

NO. 36120-5-II

COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION TWO

WHIDBEY GENERAL HOSPITAL,

Appellant

vs.

STATE OF WASHINGTON
DEPARTMENT OF REVENUE,

Respondent

An Appeal from the Thurston County
Superior Court, Case No. 05-2-02517-1

APPELLANT'S REPLY BRIEF

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A. The Court Should Decline to Apply the Definition of “Employee Benefit Plan” Supplied by the Department.

The parties agree that the phrase “employee benefit plan” in RCW 82.04.4297 is unambiguous, but they differ on what definition to apply and whether CHAMPUS meets that definition.

The Department asks the Court to apply the Department’s self-serving definition of “employee benefit plan”:

It takes no special knowledge or expertise to conclude that an ‘employee benefit plan’ is [a] plan under which an employer offers benefits of a non-salary nature to persons who perform work for hire for that employer. No one who has ever worked in a private or governmental organization requires resort to a dictionary or legal citation to understand the general concept of an “employee benefit plan.”

Respondent’s Brief at 8.

Prior to supplying this definition, the Department conceded that undefined statutory terms should be given the meaning ascribed to them by a dictionary. Respondent’s Brief at 7. This is consistent with the general rule that a court will look to a standard or a technical dictionary, if available, for the meaning of an undefined statutory term. State v. Sullivan, 143 Wn.2d 162, 175, 19 P.3d 1012 (2001) (“In the absence of a statutory definition, [a court] will give the term its plain and ordinary meaning ascertained from a standard dictionary.”); City of Spokane v. Dep’t of Revenue, 145 Wn.2d 445, 452, 38 P.3d 1010 (2002) (noting that “courts have turned to the technical definition of a term of art even where

a common definition is available”).

Despite a host of Washington cases on statutory interpretation, the Department cannot point to one in which a court applied a party’s unattributed definition of an undefined statutory term. The only dictionary definition available, whether characterized as ordinary or technical, is found in Black’s Law Dictionary. Appellant’s Brief at 8-10. That definition excludes CHAMPUS. Because CHAMPUS is not an “employee benefit plan” under RCW 82.04.4297 as Black’s defines that term, the statute’s deduction applies and Whidbey is entitled to the tax refund it seeks.

B. The Court Should Hold that CHAMPUS is not an “Employee Benefit Plan” because Military Members are not Employees.

In the event that the Court does not apply either party’s definition, then it is appropriate to look to the common law to help define “employee benefit plan.” See e.g., State v. Pacheco, 125 Wn.2d 150, 154, 882 P.2d 183 (1994) (“As a general rule, we presume the Legislature intended undefined words to mean what they did at common law.”).

Although “employee benefit plan” has no common law definition, common sense suggests that military members must be employees for CHAMPUS to be an “employee benefit plan,” since “employee” modifies “benefit plan.” See Metropolitan Water Dist. v. Superior Court, 32 Cal.4th 491, 500, 84 P.3d 966 (Cal. 2004) (“In this circumstance – a

statute referring to employees without defining the term – courts have generally applied the common law test of employment.”).

Military members fall outside any common law test for employment. The life of military members is entirely circumscribed by statute, not the common law. As Title 10 of the United States Code, which governs the armed forces, describes it:

(8) Military life is fundamentally different from civilian life in that –

(A) the extraordinary responsibilities of the armed forces, the unique conditions of military service, and the critical role of unit cohesion, require that the military community, while subject to civilian control, exist as a specialized society; and

(B) the military society is characterized by its own laws, rules, customs, and traditions, including numerous restrictions on personal behavior, that would not be acceptable in civilian society.

10 U.S.C. § 654(8).

The only life that military members know is one that is regulated every minute of every day for the term of their enlistment:

The standards of conduct for members of the armed forces regulate a member’s life for 24 hours each day beginning at the moment the member enters military status and not ending until that person is discharged or otherwise separated from the armed forces.

Id. at § 654(9).

The standards of conduct applied to military members are enacted

in the Uniform Code of Military Justice, and they apply “whether the member is on base or off base, and whether the member is on duty or off duty.” Id. at § 654(10). “The pervasive application of the standards of conduct is necessary because members of the armed forces must be ready at all times for worldwide deployment to a combat environment.” Id. at 654(11).

