NO. 100497-4

SUPREME COURT OF THE STATE OF WASHINGTON

LAKESIDE INDUSTRIES, INC.,

Petitioner,

v.

WASHINGTON STATE DEPARTMENT OF REVENUE,

Respondent.

ANSWER TO PETITION FOR REVIEW

ROBERT W. FERGUSON
Attorney General

Heidi A. Irvin
Senior Counsel
WSBA No. 17500
Andrew Krawczyk
Assistant Attorney General
WSBA No. 42982

P.O. Box 40123
Olympia, WA 98504-0123
OID No. 91027

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Rules

Regulations

Other Authorities

I. INTRODUCTION

Lakeside Industries attempts to circumvent the decades-old statutory scheme the Legislature enacted for taxpayers to challenge excise taxes in court. Taxpayers have many options for accessing the courts, but with the exception of constitutional challenges, they must first pay the challenged taxes. The Legislature enacted this condition precedent to ensure that taxpayer challenges would not interfere with the smooth operation of government functions. Each court to address Lakeside's challenge has applied this statutory scheme, and Lakeside's failure to satisfy this requirement raises no issue warranting this Court's review.

Lakeside cannot sidestep this prepayment requirement by challenging tax-reporting instructions for future tax years under the Administrative Procedure Act simply by claiming it is not currently seeking a refund. Accepting this argument would nullify the statutory scheme by exempting any challenge addressing future tax years. Lakeside's proposed interpretation

of the statutory prepayment requirement would create a massive loophole in the statutory scheme, undermining its purpose of avoiding disruption to governmental functions. The Court of Appeals correctly concluded that the exclusive review mechanisms of RCW Title 82 are not so easily thwarted.

Nothing in this Court's decision in *Washington Bankers Association* is inconsistent with the Court of Appeals decision below, which recognized an exception to the pre-payment rule for constitutional claims. Nor is the decision below in conflict with any existing appellate decisions. And the application of the statutory scheme raises no issue of substantial public importance warranting this Court's review. To the contrary, Lakeside has an easy path to challenge the reporting instructions: pay some amount of contested tax and sue for a tax refund. Its refusal to follow this well-established practice under well-established law does not warrant this Court's review. This Court should deny Lakeside's petition for review.

II. COUNTERSTATEMENT OF THE ISSUE

Three different statutes—RCW 82.03.180, RCW 82.32.150, and RCW 82.32.180—require taxpayers to pay the contested tax prior to obtaining judicial review. Do these statutes preclude a taxpayer from challenging the Department's administration of the tax code under the APA without first meeting the statutory prepayment requirements?

III. COUNTERSTATEMENT OF THE CASE

Lakeside is an asphalt manufacturer, retailer, and paving company whose business activities include paving; extracting rock; and manufacturing asphalt, crushed rock, and aggregates. AR 88. In addition to selling asphalt products to third parties, such as other paving contractors, Lakeside uses a substantial portion of the products it manufactures in performing public road construction projects. AR 58; AR 74-75.

The business and occupation tax on manufacturing activities is based on the value of products, and normally the value is determined by the gross proceeds from the sale of the

products. RCW 82.04.240, .450(1). However, where the product is manufactured and then commercially used by the manufacturer instead of being sold, an alternative basis is used to value the products, typically based on comparable sales.
RCW 82.04.450(2). The use tax also applies to such products, and the use tax statute sets the same standard for comparable sales. RCW 82.12.010(7)(b). Only in the absence of comparable sales may the taxpayer determine the value of the products using the cost basis. *Id.*; WAC 458-20-112.

