97557-4

NO. 79648-8-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

PEACEHEALTH ST. JOSEPH MEDICAL CENTER AND
PEACEHEALTH ST. JOHN MEDICAL CENTER,

Appellants,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Respondent.

PETITION FOR REVIEW BY THE SUPREME COURT

Dirk Giseburt
WSBA No. 13949
Michele Radosevich
WSBA No. 24282
David Maas, WSBA No. 50694
Davis Wright Tremaine LLP
Attorneys for PeaceHealth

Suite 3300, 920 Fifth Avenue
Seattle, Washington
98104-1610
206-622-3150
michelradosevich@dwt.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Statutes

Session Laws

Other Authorities

I. INTRODUCTION

At issue here is RCW 82.04.4311, the statutory deduction that allows public and nonprofit hospitals to deduct the amounts received from Medicaid and the Children's Health Program, as well as Medicare, from gross revenues for purposes of the state's business and occupation ("B&O") tax. The Department of Revenue ("Department") contends that the deduction for Medicaid and Children's Health is limited to revenue received from the State of Washington's version of these federal programs. This interpretation flies in the face of the rules of statutory consstruction and violates the Commerce Clause of the federal constitution. The Department's interpretation, moreover, conflicts with the controlling precedent of *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, 520 U.S. 564, 117 S. Ct. 190, 137 L. Ed. 2d 852 (1997), in which the Supreme Court invalidated a tax exemption that differentiated between nonprofit camps based on the residency of the campers.

II. IDENTITY OF PETITIONER

PeaceHealth St. Joseph Medical Center and PeaceHealth St. John Medical Center (collectively, "PeaceHealth") petition for review.

III. COURT OF APPEALS DECISION

PeaceHealth asks review of the Court of Appeals decision filed July 22, 2019, in the above-titled case. The decision is attached hereto as Appendix A.

IV. ISSUES PRESENTED FOR REVIEW

A. Does the statutory language contained in RCW 82.04.4311 limit the B&O tax deduction for Medicaid and Children's Health receipts to receipts from the Washington state programs?

B. If so, does the statute unlawfully discriminate against interstate commerce in violation of the Commerce Clause of the U.S. Constitution by making it more expensive to provide hospital services to low-income persons from other states than low-income Washington residents?

V. STATEMENT OF THE CASE

A. The Hospitals' Activities.

St. Joseph Medical Center and St. John Medical Center are nonprofit hospitals owned by PeaceHealth, a nonprofit health care system with facilities in Washington, Oregon, and Alaska. St. Joseph Medical Center is located in Bellingham, Washington, and St. John Medical Center is located in Longview, Washington. Certified Admin. Rec. 255 (Urban

Dec., ¶ 2).[1] Both hospitals serve Medicaid and Children's Health patients from Washington and other states. St. John, located near the Oregon border, receives approximately 8.5 percent of its Medicaid revenues from states other than Washington, primarily Oregon. PeaceHealth also operates Southwest Medical Center in Vancouver, Washington, which receives approximately 13 percent of its Medicaid revenues from other states, also primarily Oregon. In contrast, St. Joseph receives approximately one percent of its Medicaid revenues from other states. *Id.*, ¶ 3.

Medicaid receipts constituted 15 percent of PeaceHealth's net patient service revenue in 2015. The receipts from federal and state government do not cover the cost of care. The unreimbursed cost of care rendered to Medicaid patients was over $22 million for St. John Medical Center and $36 million for St. Joseph Medical Center in fiscal year 2015. *Id.*, ¶ 4.

B. Proceedings.

PeaceHealth, on behalf of the two medical centers, applied for a refund from the Department for the period December 1, 2007 through December 31, 2008 for tax paid on out-of-state Medicaid and Children's

[1] The Board of Tax Appeals prepared and filed with Thurston County Superior Court two identical Certified Administrative Records for its respective dockets for the two Appellants, to be cited below as "AR".

Health receipts. PeaceHealth is entitled to deduct such receipts under RCW 82.04.4311(1), which provides as follows:

> A public hospital that is owned by a municipal corporation or political subdivision, or a nonprofit hospital, or a nonprofit community health center, or a network of nonprofit community health centers, that qualifies as a health and social welfare organization as defined in RCW 82.04.431, may deduct from the measure of tax amounts received as compensation for health care services covered under the federal medicare program authorized under Title XVIII of the federal social security act; medical assistance, children's health, or other program under chapter 74.09 RCW; or for the state of Washington basic health plan under chapter 70.47 RCW.

The Department denied the request.[2] The Department's position is that the legislature purposefully adopted a rule of unequal taxation of public and nonprofit hospitals with regard to Medicaid and Children's Health patient service revenues. Reimbursements for services provided to Washington program participants are deductible under the Department's interpretation, but not reimbursements for services provided to indigent Oregon residents or residents of other states.

PeaceHealth appealed to the Board of Tax Appeals ("BTA"), which held that the statute does provide hospitals a deduction for all Medicaid and Children's Health receipts, not just those paid by the State of Washington. The BTA decision is attached hereto as Appendix B.

[2] Refund claims for other periods and for other PeaceHealth facilities are pending internally at the Department and in Thurston County Superior Court.

The Department appealed to the Thurston County Superior Court, which reversed the BTA. PeaceHealth filed a Notice of Appeal with the Court of Appeals, Division II. Division II transferred the case to Division I, which concurred with the Superior Court in an unpublished decision dated July 22, 2019.

The most fundamental flaw of the Court of Appeals' decision is the holding that the discrimination in question – denying the deduction for compensation received for providing services to low-income persons qualified under Medicaid and Children's Health from other states, while granting the deduction for services to similarly situated Washington residents – is immune from Commerce Clause scrutiny. The court referenced U.S. Supreme Court statements that the Commerce Clause does not limit a state's actions when participating in a market or in advancing state programs and held:

> In this case, the B&O tax exemption assists nonprofit hospitals serving indigent Washington residents, a law that ultimately benefits the state finances because it is the state that procures and ultimately pays for these services.

Slip Op. at 9. The court cited no authority for the assertion that the deduction "benefits the state finances," and it is a false narrative. To the contrary, Washington's Medicaid reimbursement schedule is not based on

hospitals' costs, AR 40 (Busz Decl., ¶¶ 3-5), and "the deduction has no effect on the State's outlay." *Id.*, ¶ 6.

The Department has seized on this erroneous analysis – which it says "determines an unsettled or new question of law" and "would provide useful guidance to taxpayers and the courts" – as grounds for a motion to publish the Court of Appeals' decision in this case. *See* Department of Revenue's Motion to Publish at 3 (attached as Appendix C (appendices omitted)).

C. Medicaid.

Medicaid is a federal program that is administered by the states with marginal flexibility that is mostly irrelevant to hospital services. Medicaid is created and structured by federal law. There are some benefits that are considered optional for states, but these are not the major benefits of the program. What most of us would think of as core health services are required by federal law. AR 251 (Sauer Dec., ¶ 3).

Relevant to this case, federal Medicaid law mandates coverage of inpatient and outpatient hospital services, as well as laboratory and x-ray services. All states participate in Medicaid, and all states must offer these services. They are a national guarantee. The Medicaid program receives a majority of its funding from the federal, not state government, and

matching percentages of state and federal funds are set by the federal government. *Id.,* ¶ 4.

Another federal law requires that hospitals must treat patients across state lines. The federal Emergency Medical Treatment and Labor Act or EMTALA (42 U.S.C. § 1395dd) requires that hospitals serve all patients – not only patients from other states but patients from other countries. AR 251 (Sauer Decl., ¶ 5).

