Supreme Court No. 101794-4

Court of Appeal No. 83065-1-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

PETROGAS PACIFIC LLC and PETROGAS WEST LLC,

Appellants/Petitioners,

v.

REBECCA XCZAR, Whatcom County Assessor,

Respondent.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONERS

Petrogas Pacific LLC and Petrogas West LLC ("Petrogas" or "taxpayers") are affiliated companies that own a wharf and an onshore liquefied petroleum gas ("LPG") terminal in Whatcom County. The taxpayers seek review of a Court of Appeals decision affirming a property tax decision by the State Board of Tax Appeals ("Board") under the Administrative Procedure Act (RCW Chapter 34.05).

II. COURT OF APPEALS DECISION

The taxpayers seek review of the published decision *Petrogas Pacific LLC v. Xczar*, No. 83065-1-I, ___ Wn. App. 2d ___, 520 P.3d 1077 (Nov. 28, 2022). Appendix A contains a copy of the decision and the Court's February 8, 2023 order denying reconsideration.

III. ISSUES PRESENTED FOR REVIEW

The case involves issues warranting review under RAP 13.4(b)(1) and (4):

1. The Court of Appeals affirmed the Board's conclusion of law rejecting the taxpayers' appraisal method, the cost approach to value, because it is limited to tangible property and thereby excludes intangible property from taxation. Both this Court and the legislature have favored the cost approach for valuing complex industrial property like that involved here. Should the Court grant review to resolve this conflict and guide statewide property tax assessment practices for the future?
2. The Court of Appeals affirmed the Board's conclusion that the taxpayers' assessments must, as a matter of law, include "taxable intangible values." Since 1908, this Court has recognized and upheld the legislature's decision to exclude all intangibles from property taxation. Should the Court grant review to re-

solve this conflict and answer Justice Stephens' recent questions[1] about the statute prohibiting ad valorem taxation of intangible property?

3. The Court of Appeals affirmed the extension of "taxable intangible values" to the taxpayers' interests in state-owned land on which the wharf is built. In 1977, this Court upheld the legislature's decision to tax such interests by the leasehold excise tax (RCW Chapter 82.29A) in lieu of the property tax. Should the Court grant review to resolve this conflict and restore the longstanding policy of taxing private interests in public land only once?

4. The Court of Appeals decision will require all 39

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[1] Wash. Supreme Court oral argument, *Quinn v. State*, No. 100769-8 (Jan. 26, 2023), at 24 min., 18 sec.–25 min., 17 sec.; 55 min., 21 sec.–56 min., 25 sec., audio recording by TVW, Wash. State's Public Affairs Network, https://tvw.org/video/washington-state-supreme-court-2023011412/?eventID=2023011412 (Appendix G at 5, 7–8).

county assessors to identify and quantify "taxable intangible values," including the value-enhancing effect of private interests in public land, and to do so without the benefit of the cost approach to value. Should the Court grant review to provide an authoritative determination on this issue of substantial public interest?

Because the decision conflicts with Supreme Court precedents and involves issues of great public interest, review is warranted.

IV. STATEMENT OF THE CASE

This case involves the property tax values of two parcels: the wharf improvements and the terminal improvements. The wharf is on leased public land. As such, the wharf owner pays leasehold excise tax in lieu of property tax. CP 1774, 1797. Only the privately owned improvements are subject to property tax. The terminal's land is

taxed to a separate parcel not at issue here.

A. Petrogas purchased the terminal business in 2014 but did not receive all the business assets promised in the transaction.

In 2014, Petrogas agreed to pay $242 million to Chevron USA Inc. ("Chevron") for the terminal business. CP 2826. Closing adjustments brought the total price to approximately $247 million. As required for financial accounting purposes, the price paid for the business was allocated among the total assets of the acquired business. *Id.* PricewaterhouseCoopers ("PwC"), as independent auditor, allocated the price among the assets it identified as part of the acquisition:

- Land (separate tax parcel, not appealed)
- Terminal/tanks (tax parcel under appeal)
- Tangible personal property (separate tax account, not appealed)
- Throughput service contract (no tax parcel)
- Wharfage agreement & aquatic land lease license (no tax parcels)

PwC based the allocations to land and the terminal improvements ("terminal/tanks") on appraisals. CP 1593–97, 4262. PwC allocated the remainder of the purchase price to assignable contracts: (1) a contract for throughput services to a third party and (2) a wharfage agreement with Alcoa Intalco Works ("Alcoa"), owner of a nearby aluminum smelter and its wharf. CP 2827, 4668–70. Though promised as part of the transaction, the two contracts did not materialize as Chevron could not obtain the necessary consents for assigning them. CP 2827–28.

B. To resolve the impasse, Petrogas purchased the wharf in 2016 for what the Court correctly termed "an overpayment."

Facing delay in its business expectations due to threatened litigation between Chevron and Alcoa over the wharfage consent (by the contract terms consent

could not be unreasonably withheld), Petrogas negotiated with Alcoa to resolve its wharf access. CP 2827–29. Ultimately, in September 2016, Petrogas agreed to buy the wharf assets for "far more than they were worth"—$122 million—due to Alcoa's "extraordinary commercial leverage." CP 1329–31, 1335. The Court of Appeals correctly stated that Petrogas overpaid for the wharf assets."[2]

For financial reporting purposes, PwC identified the following assets in the Petrogas–Alcoa transaction:

- Wharf improvements (tax parcel under appeal)
- Tangible personal property (separate tax account, not appealed)
- Aquatic land lease (no tax parcel)
- Intangible/goodwill (no tax parcel)

CP 2548. PwC accepted an appraised value for the wharf of less than 10 percent of the total paid to Alcoa. CP

[2] *Petrogas Pac.*, 520 P.3d at 1079.

2547–48. After allocating to the wharf improvements and the small amount of tangible personal property, PwC allocated the remaining amount paid to the lease of state-owned land and goodwill. CP 2548. The real estate excise tax affidavit associated with the deed for the wharf improvements reported the wharf's appraised value of $10,205,208 for the taxable amount, with the rest of the $122-million payment not subject to real estate excise tax. CP 342. The Department of Revenue audited the transaction and agreed. CP 341, 2548.

C. Then began the property tax appeals at issue here.

Later in 2016, the Assessor drastically raised the values on both real property tax parcels involved in this case:

Assessment Year	*Wharf Assessed Value*	*Terminal Assessed Value*
2015	$8,462,024	$17,508,394
2016	**$182,725,099**	$90,108,394
2017	**$98,244,952**	**$190,710,788**
2018	**$100,251,680**	**$194,606,203**

CP 534, 569, 1418, 1424, 2485. The taxpayers appealed. The bolded values above were subject to a consolidated hearing before the Board. CP 2485.

The taxpayers presented an independent appraisal report (CP 4236–4351) analyzing the business transactions summarized above and concluding that the PwC–allocated value for the terminal improvements was consistent with the independent appraisal. CP 4261–63. The independent appraisal concluded a value for the wharf improvements that was somewhat higher than the amount allocated in the 2016 transaction. CP 4242, 4263. The independent appraisers agreed with PwC in characterizing as intangibles (1) the throughput con-

tract, wharfage agreement, and aquatic land lease license in the 2014 transaction and (2) the aquatic land lease and goodwill in the 2016 transaction. CP 2316–18.

Based on the "premise that a prospective buyer would not pay any more for a property than what it would cost to construct or acquire a similar property with equal utility, less deductions for all forms of depreciation," the taxpayers' appraisal report developed a full cost approach to value. CP 4265. One of the first steps was to determine the replacement cost new, i.e., what equal improvements would cost brand new. *Id.* The wharf improvements' replacement cost **new** was approximately $40 million—well below the appealed values. CP 4324, 4328, 4332. The terminal improvements' replacement cost **new** was less than $210 million—similar to the appealed values. CP 4279, 4283.

Then, from the replacement cost new, the taxpayers' appraisers deducted physical depreciation (approximately 30 percent, supported by detailed analysis) to conclude the market value for the used improvements; no deductions were made for any form of obsolescence. CP 4278–79, 4282, 4292, 4296, 4300. This represented the maximum value based on the wharf and terminal operating together to export LPG products. CP 4260.

The taxpayers' appraisers considered other valuation methodologies (based on sales or income), but the uniqueness of this property at the time made other methodologies impossible. *See, e.g.*, CP 4269–72.

The parties agree the property is of a complex nature.[3] As of the valuation dates at issue (January 1,

[3] *Petrogas Pac.*, 520 P.3d at 1084.

2016–2018), this was the only LPG export facility on the West Coast of North America.[4]

The Board's Conclusions of Law 21–26 are at issue here. Conclusion 21 concluded the 2014 and 2016 transaction prices, including "taxable intangible values" (and excluding only the land and tangible personal property taxed separately) best reflected the market value of the terminal and wharf improvements (CP 2575):

> 21. The Board finds that the purchase price allocations prepared by PricewaterhouseCoopers in compliance with U.S. GAAP are the most persuasive evidence of value when the taxable intangible values are included.
>
> a. For the Terminal, the values of the Terminal/tanks, BP Energy Throughput Contract, and Wharfage Agreement and Aquatic Lands Lease total $232,480,541, in excess of the assessed values for either year.
>
> b. For the Wharf, the values of the Wharf, Intangible property, and Aquatic Lands Lease total $121,904,954, in excess of the assessed values for all three years. Thus, the Board reduces the 2016 Wharf valuation in alignment with 2017 and 2018 assessed values.

The values in Conclusion 21 include the following assets identified in PwC's price allocations:

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[4] *Id.* at 1083.

