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STATE OF WASHINGTON

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No. 39417-I-II

DIVISION II, COURT OF APPEALS  
OF THE STATE OF WASHINGTON

TESORO REFINING AND MARKETING COMPANY,

Plaintiff-Appellant,

v.

STATE OF WASHINGTON,  
DEPARTMENT OF REVENUE,

Defendant-Respondent

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ON APPEAL FROM THURSTON COUNTY SUPERIOR COURT  
(Hon. Richard D. Hicks)

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**APPELLANT'S REPLY BRIEF**

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## I. INTRODUCTION

The most remarkable point that can be made about the Department's response brief is its complete failure to address – let alone even acknowledge – the Supreme Court's recent decision in *HomeStreet, Inc. v. Dep't of Revenue*, 166 Wn.2d 444, 210 P.3d 297 (2009). This case is dispositive of the statutory construction issue.

In *HomeStreet*, the court construed the phrase “amounts derived from” in the B&O tax deduction statute, RCW 82.04.4292:

In computing tax there may be deducted from the measure of [B&O] tax by those engaged in banking, loan, security or other financial businesses, *amounts derived from* interest received on investments or loans primarily secured by first mortgages or trust deeds on nontransient residential properties.

166 Wn.2d at 449 (emphasis added).

This appeal involves another B&O tax deduction statute, RCW 82.04.433. During the periods at issue in this appeal this statute stated in part:

In computing tax there may be deducted from the measure of tax . . . *amounts derived from* sales of fuel for consumption outside the territorial waters of the United States, by vessels used primarily in foreign commerce.

RCW 82.04.433(1) (emphasis added).<sup>1</sup>

In construing the phrase “derived from” the court in *HomeStreet* held:

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<sup>1</sup> RCW 82.04.433 was enacted in 1985 (c 471 § 16) and amended in 2009 (c 494 § 2). The statute quoted above is the 1985 version of RCW 82.04.433(1). The 2009 amendment is addressed later in this brief.

“Derived from” is not defined in the B&O tax statutes . . . .  
“Derived” is defined as “to take or receive esp. from a source.”  
WEBSTER’S [THIRD NEW INTERNATIONAL DICTIONARY (2002)], at  
608. . . .

The revenue at issue here is received from a source, and the source is interest. The revenue is therefore “derived from interest” because it is taken from the interest the borrowers pay on their loans.

*HomeStreet*, 166 Wn.2d at 453-54.

The revenue at issue in this case is also received from a source, and that source is sales of bunker fuel. The undisputed facts are that the fuel at issue is manufactured by Tesoro and then sold to ocean-going vessels engaged in foreign commerce for consumption outside the territorial waters of the United States. CP 9. Revenues are *reported* by taxpayers that manufacture and then sell products, under both the Manufacturing (RCW 82.04.240) B&O tax classification and Retailing (RCW 82.04.250) or Wholesaling (RCW 82.04.270) B&O tax classification. And, under the Multiple Activities Tax Credit (*see* RCW 82.04.440) (“MATC”), the B&O tax is *paid* under only the Manufacturing classification.

Nevertheless, the *source* of the revenue was sales.<sup>2</sup> And because the revenue was “derived from sales of fuel,” it was eligible for deduction

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<sup>2</sup> This is confirmed by the statutory measure of the Manufacturing B&O tax, which is paid on the “value of the products . . . manufactured” (RCW 82.04.240(1)). And the term “value of products” is defined to mean “the gross proceeds derived from . . . sale[s]” (RCW 82.04.450(1)). The Department argues that “RCW 82.04.450 does not define the phrase ‘the value of products’ in RCW 82.04.240” because under RCW 82.04.010 “the general statutory definitions” in the B&O tax chapter “are contained in RCW 82.04.020 through .217” and, of course, RCW 82.04.450 is not included within these definitional statutes. *See* Department’s Brief at 10. But, while RCW 82.04.010 says that “the definitions set forth in the sections *preceding* RCW 82.04.220 apply throughout” (emphasis added), the quoted language is preceded by the prefatory clause “[u]nless the context clearly requires otherwise.” RCW 82.04.010; *see* Department’s Brief at 10. Tesoro submits the definition of “value of products” set forth in RCW 82.04.450, while  
*(footnote continued on next page)*

under RCW 82.04.433(1) and the ruling of the Supreme Court in *HomeStreet*.

Yet, remarkably, the Department's response brief wholly ignores the *HomeStreet* decision, including the Supreme Court's construction of the phrase "derived from."<sup>3</sup> One can only conclude that the Department is in denial over this decision (or the Department wants to pretend the decision does not exist). In either case, the Department's failure to address this key case is tantamount to an admission that there is no defense to it. While the Department does make a blizzard of other arguments, it does not come to grips with the key case dispositive of this appeal. This Court should apply the ruling in *HomeStreet*, disregard the Department's other arguments (which are more fully addressed below), and reverse and remand to the trial court for computation of the refund owed to Tesoro.

## II. ARGUMENT ON REPLY

### A. The Department's Argument That The Phrase "In Computing Tax" In RCW 82.04.433(1) Is Essentially Meaningless Violates Basic Rules Of Statutory Construction.

The Department contends the introductory "phrase 'in computing tax' sheds no light whatsoever on the intended scope of the deduction." Response Brief at 4. The Department essentially asks the Court to declare

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perhaps outside the group of B&O tax definitions included between RCW 82.04.020 and 82.04.217, is nevertheless a definition under the exception "unless the context clearly requires otherwise." Therefore, RCW 82.04.450 is the statute that defines the term "value of products," the measure of the Manufacturing B&O tax.

<sup>3</sup> It is not that *HomeStreet* was not addressed by Tesoro in its opening brief; on the contrary, the *HomeStreet* decision was argued extensively. See Tesoro's opening brief at 19-25.

this phrase meaningless. This argument runs counter to the rule of statutory construction that all words in a statute must have meaning.

As noted in the introduction this case turns on the construction of RCW 82.04.433(1). The meaning of this statute is plain and unambiguous; indeed, the Department does not dispute that the statute has a plain meaning.<sup>4</sup> When a statute is unambiguous, the rules of construction are straightforward:

[The] court reviews issues of statutory interpretation de novo. *Clauson v. Dep't of Labor & Indus.*, 130 Wn.2d 580, 583, 925 P.2d 624 (1996). "Statutory construction begins by reading the text of the statute." *State v. Roggenkamp*, 153 Wn.2d 614, 621, 106 P.3d 196 (2005); see *W. Telepage, Inc. v. City of Tacoma Dep't of Fin.*, 140 Wn.2d 599, 609, 998 P.2d 884 (2000). "When we read a statute, we must read it as a whole and give effect to all language used." *In re Pers. Restraint of Skylstad*, 160 Wn.2d 944, 948, 162 P.3d 413 (2007); see *State v. Young*, 125 Wn.2d 688, 696, 888 P.2d 142 (1995). "We give words in a statute their plain and ordinary meaning unless a contrary intent is evidenced in the statute." *C.J.C. v. Corp. of Catholic Bishop*, 138 Wn.2d 699, 708 P.2d 262 (1999).

*State v. Lilyblad*, 163 Wn.2d 1, 6, 177 P.3d 686 (2008) (emphasis added).

The Department says that the phrase "in computing tax" discloses nothing about the intended scope of the bunker fuel B&O tax deduction statute; and accordingly, this statutory language is meaningless.

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<sup>4</sup> The Department does look, in part, to legislative history to make its argument. See Responsive Brief at 18-22. The Court may only examine legislative history if the statute is ambiguous. See *State v. Armendariz*, 160 Wn.2d 106, 110-111, 156 P.3d 201 (2007). But, the Department never states that RCW 82.04.433 is ambiguous, or explains why. The Department devotes a portion of its brief to the rule that ambiguous tax deduction statutes are to be narrowly construed against the taxpayer. See Response Brief at 26-27. But again, the Department does not explain why the statute is ambiguous. Instead, the Department concludes that "the Legislature in 1985 intended the deduction . . . to be narrowly confided to B&O taxes imposed on selling activities." *Id.* at 27. In other words, the Department jumps over the question of ambiguity and goes directly to legislative history. To put it mildly, this is putting the cart before the horse.

Department's Brief at 4-8. The Department made a similar argument in *HomeStreet*. There, the Department asserted that the words "derived from" in RCW 82.04.4292 were "unnecessary and meaningless." *HomeStreet*, 166 Wn.2d at 454 (citing Verbatim Report of Proceedings (VRP) at 27-28). The court rejected this argument and found that the words "amounts derived from" in RCW 82.04.4292 were "not meaningless or superfluous, as all words in a statute must be accorded their meaning." *HomeStreet*, 166 Wn.2d at 454-455 (emphasis added). The court concluded that the Department "cannot simply delete these three words from the statute to suit the meaning it wishes it to convey." *Id.* at 455.