This regimented way of life furthers the “[t]he primary purpose of the armed forces [which] is to prepare for and to prevail in combat should the need arise.” Id. at § 654(4). The possibility of combat requires sacrifices unknown to civilian life, “including the ultimate sacrifice, in order to provide for the common defense.” Id. at § 654(5). To further the military’s ultimate purpose, it is therefore “necessary for members of the armed forces *involuntarily* to accept living conditions and *working conditions* that are often spartan, primitive, and characterized by forced intimacy with little or no privacy.” Id. at § 654(12) (emphasis added).

The military’s “specialized society” with “its own laws” that make it “fundamentally different” from “civilian society” is incompatible with the notion that military members are employees who work prescribed hours for pay, go home at the end of the day, may live where they wish, are free to do what they want with their free time, may leave their jobs at will for another job, or may be fired for not doing their job properly.

Military members do not know such a life.

It is telling that Title 10 never refers to – much less defines – military members as employees. Instead it refers to them as “members of the armed forces” or “members of the uniformed services” or “active duty members.” For example, CHAMPUS itself refers to military members as “members of the uniformed services” not as “employees:”

To assure that medical care is available for dependents ... of *members of the uniformed services*¹ who are on active duty for a period of more than 30 days, the Secretary of Defense, after consulting with the other administering Secretaries, shall contract, under the authority of this section, for medical care for those persons under such insurance, medical service, or health plans as he considers appropriate.

10 U.S.C. § 1079 (emphasis added). The purpose of CHAMPUS is “to create and maintain high morale in the *uniformed services* by providing an improved and uniform program of medical and dental care for *members* and *certain former members* of those services, and for their dependents.”

10 U.S.C. § 1071 (emphasis added).

Similarly, the Code of Federal Regulations (“C.F.R.”) makes no mention of the word “employee” in setting out the details of the CHAMPUS program. See, generally, 32 C.F.R. § 199. Instead, the

¹ A member of the armed forces is the same thing as a member of the uniformed services, since 10 U.S.C. § 1072(1) defines “uniformed services” as synonymous with “armed forces.”

C.F.R. uses the words “active duty” and “active duty member” and “member” to define those who serve in the armed forces. 32 C.F.R. 199.2(b). “Active duty” refers to “[f]ull-time duty in the Uniformed Services of the United States.” Id. “Active duty member” and “member” both refer to “[a] person on active duty in a Uniformed Service under a call or order that does not specify a period of 30 days or less.” Id.

The distinction between military members and employees was not lost on Congress. Chapter 81 of Title 10 sets forth the sections that govern civilian employees that the military actually hires, as opposed to military members who enlist. 10 U.S.C. §§ 1581-1599c. Chapter 81 defines “civilian employee” by referring to the definition of “the term ‘employee’ by section 2105(a) of title 5.” 10 U.S.C. § 1587(2). That definition does not include military personnel. 5 U.S.C. § 2105(a).

If the Title that actually governs military members does not treat, define, or refer to military members as employees, then there is no reason for this Court to do so. That Congress has distinguished between members of the armed forces and civilian employees demonstrates its belief that military members are not employees. Similarly, if CHAMPUS and the C.F.R. sections outlining the CHAMPUS program do not define military members as “employees” then there is no reason for this Court to hold that they are “employees.”

Because military members' service for their country is governed by statute, they are not subject to the common law like ordinary employees. Norman v. United States, 392 F.2d 255, 259 (Ct. Cl. 1968) (*"The status of these officers was not a common law contractual relationship with the Government, but was created entirely by statute and could be altered or taken away by statute."*) (emphasis added); see also Bell v. United States, 366 U.S. 393, 401 (1961) (*"[I]t is to be observed that common-law rules governing private contracts have no place in the area of military pay."*).

Accordingly, neither military members nor the Department of Defense possess the fundamental right of the common law employer-employee relationship. "Under the common law, at-will employees could quit or be fired for any reason." Gardner v. Loomis Armored Inc., 128 Wn.2d 931, 935, 913 P.2d 377 (1996). In contrast "[a]n enlisted man in the Army ... is not free to quit his 'job,' nor is the Army free to fire him from his employment." Johnson v. Alexander, 572 F.2d 1219, 1223 n.4 (8th Cir. 1978).

