hundred dollars and does not exceed five hundred dollars or fractional part thereof, ~~((fifty cents))~~ one dollar; and for each additional five hundred dollars or fractional part thereof, ~~((fifty cents))~~ one dollar.

(2) ~~((An additional tax is imposed equal to the rate specified in RCW 82.02.030 multiplied by the tax payable under subsection (1) of this section.))~~ Forty-six and one-half percent of the moneys collected under this section shall be deposited in the public works assistance account created in section 8 of this 1985 act.

(3) This section shall not apply to any instrument or writing, given to secure a debt, nor to any conveyance to the state.

NEW SECTION. Sec. 12. The following acts or parts of acts are each repealed:

(1) Section 1, chapter 244, Laws of 1984, section 9, chapter 6, Laws of 1985 and RCW 43.63A.200;

(2) Section 2, chapter 244, Laws of 1984, section 42, chapter 57, Laws of 1985 and RCW 43.79.450; and

(3) Section 3, chapter 244, Laws of 1984 and RCW 43.79.452.

**NEW SECTION. Sec. 13. It is the intent of the state of Washington in section 14 of this act to provide assistance to those economically distressed areas that do not have substantial means to attract and encourage new business into their communities and also to provide substantial financial incentives for business that will create new jobs within those distressed areas.*

*Sec. 13 was vetoed, see message at end of chapter.

**NEW SECTION. Sec. 14. A new section is added to chapter 82.04 RCW to read as follows:*

(1) "New businesses" means businesses as defined in RCW 82.04.140 which were first legally required to register with the department of revenue on or after the effective date of this section and which have not been licensed to operate within the state of Washington within the last five years.

(2) "Eligible businesses" means businesses engaging in manufacturing, research and development, and warehousing.

(3) "Distressed areas" means:

(a) Any county which exceeds the state-wide average annual unemployment rate and any city with a population of forty thousand or less within such a county; and

(b) Any city with a population of forty thousand or less that can demonstrate that it is distressed by reason of recent business closures, or notice thereof, severe layoffs for periods in excess of six months, and any other criteria established by the department of commerce and economic development to identify an area as disadvantaged.

*Sec. 14 was vetoed, see message at end of chapter.

***NEW SECTION. Sec. 15.** A new section is added to chapter 82.04 RCW to read as follows:

Persons engaging in new eligible businesses in distressed areas shall be exempt during the first five years of business operation from the payment of fifty percent of the tax otherwise imposed under this chapter by reason of such activities.

*Sec. 15 was vetoed, see message at end of chapter.

NEW SECTION. Sec. 16. A new section is added to chapter 82.04 RCW to read as follows:

(1) In computing tax there may be deducted from the measure of tax amounts derived from sales of fuel for consumption outside the territorial waters of the United States, by vessels used primarily in foreign commerce.

(2) Nothing in this section shall be construed to imply that amounts which may be deducted under this section were taxable under Title 82 RCW prior to the enactment of this section.

NEW SECTION. Sec. 17. If any provision of this 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.

NEW SECTION. Sec. 18. This act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect July 1, 1985.

Passed the Senate April 26, 1985.

Passed the House April 19, 1985.

Approved by the Governor May 21, 1985, with the exception of certain items which are vetoed.

Filed in Office of Secretary of State May 21, 1985.

Note: Governor's explanation of partial veto is as follows:

"I am returning herewith, without my approval as to Sections 2 through 4 and Sections 13 through 15, Engrossed Substitute Senate Bill 4228, entitled:

"AN ACT Relating to revenue and taxation;"

This measure contains several changes to business taxes. It includes important new revenue sources to meet the infrastructure financing needs of local government. It also includes adjustments in taxes for several industries which have clearly demonstrated that present taxes place them at a significant competitive disadvantage to similar businesses in other states. In each of these cases, Washington industries made convincing cases that continuing the current taxes would result in actual loss of existing business within the state with a resulting loss of jobs.

While approving the provisions of Sections 1, 5, 6, 7 and 16, I want to express once again my extreme distaste for piecemeal tax reform. I have approved these provisions only because I believe actual and irreparable losses of business and jobs would result before any general reform can occur. Substantial inequity continues to exist for many other industries in this state which must be addressed in a comprehensive manner in the very near future.

Sections 2 and 3 are essentially identical to Sections 1 and 2 of Engrossed House Bill 99, which I have already signed into law. They are vetoed to avoid double amendments. Section 4 is identical to Section 5 of Engrossed House Bill 99, which I have vetoed and which I am again vetoing.

Sections 13 through 15 create a fifty percent exemption from the B&O tax for new businesses which locate in distressed areas. These sections have an extremely laudable intent. I am firmly committed to bringing new jobs and industry to areas in which there is persistent unemployment resulting from long-term changes in the local economy. Given the state's limited resources, however, it is essential that such efforts are carefully targeted to reach areas with the greatest need. Unfortunately, I do not believe the exemption created in Section 13 through 15 meets this test.

These sections, taken as a whole, are likely to result in substantial loss of revenue to the state without necessarily benefitting truly distressed areas. For example, an existing business could dissolve and reincorporate under a new name or create a wholly owned subsidiary and become eligible for the exemption. Also, Section 15 does not specify how much of a qualifying business is eligible for the exemption. It is, therefore, possible that a new business would qualify for the entire exemption by locating an insignificant operation in a distressed area while the vast majority of its business was located elsewhere in the state in a non-distressed area.

In addition, the fact that a county is considered distressed at any time its unemployment rate exceeds the average, will result in benefits going to businesses in areas with temporary problems instead of being restricted to areas with persistent high joblessness.

For these reasons, I have vetoed Sections 2 through 4 and Sections 13 through 15 of Engrossed Substitute Senate Bill No. 4228.

With the exceptions of Sections 2 through 4 and Sections 13 through 15, which I have vetoed, Engrossed Substitute Senate Bill No. 4228 is approved."

CHAPTER 472

[Engrossed Substitute Senate Bill No. 3333]
MOTORCYCLE DEALERS' FRANCHISES

AN ACT Relating to motorcycle dealers' franchises; amending RCW 46.70.101 and 46.70.180; adding a new chapter to Title 46 RCW; and prescribing penalties.

Be it enacted by the Legislature of the State of Washington:

NEW SECTION. Sec. 1. This chapter shall be known as the motorcycle dealers' franchise act.

NEW SECTION. Sec. 2. The legislature recognizes it is in the best public interest for manufacturers and dealers of motorcycles to conduct business with each other in a fair, efficient, and competitive manner. The legislature declares the public interest is best served by dealers being assured of the ability to manage their business enterprises under a contractual obligation with manufacturers where dealers do not experience unreasonable interference, receive adequate allocations of merchandise in a timely manner at competitive prices, and transfer ownership of their business without undue constraints. It is the intent of the legislature to impose a regulatory scheme and to regulate competition in the motorcycle industry to the extent necessary to balance fairness and efficiency. These actions will assure the public that motorcycle dealers will devote their best competitive

storage facilities for the storage of raw materials or finished goods when such facilities are essential to and an integral part of a factory, mill or manufacturing plant, but shall not include manufacturing or industrial fixtures or equipment such as tanks, conveyor systems, cranes, industrial machinery and related facilities irrespective of whether or not such fixtures or equipment are affixed to the realty. Notwithstanding the foregoing, the term "buildings" shall also include potlines and furnaces used directly in the manufacturing of metals. The phrase "construction of buildings" refers only to new or enlarged buildings and not to the repair or renovation of existing buildings.

This credit shall be allowable only against tax payable by the manufacturer and measured by the value of products or gross proceeds of sales of articles, substances or commodities manufactured in this state, and shall be allowable only against any tax payable which is attributable to manufacturing occurring in the particular factory, mill or manufacturing plant in which such buildings are located.

No tax credit claimed shall be deducted on any return until such claim has been approved by the department of revenue or until ninety days after such claim has been submitted to the department of revenue for approval. This credit shall not be allowable for tax paid on purchases of material, labor or services on which the supplier thereof became entitled to compensation prior to July 1, 1964 or subsequent to January 1, 1971: *Provided*, That the credit shall be allowable for the tax paid on such purchases pursuant to any contract entered into prior to January 1, 1971 if such tax is paid on such contract purchases prior to July 1, 1972: *And provided further*, That with respect only to the construction of buildings used directly in the manufacturing of metals, this credit shall be allowable for tax paid on all purchases pursuant to construction which was in progress on January 1, 1971, and was completed after that date.

Any credits granted prior to July 1, 1969 pursuant to this section shall not be affected by *this 1969 amendatory act. [1971 ex.s. c 299 § 6; 1969 ex.s. c 257 § 1; 1967 ex.s. c 89 § 1; 1965 ex.s. c 173 § 26.]

*Reviser's note: "This 1969 amendatory act" [1969 ex.s. c 257] is the amendment to RCW 82.04.435 by 1969 ex.s. c 257.

Effective dates—Severability—1971 ex.s. c 299: See notes following RCW 82.04.050.

82.04.440 Persons taxable on multiple activities. (1) Except as provided in subsections (2) and (3) of this section, every person engaged in activities which are within the purview of the provisions of two or more of sections RCW 82.04.230 to 82.04.290, inclusive, shall be taxable under each paragraph applicable to the activities engaged in.

(2) Persons taxable under RCW 82.04.250 or 82.04.270 shall not be taxable under RCW 82.04.230, 82.04.240, or subsection (2), (3), (4), (5), or (7) of RCW 82.04.260 with respect to extracting or manufacturing of the products so sold.

(3) Persons taxable under RCW 82.04.240 or 82.04.260 subsection (4) shall not be taxable under RCW 82.04.230 with respect to extracting the ingredients of the products so manufactured.

(4)(a) If it is determined by a court of competent jurisdiction, in a judgment not subject to review, that subsection (2) of this section results in an unconstitutional discrimination against interstate or foreign commerce, and that relief is appropriate for any tax reporting periods either before or after April 30, 1985, it is the intent of the legislature that the credit provided in (b) of this subsection shall be applied to such reporting periods and that relief for such periods be limited to the granting of such credit. It is further the intent of the legislature that such credit shall be applicable only under the conditions and to the extent provided in this subsection (4).

(b) As provided in (a) of this subsection, a person taxable under RCW 82.04.230, 82.04.240, or subsection (2), (3), (4), (5), or (7) of RCW 82.04.260 with respect to extracting or manufacturing products in this state shall be allowed a credit against those taxes for any gross receipts taxes paid to another state with respect to the sales of the products so extracted or manufactured in this state. The amount of the credit shall not exceed the tax liability arising under this chapter with respect to the extraction or manufacturing of those products.

(c) For the purpose of this subsection, "gross receipts tax" means a tax:

(i) Which is imposed on or measured by the gross volume of business, in terms of gross receipts or in other terms, and in the determination of which the deductions allowed would not constitute the tax an income tax or value added tax; and

(ii) Which is also not, pursuant to law or custom, separately stated from the sales price.

(d) For the purpose of this subsection, "state" means state of the United States, any political subdivision thereof, or the District of Columbia, and any foreign country or political subdivision thereof. [1985 c 190 § 1; 1981 c 172 § 5; 1967 ex.s. c 149 § 16; 1965 ex.s. c 173 § 12; 1961 c 15 § 82.04.440. Prior: 1959 c 211 § 3; 1951 1st ex.s. c 9 § 1; 1950 ex.s. c 5 § 2; 1949 c 228 § 2-A; 1943 c 156 § 3; 1941 c 178 § 3; 1939 c 225 § 3; 1937 c 227 § 3; 1935 c 180 § 6; Rem. Supp. 1949 § 8370-6.]

Severability—1985 c 190: "If any provision of this 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." [1985 c 190 § 8.]

Effective dates—1981 c 172: See note following RCW 82.04.240.

