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COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

SKAGIT COUNTY PUBLIC
HOSPITAL DISTRICT NO. 1, d/b/a
SKAGIT VALLEY MEDICAL
CENTER,

Appellant,

vs.

STATE OF WASHINGTON
DEPARTMENT OF REVENUE,

Respondent.

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

Not surprisingly, the parties disagree over how the Court should approach the two main issues presented on appeal. Each issue, however, can be distilled into a few discrete legal questions. In the case of the first question concerning Medicare revenue, the Court must decide whether the plain-language meaning of the term "instrumentality" will control in the absence of ambiguity and a statutory definition and whether Medicare patients and Medigap insurers are in fact instruments of the government within the meaning of RCW 82.04.4297's deduction.

The answer to this first question is plain given that the parties agree that the term is unambiguous and the general rule that absent ambiguity and a statutory definition, a court will apply a dictionary one. Homestreet, Inc. v. State Dep't. of Revenue, 166 Wn.2d 444, 451, 210 P.3d 297 (2009); see also State v. Sullivan, 143 Wn.2d 162, 175, 19 P.3d 1012 (2001) ("In the absence of a statutory definition, [a court] will give the term its plain and ordinary meaning ascertained from a standard dictionary."). Under its plain and ordinary dictionary meaning, an "instrumentality" is a person or an entity used to accomplish the ends of another. Here, Medicare copayments and

deductibles along with payments from Medigap insurers are the government's means—or instrumentality—used to compensate Skagit for a portion of the health and social welfare services it renders to Medicare patients.[1]

Accordingly, RCW 82.04.4297 permits Skagit to deduct monies received from Medicare patients and Medigap insurers from its gross income subject to the B&O tax as patients andMedigap insurers are acting as instrumentalities of the federal government when paying Skagit for rendering Medicare services.

The second issue is whether the Department may collect interest on tax assessments from a public-hospital district is answered in the negative. Skagit is a municipal corporation and, absent express statutory authority that empowers the Department to collect these amounts from a hospital district, Skagit will enjoy sovereign immunity from interest on B&O tax assessments. Since the Department purports to derive authority to collect interest on the assessments against Skagit from a statute of general application, and not a specific authorizing statute, Skagit is entitled to a refund for the payment of interest. Moreover, even if the Department was acting under some

[1] In its opening brief, Skagit details the ways in which Medicare uses patient copayments and deductibles and payments from Medigap insurers to reimburse Skagit for services rendered to Medicare patients.

specific statutory authority, the interest must be waived because payment was delayed for reasons other than Skagit's inaction.

II. ARGUMENT

A. Standard of Review.

In as much as this appeal primarily concerns questions of law and statutory interpretation, the BTA's conclusions are subject to de novo review. City of Spokane ex rel. Wastewater Mgmt. Dep't v. State Dep't of Revenue, 145 Wn.2d 445, 451, 38 P.3d 1010 (2002). If a finding of fact contains legal implications, this Court may engage in de novo review, as it would on any other issue of law. See, e.g., Mid-Town Ltd. P'ship v. Preston, 69 Wash. App. 227, 232, 848 P.2d 1268 (1993) ("If what is in fact a conclusion of law is wrongly denominated a finding of fact, it is subject to review as a conclusion of law."). Thus, the labels used by the BTA—finding of fact vs. conclusion of law—are inconsequential because the Court must consider legal conclusions as such, even though they may be mislabeled as findings of fact.

Here, the Board issued 10 separate findings of fact, many of which Skagit presents in its assignment of error, but a closer examination of these findings reveals that most, if not all, contain legal conclusions. For example, the Board reached findings of fact numbers

two and three, to which Skagit assigned error, only after applying legal reasoning to determine the patients' payment obligations arising under Medicare. Likewise, finding number four contains a legal conclusion concerning the applicability of a statutory waiver of interest. These findings are a determination of the legal effect of an action or statute and, thus, are conclusions of law. Therefore, the pertinent standard of review is whether the Board erroneously interpreted or applied the law. City of Spokane ex rel. Wastewater Mgmt. Dep't v. State Dep't of Revenue, 145 Wn.2d 445, 451, 38 P.3d 1010 (2002).