Historically, Lakeside utilized a cost basis to calculate and report its use tax on the value of the self-manufactured asphalt used in public road projects. AR 97. Until 2018, the Department had not challenged Lakeside's practice of reporting its use tax on a cost basis. *Id.*

In June 2018, the Department initiated a partial audit of Lakeside to review its motor vehicle sales and to provide future reporting instructions for valuing manufactured products it uses in public road construction. AR 124. The audit resulted in no

adjustments to the motor vehicle sales for the audit period of January 2014 through March 2018. AR 122-24. The auditor issued a report that included future reporting instructions on how to value the asphalt products used in public road construction projects for purposes of calculating use tax under RCW 82.12.010(7)(b) and WAC 458-20-171. AR 124-26. The auditor expressly instructed Lakeside to use a comparable sales method in future reporting, rather than a cost basis method. AR 125.

In September 2018, Lakeside sought administrative review at the Department. AR 78. Lakeside petitioned for an adjudication and withdrawal of the future reporting instructions pursuant to WAC 458-20-100, the Department rule governing administrative appeals, and under the Administrative Procedure Act (APA), RCW 34.05.413. *Id.*

After a hearing on Lakeside's petition, the Department issued Determination No. 19-0219, which was "the decision of the Department of Revenue pursuant to WAC 458-20-100." AR 43. The Determination makes no reference to

RCW 34.05.413. AR 41-49. The Determination slightly modified the instructions, but kept the requirement that Lakeside value its asphalt products incorporated into its public construction projects using the comparable sales method. AR 48-49.

Lakeside requested the Department reconsider its decision pursuant to WAC 458-20-100. AR 16-23. The Department issued a revised determination, granting Lakeside's petition in part and revising the instructions. AR 62-63. Specifically, the Department changed the instructions' effective date from June 2018 to January 2020. The Department again instructed Lakeside to report the value of its manufactured asphalt and other products incorporated into its public road construction projects "using the comparable sales method pursuant to RCW 82.04.450 and WAC 458-20-112." AR 62. Having earlier rejected Lakeside's arguments that it had no comparable sales, AR 61, the Department instructed Lakeside that it could request use of the cost basis in the future if the facts changed:

> If, in the future, Taxpayer's business activities change and Taxpayer ceases to have comparable sales, Taxpayer may use the cost basis method. However, Taxpayer must first seek a Letter Ruling from the Department to confirm that Taxpayer no longer has comparable sales. Taxpayer must include one year of contract documents supporting contract quantities and prices of [hot mix asphalt] sold to third party customers, whether at retail or wholesale, as well as bid documents and invoices showing Taxpayer's own contract quantities of [hot mix asphalt] used in public road construction.

AR 62-63.

Lakeside filed an APA petition for judicial review in King County Superior Court, seeking review of the "future tax reporting instructions" in Determination No. 19-0219R. CP 6. Lakeside alleged the court had authority to review the reporting instructions in the Determination under RCW 34.05.570(3) and (4). CP 1, 6-8. Lakeside requested an order setting aside the Determination and the reporting instructions. CP 8.

The Department moved to dismiss Lakeside's APA petition for lack of subject matter jurisdiction, improper venue, and failure to state a claim upon which relief may be granted.

CP 185-96. The court granted the Department's motion for lack of subject matter jurisdiction and failure to state a claim. CP 199-201, VRP 23. In its oral ruling, the trial court agreed that Lakeside had failed to follow statutory requirements for seeking judicial review of tax matters, citing existing state and federal case law. VRP 23 (referring to *Booker Auction Co. v. Dep't of Revenue*, 158 Wn. App. 84, 89, 241 P.3d 439 (2010); *Bravern Residential, II, LLC v. Dep't of Revenue*, 183 Wn. App. 769, 774-75, 334 P.3d 1182 (2014); and *Nat'l Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, 515 U.S. 582, 591, 115 S. Ct. 2351, 132 L. Ed. 2d 509 (1995)).

Lakeside appealed. While the Court of Appeals reversed the superior court's dismissal for lack of subject matter jurisdiction (CR 12(b)(1)), it affirmed the dismissal for failure to state a claim under CR 12(b)(6). The Court held that Lakeside's action failed to comply with the procedures for judicial review in RCW Title 82. *Lakeside Indus., Inc. v. Dep't of Revenue*, 19 Wn.