As in *HomeStreet* the Department wants to delete the three words "in computing tax" from RCW 82.04.433(1). But, this position violates the rule that courts must "give effect to all language used." See *HomeStreet*, 166 Wn.2d at 452 (quoting *State ex rel. Schillberg v. Barnett*, 79 Wn.2d 578, 584, 488 P.2d 255 (1971) ("[E]ach word of a statute is to be accorded meaning"). While the Department asks this Court to ignore the phrase "in computing tax," "[c]ourts are not permitted to simply ignore terms in a statute." *Parentage of J.M.K.*, 155 Wn.2d 374, 393, 119 P.3d 840 (2005) (citing *Arborwood Idaho, L.L.C. v. City of Kennewick*, 151 Wn.2d 359, 367, 89 P.3d 217 (2004); see *Pers. Restraint of Nichols*, 120 Wn. App. 425, 431, 85 P.3d 955 (2004) (citing *City of Seattle v. State*, 136 Wn.2d 693, 698, 965 P.2d 619 (1998)) ("We give effect to every word in a statute and will not adopt an interpretation that renders words useless, superfluous, or ineffectual"); *HomeStreet*, 166 Wn.2d at 452 (citing

*Kasper v. City of Edmonds*, 69 Wn.2d 799, 804, 420 P.2d 346 (1966) (quoting *Groves v. Meyers*, 35 Wn.2d 403, 407, 213 P.2d 483 (1950)) (“Whenever possible, statutes are to be construed so no clause, sentence or word shall be superfluous, void or insignificant” (internal quotations omitted)).

As Tesoro argued in its opening brief (*see* pp. 13-18) the “in computing tax” language means the intended scope of RCW 82.04.433(1) was quite broad, *i.e.*, the statute was intended to apply to *any* B&O tax payable. The deduction was not intended to apply only to taxes paid under certain B&O classifications – such as Retailing (RCW 82.04.250) and Wholesaling (RCW 82.04.270) – as the Department would have this Court believe. Nothing in the plain language of RCW 82.04.433(1) even remotely suggests that this deduction was limited only to B&O taxes payable under the Wholesaling and Retailing categories. On the contrary, the use of the generic language “in computing tax” means that *any* classification of B&O tax is eligible for the deduction, so long as the tax is measured by “amounts derived from sales of fuel” (and which fuel is for use outside the United States by vessels primarily engaged in foreign commerce).

There is no question that Tesoro met these requirements. Tesoro manufactured bunker fuel. CP 9. Tesoro sold the fuel it manufactured to purchasers, all of which were vessels (for which the deduction was claimed) engaged in foreign commerce. CP 10. Tesoro obtained the requisite exemption certificates, which the Department required to document the tax-exempt nature of the sales. *Id.*; *see* WAC 458-20-175.

For the Department or the trial court to limit the deduction to taxes paid under the Wholesaling and Retailing B&O tax classifications is to impute a requirement beyond the plain language of the statute, which is simply not allowed. *See Lone Star Industries, Inc. v. Dep't of Revenue*, 97 Wn.2d 630, 635, 647 P.2d 1013 (1982) (a Department rule, imposing requirements not mentioned in the statute to qualify the taxpayer for an exemption, was found invalid); *see also Van Dyk v. Dep't of Revenue*, 41 Wn. App. 71, 702 P.2d 472 (1985) (“[the] regulation . . . [was] invalidated as inconsistent with the statute”).

The 2009 amendment to the statute confirms Tesoro’s reading of the requirements to qualify for the deduction. After the amendment, the only sales purportedly eligible for the deduction are those taxable under the Retailing and Wholesaling B&O tax classifications. As amended last year, RCW 82.04.433(1) now reads:

In computing tax there may be deducted from the measure of tax imposed under RCW 82.04.250 or 82.04.270 amounts derived from . . . (new language underscored).

If the statute as originally enacted in 1985 only intended to apply to taxes payable under the Wholesaling and Retailing B&O tax classifications, what was the purpose of the 2009 amendment? Tesoro submits that the obvious purpose was to *change* the requirements for deduction by narrowing the deduction’s scope. *See Abbott v. General Accident Group*, 39 Wn. App. 263, 268, 693 P.2d 130 (1984) (the addition of language in a statutory amendment is indicative of the Legislature’s intent to change the law). Prior to the amendment the “in computing tax”

language – without the specific references to RCW 82.04.250 and 82.04.270 – meant that any of the various B&O tax classifications fell within the scope of the deduction, so long as all of the other requirements of the statute were met. In short, the “in computing tax” language *does* shed light on the scope of deduction, and this Court should give meaning to the Legislature’s original 1985 enactment, under which all B&O tax classifications, including Manufacturing, were to be eligible for the deduction.<sup>5</sup>

**B. The Department’s “Natural” Reading Of The Phrase “Amounts Derived From Sales of Fuel” Is Unsupported.**

Next, the Department argues that “the natural and ordinary meaning of the language ‘amounts derived from sales of fuel’” really means “amounts received from the activity of *selling* bunker fuel, not the activity of *manufacturing* bunker fuel,” and that there “is no hint in this language itself that the Legislature had the manufacturing B&O tax in mind at all when it enacted this deduction.” Department’s Brief at 9 (bold italic emphasis in original). There are two things wrong with this statement. First, the Department offers no authority or support for what it believes is a “natural” meaning of the language of RCW 82.04.433(1) (because no such authority exists). The rules of statutory construction

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<sup>5</sup> A key word in the phrase “in computing tax” is the last word, “tax.” RCW 82.04.433 does not define this word, nor is the word defined in the B&O tax chapter. But, the word has been defined by the Supreme Court: “[T]he term ‘tax’ has as its common meaning a ‘pecuniary charge imposed by legislative or other public authority upon persons or property for public purposes : a forced contribution of wealth to meet the public needs of a government.’” *Amalgamated Transit Union Local 587 et al. v. State*, 142 Wn.2d 183, 219, 11 P.3d 762 (2000) (citing WEBSTER’S THIRD INTERNATIONAL DICTIONARY 2345 (1986)). The Manufacturing B&O “tax” is just as much a “tax” as the Wholesaling “tax” and Retailing “tax.”

require the Court to derive the meaning of a statute from its plain language, not its “natural language” – whatever that might be.<sup>6</sup>

The fundamental duty of this Court is to derive the meaning of RCW 82.04.433(1) solely from the plain language of that statute unless the statute is ambiguous, in which case the Court can revert to aids to construction. *See Dot Foods, Inc. v. Dep’t of Revenue*, 141 Wn. App. 874, 881, 173 P.3d 309 (2007) (citing *McLane Co. v. Dep’t of Revenue*, 105 Wn. App. 409, 413, 19 P.3d 1119 (2001) and *U.S. Tobacco Sales & Mktg. Co. v. Dep’t of Revenue*, 96 Wn. App. 932, 938, 982 P.2d 652 (1999)). The Department does not allege that RCW 82.04.433 is ambiguous. Instead, as the discussion in II.A, *supra*, shows, the Department first wants this Court to add language to the statute, contrary to the rule that the Court should “neither add language to nor construe an unambiguous statute.” *Bowie v. Washington Dep’t of Revenue*, 150 Wn. App. 17, 21, 206 P.3d 675 (2009) (citing *Lacey Nursing Ctr., Inc. v. Dep’t of Revenue*, 128 Wn.2d 40, 53, 905 P.2d 338 (1995) (“we look to the statute’s plain meaning in order to fulfill our obligation to give effect to legislative intent”)); *see also, Cerrillo v. Esparza*, 158 Wn.2d 194, 201, 142 P.3d 155 (2006) (the court “does not subject an unambiguous statute to statutory construction”). The Department then wants this Court to apply some undefined “natural” reading to the statute – which, of course, is the Department’s reading – as opposed to the statute’s plain reading. Because

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<sup>6</sup> Besides, what could the “natural” meaning of a statute be, except for its “plain” meaning?

the Department's approach is contrary to established rules of statutory construction, this Court should decline to adopt the Department's "natural" reading of the statute.

Second, the Department contends the Legislature did not have "the manufacturing B&O tax in mind" when RCW 82.04.433(1) was enacted. Department's Brief at 9. The best evidence of what the Legislature had "in mind" is the plain meaning of the words the Legislature used. And the plain meaning of RCW 82.04.433(1) shows the Legislature had in mind that manufacturers of bunker fuel would be exempt from B&O tax for "amounts derived from sales." Under the MATC, amounts derived are reported on both the manufacturing and selling activities but the tax is paid under the Manufacturing B&O classification. Nothing in this B&O tax structure suggests the Legislature intended to deprive manufacturers of a deduction to which they were entitled under RCW 82.04.433(1).

When RCW 82.04.433 was enacted (1985 c 471 § 16), persons who manufactured and sold a product in this state (like bunker fuel) were entitled to exempt the manufacturing activity from the B&O tax under the multiple activities tax exemption statute (former RCW 82.04.440). This meant that manufacturers paid the B&O tax on the selling (retailing or wholesaling) activity. The U. S. Supreme Court declared the multiple activities tax exemption statute unconstitutional in 1987. *See Tyler Pipe Industries, Inc. v. State Department of Revenue*, 483 U.S. 232, 107 S. Ct. 2810, 97 L. Ed. 2d 199 (1987). In response the Legislature amended RCW 82.04.440 to create the MATC. *See Laws of 1987 2<sup>nd</sup> ex.s. c. 3 § 2.*

Under the MATC the reporting of persons who both manufacture and sell products in the state stayed the same and manufacturers still paid only one B&O tax, except the tax was now paid under the Manufacturing B&O tax classification, not the Retailing or Wholesaling classification, as was the case before under the multiple activities tax exemption statute. There is nothing in the 1987 change from a multiple activities *exemption* to a *credit* that suggests the Legislature intended to take the bunker fuel deduction away from refiners, and the Department has not pointed to anything, either.<sup>7</sup>

