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

CLARK COUNTY PUBLIC UTILITY DISTRICT NO. 1,
a municipal corporation;
and
GRAYS HARBOR PUBLIC UTILITY DISTRICT NO. 1,
a municipal corporation,

Plaintiffs/Respondents/Cross-Appellants

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Defendant/Appellant/Cross-Respondent

ON APPEAL FROM THURSTON COUNTY SUPERIOR COURT
(Hon. Anne Hirsch)

**REPLY BRIEF ON CROSS-APPEAL OF
RESPONDENTS/CROSS-APPELLANTS**

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I.

INTRODUCTION

The Department makes two principal arguments in response to the Districts' cross-appeal, which asks this Court to order five years of privilege tax refunds instead of the three years granted by the trial court.¹

First, the Department argues—and for the first time in this case—that the Districts' entire refund claim should be dismissed because the Washington courts do not have subject matter jurisdiction. See Response and Reply Brief of Appellant/Cross-Respondent (“Department’s Response”) at 1, n.1 (citing RAP 2.5(a)(1); In Re Saltis, 94 Wn.2d 889, 893, 621 P.2d 716 (1980); and Crosby v. Spokane County, 137 Wn.2d 296, 301, 971 P.2d 32 (1999)).² Second, assuming this Court rejects this

¹ The trial court allowed three years of tax refunds in accordance with RCW 4.16.080(3), 43.01.072 and 43.88.170, although the court did not expressly state these are the statutes upon which it relied. See CP 809. Nevertheless, these are the statutes of limitation the Department argued to the trial court applied in respect to the Districts' refund claims (see CP 575-76), as opposed to the five-year limitations period under RCW 82.32.060 argued by the Districts (CP 206-211). It is, therefore, reasonable to conclude that the three-year statutes are the basis for the trial court's ruling on the scope of the refund period.

² The epiphany on this newly-raised jurisdictional issue is said to have come to the Department following its reading of the Districts' opening argument in support of their cross-appeal. See Department's Response at 1, n.1. The Department states it “realized when reading the Districts' argument in their Cross-Appeal that if there was no authority for the Department to issue a refund under RCW 43.01.072 or RCW 43.88.170 then the trial court would not have subject matter jurisdiction.” Id. This “realization” apparently came as a response to the argument made by the Districts that because these statutes allow refunds for “fees or other payments” taxes are excluded from this term. See Consolidated Answering Brief and Opening Brief on Cross-Appeal of Respondent's (“Districts' Brief”) at 55, n.25 (citing Tesoro Refining and Marketing Company v. Department of Revenue, 164 Wn.2d 310, 190 P.3d 28 (2008); Covell v. City of Seattle, 127 Wn.2d 874, 905 P.2d 324 (1995)). This point will be addressed in more detail later. See Section II, B, 3., infra. The Department acknowledges its tardiness in raising this so-

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new jurisdictional argument, the Department contends that the general rules for excise tax refunds do not apply to the privilege taxes imposed under RCW Chapter 54.28 (the “Act”). Department’s Response at 6-8.

The Department’s arguments should be rejected. The Districts have shown that the general authority for the Department to grant tax refunds codified in RCW Chapter 82 (the “Revenue Act”) applies equally to refunds of overpaid privilege taxes imposed under the Act. See Districts’ Brief at 51-61. If the tax refund provisions of the Revenue Act do not apply to overpayments of privilege taxes, other sections of Washington state law (see n. 1, supra) as found by the trial court (see CP 809) authorize refunds in this exact situation—where the Legislature has not expressly granted statutory refund authority to a government agency. And, even if none of these statutory remedies are found to apply here, due process requires the return of monies unlawfully taken from the Districts.

In sum, this Court should uphold the trial court’s determination that the Districts were entitled to refunds of the privilege taxes they paid on basic customer service charges, but modify the trial court’s ruling to allow refunds of those taxes paid over five full years.

called jurisdictional issue, but generously allows the Districts “an opportunity to reply to this argument in their cross-appeal reply brief.” Department’s Response at 1, n. 1.

II.

ARGUMENT ON REPLY IN CROSS-APPEAL

A. **The Department's Argument, That The Districts Failed To Properly Invoke The Court's Subject Matter Jurisdiction And The Districts' Refund Claims Therefore Should Be Dismissed, Is Meritless And Should Be Rejected.**

1. **RAP 2.5(a)(1) Does Not Require Dismissal Of The Districts' Refund Claims.**

The Department contends that the trial court did not have subject matter jurisdiction over the Districts' privilege tax refund claims, and that those claims therefore should be dismissed. Department's Response at 1. The Department supports this argument by citing RAP 2.5(a)(1), which provides that superior court subject matter jurisdiction may be raised at any time ("a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction"). Article IV, Section 6 of the state Constitution, however, establishes that superior courts "shall have original jurisdiction in all cases at law which involve . . . the legality of any tax." There is no merit in the Department's claim that the Districts should receive no refunds because the trial court did not have subject matter jurisdiction. This argument is nothing more than a legal challenge to the Districts' entitlement to any refunds at all,

and not really a jurisdictional argument. Accordingly, it is an issue that should have been raised below and in the Department's opening brief.³

