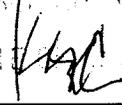


FILED  
COURT OF APPEALS  
DIVISION II

07 SEP 20 PM 4: 53

NO. 36120-5-II

STATE OF WASHINGTON  
BY   
CLERK

---

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

---

WHIDBEY GENERAL HOSPITAL,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Respondent.

---

**BRIEF OF RESPONDENT**

---

ROBERT M. MCKENNA  
Attorney General

HEIDI A. IRVIN, WSBA #17500  
Assistant Attorney General  
Revenue Division  
P.O. Box 40123  
Olympia, WA 98504-0123  
(360) 753-5528

**TABLE OF CONTENTS**

I. INTRODUCTION.....1

II. COUNTERSTATEMENT OF THE ISSUES .....2

III. STATEMENT OF THE CASE.....2

IV. ARGUMENT .....3

    A. CHAMPUS Income Is Not Deductible Under RCW 82.04.4297 Because It Is Received Under An “Employee Benefit Plan.” .....3

        1. CHAMPUS is similar to other health benefit plans offered by employers to employees as a fringe benefit. ....4

        2. The Department’s interpretation of RCW 82.04.4297 is consistent with other statutory definitions of “employee benefit plan.” .....8

        3. Members of the military are properly considered “employees” for purposes of the term “employee benefit plan” in RCW 82.04.4297. ....15

        4. CHAMPUS is a “benefit plan.” .....16

        5. The legislative history of RCW 82.04.4297 confirms that CHAMPUS should be considered an “employee benefit plan.” .....20

        6. If this Court were to find RCW 82.04.4297 is ambiguous, it should construe the statute strictly against Whidbey General. ....23

    B. Federal Law Does Not Preempt Application Of Washington’s B&O Tax To Hospitals’ CHAMPUS Income.....26

1.	Congress demonstrated no clear and manifest purpose to preempt state taxes on hospitals' CHAMPUS income. ....	26
2.	The Department of Defense's regulation does not preempt application of Washington's B&O tax to hospitals' CHAMPUS income. ....	34
a.	The Washington B&O tax does not relate to "health insurance, prepaid health plans, or other health care delivery or financing methods." ....	36
b.	The B&O tax on hospitals' CHAMPUS income is not a "premium tax" on an insurance business. ....	37
c.	B&O taxes are "applicable to a broad range of business activity" and therefore are not preempted. ....	43
C.	Whidbey General Would Not Be Entitled To Attorney Fees And Expenses Under RAP 18.1 If It Were The Prevailing Party On Appeal. ....	49
V.	CONCLUSION .....	50

## TABLE OF AUTHORITIES

### Cases

<u>American Foreign Service Ass'n v. Garfinkel,</u> 490 U.S. 153, 109 S. Ct. 1693, 104 L. Ed. 2d 139 (1989).....	15
<u>Barnett v. Weinberger,</u> 818 F.2d 953 (D.C. Cir. 1987).....	6
<u>Budget Rent-A-Car of Washington-Oregon, Inc. v. Dep't of Revenue,</u> 81 Wn.2d 171, 500 P.2d 764 (1972).....	24
<u>California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.,</u> 519 U.S. 316, 117 S. Ct. 832, 136 L. Ed. 2d 791 (1997).....	30
<u>City of Spokane ex rel. Wastewater Mgmt. Dep't v. Dep't of Revenue,</u> 145 Wn.2d 445, 38 P.3d 1010 (2002).....	7
<u>Corn Products Ref. Co. v. Commissioner,</u> 350 U.S. 46, 76 S. Ct. 20, 100 L. Ed. 29 (1955).....	25
<u>De Buono v. NYSA-ILA Medical &amp; Clinical Services Fund,</u> 520 U.S. 806, 117 S. Ct. 1747, 138 L. Ed. 2d 21 (1997).....	passim
<u>Dep't of Ecology v. Campbell &amp; Gwinn, LLC,</u> 146 Wn.2d 1, 43 P.3d 4 (2002).....	7
<u>Franklin v. Massachusetts,</u> 505 U.S. 788, 112 S. Ct. 2767, 120 L. Ed. 2d 636 (1992).....	15
<u>Group Health Coop. of Puget Sound, Inc. v. Dep't of Revenue,</u> 106 Wn.2d 391, 722 P.2d 787 (1986).....	21
<u>Group Health Coop. of Puget Sound, Inc. v. Wash. State Tax Comm'n,</u> 72 Wn.2d 422, 433 P.2d 201 (1967).....	24

<u>Health Maintenance Org. of New Jersey v. Whitman,</u> 72 F.3d 1123 (3d Cir. 1995) .....	41, 42, 49
<u>Impecoven v. Dep't of Revenue,</u> 120 Wn.2d 357, 841 P.2d 752 (1992).....	45
<u>In re HLM Corporation,</u> 183 B.R. 852 (D. Minn. 1994), <u>affirmed</u> , 62 F.3d 224 (8 <sup>th</sup> Cir. 1995) .....	14
<u>In re Marriage of Kraft,</u> 119 Wn.2d 438, 832 P.2d 871 (1992).....	15
<u>Lacey Nursing Center, Inc. v. Dep't of Revenue,</u> 128 Wn.2d 40, 905 P.2d 338 (1995).....	24
<u>Lindeman v. Kelso School Dist. No. 458,</u> 127 Wn. App. 526, 111 P.3d 1235 (2005).....	7
<u>Lopez v. Johnson,</u> 333 F.3d 959 (9 <sup>th</sup> Cir. 2003) .....	15
<u>Ma'ele v. Arrington,</u> 111 Wn. App. 557, 45 P.3d 557 (2002).....	15
<u>McGee v. Funderberg,</u> 17 F.3d 1122 (8 <sup>th</sup> Cir. 1994) .....	16
<u>Miller v. Albright,</u> 523 U.S. 420, 118 S. Ct. 1428, 140 L. Ed. 2d 575 (1998).....	15
<u>Morales v. Trans World Airlines, Inc.,</u> 504 U.S. 374, 112 S. Ct. 2031, 119 L. Ed. 2d 157 (1992).....	28
<u>Nationwide Ins. v. Williams,</u> 71 Wn. App. 336, 858 P.2d 516 (1993), <u>review denied</u> , 123 Wn.2d 1022 (1994).....	6
<u>New York State Conf. of Blue Cross &amp; Blue Shield Plans v.</u> <u>Travelers Ins. Co.,</u> 514 U.S. 645, 115 S. Ct. 1671, 131 L. Ed. 2d 695 (1995).....	26, 29, 30

<u>S. Martinelli &amp; Co. v. Dep't of Revenue,</u> 80 Wn. App. 930, 912 P.2d 521, <u>review denied</u> , 130 Wn.2d 1004 (1996).....	25
<u>Simpson Investment Co. v. Dep't of Revenue,</u> 141 Wn.2d 139, 3 P.3d 741 (2000).....	45
<u>State of Connecticut v. United States,</u> 1 F. Supp. 2d 147 (D. Conn. 1998).....	48, 49
<u>State v. Thomas,</u> 121 Wn.2d 504, 851 P.2d 673 (1993).....	7
<u>United Parcel Serv., Inc. v. Dep't of Revenue</u> 102 Wn.2d 355, 687 P.2d 186 (1984).....	24
<u>United States v. Fresno,</u> 429 U.S. 452, 97 S. Ct. 699, 50 L. Ed. 2d 683 (1977).....	41
<u>United States v. West Virginia,</u> 339 F.3d 212 (4 <sup>th</sup> Cir. 2003) .....	passim
<u>Wilson Court Ltd. Partnership v. Tony Maroni's, Inc.,</u> 134 Wn.2d 692, 952 P.2d 590 (1998).....	50

#### Statutes

5 U.S.C.S. § 8909(f) (2000).....	35, 47, 48
5 U.S.C.S. § 8909(f)(1) (2000) .....	35, 40
5 U.S.C.S. § 8909(f)(2) (2000) .....	36
10 U.S.C.S. § 101(d)(1) (1998).....	4
10 U.S.C.S. § 1070 (1998).....	4
10 U.S.C.S. § 1071 (1998).....	1, 5
10 U.S.C.S. § 1072(4) (1998) .....	4

10 U.S.C.S. § 1072(7) (1998) .....	6, 13
10 U.S.C.S. § 1079 (1998) .....	31
10 U.S.C.S. § 1079(b) (1998) .....	5
10 U.S.C.S. § 1079(e) (1998) .....	5, 17
10 U.S.C.S. § 1079(f) (1998) .....	17
10 U.S.C.S. § 1079(h) (1998) .....	33
10 U.S.C.S. § 1086 (1998) .....	4
10 U.S.C.S. § 1103 (1998) .....	passim
10 U.S.C.S. § 1103(a) (1998) .....	27
10 U.S.C.S. § 1103(a)(1) (1998) .....	33
10 U.S.C.S. § 1103(a)(2) (1998) .....	33
28 U.S.C.S. § 2671 (2005) .....	16
29 U.S.C.S. § 1002(1) (2006) .....	9, 10
29 U.S.C.S. § 1002(3) (2006) .....	9, 10
29 U.S.C.S. § 1002(32) (2006) .....	9, 16
29 U.S.C.S. § 1003(b) (2006) .....	9
42 U.S.C.S. § 1320d(5) (1998) .....	17
Laws of 1979, 1 <sup>st</sup> Ex. Sess., ch. 196, § 5 .....	20
Laws of 1979, 1 <sup>st</sup> Ex. Sess., ch. 196, § 6. ....	20
Laws of 1980, ch. 30, § 1 .....	20
Laws of 1980, ch. 30, § 17 .....	20