Washington hospitals may not discriminate against Medicaid or Medicare enrollees from other states. 42 C.F.R. § 431.52, a Medicaid regulation, provides that all states participating in Medicaid must "facilitate furnishing of medical services to individuals who are present in the state and are eligible for Medicaid under another state's plan." Medicaid and Medicare enrollees may cross state lines and receive care at any hospital in our state. A hospital could not choose to turn away a Medicaid patient from another state. Medicaid and Medicare enrollees who are traveling and not in their home state can expect to have their health insurance provided through Medicaid or Medicare fully accepted by a Washington State hospital. AR 251, 253 (Sauer Decl., ¶¶ 6, 12).

Consistent with PeaceHealth's experience cited above, the federal government reported that Medicaid represented 17% of national health expenditures in the US in 2017. Centers for Medicare & Medicaid

Services, https://www.cms.gov/research-statistics-data-and-systems/statistics-trends-and-reports/nationalhealthexpenddata/nhe-fact-sheet.html (visited Aug. 14, 2019; Medicare expenditures accounted for 20% of the total). Medicaid receipts from federal and state government do not cover the cost of care. AR 40 (Busz Decl., ¶ 3).

In order to help the State's public and nonprofit hospitals fill the gap between Medicaid costs and reimbursements, the 2002 legislature enacted HB 2732, Section 2 of which is now codified at RCW 82.04.4311. Section 1 of the bill announced the legislature's intent:

> The legislature finds that the provision of health services to those people who receive *federal or state* subsidized health care benefits by reason of age, disability, or lack of income is a recognized, necessary, and vital governmental function. As a result, the legislature finds that it would be inconsistent with that governmental function to tax amounts received by a public hospital or nonprofit hospital . . . when the amounts are paid under a health service program subsidized by *federal or state* government.

2002 Laws, ch. 314, sec. 1 (emphasis added). The legislature went on to provide that public and nonprofit hospitals were entitled to a refund of any B&O tax paid between 1998 and 2002 on services covered by either Medicare, Medicaid, or Children's Health services. *Id.*, sec. 4. This legislation was not a finely calibrated scheme attuned to managing Washington's financing of Medicaid benefits.

VI. ARGUMENT

This Court should accept review of this case for two reasons. First, as the Department's Motion to Publish attests, the case involves a significant question of law under the federal Commerce Clause. On this point, the opinion below directly conflicts with U.S. Supreme Court precedent in *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, 520 U.S. 564, 117 S. Ct. 190, 137 L. Ed. 2d 852 (1997). The petition thereby satisfies RAP 13.4(b)(1) and (3). Second, this case involves an issue of substantial public importance to Washington's public and nonprofit hospitals, particularly those hospitals near state borders and those providing specialized care to the entire northwest region of the United States, thereby satisfying RAP 13.4(b)(4).

A. This Case Presents a Significant Commerce Clause Question and Conflicts with U.S. Supreme Court Precedent.

The Court of Appeals improperly rejected PeaceHealth's position that the statute, as interpreted by the court and the Department, discriminates against interstate commerce in violation of the Commerce Clause. The court did not address controlling U.S. Supreme Court precedent. Instead, contrary to the record, the court claimed *ipse dixit* that the tax deduction "benefits the state finances because it is the state that procures and ultimately pays for [Medicaid] services." Slip Op. at 9. For

this reason, the court held the deduction statute is immune from Commerce Clause review. *Id.*

As the Department's Motion to Publish notes, the court's opinion addresses an important issue relating to the scope of the Commerce Clause, not previously addressed by Washington courts. *See* App. C at 4. Such a decision should be reviewed by this Court, especially since the court below cited no authority or factual basis for the key assertion underlying its result. Given that Medicaid reimbursements are not based on the provider's costs, and the tax deduction has no impact on the State's Medicaid outlays, *see* AR 40 (Busz Decl.), the deduction has no direct benefit to the State and the decision below is fundamentally wrong.

The Commerce Clause provides that "[t]he Congress shall have Power ... to regulate Commerce … among the several States." U.S. Const., Art. I, § 8. "It has long been accepted that the Commerce Clause not only grants Congress the authority to regulate commerce among the States, but also directly limits the power of the States to discriminate against interstate commerce." *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273, 108 S. Ct. 1803, 100 L. Ed. 2d 302 (1988). This limitation—often referred to as the "dormant" Commerce Clause—"prohibits discrimination against interstate commerce and bars state regulations that unduly burden interstate commerce." *Sam Francis*

Found. v. Christies, Inc., 784 F.3d 1320, 1323 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 795 (2016). "The point [of the dormant Commerce Clause] is to effectuate the Framers' purpose to prevent a State from retreating into the economic isolation that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Dep't of Revenue of Kentucky v. Davis*, 553 U.S. 328, 338, 128 S. Ct. 1801, 170 L. Ed. 2d 685 (2008) (citations and punctuation omitted).

A statute can discriminate against out-of-state interests in three different ways: (a) facially, (b) purposefully, or (c) in practical effect. *Wyoming v. Oklahoma*, 502 U.S. 437, 454–55, 112 S. Ct. 789, 117 L. Ed. 2d 1 (1992). Although dormant Commerce Clause doctrine has developed largely in the context of laws that discriminate against out-of-state *businesses*, the Supreme Court has explicitly stated that unlawful "[e]conomic protectionism is not limited to attempts to convey advantages on local merchants; it may include attempts to give local consumers an advantage over consumers in other States." *Camps Newfound*, 520 U.S. at 577–78 (quoting *Brown–Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 580 (1986)); *see also Maryland v. Louisiana*, 451 U.S. 725, 756–760, 101 S. Ct. 2114, 68 L. Ed. 2d 576 (1981) (striking down under dormant Commerce Clause state statute favoring in-state gas consumers and discriminating against purchasers of gas moving in

interstate commerce); *Pennsylvania v. West Virginia*, 262 U.S. 553, 598, 43 S. Ct. 658, 67 L. Ed. 1117 (1923) (dormant commerce clause prohibits state from regulating "interstate business to the advantage of the local consumers").

Moreover, and importantly, the Commerce Clause also prohibits a state from inhibiting its own citizens from engaging in commerce with customers or vendors from other states. *See Comptroller of the Treasury of Maryland v. Wynne*, __ U.S. ___, 135 S. Ct. 1787, 1802, 191 L. Ed. 2d 813 (2015) (lack of tax credit for income tax paid by Maryland residents to other states on income from non-Maryland sources "is inherently discriminatory and operates as a tariff" on interstate investing); *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, ___ U.S. ___, 139 S. Ct. 2449, 2471 (2019) (quoting *Granholm v. Heald*, 544 U.S. 460, 473 (2005)) (state action depriving citizens of right of access to markets of other states on equal terms with the home state violates Commerce Clause).

In *Camps Newfound*, Maine offered property tax exemptions for property used by charitable institutions, but restricted the exemption to institutions operated principally for the benefit of Maine residents. 520 U.S. at 575-76. Because the Maine statute expressly distinguished between institutions based on the residence of the consumers they served and thereby discouraged charities from benefitting non-residents, the

Supreme Court found that the tax exemption was facially discriminatory and violated the Commerce Clause. *Id*. The court recognized that "the discriminatory burden is imposed on the out-of-state customer indirectly by means of a tax on the entity transacting business with the non-Maine customer," but "[t]his distinction makes no analytic difference." *Id*. at 580. "Imposition of a differential burden on any part of the stream of commerce—from wholesaler to retailer to consumer—is invalid." *Id.*

In *Camps Newfound*, the Town contended that the discrimination against out-of-state consumers was justified because the disputed tax treatment subsidized charities that "focus their activities on local concerns." *Id.* at 589. The Supreme Court rejected the Town's argument, holding that a discriminatory tax provision may not be justified under the Commerce Clause by its purported role in funding public programs. *Id.* The Town also argued that the discriminatory law should be exempt from review under a narrow exception to the dormant Commerce Clause for instances where the state is participating in the market like a private buyer or seller, as opposed to regulating the market "in its distinctive governmental capacity." *Limbach*, 486 U.S. at 277; *see Camps Newfound*, 520 U.S. at 592-95. The Court rejected this argument, reiterating its prior holding that "assessment and computation of taxes [is] a primeval government activity" that is "not the sort of direct state involvement in the market that

falls within the market-participation doctrine." *Camps Newfound*, 520 U.S. at 593 (citing *Limbach*, 486 U.S. at 277).