82.04.444 Credit for property taxes paid on business inventories—Verification of payment—Penalty. (1) Each taxpayer requesting business and occupation tax credit under *RCW 82.04.442 shall verify, by completing and signing a form prepared and made available by the department of revenue, payment of business inventory taxes on which such credit is based.

(2) Any person signing a false claim with the intent to defraud or evade the payment of any tax shall be guilty of a gross misdemeanor. [1974 ex.s. c 169 § 5.]

RCW 82.04.240

Tax on manufacturers. (Contingent expiration date.)

Upon every person engaging within this state in business as a manufacturer, except persons taxable as manufacturers under other provisions of this chapter; as to such persons the amount of the tax with respect to such business shall be equal to the value of the products, including by-products, manufactured, multiplied by the rate of 0.484 percent.

The measure of the tax is the value of the products, including by-products, so manufactured regardless of the place of sale or the fact that deliveries may be made to points outside the state.

[2004 c 24 § 4; 1998 c 312 § 3; 1993 sp.s. c 25 § 102; 1981 c 172 § 1; 1979 ex.s. c 196 § 1; 1971 ex.s. c 281 § 3; 1969 ex.s. c 262 § 34; 1967 ex.s. c 149 § 8; 1965 ex.s. c 173 § 5; 1961 c 15 § 82.04.240. Prior: 1959 c 211 § 1; 1955 c 389 § 44; prior: 1950 ex.s. c 5 § 1, part; 1949 c 228 § 1, part; 1943 c 156 § 1, part; 1941 c 178 § 1, part; 1939 c 225 § 1, part; 1937 c 227 § 1, part; 1935 c 180 § 4, part; Rem. Supp. 1949 § 8370-4, part.]

Notes:

Intent -- Effective date -- 2004 c 24: See notes following RCW 82.04.2909.

Effective date -- Savings -- 1998 c 312: See notes following RCW 82.04.332.

Severability -- Effective dates--Part headings, captions not law--1993 sp.s. c 25: See notes following RCW 82.04.230.

Effective dates -- 1981 c 172: "This act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect July 1, 1981, except section 9 of this act shall take effect September 1, 1981, sections 7 and 8 of this act shall take effect October 1, 1981, and section 10 of this act shall take effect July 1, 1983." [1981 c 172 § 12.]

Effective date -- 1979 ex.s. c 196: "This act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect on July 1, 1979." [1979 ex.s. c 196 § 15.]

RCW 82.04.240

Tax on manufacturers. (Contingent effective date; contingent expiration of subsection.)

(1) Upon every person engaging within this state in business as a manufacturer, except persons taxable as manufacturers under other provisions of this chapter; as to such persons the amount of the tax with respect to such business shall be equal to the value of the products, including by-products, manufactured, multiplied by the rate of 0.484 percent.

(2) Upon every person engaging within this state in the business of manufacturing semiconductor materials, as to such persons the amount of tax with respect to such business shall, in the case of manufacturers, be equal to the value of the product manufactured, or, in the case of processors for hire, be equal to the gross income of the business, multiplied by the rate of 0.275 percent. For the purposes of this subsection "semiconductor materials" means silicon crystals, silicon ingots, raw polished semiconductor wafers, compound semiconductors, integrated circuits, and microchips. This subsection (2) expires twelve years after the effective date of this act.

(3) The measure of the tax is the value of the products, including by-products, so manufactured regardless of the place of sale or the fact that deliveries may be made to points outside the state.

[2003 c 149 § 3; 1998 c 312 § 3; 1993 sp.s. c 25 § 102; 1981 c 172 § 1; 1979 ex.s. c 196 § 1; 1971 ex.s. c 281 § 3; 1969 ex.s. c 262 § 34; 1967 ex.s. c 149 § 8; 1965 ex.s. c 173 § 5; 1961 c 15 § 82.04.240. Prior: 1959 c 211 § 1; 1955 c 389 § 44; prior: 1950 ex.s. c 5 § 1, part; 1949 c 228 § 1, part; 1943 c 156 § 1, part; 1941 c 178 § 1, part; 1939 c 225 § 1, part; 1937 c 227 § 1, part; 1935 c 180 § 4, part; Rem. Supp. 1949 § 8370-4, part.]

Notes:

***Contingent effective date -- Findings -- Intent -- 2003 c 149:** See notes following RCW 82.04.426.

Effective date -- Savings -- 1998 c 312: See notes following RCW 82.04.332.

Severability -- Effective dates--Part headings, captions not law--1993 sp.s. c 25: See notes following RCW 82.04.230.

APPENDIX A - 12

Effective dates -- 1981 c 172: "This act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect July 1, 1981, except section 9 of this act shall take effect September 1, 1981, sections 7 and 8 of this act shall take effect October 1, 1981, and section 10 of this act shall take effect July 1, 1983." [1981 c 172 § 12.]

Effective date -- 1979 ex.s. c 196: "This act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect on July 1, 1979." [1979 ex.s. c 196 § 15.]

RCW 82.04.250
Tax on retailers. (Expires July 1, 2011.)

(1) Upon every person engaging within this state in the business of making sales at retail, except persons taxable as retailers under other provisions of this chapter, as to such persons, the amount of tax with respect to such business shall be equal to the gross proceeds of sales of the business, multiplied by the rate of 0.471 percent.

(2) Upon every person engaging within this state in the business of making sales at retail that are exempt from the tax imposed under chapter 82.08 RCW by reason of RCW 82.08.0261, 82.08.0262, or 82.08.0263, except persons taxable under RCW 82.04.260(11) or subsection (3) of this section, as to such persons, the amount of tax with respect to such business shall be equal to the gross proceeds of sales of the business, multiplied by the rate of 0.484 percent.

(3) Upon every person classified by the federal aviation administration as a federal aviation regulation part 145 certificated repair station and that is engaging within this state in the business of making sales at retail that are exempt from the tax imposed under chapter 82.08 RCW by reason of RCW 82.08.0261, 82.08.0262, or 82.08.0263, as to such persons, the amount of tax with respect to such business shall be equal to the gross proceeds of sales of the business, multiplied by the rate of .2904 percent.

[2008 c 81 § 5; 2006 c 177 § 5; 2003 2nd sp.s. c 1 § 2; (2003 1st sp.s. c 2 § 1 expired July 1, 2006). Prior: 1998 c 343 § 5; 1998 c 312 § 4; 1993 sp.s. c 25 § 103; 1981 c 172 § 2; 1971 ex.s. c 281 § 4; 1971 ex.s. c 188 § 2; 1969 ex.s. c 262 § 35; 1967 ex.s. c 149 § 9; 1961 c 15 § 82.04.250; prior: 1955 c 389 § 45; prior: 1950 ex.s. c 5 § 1, part; 1949 c 228 § 1, part; 1943 c 156 § 1, part; 1941 c 178 § 1, part; 1939 c 225 § 1, part; 1937 c 227 § 1, part; 1935 c 180 § 4, part; Rem. Supp. 1949 § 8370-4, part.]

Notes:

Expiration date -- 2008 c 81 § 5: "Section 5 of this act expires July 1, 2011." [2008 c 81 § 19.]

Findings -- Savings -- Effective date -- 2008 c 81: See notes following RCW 82.08.975.

Expiration date -- 2006 c 177 § 5: "Section 5 of this act expires July 1, 2011." [2006 c 177 § 14.]

Effective date -- 2006 c 177 §§ 1-9: "Sections 1 through 9 of this act take effect July 1, 2006." [2006 c 177 § 12.]

Contingent effective date -- 2003 2nd sp.s. c 1: See RCW 82.32.550.

Finding -- 2003 2nd sp.s. c 1: See note following RCW 82.04.4461.

Expiration date -- 2003 1st sp.s. c 2: "This act expires July 1, 2006." [2003 1st sp.s. c 2 § 3.]

Effective date -- 2003 1st sp.s. c 2: "This act takes effect August 1, 2003." [2003 1st sp.s. c 2 § 4.]

Effective date -- 1998 c 343: See note following RCW 82.04.272.

Effective date -- Savings -- 1998 c 312: See notes following RCW 82.04.332.

Severability -- Effective dates--Part headings, captions not law--1993 sp.s. c 25: See notes following RCW 82.04.230.

Effective dates -- 1981 c 172: See note following RCW 82.04.240.

Effective date -- 1971 ex.s. c 186: See note following RCW 82.04.110.

RCW 82.04.250
Tax on retailers. (*Effective July 1, 2011.*)

(1) Upon every person engaging within this state in the business of making sales at retail, except persons taxable as retailers under other provisions of this chapter, as to such persons, the amount of tax with respect to such business shall be equal to the gross proceeds of sales of the business, multiplied by the rate of 0.471 percent.

(2) Upon every person engaging within this state in the business of making sales at retail that are exempt from the tax imposed under chapter 82.08 RCW by reason of RCW 82.08.0261, 82.08.0262, or 82.08.0263, except persons taxable under RCW 82.04.260(11), as to such persons, the amount of tax with respect to such business shall be equal to the gross proceeds of sales of the business, multiplied by the rate of 0.484 percent.

[2007 c 54 § 5; 2003 2nd sp.s. c 1 § 2; (2003 1st sp.s. c 2 § 1 expired July 1, 2006). Prior: 1998 c 343 § 5; 1998 c 312 § 4; 1993 sp.s. c 25 § 103; 1981 c 172 § 2; 1971 ex.s. c 281 § 4; 1971 ex.s. c 186 § 2; 1969 ex.s. c 262 § 35; 1967 ex.s. c 149 § 9; 1961 c 15 § 82.04.250; prior: 1955 c 389 § 45; prior: 1950 ex.s. c 5 § 1, part; 1949 c 228 § 1, part; 1943 c 156 § 1, part; 1941 c 178 § 1, part; 1939 c 225 § 1, part; 1937 c 227 § 1, part; 1935 c 180 § 4, part; Rem. Supp. 1949 § 8370-4, part.]

Notes:

Effective date -- 2007 c 54 § 5: "Section 5 of this act takes effect July 1, 2011." [2007 c 54 § 30.]

Severability -- 2007 c 54: See note following RCW 82.04.050.

Contingent effective date -- 2003 2nd sp.s. c 1: See RCW 82.32.550.

Finding -- 2003 2nd sp.s. c 1: See note following RCW 82.04.4461.

Expiration date -- 2003 1st sp.s. c 2: "This act expires July 1, 2006." [2003 1st sp.s. c 2 § 3.]

Effective date -- 2003 1st sp.s. c 2: "This act takes effect August 1, 2003." [2003 1st sp.s. c 2 § 4.]

Effective date -- 1998 c 343: See note following RCW 82.04.272.

Effective date -- Savings -- 1998 c 312: See notes following RCW 82.04.332.

Severability -- Effective dates--Part headings, captions not law--1993 sp.s. c 25: See notes following RCW 82.04.230.

Effective dates -- 1981 c 172: See note following RCW 82.04.240.

Effective date -- 1971 ex.s. c 186: See note following RCW 82.04.110.

RCW 82.04.270
Tax on wholesalers.

Upon every person engaging within this state in the business of making sales at wholesale, except persons taxable as wholesalers under other provisions of this chapter; as to such persons the amount of tax with respect to such business shall be equal to the gross proceeds of sales of such business multiplied by the rate of 0.484 percent.

[2004 c 24 § 5; 2003 2nd sp.s. c 1 § 5; 2001 1st sp.s. c 9 § 3; (2001 1st sp.s. c 9 § 2 expired July 1, 2001); 1999 c 358 § 2. Prior: 1999 c 358 § 1; 1998 c 343 § 2; 1998 c 329 § 1; 1998 c 312 § 6; 1994 c 124 § 2; 1993 sp.s. c 25 § 105; 1981 c 172 § 4; 1971 ex.s. c 281 § 6; 1971 ex.s. c 186 § 4; 1969 ex.s. c 262 § 37; 1967 ex.s. c 149 § 11; 1961 c 15 § 82.04.270; prior: 1959 ex.s. c 5 § 3; 1955 c 389 § 47; prior: 1950 ex.s. c 5 § 1, part; 1949 c 228 § 1, part; 1943 c 156 § 1, part; 1941 c 178 § 1, part; 1939 c 225 § 1, part; 1937 c 227 § 1, part; 1935 c 180 § 4, part; Rem. Supp. 1949 § 8370-4, part.]