Laws of 1988, ch. 67, § 1 .....	11, 21
Laws of 1995, ch. 229, § 1 .....	11
Laws of 2001, 2d Sp. Sess., ch. 23, § 1 .....	22
Laws of 2001, 2d Sp. Sess., ch. 23, § 2 .....	22
Laws of 2002, ch. 314, § 2 .....	22
RCW 6.15.020(4) .....	13
RCW 43.72.900 .....	27, 28, 31
RCW 48.14 .....	39
RCW 48.14.020(1) .....	38
RCW 48.14.0201 .....	39
RCW 48.14.0201(1) .....	39
RCW 48.14.0201(2) .....	39
RCW 49.78.020(6) .....	13
RCW 70.47 .....	18
RCW 74.09 .....	18
RCW 82.04 .....	31, 33, 39
RCW 82.04.080 .....	46
RCW 82.04.140 .....	45
RCW 82.04.220 .....	45
RCW 82.04.230 .....	46
RCW 82.04.260 .....	46

RCW 82.04.260(10).....	46, 48
RCW 82.04.290(1).....	11
RCW 82.04.290(2).....	46
RCW 82.04.293 .....	passim
RCW 82.04.293(3)(c) .....	11, 12, 13
RCW 82.04.298 .....	46
RCW 82.04.320 .....	39
RCW 82.04.322 .....	39
RCW 82.04.4297 .....	passim
RCW 82.04.430(16).....	20
RCW 82.04.431 .....	4, 20, 21
RCW 82.04.431(2).....	19
RCW 82.04.431(2)(a) .....	19
RCW 82.04.431(2)(f).....	19
RCW 82.04.431(2)(i).....	19
RCW 82.04.431(2)(l).....	19
RCW 82.04.4311 .....	22
RCW 82.12.0293 .....	25
RCW 82.32.180 .....	50

**Regulations**

32 C.F.R. § 199.1(d) .....	18, 21
32 C.F.R. § 199.1(p)(1)(i).....	5
32 C.F.R. § 199.17 .....	6, 34
32 C.F.R. § 199.17(a)(6)(ii)(C).....	6
32 C.F.R. § 199.17(a)(7).....	1, 35, 44
32 C.F.R. § 199.17(a)(7)(i).....	34
32 C.F.R. § 199.17(a)(7)(ii).....	36
32 C.F.R. § 199.17(a)(7)(iii).....	38, 39, 42
32 C.F.R. § 199.2 .....	18
32 C.F.R. § 199.2(b) .....	4
32 C.F.R. § 199.3(b) .....	4
32 C.F.R. § 199.4(a).....	5
32 C.F.R. § 199.4(a)(1)(i).....	5
32 C.F.R. §199.1(d) .....	4
Federal Employees Health Benefits Acquisition Regulations; Termination of Contracts, 56 Fed. Reg. 20575 (May 6, 1991).....	40
WAC 458-20-168(3)(e) .....	13

**Rules**

RAP 14.3..... 49, 50  
RAP 18.1..... 49, 50

**Other Authorities**

*Black's Law Dictionary* 564 (8<sup>th</sup> ed. 2004)..... 10  
H.R. Rep. No. 103-200, at 26 (1993)..... 32

**Treatises**

2A Norman J. Singer, *Statutes and Statutory Construction* § 48A:16,  
at 809-10 (6<sup>th</sup> ed. 2000)..... 7

## I. INTRODUCTION

This case concerns the application of Washington’s business and occupation (“B&O”) tax to income Whidbey General Hospital receives for treating patients who receive benefits under the Civilian Health and Medical Program of the Uniformed Services, 10 U.S.C. § 1071 et seq. (“CHAMPUS”). The Legislature allows qualifying “health or social welfare organizations” to deduct from their taxable gross income amounts received from government sources for providing “health or social welfare services.” RCW 82.04.4297. Amounts received from governments under an “employee benefit plan,” however, are not allowed to be deducted. The Washington State Department of Revenue (“Department”) treats CHAMPUS as an “employee benefit plan” within the definition in RCW 82.04.4297, and the trial court agreed with that interpretation.

If this Court agrees with the trial court, as the Department believes it should, it will need to address the question whether application of Washington’s B&O tax to Whidbey General’s CHAMPUS income is preempted by federal law. Whidbey General’s preemption argument turns on interpretation of 10 U.S.C. § 1103, the CHAMPUS preemption statute, and 32 C.F.R. § 199.17(a)(7), the United States Department of Defense’s preemption regulation concerning CHAMPUS. As the trial court concluded, the federal statute and regulation fail to demonstrate any clear

or manifest purpose by Congress or the Department of Defense to preclude Washington from imposing B&O tax on hospitals' CHAMPUS income. In the absence of such clear intent, no preemption exists.

The trial court granted summary judgment to the Department and denied Whidbey General's cross-motion on both the question of how RCW 82.04.4297 ought to be interpreted and the federal preemption question. This Court should affirm the trial court's order.

## **II. COUNTERSTATEMENT OF THE ISSUES**

1. CHAMPUS is a federal government program of medical benefits provided to military retirees and their dependents, dependents of active duty military members, and survivors of military members. Is CHAMPUS a government "employee benefit plan" under RCW 82.04.4297?

2. Federal law preempts "premium taxes" on CHAMPUS "health or dental insurance carriers or underwriters or plan managers." Is Washington's B&O tax applied to hospitals preempted?

## **III. STATEMENT OF THE CASE**

The Department accepts Whidbey General's statement of the case, except to add that this litigation arises out of an audit the Department conducted for the tax period of January 1, 1995, through March 31, 1999 and the related assessment. CP 270-71.

#### IV. ARGUMENT

The trial court properly granted summary judgment to the Department on both of the issues in this case. Whidbey General's CHAMPUS revenues are amounts from an "employee benefit plan" as that term is used in RCW 82.04.4297, and therefore should not be deducted from Whidbey General's gross income for B&O tax purposes. Likewise, an examination of the pertinent federal authorities fails to demonstrate that either Congress or the Department of Defense, to whom Congress delegated its authority to preempt state law, intended to preempt application of the B&O tax to CHAMPUS payments received by hospitals. This Court should affirm the trial court's order granting summary judgment to the Department and denying Whidbey General's motion for summary judgment.

**A. CHAMPUS Income Is Not Deductible Under RCW 82.04.4297 Because It Is Received Under An "Employee Benefit Plan."**

Under RCW 82.04.4297, the Legislature allows "health and social welfare organizations" to deduct certain amounts received from government agencies from their gross receipts before computing B&O taxes:

In computing tax there may be deducted from the measure of tax amounts received from the United States or any instrumentality thereof or from the state of Washington or any municipal corporation or political subdivision thereof

as compensation for, or to support, health or social welfare services rendered by a health or social service welfare organization or by a municipal corporation or political subdivision, except deductions are not allowed under this section for amounts that are received under an employee benefit plan.

(Emphasis added). In this case, the parties do not dispute that Whidbey General is a “health or social welfare organization”<sup>1</sup> or that its CHAMPUS income was compensation from the United States for “health or social welfare services.” The statutory issue is whether CHAMPUS income constitutes amounts received under an “employee benefit plan.” The trial court correctly held that it does.

**1. CHAMPUS is similar to other health benefit plans offered by employers to employees as a fringe benefit.**

CHAMPUS is a program of medical benefits provided by the United States government to specified categories of qualified individuals. 10 U.S.C. §§ 1072(4), 1070, 1086; 32 C.F.R. §199.1(d) (2006). Military retirees and their dependents, as well as dependents of active duty military members and survivors of military members, are eligible to receive CHAMPUS benefits. 32 C.F.R. § 199.3(b). “Active duty” means “full-time duty in the active military service of the United States.” 10 U.S.C. § 101(d)(1); 32 C.F.R. § 199.2(b) (defining “member” as a “person on active duty in the Uniformed Services”).

---

<sup>1</sup> The term “health or social welfare organization” is defined for B&O tax purposes in RCW 82.04.431.

The CHAMPUS program “is essentially a supplemental program to the Uniformed Services direct medical care system.” 32 C.F.R. § 199.1(p)(1)(i); see also 32 C.F.R. § 199.4(a). It is “similar to private insurance programs, and is designed to provide financial assistance to CHAMPUS beneficiaries for certain prescribed medical care obtained from civilian sources.” 32 C.F.R. § 199.4(a). CHAMPUS provides for a broad range of benefits:

[T]he CHAMPUS Basic Program will pay for medically necessary services and supplies required in the diagnosis and treatment of illness or injury, including maternity care and well-baby care. Benefits include specified medical services and supplies provided to eligible beneficiaries from authorized civilian sources such as hospitals, other authorized institutional providers, physicians, other authorized individual professional providers, and professional ambulance service, prescription drugs, authorized medical supplies, and rental or purchase of durable medical equipment.

32 C.F.R. § 199.4(a)(1)(i). Depending upon the specific plan, beneficiaries can be required to make payments in the nature of co-payments and deductibles. See, e.g., 10 U.S.C. § 1079(b) & (e).

The broad purpose of the program 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, and for their dependents.” 10 U.S.C. § 1071. The principal improvement over the prior system was the authority for the

Department of Defense to contract for provision of medical care by civilian hospitals and physicians to dependents of active-duty personnel, thereby relieving a burden on military hospitals and staffs. Barnett v. Weinberger, 818 F.2d 953, 957 (D.C. Cir. 1987) (outlining history of statutory scheme).