PwC Allocation of Price for Terminal Business (CP 2547, 2575)		
Terminal/tanks	$157,753,327	
Subtotal: Tangible Property		$157,753,327
Throughput service contract	$3,687,908	
Wharfage agreement & Aquatic land lease license	$71,039,306	
Subtotal: "Taxable Intangible Values"		$74,727,214
BOARD'S TOTAL TAXABLE VALUE		$232,480,541

PwC Allocation of Price Paid in Wharf Transaction (CP 2548, 2575)		
Wharf improvements	$10,205,058	
Subtotal: Tangible Property		$10,205,058
Aquatic land lease	$11,699,896	
Intangible/goodwill	$100,000,000	
Subtotal: "Taxable Intangible Values"		$111,699,896
BOARD'S TOTAL TAXABLE VALUE		$121,904,954

The Board did not adopt the values it concluded as "the most persuasive," however. CP 2575. The Board's total taxable value for the wharf was less than its assessed value for 2016, so the Board reduced the 2016 value. CP 2485, 2575. But, without explanation, the Board reduced the wharf value to $98 million to "align" it with the later assessed values. CP 2575. For 2017 and 2018,

the Board's total values exceeded the assessed values. *Id.* Under RCW 84.08.060, the Board cannot increase values above the original assessed values. So the Board affirmed the assessed values for 2017 and 2018. *Id.* In considering this, one should note that the former Assessor, who was responsible for setting those values, was the **only** witness that the Board did not find credible.[5] Based on Conclusion 21, the Board decided intangibles should be included. But, in its decision over 90 pages long, it did not specify what a "taxable intangible" is nor how to determine its value (such as in other cases where no purchase price allocation exists).

In Conclusion 22, the Board explains that it rejected

[5] The Board deemed all five of the taxpayers' witnesses credible. CP 2546, 2549, 2552, 2558, 2565. The Board also found the Assessor's outside consultant credible but made no finding that the former Assessor was credible. CP 2555.

the taxpayers' appraisal because its cost approach considered tangible property only. CP 2576. Conclusion 23 praises the taxpayers' wharf appraisal for its "credible" replacement cost **new** of approximately $40 million; yet the Board deemed the **used** wharf improvements worth nearly $122 million. *Id.* Though it vaguely endorsed the assessed values as "properly and legally performed" (Conclusions 24 and 25), the Board deemed the gross selling prices including the improvements and intangible property as "the most persuasive evidence of value" for the improvements alone (Conclusion 21). CP 2575–76. Lastly, Conclusion 26 claims the taxpayers' appraisal "exclude[d] attributes that are properly taxable." CP 2576. In the Board's words (CP 2576):

22. The Taxpayers' appraisal errs by considering only the cost approach of tangible property. It does not appropriately consider the subject sales nor any income approach valuation.
23. The WSP replacement cost new for the Wharf with modern materials and construction is credible.
24. The Department of Revenue and the Assessor properly used unitary valuation methods to value the Terminal and Wharf.[251]
25. The Board concludes that, under the applicable statutes and rules, the Assessor's valuations of the subject properties were properly and legally performed.
26. The Board concludes that, under the applicable statutes and rules, the Taxpayers' contended values exclude attributes of the properties that are properly taxable.

On direct judicial review under RCW 34.05.518 and 34.05.570, the Court of Appeals issued a published opinion affirming the Board's decision.

V. ARGUMENT FOR GRANTING REVIEW

The Court of Appeals decision conflicts with at least nine prior Supreme Court decisions in three areas. First, the basis for rejecting the taxpayers' appraisal conflicts with at least six Supreme Court decisions and a statutory preference for the cost approach for complex property. Moreover, regardless of method used, the property

tax value cannot include intangible property. The Board wrongly viewed as a flaw in the taxpayers' cost approach the fact that it valued tangible property only. Second, the Court of Appeals decision conflicts with decisions this Court issued in 1908 and 1931 holding all intangibles exempt from property taxation under statutory language that remains in force today. Third, in extending "taxable intangible values" to the value of rights to use and occupy state-owned land, the decision conflicts with this Court's 1977 decision that the leasehold excise tax replaces the property tax for such rights. Review is also needed because the decision breaks dramatically from longstanding tax laws and assessment practices. This will affect public officials and taxpayers across all the state's 39 counties.

A. The Board's basis for rejecting the taxpayer's cost approach conflicts with at least six Supreme Court decisions.

Regardless of appraisal method used, property tax values cannot include intangible property. The Court of Appeals, missing the legal error in Conclusion 22 (faulting the taxpayers' appraisal for valuing only tangible property), applied to this issue the wrong standard of review—substantial evidence rather than an error of law.[6] The Court of Appeals then misstated the evidence, all the while sidestepping the legal error.[7]

The decision conflicts with this Court's reading of the statutory valuation criteria applicable to complex property. This Court explained its reading of the statute in

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[6] *Petrogas Pac.*, 520 P.3d at 1085.

[7] *Id.* at 1084–85. Contrary to what the decision asserts, the taxpayers' appraisal fully considered the sales of the subject properties, dedicating a full section of the appraisal report to analyze the transactions in detail and finding the purchase price allocations consistent with the appraisers' independent valuations. CP 4261–63.

two separate decisions in the 1980s *Folsom* case: *Folsom I* explained that RCW 84.40.030(3)(b) instructs assessors "to **rely most heavily** on the cost and income approaches in valuing properties of a 'complex nature,'"[8] and *Folsom II* emphasized that "discretion is not unlimited" where "a cost-based valuation was dictated" by this statutory provision.[9] And yet, the Court of Appeals incorrectly affirmed the Board's misplaced reliance on gross selling prices for a business, including what the Court of Appeals recognized was "an overpayment" as to the Alcoa transaction.[10]

In so affirming, the decision conflicts with precedents properly applying this statutory mandate for valuing

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[8] *Folsom v. Cty. of Spokane*, 106 Wn.2d 760, 763, 725 P.2d 987 (1986) [*Folsom I*] (emphasis added) (interpreting the same statutory language as in the current statute, as shown in Laws of 1988, ch. 222, § 14).
[9] *Folsom v. Cty. of Spokane*, 111 Wn.2d 256, 271, 759 P.2d 1196 (1988) [*Folsom II*].
[10] *Petrogas Pac.*, 520 P.3d at 1079.

complex property. At least four other Supreme Court property tax decisions over the course of many decades have agreed with cost approaches that were limited to tangible property used in various types of complex businesses: *Weyerhaeuser Co. v. Easter* (pulp mill),[11] *Sahalee Country Club, Inc. v. Bd. of Tax Appeals* (championship golf course),[12] *Boise Cascade Corp. v. Pierce Cty.* (paper mill),[13] and *Ozette Ry. Co. v. Grays Harbor Cty.* (logging railroad).[14] Two of these decisions upheld assessments that considered only the cost approach: one recognized "the superiority of the cost approach" as "particularly applicable where the property is being used at its highest and best use;[15] the other found "fully justified" the

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[11] 126 Wn.2d 370, 894 P.2d 1290 (1995).
[12] 108 Wn.2d 26, 735 P.2d 1320 (1987).
[13] 84 Wn.2d 667, 529 P.2d 9 (1974).
[14] 16 Wn.2d 459, 133 P.2d 983 (1943), *overruled on other grounds by Xerox Corp. v. King Cty.*, 94 Wn.2d 284, 617 P.2d 412 (1980).
[15] *Sahalee*, 108 Wn.2d at 36.

assessor's valuation based on total original construction costs less depreciation.[16] The other two decisions reduced assessments based on the cost approach: this Court held the cost approach most "accurate" for valuing a pulp mill;[17] and it affirmed a trial court's value reduction for a paper mill's large equipment based solely on the cost approach where the assessor, following Department of Revenue advice, had also based his assessed value only on the cost approach.[18]

In every one of these cases, the cost approach valued the tangible property only. Here, the only reason the Board rejected the taxpayers' cost approach was that it valued tangible property only. The Court of Appeals pointed to nothing that would render these 80 years of

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[16] *Ozette*, 16 Wn.2d at 474.
[17] *Weyerhaeuser*, 126 Wn.2d at 375, 376 n.2.
[18] *Boise Cascade*, 84 Wn.2d at 669, 672.

Supreme Court caselaw inapposite. All six decisions discussed above remain good law as applied to the Petrogas situation, and none can be reconciled with the Court of Appeals decision.

B. The Court of Appeals decision is at odds with Supreme Court precedents recognizing a total exemption of intangibles.

For over 100 years, our state's property tax laws have taxed real property (land and fixtures) and chattels but exempted credits, or what, in modern parlance, we call *intangibles*. The Board's neologism of "taxable intangible values" conflicts with over a century of state law and sound policy. Since 1908 this Court and other authorities have consistently held that all intangibles are exempt from property tax. The Court of Appeals does not even mention this Court's prior decisions confirming this total exemption nor the statutory language on which those decisions were based. Instead, without any

precedent, the Court of Appeals defends the Board's conclusion as though statutory language added in 1997 overruled this Court's longstanding recognition of a total exemption of intangibles. This is a surprising, unprecedented, and mistaken construction of the 1997 legislation.

Our state's property tax is limited to tangible property. This is the logical corollary of the statute's total exemption of all intangible property. The taxpayers' briefing in the Court of Appeals recounts the history of this state's exemption of intangible property.[19] That history addresses questions Justice Stephens raised recently during oral argument in the capital gains tax litigation by showing that (1) since the 1930 amendment to the tax uniformity clause of the state's constitution there has

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[19] Appellants' Opening Br. at 53–72, *Petrogas Pac. LLC v. Xczar*, No. 83065-1-I, ___ Wn. App. ___, 520 P.3d 1077, 1083 (Nov. 28, 2022).

been no ad valorem property tax on any intangibles—until this case—and (2) there are sound policy reasons for the total exemption of intangibles.[20] Neither the Assessor nor the Court of Appeals found any defect in that detailed historical explanation.[21]

The Court of Appeals should have been guided by the adage that "a page of history is worth a volume of logic"[22] in order to understand the intangibles exemption statute. Instead, the Court closed its eyes to history. Though the Court of Appeals did invoke the historical context for this same exemption in another decision (discussed below), here it decided any historical context was outside

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[20] *Id.*; Appendix G at 5, 7–8 (J. Stephens).
[21] Br. of Resp't at 12, *Petrogas Pac. LLC v. Xczar*, ___ Wn. App. ___, 520 P.3d 1077, 1083 (Nov. 28, 2022) (No. 83065-1-I); *Petrogas Pac.*, 520 P.3d 1077.
[22] Appendix G at 5 (J. Stephens); *see also New York Trust Co. v. Eisner*, 256 U.S. 345, 349, 41 S. Ct. 506, 65 L. Ed. 963 (1921).

the purview of a "plain language" analysis.[23] (And yet, the Court did not confine itself to the statutory text: it also considered an inaccurate regulatory gloss of the same statute.)[24] Moreover, the Court of Appeals constricted its analysis to only a small part of the statute rather than considering the import of the statute as a whole.[25] The Court of Appeals thus implausibly concluded that some intangibles are taxable, both in affirming the Board's conclusions and in the Court of Appeals' own notion of a "difference between exempt intangible property and other intangibles."[26] This very notion is contrary to Supreme Court precedents, the exemption's history, and a logical reading of the statute as a whole.[27]

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[23] *Petrogas Pac.*, 520 P.3d at 1082–83.
[24] *Id.*
[25] *Id.* (discussing RCW 84.36.070(3) while neglecting to discuss RCW 84.36.070(1), (2), and the statutory scheme as a whole).
[26] *Id.*, 520 P.3d at 1083.
[27] *Id.* at 1083–84.