Notes:

Intent -- Effective date -- 2004 c 24: See notes following RCW 82.04.2909.

Contingent effective date -- 2003 2nd sp.s. c 1: See RCW 82.32.550.

Finding -- 2003 2nd sp.s. c 1: See note following RCW 82.04.4461.

Effective dates -- 2001 1st sp.s. c 9: See note following RCW 82.04.298.

Expiration dates -- 2001 1st sp.s. c 9: See note following RCW 82.04.290.

Effective date -- 1999 c 358 § 2: "Section 2 of this act takes effect July 1, 2001." [1999 c 358 § 23.]

Effective date -- 1999 c 358 §§ 1 and 3-21: See note following RCW 82.04.3651.

Effective date -- 1998 c 343: See note following RCW 82.04.272.

Effective date -- 1998 c 329: "This act takes effect July 1, 1998." [1998 c 329 § 2.]

Effective date -- Savings -- 1998 c 312: See notes following RCW 82.04.332.

Severability -- Effective dates--Part headings, captions not law--1993 sp.s. c 25: See notes following RCW 82.04.230.

Effective dates -- 1981 c 172: See note following RCW 82.04.240.

Effective date -- 1971 ex.s. c 186: See note following RCW 82.04.110.

RCW 82.04.440
Credit — Persons taxable on multiple activities.

(1) Every person engaged in activities that are subject to tax under two or more provisions of RCW 82.04.230 through 82.04.298, inclusive, shall be taxable under each provision applicable to those activities.

(2) Persons taxable under RCW 82.04.2909(2), 82.04.250, 82.04.270, 82.04.294(2), or 82.04.260 (1)(c), (4), (11), or (12) with respect to selling products in this state, including those persons who are also taxable under RCW 82.04.261, shall be allowed a credit against those taxes for any (a) manufacturing taxes paid with respect to the manufacturing of products so sold in this state, and/or (b) extracting taxes paid with respect to the extracting of products so sold in this state or ingredients of products so sold in this state. Extracting taxes taken as credit under subsection (3) of this section may also be taken under this subsection, if otherwise allowable under this subsection. The amount of the credit shall not exceed the tax liability arising under this chapter with respect to the sale of those products.

(3) Persons taxable as manufacturers under RCW 82.04.240 or 82.04.260 (1)(b) or (12), including those persons who are also taxable under RCW 82.04.261, shall be allowed a credit against those taxes for any extracting taxes paid with respect to extracting the ingredients of the products so manufactured in this state. The amount of the credit shall not exceed the tax liability arising under this chapter with respect to the manufacturing of those products.

(4) Persons taxable under RCW 82.04.230, 82.04.240, 82.04.2909(1), 82.04.294(1), 82.04.2404, or 82.04.260 (1), (2), (4), (11), or (12), including those persons who are also taxable under RCW 82.04.261, with respect to extracting or manufacturing products in this state shall be allowed a credit against those taxes for any (i) gross receipts taxes paid to another state with respect to the sales of the products so extracted or manufactured in this state, (ii) manufacturing taxes paid with respect to the manufacturing of products using ingredients so extracted in this state, or (iii) manufacturing taxes paid with respect to manufacturing activities completed in another state for products so manufactured in this state. The amount of the credit shall not exceed the tax liability arising under this chapter with respect to the extraction or manufacturing of those products.

(5) For the purpose of this section:

(a) "Gross receipts tax" means a tax:

(i) Which is imposed on or measured by the gross volume of business, in terms of gross receipts or in other terms, and in the determination of which the deductions allowed would not constitute the tax an income tax or value added tax; and

(ii) Which is also not, pursuant to law or custom, separately stated from the sales price.

(b) "State" means (i) the state of Washington, (ii) a state of the United States other than Washington, or any political subdivision of such other state, (iii) the District of Columbia, and (iv) any foreign country or political subdivision thereof.

(c) "Manufacturing tax" means a gross receipts tax imposed on the act or privilege of engaging in business as a manufacturer, and includes (i) the taxes imposed in RCW 82.04.240, 82.04.2404, 82.04.2909(1), 82.04.260 (1), (2), (4), (11), and (12), and 82.04.294(1); (ii) the tax imposed under RCW 82.04.261 on persons who are engaged in business as a manufacturer; and (iii) similar gross receipts taxes paid to other states.

(d) "Extracting tax" means a gross receipts tax imposed on the act or privilege of engaging in business as an extractor, and includes (i) the tax imposed on extractors in RCW 82.04.230 and 82.04.260(12); (ii) the tax imposed under RCW 82.04.261 on persons who are engaged in business as an extractor; and (iii) similar gross receipts taxes paid to other states.

(e) "Business", "manufacturer", "extractor", and other terms used in this section have the meanings given in RCW 82.04.020 through 82.04.212, notwithstanding the use of those terms in the context of describing taxes imposed by other states.

[2006 c 300 § 8; 2006 c 84 § 6; (2007 c 54 § 10 expired July 22, 2007); 2005 c 301 § 3. Prior: 2004 c 174 § 5; 2004 c 24 § 7; 2003 2nd sp.s. c 1 § 6; 1998 c 312 § 9; 1994 c 124 § 4; 1987 2nd ex.s. c 3 § 2; 1985 c 190 § 1; 1981 c 172 § 5; 1967 ex.s. c 149 § 16; 1965 ex.s. c 173 § 12; 1961 c 15 § 82.04.440; prior: 1959 c 211 § 3; 1951 1st ex.s. c 9 § 1; 1950 ex.s. c 5 § 2; 1949 c 228 § 2-A; 1943 c 156 § 3; 1941 c 178 § 3; 1939 c 225 § 3; 1937 c 227 § 3; 1935 c 180 § 6; Rem. Supp. 1949 § 8370-6.]

Notes:

Reviser's note: This section was amended by 2006 c 84 § 6 and by 2006 c 300 § 8, 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).

Contingent expiration date -- 2007 c 54 § 10: "Section 10 of this act expires if the contingency in section 29 of this act occurs." [2007 c 54 § 31.] The contingency in section 29, chapter 54, Laws of 2007 occurred on December 1, 2006.

APPENDIX A - 17

Effective dates -- Contingent effective date -- 2006 c 300: See note following RCW 82.04.261.

Effective date -- 2006 c 84 §§ 2-8: See note following RCW 82.04.2404.

Findings -- Intent -- 2006 c 84: See note following RCW 82.04.2404.

Findings -- Intent -- Effective date -- Report to legislature -- 2005 c 301: See notes following RCW 82.04.294.

Effective date -- 2004 c 174: See note following RCW 82.04.2908.

Intent -- Effective date -- 2004 c 24: See notes following RCW 82.04.2909.

Contingent effective date -- 2003 2nd sp.s. c 1: See RCW 82.32.550.

Finding -- 2003 2nd sp.s. c 1: See note following RCW 82.04.4461.

Effective date -- Savings -- 1998 c 312: See notes following RCW 82.04.332.

Retroactive application -- 1994 c 124: "Except as otherwise provided in section 6 of this act, section 4 of this act applies retrospectively to all tax reporting periods on or after June 23, 1987." [1994 c 124 § 7.]

Legislative findings and intent -- 1987 2nd ex.s. c 3: "The legislature finds that the invalidation of the multiple activities exemption contained in RCW 82.04.440 by the United States Supreme Court now requires adjustments to the state's business and occupation tax to achieve constitutional equality between Washington taxpayers who have conducted and will continue to conduct business in interstate and intrastate commerce. It is the intent of chapter 3, Laws of 1987 2nd ex. sess. and sections 4 through 7 of this act to preserve the integrity of Washington's business and occupation tax system and impose only that financial burden upon the state necessary to establish parity in taxation between such taxpayers.

Thus, chapter 3, Laws of 1987 2nd ex. sess. and sections 4 through 7 of this act extends [extend] the system of credits originated in RCW 82.04.440 in 1985 to provide for equal treatment of taxpayers engaging in extracting, manufacturing or selling regardless of the location in which any of such activities occurs. It is further intended that RCW 82.04.440, as amended by section 2, chapter 3, Laws of 1987 2nd ex. sess. and sections 4 through 7 of this act, shall be construed and applied in a manner that will eliminate unconstitutional discrimination between taxpayers and ensure the preservation and collection of revenues from the conduct of multiple activities in which taxpayers in this state may engage." [1994 c 124 § 5; 1987 2nd ex.s. c 3 § 1.]

Application to prior reporting periods -- 1987 2nd ex.s. c 3: "If it is determined by a court of competent jurisdiction, in a judgment not subject to review, that relief is appropriate for any tax reporting periods before August 11, 1987, in respect to RCW 82.04.440 as it existed before August 11, 1987, it is the intent of the legislature that the credits provided in RCW 82.04.440 as amended by section 2, chapter 3, Laws of 1987 2nd ex. sess. and section 4 of this act shall be applied to such reporting periods and that relief for such periods be limited to the granting of such credits." [1994 c 124 § 6; 1987 2nd ex.s. c 3 § 3.]

Severability -- 1987 2nd ex.s. c 3: "If any provision of this 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." [1987 2nd ex.s. c 3 § 4.]

Severability -- 1985 c 190: "If any provision of this 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." [1985 c 190 § 8.]

Effective dates -- 1981 c 172: See note following RCW 82.04.240.

poultry or poultry products. [1967 ex.s. c 149 § 15; 1961 c 15 § 82.04.410. Prior: 1959 c 197 § 25; prior: 1945 c 249 § 2, part; 1943 c 156 § 4, part; 1941 c 178 § 6, part; 1939 c 225 § 5, part; 1937 c 227 § 4, part; 1935 c 180 § 11, part; Rem. Supp. 1945 § 8370-11, part.]

82.04.415 Exemptions—Sand, gravel and rock taken from county or city pits or quarries, processing and handling costs. This chapter shall not apply to:

(1) The cost of or charges made for labor and services performed in respect to the mining, sorting, crushing, screening, washing, hauling, and stockpiling of sand, gravel, and rock, when such sand, gravel, or rock is taken from a pit or quarry which is owned by or leased to a county or city and such sand, gravel, or rock is either stockpiled in said pit or quarry for placement or is placed on the street, road, place, or highway of the county or city by the county or city itself; or

(2) The cost of or charges for such labor and services if any such sand, gravel, or rock is sold by the county or city to a county, or a city at actual cost for placement on a publicly owned street, road, place, or highway.

The exemption provided for in this section shall not apply to the cost of or charges for such labor and services if the sand, gravel, or rock is used for other than public road purposes or is sold otherwise than as provided for in this section. [1965 ex.s. c 173 § 10.]

Effective date—1965 ex.s. c 173: The effective date of this section was June 1, 1965; see note following RCW 82.04.050.

82.04.417 Exemption of amounts or value paid or contributed to any county, city, town, political subdivision, or municipal corporation for capital facilities. The tax imposed by chapters 82.04 and 82.16 RCW shall not apply or be deemed to apply to amounts or value paid or contributed to any county, city, town, political subdivision, or municipal or quasi municipal corporation of the state of Washington representing payments of special assessments or installments thereof and interests and penalties thereon, charges in lieu of assessments, or any other charges, payments or contributions representing a share of the cost of capital facilities constructed or to be constructed or for the retirement of obligations and payment of interest thereon issued for capital purposes.

Service charges shall not be included in this exemption even though used wholly or in part for capital purposes. [1969 ex.s. c 156 § 1.]