The Court of Appeals did not address *Camps Newfound,* let alone differentiate it. The court devoted a page and a half to its discussion of the issue, concluding that the Commerce Clause did not apply because the tax exemption "benefits the state finances because it is the state that procures and ultimately pays for [Medicaid] services." Slip Op. at 9. However, neither the factual record nor the law supports that summary disposition of the issue. The Department's Motion to Publish claims that the court's application of *Department of Revenue of Kentucky v. Davis* is precedent-worthy, *see* App. C at 4, but in fact the opinion misapplied *Davis.* That case upheld Kentucky's income tax exemption for interest received on Kentucky's own state and municipal bonds, but not other states', because the exemption directly benefited the marketing of the State's own economic product. In this case, in contrast, the factual record expressly shows that the tax exemption has no effect on the State's Medicaid expenditures. *See* AR 40 (Busz Decl.)

The Court of Appeals' decision invites the legislature to engage in tax discrimination against out-of-state businesses and customers, and in-state economic interests that engage in interstate commerce, whenever there is some element of public finance involved in the activity, even if the

tax does not bear on the State's cost of supporting that activity. The Department has admitted that the decision below involves a significant question of constitutional law, and the facts show the court's conclusion directly conflicts with Supreme Court precedent. Review is merited.

B. This Case Involves an Issue of Substantial Public Importance to Public and Nonprofit Hospitals.

This case is important to Washington public and nonprofit hospitals because Medicaid is an important piece of the economic picture for the hospitals. As explained above in Part IV, Medicaid is a substantial component of hospital revenue, and hospitals, unlike some other providers, have no ability to turn down Medicaid patients. And finally, 42 C.F.R. § 431.52 requires hospitals to provide services to any person who is eligible for Medicaid in any state.

Medicaid builds on the existing health care delivery system, which does not pay attention to state boundaries. Washington's health care system is designed to deliver care not only to state residents, but also to residents from throughout the region. Our state has structures in place that specifically require Washington to serve as a regional center of care. As Governor Christine Gregoire has stated on behalf of the State in a number of amicus filings in federal health care access laws,

> Harborview Medical Center, operated by the University of Washington, is the only Level I trauma center for the four-

> state region of Washington, Alaska, Montana, and Idaho. Uninsured individuals who suffer catastrophic injuries from accidents and other unpredictable events are transported to Harborview for the care it can uniquely provide. In 2009, Harborview cared for 12,028 patients from states in the region outside of Washington. 10% of patients from Alaska and Montana and 6% from Idaho were uninsured. Many more were on Medicaid, which pays only a portion of hospital care costs. In the last five years, Idaho alone has paid Harborview $8,658,000 for uninsured and Medicaid patients from that state who received care.

Brief of Amicus Curiae Governor of Washington, 2011 WL 1977363, *19-*20, Thomas More Law Center v. Obama, 651 F.3d 529 (6th Cir. 2011) (No. 10-2388) (the "Governor's Brief") (supporting minimum coverage provisions of Affordable Care Act).[3]

This interstate delivery system is not just at Harborview. Appellant St. John Medical Center and the other PeaceHealth facility in the area, Southwest Medical Center in Vancouver, are part of Oregon's trauma care system. *See* Oregon Health Authority, Trauma Systems, https://www.oregon.gov/oha/PH/ProviderPartnerResources/EMSTraumaSystems/TraumaSystems/Pages/desiglvl.aspx . Other Washington hospitals routinely receive patients from across state lines. Hospitals in Spokane, for example, provide significant services to patients from Idaho. Hospitals

[3] The numbers cited by Governor Gregoire came from public disclosure requests made to Harborview by attorneys for the Governor. *See* Governor's Brief, 2011 WL 1977363, at *19-*20 nn. 25, 27.

in Walla Walla provide significant services to patients from rural Oregon. AR 252 (Sauer Decl., ¶ 9).

Pediatric services are another example of cross-state collaboration. Seattle Children's Hospital provides lifesaving services to very sick children from around the Northwest. Seattle Cancer Care Alliance also provides services to patients from around the region. *Id.,* ¶ 10.

Our state also is part of a system of regional medical education. The Washington legislature has enacted legislation designed to foster collaboration with surrounding states in medicine. *See, e.g.*, RCW 28B.15.225 (allowing waiver of out-of-state tuition rates for medical students from Alaska, Montana, Idaho, or Wyoming as part of regional health planning). The five states in the WWAMI program partner with the UW School of Medicine to educate medical students from and for their states. These students often are providing care to Medicaid residents from other states. AR 252 (Sauer Decl., ¶ 11).

Given the design of Medicaid and the regional nature of health care services, taxing Medicaid receipts differently when the patients come from Oregon or Idaho only exacerbates the burden on public and nonprofit hospitals to recover the cost of uncompensated care from other sources. The increased tax is not and cannot be billed to the patient. It is paid by the hospital and impacts the hospital's ability to provide care, acting as an

added penalty over and above the cost of uncompensated care under Medicaid. The two hospitals here, for instance, provided $58 million in uncompensated care to Medicaid patients in FY 2015. Increasing their costs of serving Medicaid patients just increases the cost of health care services generally. And by singling out hospitals near the state's borders, the tax simply increases the costs of health care services to Washington residents who live in those areas.

In the context of defending the Affordable Care Act, which greatly expanded Medicaid eligibility, the Governor has argued on behalf of the State against a penalty for the provision of cross-border services:

> [I]t is unrealistic to suppose that the states can address these economic impacts on a state by state basis. The reality is quite different: a health care network where geographic distance and specialized medical centers, rather than state borders, are key factors to care and where any person might unexpectedly be transported to another state for care. The magnitude of such activity, involving the consumption of health care goods and services by those who are unable to pay their full cost, is another reason the Governor welcomes the ACA as a federal solution that will both rationalize payment for such care and relieve some of the burden on State resources.

Governor's Brief, 2011 WL 1977363, at *20.

The burden of a differential tax on serving low-income residents of other states is real and it extends far beyond the two hospitals in this case. Washington's hospitals deserve an answer from this Court as to the rationality of taxing only out-of-state Medicaid receipts.

VII. CONCLUSION

For the above-stated reasons, this Court should accept review.

RESPECTFULLY SUBMITTED this 19th day of August, 2019.

Davis Wright Tremaine LLP
Attorneys for PeaceHealth

By */s/ David Maas*
Dirk Giseburt, WSBA 13949
Michele Radosevich, WSBA 24282
David Maas, WSBA 50694

CERTIFICATE OF SERVICE

I, Gina Chan, hereby certify under penalty of perjury under the laws of the State of Washington that on the date below I caused to be served via electronic mail with the below listed parties the following documents:

Petition for Review by the Supreme Court

Rosann Fitzpatrick
Attorney General/Revenue
Division
PO Box 40123
Olympia, WA 98504-0123
RosannF@atg.wa.gov
DebbieA@atg.wa.gov
REVolyEF@atg.wa.gov

Attorneys for Respondent
State of Washington Department of
Revenue

DATED at Seattle, Washington, this 19th day of August, 2019.