This is one reason why courts have found that the relationship between military members and the Department of Defense is outside the common law master-servant relationship:

Personnel in the military service are in an honored calling performing the highest duty to their country. Theirs is not

that of the relationship of master and servant known in the civil law although some of the fundamentals of the two may be compared.

Layne v. United States, 190 F.Supp. 532, 536 (S.D. Ind. 1961).

Other authority is in accord with this position:

[A]t the heart of plaintiff's claim is the premise that the relationship between the government and a uniformed member of the Army, Navy, Marine Corps, Air Force or Coast Guard is that of employer-employee, and that an applicant for enlistment in one of those armed services is an applicant for "employment" and should have his application judged by Title VII standards. We cannot accept that premise and accordingly cannot accept counsels' conclusions based thereon.

While military service possesses some of the characteristics of ordinary civilian employment, it differs materially from such employment in a number of respects that immediately spring to mind, and the peculiar status of uniformed personnel of our armed forces has frequently been recognized by the courts.

Johnson, 572 F.2d at 1223-1224 (emphasis added).

Perhaps most telling are the Department's own concessions that there is a meaningful distinction between common law employees and military members:

The Department does not deny that a service member's rights and benefits in relation to the military are governed by statute and that common law principles applicable to employment relationships in the private, civilian arena often do not apply in the military arena.

Respondent's Brief at 15 (emphasis added); see also CP 298 (Department noting that "some may still question whether uniformed military are

employees in the traditional sense); CP 304 (Department admitting that “members of the military are not called ‘employees’ ...”).

The Department claims, however, that even though military members are not common law employees, it would be an “error” not to treat them as such. For one, it says, some courts have used the word “military employee” to describe someone who is a member of the armed services. Respondent’s Brief at 15. But none of these courts considered whether a military member was an employee for purposes of a particular statute, much less held that military members are employees.

For example, in Ma’ele v. Arrington, 111 Wn. App. 557, 45 P.3d 557 (2002), the court only considered whether there was sufficient evidence of proximate cause to support a jury verdict for plaintiff in a personal injury case. The case had nothing to do with whether a military member is a military employee. The phrase “military employee” was used once in the entire opinion as background information in the statement of facts: “Ma’ele, a military employee, moved to Kansas City after the accident and later moved back to Washington.” Id. at 560. Use of the phrase “military employee” as an offhand way to refer to military members simply has no bearing on the question presented.

The Department also states that military members should be considered “employees” because that is how they are defined for purposes

of the Federal Tort Claims Act. Respondent's Brief at 15-16. The Federal Tort Claims Act definition of employee specifically states that its definition is limited to that particular Act. 28 U.S.C. § 2671. Because Congress limited its definition of "employee" in the Federal Tort Claims Act to that specific Act, the Department may not use that definition to define military members as employees in this case. See Respondent's Brief at 11-12 (arguing that where legislature limits a statutory definition to a particular section, that definition may not be used to another statute).

Finally, the Department also claims that military members fit within the definition of "employee" under ERISA. Respondent's Brief at 16. But the Department itself has argued that how ERISA treats the phrase "employee benefit plan" is irrelevant to the question presented. Id. at 14. Further, ERISA does not define "employee," so courts give it the meaning it has at common law. Nationwide Mutual Insurance Co. v. Darden, 503 U.S. 318, 322 (1992).

As Title 10, the case law, and the Department's admissions establish, however, a military member is not a common law employee. If military members are not employees, then CHAMPUS, which covers retired military personnel and the dependents of active duty military personnel, is not an "employee benefit plan" under RCW 82.04.4297. Because CHAMPUS is not an "employee benefit plan" under RCW

82.04.4297, Whidbey is entitled to that section's tax deduction.

C. **The Court Should Hold that CHAMPUS is not an "Employee Benefit Plan" because CHAMPUS is not a Benefit Plan.**

Assuming, *arguendo*, that military members are employees, CHAMPUS is not a benefit plan and therefore is still not an "employee benefit plan" under RCW 82.04.4297.

The Department argues that CHAMPUS is a benefit plan because (1) income from CHAMPUS is unlike income from "entitlement" programs such as Medicare and Medicaid, which a health or social welfare organization may deduct under RCW 82.04.4297, and (2) CHAMPUS payments are analogous to the health insurance payments that the Legislature intended to exempt from RCW 82.04.4297. Respondent's Brief 16-19.