2. SALTIS And CROSBY Are Factually Distinguishable And Not Controlling.

The Department relies—in addition to RAP 2.5(a)(1)—on In re Saltis (94 Wn.2d 889) and Crosby v. Spokane County (137 Wn.2d 296) to support its argument that “the trial court’s lack of jurisdiction can be raised for the first time in the appellate court.” Department’s Response at 1, n.1. Saltis and Crosby, however, are factually distinguishable and not controlling. In both Saltis and Crosby, the superior court did not have general jurisdiction over the proceedings, as the Thurston County Superior Court had over the proceedings in this case. Rather, the courts in Saltis and Crosby were acting in an appellate capacity, reviewing proceedings before administrative tribunals.⁴

³ In fairness to the Department, this really isn't the *first* time this “no refund at all” position has been raised by the Department. Back on December 14, 2004 (even before this case was filed in Thurston County Superior Court (CP 4-9) on December 28, 2005), the Department wrote that “chapter 54.28 does not address the procedure to file a claim for [privilege tax] refund nor is there an associated administrative code that addresses this issue[,] [t]herefore, there is not a statutory remedy for a PUD to file a claim for the overpayment of the PUD Privilege Tax.” CP 182 (emphasis in original). The Department did say “there may be a refund remedy based upon equitable principles” but didn't specify what those “equitable remedies” might be. Id. In fact, they are grounded also in Article IV, Section 6, which grants “Superior courts and district courts concurrent jurisdiction in cases in equity.” The Department did not, however, raise the issue before the trial court or in its opening brief.

⁴ In Saltis, the court was reviewing an order of the state Board of Industrial Insurance Appeals in a worker's compensation claim case. Saltis, 94 Wn.2d at 892, 894-95. Appellate jurisdiction was conferred upon the superior court under RCW 51.52.110. Saltis, 94 Wn.2d at 893-94. In Crosby, the agency at issue was the Spokane County Board of Commissioners in a land use proceeding. Crosby, 137 Wn.2d at 299. Crosby also involved a statutory *writ of certiorari* or writ of review under Chapter 7.16 RCW.

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This circumstance is in marked contrast to this appeal, which does involve the general jurisdiction of the superior court under RCW 82.32.180, RCW 4.92.010(5), and Article IV, Section 6. In sum, Saltis and Crosby do not support the Department’s argument that the trial court lacked subject matter jurisdiction over the Districts’ privilege tax refund claims.

3. The Jurisdiction Of The Trial Court Was Properly Invoked By The Districts.

On the assumption a jurisdictional challenge is even valid at this point, it should nevertheless be rejected because the Districts’ refund claims were brought, and the trial court’s jurisdiction was invoked, under two separate statutes, RCW 82.32.180 and RCW 4.92.010(5). See CP 5 (Complaint ¶ 6.)

First, RCW 82.32.180 provides that “[a]ny person, . . . having paid any tax as required and feeling aggrieved by the amount of the tax may appeal to the superior court of Thurston county, within the time limitation for a refund provided in Chapter 82.32 RCW” (emphasis added). Here, the Districts are each a “person” as defined under the tax statutes. (See RCW 82.04.030 for definition of “person” that includes any “municipal

Id. at 301. In these types of proceedings, the superior court is acting in an appellate capacity and “has only such jurisdiction as is conferred by law.” Id. (citing Deschenes v. King County, 83 Wn.2d 714, 716, 521 P.2d 1181 (1974); KSLW v. City of Renton, 47 Wn.App 587, 595, 736 P.2d 664 (1986)).

corporation . . . of the State of Washington.”)⁵ The Districts paid a tax (the privilege tax) that they were required to pay by RCW 54.28.020(1)(a). They felt “aggrieved by the amount of the tax” paid, since they were required to pay the tax on amounts (basic customer service charges) that RCW 54.28.020(1)(a) did not require payment of the tax. Finally, the suit was brought in Thurston County Superior Court “within the time limitation for a refund provided in” RCW 82.32.060.⁶ The Districts thus met each and every jurisdictional requirement for bringing a privilege tax refund claim under RCW 82.32.180. Until now, the Department has never disputed the trial court’s jurisdiction under RCW 82.32.180.⁷

A second jurisdictional statute was also relied upon by the Districts, RCW 4.92.010. It addresses general actions and claims against the state of Washington and is both a jurisdictional and venue statute. RCW 4.92.010 states that “[a]ny person or corporation having any claim against the state of Washington shall have a right of action against the state in the superior court” and that “venue for such actions shall be [among others] . . . (5) Thurston County” (emphasis added).

⁵ Public utility districts are municipal corporations. See RCW 54.04.020.

⁶ RCW 82.32.060(1) states that “no refund or credit shall be made for taxes . . . paid [by a taxpayer] more than four years prior to the beginning of the calendar year in which the refund application is made.”

⁷ The authority of the Districts to receive five years of refunds is found in RCW 82.32.060, not RCW 82.32.180. The Districts’ refund claim was filed in Thurston County Superior Court on December 28, 2005. See CP 4-9. Therefore, under RCW 82.32.060(1), the Districts are entitled to receive refunds of all overpaid taxes back to January 1, 2001.