App. 2d 225, 233-36, 495 P.3d 257 (2021). The Court of Appeals denied Lakeside's motion for reconsideration.

Lakeside timely petitioned this Court for review.

IV. REASONS THE COURT SHOULD DENY REVIEW

The Court of Appeals decision correctly applies the governing statutes in RCW Title 82 addressing judicial review in excise tax cases, giving effect to both the letter and spirit of those statutes. It also follows and applies existing appellate cases addressing these same statutes, all honoring the Legislature's intent.

Lakeside's argument that it can avoid exclusive mechanisms for review in excise tax cases elevates form over substance. Lakeside does not seek a refund only because it chose not to apply the challenged instructions to its future tax periods and then seek a refund. The Court of Appeals properly held that Lakeside must first pay the taxes at issue under the challenged instructions and only then can it seek judicial review of the instructions. The Court of Appeals also properly rejected

Lakeside's effort to use the APA to undermine the purpose and effect of RCW Title 82 to significantly expand judicial involvement in the administration of state excise taxes. Its decision is sound and requires no further review.

A. The Legislature Provided Pathways for Taxpayers to Obtain Judicial Review

In excise tax cases, taxpayers must follow a statutory scheme carefully crafted by the Legislature offering several defined pathways for obtaining judicial review at a superior court. Lakeside argues it can simply skip these requirements and obtain review of the issues in this case under the APA. Understanding the statutory scheme the Legislature provided for excise tax challenges is key to understanding why the lower courts correctly dismissed Lakeside's case.

In the tax arena, as with other areas of law, the Legislature determines the procedures and prerequisites for commencing a suit. Article II, section 26 of the Washington Constitution provides: "The legislature shall direct by law, in what manner, and in what courts, suits may be brought against

the state." Washington's courts have long held that the right to sue the state or a state agency must be derived from statute, and the Legislature may establish preconditions for exercising that right. *Nelson v. Dunkin*, 69 Wn.2d 726, 729, 419 P.2d 984 (1966); *McDevitt v. Harborview Med. Ctr.*, 179 Wn.2d 59, 64-68, 316 P.3d 469 (2013).

For excise tax challenges, the Legislature has chosen, by statute, to allow taxpayers a right to pursue a challenge against the state and obtain judicial review in one of the ways described below. For excise tax actions, the right must be "exercised in the manner provided by the statute." *Guy F. Atkinson Co. v. State*, 66 Wn.2d 570, 575, 403 P.2d 880 (1965).

To summarize the options, taxpayers who first seek a refund from the Department may obtain informal review of a refund denial within the Department, and if unsuccessful, may appeal to the Board of Tax Appeals for further review. RCW 82.03.130(1); RCW 82.03.190; *see also* RCW 82.32.170 (departmental review of denial of refund request). Board

appeals can be formal or informal. Formal appeals are conducted as adjudicative proceedings under the APA. RCW 82.03.160. Judicial review of the Board's formal appeal decisions are governed by the APA, RCW 34.05.510-.598, whereas judicial review of its informal appeal decisions is *de novo* and not governed by the APA. RCW 82.32.180.

A taxpayer choosing not to appeal to the Board either formally or informally may obtain judicial review of contested tax either by filing a tax refund in superior court as soon as it has paid the tax, or by first asking the Department for a refund and then filing a tax refund action in superior court if the Department denies that request. RCW 82.32.180.

Both RCW 82.32.180 and the Board's statute, RCW 82.03.180, require payment of the challenged tax before any court action may be maintained. RCW 82.03.180 ("no review . . . may be obtained by a taxpayer unless . . . the taxpayer shall have first paid in full the contested tax"); RCW 82.32.180 (taxpayers may seek refunds "having paid any

tax as required," and "no court action or proceeding of any kind shall be maintained by the taxpayer to recover any tax paid . . . except as herein provided"). Both statutes are consistent with RCW 82.32.150, which bars injunctions against taxes except on constitutional grounds, and further provides: "All taxes, penalties, and interest shall be paid in full before any action may be instituted in any court to contest all or any part of such taxes, penalties, or interest."