In 1995, the Department of Defense established the TRICARE program, which is a “managed health care program that . . . includes the competitive selection of contractors to financially underwrite the delivery of health care services under [CHAMPUS].” 10 U.S.C. § 1072(7); 32 C.F.R. § 199.17. The basic CHAMPUS program is called the TRICARE Standard amongst the three options for receiving care under TRICARE. 32 C.F.R. § 199.17(a)(6)(ii)(C).

The plain meaning of “employee benefit plan” in RCW 82.04.4297 includes the CHAMPUS program. When words are not defined in a statute, courts normally should give them their usual and ordinary meaning. Nationwide Ins. v. Williams, 71 Wn. App. 336, 342, 858 P.2d 516 (1993), review denied, 123 Wn.2d 1022 (1994). As currently applied by our Supreme Court, the “plain meaning” rule of construction suggests courts should consider the meaning words are ordinarily given, “taking into account the statutory context, basic rules of grammar, and any special usages stated by the legislature on the face of the statute.” Dep’t of

Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 11, 43 P.3d 4 (2002) (quoting 2A Norman J. Singer, *Statutes and Statutory Construction* § 48A:16, at 809-10 (6<sup>th</sup> ed. 2000)). Undefined words may be given their ordinary meaning by reference to a dictionary. Lindeman v. Kelso School Dist. No. 458, 127 Wn. App. 526, 539, 111 P.3d 1235 (2005). Courts should give statutes “a rational, sensible construction” that produces a sensible result consistent with legislative intent. State v. Thomas, 121 Wn.2d 504, 512, 851 P.2d 673 (1993).

In the context of the statute at issue, RCW 82.04.4297, the Legislature generally allows non-profit hospitals to deduct from their taxable gross receipts amounts received from government sources for “health and social welfare services.” The stated exception is amounts received under an “employee benefit plan.” As limited by its context in the statute, the exception can apply only to amounts received under a government employee benefit plan. Beyond that, the Legislature provided no hint that the term “employee benefit plan” should be interpreted in anything other than its common and ordinary sense.<sup>2</sup>

---

<sup>2</sup> The Department does not entirely understand Whidbey General’s argument that “employee benefit plan” in RCW 82.04.4297 should be given its “technical meaning,” other than perhaps as a basis to advocate application of statutory definitions found in unrelated statutes. See App. Brief at 7-10, 13-14. The City of Spokane case Whidbey General cites was a tax case in which the court needed to distinguish between “sewerage collection” services and sewerage transportation and treatment services. City of Spokane ex rel. Wastewater Mgmt. Dep’t v. Dep’t of Revenue, 145 Wn.2d 445, 447, 38 P.3d 1010 (2002). The point at which sewerage collection ends and sewerage

It takes no special knowledge or expertise to conclude that an “employee benefit plan” is plan under which an employer offers benefits of a non-salary nature to persons who perform work for hire for that employer. Employee benefit plans can include health insurance, pension or other retirement savings vehicles, employee assistance programs, and other types of benefits. 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.”

CHAMPUS is an employee benefit plan because it is a plan that provides health care benefits to the dependents and survivors of military members and to retired military members and their dependents as a form of non-salary compensation to members of the military.<sup>3</sup>

**2. The Department’s interpretation of RCW 82.04.4297 is consistent with other statutory definitions of “employee benefit plan.”**

The Department’s interpretation of “employee benefit plan” in RCW 82.04.4297 is entirely consistent with the definition of the same term in the Employee Retirement Income Security Act of 1971

---

transportation begins is not a matter of common knowledge, so it was logical that the court chose to give the statutory term “sewerage collection” a technical definition. In contrast, the term “employee benefit plan” is commonly understood, and there is no indication the Legislature intended to use it in any technical sense.

<sup>3</sup> Whidbey General argues that the Department’s interpretation of the term “strains credulity,” but three different trial court judges have agreed with the Department’s interpretation. CP at 286-94. It is Whidbey General’s arguments that are strained, not the Department’s.

(“ERISA”). Under ERISA, an “employee benefit plan” is defined as “an employee welfare benefit plan or an employee pension benefit plan or a plan which is both[.]” 29 U.S.C. § 1002(3). The term “employee welfare benefit plan” is defined as “any plan, fund, or program . . . maintained by an employer or employee organization . . . for the purpose of providing for its participants or its beneficiaries, . . . medical, surgical, or hospital care or benefits[.]” 29 U.S.C. § 1002(1). Barring any statutory exclusion, CHAMPUS and other government employee health plans would fall within this definition of an “employee welfare benefit plan,” and thereby qualify as an “employee benefit plan” under ERISA. Because the policy behind ERISA was to bring government regulation or oversight to private employee benefit plans, however, ERISA excludes “governmental plans” from its coverage. 29 U.S.C. § 1003(b). A “governmental plan” is defined in relevant part as “a plan established or maintained for its employees” by a federal or state government or agency. 29 U.S.C. § 1002(32).

Whidbey General concludes from the foregoing that because CHAMPUS is excluded from the definition of “employee benefit plan” in ERISA by reason of the exception clause in 29 U.S.C. § 1003(b) and the definition of “governmental plan” in § 1002(32), CHAMPUS is not an “employee benefit plan” under RCW 82.04.4297. The problem with this

argument is obvious: No government employee benefit plan would qualify under RCW 82.04.4297, because they all would be excluded under the ERISA provisions. This is an absurd result because by its context, the exception in RCW 82.04.4297 applies only to amounts received under a government employee benefit plan. Whidbey General's argument wipes the exception away altogether.

A more sensible consideration of ERISA in this case would note that, but for the exclusion of all governmental plans from its scope, CHAMPUS easily fits within the definition of an "employee welfare benefit plan" under 29 U.S.C. § 1002(1), and therefore within the definition of "employee benefit plan" in 29 U.S.C. § 1002(3). That is, CHAMPUS fits within the broad understanding of what an "employee benefit plan" is.<sup>4</sup> Whidbey General's ERISA argument actually confirms that the Department's (and the trial court's) interpretation of RCW 82.04.4297 is correct.

Whidbey General notes that another B&O tax statute, RCW 82.04.293, contains a definition of "employee benefit plan" that includes the ERISA definition. App. Brief at 10. Whidbey General argues that

---

<sup>4</sup> Because CHAMPUS fits within the definition of "employee benefit plan" under ERISA as an "employee welfare benefit plan," CHAMPUS also is an "employee benefit plan" under the Black's Law Dictionary definition Whidbey General cites, which expressly incorporates "employee welfare benefit plans" under ERISA. *Black's Law Dictionary* at 564 (8<sup>th</sup> ed. 2004).

because the definition in RCW 82.04.293 is “coextensive” with ERISA, CHAMPUS cannot be an “employee benefit plan” under RCW 82.04.4297. App. Brief at 10-14.

Whidbey General overlooks the fact that the Legislature enacted the “employee benefit plan” exception in RCW 82.04.4297 in 1988, but did not enact RCW 82.04.293 until 1995. See Laws of 1988, ch. 67, § 1; Laws of 1995, ch. 229, § 1. The Legislature could not have been relying on the definition in RCW 82.04.293 when it enacted the exception in RCW 82.04.4297.

In addition, Whidbey General’s argument based on application of ERISA is flawed for the same reasons outlined above. Furthermore, the definition of “employee benefit plan” in RCW 82.04.293 is broader than the ERISA definition, and CHAMPUS falls within its express terms.

Under RCW 82.04.293(3)(c), the Legislature provided a definition of “employee benefit plan” for purposes of applying the B&O tax in RCW 82.04.290(1) to international investment management service businesses. The introduction to RCW 82.04.293 expressly states that all its provisions are “[f]or purposes of RCW 82.04.290.” Under these circumstances, any presumption that the same meaning should be applied to the same words in different parts of a statute is overcome. Instead, the definition in RCW 82.04.293 should be considered useful as an example of what constitutes

an “employee benefit plan,” but not as strictly dictating a definition for purposes of RCW 82.04.4297.

The definition in RCW 82.04.293 states that an “employee benefit plan”:

[I]ncludes any plan, trust, commingled employee benefit trust, or custodial arrangement that is subject to [ERISA], or that is described in sections 125, 401, 403, 408, 457, and 501(c)(9) and (17) through (23) of the internal revenue code of 1986, as amended, or a similar plan maintained by a state or local government, or a plan, trust, or custodial arrangement established to self-insure benefits required by federal, state, or local law.

RCW 82.04.293(3)(c).<sup>5</sup> As discussed above, but for ERISA’s exclusion of “governmental plans,” CHAMPUS fits squarely within the ERISA definition of “employee benefit plan.” Because CHAMPUS is not “subject to” ERISA, however, it falls outside the first clause of this definition of “employee benefit plan” in RCW 82.04.293.