As for the first argument, the Department states:

A better approach is to consider the sources of income RCW 82.04.4297 allows qualifying organizations to deduct. These include funds from federal Medicare programs, state medical assistance or children's health programs (RCW 74.09), and Washington's Basic Health Care Plan (RCW 70.47). The income from these **entitlement programs** is from either the state or federal government. None of these programs are "employee benefit plans." An individual may qualify for benefits under these programs without having provided any service to the federal or state government.... Though members of the military are not called "employees" in many settings, CHAMPUS is more like these government-funded employee benefit plans than the **entitlement programs** listed above.

Respondent's Brief at 18 & 19 (emphasis added).

But CHAMPUS is like the programs listed by the Department for the very reason that it is an "entitlement" program. CHAMPUS does not involve an "offer" of a "benefit" by an employer as the Department claims. CHAMPUS is not discretionary. Under CHAMPUS, "access to statutorily-authorized military-dependent medical care is a *legal entitlement...*" See Barnett v. Weinberger, 818 F.2d 953, 958 (D.C. Cir. 1987) (emphasis added).

CHAMPUS is not funded by an employer as a benefit program for its employees. "CHAMPUS is funded by annual Congressional appropriations." Smith v. Office of Civilian Health & Medical Program of the Uniformed Services, 97 F.3d 950, 952 (7th Cir. 1996); 32 C.F.R. 199.1(e) ("The funds used by CHAMPUS are appropriated funds furnished by the Congress through annual appropriation acts for the Department of Defense and the DHHS.").

What is notable about CHAMPUS "is that it converted the provision of military-dependent medical care from a mere act of grace to a full-fledged matter of right." Id. at 957. Unlike discretionary benefits offered by a typical employer, supplemental health care under CHAMPUS for military retirees and dependents of active military members is mandated by Congress. Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 91

(1983) (noting that “ERISA does not mandate that employers provide any particular benefits”).

Contrary to the Department’s argument, CHAMPUS is similar to other entitlement programs whose payments to social and welfare organizations are not taxed under RCW 82.04.4297:

Medicare is a federal health insurance program designed to provide medical services, medical equipment, and supplies to persons 65 years of age and older and to blind and disabled persons.... The United States Department of Health and Human Services (“HHS”) funds and administers Medicare. The Health Care Financing Administration (“HCFA”), an agency within HHS, manages the Medicare program. *Medicaid and the Civilian Health and Medical Program of the Uniformed Services (“CHAMPUS”) provide similar coverage, respectively, for the indigent and armed services retirees and dependents of active duty members. The three programs function essentially the same.*

United States v. Whiteside, 285 F.3d 1345, 1346 (2002) (emphasis added).

The Department further claims that programs like Medicare are distinguishable, because a person may qualify for them “without having provided any service to the federal or state government.” Under CHAMPUS, which covers dependents of active duty military members in addition to retirees, a number of people qualify who have *never* provided such service. 32 C.F.R. § 199.3(b)(1) & (2).

Moreover, while a person may qualify for Medicare without having provided any service to the federal or state government, such

person generally must have worked at least 10 years in Medicare-covered employment before he will qualify. 42 U.S.C. §§ 426(a)(2)(A), 402(a), 414(a)(2). In other words, the individual must have paid FICA taxes for at least 10 years. This employment requirement hardly makes Medicare beneficiaries the recipients of an employee benefit plan any more than the requirement that a CHAMPUS beneficiary be a military dependent or retiree.

The Department claims that Whidbey fails to explain why the definition of CHAMPUS as a “health plan” under the Social Security Act makes a difference in the analysis. The inclusion of CHAMPUS in that definition makes it comparable to programs like Medicare, which is also defined as a “health plan.” As the Department admits, payments under entitlement “health plans” like Medicare are tax deductible. CHAMPUS, like Medicare, is simply one of many “health programs” that the federal government provides. Because payments from CHAMPUS are similar to payments from these other government programs, they too should be tax deductible.

Distinguishing CHAMPUS from insurance is important for a different reason. The Department claims that “explication of some of the differences [between insurance and CHAMPUS] does not shed any light on how to interpret “employee benefit plan” in RCW 82.04.4297. Not so.