The 1907 Legislature first exempted intangibles in language now codified as the final proviso of RCW 84.04.080.[28] Though the import of this language might not be obvious to the modern reader, a prominent academic of the day explained that this language excluded all intangibles from taxation: "Tho corporate securities are not specifically mentioned in [the statute], it seems to be generally conceded that it applies to them as well as to all other forms of property commonly known as intangibles."[29] In 1908, this Court agreed. In *State ex rel.*

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[28] Appendix B (highlighted text); Laws of 1907, ch. 48, § 1 (Appendix C, highlighted text).

[29] Vanderveer Custis, *Tax Reform in Washington: The Exemption of Intangibles*, 23 Q. J. Econ. 718, 721 (1909); *accord* Vanderveer Custis, *The State Tax System of Washington* 126 (1916) (describing the state's "complete exemption" of intangibles); *see also* Univ. Extension Div., Univ. of Wash., *Taxation in Washington: Papers and Discussions of the State Tax Conference at the University of Washington, May 27, 28 and 29, 1914* (1914).

Wolfe v. Parmenter, the Court upheld this broad exclusion of intangibles (which it termed "credits") from property taxation.[30] A later legal scholar summarized this decision's legacy: "[Following *Parmenter*,] it appears that for all practical purposes, no effort was made to tax any type of intangible property . . . ."[31]

This Court revisited the issue shortly after 1931 legislation adopted the language now codified in RCW 84.36.070(2)(a).[32] Refusing to order the King County assessor to add "all" intangible property to the property tax rolls, this Court held in *State ex rel. Atwood v. Wooster* that the then new statutory exemption of "what are popularly called credits or intangibles" applied to all

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[30] 50 Wash. 164, 175, 178, 96 P. 1047 (1908).
[31] Alfred Harsch, *The Washington Tax System—How It Grew*, 39 Wash. L. Rev. 944, 956 (1965).
[32] Appendix E (highlighted text in current statute); Laws of 1931, ch. 96, § 1 (Appendix F).

intangible property.[33] The Court called it a "total exemption" of intangibles.[34]

No legislative history for subsequent modernization of the statutes evinces any intent to reverse the legislative policy underlying these two decisions of this Court. Both remain good law. The Court of Appeals' notion of a "difference between exempt intangible property and other intangibles" and its agreement with the Board's conclusion that Petrogas has "taxable intangible values"[35] breaks with these longstanding precedents. The Court of Appeals never even mentions these binding judicial precedents that run counter to its decision.

The Court of Appeals' misunderstanding of the statute at issue in *Atwood* resembles its misunderstanding of the same statute in *Kunath v. City of Seattle* involving

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[33] 163 Wash. 659, 2 P.2d 653 (1931) (Appendix D).
[34] *Id.*
[35] *Petrogas Pac.*, 520 P.3d at 1083.

Seattle's recent effort to adopt an income tax.[36] In *Kunath* the Court of Appeals looked to "the statute's text and legislative history," both of which it misunderstood, to then erroneously conclude that the exemption in RCW 84.36.070 is limited to only specific types of intangible property "listed" in the statute.[37] The taxpayers' briefing below thoroughly explains that error in *Kunath*.[38] In short, the Court of Appeals could only so conclude by skipping over a key word in the statute: "credits," the word that *Parmenter*, *Atwood*, and many other contemporary sources explain to mean intangible property in the broadest sense.[39]

The Court of Appeals declined the opportunity this

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[36] 10 Wn. App. 2d 205, 219 n.58, 444 P.3d 1235 (2019), *review denied*, 195 Wn.2d 1013 (2020).
[37] *Id.*
[38] Appellants' Opening Br. at 38–50, *Petrogas Pac. LLC v. Xczar*, No. 83065-1-I, ___ Wn. App. ___, 520 P.3d 1077, 1083 (Nov. 28, 2022).
[39] RCW 84.36.070(2)(a) (Appendix E, highlighted text).

case presented to better understand the legislative history and correct its error in the published *Kunath* opinion. Starting from the same fundamental misunderstanding of the total exemption in RCW 84.36.070(1) and (2)—key sections of the statute that the Court of Appeals avoids even discussing here—, the Court of Appeals focuses on a reading of only RCW 84.36.070(3) and (4) that is at odds with the obvious policy of the statutory scheme as a whole and this Court's precedents.

In RCW 84.36.070(3), the 1997 Legislature merely clarified that a tangible property's physical and legal characteristics are not intangible property at all. Valuation of tangible property at its highest and best use (here as two properties used together for an LPG export facility) inherently includes the value of that property with its physical and legal characteristics. For example, the taxpayers' appraisal values the property as zoned and

located where it could be put to profitable use; it does not make any obsolescence deduction as might be needed if it were unsuitably zoned or located. Here, the taxpayers' only deduction was for physical depreciation because the improvements are not new. Safeguarding against improper **subtractions** from the value of tangible property accords with the total exemption for intangibles under RCW 84.36.070(1) and (2). The Court of Appeals instead misreads RCW 84.36.070(3) to justify **adding** the value of specific intangible assets identified by PwC—even ones specified as exempt in RCW 84.36.070(2)(c) (e.g., "licenses," "favorable contracts," "integrity of a business").

Because the Court of Appeals decision cannot be reconciled with this Court's precedents confirming a total exemption of all intangibles under statutory language still in force today, this Court's review is needed.

C. The decision conflicts with Supreme Court precedent recognizing that private interests in state–owned lands should be taxed only once.

The "taxable intangible values" in the Board's Conclusion 21 included values PwC allocated to a wharfage agreement and aquatic land lease license (a combined asset) and an aquatic land lease. These constitute rights to occupy and use state-owned lands. RCW 84.36.451 exempts from property tax "[a]ny and all rights to occupy or use" such lands. Instead, the taxpayers pay leasehold excise tax under RCW Chapter 82.29A.

Including such rights in the property tax base under the Court of Appeals decision goes against this Court's 1977 conclusion that "[t]he legislation [creating the leasehold excise tax] makes it clear that the excise tax

was intended to replace the ad valorem tax."[40] Never until now have private interests in public land been subject to both types of tax. Again, the Court of Appeals ignores this precedent, constricting its analysis to RCW 84.36.070(4),[41] which was never intended to overrule or narrow this Court's 1977 decision. Neither section (3) or (4) of this statute is a carveout from the total exemption of intangibles. As discussed above, the taxpayers' valuation of the tangible properties already accounted for their highest and best use as an integrated LPG export facility. The statute does not add the value of the public land lease and a contract to use the wharf on public land (a contract that never even materialized). This Court should accept review to address this conflict with its prior decision against taxing such rights twice.

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[40] *Japan Line, Ltd. v. McCaffree*, 88 Wn.2d 93, 98, 558 P.2d 211 (1977).
[41] *Petrogas Pac.*, 520 P.3d at 1083–84.

D. Issues of great public interest are at stake.

This case satisfies the factors that this Court has held establish "substantial public interest."[42] The Court of Appeals decision will significantly impact tax authorities and taxing districts. It will also affect many taxpayers: those with businesses (do they have "taxable intangible values"?), those with complex industrial property (is the cost approach no longer valid despite the statutory directive that cost or income must be dominant for complex property?), those who paid an above–market price to acquire their property (is "an overpayment"[43] now part of taxable "market value" in Washington for property taxes, and perhaps for real estate excise taxes?), and those with privately owned improvements on public land (are private interests in public land now

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[42] *See State v. Watson*, 155 Wn.2d 574, 122 P.3d 903 (2005) (applying RAP 13.4(b)(4) to the facts of that case).
[43] *Petrogas Pac.*, 520 P.3d at 1079.

subject to both leasehold excise tax and property tax?).

In breaking with prior caselaw, statutes, and established assessment practices, the Court of Appeals decision will invite unnecessary litigation and create confusion. Taxing districts and taxpayers need greater certainty than this to budget annually for property taxes. So unnecessary litigation and confusion will cause widespread harm.

This Court's recent hearing in the capital gains tax litigation showed an interest in the history and policy underlying the property tax exemption of intangibles.[44] The history, and the policy it reveals, is instructive and should have been heeded by the Court of Appeals. For what this Court observed in 1908 about the challenges of taxing intangibles remains true today: "one of the

[44] Appendix G.

most fruitful sources of inequality in taxation is the attempt to tax credits," i.e., intangibles.[45] Attempting to subject intangible property to property taxation can only make the property tax system more complicated, less efficient, and less fair. Absent legislative adoption of a different policy, which has not occurred to date, a change in policy should not occur—and certainly not without this Court's review.

VI. CONCLUSION

Contrary to at least nine decisions of this Court, all legislative authority (when properly understood), other authorities, and longstanding assessment practices across the state, the Court of Appeals presents the un-

[45] *State ex rel. Wolfe v. Parmenter*, 50 Wash. 164, 178, 96 P. 1047 (1908).

precedented notion of a "difference between exempt intangible property and other intangibles."[46] Thus the taxpayers in this case face the incomprehensible prospect of taxable values far higher than if the improvements were new. Such a drastic departure from longstanding law and established practices cannot be implemented in a uniform, efficient and effective manner. Nor is it required by the 1997 legislation on which the Court of Appeals relied. These conflicts with longstanding laws and widespread effects warrant review.