Though Whidbey General concludes its analysis of RCW 82.04.293 at this point, this Court should not. The statute includes not only ERISA plans in its definition, but also specified internal revenue code plans and any “similar plan maintained by a state or local government, or a plan . . . established to self-insure benefits required by federal, state, or local law.” CHAMPUS falls within this last clause of the definition as a

---

<sup>5</sup> Use of the word “includes” in this definition does not necessarily suggest any exclusive exhaustion of the class by the examples provided.

plan that both finances and provides health benefits required by federal law to designated beneficiaries. See 10 U.S.C. § 1072(7); 32 C.F.R. § 199.17. Accordingly, whether one applies the ERISA definition of “employee benefit plan” by analogy or the final clause in RCW 82.04.293(3)(c) directly, CHAMPUS is an “employee benefit plan” under RCW 82.04.293.<sup>6</sup>

In support of its argument that the ERISA definition should apply in RCW 82.04.4297, Whidbey General quotes from two other Washington statutes containing definitions of “employee benefit plan,” applying or including the definition in ERISA, or excluding government plans. RCW 6.15.020(4) (enforcement of judgments); RCW 49.78.020(6) (Family Medical Leave Act); App. Brief at 12-13. Again, Whidbey General ignores the context of RCW 82.04.4297, under which the exception for “employee benefit plans” can apply only to government “employee benefit plans” because RCW 82.04.4297 applies only to funds received from government sources in the first place.

---

<sup>6</sup> Whidbey General asserts that the Department adopted the definition of “employee benefit plan” in RCW 82.04.293 for purposes of RCW 82.04.4297 in a 2000 memorandum. App. Brief at 11. The document Whidbey General refers to is an internal memorandum, written by a non-supervisory employee in January 2000, not a document expressing Department policy. CP 291-295. In 2005, however, the Department amended its rule regarding the taxation of hospitals to include an identical definition to that in RCW 82.04.293 for use in applying the exception in RCW 82.04.4297. WAC 458-20-168(3)(e) (“Rule 168”). To be consistent with RCW 82.04.4297, which covers only payments from government sources, the definition in Rule 168 should be considered as providing a nonexclusive list, as does RCW 82.04.293, and as including ERISA-covered plans by analogy only.

These other statutory definitions of “employee benefit plan” Whidbey General cites are not useful here, because they define the term “employee benefit plan” for a specific purpose that is unrelated to the deduction in RCW 82.04.4297. See In re HLM Corporation, 183 B.R. 852, 855 (D. Minn. 1994) (definition and construction of “employee benefit plan” in ERISA is irrelevant in construing term in Bankruptcy Code), affirmed, 62 F.3d 224 (8<sup>th</sup> Cir. 1995). The court in HLM expressly warned against “[t]he havoc that would result if the definition of terms in different federal programs were interchanged and intermingled by the judiciary” as the appellant was suggesting. 183 B.R. at 855 n.3.

In some statutory schemes defining “employee benefit plan,” a government employee benefit plan will be excluded, and in others, private employee benefit plans may be excluded. It all depends upon the purpose of the particular statute. Under RCW 82.04.4297, only government employee benefit plans are included because the statute relates only to funds received from the government. ERISA and RCW 82.04.293 are illustrative here, but they do not directly apply. What they do demonstrate, though, is that under the plain language of RCW 82.04.4297 and the ordinary understanding of the words, CHAMPUS is an “employee benefit plan.”

**3. Members of the military are properly considered “employees” for purposes of the term “employee benefit plan” in RCW 82.04.4297.**

Whidbey General argues that military members are not “employees” and have a special status, thus concluding that CHAMPUS cannot be an “employee benefit plan” under RCW 82.04.4297. App. Brief at 15-17. 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. It is an error, however, to jump from this to the conclusion that a member of the military cannot be considered an “employee” in the ordinary sense of the word or that benefits allowed to members of the military cannot be considered “employee benefits.”

Federal and state court opinions routinely refer to “military employees” or describe members of the military as “employees.”<sup>7</sup> Congress has done the same, by including within the definition of “employees of the government” in the Federal Tort Claims Act, 28 U.S.C.

---

<sup>7</sup> See, e.g., Miller v. Albright, 523 U.S. 420, 486, 118 S. Ct. 1428, 140 L. Ed. 2d 575 (1998) (Breyer, J., dissenting); Franklin v. Massachusetts, 505 U.S. 788, 793, 112 S. Ct. 2767, 120 L. Ed. 2d 636 (1992); American Foreign Service Ass’n v. Garfinkel, 490 U.S. 153, 156, 109 S. Ct. 1693, 104 L. Ed. 2d 139 (1989); Lopez v. Johnson, 333 F.3d 959, 962 (9<sup>th</sup> Cir. 2003); In re Marriage of Kraft, 119 Wn.2d 438, 445, 832 P.2d 871 (1992); Ma’ele v. Arrington, 111 Wn. App. 557, 559, 45 P.3d 557 (2002).

§ 2671, officers and employees of federal agencies, as well as “members of the military or naval forces.”

Whidbey General’s own ERISA analysis demonstrates the same point and completely undermines its argument that members of the military are not “employees” for purposes of the term “employee benefit plan” in RCW 82.04.4297. Whidbey General asserts CHAMPUS is a “governmental plan” under 29 U.S.C. § 1002(32). App. Brief at 9.<sup>8</sup> The Department agrees. But because 29 U.S.C. § 1002(32) defines “governmental plan” as a plan established or maintained by a government “for its employees,” Whidbey General must concede that members of the military are “employees” as ERISA uses that term.

Absent evidence that the Legislature intended to distinguish between civilian and military employee benefit plans under RCW 82.04.4297, which Whidbey General has not offered, CHAMPUS must be considered to fall squarely within the term “employee benefit plan.”

#### **4. CHAMPUS is a “benefit plan.”**

In addition to arguing that members of the military are not “employees,” Whidbey General argues CHAMPUS is not a “benefit plan,” and therefore cannot be an “employee benefit plan.” App. Brief at 17-20. It argues that Congress has defined CHAMPUS as a “health plan” funded

---

<sup>8</sup> Citing McGee v. Funderberg, 17 F.3d 1122, 1125 (8<sup>th</sup> Cir. 1994).

by the federal government under 42 U.S.C. § 1320d(5), and has excluded CHAMPUS from being an “employee benefit plan” under ERISA, so CHAMPUS “cannot be a benefit plan as defined by the Department.” App. Brief at 18. Whidbey General also outlines some differences between private health insurance programs and CHAMPUS.

First, the Legislature chose the term “employee benefit plan” in RCW 82.04.4297, not the Department. Second, the analytical flaws in Whidbey General’s ERISA arguments have already been explained above. Third, Whidbey General has not explained why inclusion of CHAMPUS in a federal statutory definition of “health plan” for Social Security Administration purposes in Title 42 U.S.C. and exclusion of CHAMPUS from a definition of “employee benefit plan” for ERISA purposes means CHAMPUS “cannot” be considered a “benefit plan” for purposes of RCW 82.04.4297.

The focus here should be on what the Legislature intended in using the term “employee benefit plan” in RCW 82.04.4297, not on what Congress was trying to accomplish in completely unrelated federal statutes. Furthermore, Whidbey General does not dispute that CHAMPUS is a “plan,” and it cannot possibly dispute that CHAMPUS provides “benefits” to members of the military and their dependents. See, e.g., 10 U.S.C. § 1079(e) & (f) (referring to “benefits” provided for medical care

for spouses and children); 32 C.F.R. § 199.2 (multiple CHAMPUS program definitions referring to “benefits” and “beneficiaries”).

Whidbey General’s discussion of private insurance programs also does not demonstrate that CHAMPUS is not a “benefit plan.” Federal regulations indicate CHAMPUS is “similar in structure in many of its aspects” to private insurance plans, “but is not an insurance program in that it does not involve a contract guaranteeing the indemnification of an insured party against a specified loss in return for a premium paid.” 32 C.F.R. § 199.1(d). From this sentence alone, we know that CHAMPUS is similar in many respects to private insurance, but different in others. Whidbey General’s explication of some of the differences does not shed any light on how to interpret “employee benefit plan” in RCW 82.04.4297.

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.

Another indicator of legislative intent is the list of services that qualify as “health or social welfare services” under RCW 82.04.431(2), and therefore for the deduction in RCW 82.04.4297. In addition to “health care services,” these include, among others: mental health, drug or alcoholism counseling; care of orphans or foster children; legal services for the indigent; and community services to low-income individuals designed to have a measurable impact on causes of poverty. See RCW 82.04.431(2)(a), (f), (i) & (l). This partial list illustrates the “social welfare” emphasis of these two statutes, which were enacted in the same 1979 legislation. Employee benefits are very different.

The programs that fall into the exception to the deduction include state or federally-funded programs providing benefits to government employees. 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. It is also more like private medical insurance programs offered through employers than the entitlement programs, which do not require service to a particular employer to obtain the benefits. In all material respects, CHAMPUS is an “employee benefit plan” under RCW 82.04.4297.

**5. The legislative history of RCW 82.04.4297 confirms that CHAMPUS should be considered an “employee benefit plan.”**

Contrary to Whidbey General’s arguments, nothing in the legislative history of RCW 82.04.4297 suggests the Legislature intended that hospitals be allowed to deduct from taxable income CHAMPUS payments received from the federal government. To the extent the legislative history illuminates the issue here, it favors the Department’s interpretation that CHAMPUS revenues are amounts received under an “employee benefit plan.”

This deduction originated in 1979, when the Legislature added a provision similar to what appears today in RCW 82.04.4297 (without the exception). Laws of 1979, 1<sup>st</sup> Ex. Sess., ch. 196, § 5 (codified as RCW 82.04.430(16)). The same legislation created the definitions of “health or social welfare organization” and “health or social welfare services,” which are found in RCW 82.04.431. Laws of 1979, 1<sup>st</sup> Ex. Sess., ch. 196, § 6. The deduction moved to its own section of the Code in 1980, without any change in its meaning intended. Laws of 1980, ch. 30, §§ 1, 17.