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<sup>7</sup> The Department states that the Legislature did not have “the manufacturing B&O tax in mind” when it enacted the RCW 82.04.433(1) deduction. Response Brief at 9. This claim ignores the fact that only manufacturers pay the Manufacturing B&O tax and manufacturers sell the products they manufacture. So, manufacturers were specifically in mind when RCW 82.04.433 was enacted. This fact is confirmed by examining the legislative history. (Tesoro is not addressing legislative history on account of an ambiguity in the statute; instead, this history is simply instructive.) For example, the Port of Seattle wrote to Governor Booth Gardner on May 16, 1985, supporting the bill that enacted the bunker fuel B&O tax deduction, because the “tax savings should reduce the price of marine fuel to the steamship lines engaged in international trade, [and] make the Port of Seattle an even more attractive gateway.” CP 288. Because manufacturers sell marine bunker fuel the “tax savings” addressed by the Port would be defeated if manufacturers were excluded from taking the deduction. Similarly, the President of Pacific Northern Oil wrote the Governor on April 30, 1985, stating that the deduction “will save jobs in our industry” and allow Pacific “to pass on this tax savings in the price of the marine fuel [sold] to foreign flag vessels calling on ports in this state.” CP 290. Again, the “tax savings” for the entire “industry” does not exist if manufacturers of bunker fuel are ineligible for the deduction. (The facts here disclose that Tesoro, even though a manufacturer, sells directly to vessels engaged in foreign commerce. CP 9.) Crowley Maritime Corporation wrote on May 2, 1985, that the B&O tax deduction “contains significant positive support for our industry by placing the Puget Sound marine fuels business on an equal par with other West Coast ports which already enjoy similar legislative protection.” CP 292. Thus, RCW 82.04.433(1) was a tax deduction enacted for the benefit of the entire marine fuels “industry” and the “Puget Sound marine fuels business,” which most certainly includes manufacturers, without which there would be no fuel to sell. Finally, Representative Appelwick stated on the floor of the House that testimony before the Ways & Means Committee showed that persons “who are supplying fuel” to ships “can not stay in business in the state if the department collects that revenue as they are now intending to do and trying to do,” and that to vote against the floor amendment “is, in all probability, to eliminate that particular segment from the state.” CP 284; see Response Brief at 20, n. 10. This latter statement, and all of these revealing statements from the Port, Pacific Northern Oil and Crowley, establish the clear  
*(footnote continued on next page)*

In summary, there was no legislative intent to apply a B&O tax on bunker fuel manufacturers/sellers with the passage of the MATC, when refiners did not pay B&O tax prior to passage of the MATC. The Legislature's purpose in passing the MATC was to correct a constitutional flaw in the overall B&O taxing scheme, not to impose a B&O tax on bunker fuel manufacturers/sellers who were previously exempted from the tax.

The Department's interpretation of the statute over the two intervening *decades*, both before and after the multiple activity statute (RCW 82.04.440) was amended in 1987 to change from an exemption to a credit, confirms that manufacturers paying B&O tax under the Manufacturing classification are entitled to the deduction. As long ago as 1988, the Department issued the first of three determinations to other oil refineries, and in each situation the RCW 82.04.433(1) deduction was allowed for manufacturers. These three determinations came to the same, consistent, uniform conclusion: that RCW 82.04.433(1) does not limit what specific B&O tax classification is deductible. CP 294. In the words of the Department itself, "it does not make any difference if the tax is Retailing B&O, Wholesaling B&O, Manufacturing B&O, or whatever." *Id.*<sup>8</sup> So, the Department's immediate, contemporaneous and long-standing

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intent to exempt bunker fuel from taxation, so that the price would be lower. If manufacturers cannot take the deduction, as the night follows the day, the tax will be passed through to the vessels buying the fuel, making the product costlier and driving sales out of state, the precise situation the 1985 legislation was designed to avoid. For what it's worth, the legislative intent supports Tesoro's interpretation of the statute.

<sup>8</sup> The Department issued the first of the three determinations to Sound Refining, Inc., in 1988. CP 294. This decision covered the period July 1, 1985 through January 31, 1986, *i.e.*, from the enactment of the deduction but *before* RCW 82.04.440 was changed from a multiple activities exemption to a credit. *Id.* Later, the Department issued two more  
*(footnote continued on next page)*

interpretation of RCW 82.04.433(1) was, and always has been (until Tesoro asked to have the deduction applied to its sales) to grant the deduction to manufacturers, regardless whether the actual B&O tax paid was on the selling or manufacturing activity.

Courts give “considerable weight to a statutory interpretation by a party who has been designated to implement the statute.” *Heinsma v. City of Vancouver*, 144 Wn.2d 556, 566, 29 P.3d 709 (2001) (citing *Seattle Newspaper-Web Pressmen’s Union Local No. 26 v. City of Seattle*, 24 Wn. App. 462, 467, 604 P.2d 170 (1979)). Here, the Department interpreted the deduction to apply to manufacturers *three separate times*.<sup>9</sup> These rulings occurred over a period of five years and were made under both the former and current versions of RCW 82.04.440 (former multiple activities tax exemption, current MATC). They cannot be considered isolated nor can they be disregarded; instead, they represented the consistent, uniform and longstanding interpretation of RCW 82.04.433(1), by the agency charged with the statute’s administration and enforcement. This Court should find this interpretation persuasive.

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determinations, both in 1993, one to U.S. Oil (*see* CP 220-225), and later in 1993, to Pacific Northern Oil Corporation. CP 294. These latter two decisions covered periods *after* RCW 82.04.440 was amended. All three determinations came to the same conclusion, that “RCW 82.04.433 was intended to be a deduction against *any* B&O tax.” *Id.* (emphasis added).

<sup>9</sup> This is not a case where the Department made inconsistent interpretations as a result of an isolated ruling. *See Tanner Electric Coop. v. Puget Sound Power & Light*, 128 Wn.2d 656, 672, 911 P.2d 1301 (1996) (citing *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 815, 828 P.2d 549 (1992)) (a ruling by an administrative agency that is inconsistent with an earlier ruling is not entitled to deference by the court if the later action is found to be no more than an isolated action).

C. **Former Subsection (2) of RCW 82.04.433 Did Not Limit The B&O Tax Deduction To Selling Activities.**

The Department next contends that former subsection (2) of RCW 82.04.433 “reinforces the conclusion that the 1985 Legislature did not intend the deduction to extend to the manufacturing B&O tax.” Response Brief at 12-13. The Department then goes into an extensive discussion of how Washington’s B&O tax on sales of bunker fuel does not violate the Import-Export Clause of the U.S. Constitution (art. 1, § 10). *Id.*, pp. 13-18.

The original RCW 82.04.433(2) provided:

Nothing in this section shall be construed to imply that amounts which may be deducted under this section were taxable under Title 82 RCW prior to enactment of this section.<sup>10</sup>

The plain language of subsection (2) reveals that the Legislature intended to make clear that the establishment of the express statutory deduction should not be construed to mean that amounts deductible under the new statutory deduction had previously been taxable. The Department eventually (albeit grudgingly) acknowledges this fact here.<sup>11</sup> The Department contends, however, that sales of bunker fuel prior to the enactment of RCW 82.04.433 were fully taxable and not exempt as

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<sup>10</sup> As amended in 2009, RCW 82.04.433(2) now reads:

The deduction in subsection (1) of this section does not apply with respect to the tax imposed under RCW 82.04.240, whether the value of the fuel under that tax is measured by the gross proceeds derived from the sale thereof or otherwise under RCW 82.04.450.

Chapter 494, Laws of 2009, Section 2(2).

<sup>11</sup> See Response Brief at 13 (“Former RCW 82.04.433(2) was an attempt to preserve taxpayer arguments that wholesaling or retailing B&O taxes on their business activities of selling bunker fuel for consumption outside the territorial waters of the United States, by vessels used primarily in foreign commerce, were not owed even before the enactment of RCW 82.04.433”).

exports.<sup>12</sup> In *Carrington*, the Supreme Court reaffirmed the principal that “[t]o enjoy constitutional protection [from taxation] as an export, goods must have entered the export stream with certainty of a foreign destination.” 84 Wn.2d at 445. In the case of bunker fuel, Tesoro delivered or arranged delivery of the fuel to vessels engaged in foreign commerce. The product was put in to the fuel tanks of vessels transporting goods overseas. How much more certainty could there be: that the fuel had entered the export stream, the fuel was destined for export, and a foreign destination was certain? So, it is wrong for the Department to imply or suggest that there was no exemption from the B&O tax for sales of bunker fuel for consumption outside the territorial waters of the U.S., by vessels primarily engaged in foreign commerce, prior to the enactment of RCW 82.04.433 in 1985.

Nevertheless, the statutory language used in RCW 82.04.433(2) does not support the Department’s argument that the Legislature did not intend the deduction to apply to manufacturing. The language the Legislature invoked was, “Nothing . . . shall be construed to imply that *amounts* which may be deducted . . . were taxable . . . prior to enactment of this section.” RCW 82.04.433(2) (emphasis added). As with subsection (1)’s “in computing tax” language the Legislature used the

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<sup>12</sup> See Response Brief at 13 (“In 1985, there were at least colorable – *though ultimately unpersuasive* – arguments that taxing the activity of *selling* bunker fuel in Washington under RCW 82.04.250 or RCW 82.04.270 might have been prohibited by the Import-Export Clause” (bold emphasis in original; emphasis added) (citing *Carrington Co. v. Dep’t of Revenue*, 84 Wn.2d 444, 527 P.2d 74 (1974), *cert. denied*, 421 U.S. 979 (1975); *Shell Oil Co. v. State Bd. Of Equalization*, 64 Cal.2d 713, 414 P.2d 820, 823-27, 51 Cal. Rptr. 524 (1966)).

word “amounts” in subsection (2) to describe what was previously exempted from B&O tax. If the Legislature wanted to limit the deductible “amounts” to only those “amounts” taxable under the selling (Wholesaling or Retailing) B&O taxes – and wished to exclude from the deduction the Manufacturing B&O tax, as the Department contends the Legislature did in fact do in 1985 – subsection (2) would have read, “Nothing . . . shall be construed to imply that amounts which may be deducted *from the tax imposed by RCW 82.04.250 or 82.04.270* . . . were taxable . . . prior to enactment of this section” (new language emphasized). Indeed, the Legislature would have utilized language similar to the 2009 amendment. *See* n.10, *supra*. Instead, in 1985 the Legislature did not qualify what “amounts” were deductible. In short, the generic use of the word “amounts” in RCW 82.04.433(2) indicates that *any* B&O tax was deductible. A plain reading of subsection (2) verifies this result.