As these statutes illustrate, the Legislature provides taxpayers multiple, exclusive avenues to obtain judicial review of challenged excise taxes:

> (a) File a de novo refund action in Thurston County Superior Court within the statutory nonclaim period (RCW 82.32.180);
>
> (b) File a de novo refund action in Thurston County Superior Court within 30 days of the Department denying a request for refund (RCW 82.32.180);
>
> (c) Obtain a determination in administrative review at the Department, appeal that determination to the Board in an *informal* appeal, then seek de novo judicial review of the Board's decision in a refund action under RCW 82.32.180 (RCW 82.03.180);

(d) Obtain a determination in administrative review at the Department, appeal that determination to the Board in a *formal* appeal, then obtain judicial review of the Board's decision as an APA appeal from an adjudicative order (RCW 82.03.180); or

(e) Seek an injunction or restraining order if challenging the constitutionality of a tax assessment (RCW 82.32.150).

Of these options, only the last is available without prepayment of a contested tax, and because Lakeside alleges no constitutional objections to the Department's written instructions, it does not apply.

Rather than attempt to apply the Department's instructions, pay the tax as calculated according to those instructions, and then seek judicial review through the options laid out above, Lakeside immediately filed suit under the APA, challenging the written instructions regarding its future tax reporting. The Court of Appeals correctly affirmed dismissal of Lakeside's case.

B. The Court of Appeals Recognized that Lakeside Could Have and Should Have Complied with Procedures in RCW Title 82 to Access the Court

Lakeside's central legal premise is that the tax statutes are silent regarding judicial review of reporting instructions. Petition at 3, 22. As a result, it claims, the APA provides the only means for obtaining judicial relief of such instructions. Petition at 2, 13, 26-27. But as the Court of Appeals recognized, the Legislature could not have been clearer in its intent to limit access to the court to taxpayers only after payment of the tax and prohibiting the type of piecemeal, hypothetical challenges to instructions governing future tax years as Lakeside seeks here.

This case provides an excellent illustration of why the Legislature's precondition to judicial review is based on sound policy. Because the challenged instructions apply to calculating and reporting Lakeside's taxes *in the future*, until the business activities occur and the actual facts are known, nobody can know for certain what taxes are owing from those activities, or

whether "comparable" sales exist or not. The Legislature wisely decided against tying up the courts in hypothetical disputes over taxes before they are actually paid or the liability can be determined. Such a scenario would also be detrimental to government operations.[1] The Court of Appeals correctly gave effect to this statutory scheme. *See Ass'n of Wash. Spirits & Wine Distribs. v. Wash. State Liquor Control Bd.*, 182 Wn.2d

[1] State and federal law both recognize the public's interest in not disrupting collection of taxes by allowing anticipatory or pre-deprivation relief. *See, e.g.*, *Tyler Pipe Indus., Inc. v. Dep't of Revenue*, 96 Wn.2d 785, 796-97, 638 P.2d 1213 (1982) (court disfavors injunctions, and unless special circumstances are shown, the appellant has an adequate remedy at law with post-deprivation refund suit); *Nat'l Private Truck Council*, 515 U.S. at 591 (declaratory relief in state tax cases might throw tax administration into disarray, and taxpayers might escape the ordinary procedural requirements imposed by state law); *Cal. Dep't of Tax & Fee Admin. v. Superior Court*, 48 Cal. App. 5th 922, 930-31, 262 Cal. Rptr. 3d 397 (2020) (the "'pay first, litigate later' rule . . . has been a bedrock principle of tax law for over a century"); *see also Booker Auction*, 158 Wn. App. at 89 ("Our legislature's requirement that taxes be paid, and then contested, harmonizes with" the "public's interest in not disrupting tax streams into the state treasury.")

342, 350, 340 P.3d 849 (2015) (when discerning legislative intent, courts consider "the statutory scheme as a whole").