In 1988, the Legislature added the exception language in RCW 82.04.4297 that “deductions are not allowed under this section for amounts that are received under an employee benefit plan.” This legislation resulted from the decision in Group Health Coop. of Puget

Sound, Inc. v. Dep't of Revenue, 106 Wn.2d 391, 722 P.2d 787 (1986);  
see Laws of 1988, ch. 67, § 1.

In Group Health, the focus under RCW 82.04.4297 was whether Group Health qualified as a “health or social welfare organization,” not on the nature of the payments Group Health was receiving from a government source.<sup>9</sup> The court concluded that Group Health did qualify for the deduction. 106 Wn.2d at 397. However, this decision prompted legislative concern that the Department and the courts were interpreting the statute to allow hospitals to “exempt from B&O tax amounts received from federal, state, and local governments for health insurance.” CP at 280 (Final Bill Report, SHB 1089). Consequently, the Legislature added the exception clause to disallow a deduction for income associated with “employee benefit plans.”

In the 1988 amendment, the Legislature intended to prevent non-profit hospitals, like Whidbey General, from deducting income received from government employee benefit plans. CHAMPUS payments to hospitals are within the intent of the 1988 amendment. Federal regulations describe CHAMPUS as like private health insurance in many aspects. 32 C.F.R. § 199.1(d).

---

<sup>9</sup> The term “health or social welfare organization” is defined for B&O tax purposes in RCW 82.04.431. The definition contains many conditions, including conditions on executive salaries, which was the issue in dispute in Group Health. See Group Health, 106 Wn.2d at 393-400.

Later amendments to RCW 82.04.4297 in 2001 and 2002 resulted in no change to the exception clause, and they shed no light on the issue before this Court. In 2001, the Legislature passed a bill adding a sentence to RCW 82.04.4297 explaining what “amounts received from” a government means. Its purpose was to clarify that payments for governmental health care programs may come through managed care organizations or other administrative intermediaries under contract with the government, and need not come directly from the government to qualify for the deduction. See Laws of 2001, 2d Sp. Sess., ch. 23, § 2. The legislative findings Whidbey General quotes are from 2001 act. See App. Brief at 21-22; Laws of 2001, 2d Sp. Sess., ch. 23, § 1.<sup>10</sup>

In the next session, the Legislature deleted the language it added to RCW 82.04.4297 in 2001 and created a new section accomplishing the same result, now codified as RCW 82.04.4311. See Laws of 2002, ch. 314, § 2. The 2001 and 2002 amendments to RCW 82.04.4297 do not support Whidbey General’s argument that CHAMPUS payments do not fall within the exception clause as amounts received under an employee benefit plan, because the 2001 and 2002 acts were directed at clarifying a different portion of the statute than what is at issue here. In this case, the

---

<sup>10</sup> Evidence in the record suggests that before this amendment, the Department may have been denying the deduction when funds did not come directly from the government and came through an administrative intermediary. CP 273 (Krumdiack Decl. ¶ 12), 275 (audit narrative citing alternative reason for denying deduction).

Department does not dispute that Whidbey General's CHAMPUS payments were "received from" the federal government.

Whidbey General's primary argument about the legislative history is that it demonstrates the Legislature's concern about government purchasing power. App. Brief at 21-22. Clearly, this is a policy reason for the deduction in RCW 82.04.4297, but the argument proves nothing in the context of this case. The Legislature created an exception to the deduction for a particular type of government-funded health-care program, an "employee benefit plan," so focusing on the general purpose of the deduction does not help at all to answer the question whether CHAMPUS qualifies as an "employee benefit plan." By adding the exception clause in 1988, the Legislature demonstrated that it did not have the same concern about government purchasing power in the context of "employee benefit plans" that it did for the traditional entitlement programs.

To the extent it is pertinent to the issue in this case, the legislative history supports the Department's position that CHAMPUS revenues are amounts received under an "employee benefit plan."

**6. If this Court were to find RCW 82.04.4297 is ambiguous, it should construe the statute strictly against Whidbey General.**

The guiding principle in tax cases is that taxation is the rule, and exemptions and deductions are the exception. United Parcel Serv., Inc. v.

Dep't of Revenue 102 Wn.2d 355, 360, 687 P.2d 186 (1984); Budget Rent-A-Car of Washington-Oregon, Inc. v. Dep't of Revenue, 81 Wn.2d 171, 174-75, 500 P.2d 764 (1972). When the question is the interpretation of tax exemptions or deductions, the taxpayer has the burden of establishing its eligibility for that exemption or deduction, and the exemption or deduction should be interpreted narrowly. Lacey Nursing Center, Inc. v. Dep't of Revenue, 128 Wn.2d 40, 53, 905 P.2d 338 (1995).

Neither party in this case is arguing that RCW 82.04.4297 is ambiguous. Because tax deductions should be construed narrowly, if this Court determines RCW 82.04.4297 is ambiguous, the statute should be construed strictly, but fairly, against Whidbey General. See Lacey Nursing, 128 Wn.2d at 53; Group Health Coop. of Puget Sound, Inc. v. Wash. State Tax Comm'n, 72 Wn.2d 422, 429, 433 P.2d 201 (1967).

Whidbey General acknowledges the foregoing principles apply, but argues that because the phrase "employee benefit plan" is contained within an exception clause to the deduction in RCW 82.04.4297, the Court should conclude that CHAMPUS payments are deductible in the event the Court determines the statute is ambiguous. App. Brief at 21-23. Whidbey General relies on a water rights case, but fails to mention that this Court has already rejected the same argument in another tax case, S. Martinelli

& Co. v. Dep't of Revenue, 80 Wn. App. 930, 940, 912 P.2d 521, review denied, 130 Wn.2d 1004 (1996).

In Martinelli, which concerned the taxability of the taxpayer's sparkling fruit juices, this Court construed a use tax exemption for "food products" in a former version of RCW 82.12.0293. The exemption included "fruit juices," but also contained an exception to the exemption for "carbonated beverages." 80 Wn. App. at 937-38. Faced with apparently conflicting rules of statutory construction, this Court applied by analogy the maxim that a specific statute controls a general one. Id. at 940. It concluded that the rule requiring narrow construction of tax exemptions addresses a more specific area of tax law than the general requirement that ambiguous taxing statutes be construed against the taxing authority. Id. It broadly construed the exception for "carbonated beverages" in order to give the "food products" exemption as a whole a narrow reading. Id.; see also Corn Products Ref. Co. v. Commissioner, 350 U.S. 46, 52, 76 S. Ct. 20, 100 L. Ed. 29 (1955) (since Internal Revenue Code provision was an exception from the normal requirements, the definition of a capital asset must be narrowly applied and its exclusions interpreted broadly). This Court should read the exception in RCW 82.04.4297 broadly to effectuate legislative intent.

**B. Federal Law Does Not Preempt Application Of Washington's B&O Tax To Hospitals' CHAMPUS Income.**

The trial court correctly concluded that federal law does not preempt application of Washington's B&O tax to Whidbey General's CHAMPUS income. Its ruling should be affirmed.

A court considering whether federal law preempts a state law must begin with the presumption that Congress does not intend to supplant state law, and that a state law is not preempted unless that was the "clear and manifest purpose of Congress." New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 654-55, 115 S. Ct. 1671, 131 L. Ed. 2d 695 (1995). No such "clear and manifest purpose" exists here.

**1. Congress demonstrated no clear and manifest purpose to preempt state taxes on hospitals' CHAMPUS income.**

The applicable federal statute, 10 U.S.C. § 1103, does not directly preempt any state law. Rather, it conditions preemption upon specific findings required to be made by the Department of Defense. Essentially, it authorizes the Department of Defense to adopt rules preempting certain state or local laws. The pertinent language provides:

**(a) Occurrence of preemption.**—A law or regulation of a State or local government relating to health insurance, prepaid health plans, or other health care delivery or financing methods shall not apply to any contract entered

into pursuant to this chapter . . . to the extent that the Secretary of Defense . . . determine[s] that –

(1) the State or local law or regulation is inconsistent with a specific provision of the contract or a regulation promulgated by the Secretary of Defense . . . pursuant to this chapter; or

(2) the preemption of the State or local law or regulation is necessary to implement or administer the provisions of the contract or to achieve any other important Federal interest.

10 U.S.C. § 1103(a). This statute expresses no intention to preempt B&O taxes on hospitals' CHAMPUS income.

Washington's B&O tax applied to hospitals is not a state law "relating to health insurance, prepaid health plans, or other health care delivery or financing methods." It is a tax law of general applicability that makes no attempt to regulate health insurance, prepaid health plans, or other types of health care delivery or financing methods.

Whidbey General argues that application of the B&O tax to CHAMPUS income is a law "relating to . . . health care delivery or financing methods" because the tax revenues collected from hospitals are placed in a health services account under RCW 43.72.900, rather than in the general fund, and because collecting the tax allegedly "makes it more expensive for the federal government to purchase health care for its CHAMPUS beneficiaries." App. Brief at 24-27 (quotation on page 27). The health services account exists for a variety of public health purposes,

including “maintaining and expanding health services access for low-income residents.” RCW 43.72.900.