**D. The Department’s Argument, That General Statements In Two Administrative Rules Somehow Trump Three Administrative Decisions Issued To Three Different Manufacturers On The Precise Statute At Issue Here, Is Nonsense.**

The Department contends that its “contemporaneous administrative construction of RCW 82.04.433” is reflected in two rules (WAC 458-20-175 and 458-20-193C) and these rules refute Tesoro’s argument. Response Brief at 22. Rules 175 and 193C were amended in 1986 by the insertion of the following identical sentence in each rule:

. . . [O]n July 1, 1985, a statutory business and occupation tax deduction became effective for sales of fuel for consumption outside the territorial waters of the United States by vessels used primarily in foreign commerce.

Response Brief at 22-24 (citing State Register 86-07-005).

The Department misinterprets the scope and intent of the 1986 amendments to Rules 175 and 193C. The historical record shows that prior to July 1, 1985, the Department of its own accord was not collecting B&O tax on sales of bunker fuel. The Department was effectively granting an exemption from the tax on such sales because it was thought (as previously discussed) that the State could not reach these sales for taxation purposes on account of the Import-Export Clause. In 1985 the statutory deduction became effective and the two rules were duly amended to acknowledge this fact (“[O]n July 1, 1985, a statutory “[B&O] tax deduction became effective . . .”). This statement is doing nothing more than describing an historical event that acknowledges the deduction.

Moreover, the sentence inserted in Rules 175 and 193C was not an interpretive statement of the newly enacted statutory deduction. A plain reading of this sentence demonstrates that it does not interpret any aspect of the content of RCW 82.04.433(1). To this extent, the amendments to Rules 175 and 193C were neither interpretive nor legislative. *See Ass’n of Wash. Bus. v. Dep’t of Revenue*, 155 Wn.2d 430, 120 P.3d 46 (2005). Instead, the rule amendments simply acknowledged a fact and did not attempt to interpret the content or context of the deduction for “amounts derived from sales of fuel for consumption outside the territorial waters of the United States, by vessels used primarily in foreign commerce.” RCW 82.04.433(1). In fact, the one-sentence 1986 amendment to both Rules 175 and 193C is devoid of content and does not speak to the full scope of

the deduction. This reading of the amendment avoids a conflict between the Department's current interpretation of RCW 82.04.433(1) and the three interpretive determinations the Department subsequently issued, which explicitly speak to the scope and intent of the deduction.

The Department also challenges Tesoro's reliance on the three determinations issued to other refiners. Response Brief at 24-26. In trashing its own decisions, the Department claims that those determinations were decided in error because they "failed to mention, let alone follow, either Rule 193C or Rule 175." *Id.* at 24. Pointing to one of the decisions, Determination No. 93-257 (CP 220-225), the Department describes it as a "brief, conclusory analysis of the issue." *Id.* at 24-25. The Department claims Tesoro has no right to rely on these three rulings because they were "unpublished," "apply only to the taxpayer named in the determination," and may not be relied on by any other taxpayer. *Id.* at 25.<sup>13</sup> The Department concludes by arguing that the three determinations "did not ever reflect the official position of the Department," that "Tesoro cannot base its refund claim on three erroneous unpublished determinations issued to other taxpayers," and the prior decisions cannot "reflect the Department's 'longstanding position' on the scope of the bunker fuel deduction," because the determinations "were in direct conflict with the Department's published rules." *Id.* at 26.

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<sup>13</sup> RCW 82.32.410 allows the Department to designate certain determinations as precedents and publish these determinations in the public record.

These arguments of the Department create an incoherence between the rules and the determinations, when in fact there is no conflict. The rules contain a statement of historical fact, that a statutory deduction was created in 1985 for sales of certain marine fuels. The determinations interpret the scope of the deduction to include “amounts derived” by manufacturers. The rules do not contain any interpretation of the deduction. This Court should look to the determinations as a proper interpretation of the statute. The Court should also look at both the rules and the determinations in combination as creating a coherent interpretation of the statute, instead of trying to say one was wrong and the other right, as the Department does here.

Finally, whether expressly declared to be precedential or not under RCW 82.32.410(1), the three determinations do establish a longstanding interpretation by the agency charged with the administration of the statute. As such, the Department should not be allowed to repudiate these determinations, just so it can treat a similarly situated taxpayer differently. At a minimum the three determinations are *evidence* of how to correctly interpret RCW 82.04.433(1); that the determinations have not been declared precedential is beside the point.<sup>14</sup>

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<sup>14</sup> Ordinarily, when the Department makes an interpretation it is quick to trumpet the deference rule. In this case, the deference argument is nowhere to be seen in the Department’s brief.

**E. Tesoro's Arguments To The Trial Court Below Were Based In Part On Principles Of Fairness, Equality, And Consistency; Those Arguments Are Fair Game For Presentation To This Court, Too.**

The Department contends that this Court “should refuse to consider any new legal theories Tesoro now attempts to raise on appeal.” Response Brief at 29. These so-called “new legal theories” include a duty of fairness, equality and consistency, which were taken from the Department’s own mission statement; rights granted to taxpayers under the Taxpayer Rights and Responsibilities Act (Chapter 82.32A RCW); and by analogy, a duty of consistency imposed upon the Internal Revenue Service by the federal courts. *See* Response Brief at 29-30.

First, Tesoro’s “fairness, equality and consistency” argument, as well as the taxpayer rights and responsibilities act, *were* raised to the trial court below in Tesoro’s motion for summary judgment. *See* CP 30, n.13. The source of this argument was the Department’s own mission statement and the taxpayer rights act. *See Id.* (citing <http://dor.wa.gov/Content/AboutUs/mission.aspx>; <http://dor.wa.gov/Content/AboutUs/TaxpayerRights.aspx>). The Department publishes wonderful mission statements, promising fairness, consistency, and equality, but the Department evidently does not expect to be held to these standards. Similarly, the taxpayer rights and responsibilities act (Chapter 82.32A RCW) is grounded in statute, promising that Washington taxpayers have a right to “fair and equitable treatment,” but the Department apparently does not want fairness and equity to be actually applied. These arguments were made again in Tesoro’s reply to the trial court. CP 305. It is flat-out

wrong for the Department to state these arguments were not made below and were first raised on appeal.

Second, the Department misconstrues Tesoro's argument based on *International Business Machines Corp. v. United States*, 170 Ct. Cl. 357, 343 F.2d 914 (1965). See Tesoro's Brief at 30-34. In this case, the court ruled that the IRS has a duty of consistency, that taxpayers have a right to equality of treatment, and that the levying of taxes must be done in parity in order to have full and fair competition. 343 F.2d at 920, 923. Who could argue with these principles? (Well, the Department, for one does. See Response Brief at 31-33.) The Department calls a taxpayer's right to fair and equitable treatment a "vague" right. *Id.* at 32. The *IBM* case was put forth as an example of how a court might rule when taxpayers are not treated fairly, consistently, or on a level playing field. Tesoro acknowledges that this Court is not bound by federal court decisions. See *Corp v. Atlantic-Richfield Co.*, 122 Wn.2d 574, 583, 860 P.2d 1015 (1993). But, the *IBM* decision is certainly helpful given that the issue – how should similarly situated taxpayers be treated by the taxing authority – is present in both cases. The Department claims that Washington law "grants no vague statutory right to 'fair and equitable treatment.'" Response Brief at 32-33.<sup>15</sup> Even if the Department is correct, this Court has equitable powers to grant fair and equal treatment. This Court should

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<sup>15</sup> Tesoro submits that it is a good bet that Governor Gregiore, Attorney General McKenna, and most members of the State Senate and House of Representatives would be surprised to learn of this statement being made by the Department in a brief submitted to the Court of Appeals.

exercise that power. The *IBM* case is a roadmap to the right decision; this Court should follow it.

**F. The 2009 Amendment's Adoption Violated The Two-Thirds Majority Requirement of Initiative 601.**

At the time the 2009 amendment to RCW 82.04.433 was enacted, RCW 43.135.035(1) provided in pertinent part as follows:

After July 1, 1995, any action or combination of actions by the legislature that *raises taxes* may be taken only if approved by a two-thirds vote of each house of the legislature. . . .

(Emphasis added.) The term “raises taxes” was defined by the same statute:

. . . “raises taxes” means any action or combination of actions by the legislature that increases state tax revenue deposited in any fund, budget, or account, regardless of whether the revenues are deposited into the general fund.

RCW 43.135.035(6).