Gina Chan

APPENDIX A

FILED
7/22/2019
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

PEACEHEALTH ST. JOSEPH MEDICAL CENTER AND PEACEHEALTH ST. JOHN MEDICAL CENTER, Appellants, v. STATE OF WASHINGTON, DEPARTMENT OF REVENUE, Respondent.	)	No. 79648-8-I DIVISION ONE UNPUBLISHED OPINION FILED: July 22, 2019

ANDRUS, J. — PeaceHealth St. Joseph Medical Center and St. John Medical Center[1] appeal a superior court determination that, under RCW 82.04.4311, they are not entitled to a business and occupation (B&O) tax refund for taxes paid on compensation received from non-Washington state Medicaid or Children's Health Insurance Programs (CHIP). Because the plain language of the statute unambiguously limits the B&O tax deduction to compensation received from Washington programs, we affirm.

FACTS

PeaceHealth is a non-profit corporation that operates multiple medical facilities in Washington State, including St. Joseph Medical Center in Bellingham,

[1] For purposes of this opinion, the appellants are collectively referred to as "PeaceHealth."

St. John Medical Center in Longview, and Southwest Medical Center in Vancouver. Because some of its facilities are located near the Oregon border, PeaceHealth treats Oregon Medicaid and CHIP recipients. PeaceHealth paid B&O taxes on the compensation it received from Oregon's Medicaid and CHIP programs.

PeaceHealth sought a refund from the Department of Revenue (the Department) for the taxes it paid between December 1 and 31, 2008 under RCW 82.04.4311.[2] PeaceHealth argued that, as a non-profit hospital, any revenue it receives from any state's Medicaid and CHIP programs is tax-exempt. The Department's Audit Division denied PeaceHealth's refund request, reasoning that RCW 82.04.4311 limited the tax deduction to Medicaid and CHIP compensation authorized "under chapter 74.09 RCW," thus limiting the deduction to compensation received from Washington state Medicaid and CHIP programs.

PeaceHealth appealed to the Board of Tax Appeals. The Board agreed with PeaceHealth that RCW 82.04.4311 grants a B&O tax deduction for amounts received from any state's Medicaid and CHIP programs. The Department appealed to Thurston County Superior Court under RCW 82.03.180 and RCW 34.05.510. The trial court reversed the Board's decision, holding that the B&O tax deduction under RCW 82.04.4311 does not extend to other states' Medicaid or CHIP programs. PeaceHealth appeals the trial court's ruling.

---

[2] PeaceHealth also sought a refund of B&O tax on medical services provided to PeaceHealth employees, which the Department denied. PeaceHealth did not appeal this determination to the Board or to this court. The Department granted PeaceHealth's request for B&O tax refunds for services rendered under Washington Medicaid and CHIP.

ANALYSIS

This court reviews Board proceedings under the Administrative Procedure Act (APA), chapter 34.05 RCW. Steven Klein, Inc. v. State, Dep't of Revenue, 183 Wn.2d 889, 895, 357 P.3d 59 (2015). Under the APA, an agency's legal conclusions are reviewed de novo. Id. RCW 34.05.570(3)(d) provides that the court "shall grant relief from an agency order" if it determines that the agency has erroneously interpreted or applied the law.

At issue in this appeal is the Board's interpretation of RCW 82.04.4311. Statutory interpretation is an issue of law reviewed de novo. Spokane County v. Dep't of Fish & Wildlife, 192 Wn.2d 453, 457, 430 P.3d 655 (2018). We start with "the statute's plain language and ordinary meaning." Id. (internal quotation marks omitted) (quoting State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003). When the plain language is unambiguous, subject to only one reasonable interpretation, our inquiry ends. Id. at 458. We do not use interpretive tools such as legislative history when statutory language is unambiguous. Id.

A reviewing court must "accord substantial weight to an agency's interpretation of a statute within its expertise, and to an agency's interpretation of rules that the agency promulgated." Verizon NW, Inc. v. Emp't. Sec. Dep't, 164 Wn.2d 909, 915, 194 P.3d 255 (2008). As the agency charged with assessing and collecting taxes, the Department is entitled to this deference. See RCW 82.01.060(1) (department of revenue assesses and collects all taxes); see also Port of Seattle v. Pollution Control Hr'gs Bd., 151 Wn.2d 568, 595, 90 P.3d 659 (2004) (a reviewing court defers to the interpretation of the agency designated by

the Legislature to administer the statute, not to the interpretation of the quasi-judicial body interpreting the statute). This court thus gives no deference to either the Board's or the superior court's interpretation of RCW 82.04.4311. Verizon, 164 Wn.2d at 915.

RCW 82.04.411 reads:

> (1) A public hospital . . . or a nonprofit hospital . . . may deduct from the measure of tax amounts received as compensation for health care services covered under the federal medicare program authorized under Title XVIII of the federal social security act; medical assistance, children's health, or other program under chapter 74.09 RCW; or for the state of Washington basic health plan under chapter 70.47 RCW . . . .

At issue here is the second clause of the statute, allowing a deduction for compensation for health care services covered under "medical assistance, children's health, or other program under chapter 74.09 RCW." PeaceHealth argues the statute grants a B&O tax deduction for all compensation a non-profit hospital receives from any state's Medicaid or CHIP programs. We disagree, based on basic rules of grammar and the overall structure of Washington's subsidized health programs within chapter 74.09 RCW.

PeaceHealth first argues that under the last antecedent rule, the phrase "under chapter 74.09 RCW" modifies only the preceding words "other programs," and cannot be read to modify "medical assistance," or "children's health." Courts employ traditional rules of grammar in discerning the plain language of a statute. State v. Bunker, 169 Wn.2d 571, 578, 238 P.3d 487 (2010). One of those rules is known as the last antecedent rule, under which "qualifying or modifying words and phrases refer to the last antecedent." Id. Related to this rule is the corollary

principle that the presence of a comma before the qualifying phrase is evidence the qualifier is intended to apply to all antecedents instead of only the immediately preceding one. City of Spokane v. County of Spokane, 158 Wn.2d 661, 673, 146 P.3d 893 (2006). In this case, PeaceHealth correctly points out that the Legislature did not insert a comma before the phrase "under chapter 74.09 RCW."

The last antecedent rule, however, is "not inflexible and uniformly binding." State v. McGee, 122 Wn.2d 783, 788, 864 P.2d 912 (1993). Structural or contextual evidence may rebut the last antecedent inference. Lockhart v. United States, __ U.S. __, 136 S. Ct. 958, 960, 194 L. Ed. 2d 48 (2016) (quoting Jama v. Imm. & Customs Enforcement, 543 U.S. 335, n.4, 124 S. Ct. 694, 160 L. Ed. 2d 708 (2005)).

Under the "series-qualifier" rule of grammar, there is a presumption that "when there is a straightforward, parallel construction that involves all nouns or verbs in a series, a prepositive or postpositive modifier normally applies to the entire series." BLACK'S LAW DICTIONARY (10th ed. 2014). This rule applies when two textual signals are present: first, when the modifying phrase makes sense with all items in the series; and second, when the modifying clause appears at the end of a single, integrated list. Lockhart, 136 S. Ct. at 965.

First, the modifier makes sense when we apply it to all of the items in the statutory series. RCW 74.09.010(14) defines "medical assistance" as "the federal aid medical care program provided to categorically needy persons as defined under Title XIX of the federal social security act."[3] RCW 74.09.010(14). RCW

[3] Title XIX of the Social Security Act establishes Medicaid, which enables participating states to receive federal funding to establish state programs for medical assistance for low-income

74.09.010(3) defines "children's health program" as "the health care services program provided to children under eighteen years of age and in households with incomes at or below the federal poverty level . . . and who are not otherwise eligible for medical assistance."[4] Washington's Medicaid program was established in RCW 74.09.510 and its CHIP program was established in RCW 74.09.470. Both of these programs arise "under chapter 74.09 RCW." The modifier makes sense when applied to each of the items in the statutory series.