RCW 4.92.010 is clear and unambiguous. Any person or corporation having any claim against the state has a right of action in superior court. There are no pre-qualifications to this jurisdictional authority. Here, the Districts had a refund claim against the state, by and through the Department, an agency of the state, which collected the privilege tax. The Districts brought their claim in Thurston County, as authorized by RCW 4.92.010(5). This was an alternative jurisdictional basis for relief, and was raised in the unlikely event the trial court's jurisdiction under RCW 82.32.180 did not apply.

The Department challenged the limitations period (RCW 82.32.060) for which refunds could be granted in both the Department's answer to the Districts' complaint (see CP 13, ¶ 30) and in the summary judgment proceeding (see CP 575-76). But, at no time was the trial court's jurisdiction under RCW 4.92.010 challenged. Under these facts, the Department should be deemed to have affirmatively waived its jurisdictional claim; there is simply no basis for the now-belated contention that the trial court did not have subject matter jurisdiction over the Districts' refund claims.⁸

⁸ Also for the first time in this case, the Department raises the possibility that the Districts have the opportunity to pursue their refund claims and "challenge the Department's assessment of [privilege] taxes pursuant to the Administrative Procedures Act." Department's Response at 3; see also RCW 34.05.510(1), 34.05.010(3) cited at 3, n.3. This would be unnecessary, given the clear and unmistakable jurisdiction granted to the trial court under Article IV, Section 6 of the Constitution, CR 3 (see, Section II, A, 6, at 15-16, infra), RCW 82.32.180 and RCW 4.92.010. Also, the APA does not specifically

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4. **Due Process Requires The Return Of The Districts' Money Unlawfully Taken By The State.**

Furthermore, even if there were some merit to this “no refund at all” argument of the Department under state law, principles of due process require the return of monies unlawfully taken from the Districts and this includes monies taken illegally by the government. A long-established, fundamental principle provides that “[t]he obligation to do justice rests upon all persons, natural and artificial, and if a [taxing authority] obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation,” Marsh v. Fulton Cy. Board of Supervisors, 77 U.S. 676, 684, 19 L.Ed. 1040, 10 Wall. 676 (1870) (emphasis added).

In Atchison, Topeka & Santa Fe Railway Company v. O’Conner, 223 U.S. 280, 285, 32 S.Ct. 216, 56 L.Ed. 436 (1912), the issue was whether the taxpayer (a railroad) had paid the disputed tax under “duress,” which at the time was a universal precondition for refund relief. The railroad challenged a tax levied by the state of Kansas, of two cents upon each thousand dollars of the company’s capital stock. Id. Kansas did not dispute the tax had been unconstitutionally assessed and collected from the railroad, but did claim the railroad had paid the tax “voluntarily” and

provide for a refund, either. And, by the logic of the Department’s argument, the Districts still end up without refunds because no express refund specific to the privilege tax is authorized by the APA, which means no refund at all.

therefore was not entitled to the remedy of a refund. Id. In rejecting this claim, Justice Holmes stated for a unanimous United States Supreme Court:

It is reasonable that a man who denies the legality of a tax should have a clear and certain remedy. The rule being established that apart from special circumstances he cannot interfere by injunction with the state's collection of its revenues, an action at law to recover back what he has paid is the alternative left. Of course, we are speaking of those cases where the state is not put to an action if the citizen refuses to pay. In these latter [cases,] he can interpose his objections by way of defense; but when, as is common, the state has a more summary remedy, such as distress, and the party indicates by protest that he is yielding to what he cannot prevent, courts sometimes, perhaps, have been a little too slow to recognize the implied duress under which payment is made. But even if the state is driven to an action, if, at the same time the citizen is put at a serious disadvantage in the assertion of his legal, in this case of his constitutional, rights, by defense in the suit, justice may require that he should be at liberty to avoid those disadvantages by paying promptly and bringing suit on his side. He is entitled to assert his supposed right on reasonably equal terms.

Id. at 285-86 (citations omitted) (emphasis added).

The United States Supreme Court found the railroad did not voluntarily pay the taxes at issue, given the company would forfeit its right to do business within the state of Kansas, and suffer a penalty of ten percent each six months until the taxes were paid. Id. at 286. The court also rejected the state's claim that the railroad's monies somehow became the state's, merely by the act of collection:

It is said that the money, as soon as collected, belonged to the state. Very likely it would have but for the plaintiff's claim, assuming it to remain an identified trust fund; but the plaintiff's claim was paramount to that of the State . . .

Id. at 287 (emphasis added).