The exception to RCW 82.04.4297's deduction was enacted to overturn a Supreme Court decision that Group Health "was entitled to deduct for B&O tax purposes **health insurance payments** received from federal, state, and local governments." CP 234, 237-38 (emphasis added). Because the exception is designed to preclude a deduction for "health insurance payments" from the government, it undoubtedly matters whether CHAMPUS payments qualify as "health insurance payments."

Although similar in some respects, CHAMPUS is not health insurance. Whidbey set forth numerous differences between health insurance and CHAMPUS in its initial briefing. Appellant Brief at 18-20; see also 32 C.F.R. § 199.1(d) ("Further, CHAMPUS is not subject to those state regulatory bodies or agencies that control the insurance business generally.") The Department does not dispute these differences. Respondent's Brief at 18.

The Department says that these differences are irrelevant. Id. However, the Legislature thought the question was important enough to list government health insurance payments as the reasons for enacting RCW 82.04.4297's exception. If CHAMPUS payments are not "health insurance payments," then the Legislature did not consider them amounts received under an "employee benefit plan." CHAMPUS is not health insurance, and is instead an "entitlement" health program. Therefore, the

Legislature did not intend to preclude hospitals from deducting amounts received under CHAMPUS.

D. Even if CHAMPUS is an “Employee Benefit Plan,” the Federal Government has Pre-empted RCW 82.04.4297.

The fundamental question in determining whether there is pre-emption is whether Congress intended it. Here, Congress expressly set forth its intent to allow the Secretary of Defense (subject to certain determinations made by the Secretary) to pre-empt state laws. 10 U.S.C. § 1103(a). The Secretary of Defense exercised its prerogative when it promulgated 32 C.F.R. § 199.17(a)(7)(ii), which states that “any State or local law relating to ... health care delivery or financing methods is preempted and does not apply in connection with” CHAMPUS.

To some extent, then, the pre-emption question turns on the phrase “relating to.” As Whidbey argued on appeal, the Supreme Court and our own state courts have held that this phrase is broad in the context of ERISA and other statutes. Appellant’s Brief at 25-26. The Department, in turn, contends that DeBuono v. NYSA-ILA Medical & Clinical Services Fund, 520 U.S. 806 limits this “simplistic approach to preemption analysis and require[s] a more thoughtful approach.” Respondent’s Brief at 28-30.

DeBuono did not overrule the authority relied on by Whidbey. The Court first noted that it had recently acknowledged “that the literal text of [relating to] is clearly expansive.” 520 U.S. at 810 (quoting New

York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645 (1995)). While the Court cautioned that this does not mean there are no outer limits to this expansiveness, it did affirm that prior interpretations of “relating to” as synonymous with having a “connection with or reference to” were undoubtedly correct. Id.

There is no doubt, though, that the phrase “relating to” is still a broad one:

Black's Law Dictionary defines “related” to mean “to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with.” Supreme Court and Ninth Circuit precedent suggest that this broad definition of “related” is an appropriate one to use here.

Padilla v. Lever, 463 F.3d 1046 (9th Cir. 2006) (citations and quotations omitted).

The question, then, is whether the B&O tax levied against hospitals is one relating to - or that has a connection with - health care delivery or health care financing. The revenues from the tax against hospitals are “deposited in the health services account created under RCW 43.72.900.” RCW 82.04.260(10). The revenues in that account finance health care delivery in Washington. RCW 43.72.900. It is hard to imagine a stronger “connection with” health care delivery and financing than a tax that finances health care delivery.

The Department argues that for a law to “relate to” health care

delivery or financing, the law must “regulate” or be a law “regulating it. Respondent’s Brief at 27, 31, 32. The phrase “relating to” is not so narrow. Had Congress and the Department of Defense intended such a narrow scope of preemption it would have said that “any State or local law [*regulating*] ... health care delivery or financing methods is preempted and does not apply in connection with” CHAMPUS. However, Congress and the Department of Defense did not use that phrase; it used a phrase that means having a connection with or referring to.

The Department relies on DeBuono, which held that ERISA did not preempt New York from imposing a gross receipts tax on medical centers which were owned and operated by an ERISA-covered employee benefit plan. While the case may be useful for setting the outer limits of the definition of “relating to” in various statutes, it has no application beyond that.