82.04.420 Exemptions—Persons taxable on gross income from certain mechanical devices. This chapter shall not apply to any person performing any activities with respect to which a tax is specifically imposed upon the gross operating income derived therefrom under the provisions of *chapter 82.28 RCW of this title. [1961 c 15 § 82.04.420. Prior: 1959 c 197 § 26; prior: 1945 c 249 § 2, part; 1943 c 156 § 4, part; 1941 c 178 § 6, part; 1939 c 225 § 5, part; 1937 c 227 § 4, part; 1935 c 180 § 11, part; Rem. Supp. 1945 § 8370-11, part.]

*Reviser's note: Chapter 82.28 RCW was repealed by 1973 1st ex.s. c 218 § 29.

[Title 82 RCW (1979 Ed.)—p 18]

82.04.425 Exemptions—Accommodation sales. This chapter shall not apply to sales for resale by persons regularly engaged in the business of making sales of the type of property so sold to other persons similarly engaged in the business of selling such property where (1) the amount paid by the buyer does not exceed the amount paid by the seller to his vendor in the acquisition of the article and (2) the sale is made as an accommodation to the buyer to enable him to fill a bona fide existing order of a customer or is made within fourteen days to reimburse in kind a previous accommodation sale by the buyer to the seller; nor to sales by a wholly owned subsidiary of a person making sales at retail which are exempt under RCW 82.08.030(11) when the parent corporation shall have paid the tax imposed under this chapter. [1965 ex.s. c 173 § 9; 1961 c 15 § 82.04.425. Prior: 1955 c 95 § 1.]

Effective date—1965 ex.s. c 173: The effective date of the above amendment was June 1, 1965; see note following RCW 82.04.050.

82.04.427 Exemptions and credits—Pollution control facilities. See chapter 82.34 RCW.

82.04.430 Deductions enumerated. In computing tax there may be deducted from the measure of tax the following items:

(1) Amounts derived by persons, other than those engaging in banking, loan, security, or other financial businesses, from investments or the use of money as such, and also amounts derived as dividends by a parent from its subsidiary corporations;

(2) Amounts derived from bona fide initiation fees, dues, contributions, donations, tuition fees, charges made for operation of privately operated kindergartens, and endowment funds. This paragraph shall not be construed to exempt any person, association, or society from tax liability upon selling tangible personal property or upon providing facilities or services for which a special charge is made to members or others. If dues are in exchange for any significant amount of goods or services rendered by the recipient thereof to members without any additional charge to the member, or if the dues are graduated upon the amount of goods or services rendered, the value of such goods or services shall not be considered as a deduction hereunder;

(3) The amount of cash discount actually taken by the purchaser. This deduction is not allowed in arriving at the taxable amount under the extractive or manufacturing classifications with respect to articles produced or manufactured, the reported values of which, for the purposes of this tax, have been computed according to the provisions of RCW 82.04.450;

(4) The amount of credit losses actually sustained by taxpayers whose regular books of account are kept upon an accrual basis;

(5) So much of the sale price of motor vehicle fuel as constitutes the amount of tax imposed by the state or the United States government upon the sale thereof;

(6) Amounts derived from business which the state is prohibited from taxing under the Constitution of this state or the Constitution or laws of the United States;

(7) Amounts derived by any person as compensation for the receiving, washing, sorting, and packing of fresh perishable horticultural products and the material and supplies used therein when performed for the person exempted in RCW 82.04.330, either as agent or as independent contractor;

(8) Amounts derived as compensation for services rendered or to be rendered to patients or from sales of prescription drugs as defined in RCW 82.08.030 furnished as an integral part of services rendered to patients by a hospital, as defined in chapter 70.41 RCW, devoted to the care of human beings with respect to the prevention or treatment of disease, sickness, or suffering, when such hospital is operated by the United States or any of its instrumentalities, or by the state, or any of its political subdivisions;

(9) Amounts derived as compensation for services rendered to patients or from sales of prescription drugs as defined in RCW 82.08.030 furnished as an integral part of services rendered to patients by a hospital, as defined in chapter 70.41 RCW, which is operated as a nonprofit corporation, nursing homes and homes for unwed mothers operated as religious or charitable organizations, but only if no part of the net earnings received by such an institution inures directly or indirectly, to any person other than the institution entitled to deduction hereunder. In no event shall any such deduction be allowed, unless the hospital building is entitled to exemption from taxation under the property tax laws of this state;

(10) Amounts derived by a political subdivision of the state of Washington from another political subdivision of the state of Washington as compensation for services which are within the purview of RCW 82.04.290;

(11) By those engaged in banking, loan, security or other financial businesses, amounts derived from interest received on investments or loans primarily secured by first mortgages or trust deeds on nontransient residential properties;

(12) By those engaged in banking, loan, security or other financial businesses, amounts derived from interest paid on all obligations of the state of Washington, its political subdivisions, and municipal corporations organized pursuant to the laws thereof;

(13) Amounts derived as interest on loans to bona fide farmers and ranchers, producers or harvesters of aquatic products, or their cooperatives by a lending institution which is owned exclusively by its borrowers or members and which is engaged solely in the business of making loans and providing finance-related services to bona fide farmers and ranchers, producers or harvesters of aquatic products, their cooperatives, rural residents for housing, or persons engaged in furnishing farm-related or aquatic-related services to these individuals or entities;

(14) By persons subject to payment of the tax on manufacturers pursuant to RCW 82.04.240, the value of articles to the extent of manufacturing activities completed outside the United States, if

(a) any additional processing of such articles in this state consists of minor final assembly only, and

(b) in the case of domestic manufacture of such articles, can be and normally is done at the place of initial manufacture, and

(c) the total cost of the minor final assembly does not exceed two percent of the value of the articles, and

(d) the articles are sold and shipped outside the state;

(15) That portion of amounts received by any funeral home licensed to do business in this state which is received as reimbursements for expenditures (for goods supplied or services rendered by a person not employed by or affiliated or associated with the funeral home) and advanced by such funeral home as an accommodation to the persons paying for a funeral, so long as such expenditures and advances are billed to the persons paying for the funeral at only the exact cost thereof and are separately itemized in the billing statement delivered to such persons.

(16) Amounts received from the United States or any instrumentality thereof or from the state of Washington or any municipal corporation or political subdivision thereof as compensation for, or to support, health or social welfare services rendered by a health or social welfare organization or by a municipal corporation or political subdivision.

(17) Amounts used solely for repair, maintenance, replacement, management, or improvement of the residential structures and commonly held property, but excluding property where fees or charges are made for use by the public who are not guests accompanied by a member, which are derived by:

(a) A cooperative housing association, corporation, or partnership from a person who resides in a structure owned by the cooperative housing association, corporation, or partnership;

(b) An association of owners of property as defined in RCW 64.32.010, as now or hereafter amended, from a person who is an apartment owner as defined in RCW 64.32.010; or

(c) An association of owners of residential property from a person who is a member of the association. "Association of owners of residential property" means any organization of all the owners of residential property in a defined area who all hold the same property in common within the area.

For the purposes of this subsection "commonly held property" includes areas required for common access such as reception areas, halls, stairways, parking, etc., and may include recreation rooms, swimming pools and small parks or recreation areas; but is not intended to include more grounds than are normally required in a residential area, or to include such extensive areas as required for golf courses, campgrounds, hiking and riding areas, boating areas, etc.

To qualify for the deductions under this section:

(a) The salary or compensation paid to officers, managers, or employees must be only for actual services rendered and at levels comparable to the salary or compensation of like positions within the county wherein the property is located;

(b) Dues, fees, or assessments in excess of amounts needed for the purposes for which the deduction is allowed must be rebated to the members of the association;

(c) Assets of the association or organization must be distributable to all members and must not inure to the benefit of any single member or group of members. [1979 1st ex.s. c 196 § 5; 1977 ex.s. c 105 § 1; 1971 c 13 § 1; 1970 ex.s. c 101 § 2; 1970 ex.s. c 65 § 5; 1965 ex.s. c 173 § 11; 1961 c 293 § 5; 1961 c 15 § 82.04.430. Prior: 1945 c 249 § 3; 1935 c 180 § 12; Rem. Supp. 1945 § 8370-12.]

Effective date—1979 1st ex.s. c 196: See note following RCW 82.04.240.

Severability—1970 ex.s. c 101: "If any provision of this 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." [1970 ex.s. c 101 § 5.]

Effective date—1970 ex.s. c 101: "This act is necessary for the immediate preservation of the public peace, health and safety, the support of the state government and its existing public institutions, and shall take effect March 1, 1970." [1970 ex.s. c 101 § 6.]

Severability—1970 ex.s. c 65: See note following RCW 82.03.050.

Effective date—1970 ex.s. c 65: The effective date of the 1970 amendment to this section was July 1, 1970; see note following RCW 82.03.050.

82.04.431 "Health or social welfare organization" defined for RCW 82.04.430(16)—Conditions for exemption—"Health or social welfare services" defined.

(1) For the purposes of RCW 82.04.430(16), the term "health or social welfare organization" means an organization which renders health or social welfare services as defined in subsection (2) of this section, which is a not-for-profit corporation under chapter 24.03 RCW and which is managed by a governing board of not less than eight individuals none of whom is a paid employee of the organization or which is a corporation sole under chapter 24.12 RCW. In addition a corporation in order to be exempt under RCW 82.04.430(16) shall satisfy the following conditions:

(a) No part of its income may be paid directly or indirectly to its members, stockholders, officers, directors, or trustees except in the form of services rendered by the corporation in accordance with its purposes and bylaws;

(b) Salary or compensation paid to its officers and executives must be only for actual services rendered, and at levels comparable to the salary or compensation of like positions within the public service of the state;

(c) Assets of the corporation must be irrevocably dedicated to the activities for which the exemption is granted and, on the liquidation, dissolution, or abandonment by the corporation, may not inure directly or indirectly to the benefit of any member or individual except a nonprofit organization, association, or corporation which also would be entitled to the exemption;

(d) The corporation must be duly licensed or certified where licensing or certification is required by law or regulation;

(e) The amounts received qualifying for exemption must be used for the activities for which the exemption is granted;

(f) Services must be available regardless of race, color, national origin, or ancestry; and

(g) The director of revenue shall have access to its books in order to determine whether the corporation is exempt from taxes within the intent of RCW 82.04.430(16) and this section.

(2) The term "health or social welfare services" includes and is limited to:

(a) Mental health, drug, or alcoholism counseling or treatment;

(b) Family counseling;

(c) Health care services;

(d) Therapeutic, diagnostic, rehabilitative, or restorative services for the care of the sick, aged, or physically, developmentally, or emotionally-disabled individuals;

(e) Activities which are for the purpose of preventing or ameliorating juvenile delinquency or child abuse, including recreational activities for those purposes;

(f) Care of orphans or foster children;

(g) Day care of children;

(h) Employment development, training, and placement; and

(i) Legal services to the indigent. [1979 1st ex.s. c 196 § 6.]

Effective date—1979 1st ex.s. c 196: See note following RCW 82.04.240.

82.04.432 Deductions—Municipal sewer service fees or charges. In computing the tax imposed by this chapter, municipal sewerage utilities and other public corporations imposing and collecting fees or charges for sewer service may deduct from the measure of the tax, amounts paid to another municipal corporation or governmental agency for sewerage interception, treatment or disposal. [1967 ex.s. c 149 § 17.]