Within the next several years, the decision in Atchison, Topeka was followed by a series of decisions, confirming what Justice Holmes' language plainly implied – fundamental principles of due process circumscribe the power of taxing authorities to refuse a refund of taxes illegally exacted:

- In Ward v. Love County Board of Commissioners, 253 U.S. 17, 40 S.Ct. 419, 64 L.Ed. 751 (1920), the court reversed the Oklahoma Supreme Court's refusal to award a refund for an unlawful tax. The court explained the state's duty to refund the tax as follows:

It is a well-settled rule that "money got through imposition" may be recovered back; and, as this court has said on several occasions, "the obligation to do justice rests upon all persons, natural and artificial, and if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation." To say that the county could collect these unlawful taxes by coercive means and not incur any obligation to pay them back is nothing short of saying that it could take or appropriate the property . . . arbitrarily and without due process of law. Of course this would be in contravention of the Fourteenth Amendment, which binds the county as an agency of the State.

253 U.S. at 24 (citations omitted).

- In Montana National Bank v. Yellowstone County, 276 U.S. 499, 48 S.Ct. 331, 72 L.Ed. 673 (1928), the court again reversed a refusal to award a refund of an unlawful tax. There, the Montana Supreme Court had overruled its prior decision barring the collection from state chartered banks of a tax on bank shares which had been collected from

federally chartered banks, but then refused to award a refund because state tax authorities had declined to collect the tax from state chartered banks in reliance on the Montana Supreme Court's prior decision. 276 U.S. at 504-05. The court held that the change in state law could not deprive the taxpayer of a refund of the wrongfully collected taxes:

It is true that the state Supreme Court in the present case expressly repudiated the construction theretofore put by it upon the state statutes But that does not cure the mischief which had been done under the earlier construction. That construction had already been acted upon by the taxing officials and the application thus made of the statutes had given rise to the present cause of action and an undoubted right to recover thereon. The statutes, as thus construed and applied to the concrete facts of the case, were invalid; and this is enough to justify the challenge here under consideration. . . . Plaintiff in error cannot be deprived of its legal right to recover the amount of the tax unlawfully exacted of it by the later decision which . . . leaves the monies thus exacted in the public treasury.

276 U.S. at 504-505 (emphasis added).

- In Carpenter v. Shaw, 280 U.S. 363, 50 S.Ct. 121, 74 L.Ed.

478 (1930), a case analogous to Ward, the court reversed another refusal to award a refund of an unlawful tax, holding that:

a denial by a state court of a recovery of taxes exacted in violation of the laws or Constitution of the United States by compulsion is itself in contravention of the Fourteenth Amendment.

280 U.S. at 369.

- In Iowa-Des Moines National Bank v. Bennett, 284 U.S.

239, 52 S.Ct. 133, 76 L.Ed. 265 (1931), the court reversed another refusal to award a refund of an unlawful tax (in that case, a claim only for the

discriminatory excess collected from the complaining taxpayers). The Supreme Court held that the mere power of the state to rectify the discrimination, by retroactive collection from those who were taxed at the lesser rate, did not relieve the state of its constitutional obligation to pay the claimed refund:

. . . a taxpayer who has been subjected to discriminatory taxation through the favoring of others in violation of federal law, cannot be required himself to assume the burden of seeking an increase of the taxes which the others should have paid. . . . Nor may he be remitted to the necessity of awaiting such action by the state officials upon their own initiative.

284 U.S. at 247 (citations omitted).⁹

These decisions make clear that due process places substantial limits on a state's ability to refuse a refund. Here, RCW 54.28.030 requires the Districts to file a report with the Department and RCW 54.28.020(1)(a) requires them to pay a privilege tax. Thereafter, an assessment will be issued to the Districts that must be paid by a date certain (June 1). See RCW 54.28.040(1). If the tax isn't timely paid, the Department must impose penalties (RCW 54.28.040(2)) and interest (RCW 54.28.060). But, if the amount of privilege tax that was paid by the Districts was wrong—because, as here, the Districts were compelled to pay the tax on revenues upon which the statute (RCW 54.28.020(1)(a)) does not apply the tax—the Department says there is no right to a refund

⁹ A similar claim had been made, and also rejected, in Montana National Bank. See 276 U.S. at 505.

of the overpaid taxes. In other words, the state would afford the Districts no remedy, which would be a clear and unequivocal violation of the Due Process Clause and its mandate to “compel restitution” (Marsh, 77 U.S. at 684).¹⁰

5. If This Court Must Choose Between A Ruling That Has Constitutional Implications, And One That Does Not, The Court Should Adopt The Latter Course.

The Department’s position presents a choice to the Court—adopt the Department’s view (that there is no refund remedy available at all) and the constitutional issue addressed in the immediately preceding section must be confronted, or adopt the Districts’ reading of how the statutes should work, in which case the constitutional issue would be avoided. As this Court is well aware, when confronted with a reading of a statute that avoids a potential constitutional difficulty and a reading of one that does not, courts should always elect the latter. See, e.g., In re Detention of C.W., 147 Wn.2d 259, 277, 53 P.3d 979 (2002) (“[W]here a statute is susceptible to an interpretation that may render it unconstitutional, courts should adopt, if possible, a construction that will uphold its