The Department of Defense has stated that “[f]or purposes of assessing the effect of Federal preemption of State and local taxes and fees in connection with Department of Defense health and dental services contracts, interpretations shall be consistent with those applicable to the Federal Employees Health Benefits Program under 5 U.S.C. 8909(f).” 32 C.F.R. 199.17. Had the Department of Defense intended for courts to rely on ERISA cases in determining the scope of preemption, it would have

said so.

The Department of Defense dictated that courts follow FEHBP cases because the preemption sections for CHAMPUS and FEHBP are similar. On the other hand, ERISA's preemption section provides that state law is preempted when it relates to an employee benefit plan. Asking whether a state law relates to an employee benefit plan differs significantly from asking whether a state law relates to health care delivery or financing. The inquiry, which the Court is undertaking here, latter is a much broader inquiry.

Had the Court held that gross receipts tax applied to hospitals did not relate to health care delivery or financing then DeBuono might apply. Instead, it merely held that the tax did not relate to employee benefit plans, an altogether different inquiry. Moreover, the tax in DeBuono is factually distinguishable. Unlike revenues from the tax here, which go into a special fund and therefore make it a special purpose tax, "[t]he assessments [in New York] become a part of the State's general revenues." 520 U.S. at 810.

Having established that the tax at issue is one relating to health care delivery or financing as required by 10 U.S.C. § 1103 (a) and 32 C.F.R. § 199.17(a)(7)(ii), it is necessary to turn to 32 C.F.R. 199.17(a)(7)(iii), where the Department of Defense set forth an exception

to the broad preemption of 32 C.F.R. 199.17(a)(7)(ii). The applicable regulation states:

The preemption of State and local laws set forth in paragraph (a)(7)(ii) of this section includes State and local laws imposing premium taxes on health or dental insurance carriers or underwriters or other plan managers, or similar taxes on such entities. Such laws are laws relating to health insurance, prepaid health plans, or other health care delivery or financing methods, within the meaning of the statutes identified in paragraph (a)(7)(i) of this section. **Preemption, however, does not apply to taxes, fees, or other payments on net income or profit realized by such entities in the conduct of business relating to DOD health services contracts, if those taxes, fees or other payments are applicable to a broad range of business activity.** For purposes of assessing the effect of Federal preemption of State and local taxes and fees in connection with DOD health and dental services contracts, interpretations shall be consistent with those applicable to the Federal Employees Health Benefits Program under 5 U.S.C. 8909(f).

32 C.F.R. 199.17(a)(7)(iii) (emphasis added).

The Department begins by focusing on the first sentence, which states that “[t]he preemption of State and local laws set forth in paragraph (a)(7)(ii) of this section includes State and local laws imposing premium taxes ...” The Department argues that (1) this is an exclusive list of the taxes that the Department of Defense has preempted, and (2) because the tax at issue is not a premium tax there cannot be preemption here.

Respondent’s Brief at 37-43.

As Washington courts have noted, though, “When ‘include’ is

utilized, it is generally improper to conclude that entities not specifically enumerated are excluded.” Fortin v. State Farm Mutual Automobile Ins. Co., 82 Wn. App. 74, 84 n.4, 914 P.2d 1209 (1996), overruled on jurisdictional grounds 133 Wn.2d 490, 946 P.2d 388 (1997) (quoting 2A Norman J. Singer, Sutherland Stat. Const., Intrinsic Aids § 47.23 (5th ed. 1992)).

Other courts agree that use of the word “includes” in a statute does not imply the exclusion of things not listed. Thoeni v. Consumer Electronic Services, 151 P.3d 1249 (Alaska S. Ct. 2007) (“Because the legislature chose to use the word “includes” rather than more exclusive terms, we interpret the definition as a non-exclusive list.”); see also Schwab v. Ariyoshi, 58 Haw. 25, 564 P.2d 135, 141 (1977) (“The term ‘includes’ is ordinarily a term of enlargement, not of limitation; a statutory definition of a thing as ‘including’ certain things does not necessarily impose a meaning limited to the inclusion.”).

Thus the fact that the regulation states that preemption includes premium taxes does not mean that other taxes are excluded from preemption. In other words, 32 C.F.R. 199.17(a)(7)(iii) is not an exhaustive list of every type of tax that the Department of Defense intended to preempt. This makes the Department’s analysis as to whether the tax at issue is a premium tax irrelevant.