The undersigned certifies this petition contains 4,939 words, excluding items exempted under RAP 18.17.

Respectfully submitted this 10th day of March, 2023.

FOX ROTHSCHILD LLP

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Attorneys for Petitioners

[46] *Petrogas Pac.*, 520 P.3d at 1083.

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

PETROGAS PACIFIC LLC AND PETROGAS WEST LLC, Appellants, v. REBECCA XCZAR, WHATCOM COUNTY ASSESSOR, Respondent.	No. 83065-1-I DIVISION ONE PUBLISHED OPINION

MANN, J. — This appeal arises from the property tax valuation of a terminal and wharf owned by Petrogas Pacific LLC and Petrogas West LLC (Petrogas). Petrogas appeals the final decision of the Board of Tax Appeals (Board). Petrogas argues that the Board erred (1) by considering intangible characteristics of the subject properties, (2) by considering an aquatic lands lease in the property tax value, and (3) by rejecting Petrogas's appraisal. We affirm.

FACTS

A. Purchase and Valuation

Petrogas owns and operates a liquified petroleum gas (LPG) terminal and wharf near Ferndale, Washington. In May 2014, Petrogas acquired the terminal from Chevron

for $242,000,000. In September 2016, Petrogas acquired the wharf from Intalco Aluminum for $122,000,000.

The terminal provides storage and distribution of liquefied propane and butane to domestic and international markets. The terminal can export and import up to 30,000 barrels a day, has rail, truck, and pipeline capacity, and is connected to two local refineries. The wharf serves the LPG operation of the terminal and the aluminum smelting operation of Intalco. The wharf is built on aquatic lands within the Strait of Georgia and subject to an aquatic lands lease with the State of Washington. The aquatic lands lease allows 48 ships to dock at the pier per year, regardless of product. Ships unload alumina ore to supply the Intalco aluminum smelting plant and load LPG product from the terminal to ship overseas.

The purchases of the terminal and wharf were somewhat complicated by the arrangements currently in place and a third party right of first refusal. Because purchase of the terminal connected significantly with Petrogas's other assets and connections, Petrogas was motivated to bid very aggressively on the property. Yet Petrogas's counsel testified that the transaction was "typical of such a sale." In addition, during the 2016 purchase of the wharf, Petrogas agreed to an overpayment because the wharf was critical to the integrity of the terminal and Petrogas's export program as a whole.

After purchasing the terminal, Petrogas's independent auditors, Pricewaterhouse Coopers (PwC) conducted an appraisal and allocation. PwC's appraisal was conducted under U.S. general approved accounting practices (U.S. GAAP). Based on appraisals, PwC allocated $11,895,000 to land, $157,752,327 to the real property improvements

(Terminals/Tanks), and $2,772,500 to tangible personal property. PwC allocated the remaining amount of the price to intangible value.

After purchasing the wharf, Petrogas engaged an appraisal firm to assess the wharf's condition, which estimated repair costs of around $11 million, and obtained an appraisal concluding the fair market value of the wharf in its condition at the time of sale was $10,205,058. Petrogas allocated $10,205,058 to the wharf improvements, other smaller amounts to tangible personal property at the wharf, $100,000,000 to intangible goodwill, and $11,699,896 to the aquatic lands lease. Petrogas reported this allocation on the real estate excise tax affidavit. PwC reviewed and agreed to the allocation for the purposes of financial accounting under U.S. GAAP.

Once the Whatcom County Assessor[1] (Assessor) received notice of the terminal sale, it believed the property had been undervalued and began a review. During this review, the Assessor reviewed publicly available information on the industry to understand the "fundamentally dynamic changes that had been occurring" in the business. The Assessor found that demand from the Asian market had been increasing, while on the supply side, new reserves were being discovered. It also found that the highest and best use of the wharf was changing from its initial purpose to support Intalco's aluminum smelter to increasingly larger shipments of LPG.

For its 2016 valuation of the wharf, the Assessor relied on the sales information for the combined terminal and wharf for $364,000,000. After deductions for inventory,

[1] Rebecca Xczar is now the Whatcom County Assessor, but for the relevant valuation years, Keith Willnauer was the assessor.

intangible value, and others values, the Assessor valued the wharf at $182,725,099, and the terminal at $90,108,394.

In 2017, the Assessor requested an Advisory Appraisal from the Department of Revenue (DOR). DOR used all three valuation approaches—cost, income, and sales—to form a final opinion of market value. While the Assessor criticized aspects of the DOR appraisal, it used some of their documentation and methodology to conduct both a cost approach and an income approach to value Petrogas's property for 2017 and 2018. As a result, the Assessor valued the terminal at $190,710,788 for 2017 and $194,606,203 for 2018. The Assessor valued the wharf at $182,725,099 for 2016, $98,244,952 for 2017, and $100,251,680 for 2018.

Petrogas sought review of all five valuations before the Board.

B. Proceedings before the Board

The Board conducted a formal hearing over six days, hearing from seven witnesses. The Board admitted multiple exhibits from each party, including an appraisal report commissioned by Petrogas, a review of the appraisal submitted by the Assessor, and rebuttal reports.

Petrogas's appraisal report was conducted by Kevin Reilly, ASA, of evcValuation LLC. At the time of the report, there were only 10 LPG export facilities in North America, with several more planned or under construction. Petrogas's LPG terminal and wharf were the only operating LPG storage and export facility on the West Coast.

When Reilly considered all three of the traditional approaches to valuation, Reilly found the sales comparison approach and income approach not applicable to the valuation of the terminal and wharf. Reilly did not develop the sales comparison

approach because Petrogas's purchase was the only known sale of an operating LPG terminal on the West Coast and "there are typically many details of [these] transactions that are not able to be discerned." In deciding not to develop an income approach to value, Reilly cited several challenges such as: limited historical financials, a limited number of comparable terminals to establish a regional market, related parties leading to unrecognized revenues and operating expenses, limited information to develop market-based throughput rates for the West Coast, and the overall highly proprietary nature of LPG terminal history.

Thus, Reilly only developed and applied the cost approach. Under the cost approach, Reilly concluded that both the 2018 and 2017 market values for the terminal were $157,000,000. Reilly also concluded the market values for the wharf were $17,000,000 for 2018, $16,000,000 for 2017, and $15,000,000 for 2016. The appraisal also concluded that "the highest and best use of the LPG Terminal and Wharf are their current uses as LPG export facilities."

The Assessor's review appraisal was conducted by Brent Eyre, ASA. Eyre's report criticized the Reilly appraisal in three main areas. First, Eyre argued that in analyzing the highest and best use for the properties, Reilly's cost approach, a summation of the value of the tangible real property as individual and independent assets, would not achieve the highest and best use as an integrated assets function. In contrast, under a unit appraisal, an integrated group of operating assets is valued as "one thing without reference to the independent value of the component parts."

Second, Eyre argued that Reilly should have included the value of the aquatic lands lease in assessing the overall value of the terminal and wharf. Third, Eyre

criticized Reilly's failure to consider and analyze the sale of the subject properties. This would have shown that considerable taxable value was missing from the cost approach and led Reilly to use a unitary valuation method. Eyre concluded, "these errors have led to an improper valuation of the subject property." The Board found Eyre credible.

The Board issued its final decision on June 29, 2021. While the Board found Reilly credible, it also found that Reilly "did not consider intangible characteristics including proximity to Asian markets, scarcity of LPG facilities on the West Coast, the aquatic lands lease, and the number of ships that can land at the wharf annually." The Board concluded that the Reilly appraisal erred by considering only the cost approach and not appropriately considering the subject sales nor any income approach valuation. And the Board concluded that Petrogas's contended values excluded attributes of the properties that were properly taxable. The Board concluded that the DOR and Assessor properly used unitary valuation methods and the Assessor's valuations were properly performed.

As a result, the Board upheld the Assessor's valuation of the terminal for 2017 and 2018. The Board also upheld the Assessor's valuation of the wharf for 2017 and 2018. The Board, however, adjusted the 2016 valuation of the wharf from $182,725,099 to $98,000,000. The assessed values, Petrogas's response, and the Board's decision are as follows:

Assessment Year	Assessed Value	Petrogas's Appraisal	Board's Decision
Wharf			
2016	$182,725,099	$15,000,000	$98,000,000
2017	$98,244,952	$16,000,000	$98,244,952
2018	$100,251,680	$17,000,000	$100,251,680

Terminal			
2017	$190,710,788	$157,000,000	$190,710,788
2018	$194,606,203	$157,000,000	$194,606,203

Petrogas petitioned for review of the agency decision. Whatcom County Superior Court certified the case for direct review under RCW 34.05.518.

ANALYSIS

We review decisions by the Board of Tax Appeals under the Administrative Procedure Act (APA), ch. 34.05 RCW. Judicial review is limited to the agency record. RCW 34.05.558; see also Puget Soundkeeper All. v. Dep't of Ecology, 191 Wn.2d 631, 637, 424 P.3d 1173 (2018). Under the APA, we may grant relief from an agency's order based on one of nine reasons listed in RCW 34.05.570(3), including that the order is (1) based on an erroneous interpretation or application of the law, (2) not supported by substantial evidence, or (3) arbitrary or capricious. RCW 34.05.570(3)(d), (e), (i).

We review questions of law, statutory construction, and an agency's application of the law de novo. Puget Soundkeeper, 191 Wn.2d at 637. We review an agency's factual findings for substantial evidence, "asking whether the record contains evidence sufficient to convince a rational, fair-minded person that the finding is true." Pac. Coast Shredding, L.L.C. v. Port of Vancouver, USA, 14 Wn. App. 2d 484, 501, 471 P.3d 934 (2020). We defer to the agency's broad discretion in weighing the evidence. Whidbey Envtl. Action Network v. Growth Mgmt. Hr'gs Bd., 14 Wn. App. 2d 514, 526, 471 P.3d 90 (2020). An agency's unchallenged findings of fact are verities on appeal. Darkenwald v. Emp't Sec. Dep't, 183 Wn.2d 237, 244, 350 P.3d 647 (2015).