¹⁰ The Department contends that “[d]ue process protections do not apply to municipal corporations . . . and cannot be invoked against the state.” Department’s Response at 4 (citations omitted). As to the latter contention, the above U.S. Supreme Court cases answer whether due process can be invoked against the state; it can. As to the first contention, the Department cites several cases for the general proposition that due process does not apply to municipal corporations. See Department’s Response at 4 (citing Samuel’s Furniture, Inc. v. Department of Ecology, 147 Wn.2d 440, 463, 54 P.3d 1194 (2002); Pierce County v. Dep’t of Licensing, 150 Wn.2d 422, 441, 78 P.3d 640 (2003); Moses Lake School District v. Big Bend Community College, 81 Wn.2d 551, 557-58, 503 P.2d 86 (1973)), but none of these cases dealt with taxes illegally paid by a municipal corporation.

constitutionality” (citation omitted)). Here, a finding that the Districts are not entitled to refunds of taxes illegally collected is a finding that RCW 54.28.020 is unconstitutional, and would render all of the privilege taxes imposed under this statute invalid and refundable, not just the small amount of taxes paid on basic customer service charges.¹¹

In other words, the Court would be performing a grave disservice to the state treasury if the Court refuses refunds and invalidates the privilege tax. The Districts do not advance such a position and merely seek to recover those privilege taxes—paid on basic customer service charges under RCW 54.28.020(1)(a)—that were illegally taken from them. This Court can—and should—avoid the drastic consequence of invalidity by rejecting the Department’s “no refund” claim.

6. **The Department’s Sovereign Immunity Argument On The Trial Court’s Purported Lack Of Subject Matter Jurisdiction Has No Basis, Either.**

The Department also argues that the state’s sovereign immunity precludes the Districts’ complaint for refund. Department’s Response at 2-3. Citing Constitution Article II, Section 26 (“The legislature shall direct by law, in what matter, and in what courts, suits may be brought

¹¹ RCW 54.28.020 actually imposes four different privilege taxes. Subsection (1)(a) imposes the tax at issue in this case, on electricity distributed to customers of public utility districts. Subsection (1)(b) imposes a separate privilege tax on self-generated electric energy distributed to consumers, and subsection (1)(c) imposes a third privilege tax on self-generated electric energy that is resold. The fourth privilege tax imposed under this statute is a surtax on all of the above taxes. RCW 54.28.020(2). The existence of these taxes would be in jeopardy if the Court adopts the Department’s view of the law.

against the state”), the Department states that “[i]n order to sue the state there must be a statutory mechanism to provide the court subject matter jurisdiction.” Id. As shown in Section II, A, 3, supra, the trial court’s subject matter jurisdiction was properly invoked under RCW 82.32.180 and RCW 4.92.010. The Department also contends it “must have statutory authority to issue a refund.” Department’s Response, at 6-7. That statutory authority is RCW 82.32.060 (or, alternatively, RCW 43.01.072 and 43.88.170).

The Department acknowledges Article IV, Section 6, but claims “this provision is not self-executing and there must be a provision to invoke the court’s original jurisdiction.” Department’s Response at 3, n.2 (citing City of Tacoma v. Mary Kay Inc., 117 Wn.App. 111, 114-15, 70 P.3d 144 (2003)).¹² Here, the superior court’s jurisdiction was invoked when the Districts filed their complaint. Under CR 3(a), “a civil action is commenced . . . by filing a complaint.” See Haywood v. Aranda, 143 Wn.2d 231, 237, 19 P.3d 406 (2001) (quoting Nevers v. Fireside, Inc., 133 Wn.2d 804, 812, n.4, 947 P.2d 721 (1997) (the superior court’s “jurisdiction is invoked upon the filing of the underlying lawsuit”)). Thus, the trial court’s jurisdiction was properly invoked under CR 3(a), as

¹² The Department’s reliance on Mary Kay is misplaced. That case involved a situation where the city of Tacoma filed a notice of appeal of an administrative decision pursuant to a procedure outlined in a Tacoma municipal ordinance. The court noted that the superior court’s original jurisdiction can be invoked by filing a complaint under CR 3 or a statutory or common law writ. Mary Kay, 117 Wn.App. at 115-16. There is no question here that the Districts filed a complaint (see CP 4-9).

well as under RCW 82.32.180 and RCW 4.92.010. See Section II, A, 3, supra.¹³

B. The Refund Provisions Of The Revenue Act (RCW Chapter 82) Apply To Overpayments Of Privilege Taxes.

1. The Statutes And Rules Support A Five-Year Refund Period.

As shown in the Districts' Brief (see pp. 56-61), there is a clear pathway to finding that the refund authority granted in the Revenue Act applies to overpayments of privilege taxes under the Act:

- The Act does not explicitly articulate a procedure for asserting a claim for refund of privilege taxes. It also does not provide a procedure for the auditing of public utility districts' compliance with their privilege tax payment obligations.¹⁴ Nor does it establish procedures for districts to contest a privilege tax assessment. However, numerous provisions appoint the Department as the agency responsible for