Second, the modifier appears at the end of a single, integrated list. Chapter 74.09 established several state health services programs, in addition to Medicaid and CHIP. See e.g. RCW 74.09.655 (coverage for smoking cessation programs); RCW 74.09.715 (dental care to seniors and adults who are categorically needy, blind, or disabled); and RCW 74.09.770 (maternity care for low-income women).[5] The catchall phrase "or other program" makes sense contextually in light of the other programs included by the Legislature within the same chapter. See also Paroline v. United States, 572 U.S. 434, 447, 134 S. Ct. 1710, 188 L. Ed .2d 714 (2014) (the catchall clause "any other loss" is "read as bringing within a statute categories similar in type to those specifically enumerated").

---

individuals and children. 42 U.S.C. § 1396-1. A state is eligible for federal funding if it complies with federal guidelines. 42 U.S.C. § 1396a. In Washington, the state agency that administers the Medicaid program is the Washington State Health Care Authority (HCA). RCW 41.05.021; WAC 182-02-045.

[4] The Children's Health Insurance Program (CHIP) enables participating states to receive federal funding to establish state programs to expand child health assistance to uninsured, low-income children. 42 U.S.C. § 1397aa. The HCA administers CHIP. RCW 41.05.021. In Washington, CHIP is called "Apple Health for Kids." WAC 182-500-0010 ("'Apple health for kids' is the umbrella term for health care coverage for certain groups of children that is funded by the state and federal governments under Title XIX medicaid programs, Title XXI Children's Health Insurance Program, or solely through state funds.")

[5] Together, these programs comprise Washington Apple Health. WAC 182-500-0120. The HCA administers all of chapter 74.09 RCW programs. See RCW 41.05.006 (creating the HCA); RCW 74.09.010(1) (defining "authority" as referred to in chapter 74.09 as the HCA).

> Under the series-qualifier rule, the language would be naturally read as:
>
> medical assistance [program under chapter 74.09 RCW], children's health [program under chapter 74.09 RCW], or other program under chapter 74.09 RCW.

The fact that the Legislature combined different programs, all authorized by the same chapter, in the same clause in a straightforward and parallel construction makes the series-qualifier rule much more reasonable than the last antecedent rule.

Finally, the Legislature used semicolons to divide the tax deduction statute into three categories of qualifying government programs: (1) the Medicare program "under Title XVIII of the federal social security act;" (2) medical assistance, children's health, or other program "under chapter 74.09 RCW;" and (3) Washington's Basic Health Plan "under chapter 70.47 RCW." The parallelism[6] created by these three clauses also demonstrates that the Legislature intended "medical assistance, children's health, or other program" to form a single category of programs modified by the phrase "under chapter 74.09 RCW," therefore limiting the deduction to revenue received from Washington state programs only.

PeaceHealth essentially advances an interpretation of the tax deduction statute to cover compensation from any medical assistance program, any children's health program, and any program under chapter 74.09 RCW. The Legislature did not choose this formulation. The context and structure of the

[6] "Every element of a parallel series must be a functional match (word, phrase, clause, sentence) and serve the same grammatical function in the sentence (e.g., noun, verb, adjective, adverb)." CHICAGO MANUAL OF STYLE § 5.242.

provision evidences a legislative intent to keep the deduction limited to a much narrower category of subsidized health care programs.

Finally, we reject PeaceHealth's contention that our reading of the statute raises dormant Commerce Clause concerns. States may not discriminate against or burden the interstate flow of articles of commerce. Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of Or., 511 U.S. 93, 98, 114 S. Ct. 1345, 128 L. Ed. 2d 13 (1994). If a state law discriminates against out-of-state goods or nonresident economic actors, the law can be sustained only on a showing that it is narrowly tailored to advance a legitimate local purpose. Tennessee Wine & Spirits Retailers Ass'n v. Thomas, 588 U.S. __, 139 S. Ct. 2449, 2462 (2019).

But a law that favors local government is not susceptible to standard dormant Commerce Clause scrutiny when the motivation for the law is based on legitimate government goals unrelated to economic protectionism. See United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 342, 127 S. Ct. 1786, 167 L. Ed. 2d 655 (2007) (ordinance requiring trash haulers to deliver solid waste only to processing plant owned and operated by New York state justified by government interest in protecting health, safety and welfare of its citizens).

Additionally, when states are not mere regulators, but are also economic actors and participate in the marketplace, any decisions they make as a market participant, rather than a market regulator, are exempted from the dormant Commerce Clause. Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 339, 128 S. Ct. 1801, 170 L. Ed. 2d 685 (2008) (Kentucky taxation structure exempting

interest income from in-state and local bonds but taxed interest on out-of-state bonds did not violate dormant Commerce Clause).

In this case, the B&O tax exemption assists nonprofit hospitals serving indigent Washington residents, a law that ultimately benefits the state finances because it is the state that procures and ultimately pays for these services. Using tax laws that favor programs for in-state residents is not impermissible economic protectionism. Washington may adopt tax laws to support its efforts to provide health care to the elderly, disabled or indigent who reside in this state without infringing on the dormant Commerce Clause. We therefore reject PeaceHealth's Commerce Clause challenge to the statute.[7]

We conclude that the plain language of RCW 82.04.4311 limits the B&O tax deduction to compensation PeaceHealth receives from Washington Medicaid and CHIP programs and does not extend to compensation it receives from other states' subsidized health programs.

Affirmed.

Andrus, J.

WE CONCUR:

[7] The U.S. Supreme Court's most recent decision on the dormant Commerce Clause, Tennessee Wine & Spirits, invalidated a state statute imposing a durational residency requirement on any person or corporation seeking to obtain or renew a license to operate a liquor store. 139 S. Ct. at 2456. The Tennessee statute in that case is not analogous to the B&O tax exemption statute at issue here because it did not involve the state provision of traditional government services, like health care, or methods to encourage taxpaying providers to deliver those services.

APPENDIX B

BEFORE THE BOARD OF TAX APPEALS
STATE OF WASHINGTON

PEACEHEALTH ST. JOSEPH MEDICAL CENTER, Appellant, v. STATE OF WASHINGTON DEPARTMENT OF REVENUE, Respondent.	Docket No. 14-123 RE: Excise Tax Appeal FINAL DECISION: ORDER GRANTING APPELLANTS' MOTION FOR SUMMARY JUDGMENT
PEACEHEALTH ST. JOHN MEDICAL CENTER, Appellant, v. STATE OF WASHINGTON DEPARTMENT OF REVENUE, Respondent.	Docket No. 14-124 RE: Excise Tax Appeal FINAL DECISION: ORDER GRANTING APPELLANTS' MOTION FOR SUMMARY JUDGMENT

These matters came before the Board of Tax Appeals (the Board), with Marta B. Powell presiding, on September 14, 2016, for a joint hearing on summary judgment. Attorney Michele Radosevich, of Davis Wright Tremaine, LLP, represented the Appellants, PeaceHealth St. Joseph Medical Center and PeaceHealth St. John Medical Center (the Taxpayers). Assistant Attorney General Rosann Fitzpatrick represented the Respondent, State of Washington Department of Revenue (the Department). Also present were attorney Dirk Giseburt, of Davis Wright Tremaine, LLP, and Kerry Radcliffe, Deputy General Counsel, PeaceHealth.

Pursuant to WAC 456-09-545 and the Board's Second Prehearing Order, issued on June 30, 2016, the Taxpayers moved for summary judgment. The Department, as the nonmoving party, requested summary judgment in its response brief.[1]

[1] *See Duncan v. Dep't of Revenue*, BTA Docket No. 12-286 (2016), p. 2 n. 1 (citing *Impecoven v. Dep't of Revenue*, 120 Wn.2d 357, 365, 841 P.2d 752 (1992), and *In re Estate of Toland*, 180 Wn.2d 836, 329 P.3d 878 (2014)).