A. Consideration of Intangible Characteristics

Petrogas argues that the Board erred by including intangible personal property in the taxable value of the property. We disagree.

Statutory interpretation is a question of law reviewed de novo. Dep't of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 9, 43 P.2d 4 (2002). The ultimate goal of interpretation is to determine and carry out the intent of the legislature. Campbell & Gwinn, 146 Wn.2d at 9. If possible, courts "must give effect to [the] plain meaning [of a statute] as an expression of legislative intent." Campbell & Gwinn, 146 Wn.2d at 9. Courts derive plain meaning from the context of the entire act as well as any "related statutes which disclose legislative intent about the provision in question." Campbell & Gwinn, 146 Wn.2d at 11. If a statute is unambiguous, courts need not consider outside sources. State v. Delgado, 148 Wn.2d 723, 717, 63 P.3d 792 (2003).

A statute is ambiguous when, after examination, "it is subject to more than one reasonable interpretation." City of Seattle v. Winebrenner, 167 Wn.2d 451, 456, 219 P.3d 686 (2009). Once a statute is subject to more than one reasonable interpretation, courts "may resort to statutory construction, legislative history, and relevant case law for assistance in discerning legislative intent." Christensen v. Ellsworth, 162 Wn.2d 365, 373, 173 P.2d 228 (2007).

All property must be valued at 100 percent of its true and fair value. RCW 84.40.030(1). True and fair value means market value and is the amount of money a buyer would pay a seller, taking into consideration all uses to which the property is adapted. WAC 458-07-030(1).

While intangible personal property is exempt from ad valorem taxation, RCW 84.36.070 distinguishes between intangible personal property and the characteristics or attributes of property. Specifically, "intangible personal property does not include zoning, location, view, geographic features, easements, covenants, proximity to raw materials, condition of surrounding property, proximity to markets, the availability of a skilled workforce, and other characteristics or attributes of property." RCW 84.36.070(3) (emphasis added).

RCW 84.36.070 provides in full:

> (1) Intangible personal property is exempt from ad valorem taxation.
>
> (2) "Intangible personal property" means:
>
> (a) All moneys and credits including mortgages, notes, accounts, certificates of deposit, tax certificates, judgments, state, county and municipal bonds and warrants and bonds and warrants of other taxing districts, bonds of the United States and of foreign countries or political subdivisions thereof and the bonds, stocks, or shares of private corporations;
>
> (b) Private nongovernmental personal service contracts, private nongovernmental athletic or sports franchises, or private nongovernmental athletic or sports agreements provided that the contracts, franchises, or agreements do not pertain to the use or possession of tangible personal or real property or to any interest in tangible personal or real property; and
>
> (c) Other intangible personal property such as trademarks, trade names, brand names, patents, copyrights, trade secrets, franchise agreements, licenses, permits, core deposits of financial institutions, noncompete agreements, customer lists, patient lists, favorable contracts, favorable financing agreements, reputation, exceptional management, prestige, good name, or integrity of a business.
>
> (3) "Intangible personal property" does not include zoning, location, view, geographic features, easements, covenants, proximity to raw materials, condition of surrounding property, proximity to markets, the availability of a skilled workforce, and other characteristics or attributes of property.
>
> (4) This section does not preclude the use of, or permit a departure from, generally accepted appraisal practices and the appropriate application thereof in the valuation of real and tangible personal property, including the appropriate consideration of licenses, permits, and

> franchises granted by a government agency that affect the use of the property.

DOR's regulations also explain the difference between exempt intangible property and other intangibles. WAC 458-50-160(4) explains:

> Nonproperty intangible characteristics or attributes are elements or components of value associated with a real or tangible asset. These characteristics or attributes are "intangible" but they are not "property" and therefore are not tax exempt intangible personal property. They are contingent and dependent upon other property and cannot be owned, used, transferred, or held separately from other property. To the extent that these characteristics, attributes, or other factors contribute to, or affect the value of property, they must be appropriately considered when determining taxable value. They include the following types:
>
> (a) Zoning, location, view, geographic features, easements, covenants, proximity to raw materials, condition of surrounding property, proximity to markets, or the availability of a skilled work force;
>
> (b) Grants of licenses, permits, and franchises by a government agency that affect the use of the property being valued; and
>
> (c) Other characteristics of property, such as scarcity, uniqueness, adaptability, or utility as an integrated unit.

The Board's findings and conclusions fall within the plain meaning of RCW 84.36.070(3) and WAC 458-50-160(4). First, the Board heard testimony of the increasing demand for LPG in Asian markets and the properties' proximity to these markets. Second, witnesses for both parties recognized the uniqueness and scarcity of Petrogas's properties, being the only LPG export facility on the West Coast. Finally, the Assessor provided testimony that the terminal and wharf benefit from their utility as an integrated unit. While Petrogas's appraiser denied that the properties benefit from operation as an integrated unit, Reilly conceded that without the terminal the wharf would have no ability to ship LPG via ocean-going vessels.

Because the plain language of RCW 84.36.070(3) permits consideration of characteristics or attributes of property such as scarcity, uniqueness, and value as an integrated unit, the Board did not err.

B. Aquatic Lands Lease

Petrogas argues that as a leasehold interest in public land, the aquatic lands lease is exempt from taxation. Under RCW 84.36.451(1)(a) and (c), any leasehold interest to occupy or use property owned by the State of Washington is exempt from taxation. The Assessor concedes that by statute, leasehold interests in government-owned property are exempt from ad valorem property taxation. But the Board did not include the leasehold interest as taxable value. Instead, the Board concluded that it was error for Petrogas's appraisal to not include the aquatic lands lease as a characteristic or attribute of intangible property in its valuation. RCW 84.36.070(1).

Under RCW 84.36.070(4), the exemption of intangible personal property does not preclude the use of "generally accepted appraisal practices and the appropriate application thereof in the valuation of real and tangible personal property, including the appropriate consideration of licenses, permits, and franchises granted by a government agency that affect the use of the property." In addition, under WAC 458-50-160(4), when determining taxable value, characteristics, attributes, or other factors that contribute to, or affect the value of property must be appropriately considered. These factors include "[g]rants of licenses, permits, and franchises by a government agency that affect the use of the property being valued." WAC 458-50-160(4)(b).

The Assessor testified before the Board that he did not attribute any value directly to the aquatic lease in his assessment. Instead, he considered "the contributory

value associated with the highest and best use of the property that is valuing the property in recognition of the presence of that lease." Petrogas's appraisal considered the aquatic lands lease to be an intangible asset and assigned no taxable value. Reilly explained, "in arriving at my value conclusion under the cost approach, we did not appraise intangible values or value in my overall conclusions."

The plain language of RCW 84.36.070(4) and WAC 458-50-160(4) support consideration of the aquatic lands lease because it affects the highest and best use of the properties. In this case, the aquatic lands lease is intertwined with a real asset because it pertains directly to the use of the wharf. In addition, use of the wharf contributes directly to the business of the terminal. The terminal uses the wharf to ship LPG across the Pacific Ocean. The lease allows Petrogas to dock 48 ships at the pier per year. The value of the wharf would be diminished without this permitted use.

Because the aquatic lands lease could be considered in determining the highest and best use of the property, the Board did not err.

C. Market Value Approach

Petrogas argues that the Board erred by rejecting its appraisal and concluding that the cost approach to valuation should not be a dominant factor. The Assessor argues that Petrogas's appraisal was rejected by the Board because it ignored the sales of the subject properties and excluded intangible attributes that should be considered in valuation. We agree with the Assessor.

In determining market value, there are three general approaches. Washington Beef, Inc. v. County of Yakima, 143 Wn. App. 165, 165, 177 P.3d 162 (2008). In general, appraisers use one or a combination of the approaches to arrive at fair market

value. Washington Beef, 143 Wn. App. at 165-66; WAC 458-070-030(2). First, under the income approach, value is approximately equal to the present value of the future benefits of property ownership. Sahalee Country Club, Inc. v. Bd. of Tax Appeals, 108 Wn.2d 26, 33, 735 P.2d 1320 (1987). Second, the cost approach estimates what it would cost a typically informed purchaser to produce a replica of the property in its present condition. Sahalee, 108 Wn.2d at 33. Third, under the sales approach, an appraiser compares the sale prices of similar properties. Sahalee, 108 Wn.2d at 33. When the supporting data is adequate, the sales approach is the most reliable method of valuation. Sahalee, 108 Wn.2d at 33.

Because the sales approach is the most reliable method, RCW 84.40.030(3)(a) requires an assessor to base valuation on any sales of the property being appraised or similar property sold within the past five years. (Emphasis added). Similarly, WAC 458-07-030(2)(a) provides that sales of the property being appraised that occurred within five years of the assessment are valid indicators of true and fair value. The assessor should be afforded considerable discretion in determining property value for tax purposes. Folsom v. Spokane County, 106 Wn.2d 760, 769, 725 P.2d 987 (1986).

Petrogas relies on RCW 84.40.030(3)(b) for the proposition that in assessing property of a complex nature, the dominant factors in valuation should be "cost, cost less depreciation, reconstruction cost less depreciation, or capitalization of income that would be derived from prudent use of the property." Petrogas also cites several cases that recognize the validity of the cost approach. Both parties agree that the property is of a complex nature. But they disagree that the cost approach was the only appropriate

method of valuation. Thus, the issue is whether the Board's decision to reject Petrogas's appraisal was supported by substantial evidence. RCW 34.05.570(3)(e).

Petrogas's appraisal by Reilly only used the cost approach. Reilly concluded that the income approach was not a meaningful indicator of value because there were limited historical financials, a limited number of comparable terminals to establish a regional market, related parties leading to unrecognized revenues and operating expenses, limited information to develop market-based throughput rates for the West Coast, and the overall highly proprietary nature of LPG terminal history. Reilly did not use the sales comparison approach because he only found two comparable sales that failed to disclose the purchase consideration. While Reilly did not consider the sales of the terminal and wharf to Petrogas in his valuation because he did not believe the sales represented market value, per RCW 84.40.030(a), because the sales were within five years, they should have been considered.