The 2009 amendment (sometimes referred to as SB 6096) violated these provisions. This bill raised taxes. It raised taxes on all manufacturers that sell bunker fuel. Specifically, it raised U.S. Oil & Refinery Co.’s taxes. (U.S. Oil received a determination in 1993 from the Department, holding that RCW 82.04.433(1) granted a deduction for U.S. Oil’s sales of bunker fuel to vessels engaged in foreign commerce. CP 220-225.) SB 6096 also raised the taxes of Sound Refining, Inc. (This taxpayer also received a determination from the Department (in 1988).) Sound Refining was able to deduct amounts derived from sales of bunker fuel for a period longer than U.S. Oil. CP 294. SB 6096 raised the taxes of Pacific Northern Oil Corporation, as well. (This taxpayer, in 1993 also,

received a determination from the Department that amounts it derived from sales of bunker fuel were deductible from the measure of B&O tax under RCW 82.04.433(1). CP 295.) In short, SB 6096 changed the rules for deduction. Beginning May 14, 2009, amounts derived by manufacturers from sales of bunker fuel were no longer deductible; instead, such sales were now taxable. Because SB 6096 changed what was, and what was not, deductible it was a bill that “raises taxes.” RCW 43.135.035(6). And, because it raised taxes, SB 6096 had to have been “approved by a two-thirds vote of each house of the legislature.” RCW 43.135.035(1). The bill passed the Senate by a vote of 29-19. *See* Appendix A, cover page.<sup>16</sup> This was less than two-thirds vote of the Senate. SB 6096 passed the House by a vote of 51-45. *Id.* This, too, was less than a two-thirds vote of the House. Therefore, SB 6096 and the 2009 amendment did not validly become law under RCW 43.135.035 and this Court should declare the entire bill null and void.

The Department contends that Tesoro’s argument rests on the “erroneous premise . . . that a prior statute can invalidate a subsequent statute.” Response Brief at 38 (citing *Washington State Farm Bureau Federation v. Gregoire*, 162 Wn.2d 284, 174 P.3d 1142 (2007)). The Department does not cite anywhere in Tesoro’s opening brief where it was argued that the original, 1985 version of RCW 82.04.433 invalidated the

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<sup>16</sup> Appendix A is a complete copy of SB 6096 (Chapter 494, Laws of 2009) enacted by the Legislature effective May 14, 2009.

2009 amendment to that statute. This argument makes no sense and whatever legal theory the Department is attempting to advance it is unsupported.

The facts here are undisputed. The Legislature enacted RCW 82.04.433 in 1985 to grant a B&O tax deduction for “amounts derived from sales of fuel for consumption outside the territorial waters of the United States, by vessels used primarily in foreign commerce.” RCW 82.04.433(1). In a contemporaneous interpretation on the scope of this statute issued in 1988 (and including the period beginning with the enactment of the new law) the Department ruled that the deduction applied to manufacturers of bunker fuel. The Department subsequently reaffirmed this ruling in not one, but *two* more administrative decisions (both in 1993). This interpretation remained the consistent and uniform position of the scope of the deduction statute for over 20 years until, suddenly, the deduction that was granted to three other manufacturers of bunker fuel, was denied to Tesoro. Then, the Legislature hastily enacted a “clarification” amendment to RCW 82.04.433. Chapter 494, Laws of 2009, Sec. 1. One day before the trial court was set to rule on Tesoro’s refund claim the Governor signed the amendment into law, with a retroactivity provision extending back to July 1, 1985. This was no “clarification” of an existing tax, but an attempt to change the scope of that tax, to make subject to that tax what had previously been held not subject to that tax, and to interfere with this litigation.

The Department contends that RCW 43.135.035 (and the underlying Initiative 601) do not control here. The Department’s

argument is based on the *Farm Bureau* decision, that “a prior statute . . . cannot prospectively invalidate a later-enacted statute.” Response Brief at 39. The Department then states that the two statutes – original RCW 82.04.433 and amended RCW 82.04.433 (SB 6096, Ch. 494, Laws of 2009) – “are separate legislative actions, of equal rank in the constitutional scheme” and therefore SB 6096 (the second separate enactment) “cannot be said to ‘violate’ the supermajority requirement of RCW 43.135.035(1).” Response Brief at 39. While it is difficult to exactly follow what the Department is attempting to argue, the logic of its argument must be a claim that the act of passing the amendment in 2009 by a mere majority vote of each house of the Legislature takes the 2009 amendment out from under the two-thirds majority requirement of RCW 43.135.035(1).

The Department ignores, however, that the Legislature understood that RCW 43.135.035(1) *could* control. Hence, at the time SB 6096 was ready for final passage by the State Senate, a point of order was raised to the President of the Senate (Lieutenant Governor Brad Owen) by Senator Brandland, as to whether SB 6096 required only a simple majority rather than a two-thirds majority on final passage. *See* Appendix B (Rulings of Lieutenant Governor Brad Owen, “Clarification: Agency Determination,” at 106-107). The Lieutenant Governor ruled the point out of order, not because the Legislature was free to ignore RCW 43.135.035(1) (as the Department claims here), but only because, in the Lieutenant Governor’s view, the statute did not apply because SB 6096 did not impose a new

tax.).<sup>17</sup> The Lieutenant Governor's ruling, however, is not binding on this Court.<sup>18</sup> In the United States, the courts say what the law is (*see Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L. Ed. 60 (1803) (it "is emphatically the province and duty of the judicial department to say what the law is"), and here the Lieutenant Governor just got it wrong. Amending a tax deduction statute to take away the deduction as to a certain class of taxpayers results in the application of a new tax and falls within the plain language of RCW 43.135.035(1).

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<sup>17</sup> In doing so, however, the Lieutenant Governor quite rightly castigated the conduct of the Department:

...the Department's own apparent inconsistencies with interpreting a statute that has remained unchanged since 198[5] clouds the issue significantly. *This is every bit as troubling to the President as it must be to the individual taxpayers involved*, and the President would note as an aside that this is at least the third case of which he is aware this year where an agency changing its mind after issuing an earlier determination has resulted in chaos, expense, and heartache for many members of the public. It is one thing for there to be a genuine dispute as to the meaning of a statute; *it is quite another for the agency charged with implementing that statute to reverse itself*. In this case, for example, we are left with little or no explanation as to why the Department of Revenue changed its original interpretation from that issued in a 1993 determination. Likewise, *it is unclear as to why the Department did not seek an earlier change to the law if this was truly an issue of clarification. The President – and the public – are left to wonder as to the Department's rationale and motivations*. The President points this out to illustrate both the difficulties he faces in making a ruling now, given the past unclear history, *as well as the disservice he believes is done to the general public by the Department's reversals*.

Rulings of Lieutenant Governor Brad Owen, "Clarification: Agency Determination," at 106-107 (emphasis added) (App. B.).

<sup>18</sup> The Lieutenant Governor recognizes his limitations, as he reminded the Legislature four years before in ruling upon a point of inquiry involving (ironically enough) yet another "SB 6096":

The President reminds the body that he rules on parliamentary, and not legal, issues; it is up to the body to decide the policies and language to enact, and it is up to the courts to rule as to the various legal limitations or invalidities of such language.

Rulings of Lieutenant Governor Brad Owen, "Future Legal Matters," 48 (App. C.).

Incredibly, the Department makes no attempt to address whether the Lieutenant Governor was correct in his ruling. The Department only argues that the Legislature's 2009 amendment is somehow co-equal to the original statute, and therefore RCW 43.135.035(1) cannot affect the amendment's validity. But if the mere act of legislating a revenue increase (by amendment) was enough to displace I-601 as codified in RCW 43.135.035(1), then why did the Legislature bother to suspend RCW 43.135.035(1) this year, before passing a plethora of new taxes and tax increases? *See* Appendix D (Chapter 4, Laws of 2010).

**G. The 2009 Amendment's Retroactivity Clause Violates Due Process.**

Tesoro addressed the 2009 amendment (Laws of 2009, c. 494) to RCW 82.04.433 extensively in its opening brief (*see* pp. 35-48). According to the Department this act does two "critical" things: (1) it "clarifies" the original intent of RCW 82.04.433, and (2) it applies this "clarification" both prospectively *and retroactively*. *See* Response Brief at 33. The Department further claims the Legislature, in enacting the amendment, was merely exercising two of its constitutional powers: (1) the "plenary power of taxation" (Responsive Brief at 34, citing *Japan Line, Ltd v. McCaffree*, 88 Wn.2d 93, 558 P.2d 211 (1977)), and (2) the "plenary power to establish with greater clarity the scope of the deduction in RCW 82.04.433, to be applied both prospectively and retroactively (Response Brief, *supra*). Tesoro does not dispute the legislative power of taxation; it does dispute the power to "clarify" an unambiguous statute and make the amended statute apply retroactively for a period of 24 years.

In *State v. Mann*, 146 Wn. App. 349, 189 P.3d 843 (2008), the court explained that there is a presumption:

. . . that a new legislative enactment is an amendment rather than a clarification of existing law. *Johnson [v. Morris]*, 87 Wn.2d [922,]...926, 557 P.2d 1299 (1976). This presumption may be rebutted if surrounding circumstances indicate that the legislature intended to interpret, rather than change, an existing statute. *Id.* The court in *Marine Power [& Equip. Co. v. Human Rights Comm'n Hearing Tribunal]*, 39 Wn. App. 609, 694 P.2d 697 (1985)] further noted that

[o]ne well recognized indication of legislative intent to either clarify or amend is the existence or nonexistence of ambiguities in the original act. In general, legislative amendments change unambiguous statutes and legislative clarifications interpret ambiguous statutes.

*Mann*, 146 Wn. App. at 358-359 (citing *Marine Power*, 39 Wn. App. at 615 (additional citations omitted) (emphasis added)).