The Board heard the oral arguments of counsel and considered the written materials filed in these matters,[2] including the following:

1. PeaceHealth's Motion for Summary Judgment;
2. Declaration of Michele Radosevich, with Exhibits 1 through 6;
3. Declaration of Spencer Urban;
4. Declaration of Cassie Sauer;
5. Department of Revenue's Response to PeaceHealth's Motion for Summary Judgment, with Appendices A through D;
6. Declaration of Rosann Fitzpatrick, with Exhibits 1 through 9;
7. PeaceHealth's Reply in Support of the Motion for Summary Judgment; and
8. Declaration of Andrew Busz.

Based on the parties' written submissions and oral arguments, the Board concludes "that there is no genuine issue as to any material fact and that the [Taxpayers] are entitled to judgment as a matter of law."[3] The Board grants the Taxpayers' motion for summary judgment and denies the Department's request for summary judgment.

NATURE OF THE CASE

Powell. The Taxpayers, St. Joseph Medical Center and St. John Medical Center, are nonprofit hospitals owned by PeaceHealth and located in Bellingham and Longview, Washington, respectively. Both hospitals provide care to Medicaid patients from Washington, as well as from other states. Whereas St. Joseph receives only one percent of its Medicaid receipts from other states, St. John, located near the Oregon border, derives approximately 8.5 percent of its Medicaid receipts from other states, primarily Oregon. The Taxpayers report that "[t]he unreimbursed cost of care rendered to Medicaid patients was over $22 million for St. John Medical Center and $36 million for St. Joseph Medical Center in fiscal year 2015."[4]

RCW 82.04.4311 allows a qualifying nonprofit hospital to deduct from its gross receipts, for purposes of calculating Washington's Business and Occupation (B&O) tax, amounts received from Medicaid and the Children's Health Insurance Program (CHIP). The Department

---

[2] For the two appeals, the parties filed a single set of summary judgment briefs.
[3] WAC 456-09-545.
[4] PeaceHealth's Motion for Summary Judgment, p. 2 (citing Declaration of Spencer Urban, ¶4).

disallowed the Taxpayers' deductions of amounts received from out-of-state Medicaid and CHIP coverage. The Department assessed B&O tax in the amount of $83,145 against the Taxpayers for the period July 1, 2012, through December 31, 2012. The Taxpayers appealed to the Department's Appeals Division, which upheld the assessment. The Taxpayers' request for reconsideration was denied in Determination No. 14-0260R, issued on March 10, 2015. The Taxpayers timely filed a Notice of Appeal with the Board.

ISSUE

For purposes of Washington's B&O tax on gross receipts, is the deduction from gross receipts set forth in RCW 82.04.4311 limited to amounts that Washington hospitals receive from Washington's Medicaid and CHIP coverage, or are Washington hospitals also entitled to deduct the amounts they receive from other states' Medicaid and CHIP coverage?

ANALYSIS AND CONCLUSIONS

Summary Judgment Standard. The purpose of summary judgment "is to avoid a useless trial."[5] Summary judgment is appropriate where "the written record shows [1] that there is no genuine issue as to any material fact and [2] that the moving party is entitled to judgment as a matter of law."[6] The material facts—that is, those "upon which the outcome of the litigation depends"[7]—are undisputed.[8] The Board's role is to determine, in light of the facts and the applicable law, whether a party is entitled to judgment as a matter of law.

The B&O Deduction in RCW 82.04.4311. At issue is the following statute:

> [A] nonprofit hospital . . . may deduct from the measure of tax amounts received as compensation for health care services covered under the federal medicare program authorized under Title XVIII of the federal social security act; *medical assistance, children's health, or other program under chapter 74.09 RCW*; or for the state of Washington basic health plan under chapter 70.47 RCW.[9]

The Board's duty in interpreting the statute is "to discern and implement the intent of the

---

[5] *Balise v. Underwood*, 62 Wn.2d 195, 199, 381 P.2d 966 (1963).
[6] WAC 456-10-503; *see also* CR 56(c).
[7] *Capitol Hill Methodist Church of Seattle v. City of Seattle*, 52 Wn.2d 359, 364, 324 P.2d 1113 (1958).
[8] "The Department does not dispute that [the Taxpayers are] non-profit hospital[s] qualified to take the deduction for the covered health care services specified in RCW 82.04.4311." Department of Revenue's Response to PeaceHealth's Motion for Summary Judgment, p. 6. The parties provide descriptions of the relevant government programs in their briefing. *See id.* at 3-5, and PeaceHealth's Motion for Summary Judgment, pp. 7-9.
[9] RCW 82.04.4311(1) (emphasis added).

legislature."[10] As a first step, the Board looks to "the plain language and ordinary meaning of the language used, because if the meaning of the language is plain, then it must be given effect as an expression of the legislature's intent."[11] The Board may consider, in addition to the statutory provision at issue, "related statutes which disclose legislative intent about the provision in question."[12]

The Parties' Arguments. The Department maintains that the structure of RCW 82.04.4311(1) plainly limits the deduction to receipts from Washington for services covered by Medicaid and CHIP. The Department points out that semicolons are used to establish "three distinct categories of qualifying government programs" and that each category is associated with the law establishing the federal or state program[13]: "[1] the federal medicare program authorized *under Title XVIII of the federal social security act*; [2] medical assistance, children's health, or other program *under chapter 74.09 RCW*; or for [3] the state of Washington basic health plan *under chapter 70.47 RCW*."[14] In the Department's view, given the overall structure of RCW 82.04.4311(1), the prepositional phrase "under chapter 74.09 RCW" modifies all three elements in the second category—"medical assistance," "children's health," and "other program."

The Taxpayers disagree. They argue that the phrases "medical assistance" and "children's health" in the second category plainly indicate that the deduction encompasses a hospital's compensation from *any* state for services covered by Medicaid and CHIP. The Taxpayers describe the three categories as referring to "a federal program," "several federal-state partnership programs," and "a state-only program."[15] Within the second category, the Taxpayers identify both phrases—"medical assistance" and "children's health"—as "standalone references to federal programs."[16] They note that the term "medical assistance" was Congress's "original name" for Medicaid and "is defined in Washington law as the 'federal aid medical care program provided to categorically needy persons as defined under Title XIX of the federal Social Security

---

[10] *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003).
[11] *HomeStreet, Inc. v. Dep't of Revenue*, 166 Wn.2d 444, 456, 210 P.3d 297 (2009).
[12] *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002).
[13] Department of Revenue's Response to PeaceHealth's Motion for Summary Judgment, p. 8.
[14] RCW 82.04.4311(1) (emphasis added).
[15] PeaceHealth's Reply in Support of the Motion for Summary Judgment, p. 5.
[16] *Id.*

Act.'"[17] Additionally, the Taxpayers emphasize that the legislature, by identifying the third category as "*the state of Washington* basic health plan under chapter 70.47 RCW," showed that it "clearly knew how to refer to Washington-specific programs, but . . . chose to use the generic references" in the second category.[18] In further support of their plain language argument, the Taxpayers call attention to the "intent section" of the legislature's amendment of RCW 82.04.4311:

> The legislature finds that the provision of health services to those people who receive *federal or state subsidized health care benefits* by reason of age, disability, or lack of income is a recognized, necessary, and vital governmental function. As a result, the legislature finds that it would be inconsistent with that governmental function to tax amounts received by a public hospital or nonprofit hospital . . . when such *amounts are paid under a health service program subsidized by federal or state government*. Further, the tax status of these amounts should not depend on whether the amounts are received directly from the qualifying program or through a managed health care organization under contract to manage benefits for a qualifying program.[19]

In the Taxpayers' view, the legislature's use of "the generic 'state government' rather than 'Washington'" shows that the legislature "clearly intended to make all Medicaid receipts deductible for nonprofit hospitals."[20]