In contrast, the Assessor, and DOR, used all three valuation methods to determine the market value of the terminal and wharf. The Assessor also relied on the sales of the terminal and wharf in his valuations.

The Board also heard testimony from Eyre and reviewed his report. Eyre criticized the Reilly appraisal for failing to appraise the properties as a going concern using the unit valuation concept, ignoring the sales of the subject properties, and failing to include all taxable property.

Contrary to Petrogas's argument, the Board did not require all three approaches to valuation in this case. Instead, the Board considered relevant facts and expert opinions on true market value. It made factual determinations with the proper standards

in mind, specifically finding that Reilly's appraisal failed to "consider intangible characteristics including proximity to Asian markets, scarcity of LPG facilities on the West Coast, the aquatic lands lease, and the number of ships that can land at the wharf annually." As a result, the Board concluded that Reilly's appraisal erred because it did not appropriately consider the subject sales.

Because the Board "showed a good understanding of the accounting and economic principles in play here," we find that the findings of fact are supported by evidence and support the conclusions of law. Washington Beef, 143 Wn. App. at 170.

Affirmed.

Mann, J.

WE CONCUR:

Birk, J.

Dwyer, J.

FILED
2/8/2023
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

PETROGAS PACIFIC LLC AND PETROGAS WEST LLC, Appellants, v. REBECCA XCZAR, WHATCOM COUNTY ASSESSOR, Respondent.	No. 83065-1-I DIVISION ONE ORDER DENYING MOTION FOR RECONSIDERATION

Appellants Petrogas Pacific LLC and Petrogas West LLC moved to reconsider the court's opinion filed on November 28, 2022. Respondent Rebecca Xczar filed a response. The panel has determined that the motion for reconsideration should be denied. Therefore, it is

ORDERED that the motion for reconsideration is denied.

FOR THE COURT:

Mann, J.

APPENDIX B

PDF **RCW 84.04.080**

"Personal property."

"Personal property" for the purposes of taxation, shall be held and construed to embrace and include, without especially defining and enumerating it, all goods, chattels, stocks, estates or moneys; all standing timber held or owned separately from the ownership of the land on which it may stand; all fish trap, pound net, reef net, set net and drag seine fishing locations; all leases of real property and leasehold interests therein for a term less than the life of the holder; all improvements upon lands the fee of which is still vested in the United States, or in the state of Washington; all gas and water mains and pipes laid in roads, streets or alleys; and all property of whatsoever kind, name, nature and description, which the law may define or the courts interpret, declare and hold to be personal property for the purpose of taxation and as being subject to the laws and under the jurisdiction of the courts of this state, whether the same be any marine craft, as ships and vessels, or other property holden under the laws and jurisdiction of the courts of this state, be the same at home or abroad: PROVIDED, That mortgages, notes, accounts, certificates of deposit, tax certificates, judgments, state, county, municipal and taxing district bonds and warrants shall not be considered as property for the purpose of this title, and no deduction shall hereafter be made or allowed on account of any indebtedness owed.

[**1961 c 15 § 84.04.080**. Prior: 1925 ex.s. c 130 § 5, part; 1907 c 108 §§ 1, 2; 1907 c 48 § 1, part; 1901 ex.s. c 2 § 1, part; 1897 c 71 § 3, part; 1895 c 176 § 1, part; 1893 c 124 § 3, part; 1891 c 140 § 3, part; 1890 p 530 § 3, part; 1886 p 48 § 2, part; Code 1881 § 2830, part; 1871 p 37 § 1, part; 1869 p 176 § 3, part; 1854 p 332 § 4, part; RRS § 11109, part.]

Language at issue in *State ex rel. Wolfe v. Parmenter*, 50 Wash. 164, 96 P. 1047 (1908).

NOTES:

*Fox, mink, marten declared personalty: RCW **16.72.030**.*

APPENDIX C

SEC. 21. All records of Chehalis county required by this act to be transcribed shall be transcribed by a person or persons to be employed by the board of county commissioners of Grays Harbor county as follows, to-wit: Said transcribing shall be done by a person or persons under contract, who shall receive said contract after bids for said work shall have been advertised, and the contract given to the best bidded. All records so transcribed shall be certified by the officer of the respective offices from which such records shall be transcribed, under his signature and the seal of his office, if such office have a seal, in the manner following, to-wit: Each book of transcribed records shall be certified to be a correct transcript of the records of Chehalis county contained therein and each officer so certifying shall finally certify to the completeness of all records so transcribed from his office. All original volumes of the assessment rolls of Chehalis county which include only property in the territory comprising the new county of Grays Harbor shall be transmitted to the county of Grays Harbor. Who shall transcribe.

SEC. 22. An emergency exists and this act shall take effect immediately. Emergency.

Passed the House February 18th, 1907.

Passed the Senate February 21st, 1907.

Approved by the Governor February 27th, 1907.

CHAPTER 48.

[S. B. 52.]

TAXATION OF PERSONAL PROPERTY.

AN ACT amending an act entitled, "An act to amend section 3, of chapter LXXXIII of the laws of 1897 relating to revenue and taxation," passed the senate and the house June 12, 1901, notwithstanding the veto of the governor, and declaring an emergency.

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

SECTION 1. That section 3 of "Chapter LXXXIII of the Laws of 1897, amended June 12, 1901," is hereby

Personal property defined.

amended to read as follows: Sec. 3. Personal property, for the purpose of taxation, shall be construed to embrace and include, without especially defining and enumerating it, all goods, chattels, stocks or estates; all improvements upon lands, the fee of which is still vested in the United States, or in the State of Washington, or in any railroad company or corporation, and all and singular of whatsoever kind, name, nature and description, which the law may define or the courts interpret, declare and hold to be personal property, for the purpose of taxation, and as being subject to the laws and under the jurisdiction of the courts of this state, whether the same be any marine craft, as ships and vessels, or other property holden under the laws and jurisdiction of the courts of this state, be the same at home or abroad: *Provided,* That the ships or vessels registered in any custom house of the United States within this state, which ships or vessels are used exclusively in trade between this State and any of the islands, districts, territories, states of the United States, or foreign countries, shall not be listed for the purpose of or subject to taxation in this state, such vessels not being deemed property within this state: *Provided,* That mortgages, notes, accounts, moneys, certificates of deposit, tax certifictes, judgments, state, county, municipal and school district bonds and warrants shall not be considered as property for the purpose of this chapter, and no deduction shall hereafter be allowed on account of an indebtedness owed.

Ships exempt.

Credits exempt.

Emergency.

SEC. 2. An emergency exists and this act shall take effect immediately.

Passed the Senate February 14th, 1907.

Passed the House February 27th, 1907.

Approved by the Governor February 28th, 1907.

APPENDIX D

ents, and that, therefore, the respondents must be deemed to have authorized the stock payments in advance of the actual application of the money. The additional facts about this matter are that the selling agent was a corporation closely allied with the appellant, kept the appellant's books of account, advised the appellant in its business, and was not authorized by the respondents to pay any of their money for stock but did so at the appellant's request. It is obvious that there is no merit in the appellant's suggestion of a previous authorization.

The judgments appealed from are affirmed.

TOLMAN, C. J., BEALS, MILLARD, and BEELER, JJ., concur.

[No. 23248. *En Banc.* July 24, 1931.]

THE STATE OF WASHINGTON, *on the Relation of A. M. Atwood et al., Appellant*, v. MELVIN S. WOOSTER, *as County Assessor, Respondent.*[1]

[1] TAXATION (38)—PROPERTY SUBJECT—EXEMPTIONS—REQUIREMENT OF EQUALITY AND UNIFORMITY. The requirements of Const. Art. VII, §§1 and 2, that all property not exempt under the Federal law or under the constitution shall be taxed in proportion to its value and that the legislature must provide for a uniform and equal rate of assessment and taxation on all property according to its value in money, were completely abrogated by the 14th amendment to the state constitution, which provides that all taxes shall be uniform upon the same class of property within the territorial limits of the authority levying the tax, and that such property as the legislature may, by general laws, provide shall be exempt from taxation.

[2] SAME (39)—PROPERTY SUBJECT—POWER TO EXEMPT—RESTRICTIONS ON EXEMPTIONS. Laws of 1931, p. 279, § 1, providing that all moneys and what are popularly called credits or intangibles shall be exempt from taxation, was within the authority of the 14th amendment, providing that taxes shall be uniform upon

Reported in 2 P. (2d) 653.

the same class of property, and that such property as the legislature may, by general laws, provide shall be exempt from taxation.

[3] CONSTITUTIONAL LAW (14) — GRANT OR LIMITATION OF POWERS — CONSTITUTION OF UNITED STATES — LAWS RESPECTING TAXATION. The fifth amendment of the Federal constitution is a limitation upon the Federal government and not on the sovereign power of the states in the matter of state taxation.

[4] SAME (111) — EQUAL PROTECTION OF LAWS — TAXATION OF PROPERTY. Laws of 1931, p. 279, § 1, classifying property for the purpose of taxation and exempting money and credits or intangibles, is not a denial of the equal protection of the laws in the constitutional sense.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered April 9, 1931, dismissing an application for a writ of mandate to compel a county assessor to list intangible property for taxation, after a trial on the merits to the court. Affirmed.

Hyland, Elvidge & Alvord, for appellant.

The Attorney General, John A. Homer, Assistant, *Robert M. Burgunder*, and *Arthur M. Hare*, for respondent.

Poe, Falknor, Falknor & Emory, Grinstead, Laube, Laughlin & Meahim, Kerr & McCord, Preston, Thorgrimson & Turner, Shorts & Denney, Todd, Holman & Sprague, and *Tanner & Garvin*, *Amici Curiae*.