In this case, former RCW 82.04.433 was unambiguous; therefore, under *Marine Power* the 2009 amendment was deemed to have *changed* the statute. Moreover, “the legislature’s power to enact a statute is unrestrained *except where . . . it is prohibited by the state and federal constitutions.*” *State ex rel. Citizens Against Tolls v. Murphy*, 151 Wn. 2d 226, 248, 88 P.3d 375 (2004) (emphasis added). As argued, to enact a *tax* statute that is to apply for more than “only a modest period of retroactivity” violates due process. See Opening Brief at 36-42 (citing and addressing *United States v. Carlton*, 512 U.S. 26, 31-32, 114 S. Ct. 2018, 129 L. Ed. 2d 22 (1994)); see also *Lawson v. State*, 107 Wn.2d 444, 454, 730 P.2d 1308 (1986) (the Legislature has the power to enact a retrospective statute “unless the statute contravenes some constitutional

inhibition”). The 2009 amendment to RCW 82.04.433 violated the Due Process Clause in a way condemned by *Citizens v. Murphy*.

The Department also argues that the 2009 amendment did not violate Tesoro’s due process rights, because “the 2009 act made no change in the meaning of RCW 82.04.433, [therefore] it cannot possibly have violated the Due Process Clause.” Response Brief at 41. The Department says that “the 2009 act merely confirmed and clarified what the 1985 act already meant.” *Id.* But, if SB 6096 was a clarifying amendment, the original statute must have been ambiguous. *See Mann*, 146 Wn. App. at 358-359. The Department, however, makes no argument that RCW 82.04.433(1) was ambiguous. Indeed, the language of RCW 82.04.433(1) is no more ambiguous than the language of RCW 82.04.4292 in *HomeStreet*, which the Supreme Court held was “unambiguous and subject only to one interpretation.” *HomeStreet*, 166 Wn.2d at 454.<sup>19</sup> Tesoro challenges the constitutionality of the 2009 act as a clarification of an unambiguous statute, when the true effect was to alter or change the scope of the tax deduction.

The Department relies on the same U.S. Supreme Court decision as Tesoro in addressing whether the 2009 act violated due process, *United States v. Carlton*, 512 U.S. 26, 114 S. Ct. 2018, 129 L. Ed. 2d 22 (1994). The Department cites *Carlton* only for the proposition that if a statute’s

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<sup>19</sup> The key language addressed in *HomeStreet* was “amounts derived from interest.” *HomeStreet*, 166 Wn. 2d at 452-453; *see* RCW 82.04.4292. This is the language the Supreme Court found unambiguous. *Id.* At 454. The key language here is “amounts derived from sales.” *See* RCW 82.04.433(1). As noted earlier, the Department neither addresses nor mentions *HomeStreet* in its Response Brief.

retroactive application “is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remains within the exclusive province of the legislative and executive branches.” Response Brief at 43 (citing *Carlton*, 512 U.S. at 30-31). The Department ignores the second part of the test, that when the Legislature enacts a statute to apply retroactively the period of retroactivity must be “modest.” *Carlton* at 32. In *Carlton* the retrospective period was approximately one year, and the Court found the intent of the amendment to be clearly curative because the amendment followed the original statute’s enactment by only a few months. *Id.* at 31-32. Here, on the other hand, the period of retroactivity goes back at least nine years to cover Tesoro’s refund claims. Even the Department concedes that the effect of the amendment on Tesoro cuts off the refund claim beginning in 1999. See Response Brief at 42, n. 19. Arguably, the amendment goes all the way back to the statute’s enactment in 1985, since the 2009 act allegedly sought to “clarify” the 1985 Legislature’s original intent and the amendment applied “retroactively.” 2009 c. 494 §§ 1, 4. This is a far cry from the few months between the original statute and the amendment in *Carlton*.<sup>20</sup>

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<sup>20</sup> The Department never does explain how the 2009 Legislature knew the “intent” of the 1985 legislature, when so few legislators were members of both legislative sessions. See Opening Brief at 42-45. And let’s face it: the 2009 Legislature knew nothing about the dispute over the interpretation of RCW 82.04.433 until the Department showed up with its “clarifying” amendment, which was not anything the Legislature had a hand in drafting, but was a Department-inspired plan to suit the Department’s purposes in, and to shut down, this litigation.

The Department also cites *W.R. Grace & Co. v. Dep't of Revenue*, 137 Wn.2d 580, 973 P.2d 1011, *cert. denied*, 528 U.S. 950 (1999), which the Department contends rejected the same due process argument Tesoro is making here. *W.R. Grace* is factually distinguishable from this case. That case addressed the Legislature's enactment of the MATC that taxpayers were allowed to take, following the earlier decision in *Tyler Pipe* ruling the multiple activities exemption statute unconstitutional, and which ruling was applied retroactively. The MATC was enacted a short time later to be applied retroactively, which the Court upheld in *W.R. Grace*, and which was deemed to cure the illegality of the tax as originally imposed. *W.R. Grace*, 137 Wn.2d at 595-596 (citing and quoting *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 110 S. Ct. 2238, 110 L. Ed. 2d 17 (1990)).

Here, the legality of RCW 82.04.433 was never a question and when the Legislature amended the statute in 2009 it did not put any alternative deduction in place for Tesoro to take retroactively; instead, the Legislature retroactively took the deduction entirely away from Tesoro. Thus, there was no credit or other meaningful retroactive relief for Tesoro; instead, Tesoro will be denied refunds for periods when other taxpayers were granted the deduction.<sup>21</sup> This violates the rule in *McKesson* that while a state may reformulate its tax scheme, even retroactively, it must do so in a manner that would treat Tesoro and all of its competitors in a manner

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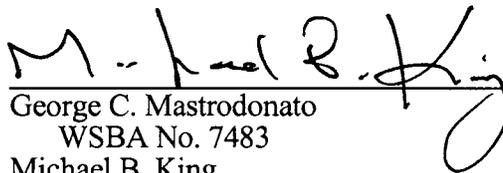
<sup>21</sup> The Department never does say what it intends to do with U.S. Oil, Sound Refining, and Pacific Northern Oil, with respect to the deduction those companies were allowed to take prior to the enactment of SB 6096.

that is consistent. *McKesson*, 496 U.S. at 39-40, 110 S. Ct. 2238. This is not what is going on here. In short, there is a substantial difference between *W.R. Grace* and this case, and this difference calls for a different result.<sup>22</sup>

### III. CONCLUSION

In conclusion, the Court should apply the *HomeStreet* ruling to the interpretation of RCW 82.04.433(1), and find that Tesoro may deduct from the measure of its B&O tax amounts derived from sales of bunker fuel to vessels engaged in foreign commerce. The Court should remand the case back to the trial court for computation of the refund. The Court should also declare the 2009 amendment to RCW 82.04.433 null and void, both retroactively *and prospectively*, because the bill did not receive the necessary two-thirds vote of both houses of the Legislature to be validly enacted under RCW 43.135.035(1).

RESPECTFULLY SUBMITTED this 23<sup>rd</sup> day of June, 2010.



George C. Mastrodonato  
WSBA No. 7483

Michael B. King  
WSBA No. 14405

Attorneys for Appellant Tesoro

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<sup>22</sup> The Department provides a string cite of cases from other states in which courts purportedly upheld legislation that applied retroactively over many years. Response Brief at 45, n. 22. But, the Department fails to mention cases in which courts invalidated retroactive tax legislation. *See, e.g., Rivers v. State*, 327 S.C. 271, 490 S.E. 2d 261 (S.C. 1997); *City of Modesto v. National Med., Inc.*, 27 Cal. Rptr. 3d 215 (Cal. Ct. App. 2005). Nevertheless, this Court is not bound by decisions of courts in other states. *See Nordstrom Credit, Inc. v. Department of Revenue*, 120 Wn.2d 935, 845 P.2d 1331 (1993). This is especially true where the Department provides no analysis of whether the taxation schemes of those other states are similar to Washington or even if the facts addressed in those cases are similar to the facts in this case. *Id.* at 942.

# APPENDICES

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# APPENDIX

## A

CERTIFICATION OF ENROLLMENT

**SENATE BILL 6096**

Chapter 494, Laws of 2009

61st Legislature  
2009 Regular Session

BUSINESS AND OCCUPATION TAX--BUNKER FUEL

EFFECTIVE DATE: 05/14/09

Passed by the Senate April 26, 2009  
YEAS 29 NAYS 19

BRAD OWEN

\_\_\_\_\_  
**President of the Senate**

Passed by the House April 26, 2009  
YEAS 51 NAYS 45

FRANK CHOPP

\_\_\_\_\_  
**Speaker of the House of Representatives**

CERTIFICATE

I, Thomas Hoemann, Secretary of the Senate of the State of Washington, do hereby certify that the attached is **SENATE BILL 6096** as passed by the Senate and the House of Representatives on the dates hereon set forth.

THOMAS HOEMANN

\_\_\_\_\_  
**Secretary**

Approved May 14, 2009, 12:14 p.m.

FILED

May 18, 2009

CHRISTINE GREGOIRE

\_\_\_\_\_  
**Governor of the State of Washington**

**Secretary of State  
State of Washington**

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**SENATE BILL 6096**

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Passed Legislature - 2009 Regular Session

**State of Washington**

**61st Legislature**

**2009 Regular Session**

**By Senator Tom**

Read first time 02/25/09. Referred to Committee on Ways & Means.

1           AN ACT Relating to the taxation of the manufacturing and selling of  
2 fuel for consumption outside the waters of the United States by vessels  
3 in foreign commerce; amending RCW 82.04.433; creating new sections; and  
4 declaring an emergency.