¹³ The Washington Supreme Court has also held that while the Legislature may limit the venue for suits within the original jurisdiction of the courts, it may not preclude the original jurisdiction of the superior courts. See Dougherty v. Dep't of Labor and Industries, 150 Wn.2d 310, 316, 76 P. 3d 1183 (2003) (citing Marley v. Dep't of Labor & Indus., 125 Wn.2d 533, 539, 886 P.2d 189 (1994) (quoting Robert J. Martineau, Subject Matter Jurisdiction as New Issue on Appeal: Reining in an Unruly Horse, 1988 BYU L. Rev. 1, 28)) (“If the type of controversy is within the subject matter jurisdiction [*e.g.*, Art. II, § 6] then all other defects or errors go to something other than subject matter jurisdiction” (bracketed inclusion and emphasis added)); see also Young v. Clark, 149 Wn.2d 130, 65 P.3d 1192 (2003); Shoop v. Kittitas County, 149 Wn.2d 29, 65 P.3d 1194 (2003). Hence, whatever argument the Department is now making about lack of subject matter jurisdiction and waiver of sovereign immunity, it is an “other” argument under Dougherty that should not be allowed to be raised for the first time on appeal.

¹⁴ Is it the Department's position that it does not have the authority to audit a District's books and records to assure correct compliance with privilege tax payment obligations? There is no audit authority granted to the Department in the Act, but the Department will assert its audit authority under RCW 82.32.070.

administering, assessing, collecting and distributing the various privilege taxes imposed under the Act¹⁵ and this leads to the authority of the Department to issue refunds.

- The Revenue Act establishes all of the duties of the Department, including the duty to assess and collect all taxes and administer all programs relating to taxes which were the responsibility of the Tax Commission as of 1967, and “which the legislature may hereafter make the responsibility of” the Department. See RCW 82.01.060(1).¹⁶

- RCW 82.01.060(2) states that the director (of revenue) is to “make, adopt and publish such rules as he or she may deem necessary or desirable to carry out the powers and duties imposed upon him or her or the department by the legislature.” RCW 82.01.060(4) requires the

¹⁵ RCW 54.28.030 requires each public utility district that generates or distributes electricity in this state to file a report with the Department. RCW 54.28.040 instructs the Department to compute, assess and collect the various privilege taxes. RCW 54.28.040(1). This statute also gives the Department authority to impose penalties if payment of the privilege taxes is not received by the due date (RCW 54.28.040(2)), and also instructs the Department to deposit the taxes collected with the State Treasurer (RCW 54.28.040(3)). RCW 54.28.050 directs how the Department is to distribute the privilege taxes to the various counties entitled to receive a share of the taxes collected. RCW 54.28.055(1) requires the Department to instruct the State Treasurer how to distribute the RCW 54.28.025(1) privilege tax on thermal electric generating facilities. And, RCW 54.28.060 requires interest on delinquent payments of privilege taxes at the same rate interest is calculated for most other excise taxes, *i.e.*, under RCW 82.32.050(2).

¹⁶ On July 1, 1967, the duties of the former Tax Commission were transferred to the Department. See RCW 82.01.090. The privilege tax is one of those taxes for which the Department, and the Tax Commission previously, was specifically responsible to assess and collect (see RCW 54.28.030). Indeed, the Department and the Tax Commission together have been responsible for administering and collecting of the privilege taxes since 1941.

Department to enact regulations and provide for an adequate system of departmental review of its assessment and collection activities.

- Although the Legislature delegated to the Department the duty to assess and collect the privilege tax (see RCW 54.28.030), no rules or regulations have ever been adopted expressly relating to the procedure the Department must follow to assess and collect this tax. The Department is therefore either in breach of its statutory duties imposed under RCW 82.01.060(2) or it considers the general authority it has been granted codified in the Revenue Act, as well as the administrative rules it has adopted pursuant to RCW 82.01.060(2) and Chapter 458-20 WAC, to be fully applicable and sufficient for purposes of assessing, collecting, auditing, refunding and otherwise administering the privilege tax.

- RCW 82.32.010 sets forth the general administrative provisions with respect to several delineated taxes, but also includes taxes imposed “under other titles, chapters, and sections in such manner and to such extent as indicated in each such title, chapter, or section.” The privilege taxes imposed under the Act are taxes imposed “under other [such] chapters.”¹⁷

¹⁷ The Department reads RCW 82.32.010 too narrowly, stating that “[n]owhere in chapter 54.28 RCW . . . does it indicate that claims for refunds are governed by the provisions of chapter 82.32 RCW.” See Department’s Response at 5. Well, nowhere does it state RCW 82.32 isn’t to be applied, either. As noted, RCW 54.28.030, .040 and .050 grant the Department the authority to assess, collect, impose penalties for late payment, deposit, and direct distribution of the privilege taxes collected to the counties. See n.15, supra. RCW 54.28.060 adopts the interest rate from RCW 82.32.050(2) to late

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- Moreover, RCW 82.04.030 defines “persons” subject to the Revenue Act. As shown above, this definition includes municipal corporations of the state of Washington. The Districts are public utility districts and municipal corporations under the law (see RCW 54.04.020) and are clearly “persons.”