As for Lakeside's insistence that this case is not a tax dispute because Lakeside does not yet seek a refund, the Court of Appeals correctly saw through such formalism: "Payment of the use tax is imminent. And the objective of Lakeside's lawsuit is to challenge the amount of taxes it owes. Lakeside's petition is a challenge to tax liability that must be brought under Title 82 RCW." 19 Wn. App. 2d at 235.

Far from having no access to judicial review, Lakeside can obtain relief from the courts just like any other taxpayer. It could, for example, follow the instructions and calculate its use tax using the sale prices for asphalt products it sells to third parties (regardless of whether it considers those sales to be "comparable"), then pay the tax for one or more months. *See* RCW 82.32.045(1) (tax payments due monthly). It could then seek a refund under RCW 82.32.180 from the Thurston County Superior Court or pursue one of the other options summarized

above. If the evidence demonstrated that the value of the products was less than the value Lakeside used for tax reporting purposes, Lakeside would be entitled to a refund, with interest. And unlike this case involving mere reporting instructions, the parties could present the court with a full record of Lakeside's business activities for a particular period. This would include facts necessary to determine whether it made any comparable sales to third parties, and if not, what costs should be included in calculating the value of the asphalt products.

In sum, Lakeside could have complied with the requirements of RCW Title 82. It just chose not to.

C. APA Judicial Review Procedures Do Not Supplant the Title 82 Procedures, Which Allow De Novo Review

The Court of Appeals also correctly rejected Lakeside's attempt to sidestep the procedures for obtaining judicial review in RCW Title 82 by means of the APA. The APA was never intended to govern judicial review when another provision of law expressly authorizes judicial review of agency action. RCW 34.05.510(3). As the Court of Appeals recognized, "the

legislature expressly authorized two separate paths for de novo review of tax challenges in Title 82 RCW." 19 Wn. App. 2d at 233 (citing RCW 82.32.180 and RCW 82.03.180). Specifically, for taxpayers who pursue refund suits either with or without having been denied a refund by the Department, the Legislature expressly authorized de novo review in RCW 82.32.180: "The trial in the superior court on appeal shall be de novo." Likewise, for taxpayers who instead obtain a determination from the Department, then appeal to the Board of Tax Appeals in an informal appeal, judicial review of the Board decision "shall be de novo in accordance with the provisions of RCW 82.32.180." RCW 82.03.180.[2]

Interpreting the APA as being unavailable for excise tax contests also harmonizes with the provision that "*no court action*

[2] The Washington Administrative Law Task Force comments on the wholesale revision of the APA expressly mention this Board statute as an example of the type of situation addressed in RCW 34.05.510(3). 1 Senate Journal, 50th Leg., Reg. Sess. at 627 (Wash. 1987) (65 Comment).

or proceeding of any kind *shall be maintained by the taxpayer to recover any tax paid*, or any part thereof " except as provided in RCW 82.32.180 (emphasis added). *See also* RCW 82.32.150 ("[a]ll taxes, penalties, and interest shall be paid in full before any action may be instituted in any court to contest all or any part of such taxes, penalties, or interest.") Numerous cases hold that, in the absence of a constitutional challenge, the procedures in RCW Title 82 must be followed for obtaining judicial review of excise tax liabilities. *See Lacey Nursing Ctr., Inc. v. Dep't of Revenue*, 128 Wn.2d 40, 50, 905 P.2d 338 (1995) (nursing homes could not bring tax refund action as a class action because they could not establish each class member met the requirements of RCW 82.32.180); *Am. Steel & Wire Co. of N. J. v. State*, 49 Wn.2d 419, 424-25, 302 P.2d 207 (1956) (foreign corporation did not request refund in manner required by RCW 82.32.180).