Whidbey General argues the phrase “relating to” in 10 U.S.C. § 1103 should be treated as “capacious, expansive, and nearly all-encompassing.” App. Brief at 25. It quotes extensively from a 1992 United State Supreme Court decision taking that approach in construing a preemption clause in the federal Airline Deregulation Act, which in turn relied upon earlier Supreme Court decision applying the phrase “relate to any employee benefit plan” in the preemption clause of the Employee Retirement Income Security Act of 1974 (“ERISA”). See Morales v. Trans World Airlines, Inc., 504 U.S. 374, 112 S. Ct. 2031, 119 L. Ed. 2d 157 (1992) (state deceptive practices laws regarding airline advertising held expressly preempted by Act). In doing so, Whidbey General has overlooked decisions the Supreme Court issued only a few years later that retreated from that simplistic approach to preemption analysis and required a more thoughtful approach. One such decision is particularly relevant here, because it dealt with a state gross receipts tax, which the Court held was not preempted by ERISA. De Buono v. NYSA-ILA Medical & Clinical Services Fund, 520 U.S. 806, 117 S. Ct. 1747, 138 L. Ed. 2d 21 (1997).

In De Buono, a trust fund established to administer an employee welfare benefit plan sought a declaration that ERISA preempted New York's gross receipts tax on health care facilities. The trust fund owned and operated treatment centers in New York for longshore workers, retirees, and their dependents. 520 U.S. at 810. In 1990, New York enacted the Health Facility Assessment ("HFA"), which imposed a tax on gross receipts for patient services at hospitals, residential health care facilities, and diagnostic and treatment centers. Id. at 809-10. The purpose of the HFA apparently was to financially shore up the state's Medicaid program. Id. at 809. The assessments became part of the state's general revenues. Id. at 810.

The Court in De Buono rejected the type of reasoning Whidbey General advocates here, noting that though the "opaque language in" the ERISA preemption clause is "clearly expansive" because its use of the phrase "relate to," the text cannot be read to "extend to the furthest stretch of its indeterminacy" because for all practical purposes preemption would never run its course. Id. at 809, 813 (quoting New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 655, 115 S. Ct. 1671, 131 L. Ed. 2d 695 (1995)).<sup>11</sup> Instead, the "starting

---

<sup>11</sup> In another ERISA preemption case, Justice Scalia commented that the approach of the earlier cases in treating the phrase "relate to" as having an "expansive sweep" "was a project doomed to failure, since, as many a curbside philosopher has

presumption” remains that Congress does not intend to supplant state law. Id. at 813. In order to evaluate whether the normal presumption against preemption has been overcome, the Court concluded it must “go beyond the unhelpful text . . . and look instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive.” Id. at 813-14 (quoting Travelers, 514 U.S. at 656).

Applying this standard, the Court began by noting that the historic police powers of states include the regulation of matters of health and safety. Id. at 814. Thus, even though the HFA was a revenue raising measure, rather than a regulation of hospitals, it clearly operated in a field traditionally occupied by the states. Id. The HFA did not forbid a method of calculating pension benefits that federal law permits, or require employers to provide certain benefits. Existence of a pension plan was not a critical element of a state-law cause of action, nor did the state statute contain provisions that expressly referred to ERISA or ERISA plans. Id. at 815. The Court concluded the HFA was one of a myriad of state laws of general applicability that impose some burden on the administration of ERISA plans but nevertheless do not “relate to” them within the meaning

---

observed, everything is related to everything else.” California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc., 519 U.S. 316, 335, 117 S. Ct. 832, 136 L. Ed. 2d 791 (1997) (Scalia, J., concurring) (case holding California’s prevailing wage law is not preempted by ERISA). Justice Scalia noted that the law would be better clarified if the Court simply acknowledged that its earlier approach to the ERISA preemption statute was wrong. Id. at 336.

of Congress. Id. The Court also stated, with respect to impacts of state taxes:

Any state tax, or other law, that increases the cost of providing benefits to covered employees will have some effect on the administration of ERISA plans, but that simply cannot mean that every state law with such an effect is pre-empted by the federal statute.

Id.

When the principles enunciated in De Buono are applied here, the result is the same: There is nothing about Washington's B&O tax as applied to hospitals that suggests it is the type of state law Congress intended the CHAMPUS preemption statute to supersede. For instance, nothing in RCW 82.04, the B&O tax chapter, or RCW 43.72.900, which describes the health services account, dictates how often CHAMPUS patients may obtain eye examinations or mammograms, or describes the locations at which CHAMPUS patients may obtain inpatient or outpatient services, or sets co-payments or cost-sharing standards for such care. Compare 10 U.S.C. § 1079 (describing Secretary of Defense's authority in contracting for medical care of spouses and children of active duty military members).

In addition, nothing in the stated objectives of the CHAMPUS preemption statute found in legislative history suggests a generally applicable state tax on hospital income should be preempted. Whidbey

General submitted a portion of a congressional committee report from 1993 describing 10 U.S.C. § 1103 as permitting “any DOD contract for medical or dental care to preempt State or local government law or regulation that relates to benefit coverage.” CP at 89 (emphasis added).<sup>12</sup>

The B&O tax on hospitals is entirely unrelated to CHAMPUS benefits coverage. The committee report also stated: “The committee does not favor blanket preemption . . . and believes that State and local government regulation of health plans operating within their purview generally provides added protection to the DOD beneficiary population, particularly in vital areas such as financial solvency.” CP at 90 (emphasis added).

The B&O tax on hospitals is not a law regulating health plans at all, much less such a law that infringes on health plans within the federal purview. But this statement shows congressional support for allowing states to continue operating within their traditional authority to both regulate and finance health care, to the extent not inconsistent with the CHAMPUS program. In other words, the mere fact that a state collects a tax from hospitals to support public funding of access to health care does not mean that tax is preempted.

Similar to New York’s HFA statute in De Buono, the B&O tax imposed on hospitals in Washington is just one of myriad state laws of

---

<sup>12</sup> See H.R. Rep. No. 103-200, at 26 (1993) (House Armed Services Committee).

general applicability that may have a downstream effect of increasing the cost of providing benefits to covered CHAMPUS beneficiaries,<sup>13</sup> but nevertheless cannot reasonably be considered a law “relating to health insurance, prepaid health plans, or other health care delivery or financing methods.” Washington’s B&O tax on hospitals does not fall within the preemption language of 10 U.S.C. § 1103.

Preemption also is lacking under 10 U.S.C. § 1103 because the Department of Defense has not determined that any provision of Washington’s B&O tax statute, RCW 82.04, is preempted under the standards set forth in 10 U.S.C. § 1103(a)(1)-(2). The only laws actually preempted are those state or local laws with respect to which the Department of Defense has specifically made the required determination of inconsistency or necessity.

---

<sup>13</sup> There is no evidence in the record that Whidbey General passes the cost of paying the B&O tax on to the federal government’s CHAMPUS program. Whidbey General just speculates in briefing that the B&O tax makes it more expensive for the federal government to purchase health care for CHAMPUS beneficiaries. App. Brief at 27, 31-32. Medical care is provided to CHAMPUS beneficiaries under contract, and language in the CHAMPUS statutes suggests the Department of Defense has a great deal of control over the amounts it will pay for such services. See, e.g., 10 U.S.C. § 1079(h) (payment provisions). In light of the foregoing, and in the absence of actual evidence, this Court should not assume Washington’s B&O tax on hospitals has a negative economic effect on the CHAMPUS program.

**2. The Department of Defense's regulation does not preempt application of Washington's B&O tax to hospitals' CHAMPUS income.**

Whidbey General relies on 32 C.F.R. § 199.17, which the Department of Defense promulgated in 1995, addressing the issue of CHAMPUS-related preemption both generally and in relation to taxes. The first portion of the regulation declares that the preemption of state and local laws "relating to health insurance, prepaid health plans, or other health care delivery or financing methods" is necessary to achieve important federal interests, including, among other things, keeping the cost of CHAMPUS and related programs as low as possible. 32 C.F.R. § 199.17(a)(7)(i). This declaration of necessity simply repeats the language of 10 U.S.C. § 1103 and provides a basis for the more specific determinations contained in subsections that follow. As discussed above, the B&O tax on hospitals is not a law "relating to" the designated categories.

In the following subsections, the regulation provides in pertinent part:

(ii) Based on the determination set forth in paragraph (a)(7)(i) of this section, any State or local law relating to health insurance, prepaid health plans, or other health care delivery or financing methods is preempted and does not apply in connection with TRICARE regional contracts. Any such law . . . is without any force or effect, and State and local governments have no legal authority to

enforce them in relation to the TRICARE regional contracts. . . .

(iii) [A] 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 [10 U.S.C. § 1103]. [B] 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. [C] 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) (emphasis added; italicized subpart designations added to subsection (iii)).

Subpart *C* of subsection (iii) refers to the Federal Employees Health Benefits Program (“FEHBP”) and its preemption statute, 5 U.S.C. § 8909(f), from which this CHAMPUS regulation clearly borrows some language. The FEHBP statute provides: “[N]o tax, fee or other monetary payment may be imposed directly or indirectly on a carrier . . . of an approved health benefits plan by any State . . ., with respect to any payment made from the [FEHBP] Fund.” 5 U.S.C. § 8909(f)(1). As in the CHAMPUS regulation, the FEHBP statute provides that subsection

(f)(1) does not exempt any carrier from state taxes “on the net income or profit” earned by the carrier from FEHBP business “if that tax, fee, or payment is applicable to a broad range of business activity.” 5 U.S.C. § 8909(f)(2).

On its face, the CHAMPUS preemption regulation is inapplicable to the tax at issue here. Furthermore, none of the published cases interpreting the preemption provision of the FEHBP suggests by implication that B&O taxes on hospital income received under the CHAMPUS program are preempted.