- RCW 82.02.010(3) defines the word “taxpayer.” A taxpayer includes any “corporation” that is “liable for any tax or the collection of any tax hereunder, or who engages in any business or performs any act for which a tax is imposed by” the Revenue Act. The Districts are municipal “corporations” and, in addition to the privilege taxes imposed by the Act, the Districts pay or collect all sorts of taxes under the Revenue Act.¹⁸ The Districts are therefore “taxpayers,” in addition to being “persons,” under the Revenue Act. As such, the provisions of RCW 82.32.060 granting “taxpayer” refund claims should be fully applicable to them as to their privilege tax payments.

- The failure of the Department to enact any rules or regulations relating to the refund claims process (or audit and assessment process) for privilege tax payers, even though authorized under RCW 82.01.060(2), further bolsters the Districts’ contention that the refund

payments of privilege taxes. See Department’s Response at 5. There is no question these provisions implicitly apply Title 82 RCW to the privilege tax.

¹⁸ These taxes include the business and occupation (B&O) tax (RCW 82.04), the retail sales tax (RCW 82.08), the use tax (RCW 82.12), and the public utility tax (RCW 82.16).

provisions in RCW 82.32.060 apply equally to the privilege taxes imposed by the Act; otherwise, rules specifically applicable to privilege tax refunds would have been necessary and adopted by the Department long ago.

- The Washington Administrative Code (“WAC”) does not contain any rules expressly pertaining to privilege tax refund claims.¹⁹ But, a Department “Excise Tax Rule” addresses procedures for refunds or credits of overpaid taxes. WAC 458-20-229 (“Rule 229”) states that “[t]his section explains the procedures relating to refunds or credits for overpayment of taxes, penalties or interest. It describes the statutory time limits for refunds and the interest rates that apply to those refunds.” WAC 458-20-229(1). This clear and unmistakable language shows there is no limitation on the scope of Rule 229 and that it applies to taxes imposed under the Revenue Act, as well as all other taxes administered by the Department.²⁰

¹⁹ Also noted, RCW 82.01.060(2) imposes upon the Department the duty to adopt rules it deems necessary to carry out its powers and duties. RCW 82.01.060(4) further requires the Department to “[p]rovide by general regulations for an adequate system of departmental review of the actions of the department . . . in the assessment or collection of taxes.” One “general regulation,” authorizing review of departmental actions “in the assessment or collection of taxes,” is WAC 458-20-100 (“Rule 100”). This rule on “Appeals” “explains the procedures for [a taxpayer to seek an] administrative review of actions of the department.” The Department says “Rule 100 governs the procedures for appealing the collection and assessment of taxes before the Departments’ internal Appeals Division and relates to the procedure outlined for refunds of taxes governed by RCW 82.32.010.” Department’s Response at 8 (emphasis added). However, nothing in Rule 100 provides that it is limited only to taxes mentioned under RCW 82.32.010.

²⁰ Rule 229 also contains the same general language as the statute, RCW 82.32.060(1), in explaining the statute of limitations. It says, “[n]o refund or credit may be made for taxes, penalties, or interest paid more than four years before the beginning of the calendar year in which a refund application is made.” WAC 458-20-229(2)(a).

- The five-year refund period set forth in RCW 82.32.060(1) would control if Rule 229 applies, because this limitations period is the only one addressed in this rule and even if Rule 229 applies only to “Excise Taxes” the Districts have demonstrated that the privilege tax is an excise tax.²¹ Thus, Rule 229 for refunds, like the Revenue Act statutes, provides a clear path to the limitations period set forth in RCW 82.32.060(1), making that statute’s five year refund period fully applicable to the Districts’ privilege tax refund claims here.

2. The Department’s Reliance On Legislative History To Show RCW Chapter 82 Does Not Apply To Privilege Taxes Is Misplaced.

The Department states that “legislative history confirms that when the Legislature amended [the Act] to include the interest calculation of RCW 82.32.050(2), it could have specifically incorporated the refund provisions in [the Revenue Act]” but did not. Department’s Response at 5, and Appendix O.²² The Department concludes that if the Legislature “wanted to include the refund provisions of RCW 82.32.180, [it] presumably would have included them . . . when it previously amended [the Act].” Department’s Response at 5-6.

²¹ See High Tide Seafoods v. State, 106 Wn.2d 695, 699, 725 P.2d 411 (1986); Black v. State, 67 Wn.2d 97, 99, 406 P.2d 761 (1965); see also, Districts’ Brief at 36.

²² The Legislature amended RCW 54.28.040 and 54.28.060 (not the entire Act) in 1996. Laws of 1996, Ch. 149, § § 12, 16. Prior to the effective date (January 1, 1997) of this legislation, interest on delinquent privilege tax payments was calculated at a flat six percent per annum. Id., § 12. Following the enactment of this bill interest is to be calculated at the variable rate under RCW 82.32.050(2). Id.

It is clear that the Department is engaging in pure speculation as to what the Legislature was thinking in 1996, or any time previously. It is just as reasonable to conclude the Legislature was satisfied that the refund and other provisions of the Revenue Act were already in place, nothing further needed to be done for the Department to administer the privilege tax, and the Legislature only intended the 1996 amendment to bring the interest rate in line, as well. See, e.g., *Brown v. Household Realty Corp.*, 146 Wn.App. 157, 170, 189 P.3d 233 (2008) (the Legislature’s inaction when amending portions of a statute is an acquiescence to an interpretation of the unamended portion). The 1996 amendment merely changed the interest rate on privilege tax underpayments from a flat six percent to the variable rate set forth in RCW 82.32.050(2). See n.22, supra. Thus, the fact that the Legislature chose RCW 82.32.050 to calculate interest in the future could demonstrate a legislative intent to further engrain the privilege tax under the Revenue Act.