82.04.435 Credits for certain manufacturers. In computing tax under this chapter there may be credited against the amount of the tax the following items:

As to persons engaging in activities defined in RCW 82.04.120 (the definition of the term "to manufacture"), an amount not to exceed the tax actually paid under chapter 82.08 RCW (Retail Sales Tax) or chapter 82.12 RCW (Use Tax) by such persons or their lessors or their contract vendors, on materials, labor and services in the construction of new buildings or the enlarging of existing buildings directly used in such activities. Where a building is used partly for manufacturing and partly for other purposes the applicable tax credit shall be determined by apportionment of the costs of construction under such rules as the department of revenue shall provide. For purposes of this section the term "buildings" shall mean and include only those structures used to house or shelter manufacturing activities, including the usual lighting, heating, ventilating and sanitary plumbing facilities. The term shall include plant offices and warehouses or other storage facilities for the storage of raw materials or finished goods when such facilities are essential to and an integral part of a factory, mill or manufacturing plant, but shall not include manufacturing or industrial fixtures or equipment such as tanks, conveyor systems, cranes, industrial machinery and related facilities irrespective of whether or not such fixtures or equipment are affixed to the realty. Notwithstanding the foregoing, the

also the purpose of this legislation to remove these conflicts and delete old statutory language concerning such elections which is no longer necessary.

(2) For elective offices of counties, cities, towns, and special purpose districts other than school districts where the ownership of property is not a prerequisite of voting, the term of incumbents shall end and the term of successors shall begin after the successor is elected and qualified, and the term shall commence immediately after December 31st following the election, except as follows:

(a) Where the term of office varies from this standard according to statute; and

(b) If the election results have not been certified prior to January 1st after the election, in which event the time of commencement for the new term shall occur when the successor becomes qualified in accordance with RCW 29.01.135.

(3) For elective offices governed by this section, the oath of office shall be taken as the last step of qualification as defined in RCW 29.01.135 but may be taken either:

(a) Up to ten days prior to the scheduled date of assuming office; or

(b) At the last regular meeting of the governing body of the applicable county, city, town, or special district held before the winner is to assume office.

Sec. 8. Section 29.27.080, chapter 9, Laws of 1965 and RCW 29.27.080 are each amended to read as follows:

(1) Notice for any state, county, district, or municipal election, whether special or general, shall be given by at least one publication not more than ten nor less than three days prior to the election by the county auditor or the officer conducting the election as the case may be, in one or more newspapers of general circulation within the county. Said legal notice shall contain the title of each office under the proper party designation, the names and addresses of all officers who have been nominated for an office to be voted upon at that election, together with the ballot titles of all measures, the hours during which the polls will be open, and that the election will be held in the regular polling places in each precinct, giving the address of each polling place: PROVIDED, That the names of all candidates for non-partisan offices shall be published separately with designation of the office for which they are candidates but without party designation. This shall be the only notice required for a state, county, district or municipal general or special election and shall supersede the provisions of any and all other statutes, whether general or special in nature, having different requirements for the giving of notice of any general or special elections.

(2) All school district elections held on February 5, 1980, at which the number and proportion of persons required by law voted to authorize bond or tax levies, are hereby validated regardless of any failure to publish notice of such election. No action challenging the validity of any such election may

be brought later than April 15, 1980, or thirty days from the effective date of this act, whichever is later. Notice of provisions of this subsection shall be published within five days after the effective date of this section of this 1980 act in a newspaper of general circulation within each county where a school district election was held on February 5, 1980, and where notice of such election was not published as provided in subsection (1) of this section.

NEW SECTION. Sec. 9. Section 8 of this 1980 act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect immediately.

NEW SECTION. Sec. 10. If any provision of this 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.

Passed the House February 21, 1980.

Passed the Senate February 15, 1980.

Approved by the Governor February 28, 1980.

Filed in Office of Secretary of State February 28, 1980.

CHAPTER 36

[House Bill No. 277]

COMIC BOOKS

AN ACT Relating to comic books; and repealing sections 1 through 15, chapter 282, Laws of 1955 and RCW 19.18.010 through 19.18.900.

Be it enacted by the Legislature of the State of Washington:

NEW SECTION. Section 1. Sections 1 through 15, chapter 282, Laws of 1955 and RCW 19.18.010 through 19.18.900 are each repealed.

Passed the House January 14, 1980.

Passed the Senate February 18, 1980.

Approved by the Governor February 29, 1980.

Filed in Office of Secretary of State February 29, 1980.

CHAPTER 37

[Substitute House Bill No. 1016]

EXCISE TAX EXEMPTIONS, DEDUCTIONS—SECTION DIVISION, RECODIFICATION

AN ACT Relating to the recodification of existing excise tax exemptions and deductions; dividing sales tax exemptions, use tax exemptions, and business and occupation tax deductions into separate sections; amending section 82.04.425, chapter 15, Laws of 1961 as amended by section 9, chapter 173, Laws of 1965 ex. sess. and RCW 82.04.425; amending section 82.12.020, chapter 15, Laws of 1961 as last amended by section 3, chapter 324, Laws of 1977 ex. sess. and RCW 82.12.020; amending section 6, chapter 196, Laws of

WASHINGTON LAWS, 1980

1979 ex. sess. and RCW 82.04.431; adding new sections to chapter 15, Laws of 1961 and to chapter 82.04 RCW; adding new sections to chapter 15, Laws of 1961 and to chapter 82.08 RCW; adding new sections to chapter 15, Laws of 1961 and to chapter 82.12 RCW; creating a new section; repealing section 82.04.430, chapter 15, Laws of 1961, section 5, chapter 293, Laws of 1961, section 11, chapter 173, Laws of 1965 ex. sess., section 5, chapter 65, Laws of 1970 ex. sess., section 2, chapter 101, Laws of 1970 ex. sess., section 1, chapter 13, Laws of 1971, section 1, chapter 105, Laws of 1977 ex. sess., section 5, chapter 196, Laws of 1979 ex. sess. and RCW 82.04.430; repealing section 1, chapter 12, Laws of 1979, section 6, chapter 266, Laws of 1979 ex. sess. and RCW 82.08.030; repealing section 2, chapter 12, Laws of 1979, section 7, chapter 266, Laws of 1979 ex. sess. and RCW 82.12.030; and declaring an emergency.

Be it enacted by the Legislature of the State of Washington:

NEW SECTION. Section 1. The separation of sales tax exemption, use tax exemption, and business and occupation deduction sections into shorter sections is intended to improve the readability and facilitate the future amendment of these sections. This separation shall not change the meaning of any of the exemptions or deductions involved.

NEW SECTION. Sec. 2. There is added to chapter 15, Laws of 1961 and to chapter 82.04 RCW a new section to read as follows:

In computing tax there may be deducted from the measure of tax amounts derived by persons, other than those engaging in banking, loan, security, or other financial businesses, from investments or the use of money as such, and also amounts derived as dividends by a parent from its subsidiary corporations.

NEW SECTION. Sec. 3. There is added to chapter 15, Laws of 1961 and to chapter 82.04 RCW a new section to read as follows:

In computing tax there may be deducted from the measure of tax amounts derived from bona fide initiation fees, dues, contributions, donations, tuition fees, charges made for operation of privately operated kindergartens, and endowment funds. This paragraph shall not be construed to exempt any person, association, or society from tax liability upon selling tangible personal property or upon providing facilities or services for which a special charge is made to members or others. If dues are in exchange for any significant amount of goods or services rendered by the recipient thereof to members without any additional charge to the member, or if the dues are graduated upon the amount of goods or services rendered, the value of such goods or services shall not be considered as a deduction hereunder.

NEW SECTION. Sec. 4. There is added to chapter 15, Laws of 1961 and to chapter 82.04 RCW a new section to read as follows:

In computing tax there may be deducted from the measure of tax the amount of cash discount actually taken by the purchaser. This deduction is not allowed in arriving at the taxable amount, under the extractive or manufacturing classifications with respect to articles produced or manufactured, the reported values of which, for the purposes of this tax, have been computed according to the provisions of RCW 82.04.450.

NEW SECTION. Sec. 5. There is added to chapter 15, Laws of 1961 and to chapter 82.04 RCW a new section to read as follows:

In computing tax there may be deducted from the measure of tax the amount of credit losses actually sustained by taxpayers whose regular books of account are kept upon an accrual basis.

NEW SECTION. Sec. 6. There is added to chapter 15, Laws of 1961 and to chapter 82.04 RCW a new section to read as follows:

In computing tax there may be deducted from the measure of tax so much of the sale price of motor vehicle fuel as constitutes the amount of tax imposed by the state or the United States government upon the sale thereof.

NEW SECTION. Sec. 7. There is added to chapter 15, Laws of 1961 and to chapter 82.04 RCW a new section to read as follows:

In computing tax there may be deducted from the measure of tax amounts derived from business which the state is prohibited from taxing under the Constitution of this state or the Constitution or laws of the United States.

NEW SECTION. Sec. 8. There is added to chapter 15, Laws of 1961 and to chapter 82.04 RCW a new section to read as follows:

In computing tax there may be deducted from the measure of tax amounts derived by any person as compensation for the receiving, washing, sorting, and packing of fresh perishable horticultural products and the material and supplies used therein when performed for the person exempted in RCW 82.04.330, either as agent or as independent contractor.

NEW SECTION. Sec. 9. There is added to chapter 15, Laws of 1961 and to chapter 82.04 RCW a new section to read as follows:

In computing tax there may be deducted from the measure of tax amounts derived as compensation for services rendered or to be rendered to patients or from sales of prescription drugs as defined in section 46 of this 1979 [1980] act furnished as an integral part of services rendered to patients by a hospital, as defined in chapter 70.41 RCW, devoted to the care of human beings with respect to the prevention or treatment of disease, sickness, or suffering, when such hospital is operated by the United States or any of its instrumentalities, or by the state, or any of its political subdivisions.

NEW SECTION. Sec. 10. There is added to chapter 15, Laws of 1961 and to chapter 82.04 RCW a new section to read as follows:

In computing tax there may be deducted from the measure of tax amounts derived as compensation for services rendered to patients or from sales of prescription drugs as defined in section 46 of this 1979 [1980] act furnished as an integral part of services rendered to patients by a hospital, as defined in chapter 70.41 RCW, which is operated as a nonprofit corporation, nursing homes and homes for unwed mothers operated as religious or charitable organizations, but only if no part of the net earnings received

by such an institution inures directly or indirectly, to any person other than the institution entitled to deduction hereunder. In no event shall any such deduction be allowed, unless the hospital building is entitled to exemption from taxation under the property tax laws of this state.

NEW SECTION. Sec. 11. There is added to chapter 15, Laws of 1961 and to chapter 82.04 RCW a new section to read as follows:

In computing tax there may be deducted from the measure of tax amounts derived by a political subdivision of the state of Washington from another political subdivision of the state of Washington as compensation for services which are within the purview of RCW 82.04.290.

NEW SECTION. Sec. 12. There is added to chapter 15, Laws of 1961 and to chapter 82.04 RCW a new section to read as follows:

In computing tax there may be deducted from the measure of tax by those engaged in banking, loan, security or other financial businesses, amounts derived from interest received on investments or loans primarily secured by first mortgages or trust deeds on nontransient residential properties.

NEW SECTION. Sec. 13. There is added to chapter 15, Laws of 1961 and to chapter 82.04 RCW a new section to read as follows:

In computing tax there may be deducted from the measure of tax by those engaged in banking, loan, security or other financial businesses, amounts derived from interest paid on all obligations of the state of Washington, its political subdivisions, and municipal corporations organized pursuant to the laws thereof.

NEW SECTION. Sec. 14. There is added to chapter 15, Laws of 1961 and to chapter 82.04 RCW a new section to read as follows:

In computing tax there may be deducted from the measure of tax amounts derived as interest on loans to bona fide farmers and ranchers, producers or harvesters of aquatic products, or their cooperatives by a lending institution which is owned exclusively by its borrowers or members and which is engaged solely in the business of making loans and providing finance-related services to bona fide farmers and ranchers, producers or harvesters of aquatic products, their cooperatives, rural residents for housing, or persons engaged in furnishing farm-related or aquatic-related services to these individuals or entities.