5 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

6           NEW SECTION. **Sec. 1.** (1) Through this act the legislature intends  
7 to address the taxation of persons manufacturing and/or selling bunker  
8 fuel. Bunker fuel is fuel intended for consumption outside the waters  
9 of the United States by vessels in foreign commerce. Although the  
10 state has historically collected tax from bunker fuel manufacturers,  
11 recently questions have arisen whether the manufacture of bunker fuel  
12 is subject to business and occupation tax under RCW 82.04.240.  
13 Pursuant to this act, the activity is taxable under RCW 82.04.240.

14           (2) The legislature finds that at the time the deduction allowed  
15 under RCW 82.04.433 was enacted in 1985, it was intended to apply only  
16 to the wholesaling or retailing of bunker fuel. In 1987 the  
17 legislature enacted the multiple activities tax credit in RCW  
18 82.04.440. Enactment of the multiple activities tax credit resulted in  
19 changed tax liability for certain taxpayers. In particular, some

1 taxpayers that engaged in activities that had been exempt under the  
2 prior multiple activities exemption became subject to tax on  
3 manufacturing activities upon enactment of the multiple activities tax  
4 credit in its place. The manufacturing of bunker fuel is one such  
5 activity.

6 **Sec. 2.** RCW 82.04.433 and 1985 c 471 s 16 are each amended to read  
7 as follows:

8 (1) In computing tax there may be deducted from the measure of tax  
9 imposed under RCW 82.04.250 and 82.04.270 amounts derived from sales of  
10 fuel for consumption outside the territorial waters of the United  
11 States, by vessels used primarily in foreign commerce.

12 (2) (~~Nothing in this section shall be construed to imply that~~  
13 ~~amounts which may be deducted under this section were taxable under~~  
14 ~~Title 82 RCW prior to the enactment of this section.)) The deduction in  
15 subsection (1) of this section does not apply with respect to the tax  
16 imposed under RCW 82.04.240, whether the value of the fuel under that  
17 tax is measured by the gross proceeds derived from the sale thereof or  
18 otherwise under RCW 82.04.450.~~

19 NEW SECTION. **Sec. 3.** The department of revenue must take any  
20 actions that are necessary to ensure that its rules and other  
21 interpretive statements are consistent with this act.

22 NEW SECTION. **Sec. 4.** This act applies both prospectively and  
23 retroactively.

24 NEW SECTION. **Sec. 5.** If any provision of this act or its  
25 application to any person or circumstance is held invalid, the  
26 remainder of the act or the application of the provision to other  
27 persons or circumstances is not affected.

28 NEW SECTION. **Sec. 6.** This act is necessary for the immediate  
29 preservation of the public peace, health, or safety, or support of the  
30 state government and its existing public institutions, and takes effect  
31 immediately.

Passed by the Senate April 26, 2009.  
Passed by the House April 26, 2009.  
Approved by the Governor May 14, 2009.  
Filed in Office of Secretary of State May 18, 2009.

# APPENDIX

# B

believes that, in general, a fairly tight connection between tolls being paid by those using the tolled facility is present. Likewise, there is a direct connection between those paying ferry fares and their use of ferries. Thus, even were this measure presumed to directly set those charges—and the President is not convinced that it does—these charges would likely still need only a simple majority vote to enact.

As to whether the Legislature may delegate rate-setting authority to an agency in the first place, the President again notes that the language in I-960 is far from a model of clarity, and Senator Stevens is correct that the initiative does seem to include language meant to limit the delegation of revenue-setting authority to agencies. The language in the initiative is, however, imprecise as to its application or enforcement, stating only, in its Section 14, “No fee may be imposed or increased in any fiscal year without prior legislative approval...” Whether this prevents any delegation of fee-setting authority in the first place, or whether his section means only that the Legislature must ultimately approve a fee set by an agency, is unclear. The President need not decide this question, however, as ambiguities within an initiative are more properly decided by a court of law. Simply put, this is a legal question, not a parliamentary one, and therefore the President does not issue an opinion on this matter.

For these reasons, Senator Stevens’ point is not well-taken, and this measure will take only a constitutional majority for final passage.” (Page 872—2009).

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**Broader Social Purpose - Tax**

Number 960 to Engrossed Substitute Senate Bill 5912 , the President finds and rules as follows:

At issue is the imposition of a three-dollar fee on certain court filings, the proceeds of which will be used to publicly fund Supreme Court campaigns. While this measure’s goal of enhancing the integrity of our Supreme Court is laudable, the President believes that this purpose is of overall benefit to society at large. While a filing charge paying for a judicial purpose—such as the daily functioning of the courts—would very likely be a fee, paying for campaigns seems only remotely connected with the operations of the courts. It is possible, for example, that a candidate who benefits from the fee by having his or her campaign paid for with public funds would not prevail in the election, never even serving on the bench. This broader social purpose of publicly-funded campaigns, arguably of great benefit to the general public, is not sufficiently connected to the fee and those paying it. The nexus between those paying and the benefit is too indirect, and thus this charge is more properly considered a tax under the provisions of I-960.

For these reasons, this measure will need a two-thirds vote of this body for final passage. (February 16, 2010).

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**Clarification: Agency Determination**

“In ruling upon the point of order raised by Senator Brandland as to the application of Initiative Number 960 to Senate Bill 6096, the President finds and rules as follows:

As was the case with several other recent rulings involving I-960, this bill is argued to be a clarification of existing law, not the imposition of a new tax. The President has, over this past Session, struggled with the provisions of I-960 and noted on a number of occasions the difficulties with interpreting

some of the ambiguities and inconsistencies with its provisions. In fact, the President will use this opportunity to comment upon the fact that the range of issues brought forward for parliamentary decision have grown astronomically in complexity, often involving the interplay of court decisions, past legislative actions, contradictory agency determinations, and complicated legislative history. The President often finds that he must unwind all of these matters and arguments simply to get to the proper procedural starting point in making these I-960 rulings.

The bill before us presents exactly this sort of complicated procedural background. What should be a fairly straightforward application of the provisions of I-960 to the plain language of the bill has quickly become a review of competing Department of Revenue determinations and court filings. The President would note that the Department's own apparent inconsistencies with interpreting a statute that has remained unchanged since 1987 clouds the issue significantly. This is every bit as troubling to the President as it must be to the individual taxpayers involved, and the President would note as an aside that this is at least the third case of which he is aware this year where an agency changing its mind after issuing an earlier determination has resulted in chaos, expense, and heartache for many members of the public. It is one thing for there to be a genuine dispute as to the meaning of a statute; it is quite another for the agency charged with implementing that statute to reverse itself. In this case, for example, we are left with little or no explanation as to why the Department of Revenue changed its original interpretation from that issued in a 1993 determination. Likewise, it is unclear as to why the Department did not seek an earlier change to the law if this was truly an issue of

clarification. The President—and the public—are left to wonder as to the Department's rationale and motivations. The President points this out to illustrate both the difficulties he faces in making a ruling now, given the past unclear history, as well as the disservice he believes is done to the general public by the Department's reversals. The Legislature may wish to consider actions to prevent such reversals or inconsistent interpretations by agencies that have such dramatic negative consequences on our state citizens.

That said, while the President would prefer that the Department had been more consistent over the years, he does believe the Legislature nonetheless has a valid interest in stepping forward to clarify this law. As near as the President can determine from the complex history of the matter, it appears that the weight of factors present in the bill itself and the procedural history come down in favor of clarification as opposed to imposition of a new tax. Factors such as the present disposition of the court case, the tax payment history involved, and deference to the intent language and provisions of the bill favor finding this to be a proper clarification, not an action that "raises revenue" pursuant to I-960.

For these reasons, the President believes this measure will take only a simple majority vote on final passage." (Page 1927—2009.)

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#### **Clarification v. New Tax**

"In ruling upon the point of order raised by Senator Honeyford as to the application of Initiative Number 960 to House Bill 2075, the President finds and rules as follows:

# APPENDIX C

been placed within a Joint Resolution because it amends the Constitution, the President finds that no where within the express text of the bill does it amend any language found within the Washington Constitution. If the body believes a Constitutional amendment is necessary, it would need, of course, to make such an amendment in the form of a Joint Resolution, but this does not preclude the body from taking up the language in this bill. For these reasons, the points are not well-taken and this measure is properly before the body for its consideration. (Page 1154–2005).

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### **Future Legal Matters**

In ruling upon the point of inquiry raised by Senator Johnson as to whether Senate Bill 6096 takes a simple majority or a two-thirds vote on final passage, the President finds and rules as follows:

Senator Johnson essentially argues that statutes enacted by Initiative No. 601 are still in force and effect notwithstanding the enactment, earlier this Session, of modifications to these statutes under Senate Bill 6078. He reasons that, because a referendum has been filed on Senate Bill 6078, its provisions are stayed from taking effect until the referendum is voted upon. For the sake of argument, the President takes notice of the fact that an Affidavit for Proposed Referendum Measure was filed with the Secretary of State today on Senate Bill 6078.

The President also notes, however, that Senate Bill 6078 contained, at Section 7, what is commonly referred to as an emergency clause that calls for the major provisions of the act at issue to take effect immediately. The Governor signed this act

into law yesterday, and those provisions went into effect immediately. It may be that those seeking the referendum may prevail in their legal arguments to have the emergency clause set aside, and it may also be that the act, for this or other legal reasons, may be found unconstitutional in a court of law. These are matters, however, to be decided by a court, not by the President.