Moreover, these statutes constitute the Legislature's specific pronouncements regarding tax disputes in superior court. Where a general statute addresses the same matter as a

specific statute, and the two cannot be harmonized, the "general statutory provision must yield" to the more specific provision. *Aventis Pharm., Inc. v. Dep't of Revenue*, 5 Wn. App. 2d 637, 656, 428 P.3d 389 (2018) (quoting *Ass'n of Wash. Spirits & Wine Distribs.*, 182 Wn.2d at 356). Thus, the Court of Appeals was correct to rule that the APA's general judicial review procedures should not overcome the specific statutory requirements in RCW 82.03.180, RCW 82.32.150, and RCW 82.32.180 that govern excise tax matters. *Lakeside Indus.*, 19 Wn. App. 2d at 233-34.

D. The Court of Appeals Analysis is Consistent with this Court's Analysis in *Washington Bankers Association*

Lakeside also incorrectly argues that the Court of Appeals decision conflicts with this Court's recent decision in *Washington Bankers Association v. State of Washington*, 198 Wn.2d 418, 495 P.3d 808 (2021). It does not.

Washington Bankers concerned a challenge under the Uniform Declaratory Judgment Act (UDJA) to the constitutionality of a 2019 business and occupation tax increase

on financial institutions reporting annual net income of at least $1 billion, applied to their activities in Washington. *See* RCW 82.04.29004. The Court concluded that the Association had standing under the UDJA to bring the action and was not limited to bringing an action under RCW 82.32.180. *Wash. Bankers*, 198 Wn.2d at 455-57. The Court held that "RCW 82.32.180 is silent as to the procedure for parties such as the financial institutions here who have paid a tax, seek no refund, and instead challenge the tax's constitutionality." *Id.* at 456. Critical to its analysis, however, was the constitutional nature of the Association's claims. The Court emphasized its own prior case law holding that "the legislature did not limit the court's equitable powers in *constitutional cases* even when 'the legal remedy may . . . be adequate.'" *Id.* (emphasis added).

Significantly, the Court in *Washington Bankers* made no attempt to overrule existing case law on the subject of how tax cases may be brought before courts in Washington where, as here, constitutional claims are not raised. And reading

Washington Bankers as permitting taxpayers to circumvent the requirements of RCW 82.32.150 and .180 anytime a taxpayer challenges instructions governing future tax years—which by definition do not seek a refund—would undermine the entire purpose and effect of the Legislature's circumscribed scope of relief. *Washington Bankers* does not stand for such a broad rule.

Lakeside is not contesting the Department's written instructions on any constitutional grounds, and it seeks relief for its claim that the instructions are wrong under the APA, not injunctive relief or a declaratory judgment under the UDJA. Significantly, *Washington Bankers* is consistent with the procedures in RCW Title 82, as RCW 82.32.150 expressly contemplates an injunction or other restraint against a tax "upon the ground that the assessment thereof was in violation of the Constitution of the United States or that of the state." In other words, the result in *Washington Bankers* is consistent with the strong public interest in the collection of taxes and disfavoring the issuance of injunctions against taxes, which are the very

policies the procedures in RCW Title 82 support. *See Tyler Pipe Indus., Inc. v. Dep't of Revenue*, 96 Wn.2d 785, 796-96, 638 P.2d 1213 (1982).

Here, in contrast, Lakeside has been instructed on how it should value its asphalt products for purposes of calculating its taxes. Without even attempting to comply with those instructions or to bring an action as provided in RCW Title 82, Lakeside raced to the court seeking relief under the APA, ignoring the prepayment requirement to obtain judicial review of tax disputes. Lakeside's actions violate the text and the Legislature's plainly expressed intent in RCW 82.03.180, RCW 82.32.150, and RCW 82.32.180.

In sum, the lesson from *Washington Bankers* is not that taxpayers are now free to file whatever tax-related claim they want, whenever they want, under whatever statute they want. Rather, under *Washington Bankers*, a taxpayer with a legitimate constitutional challenge may seek declaratory relief under the

UDJA. The Court of Appeals decision is consistent with *Washington Bankers* and does not warrant this Court's review.