**a. The Washington B&O tax does not relate to “health insurance, prepaid health plans, or other health care delivery or financing methods.”**

Subsection (ii) of the regulation preempts state laws “relating to health insurance, prepaid health plans, or other health care delivery or financing methods,” based on the declaration of necessity made in subsection (i). 32 C.F.R. § 199.17(a)(7)(ii). For all the reasons discussed in Part B.1., *supra*, the B&O tax on hospitals’ CHAMPUS income is not a law “relating to health insurance, prepaid health plans, or other health care delivery or financing methods.” It is a tax law applying to virtually all business activities in the state, including the business of operating a hospital, unless the business activity is exempt. Under the plain language

of this clause, the Department of Defense has not determined that the B&O tax on hospitals should be preempted.

**b. The B&O tax on hospitals' CHAMPUS income is not a "premium tax" on an insurance business.**

Subsection (iii) of the preemption regulation sets forth examples of state and local tax laws that fall within the scope of the more general preemption language of subsection (ii). It contains three parts, which the Department is designating subparts *A*, *B*, and *C* for purposes of this discussion. Subpart *A* of subsection (iii) describes the type of taxes that qualify for preemption, subpart *B* sets forth categories of taxes that fall outside the preemption clause, and subpart *C* indicates subsection (iii) should be interpreted consistently with interpretations under the FEHBP preemption statute. Whidbey General quotes the language of all three subparts, App. Brief at 29, but it fails to include any discussion of subpart *A*, which is the most important part of the entire subsection for purposes of this case because it constitutes the Department of Defense's determination of which state and local taxes are preempted. Subpart *A* is fatal to Whidbey General's preemption argument, which is probably why Whidbey General avoids discussing it.

The state and local taxes the Department of Defense has determined are preempted in subpart *A* are those "imposing premium taxes

on health or dental insurance carriers or underwriters or other plan managers, or similar taxes on such entities.” 32 C.F.R. § 199.17(a)(7)(iii). The reason is that “[s]uch laws are laws relating to health insurance, prepaid health plans, or other health care delivery or financing methods, within the meaning of [10 U.S.C. § 1103].” In other words, the Department of Defense has defined the phrase “laws relating to health insurance, prepaid health plans, or other health care delivery or financing methods” for tax purposes as including only “premium taxes” or similar taxes “on health or dental insurance carriers or underwriters or other plan managers.” Thus, under the Department of Defense’s own legislative rule, only “premium taxes . . . or similar taxes” are preempted, and then only if they are imposed on “health or dental insurance carriers or underwriters or other plan managers.” Neither condition is present in this case.

The B&O tax is a gross income (or gross receipts) tax on all income of a business, regardless of the nature of the business activity, unless exempt. It is not a “premium tax.” Washington and most other states have insurance premium taxes. Washington’s premium tax applies generally to most types of insurers (except title insurers) and imposes the tax at the rate of 2% of all insurance premiums received in the preceding calendar year. RCW 48.14.020(1). Another Washington premium tax applies more specifically to specified health maintenance organizations,

health care service contractors, and self-funded multiple employer welfare arrangements. RCW 48.14.0201(1). This tax is equal to 2% of the total amount of premiums and prepayments received by such organizations for health care services in the preceding calendar year. RCW 48.14.0201(2). Such premiums and prepayments are exempt from the B&O tax. RCW 82.04.320 (insurance business premiums); RCW 82.04.322 (premiums and prepayments received and taxable under RCW 48.14.0201).

Whidbey General has not demonstrated or alleged that it is an insurance business or otherwise taxable under RCW 48.14, which is part of the insurance code. It is not seeking a refund of premium taxes paid under RCW 48.14; it is seeking a refund of B&O taxes paid under RCW 82.04. The CHAMPUS preemption regulation preempts premium taxes, not gross income taxes. Moreover, the regulation preempts only those premium taxes on “health or dental insurance carriers or underwriters or other plan managers.” Whidbey General is a hospital and has not alleged that it is a health or dental insurance carrier, underwriter, or plan manager. In sum, under the plain language of the tax preemption provision in 32 C.F.R. § 199.17(a)(7)(iii), the Department of Defense has not determined that Washington’s B&O taxes cannot be applied to a hospital’s CHAMPUS revenues.

This conclusion is supported by a decision interpreting the FEHBP preemption statute, United States v. West Virginia, 339 F.3d 212, 216-19 (4<sup>th</sup> Cir. 2003). Subpart C of the CHAMPUS regulation directs that interpretations of subsection (iii) of the regulation be consistent with FEHBP preemption interpretations.

In West Virginia, the Fourth Circuit considered whether a West Virginia gross receipts tax imposed on health care providers, including hospitals, was preempted under FEHBP. The FEHBP preemption statute provides:

No tax, fee, or other monetary payment may be imposed, directly or indirectly, on a carrier or an underwriting or plan administration subcontractor of an approved health benefits plan by any State, the District of Columbia, or the Commonwealth of Puerto Rico, or by any political subdivision or other governmental authority thereof, with respect to any payment made from the Fund.

5 U.S.C. § 8909(f)(1) (emphasis added).<sup>14</sup> The court held that the gross receipts tax on health care providers was neither a direct nor indirect tax on a carrier, an underwriting subcontractor, or a plan administration subcontractor of an approved FEHBP health benefits plan, even if the tax

---

<sup>14</sup> The U.S. Office of Personnel Management, which administers FEHBP, described this statute as exempting “FEHB Program carriers, underwriters, and plan administrators, from State taxes on FEHB premiums.” Federal Employees Health Benefits Acquisition Regulations; Termination of Contracts, 56 Fed. Reg. 20575 (May 6, 1991). This interpretation is similar to the Department of Defense’s interpretation of the CHAMPUS preemption statute.

had an economic pass-through effect on the FEHBP fund.<sup>15</sup> West Virginia, 339 F.3d at 214-17. Relying on the analogous constitutional field of preemption of state taxation of the federal government, the court rejected the notion that a downstream economic effect on a federal program was sufficient to preempt the state tax. West Virginia, 339 F.3d at 216 (quoting United States v. Fresno, 429 U.S. 452, 462, 97 S. Ct. 699, 50 L. Ed. 2d 683 (1977)).

The court in West Virginia distinguished a decision Whidbey General cites, Health Maintenance Org. of New Jersey v. Whitman, 72 F.3d 1123, 1128-31 (3d Cir. 1995). West Virginia, 339 F.3d at 217. In the Whitman case, the Third Circuit held that special fixed assessments on insurance carriers constituted state taxes prohibited by the FEHBP preemption statute. 72 F.3d at 1130-31. In Whitman, unlike in West Virginia, the legal incidence of the tax was on insurance carriers of the FEHBP plan.

The results in Whitman and West Virginia represent correct applications of the FEHBP preemption statute. Whitman demonstrates

---

<sup>15</sup> Whidbey General argues in this case that because the B&O tax revenues collected from hospitals are placed in a special account for health services, the tax is related to “health care delivery or financing methods” and preempted under the CHAMPUS regulation. The gross receipts statute at issue in the West Virginia case was collected from health care providers and also placed in a special fund for health care purposes. West Virginia Code § 11-27-32 (the taxes collected under 11-27 “shall be deposited into the special revenue fund . . . and known as the Medicaid share fund”). The court in West Virginia did not mention this feature of West Virginia’s tax scheme, apparently considering it of no import in its preemption analysis.

that a state tax imposed on insurance carriers of an approved FEHBP plan is preempted. West Virginia demonstrates that a gross receipts tax imposed on hospitals is not a tax imposed directly or indirectly on insurance carriers of an approved FEHBP plan, and therefore is not preempted. Applying these decisions to the CHAMPUS preemption standards, as subpart C of the CHAMPUS regulation suggests, results in a conclusion that Washington's B&O tax on hospitals is not preempted. The legal incidence of the B&O tax as applied to hospitals falls solely on hospitals, and not on CHAMPUS health or dental insurance carriers or underwriters or other CHAMPUS plan managers.

The Department of Defense has exercised its authority under 10 U.S.C. § 1103 and has determined that state and local "premium taxes . . . or other similar taxes" on "health or dental insurance carriers or underwriters or other [CHAMPUS] plan managers" are preempted because they are "laws relating to health insurance, prepaid health plans, or other health care delivery or financing methods." 32 C.F.R. § 199.17(a)(7)(iii). Washington's B&O tax as applied to hospitals is not such a tax, and therefore it is not preempted. This conclusion is consistent with both the West Virginia and Whitman cases, interpreting an analogous provision under the FEHBP preemption statute.

Washington's B&O tax as applied to hospitals is not in the broad category of laws within which the Department of Defense has authority to make preemption determinations and is not among the state or local tax laws the Department of Defense has actually determined are preempted. Therefore, this Court need not conduct any further analysis of the preemption issue. The trial court's conclusion that the B&O tax is not preempted should be affirmed.

**c. B&O taxes are “applicable to a broad range of business activity” and therefore are not preempted.**

Skipping over the actual preemption provision for state and local taxes in subpart *A* of subsection (iii) of the CHAMPUS preemption regulation, Whidbey General jumps to an argument that Washington's B&O tax is not “saved” by the exception to the preemption language found in subpart *B* of subsection (iii). App. Brief at 35-36. Whidbey General argues that the exception language applies only to net income or profit taxes and that the B&O tax does not apply to a broad range of business activity because the revenue generated goes to a health services account, rather than to the general fund. App. Brief at 29-36.