NEW SECTION. Sec. 15. There is added to chapter 15, Laws of 1961 and to chapter 82.04 RCW a new section to read as follows:

In computing tax there may be deducted from the measure of tax by persons subject to payment of the tax on manufacturers pursuant to RCW 82.04.240, the value of articles to the extent of manufacturing activities completed outside the United States, if:

(1) Any additional processing of such articles in this state consists of minor final assembly only; and

(2) In the case of domestic manufacture of such articles, can be and normally is done at the place of initial manufacture; and

(3) The total cost of the minor final assembly does not exceed two percent of the value of the articles; and

(4) The articles are sold and shipped outside the state.

NEW SECTION. Sec. 16. There is added to chapter 15, Laws of 1961 and to chapter 82.04 RCW a new section to read as follows:

In computing tax there may be deducted from the measure of tax that portion of amounts received by any funeral home licensed to do business in this state which is received as reimbursements for expenditures (for goods supplied or services rendered by a person not employed by or affiliated or associated with the funeral home) and advanced by such funeral home as an accommodation to the persons paying for a funeral, so long as such expenditures and advances are billed to the persons paying for the funeral at only the exact cost thereof and are separately itemized in the billing statement delivered to such persons.

NEW SECTION. Sec. 17. There is added to chapter 15, Laws of 1961 and to chapter 82.04 RCW a new section to read as follows:

In computing tax there may be deducted from the measure of tax amounts received from the United States or any instrumentality thereof or from the state of Washington or any municipal corporation or political subdivision thereof as compensation for, or to support, health or social welfare services rendered by a health or social welfare organization or by a municipal corporation or political subdivision.

NEW SECTION. Sec. 18. There is added to chapter 15, Laws of 1961 and to chapter 82.04 RCW a new section to read as follows:

(1) In computing tax there may be deducted from the measure of tax amounts used solely for repair, maintenance, replacement, management, or improvement of the residential structures and commonly held property, but excluding property where fees or charges are made for use by the public who are not guests accompanied by a member, which are derived by:

(a) A cooperative housing association, corporation, or partnership from a person who resides in a structure owned by the cooperative housing association, corporation, or partnership;

(b) An association of owners of property as defined in RCW 64.32.010, as now or hereafter amended, from a person who is an apartment owner as defined in RCW 64.32.010; or

(c) An association of owners of residential property from a person who is a member of the association. "Association of owners of residential property" means any organization of all the owners of residential property in a defined area who all hold the same property in common within the area.

(2) For the purposes of this section "commonly held property" includes areas required for common access such as reception areas, halls, stairways,

parking, etc., and may include recreation rooms, swimming pools and small parks or recreation areas; but is not intended to include more grounds than are normally required in a residential area, or to include such extensive areas as required for golf courses, campgrounds, hiking and riding areas, boating areas, etc.

(3) To qualify for the deductions under this section:

(a) The salary or compensation paid to officers, managers, or employees must be only for actual services rendered and at levels comparable to the salary or compensation of like positions within the county wherein the property is located;

(b) Dues, fees, or assessments in excess of amounts needed for the purposes for which the deduction is allowed must be rebated to the members of the association;

(c) Assets of the association or organization must be distributable to all members and must not inure to the benefit of any single member or group of members.

NEW SECTION. Sec. 19. There is added to chapter 15, Laws of 1961 and to chapter 82.08 RCW a new section to read as follows:

The tax levied by RCW 82.08.020 shall not apply to casual and isolated sales of property or service, unless made by a person who is engaged in a business activity taxable under chapters 82.04 or 82.16 RCW: PROVIDED, That the exemption provided by this section shall not be construed as providing any exemption from the tax imposed by chapter 82.12 RCW.

NEW SECTION. Sec. 20. There is added to chapter 15, Laws of 1961 and to chapter 82.08 RCW a new section to read as follows:

The tax levied by RCW 82.08.020 shall not apply to sales made by persons in the course of business activities with respect to which tax liability is specifically imposed under chapter 82.16 RCW, when the gross proceeds from such sales must be included in the measure of the tax imposed under said chapter.

NEW SECTION. Sec. 21. There is added to chapter 15, Laws of 1961 and to chapter 82.08 RCW a new section to read as follows:

The tax levied by RCW 82.08.020 shall not apply to the distribution and newsstand sale of newspapers.

NEW SECTION. Sec. 22. There is added to chapter 15, Laws of 1961 and to chapter 82.08 RCW a new section to read as follows:

The tax levied by RCW 82.08.020 shall not apply to sales which the state is prohibited from taxing under the Constitution of this state or the Constitution or laws of the United States.

NEW SECTION. Sec. 23. There is added to chapter 15, Laws of 1961 and to chapter 82.08 RCW a new section to read as follows:

The tax levied by RCW 82.08.020 shall not apply to sales of motor vehicle fuel used in aircraft by the manufacturer thereof for research, development, and testing purposes and sales of motor vehicle fuel taxable under chapter 82.36 RCW: PROVIDED, That the use of any such fuel upon which a refund of the motor vehicle fuel tax has been obtained shall be subject to the tax imposed by chapter 82.12 RCW.

NEW SECTION. Sec. 24. There is added to chapter 15, Laws of 1961 and to chapter 82.08 RCW a new section to read as follows:

The tax levied by RCW 82.08.020 shall not apply to sales (including transfers of title through decree of appropriation) heretofore or hereafter made of the entire operating property of a publicly or privately owned public utility, or of a complete operating integral section thereof, to the state or a political subdivision thereof for use in conducting any business defined in RCW 82.16.010 (1), (2), (3), (4), (5), (6), (7), (8), (9), (10) or (11).

NEW SECTION. Sec. 25. There is added to chapter 15, Laws of 1961 and to chapter 82.08 RCW a new section to read as follows:

The tax levied by RCW 82.08.020 shall not apply to auction sales made by or through auctioneers of tangible personal property (including household goods) which have been used in conducting a farm activity, when the seller thereof is a farmer and the sale is held or conducted upon a farm and not otherwise.

NEW SECTION. Sec. 26. There is added to chapter 15, Laws of 1961 and to chapter 82.08 RCW a new section to read as follows:

The tax levied by RCW 82.08.020 shall not apply to sales to corporations which have been incorporated under any act of the congress of the United States and whose principal purposes are to furnish volunteer aid to members of armed forces of the United States and also to carry on a system of national and international relief and to apply the same in mitigating the sufferings caused by pestilence, famine, fire, floods, and other national calamities and to devise and carry on measures for preventing the same.

NEW SECTION. Sec. 27. There is added to chapter 15, Laws of 1961 and to chapter 82.08 RCW a new section to read as follows:

The tax levied by RCW 82.08.020 shall not apply to sales of purebred livestock for breeding purposes where the animals are registered in a nationally recognized breed association; sales of cattle and milk cows used on the farm.

NEW SECTION. Sec. 28. There is added to chapter 15, Laws of 1961 and to chapter 82.08 RCW a new section to read as follows:

The tax levied by RCW 82.08.020 shall not apply to sales of tangible personal property (other than the type referred to in section 29 of this act) for use by the purchaser in connection with the business of operating as a private or common carrier by air, rail, or water in interstate or foreign commerce: PROVIDED, That any actual use of such property in this state

utility or enterprise activity as defined by the state auditor pursuant to RCW 35.33.111 and 36.40.220 and upon which the tax imposed pursuant to this chapter had previously applied. Nothing contained in this section shall limit the authority of the legislature to authorize the imposition of such tax prospectively upon such activities as the legislature shall specifically designate. [1983 1st ex.s. c 66 § 3.]

82.04.423 Exemptions—Sales by certain out-of-state persons to or through direct seller's representatives.

(1) This chapter shall not apply to any person in respect to gross income derived from the business of making sales at wholesale or retail if such person:

(a) Does not own or lease real property within this state; and

(b) Does not regularly maintain a stock of tangible personal property in this state for sale in the ordinary course of business; and

(c) Is not a corporation incorporated under the laws of this state; and

(d) Makes sales in this state exclusively to or through a direct seller's representative.

(2) For purposes of this section, the term "direct seller's representative" means a person who buys consumer products on a buy-sell basis or a deposit-commission basis for resale, by the buyer or any other person, in the home or otherwise than in a permanent retail establishment, or who sells, or solicits the sale of, consumer products in the home or otherwise than in a permanent retail establishment; and

(a) Substantially all of the remuneration paid to such person, whether or not paid in cash, for the performance of services described in this subsection is directly related to sales or other output, including the performance of services, rather than the number of hours worked; and

(b) The services performed by the person are performed pursuant to a written contract between such person and the person for whom the services are performed and such contract provides that the person will not be treated as an employee with respect to such purposes for federal tax purposes.

(3) Nothing in this section shall be construed to imply that a person exempt from tax under this section was engaged in a business activity taxable under this chapter prior to the enactment of this section. [1983 1st ex.s. c 66 § 5.]

Reviser's note: The effective date of 1983 1st ex.s. c 66 is August 23, 1983.

82.04.425 Exemptions—Accommodation sales.

This chapter shall not apply to sales for resale by persons regularly engaged in the business of making sales of ~~the type of property so sold to other persons similarly engaged in the business of selling such property where~~ (1) the amount paid by the buyer does not exceed the amount paid by the seller to his vendor in the acquisition of the article and (2) the sale is made as an accommodation to the buyer to enable him to fill a bona fide existing order of a customer or is made within fourteen days to reimburse in kind a previous accommodation

(1985 Ed.)

sale by the buyer to the seller; nor to sales by a wholly owned subsidiary of a person making sales at retail which are exempt under RCW 82.08.0262 when the parent corporation shall have paid the tax imposed under this chapter. [1980 c 37 § 78; 1965 ex.s. c 173 § 9; 1961 c 15 § 82.04.425. Prior: 1955 c 95 § 1.]

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

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

82.04.427 Exemptions and credits—Pollution control facilities. See chapter 82.34 RCW.

82.04.4271 Deductions—Membership fees and certain service fees by nonprofit youth organization. In computing tax due under this chapter, there may be deducted from the measure of tax all amounts received by a nonprofit youth organization:

(1) As membership fees or dues, irrespective of the fact that the payment of the membership fees or dues to the organization may entitle its members, in addition to other rights or privileges, to receive services from the organization or to use the organization's facilities; or

(2) From members of the organization for camping and recreational services provided by the organization or for the use of the organization's camping and recreational facilities.

For purposes of this section: "Nonprofit youth organization" means a nonprofit organization engaged in character building of youth which is exempt from property tax under RCW 84.36.030. [1981 c 74 § 1.]

82.04.4281 Deductions—Investments—Dividends from subsidiary corporations. In computing tax there may be deducted from the measure of tax amounts derived by persons, other than those engaging in banking, loan, security, or other financial businesses, from investments or the use of money as such, and also amounts derived as dividends by a parent from its subsidiary corporations. [1980 c 37 § 2. Formerly RCW 82.04.430(1).]

Intent—1980 c 37: "The separation of sales tax exemption, use tax exemption, and business and occupation deduction sections into shorter sections is intended to improve the readability and facilitate the future amendment of these sections. This separation shall not change the meaning of any of the exemptions or deductions involved." [1980 c 37 § 1.]

82.04.4282 Deductions—Initiation fees, dues, contributions, donations, tuition fees, charges for operating private kindergartens, and endowment funds. In computing tax there may be deducted from the measure of tax amounts derived from bona fide initiation fees, dues, contributions, donations, tuition fees, charges made for operation of privately operated kindergartens, and endowment funds. This paragraph shall not be construed to exempt any person, association, or society from tax liability upon selling tangible personal property or upon providing facilities or services for which a special charge is made to members or others. If dues are in exchange for any significant amount of goods or services rendered

[Title 82 RCW—p 23]

by the recipient thereof to members without any additional charge to the member, or if the dues are graduated upon the amount of goods or services rendered, the value of such goods or services shall not be considered as a deduction hereunder. [1980 c 37 § 3. Formerly RCW 82.04.430(2).]