E. The Court of Appeals Decision is Consistent with Relevant Appellate Court Decisions

The Court of Appeals decision is consistent with other relevant appellate court decisions as well. As the Court of Appeals discussed, its ruling that Lakeside's challenge must be brought under RCW Title 82 comports with Division Three's conclusion in *Booker Auction Company v. Department of Revenue*, 158 Wn. App. 84, 89, 241 P.3d 439 (2010).[3] As in this case, *Booker Auction* involved a taxpayer challenge to Department-issued future reporting instructions. *Id.* at 87. In both cases, the courts recognized that applying the APA as the

[3] While agreeing with *Booker Auction* that the taxpayer had failed to state a claim upon which relief can be granted under CR 12(b)(6), the Court of Appeals in this case did not agree with *Booker Auction*'s holding that the court lacked subject matter jurisdiction. The Court explained that subsequent case law has narrowed the types of errors implicating a court's subject matter jurisdiction. *Lakeside Indus.*, 19 Wn. App. 2d at 233 n.3 (citing *In re Marriage of Buecking*, 179 Wn.2d 438, 448, 316 P.3d 999 (2013)).

taxpayers requested would directly conflict with RCW 82.32.150. *Lakeside Indus.*, 19 Wn. App. 2d at 236; *Booker Auction*, 158 Wn. App. at 89-90; *see also Bravern Residential, II*, 183 Wn. App. at 774-75 (noting taxpayer paid the tax then filed a refund action because there is no mechanism for direct judicial review of the Department's denial of a ruling request).

Lakeside, however, argues this Court should accept review because the Court of Appeals decision conflicts with two other appellate decisions. Petition at 23-26 (citing *AOL, LLC v. Dep't of Revenue*, 149 Wn. App. 533, 205 P.3d 159 (2009); *Wells Fargo Bank, N.A. v. Dep't of Revenue*, 166 Wn. App. 342, 353, 271 P.3d 268 (2012)). It does not.

AOL rejected taxpayer arguments to bypass the requirements of RCW 82.32.150 and .180. *See AOL*, 149 Wn. App. at 544-45. In that case, decided by Division Two, the taxpayer attempted to bring a refund action of a single month, where that month was just *part* of an assessment for a four-year

period. *Id.* at 545. Reviewing all of AOL's arguments and the statutory scheme, the court held that RCW 82.32.150 barred AOL's action because it required the taxpayer to pay "[a]ll taxes, penalties, and interest . . . *in full* before [instituting an action] in any court to contest all or any part of such taxes, penalties, or interest." (Emphasis added).[4] 149 Wn. App. at 544-45. As the court concluded, "AOL has satisfied neither the letter nor the spirit of RCW 82.32.150." *Id.* at 555.

Lakeside's position that it may seek judicial review of reporting instructions under the APA for future tax years in which taxes have not yet been assessed can be rejected for the same reason as provided in *AOL*—it would allow a taxpayer to "inexpensively circumvent" and thereby "effectively nullify[]" the statutory payment requirements. 149 Wn. App. at 554.

---

[4] Where a taxpayer has been audited and assessed, *AOL* confirms that "all taxes" covers all taxes for the period addressed in the assessment. For a taxpayer like Lakeside that has not been assessed additional taxes, "all taxes" would just mean the taxes for the periods (one month or more) for which a refund is being sought.

Like's AOL's position, it conflicts with both the letter and spirit of the provisions in RCW Title 82.

The Court of Appeals decision is also consistent with *Wells Fargo*. *Wells Fargo* involved a settlement dispute, not a tax dispute. *Wells Fargo Bank, N.A.*, 166 Wn. App. at 352. Compliance with the statutory requirements for contesting taxes was not an issue there because Wells Fargo had already paid the disputed taxes before it sought a refund and later settled the matter with the Department. *Id.* at 346. Its compliance with RCW 82.32.150 or RCW 82.32.180 was not at issue.

Because the Court of Appeals decision is consistent with other published decisions of the Court of Appeals, including *AOL* or *Wells Fargo*, RAP 13.4(b)(2) does not provide a basis for this Court's further review.