The President reminds the body that he rules on parliamentary, and not legal, issues; it is up to the body to decide the policies and language to enact, and it is up to the courts to rule as to the various legal limitations or invalidities of such language. The body undoubtedly accepts some risk that a court decision could disaffirm all or parts of Senate Bill 6078, and such a ruling could also jeopardize any subsequent measures enacted pursuant to its mandates. Unless and until there is such a ruling, however, the President has no recourse other than to interpret those provisions of law enacted by Senate Bill 6078 to be in full force and effect. For these reasons, only a simple majority vote of this body is needed for final passage of this measure. (Page 1556–2005).

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### **President Does Not Rule Upon<sup>41</sup>**

“In ruling upon the point of order raised by Senator Fraser that Substitute Senate Bill 5053 violates Article II, Section

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<sup>41</sup> See Reed’s Rule 161: “Incompatibility or inconsistency.— An amendment may be inconsistent or incompatible with the words left in the bill, or with other amendments already adopted, but that is for the assembly to decide, and not for the presiding officer. For him to pass upon such a question would be very embarrassing to the assembly, and still more so to him. So, also, the question of constitutionality is not for him to decide. Incompatibility, inconsistency, and unconstitutionality are matters of argument.”

# **APPENDIX**

# **D**

CERTIFICATION OF ENROLLMENT  
**ENGROSSED SUBSTITUTE SENATE BILL 6130**

Chapter 4, Laws of 2010

61st Legislature  
2010 Regular Session

TAX AND FEE INCREASES--INITIATIVE 960--SUSPENSION

EFFECTIVE DATE: 02/24/10

Passed by the Senate February 22, 2010  
YEAS 26 NAYS 21

ROSA FRANKLIN

**President of the Senate**

Passed by the House February 17, 2010  
YEAS 51 NAYS 47

FRANK CHOPP

**Speaker of the House of Representatives**

Approved February 24, 2010, 4:15 p.m.

CHRISTINE GREGOIRE  
**Governor of the State of Washington**

CERTIFICATE

I, Thomas Hoemann, Secretary of the Senate of the State of Washington, do hereby certify that the attached is **ENGROSSED SUBSTITUTE SENATE BILL 6130** as passed by the Senate and the House of Representatives on the dates hereon set forth.

THOMAS HOEMANN

**Secretary**

FILED

February 25, 2010

**Secretary of State  
State of Washington**

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ENGROSSED SUBSTITUTE SENATE BILL 6130

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AS AMENDED BY THE HOUSE

Passed Legislature - 2010 Regular Session

State of Washington                      61st Legislature                      2010 Regular Session

By Senate Ways & Means (originally sponsored by Senator Prentice)

READ FIRST TIME 02/09/10.

1            AN ACT Relating to amending provisions related to Initiative No.  
2 960; amending RCW 43.135.035 and 43.135.041; adding a new section to  
3 chapter 43.135 RCW; and declaring an emergency.

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

5            NEW SECTION.    **Sec. 1.** A new section is added to chapter 43.135 RCW  
6 to read as follows:

7            In order to preserve funding for education, public safety, health  
8 care, and safety net services for elderly, disabled, and vulnerable  
9 people, it is the intent of the legislature to provide a means to  
10 stabilize revenue collections.

11            **Sec. 2.** RCW 43.135.035 and 2009 c 479 s 36 are each amended to  
12 read as follows:

13            (1) After July 1, (~~(1995)~~) 2011, any action or combination of  
14 actions by the legislature that raises taxes may be taken only if  
15 approved by a two-thirds vote of each house of the legislature, and  
16 then only if state expenditures in any fiscal year, including the new  
17 revenue, will not exceed the state expenditure limits established under

1 this chapter. Pursuant to the referendum power set forth in Article  
2 II, section 1(b) of the state Constitution, tax increases may be  
3 referred to the voters for their approval or rejection at an election.

4 (2)(a) If the legislative action under subsection (1) of this  
5 section will result in expenditures in excess of the state expenditure  
6 limit, then the action of the legislature shall not take effect until  
7 approved by a vote of the people at a November general election. The  
8 state expenditure limit committee shall adjust the state expenditure  
9 limit by the amount of additional revenue approved by the voters under  
10 this section. This adjustment shall not exceed the amount of revenue  
11 generated by the legislative action during the first full fiscal year  
12 in which it is in effect. The state expenditure limit shall be  
13 adjusted downward upon expiration or repeal of the legislative action.

14 (b) The ballot title for any vote of the people required under this  
15 section shall be substantially as follows:

16 "Shall taxes be imposed on . . . . . in order to allow a  
17 spending increase above last year's authorized spending adjusted for  
18 personal income growth?"

19 (3)(a) The state expenditure limit may be exceeded upon declaration  
20 of an emergency for a period not to exceed twenty-four months by a law  
21 approved by a two-thirds vote of each house of the legislature and  
22 signed by the governor. The law shall set forth the nature of the  
23 emergency, which is limited to natural disasters that require immediate  
24 government action to alleviate human suffering and provide humanitarian  
25 assistance. The state expenditure limit may be exceeded for no more  
26 than twenty-four months following the declaration of the emergency and  
27 only for the purposes contained in the emergency declaration.

28 (b) Additional taxes required for an emergency under this section  
29 may be imposed only until thirty days following the next general  
30 election, unless an extension is approved at that general election.  
31 The additional taxes shall expire upon expiration of the declaration of  
32 emergency. The legislature shall not impose additional taxes for  
33 emergency purposes under this subsection unless funds in the education  
34 construction fund have been exhausted.

35 (c) The state or any political subdivision of the state shall not  
36 impose any tax on intangible property listed in RCW 84.36.070 as that  
37 statute exists on January 1, 1993.

1 (4) If the cost of any state program or function is shifted from  
2 the state general fund to another source of funding, or if moneys are  
3 transferred from the state general fund to another fund or account, the  
4 state expenditure limit committee, acting pursuant to RCW  
5 43.135.025(5), shall lower the state expenditure limit to reflect the  
6 shift. For the purposes of this section, a transfer of money from the  
7 state general fund to another fund or account includes any state  
8 legislative action taken that has the effect of reducing revenues from  
9 a particular source, where such revenues would otherwise be deposited  
10 into the state general fund, while increasing the revenues from that  
11 particular source to another state or local government account. This  
12 subsection does not apply to: (a) The dedication or use of lottery  
13 revenues under RCW 67.70.240(3), in support of education or education  
14 expenditures; or (b) a transfer of moneys to, or an expenditure from,  
15 the budget stabilization account.

16 (5) If the cost of any state program or function and the ongoing  
17 revenue necessary to fund the program or function are shifted to the  
18 state general fund on or after January 1, 2007, the state expenditure  
19 limit committee, acting pursuant to RCW 43.135.025(5), shall increase  
20 the state expenditure limit to reflect the shift unless the shifted  
21 revenue had previously been shifted from the general fund.

22 (6) For the purposes of chapter 1, Laws of 2008, "raises taxes"  
23 means any action or combination of actions by the legislature that  
24 increases state tax revenue deposited in any fund, budget, or account,  
25 regardless of whether the revenues are deposited into the general fund.

26 **Sec. 3.** RCW 43.135.041 and 2008 c 1 s 6 are each amended to read  
27 as follows:

28 (1) (a) After July 1, 2011, if legislative action raising taxes as  
29 defined by RCW 43.135.035 is blocked from a public vote or is not  
30 referred to the people by a referendum petition found to be sufficient  
31 under RCW 29A.72.250, a measure for an advisory vote of the people is  
32 required and shall be placed on the next general election ballot under  
33 chapter 1, Laws of 2008.

34 ~~((a))~~ (b) If legislative action raising taxes enacted after July  
35 1, 2011, involves more than one revenue source, each tax being  
36 increased shall be subject to a separate measure for an advisory vote  
37 of the people under the requirements of chapter 1, Laws of 2008.

1           (2) No later than the first of August, the attorney general will  
2 send written notice to the secretary of state of any tax increase that  
3 is subject to an advisory vote of the people, under the provisions and  
4 exceptions provided by chapter 1, Laws of 2008. Within five days of  
5 receiving such written notice from the attorney general, the secretary  
6 of state will assign a serial number for a measure for an advisory vote  
7 of the people and transmit one copy of the measure bearing its serial  
8 number to the attorney general as required by RCW 29A.72.040, for any  
9 tax increase identified by the attorney general as needing an advisory  
10 vote of the people for that year's general election ballot. Saturdays,  
11 Sundays, and legal holidays are not counted in calculating the time  
12 limits in this subsection.

13           (3) For the purposes of this section, "blocked from a public vote"  
14 includes adding an emergency clause to a bill increasing taxes, bonding  
15 or contractually obligating taxes, or otherwise preventing a referendum  
16 on a bill increasing taxes.

17           (4) If legislative action raising taxes is referred to the people  
18 by the legislature or is included in an initiative to the people found  
19 to be sufficient under RCW 29A.72.250, then the tax increase is exempt  
20 from an advisory vote of the people under chapter 1, Laws of 2008.

21           NEW SECTION. **Sec. 4.** This act is necessary for the immediate  
22 preservation of the public peace, health, or safety, or support of the  
23 state government and its existing public institutions, and takes effect  
24 immediately.

Passed by the Senate February 22, 2010.

Passed by the House February 17, 2010.

Approved by the Governor February 24, 2010.

Filed in Office of Secretary of State February 25, 2010.



upon the following:

Donald F. Cofer Attorney Generals Office Revenue Division 7141 Cleanwater Dr. SW PO Box 40123 Olympia, WA 98504-0123	<u>X</u> U.S. MAIL
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Dated this 23<sup>RD</sup> day of June, 2010.

*Patti Saiden*

\_\_\_\_\_  
Patti Saiden