A state or local tax does not need “saving” under the exception in subpart *B* unless it first falls within the preemption language of subpart *A*. Any tax falling outside the boundaries of the preemption language of

subpart *A* is not preempted, regardless of whether it also falls outside the exception language in subpart *B*. To be preempted, a state tax must fall within a Department of Defense determination of preemption. This Court should reject Whidbey General's argument that a tax falling outside the strict letter of the exception clause in subsection (iii) is preempted under the "general rule" set forth in subsection (ii). The B&O tax is "saved" from preemption because it is not a law "relating to health insurance, prepaid health plans, or other health care delivery or financing methods" under subsection (ii) of the regulations and not a "premium tax" on health or dental insurance carriers or underwriters under subpart *A* of subsection (iii), regardless of whether it also is "saved" under the exception clause in subpart *B* of subsection (iii).

Even though the B&O tax applied to hospitals is not preempted in the first place by preemption provisions in 32 C.F.R. § 199.17(a)(7), the 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. Subpart *B* of subsection (iii) of the regulation describes certain types of state and local taxes that are not preempted under subpart *A* of subsection (iii): "Preemption, however, does not apply to taxes, fees, or other payment 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.”

(Emphasis added). Hospitals are not included in “such entities” referred to in this exception because the phrase “such entities” clearly refers to the “health and dental insurance carriers or underwriters or plan managers” described in subpart *A*, and hospitals are not among those entities.

Nonetheless, Washington’s B&O tax as applied to hospitals falls within this exclusion in the most important respect, as a tax “applicable to a broad range of business activity.”

Without question, Washington’s B&O tax is a tax generally applied to all business activity in the state. Under RCW 82.04.220, “[t]here is levied and shall be collected from every person a tax for the act or privilege of engaging in business activities. Such tax shall be measured by the application of rates against value of products, gross proceeds of sales, or gross income of the business, as the case may be.” See also RCW 82.04.140 (definition of “business”).

The legislative purpose behind the B&O tax scheme “is to tax virtually all business activity in the state” and to “leave practically no business and commerce free of . . . tax.” Impecoven v. Dep’t of Revenue, 120 Wn.2d 357, 363, 841 P.2d 752 (1992) (first quotation); Simpson Investment Co. v. Dep’t of Revenue, 141 Wn.2d 139, 149, 3 P.3d 741 (2000) (second quotation). The tax rate varies among different types of

business activities explicitly mentioned in sections RCW 82.04.230 through RCW 82.04.298. If not mentioned expressly in one of these sections, a business activity is taxed at the rate of 1.5% under RCW 82.04.290(2), which is generally referred to as the “service & other” category.

Nonprofit hospitals are among dozens of businesses whose activities are taxed at rates specified for particular businesses in statutory provisions, rather than falling within the catchall provision for “service & other” in RCW 82.04.290(2). See RCW 82.04.260(10). The fact that the Legislature chose to specify a tax rate for nonprofit hospitals in RCW 82.04.260 does not change the broad applicability of the B&O tax.

Whidbey General argues that the B&O tax as applied to hospitals should be considered preempted because it is a tax on gross income, rather than “net income or profit.” It is true that the B&O tax is a gross income tax, not a “net income” tax. See RCW 82.04.080 (defining “gross income of the business”). However, Whidbey General offers no explanation for why the difference between applying a general business tax to income before deducting for expenses and applying a general business tax to income after making those deductions should have any impact on a federal

preemption analysis.<sup>16</sup> In the absence of a clear reason to distinguish between the two types of taxing schemes for preemption purposes, the logical emphasis should be on whether the taxing statute is of broad applicability, rather than the precise type of income being taxed.

At least two courts have treated gross receipts taxes in FEHBP preemption cases concerning hospitals in just this manner. In West Virginia, the Fourth Circuit held that a gross receipts tax on health care providers was not preempted under FEHBP. The court noted that because the West Virginia gross receipts tax applied to all providers of the specified categories of health care services, and not just to providers of services to enrollees in FEHBP, the tax applied equally to similarly situated constituents of the state, and the economic burden that might be passed through to carriers did not constitute an indirect tax on FEHBP carriers. Id. at 219.

Likewise, in Connecticut, the federal district court held that a tax on a hospital's gross earnings was not preempted where there was no evidence that hospitals passed the cost to their patients, and in turn to

---

<sup>16</sup> Whidbey General also has not offered any evidence that Congress considered the difference when it enacted 5 U.S.C. § 8909(f), regarding taxation of insurance carriers under FEHBP contracts, or that the Department of Defense considered it when promulgating its rule and borrowing language from the FEHBP statute. The most likely explanation for the phrasing in the FEHBP statute and the CHAMPUS regulation is that these federal authorities were unaware that a few states have a gross receipts, or gross income, tax schemes, rather than net income tax schemes.

FEHBP carriers. State of Connecticut v. United States, 1 F. Supp. 2d 147, 153 (D. Conn. 1998).

The holdings in these cases differ to the extent that the Connecticut decision implied preemption would have been found if there was an actual economic pass-through effect on the FEHBP carriers, and the West Virginia decision held that a pass-through effect on the FEHBP fund would not matter. Both decisions, however, treated the issue of a gross income tax identically: they neither discussed nor even mentioned the difference between a net income tax and a gross income tax. Because both types of taxes are taxes “applicable to a broad range of business activity,” there was no reason for them to do so.

Whidbey General also asserts that imposing B&O tax on its CHAMPUS revenues is preempted because the revenues raised by the tax are deposited in a health services account. See RCW 82.04.260(10). Neither the CHAMPUS preemption regulation nor the FEHBP statute, 5 U.S.C. § 8909(f), contain a requirement that tax revenues be applied to a general fund, rather than a special fund, in order for the preemption exception to apply. They require only that the tax be “applicable to a broad range of business activity.” The emphasis is on how broadly the tax applies, not where the money from the tax collected eventually goes.

The two FEHBP cases Whidbey General relies on for this argument do not support the proposition it asserts. See App. Brief at 33-35; Whitman, 72 F.3d at 1131-33 (state tax assessment on health insurance carriers was not “applicable to a broad range of business activity” because imposed only on the health insurance business; special fund did not enter into court’s analysis); State of Connecticut v. United States, 1 F. Supp. 2d 147, 150, 152-53 (D. Conn. 1998) (fact of special fund important to court in determining that state sales tax on patients’ hospital bills was preempted, but special fund did not enter court’s analysis that tax on hospital revenues from patient services was not preempted).

In summary, Congress has not demonstrated any “clear and manifest purpose” to preempt Washington’s B&O tax on hospitals’ CHAMPUS income in 10 U.S.C. § 1103. In addition, the Department of Defense has made no determination that Washington’s B&O tax is preempted on such income, and no published case has held that a broadly applicable gross receipts tax as applied to hospitals is preempted. The trial court’s summary judgment for the Department should be affirmed.

**C. Whidbey General Would Not Be Entitled To Attorney Fees And Expenses Under RAP 18.1 If It Were The Prevailing Party On Appeal.**

Whidbey General requests “any applicable” costs and attorney fees under RAP 14.3 and RAP 18.1. App. Brief at 37. If it were to prevail in

this appeal, Whidbey General would be entitled to the costs allowed under RAP 14.3, but not to attorney fees or expenses under RAP 18.1. Whidbey General has not cited any applicable law that would allow it to recover attorney fees or costs for pursuing a tax refund action under RCW 82.32.180, and the tax code provides no such remedy. See Wilson Court Ltd. Partnership v. Tony Maroni's, Inc., 134 Wn.2d 692, 710 n.4, 952 P.2d 590 (1998) (argument about the basis for attorney fee request required).

**V. CONCLUSION**

For the foregoing reasons, the Department respectfully requests that this Court affirm the order of the trial court granting summary judgment to the Department and denying Whidbey General's summary judgment motion.

DATED this 20<sup>th</sup> day of September, 2007.

ROBERT M. MCKENNA  
Attorney General



HEIDI A. IRVIN, WSBA #17500  
Assistant Attorney General  
Attorneys for Respondent  
State of Washington, Dept. of Revenue

FILED  
COURT OF APPEALS  
DIVISION II

NO. 36120-5-II

07 SEP 20 PM 6:53

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

*[Signature]*  
DEPUTY

WHIDBEY GENERAL HOSPITAL,

Appellant,

v.

STATE OF WASHINGTON,  
DEPARTMENT OF REVENUE,

Respondent.

DECLARATION OF  
MAILING

Candy Zilinskas, states and declares as follows:

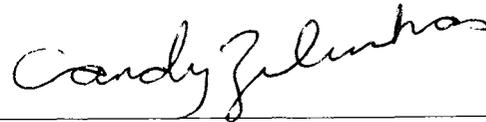
I am a citizen of the United States of America and over 18 years of age and I am competent to testify to the matters set forth herein. On September 20, 2007, I provided a true and correct copy of Respondent's Brief, and this Declaration of Mailing sent US Mail Postage Prepaid via Consolidated Mail Service to:

Justin E. Dolan  
Roger L. Hillman  
Carla M. DewBerry  
GARVEY SCHUBERT BARER  
Eighteenth Floor  
1191 Second Avenue  
Seattle, Washington 98101-2939

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

ORIGINAL

Executed this 20th day of September, 2007, in Olympia,  
Washington.

A handwritten signature in cursive script that reads "Candy Zilinskas". The signature is written in black ink and is positioned above a horizontal line.

---

CANDY ZILINSKAS  
Legal Assistant