TOLMAN, C. J.—Relators made application to the trial court for a writ of mandate, to be directed to the respondent as county assessor of King county, requiring him to list for purposes of taxation as of March 1, 1931, all moneys in bank, mortgages, notes, money, certificates of deposit, tax certificates, judgments, state, county, municipal and school district bonds and warrants, and all other property, both tangible and intan-

gible, which might be found in his county. Respondent appeared and demurred, and his demurrer having been overruled, he answered, making certain denials and setting up, as affirmative defenses: (1) Chapter 96, page 279, Laws of 1931, pleading that thereunder he had no power to assess for taxation purposes any of the property described in that act; (2) that such property is exempt from taxation under the amendment to the constitution adopted in November, 1930; and (3) that, if such property is taxable, he has no authority, means or machinery to assess it.

Demurrers were interposed to these affirmative defenses, and were overruled. Evidence was received to the effect that large sums of money and intangible property of various kinds existed in the county, and that respondent did not intend, and believed that he had no right under the law, to assess such property. Other facts were made to appear which we do not now regard as material.

From a judgment denying the writ, the relators have appealed.

[1] Prior to the adoption by the people of the constitutional amendment of 1930, the first two sections of article VII of our constitution provided, among other things: (1) That all property not exempt under the Federal law or under the constitution "shall be taxed in proportion to its value;" (2) that the legislature must provide for a uniform and equal rate of assessment and taxation on all property according to its value in money. We do not now notice sections 3 and 4, because their provisions are not here material, and, moreover, they were in effect re-adopted by the amendment.

It was under these former constitutional provisions that this court held, in *State ex rel. Wolfe v. Parmenter*, 50 Wash. 164, 96 Pac. 1047, 19 L. R. A. (N. S.) 707,

that mortgages, bonds, warrants and other like intangibles might by the legislature be classified as credits, and so escape direct taxation, but that money could not be so classified. The same subject was again reviewed in *State ex rel. Egbert v. Gifford*, 151 Wash. 43, 275 Pac. 74, where the decision in the *Parmenter* case was followed, and again it was held that intangibles might by the legislature be classed as credits, and thus exempted from direct taxation. But it was there expressly pointed out that the *Parmenter* case did not hold that the legislature must so exempt credits, nor did this court ever so hold.

The constitutional provisions upon which these two cases were decided were entirely swept away by the amendment of 1930, and in their place we have something distinct and different. The new and substituted constitutional provisions read:

"Section 1. The power of taxation shall never be suspended, surrendered or contracted away. All taxes shall be uniform upon the same class of property within the territorial limits of the authority levying the tax and shall be levied and collected for public purposes only. The word 'property' as used herein shall mean and include everything, whether tangible or intangible, subject to ownership. All real estate shall constitute one class: *Provided*, That the Legislature may tax mines and mineral resources and lands devoted to reforestation by either a yield tax or an *ad valorem* tax at such rate as it may fix, or by both. Such property as the Legislature may by general laws provide shall be exempt from taxation. Property of the United States and of the state, counties, school districts and other municipal corporations, and credits secured by property actually taxed in this state, not exceeding in value the value of such property, shall be exempt from taxation. The Legislature shall have power, by appropriate legislation, to exempt personal property to the amount of three hundred dollars ($300) for each head of a family liable to assessment and taxation under the

provisions of the laws of this state of which the individual is the actual *bona fide* owner." Laws of 1929, page 499, chapter 191.

What was the purpose of this drastic and radical change? Perhaps a fair answer is to be found in the language employed in the *Parmenter* case, *supra*, where it is said:

"It may be stated in this connection, as a matter of common knowledge, that one of the most fruitful sources of inequality in taxation is the attempt to tax credits. Laws for that purpose can never be effectively enforced. Efforts to conceal the existence of the credits are so successful that a few honest persons pay the taxes and the large majority of holders do not. Moreover, in practical experience, the tax is not really paid by the holders of the credit, but it is paid by his debtor."

These were the evils sought to be eradicated and abolished, and to that end the requirements that a uniform tax be assessed against all property were swept away, and in their place were adopted constitutional provisions which say nothing about uniformity, and do not provide that all property shall be taxed, but which do permit of the classification of all property, and provide that all taxes shall be uniform upon the same class of property, and also that such property as the legislature may provide shall be exempt from taxation. So that the legislature, freed from the former limitations, may now determine what property shall be taxed, the different rates upon which different classes of property shall be taxed, and what property shall pay no tax at all, subject only to the limitations found in the new constitutional provisions.

[2] Under these new constitutional provisions, the act of 1931, chapter 96, Laws of 1931, page 279, was duly enacted, with an emergency clause placing it in

immediate effect. The act, aside from the emergency clause, reads:

"Section 1. All monies and credits including mortgages, notes, accounts, certificates of deposit, tax certificates, judgments, state, county and municipal bonds and warrants and bonds and warrants of other taxing districts, bonds of the United States and of foreign countries or political subdivisions thereof and the bonds, stocks or shares of private corporations shall be and hereby are exempted from *ad valorem* taxation."

Here the legislature placed money and what are popularly called credits or intangibles all in one general class. We see nothing unreasonable in such a classification, because, as pointed out in the language quoted from the *Parmenter* case, these are all of the same fugitive character, permitting of ready concealment, and alike, when an attempt is made to tax them, resulting in non-enforcement and in inequality.

That the people, in amending the constitution, may have believed that the legislature would provide for such a lesser rate of taxation on this class of property as would lead to proper results and a lessening of the tax burden on other property, instead of its total exemption, is a matter between the legislature and those to whom it is responsible, and with which we as a court have nothing to do.

But it is argued that, under the case of *State ex rel. Chamberlin v. Daniel*, 17 Wash. 111, 49 Pac. 243, the legislature has no power or authority to create such an exempt class of property. Again it must be remembered that the *Daniel* case was decided under the old constitutional provisions, and there much stress is laid upon those provisions which have been wholly abrogated and abolished. When that case is carefully read, and the attempt is made to apply its several arguments

to the new constitutional provisions, it is at once apparent that it can not now be an authority against the classification and exemption under attack. The sentence in the new constitutional provision, "Such property as the legislature may by general laws provide shall be exempt from taxation," is wholly complete within itself, and likewise it is wholly independent of that which precedes or which follows it. Its language is too plain to require any construction, and must and does mean just what the words used indicate.

[3] Appellants seem to argue that the 1931 legislative act is in violation of the fifth and fourteenth amendments to the Federal constitution. As we understand it, the fifth amendment is a limitation upon the Federal government, and not upon the sovereignty of the several states. Surely if the states are sovereign in anything, it must be in the matter of taxation, upon which their very life depends.

[4] Nor do we think there is any denial of the equal protection of the laws in the constitutional sense in the act of 1931. Such a classification for purposes of taxation seems to have been sustained by the supreme court of the United States. *Puget Sound Power & Light Co. v. King County*, 264 U. S. 22, 68 L. Ed. 541; *Bell's Gap Railroad Co. v. Pennsylvania*, 134 U. S. 232, 33 L. Ed. 892.

The judgment of the trial court is right and must be, and it is, affirmed.

PARKER, HOLCOMB, MITCHELL, BEALS, MAIN, MILLARD, and BEELER, JJ., concur.

APPENDIX E

PDF **RCW 84.36.070**

Intangible personal property—Appraisal.

Language at issue in *State ex rel. Atwood v. Wooster*, 163 Wash. 659, 2 P.2d 653 (1931).

(1) Intangible personal property is exempt from ad valorem taxation.

(2) "Intangible personal property" means:

(a) All moneys and credits including mortgages, notes, accounts, certificates of deposit, tax certificates, judgments, state, county and municipal bonds and warrants and bonds and warrants of other taxing districts, bonds of the United States and of foreign countries or political subdivisions thereof and the bonds, stocks, or shares of private corporations;

(b) Private nongovernmental personal service contracts, private nongovernmental athletic or sports franchises, or private nongovernmental athletic or sports agreements provided that the contracts, franchises, or agreements do not pertain to the use or possession of tangible personal or real property or to any interest in tangible personal or real property; and

(c) Other intangible personal property such as trademarks, trade names, brand names, patents, copyrights, trade secrets, franchise agreements, licenses, permits, core deposits of financial institutions, noncompete agreements, customer lists, patient lists, favorable contracts, favorable financing agreements, reputation, exceptional management, prestige, good name, or integrity of a business.

(3) "Intangible personal property" does not include zoning, location, view, geographic features, easements, covenants, proximity to raw materials, condition of surrounding property, proximity to markets, the availability of a skilled workforce, and other characteristics or attributes of property.

(4) This section does not preclude the use of, or permit a departure from, generally accepted appraisal practices and the appropriate application thereof in the valuation of real and tangible personal property, including the appropriate consideration of licenses, permits, and franchises granted by a government agency that affect the use of the property.

[**1997 c 181 § 1**; **1974 ex.s. c 118 § 1**; **1961 c 15 § 84.36.070**. Prior: **1931 c 96 § 1**; RRS § 11111-1. FORMER PART OF SECTION: 1925 ex.s. c 130 § 5, part, now codified in RCW **84.04.080**.]

NOTES:

Construction—1997 c 181: "This act shall not be construed to amend or modify any existing statute or rule relating to the treatment of computer software, retained rights in computer software, and golden and master copies of computer software for property tax purposes." [**1997 c 181 § 3**.]

Intent—No relation to other state's law—1997 c 181: "Nothing in this act is intended to incorporate and nothing in this act is based on any other state's statutory or case law." [**1997 c 181 § 4**.]

Severability—1997 c 181: "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." [**1997 c 181 § 5**.]

Applicability—1997 c 181: "This act is effective for taxes levied for collection in 1999 and thereafter." [**1997 c 181 § 6**.]

Report to legislature—1997 c 181: "By December 1, 2000, the department of revenue shall submit a report to the house finance committee, the senate ways and means committee, and the office of the governor on tax shifts, tax losses, and any litigation resulting from this act." [**1997 c 181 § 7**.]

APPENDIX F

CHAPTER 96.

[S. B. 238.]

EXEMPTION OF INTANGIBLES FROM TAXATION.

AN ACT relating to taxation, exempting certain intangible property from ad valorem taxation and declaring that this act shall take effect immediately.

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

Monies, credits, exempt.