Both parties recognize that, if the legislative intent is not apparent from "the plain language and ordinary meaning,"[21] the Board may "resort to principles of statutory construction, legislative history, and relevant case law to assist . . . in discerning legislative intent."[22] The Board will construe any ambiguity in a statutory tax deduction "strictly, though fairly and in keeping with the ordinary meaning of [its] language, against the taxpayer."[23] Drawing on legislative history, the Taxpayers point out that, whereas an indefinite article originally introduced the statutory phrase in 2001—"a medical assistance, children's health, or other program authorized under chapter 74.09 RCW"—the article was deleted in the 2002 reenactment

---

[17] PeaceHealth's Motion for Summary Judgment, p. 5. *See* RCW 74.09.010(13) (defining "medical assistance").
[18] PeaceHealth's Reply in Support of the Motion for Summary Judgment, p. 5.
[19] Declaration of Michele Radosevich, Exhibit 6, 2002 Laws, ch. 314, sec. 1 (emphasis added).
[20] PeaceHealth's Motion for Summary Judgment, p. 6.
[21] *HomeStreet*, 166 Wn.2d at 456.
[22] *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 808, 16 P.3d 583 (2001).
[23] *Group Health Co-op of Puget Sound, Inc. v. Washington State Tax Comm'n*, 72 Wn.2d 422, 429, 433 P.2d 201 (1967); *see also Lacey Nursing Center, Inc. v. Dep't of Revenue*, 128 Wn.2d 40, 49-50, 905 P.2d 338 (1995).

of the statute. The Taxpayers contend that the deletion of "a" means that "medical assistance and children's health stand alone and do not modify the word 'program.'"[24] The Department, however, asserts that the deletion of "a" is either "of no consequence" or "reinforces the inference that 'medical assistance' refers to *the* Medicaid program specifically authorized 'under chapter 74.09 RCW.'"[25] The Board does not find determinative the presence or absence of the article "a." With or without the article "a," the prepositional phrase "under chapter 74.09 RCW" could modify all elements in the series or only the final one.

In its principal argument based on legislative history, the Department refers to the intent section of the 2001 amendment of RCW 82.04.4297, the precursor to RCW 82.04.4311(1). The purpose of the 2001 amendment, which ensured that Medicaid payments to hospitals from a managed care organization were likewise deductible, was "to extend the purchasing power of scarce government health care resources."[26] The Department thus asserts that "[t]he purpose of the deduction is to lower the non-profit provider's operational expenses (by reducing its tax liability) and thereby to lower the amount of general fund expenditures necessary to pay for covered services."[27] In the Department's analysis, extending the deduction to include payments from another state's Medicaid or CHIP coverage "would dilute the State's purchasing power by, in effect, subsidizing another State's costs for a healthcare program designed to benefit its own citizens."[28]

The Board finds more convincing the Taxpayers' contrary analysis. Underscoring the primacy of the intent section in the 2002 legislation, the Taxpayers describe the legislation as "chang[ing] the structure, language, and purpose of the statutory deduction."[29] The Taxpayers reject the Department's theory that the deduction would reduce the hospital's operating costs and that, in turn, the hospital would charge less for its services, thereby benefiting the State:

> The only way the deduction could result in lower program costs to Washington for its residents and similar lower program costs to other states for their residents is if Medicaid reimbursed hospitals based on the actual costs incurred for the particular patient. Medicaid does not reimburse hospitals based upon the

---

[24] PeaceHealth's Motion for Summary Judgment, p. 5.
[25] Department of Revenue's Response to PeaceHealth's Motion for Summary Judgment, p. 10.
[26] Declaration of Michele Radosevich, Exhibit 1, 2001 Laws, 2nd sp. Sess., ch. 23, sec. 1.
[27] Department of Revenue's Response to PeaceHealth's Motion for Summary Judgment, p. 17.
[28] *Id.* at 19.
[29] PeaceHealth's Reply in Support of the Motion for Summary Judgment, p. 6.

> individual costs incurred to treat a particular patient or even the hospital's own overall Medicaid costs. With minor adjustments, the reimbursement rates are the same for every hospital in the state. Therefore reducing hospital costs via a tax deduction does not cause the hospital to charge less and thus result in a savings to the state Medicaid program. The tax deduction instead benefits the hospitals, helping close the gap between the actual cost of service and the government reimbursement for those costs.[30]

To analyze and explain the complex reimbursement formula for Medicaid services, the Taxpayers rely on Andrew Busz, the Policy Director, Finance, for the Washington State Hospital Association.[31] The Taxpayers reason that, just as the B&O deduction "has little to no effect on Washington's Medicaid cost, it . . . does not reduce the Medicaid costs for other states either": "It certainly does not result in a subsidy to that state program. The benefit accrues to the Washington hospital, not the non-resident patient or the state government paying for the patient."[32]

In a further effort to resolve any ambiguity in the second category of RCW 82.04.4311(1), the Department suggests that two canons of statutory construction—*noscitur a sociis* and *ejusdem generis*—support reading its three terms, "medical assistance," "children's health," and "other," as one category. The Board does not find these canons apt; their purpose is to shed light on the meaning of one term by considering the meaning of the other terms in a series. The ambiguity at issue in RCW 82.04.4311 is not lexical ambiguity but rather structural ambiguity: whether the phrase "under chapter 74.09 RCW" modifies all three of the antecedent noun phrases or only the last one. The more apposite canon of construction is

> "the last antecedent rule," which "provides that unless a contrary intention appears in the statute, qualifying words and phrases refer to the last antecedent." For example, in the following statute, the qualifying phrase "over eighty inches in overall width" would refer, under the last antecedent rule, to "truck tractor," the last noun that precedes the qualifying phrase: "No person shall operate *any motor truck, passenger bus or truck tractor over eighty inches in overall width* upon any highway" except under certain conditions.[33]

Under the last antecedent rule, the phrase "under chapter 74.09 RCW" would modify only "other

---

[30] *Id.* at 2.
[31] *See id.* at 2-4; and Declaration of Andrew Busz.
[32] *Id.* at 4.
[33] *Duncan v. Dep't of Revenue*, BTA Docket No. 12-286 (2014), p. 5 (quoting *In re Sehome Park Care Center, Inc.*, 127 Wn.2d 774, 781, 903 P.2d 443 (1995), and *Schneider v. Forcier*, 67 Wn.2d 161, 163, 406 P.2d 935 (1965)).

program," unless it could be shown that a different construction was intended.

The Board's Conclusion. The Board concludes that RCW 82.04.4311(1), though imperfectly drafted, is not ambiguous. By the plain language of the provision itself and the intent section of the 2002 legislation, the statute grants a qualifying nonprofit hospital a B&O tax deduction for amounts received from any state's Medicaid and CHIP coverage. Had the Board not concluded that the legislature's intent was discernible from the provision's plain language, the Board would have reached the same result in these appeals in light of the last antecedent rule and the Taxpayers' analysis of the purpose of the deduction. Having decided that the provision's plain language entitles the Taxpayers to the deduction, the Board does not reach the Taxpayers' alternative argument based on the dormant Commerce Clause.

DECISION

For the foregoing reasons, the Board, pursuant to WAC 456-09-545, hereby grants the Taxpayers' motion for summary judgment and denies the Department's request for summary judgment.

DATED this 29th day of March, 2017.

BOARD OF TAX APPEALS

MARK J. MAXWELL, Chair

CAROL A. LIEN, Vice Chair

MARTA B. POWELL, Member

Right of Reconsideration of a Final Decision

Pursuant to WAC 456-09-955, you may file a petition for reconsideration of this Final Decision. You must file the petition for reconsideration with the Board within 10 business days of the date of mailing of the Final Decision. The petition must state the specific grounds upon which relief is requested. You must also serve a copy on all other parties and their representatives of record. The Board may deny the petition, modify its decision, or reopen the hearing.

Please be advised that a party petitioning for judicial review of a Final Decision is responsible for the reasonable costs incurred by this agency in preparing the necessary copies of the record for transmittal to the superior court. Charges for the transcript are payable separately to the court reporter.