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

82.04.4283 Deductions—Cash discount taken by purchaser. In computing tax there may be deducted from the measure of tax the amount of cash discount actually taken by the purchaser. This deduction is not allowed in arriving at the taxable amount under the extractive or manufacturing classifications with respect to articles produced or manufactured, the reported values of which, for the purposes of this tax, have been computed according to the provisions of RCW 82.04.450. [1980 c 37 § 4. Formerly RCW 82.04.430(3).]

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

82.04.4284 Deductions—Credit losses of accrual basis taxpayers. In computing tax there may be deducted from the measure of tax the amount of credit losses actually sustained by taxpayers whose regular books of account are kept upon an accrual basis. [1980 c 37 § 5. Formerly RCW 82.04.430(4).]

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

82.04.4285 Deductions—Motor vehicle fuel taxes. In computing tax there may be deducted from the measure of tax so much of the sale price of motor vehicle fuel as constitutes the amount of tax imposed by the state or the United States government upon the sale thereof. [1980 c 37 § 6. Formerly RCW 82.04.430(5).]

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

82.04.4286 Deductions—Nontaxable business. In computing tax there may be deducted from the measure of tax amounts derived from business which the state is prohibited from taxing under the Constitution of this state or the Constitution or laws of the United States. [1980 c 37 § 7. Formerly RCW 82.04.430(6).]

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

82.04.4287 Deductions—Compensation for receiving, washing, etc., horticultural products for person exempt under RCW 82.04.330—Materials and supplies used. In computing tax there may be deducted from the measure of tax amounts derived by any person as compensation for the receiving, washing, sorting, and packing of fresh perishable horticultural products and the material and supplies used therein when performed for the person exempted in RCW 82.04.330, either as agent or as independent contractor. [1980 c 37 § 8. Formerly RCW 82.04.430(7).]

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

82.04.4288 Deductions—Compensation for services to patients and attendant sales of prescription drugs

by publicly operated hospitals. In computing tax there may be deducted from the measure of tax amounts derived as compensation for services rendered or to be rendered to patients or from sales of prescription drugs as defined in RCW 82.08.0281 furnished as an integral part of services rendered to patients by a hospital, as defined in chapter 70.41 RCW, devoted to the care of human beings with respect to the prevention or treatment of disease, sickness, or suffering, when such hospital is operated by the United States or any of its instrumentalities, or by the state, or any of its political subdivisions. [1980 c 37 § 9. Formerly RCW 82.04.430(8).]

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

82.04.4289 Deductions—Compensation for services to patients and attendant sales of prescription drugs by nonprofit hospitals, nonprofit kidney dialysis facilities, nursing homes and homes for unwed mothers operated by religious or charitable organizations. In computing tax there may be deducted from the measure of tax amounts derived as compensation for services rendered to patients or from sales of prescription drugs as defined in RCW 82.08.0281 furnished as an integral part of services rendered to patients by a hospital, as defined in chapter 70.41 RCW, which is operated as a nonprofit corporation, a kidney dialysis facility operated as a nonprofit corporation, whether or not operated in connection with a hospital, nursing homes and homes for unwed mothers operated as religious or charitable organizations, but only if no part of the net earnings received by such an institution inures directly or indirectly, to any person other than the institution entitled to deduction hereunder. In no event shall any such deduction be allowed, unless the hospital building is entitled to exemption from taxation under the property tax laws of this state. [1981 c 178 § 2; 1980 c 37 § 10. Formerly RCW 82.04.430(9).]

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

82.04.4291 Deductions—Compensation received by a political subdivision from another political subdivision for services taxable under RCW 82.04.290. In computing tax there may be deducted from the measure of tax amounts derived by a political subdivision of the state of Washington from another political subdivision of the state of Washington as compensation for services which are within the purview of RCW 82.04.290. [1980 c 37 § 11. Formerly RCW 82.04.430(10).]

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

82.04.4292 Deductions—Interest on investments or loans secured by mortgages or deeds of trust. In computing tax there may be deducted from the measure of tax by those engaged in banking, loan, security or other financial businesses, amounts derived from interest received on investments or loans primarily secured by first mortgages or trust deeds on nontransient residential properties. [1980 c 37 § 12. Formerly RCW 82.04.430(11).]

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

82.04.4293 Deductions—Interest on obligations of the state, its political subdivisions, and municipal corporations. In computing tax there may be deducted from the measure of tax by those engaged in banking, loan, security or other financial businesses, amounts derived from interest paid on all obligations of the state of Washington, its political subdivisions, and municipal corporations organized pursuant to the laws thereof. [1980 c 37 § 13. Formerly RCW 82.04.430(12).]

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

82.04.4294 Deductions—Interest on loans to farmers and ranchers, producers or harvesters of aquatic products, or their cooperatives. In computing tax there may be deducted from the measure of tax amounts derived as interest on loans to bona fide farmers and ranchers, producers or harvesters of aquatic products, or their cooperatives by a lending institution which is owned exclusively by its borrowers or members and which is engaged solely in the business of making loans and providing finance-related services to bona fide farmers and ranchers, producers or harvesters of aquatic products, their cooperatives, rural residents for housing, or persons engaged in furnishing farm-related or aquatic-related services to these individuals or entities. [1980 c 37 § 14. Formerly RCW 82.04.430(13).]

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

82.04.4295 Deductions—Manufacturing activities completed outside the United States. In computing tax there may be deducted from the measure of tax by persons subject to payment of the tax on manufacturers pursuant to RCW 82.04.240, the value of articles to the extent of manufacturing activities completed outside the United States, if:

- (1) Any additional processing of such articles in this state consists of minor final assembly only; and
 - (2) In the case of domestic manufacture of such articles, can be and normally is done at the place of initial manufacture; and
 - (3) The total cost of the minor final assembly does not exceed two percent of the value of the articles; and
 - (4) The articles are sold and shipped outside the state.
- [1980 c 37 § 15. Formerly RCW 82.04.430(14).]

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

82.04.4296 Deductions—Reimbursement for accommodation expenditures by funeral homes. In computing tax there may be deducted from the measure of tax that portion of amounts received by any funeral home ~~licensed to do business in this state which is received as~~ reimbursements for expenditures (for goods supplied or services rendered by a person not employed by or affiliated or associated with the funeral home) and advanced by such funeral home as an accommodation to the persons paying for a funeral, so long as such expenditures and advances are billed to the persons paying for the funeral at only the exact cost thereof and are separately

itemized in the billing statement delivered to such persons. [1980 c 37 § 16. Formerly RCW 82.04.430(15).]

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

82.04.4297 Deductions—Compensation from public entities for health or social welfare services. In computing tax there may be deducted from the measure of tax amounts received from the United States or any instrumentality thereof or from the state of Washington or any municipal corporation or political subdivision thereof as compensation for, or to support, health or social welfare services rendered by a health or social welfare organization or by a municipal corporation or political subdivision. [1980 c 37 § 17. Formerly RCW 82.04.430(16).]

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

"Health or social welfare organization" defined for RCW 82.04.4297—Conditions for exemption—"Health or social welfare services" defined: RCW 82.04.431.

82.04.4298 Deductions—Repair, maintenance, replacement, etc., of residential structures and commonly held property—Eligible organizations. (1) In computing tax there may be deducted from the measure of tax amounts used solely for repair, maintenance, replacement, management, or improvement of the residential structures and commonly held property, but excluding property where fees or charges are made for use by the public who are not guests accompanied by a member, which are derived by:

- (a) A cooperative housing association, corporation, or partnership from a person who resides in a structure owned by the cooperative housing association, corporation, or partnership;
- (b) An association of owners of property as defined in RCW 64.32.010, as now or hereafter amended, from a person who is an apartment owner as defined in RCW 64.32.010; or
- (c) An association of owners of residential property from a person who is a member of the association. "Association of owners of residential property" means any organization of all the owners of residential property in a defined area who all hold the same property in common within the area.

(2) For the purposes of this section "commonly held property" includes areas required for common access such as reception areas, halls, stairways, parking, etc., and may include recreation rooms, swimming pools and small parks or recreation areas; but is not intended to include more grounds than are normally required in a residential area, or to include such extensive areas as required for golf courses, campgrounds, hiking and riding areas, boating areas, etc.

(3) To qualify for the deductions under this section:

- (a) The salary or compensation paid to officers, managers, or employees must be only for actual services rendered and at levels comparable to the salary or compensation of like positions within the county wherein the property is located;

(b) Dues, fees, or assessments in excess of amounts needed for the purposes for which the deduction is allowed must be rebated to the members of the association;

(c) Assets of the association or organization must be distributable to all members and must not inure to the benefit of any single member or group of members. [1980 c 37 § 18. Formerly RCW 82.04.430(17).]

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

82.04.431 "Health or social welfare organization" defined for RCW 82.04.4297—Conditions for exemption—"Health or social welfare services" defined. (1) For the purposes of RCW 82.04.4297, the term "health or social welfare organization" means an organization, including any community action council, which renders health or social welfare services as defined in subsection (2) of this section, which is a not-for-profit corporation under chapter 24.03 RCW and which is managed by a governing board of not less than eight individuals none of whom is a paid employee of the organization or which is a corporation sole under chapter 24.12 RCW. Health or social welfare organization does not include a corporation providing professional services as authorized in RCW 24.03.038. In addition a corporation in order to be exempt under RCW 82.04.4297 shall satisfy the following conditions:

(a) No part of its income may be paid directly or indirectly to its members, stockholders, officers, directors, or trustees except in the form of services rendered by the corporation in accordance with its purposes and bylaws;

(b) Salary or compensation paid to its officers and executives must be only for actual services rendered, and at levels comparable to the salary or compensation of like positions within the public service of the state;

(c) Assets of the corporation must be irrevocably dedicated to the activities for which the exemption is granted and, on the liquidation, dissolution, or abandonment by the corporation, may not inure directly or indirectly to the benefit of any member or individual except a nonprofit organization, association, or corporation which also would be entitled to the exemption;

(d) The corporation must be duly licensed or certified where licensing or certification is required by law or regulation;

(e) The amounts received qualifying for exemption must be used for the activities for which the exemption is granted;

(f) Services must be available regardless of race, color, national origin, or ancestry; and

(g) The director of revenue shall have access to its books in order to determine whether the corporation is exempt from taxes within the intent of RCW 82.04.4297 and this section.

(2) The term "health or social welfare services" includes and is limited to:

(a) Mental health, drug, or alcoholism counseling or treatment;

(b) Family counseling;

(c) Health care services;

(d) Therapeutic, diagnostic, rehabilitative, or restorative services for the care of the sick, aged, or physically, developmentally, or emotionally-disabled individuals;

(e) Activities which are for the purpose of preventing or ameliorating juvenile delinquency or child abuse, including recreational activities for those purposes;

(f) Care of orphans or foster children;

(g) Day care of children;

(h) Employment development, training, and placement;

(i) Legal services to the indigent;

(j) Weatherization assistance or minor home repair for low-income homeowners or renters;

(k) Assistance to low-income homeowners and renters to offset the cost of home heating energy, through direct benefits to eligible households or to fuel vendors on behalf of eligible households; and

(l) Community services to low-income individuals, families, and groups, which are designed to have a measurable and potentially major impact on causes of poverty in communities of the state. [1985 c 431 § 3; 1983 1st ex.s. c 66 § 1; 1980 c 37 § 80; 1979 ex.s. c 196 § 6.]

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

Effective date—1979 ex.s. c 196: See note following RCW 82.04.240.

82.04.432 Deductions—Municipal sewer service fees or charges. In computing the tax imposed by this chapter, municipal sewerage utilities and other public corporations imposing and collecting fees or charges for sewer service may deduct from the measure of the tax, amounts paid to another municipal corporation or governmental agency for sewerage interception, treatment or disposal. [1967 ex.s. c 149 § 17.]