The Department also points to the Final Bill Report for this legislation, which noted:

The general administrative rules on interest and penalties do not apply to several tax programs. These tax programs have alternative procedures for calculating interest and imposing penalties.

See Department’s Response, Appendix P. Based on this statement, the Department concludes that its “general administrative rules [do] not

govern certain excise taxes, including the public utility district [privilege] tax.” Department’s Response at 6. This leap in logic is unsupported.

It is true that the privilege tax has its own penalty scheme (see RCW 54.28.040(2)) compared to penalties imposed on other excise taxes (see RCW 82.32.090). And, prior to January 1, 1997, the privilege tax had its own interest rate for assessments (see RCW 54.28.060) compared to the general excise tax interest statute (RCW 82.32.050). But, so what? This merely meant that the Legislature imposed penalties and interest, one small area of the privilege tax, at different rates than other excise taxes and showed no specific intent to prevent the Department’s general excise tax rules from applying to the privilege tax.²³ Neither the 1996 amendment to the privilege tax nor anything else points to a broad-brush exclusion of the privilege tax from the other provisions of the Revenue Act excise tax laws that the Department advocates for here.

3. The Law Provides An Alternative Refund Claim Period.

Before the trial court, the Department argued that RCW 43.01.072, not RCW 82.32 [.060], was the “statutory authority to provide refunds of privilege taxes.” CP 575.²⁴ Now, the Department jettisons this argument

²³ The excise tax statutes are also replete with examples where specific taxes within the Revenue Act have their own interest or penalty provisions. For example, the Cigarette Tax has its own interest and penalty provisions (see RCW 82.24.120). So, too, does the Real Estate Excise Tax (see RCW 82.45.100).

²⁴ RCW 43.01.072 states:

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altogether. See Department’s Response at 1, n.1; Id. at 7, n.4. The source of the Department’s latest position is the contention, expressed in the Districts’ Brief (at 55, n. 25), that RCW 43.01.072 and 43.88.170 do not apply to tax refunds. In fact, there is only one published authority specifically interpreting RCW 43.88.170, and it held that this statute “applies when there is not a specific provision for refunds in the particular statute authorizing the collection of [a] tax or fee” (emphasis added). AGO 65-66 No. 98. The AGO addressed whether a person was entitled to a refund of the motor vehicle excise tax when the applicable statute (RCW 82.44.120) did not authorize a refund of the tax under the circumstances of the case at hand. So, RCW 43.88.170 has clearly been found to be applicable to tax refunds. And, once the Court accepts the proposition that the Districts are entitled to some remedy, the Court is

Whenever any law which provides for the collection of fees or other payments by a state agency does not authorize the refund of erroneous or excessive payments thereof, refunds may be made or authorized by the state agency which collected the fees or payments of all such amounts received by the state agency in consequence of error, either of fact or of law as to: (1) The proper amount of such fee or payments; (2) The necessity of making or securing a permit, filing, examination or inspection; (3) The sufficiency of the credentials of an applicant; (4) The eligibility of an applicant for any other reason; (5) The necessity for the payment.

RCW 43.88.170 contains nearly identical language to RCW 43.01.072. In addition, RCW 43.88.020(6) requires the Governor “or the governor’s designated agent” to write rules “to carry out the purposes of this chapter” and RCW 43.88.170 states that the “regulations issued by the governor . . . shall prescribe the procedure to be employed in making refunds.” To the best of the Districts’ knowledge, no rules or regulations have been promulgated by the Governor. This is another indication that the Department’s refund procedures (outlined in Section II, B, 1, supra) are adequate.

faced with the same dilemma as the trial Court: three years or five? The Districts believe the correct answer is five years.

III.

CONCLUSION

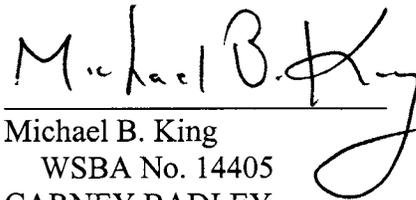
The trial court's ruling allowing only three years of refunds to the Districts should be reversed, and the Districts should receive refunds of the privilege taxes they overpaid, plus interest under RCW 82.32.060, for a full five years.

RESPECTFULLY SUBMITTED this 27th day of January, 2009.



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CERTIFICATE OF SERVICE

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I certify that on the date set forth below I served a copy of the
foregoing Reply Brief on Cross-Appeal of Respondent by United States
Mail, postage prepaid, on the Appellant, Department of Revenue's,
counsel of record, as follows:

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I declare under penalty of perjury pursuant to the laws of the state
of Washington that the foregoing is true and correct.

DATED this 27th day of January, 2009 at Seattle, Washington.



Kristi Hartman