APPENDIX C

NO. 79648-8-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, DEPARTMENT OF REVENUE, Respondent, v. PEACEHEALTH ST. JOSEPH MEDICAL CENTER AND PEACEHEALTH ST. JOHN MEDICAL CENTER, Appellants.	DEPARTMENT OF REVENUE'S MOTION TO PUBLISH

I. IDENTITY OF MOVING PARTY

The moving party is the Respondent, State of Washington, Department of Revenue.

II. STATEMENT OF RELIEF SOUGHT

Pursuant to RAP 12.3(e), the Respondent asks the Court to publish its opinion in this case, which was filed on July 22, 2019 (attached as Appendix A).

III. FACTS RELEVANT TO MOTION

The issues resolved by the Court in this case are the same as those at issue in a pending lawsuit in *PeaceHealth v. State of Washington, Department of Revenue*, Thurston County Superior Court No. 15-2-03044-34 (Complaint attached as Appendix B). The plaintiffs in that lawsuit

include Appellants in this case and three other medical facilities in the PeaceHealth regional network. The superior court case was brought as a tax refund action under RCW 82.32.180 and as a claim for declaratory judgment. Although the pending superior court action involves different tax periods and seeks a different form of relief than this case, the issues to be resolved are essentially the same as those at issue here.[1] Thus, the parties agreed to take no action in the superior court case before receiving a final appellate decision in this matter.

IV. STATEMENT OF GROUNDS FOR RELIEF

Publication of the *PeaceHealth* decision is warranted for three reasons: (1) this is the first Washington appellate decision interpreting the scope of RCW 82.04.4311 (*see* RAP 12.3(e)(3)); (2) the decision determines that the statute does not violate the dormant commerce clause (*see* RAP 12.3(e)(3)); and (3) the decision clarifies an established principle of law because it provides a clear and concise application of the "series-qualifier" rule of statutory construction (*see* RAP 12.3(e)(4)).

[1] Specifically, the plaintiffs contend the plain language of RCW 82.04.4311 allows a nonprofit or public hospital to take a B&O tax deduction for amounts received for providing services covered under any state's Medicaid or CHIP program, not just those authorized under Washington law. The plaintiffs argue in the alternative that limiting the deduction to Washington's Medicaid and CHIP programs would violate the Commerce Clause.

Publication of the decision would provide a useful precedent for the Department, other taxpayers, and the general public.

A. The Decision Determines an Unsettled or New Question of Law Concerning the Application of RCW 82.04.4311

The Court of Appeals should publish the *PeaceHealth* decision so that it will have precedential effect. There is no published decision interpreting RCW 82.04.4311.[2] Although the Department of Revenue has statutory authority to adopt interpretive rules, they are not binding on taxpayers or the courts, but "serve merely as advance notice of the agency's position should a dispute arise and the matter result in litigation." *Association of Wash. Bus. v. Dep't of Revenue*, 155 Wn.2d 430, 447, 120 P.3d 46 (2005). The Department's published tax determinations, likewise, have only persuasive value, if at all. *Cashmere Valley Bank v. Dep't of Revenue*, 181 Wn.2d 622, 635, 334 P.3d 1100 (2014). Publication of the decision will provide useful guidance for other health and social welfare organizations that are entitled to take the deduction authorized by RCW 82.04.4311.

---

[2] The statute is mentioned in identical footnotes to *Skagit County Public Hosp. Dist. No. 1 v. Dep't of Revenue*, 158 Wn. App. 426, 436, n.2, 242 P.3d 909 (2010), and *St. Joseph General Hosp. v. Dep't of Revenue*, 158 Wn. App. 450, 460, n.3, 242 P.3d 897 (2010), which were published the same day. Those cases reference RCW 82.04.4311 in the context of describing the statutory background of former RCW 82.04.4297.

Publication of the decision also would facilitate the resolution of the pending superior court case. It is not clear whether the doctrine of collateral estoppel precludes PeaceHealth from relitigating the issues resolved by this appeal given that PeaceHealth's superior court tax refund action involves subsequent tax periods. *See Dot Foods, Inc. v. Dep't of Revenue*, 185 Wn.2d 239, 254-55, 372 P.3d 747 (2016) (declining to apply collateral estoppel in a tax refund action involving the same issue but a different tax period). Publication will provide useful precedential authority for the superior court to rely upon.

B. The Decision Determines an Unsettled or New Question of Law in Holding that RCW 82.04.4311 Does Not Violate the Dormant Commerce Clause

Publication of the decision also is warranted because it is the first appellate decision in Washington to apply *Department of Revenue of Kentucky v. Davis*, 533 U.S. 328, 128 S. Ct. 1801, 170 L. Ed. 2d 685 (2008), which is an important dormant Commerce Clause precedent. In applying *Davis*, this Court distinguished the most recent Supreme Court case involving the dormant Commerce Clause, *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 588 U.S. __, 139 S. Ct. 2339, __ L. Ed. 2d __ (2019). This Court's analysis of the dormant Commerce Clause issue would provide useful guidance to taxpayers and the courts.

C. The Decision Clarifies the Interplay of the Last Antecedent Rule and the Series Qualifier Rule of Grammar

The PeaceHealth decision provides a clear and concise textual analysis of RCW 82.04.4311, using the "series-qualifier" rule of grammar. Publication would contribute to Washington case law on the proper application of the last antecedent rule. Although the general principles underlying the last antecedent rule are well-established, this is the first appellate decision in Washington to discuss the interplay of the last antecedent rule and the series-qualifier principle, relying on *Lockhart v. United States*, __ U.S. __, 136 S. Ct. 958, 194 L. Ed. 2d 48 (2016), and *Paroline v. United States*, 572 U.S. 434, 134 S. Ct. 1710, 188 L. Ed. 2d 714 (2014). Publication would provide a useful precedent for the general public and the courts in addressing questions of statutory interpretation involving analogous facts.

V. CONCLUSION

Based on the foregoing reasons, the Department of Revenue respectfully requests publication of the Court's decision in this case.

RESPECTFULLY SUBMITTED this 12th day of August, 2019.

ROBERT W. FERGUSON
Attorney General

Rosann Fitzpatrick

ROSANN FITZPATRICK
WSBA No. 37092
Assistant Attorney General
Attorneys for Respondent
OID No. 91027

PROOF OF SERVICE

I certify that on August 12, 2019, I electronically filed this document with the Clerk of the Court using the Washington State Appellate Courts' e-file portal, which will send notification of such filing to all counsel of record at the following:

DirkGiseburt@DWT.com
MicheleRadosevich@DWT.com
DavidMaas@DWT.com
ElaineHuckabee@DWT.com

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

DATED this 12th day of August, 2019, at Tumwater, WA.

Jamie Falter, Legal Assistant

DAVIS WRIGHT TREMAINE LLP

August 19, 2019 - 2:26 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	79648-8
Appellate Court Case Title:	Peacehealth St. Joseph Medical Center, et al, Appellant v. State of WA, Dept. of Revenue, Respondent
Superior Court Case Number:	17-2-02434-9

The following documents have been uploaded:

- 796488_Petition_for_Review_20190819140047D1400288_0759.pdf
  This File Contains:
  Petition for Review
  The Original File Name was PeaceHealth Petition for Review.pdf

A copy of the uploaded files will be sent to:

- dirkgiseburt@dwt.com
- elainehuckabee@dwt.com
- micheleradosevich@dwt.com
- revolyef@atg.wa.gov
- rosannf@atg.wa.gov

Comments:

Sender Name: David Maas - Email: davidmaas@dwt.com
Address:
920 5TH AVE STE 3300
SEATTLE, WA, 98104-1610
Phone: 206-622-3150

Note: The Filing Id is 20190819140047D1400288