82.04.4322 Deductions—Artistic or cultural organization—Compensation from United States, state, etc., for artistic or cultural exhibitions, performances, or programs. In computing tax there may be deducted from the measure of tax amounts received from the United States or any instrumentality thereof or from the state of Washington or any municipal corporation or subdivision thereof as compensation for, or to support, artistic or cultural exhibitions, performances, or programs provided by an artistic or cultural organization for attendance or viewing by the general public. [1981 c 140 § 1.]

*Artistic or cultural organization" defined: RCW 82.04.4328.

82.04.4324 Deductions—Artistic or cultural organization—Deduction for tax under RCW 82.04.240—Value of articles for use in displaying art objects or presenting artistic or cultural exhibitions, performances, or programs. In computing tax there may be deducted from the measure of tax by persons subject to payment of the tax on manufacturing under RCW 82.04.240, the value of articles to the extent manufacturing activities are undertaken by an artistic or cultural organization solely for the purpose of manufacturing articles for use by the organization in displaying art objects

or presenting artistic or cultural exhibitions, performances, or programs for attendance or viewing by the general public. [1981 c 140 § 2.]

"Artistic or cultural organization" defined: RCW 82.04.4328.

82.04.4326 Deductions—Artistic or cultural organizations—Tuition charges for attending artistic or cultural education programs. In computing tax there may be deducted from the measure of tax amounts received by artistic or cultural organizations as tuition charges collected for the privilege of attending artistic or cultural education programs. [1981 c 140 § 3.]

"Artistic or cultural organization" defined: RCW 82.04.4328.

82.04.4327 Deductions—Artistic and cultural organizations—Income from business activities. In computing tax there may be deducted from the measure of tax those amounts received by artistic or cultural organizations which represent income derived from business activities conducted by the organization. [1985 c 471 § 6.]

Severability—Effective date—1985 c 471: See notes following RCW 82.04.260.

"Artistic or cultural organization" defined: RCW 82.04.4328.

82.04.4328 "Artistic or cultural organization" defined. (1) For the purposes of RCW 82.04.4322, 82.04.4324, 82.04.4326, 82.04.4327, 82.08.031, and 82.12.031, the term "artistic or cultural organization" means an organization which is organized and operated exclusively for the purpose of providing artistic or cultural exhibitions, presentations, or performances or cultural or art education programs, as defined in subsection (2) of this section, for viewing or attendance by the general public. The organization must be a not-for-profit corporation under chapter 24.03 RCW and managed by a governing board of not less than eight individuals none of whom is a paid employee of the organization or by a corporation sole under chapter 24.12 RCW. In addition, to qualify for deduction or exemption from taxation under RCW 82.04.4322, 82.04.4324, 82.04.4326, 82.04.4327, 82.08.031, and 82.12.031, the corporation shall satisfy the following conditions:

(a) No part of its income may be paid directly or indirectly to its members, stockholders, officers, directors, or trustees except in the form of services rendered by the corporation in accordance with its purposes and bylaws;

(b) Salary or compensation paid to its officers and executives must be only for actual services rendered, and at levels comparable to the salary or compensation of like positions within the state;

(c) Assets of the corporation must be irrevocably dedicated to the activities for which the exemption is granted and, on the liquidation, dissolution, or abandonment by the corporation, may not inure directly or indirectly to the benefit of any member or individual except a nonprofit organization, association, or corporation which also would be entitled to the exemption;

(d) The corporation must be duly licensed or certified when licensing or certification is required by law or regulation;

(e) The amounts received that qualify for exemption must be used for the activities for which the exemption is granted;

(f) Services must be available regardless of race, color, national origin, or ancestry; and

(g) The director of revenue shall have access to its books in order to determine whether the corporation is exempt from taxes.

(2) The term "artistic or cultural exhibitions, presentations, or performances or cultural or art education programs" includes and is limited to:

(a) An exhibition or presentation of works of art or objects of cultural or historical significance, such as those commonly displayed in art or history museums;

(b) A musical or dramatic performance or series of performances; or

(c) An educational seminar or program, or series of such programs, offered by the organization to the general public on an artistic, cultural, or historical subject. [1985 c 471 § 7; 1981 c 140 § 6.]

Severability—Effective date—1985 c 471: See notes following RCW 82.04.260.

82.04.433 Deductions—Sales of fuel for consumption outside United States' waters by vessels in foreign commerce—Construction. (1) In computing tax there may be deducted from the measure of tax amounts derived from sales of fuel for consumption outside the territorial waters of the United States, by vessels used primarily in foreign commerce.

(2) Nothing in this section shall be construed to imply that amounts which may be deducted under this section were taxable under Title 82 RCW prior to the enactment of this section. [1985 c 471 § 16.]

Severability—Effective date—1985 c 471: See notes following RCW 82.04.260.

82.04.435 Credits for certain manufacturers. In computing tax under this chapter there may be credited against the amount of the tax the following items:

As to persons engaging in activities defined in RCW 82.04.120 (the definition of the term "to manufacture"), an amount not to exceed the tax actually paid under chapter 82.08 RCW (Retail Sales Tax) or chapter 82.12 RCW (Use Tax) by such persons or their lessors or their contract vendors, on materials, labor and services in the construction of new buildings or the enlarging of existing buildings directly used in such activities. Where a building is used partly for manufacturing and partly for other purposes the applicable tax credit shall be determined by apportionment of the costs of construction under such rules as the department of revenue shall provide. For purposes of this section the term "buildings" shall mean and include only those structures used to house or shelter manufacturing activities, including the usual lighting, heating, ventilating and sanitary plumbing facilities. The term shall include plant offices and warehouses or other

CHAPTER 494

[Senate Bill 6096]

BUSINESS AND OCCUPATION TAX—BUNKER FUEL

AN ACT Relating to the taxation of the manufacturing and selling of fuel for consumption outside the waters of the United States by vessels in foreign commerce; amending RCW 82.04.433; creating new sections; and declaring an emergency.

Be it enacted by the Legislature of the State of Washington:

NEW SECTION. Sec. 1. (1) Through this act the legislature intends to address the taxation of persons manufacturing and/or selling bunker fuel. Bunker fuel is fuel intended for consumption outside the waters of the United States by vessels in foreign commerce. Although the state has historically collected tax from bunker fuel manufacturers, recently questions have arisen whether the manufacture of bunker fuel is subject to business and occupation tax under RCW 82.04.240. Pursuant to this act, the activity is taxable under RCW 82.04.240.

(2) The legislature finds that at the time the deduction allowed under RCW 82.04.433 was enacted in 1985, it was intended to apply only to the wholesaling or retailing of bunker fuel. In 1987 the legislature enacted the multiple activities tax credit in RCW 82.04.440. Enactment of the multiple activities tax credit resulted in changed tax liability for certain taxpayers. In particular, some taxpayers that engaged in activities that had been exempt under the prior multiple activities exemption became subject to tax on manufacturing activities upon enactment of the multiple activities tax credit in its place. The manufacturing of bunker fuel is one such activity.

Sec. 2. RCW 82.04.433 and 1985 c 471 s 16 are each amended to read as follows:

(1) In computing tax there may be deducted from the measure of tax imposed under RCW 82.04.250 and 82.04.270 amounts derived from sales of fuel for consumption outside the territorial waters of the United States, by vessels used primarily in foreign commerce.

(2) ~~(Nothing in this section shall be construed to imply that amounts which may be deducted under this section were taxable under Title 82 RCW prior to the enactment of this section.)~~ The deduction in subsection (1) of this section does not apply with respect to the tax imposed under RCW 82.04.240, whether the value of the fuel under that tax is measured by the gross proceeds derived from the sale thereof or otherwise under RCW 82.04.450.

NEW SECTION. Sec. 3. The department of revenue must take any actions that are necessary to ensure that its rules and other interpretive statements are consistent with this act.

NEW SECTION. Sec. 4. This act applies both prospectively and retroactively.

NEW SECTION. Sec. 5. If any provision of this 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.

NEW SECTION. Sec. 6. 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 takes effect immediately.

[2641]

Passed by the Senate April 26, 2009.
 Passed by the House April 26, 2009.
 Approved by the Governor May 14, 2009.
 Filed in Office of Secretary of State May 18, 2009.

CHAPTER 495

[Substitute Senate Bill 6171]

DEPARTMENT OF HEALTH PROGRAMS-- SAVINGS

AN ACT Relating to savings in programs under the supervision of the department of health; amending RCW 43.20.050, 43.20.240, 70.119A.020, 70.119A.050, 70.119A.060, 70.119A.130, 64.44.070, 70.54.220, 70.54.220, 70.104.030, 70.104.050, 70.56.020, 70.56.030, and 70.56.040; providing an effective date; providing an expiration date; and declaring an emergency.

Be it enacted by the Legislature of the State of Washington:

Sec. 1. RCW 43.20.050 and 2007 c 343 s 11 are each amended to read as follows:

(1) The state board of health shall provide a forum for the development of public health policy in Washington state. It is authorized to recommend to the secretary means for obtaining appropriate citizen and professional involvement in all public health policy formulation and other matters related to the powers and duties of the department. It is further empowered to hold hearings and explore ways to improve the health status of the citizenry.

(a) At least every five years, the state board shall convene regional forums to gather citizen input on public health issues.

(b) Every two years, in coordination with the development of the state biennial budget, the state board shall prepare the state public health report that outlines the health priorities of the ensuing biennium. The report shall:

(i) Consider the citizen input gathered at the forums;

(ii) Be developed with the assistance of local health departments;

(iii) Be based on the best available information collected and reviewed according to RCW 43.70.050 ~~((and recommendations from the council));~~

(iv) Be developed with the input of state health care agencies. At least the following directors of state agencies shall provide timely recommendations to the state board on suggested health priorities for the ensuing biennium: The secretary of social and health services, the health care authority administrator, the insurance commissioner, the superintendent of public instruction, the director of labor and industries, the director of ecology, and the director of agriculture;

(v) Be used by state health care agency administrators in preparing proposed agency budgets and executive request legislation;

(vi) Be submitted by the state board to the governor by January 1st of each even-numbered year for adoption by the governor. The governor, no later than March 1st of that year, shall approve, modify, or disapprove the state public health report.

(c) In fulfilling its responsibilities under this subsection, the state board may create ad hoc committees or other such committees of limited duration as necessary.

(2) In order to protect public health, the state board of health shall:

[2642]

FILED
COURT OF APPEALS
DIVISION II

10 MAR 17 PM 12:52

STATE OF WASHINGTON

NO. 39417-1-II

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


DEPUTY

TESORO REFINING & MARKETING
COMPANY,

Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,

Respondent.

CERTIFICATE OF
SERVICE
(CORRECTED)

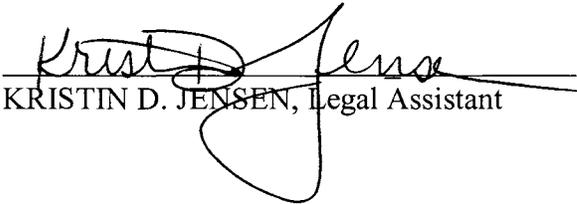
I certify that on March 16, 2010, I served a true and correct copy of the Department of Revenue's Brief of Respondent, Respondent Department of Revenue's Motion For Additional Extension Of Time To File Brief of Respondent, and this Certificate of Service, via U.S. Mail, postage prepaid, through Consolidated Mail Services, and electronically by email on the following:

George C. Mastrodonato
Dorsey & Whitney
701 Fifth Ave Suite 6100
Seattle, WA 98104
Mastrodonato.george@dorsey.com

Michael B. King
Carney Badley Spellman PS
701 Fifth Ave Suite 3600
Seattle, WA 98104
king@carneylaw.com

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 16th day of March, 2010, at Tumwater, WA.


KRISTIN D. JENSEN, Legal Assistant