F. Lakeside's Petition Does Not Involve An Issue of Substantial Public Interest that Should Be Determined by this Court

Like any taxpayer, Lakeside could follow the written instructions, pay the tax accordingly, and seek relief using

remedies in RCW Title 82. Nothing about that longstanding statutory requirement raises an issue of substantial public importance warranting this Court's review.

In its desire to overturn the Department's instructions, Lakeside never addresses the Legislature's reason for preconditioning judicial review in excise tax cases to where the disputed tax has first been paid. The reason, as discussed earlier, is to keep the state government functioning with reasonably predictable revenue streams while tax disputes are being resolved. Lakeside's proposed interpretation of RCW Title 82 and the APA, which would open the floodgates for taxpayers to challenge any aspect of the Department's tax code administration, including mere reporting instructions, directly conflicts with these established policies and would disrupt the state's collection and administration of taxes.

Lakeside's position would create a rush to the courthouse to challenge Department guidance governing future years, requiring courts to resolve disputes about a taxpayer's future

tax liability without a complete record of the taxpayer's business activities for that future period. These would essentially amount to advisory opinions on a taxpayer's tax liability. Courts, however, should not and "do not give advisory opinions." *Commonwealth Ins. Co. of Am. v. Grays Harbor Cnty.*, 120 Wn. App. 232, 245, 84 P.3d 304 (2004).

By giving effect to the statutory scheme in RCW Title 82, the Court of Appeals here not only followed the law, but it promoted the public interest by avoiding the tax administration and judicial review problems that Lakeside's approach would create. No further review is warranted for public interest purposes.

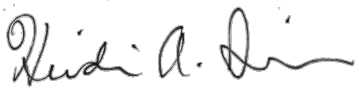
V. CONCLUSION

The Court of Appeals decision in this case is sound and rests on long-established statutes and interpretive case law. Lakeside's desire to avoid a tax reporting instruction it finds disagreeable notwithstanding, it establishes no need for this Court to weigh in with yet further review.

This document contains 4,747 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 20th day of January, 2022.

ROBERT W. FERGUSON
Attorney General



Heidi A. Irvin, WSBA No. 17500
Senior Counsel
Andrew Krawczyk, WSBA No. 42982
Assistant Attorney General
OID No. 91027

PROOF OF SERVICE

I certify that I served a copy of this document, through my legal assistant, via electronic service, per agreement, on the following:

Brett Durbin
Callie Castillo
Lane Powell
PO Box 91302
Seattle, WA 98111-9402
DurbinB@lanepowell.com
CastilloC@lanepowell.com
BrownP@lanepowell.com
LaneP@lanepowell.com

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

DATED this 20th day of January, 2022, at Olympia, WA.

s/ Heidi A. Irvin
HEIDI A. IRVIN, Senior Counsel

ATTORNEY GENERAL'S OFFICE - REVENUE & FINANCE DIVISION

January 20, 2022 - 3:28 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	100,497-4
Appellate Court Case Title:	Lakeside Industries, Inc. v. WA State Department of Revenue

The following documents have been uploaded:

- 1004974_Answer_Reply_20220120152645SC310180_0167.pdf
  This File Contains:
  Answer/Reply - Answer to Petition for Review
  The Original File Name was AnsPetRev.pdf

A copy of the uploaded files will be sent to:

- Andrew.Krawczyk@atg.wa.gov
- brownp@lanepowell.com
- castilloc@lanepowell.com
- craiga@lanepowell.com
- durbinb@lanepowell.com
- lanep@lanepowell.com

Comments:

Sender Name: Kelsi Zweifel - Email: kelsi.zweifel@atg.wa.gov
Filing on Behalf of: Heidi A. Irvin - Email: heidi.irvin@atg.wa.gov (Alternate Email: revolyef@atg.wa.gov)

Address:
PO Box 40123
Olympia, WA, 98504-0123
Phone: (360) 753-5515

Note: The Filing Id is 20220120152645SC310180