The more important question is whether the exception to preemption set forth by the Department of Defense in the third sentence applies. That sentence states that preemption does not apply to taxes on net income if those taxes are applicable to a broad range of business activity. The Department concedes that the plain language of the exception does not apply: “[T]he B&O tax falls comfortably within the spirit of the exception language of subsection (iii), even if not within the strict wording of the provision.” Respondent’s Brief at 44.

The Department focuses primarily on arguing that the exception applies because the taxes at issue are applicable to a broad range of business activity. However, as Whidbey has pointed out the tax, as applied against hospitals, is a special purpose gross receipts tax, because it is not directed to the general fund and because it finances health care delivery.

The Department acknowledges that the other requirement of the exception is not met:

It is true that the B&O tax is a gross income tax, not a “net income” tax.... However, Whidbey General offers no explanation for why the difference between applying a general business tax to income after making those deductions should have any impact on a federal preemption analysis.

Respondent’s Brief at 47.

The reason it matters is that the plain language says so:

Courts should assume the Legislature means exactly what it says. Plain words do not require construction. The courts do not engage in statutory interpretation of a statute that is not ambiguous. If a statute is plain and unambiguous, its meaning must be derived from the wording of the statute itself.

State v. Keller, 143 Wn.2d 267, 276, 51 P.3d 66 (2002).

Had the Department of Defense intended the exception to apply to a gross income tax, it would have said so. The Department does not dispute that where the language is plain and unambiguous, a court may not go beyond the text. The Department does not argue that the phrase “net income” is ambiguous, and therefore there is no need to move beyond the statute’s plain language.

Moreover, Whidbey did explain why the Department of Defense distinguished taxes on net versus gross income, and it involves the federal interest behind preemption, which is to provide affordable healthcare to military dependents and retirees. Appellant’s Brief at 30-31. Although the Department does not establish the ambiguity of “net income” required to justify looking behind the statute’s plain language, the Department offers no reasons rebutting why Whidbey’s explanation is unsatisfactory in the event that the Court did look behind the statute.

E. Conclusion

RCW 82.04.4297 allows a hospital to deduct federal money it

receives in return for providing health services, unless the money is “received under an employee benefit plan.” Under the common law, military personnel are not employees, so CHAMPUS is not an employee benefit plan. CHAMPUS is also not a benefit plan. It is a health plan and an entitlement program similar to Medicare, which the Department concedes falls within the deduction under RCW 82.04.4297. The Legislature intended the exception to cover payments from health insurance. But CHAMPUS is not health insurance. For these reasons, CHAMPUS payments fall outside the exception to the deduction.

A second reason justifies holding that Whidbey is entitled to the tax refund it seeks. The Department of Defense has expressly declared that any state law relating to health care delivery or financing methods is preempted and does not apply in connection with CHAMPUS. The B&O tax is a statute relating to health care financing and delivery to the extent that revenues from hospitals are placed in a special fund that is used to finance health care delivery in Washington. To the extent that it reaches CHAMPUS income, the B&O tax is preempted. The exception to preemption set forth by the Department of Defense does not apply, because the tax is not on “net income” and because the tax is a special purpose one that does not apply to a broad range of business activity.

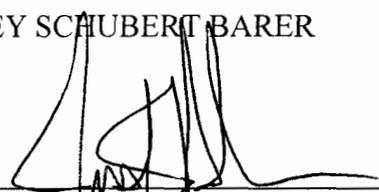
For the reasons above, Whidbey respectfully requests the Court to

reverse summary judgment in favor of the Department and enter summary judgment for Whidbey and to remand for entry of judgment in Whidbey's favor for the \$102,723 refund it seeks plus pre-judgment interest, court costs, and applicable attorney's fees, if any.

DATED this 22nd day of October 2007.

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CERTIFICATE OF SERVICE

I, Fred Schmidt, certify under penalty of perjury under the laws of the State of Washington, that on October 22, 2007, I caused a copy of the foregoing document to be served on the person(s) listed below via legal messenger.

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OCT 22 2007
17
[Signature]

Dated at Seattle, Washington, this 22nd day of October, 2007.


Fred Schmidt

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