SECTION 1. All monies and credits including mortgages, notes, accounts, certificates of deposit, tax certificates, judgments, state, county and municipal bonds and warrants and bonds and warrants of other taxing districts, bonds of the United States and of foreign countries or political subdivisions thereof and the bonds, stocks or shares of private corporations shall be and hereby are exempted from *ad valorem* taxation.

Effective immediately.

SEC. 2. This act is necessary for the immediate support of the state government and its existing institutions and shall take effect immediately.

Passed the Senate February 27, 1931.
Passed the House March 11, 1931.
Approved by the Governor March 19, 1931.

APPENDIX G

SUPREME COURT OF THE STATE OF WASHINGTON

CHRIS QUINN, an individual; CRAIG LEUTHOLD, an individual; SUZIE BURKE, an individual; LEWIS and MARTHA RANDALL, as individuals and the marital community comprised thereof; RICK GLENN, an individual; NEIL MULLER, an individual; LARRY and MARGARET KING, as individuals and the marital community comprised thereof; and KERRY COX, an individual

RESPONDENTS,

v.

STATE OF WASHINGTON; DEPARTMENT OF REVENUE, an agency of the State of Washington; VIKKI SMITH, in her official capacity as Director of the Department of Revenue, and EDMONDS SCHOOL DISTRICT, TAMARA GRUBB, MARY CURRY, and WASHINGTON EDUCATION ASSOCIATION

APPELLANTS.

Case No. 1-100769-8

INFORMAL TRANSCRIPT OF PORTIONS OF ORAL ARGUMENT
THURSDAY, JANUARY 26, 2023, AT 9:02 AM

SEGMENTS TRANSCRIBED:
20 min., 45 sec.–25 min., 57 sec.
and
53 min., 51 sec.–57 min., 33 sec.

APPEARANCES:

FOR PETITIONERS: Hon. Bob Ferguson
Cameron Comfort
Jeffrey Todd Even
Peter B. Gonick
Charles E. Zalesky
Noah Guzzo Purcell
Attorneys at Law

FOR PETITIONERS:	Paul J. Lawrence Sarah Stewart Washburn Attorneys at Law
FOR RESPONDENTS:	Scott M. Edwards Callie Anne Castillo Eric Rolf Stahlfeld Attorneys at Law

20:45 JUSTICE JOHNSON: Does it make a difference counsel, that under the incorrect and harmful argument you're presenting, that we were conducting and deciding a constitutional issue? Here's one thing that troubled me a little bit about your arguments that I--we've seen before--is that it sort of stays away from the constitutional definition that we were interpreting in *Culliton* and afterwards, and if you look at that, is that definition, or that resolution in *Culliton*, that far afield from the definition that says property is everything wherever it's located? And if that's our starting point, how is that incorrect?

21:25 MR. LAWRENCE: Well, two things. First of all, as early as the *Stiner* case, this court moved away from the notion that "everything" is everything. They said that. They said--you know, they said, "It is true that the Constitution defines property as anything subject to ownership, and, in a sense, one's business and its earnings are owned by him," but then goes on to allow privilege and excise tax based on that.

21:52 JUSTICE JOHNSON: So, the claim that you're making today could equally be presented if we were looking at the validity of *Stiner*.

22:07 MR. LAWRENCE: In part. But I think the point that I want to get at is that the "everything" language is not the key language of the amendment. What's key about the amendment is that it added intangible property to the definition of property,

so everything ownership but it then goes property tangible and intangible. So, the question that was not directly addressed and which this Court--I'll get to in a second--has addressed inconsistently, is whether income is intangible property. I don't think anyone says income is real property, but the argument is that income is intangible property. And, this court has been very inconsistent in its treatment of income, sometimes treating it as intangible property, but often treating it as not. For example, the cases that Mr. Purcell talked about where you have income being taxed, the gross income of a business, it's an excise tax. You also have the case where this court upheld the taxation of the income of public employees above a certain level. Now, that looks exactly like an income tax but was upheld by this court. So, you have incredible inconsistency with the treatment of income by this court, in addition to the errors of saying that *Culliton* affirmatively decided and affirmatively made a decision and looked at all these issues correctly. It did not.

23:27 JUSTICE STEPHENS: So, Mr. Lawrence do you think the state would agree with your characterization that those excise taxes are taxes on income?

MR. LAWRENCE: They are measured by income, but I think the state's argument is that if you have a transactional tax--tax based on transaction--but you don't uh--and, and it's related to privileges that you get as a part of your residency at Washington. But, again, there's inconsistency there because it makes no sense to treat income from a business, and in that case, that was held to be an excise tax based on the privileges

that a business has, but income from a person is going to be treated like intangible property. The person has the same privileges of residency, the same protections from government, as a business--this--

24:18 JUSTICE STEPHENS: So, can I ask--I mean your argument started with history, and they say, you know, "a page of history is worth a volume of logic," so whatever makes sense under a particular logical approach, let me just ask this, can you point to any example in Washington after the 14th Amendment that broadened property to include intangibles of an ad valorem tax on intangible property?

JUSTICE STEPHENS: Sorry, that's a little unfair. I was just saying it's all about history, and you don't have a book in front of you, but I just wonder if you can think of an example of an ad valorem property tax on intangible property.

MR. LAWRENCE: Well, there may be one in the future. Right now, real property, which is taxed on an assessment basis, the authority--I don't think there's any doubt that the state has the authority to tax ownership of stocks, bonds, and other intangibles, they just have chosen not to do that.

25:18 JUSTICE MADSEN: And how would that look as a tax?

MR. LAWRENCE: Well, I assume that it would be -

JUSTICE MADSEN: And particularly in comparison to what we have in front of us.

MR. LAWRENCE: Yes--it will be very different. I think like a real property you get an assessment every year, what the value of your real property is. If you had stocks, I

assume the state would adopt a date upon which your stocks would have value and maybe you could look up in the stock market to see what your stocks were valued at that date and then there would be a tax based on the valuation of the stocks. It has nothing to do with gains, it has nothing to do with transactions, it simply has to do with mere ownership of intangible property.

25:57 CHIEF JUSTICE GONZALEZ: And the same thing could be done with digital currency I suppose.

MR. LAWRENCE: I don't know. I'm not--I hopefully have never been involved in digital currency and never have educated myself about it, but if you're holding something for investment purposes like that--if you take, if you take cash and put it into an annuity that would be an intangible asset. If you put cash and put it into a savings account so it's sitting there earning interest, that would be an intangible property. But the earning of income is not a tangible property is the bottom line of our argument.

. . . .

53:51 JUSTICE STEPHENS: So, could I ask you--and I will, I do have another question related to the property tax issue, but on that, Ms. Castillo distinguishes the real estate excise tax because it's the sale price, essentially the sale that's being taxed.

MR. MCKENNA: Right.

JUSTICE STEPHENS: So, under the argument you just made, which I think dovetails with that distinction, would a

constitutional--I guess, would have a clean up to this capital gains tax meet your definition of an excise tax if it simply didn't net it out. If it just said whenever there's a sale of a capital asset that results in a gain of a certain amount we're taxing that sale.

54:28 MR. MCKENNA: That would correct one flaw in the tax for sure because then the incident of the tax can be the sale or exchange, but what it wouldn't solve is the problem that this tax attempts to tax income from transactions outside of the state over which the state has no jurisdiction.

JUSTICE STEPHENS: Ok, so the dormant commerce clause.

MR. MCKENNA: Third, it would not solve the problem that the real estate excise tax is imposed on the parties to the transaction, to the legal owner. This tax is imposed on income recognized by, among others, beneficial owners, who aren't parties to the transaction--who have not engaged in a voluntary transaction. So, this tax--could an excise tax be created on the sale or transfer of long-term capital assets? Yes, if it applied to the parties of the transaction, if the activity was limited to activity within the state of Washington, not outside the state of Washington, and so forth.

55:21 JUSTICE STEPHENS: OK, so my--the question I asked opposing counsel, and it goes back to the 14th amendment which encompasses intangible property, can you give me an example of an ad valorem property tax on intangibles?

MR. MCKENNA: Not off the top of my head, no. Property, you know, there are two kinds of taxes. There are excise taxes and there are property taxes. Excise taxes are indirect, they're voluntary, and they're imposed for the exercise for substantive privilege granted by the state. Property taxes are direct taxes that are unavoidable. That's why an income tax is a property tax because it is a direct tax on you, the owner of the income, and you can't avoid it once you've recognized the income.

JUSTICE STEPHENS: This is why I'm asking the question is--and I'm sorry, I should have brought this cite in with me, but there is a little statute in the tax code that says the legislature shall not impose ad valorem property taxes on intangible property. Why?

MR. MCKENNA: I don't know the answer to that your honor. I think what matters for the present analysis is that income, you know, is that a tax--to be an excise tax, has to meet the elements of the law established by this court. I mean, this isn't just about stare decisis for income as property. This is about overruling your precedents. It's what the state is asking you to do, is to effectively overrule your precedents on excise taxes because you would have to find –

56:50 JUSTICE MONTOYA-LEWIS: I have a question, this is relevant--I think is relevant to this point. So, you started in your argument talking about various attempts to bring this question to the electorate.

MR. MCKENNA: Yes.

JUSTICE MONTOYA-LEWIS: OK. So, and I know you--well, this is the question. It seems to me that some of your argument related to what you were just saying about precedent, as well, is dependent upon the vote of the electorate. So, the electorate could change the definition.

MR. MCKENNA: The definition of income, Your Honor?

JUSTICE MONTOYA-LEWIS: Yes. Do you agree with that?

MR. MCKENNA: They could change--they could--they could vote to amend the constitution to exclude income from the definition of property, and they've had six opportunities to do that as a matter of fact.

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[END OF INFORMAL TRANSCRIPT]

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the date written below, I caused a true and correct copy of the foregoing to be delivered to the following parties in the manner indicated:

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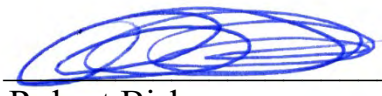
DATED this 10th day of March, 2023.



Robert Bishop

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