Even if the Board's findings of fact are indeed purely factual determinations, they become verities on appeal only "absent an assignment of error." Hilltop Homeowner's Ass'n v. Island County, 126 Wn.2d 22, 891 P.2d 29 (1995). Skagit has assigned error to each of the findings with which it takes issue pursuant to RAP 10.3(a)(4) and the nature of its challenges is made perfectly clear in its briefing, especially as it assails the Board's findings regarding Medicare payment obligations (Appellant's Brief at 15-18) and Skagit's delay in paying the Department's assessments (Appellant's Brief at 26-33). Goehle v. Fred Hutchinson Cancer Research Ctr., 100 Wn. App. 609, 614, 1 P.3d 579 (2000) ("The appellate court will review the merits of the appeal where

the nature of the challenge is perfectly clear and the challenged ruling is set forth in the appellate brief."). In the end, technical violations of the rules, if any, must not bar appellate review where justice is to be served. Id.

B. Medicare is Responsible for Paying Medicare Covered Charges.

The Department characterizes the Medicare system as one in which Medicare is actually paying for services. In reality, private insurance companies and patients make interim payments as instrumentalities of the Medicare program, subject to a year-end true-up process conducted by a third-party actor.

To be sure, Medicare is contractually bound to pay Skagit for its costs incurred in caring for Medicare patients; however, Medicare relies on third parties to administer the Medicare program and to make Medicare payments. Medicare compensation is complex and the law establishes various ways in which Medigap insurers and Medicare patients are integrated into the Medicare-coverage system. For example, Medicare patients can enroll in a Medicare HMO or a competitive health plan, in which the HMO/insurance plan makes payments for services rendered to the Medicare patient (the Department concedes that such payments are not taxable). In this way,

the government relies on a series of third parties acting between the government and healthcare providers to pay Skagit.

The Department claims that Skagit's argument concerning third parties as Medicare instrumentalities is ridiculous because, by analogy, all highly-regulated entities would then be government agents. However, it is not the fact that these third-party actors operate in a highly regulated environment that makes them instrumentalities of the government. It is the fact that they discharge a governmental function that defines them as instrumentalities of the government within the meaning of RCW 82.04.4297.

C. The Court Must Discern Legislative Intent From the Plain Language of RCW 82.04.4297 Because the Statute is Unambiguous.

It is axiomatic that "where statutory language is plain and unambiguous, courts will not construe the statute but will glean the legislative intent from the words of the statute itself, regardless of contrary interpretation by an administrative agency." Homestreet, 166 Wn.2d at 451-52. This is true even where the court believes the legislature intended something else but failed to express it adequately. Id. at 455; see also In re Detention of Martin, 163 Wn.2d 501, 509, 182 P.3d 951 (2008).

The parties agree that RCW 82.04.4297 is unambiguous (see Respondent's Brief at 13), but rather than confront the ordinary dictionary meaning of "instrumentality," the Department ignores the dictionary definition of the term and instead resorts to tools of statutory construction and interpretation, which are used only when a statute's meaning is ambiguous. The Court should not consider legislative history or other tools of statutory construction because the scope of the deduction is best discerned from its plain language and a dictionary.

1. Dictionary definitions are used in their first and primary sense.

A single term often describes a number of similar, yet distinguishable, situations. Such is true of the term "instrumentality." Each dictionary definition cited by Appellant and Respondent defines an instrumentality as an entity acting as an intermediary. Each dictionary definition also defines instrumentality to include an entity which is a functional part of another entity. The Department argues that only the second type of instrumentality is contemplated by RCW 82.04.4297; there is no authority supporting the notion that a court should resort exclusively to a secondary or subsidiary meaning

for a term while reading out of the definition the first and most accepted entry found in the dictionary.

As Skagit indicates, the word "intermediary" is included as the first definition entry for the term "instrumentality" in each respective dictionary, save for the definition found in Webster's Third New International Dictionary. The first entry found in Webster's, however, only strengthens Skagit's argument. Under Webster's, instrumentality in its first sense means "the quality or state of being instrumental: a condition of serving as an intermediary, the agreement was reached through the [instrumentality] of the governor." Webster's Third New International Dictionary 1172 (1981). Although Medigap insurers and Medicare patients are clearly instrumental to the adjudication of Medicare claims, Medicare bears ultimate responsibility for compensating Skagit for healthcare services rendered to Medicare patients. Medicare uses Medicare beneficiaries and Medigap insurers as instrumentalities (*i.e.*, intermediaries) to accomplish this end.

The court should decline the Department's invitation to bypass the clear and logical application of the primary definition of "instrumentality" in favor exclusively of its second, third, or fourth meaning.

D. Only If the Court Finds RCW 82.04.4297 Ambiguous Should It Go Beyond the Plain Language of the Statute to Determine Legislative Intent.

Because RCW 82.04.4297 is clear on its face, the Court need not adopt the definition of "instrumentality" found in inapposite case law or the one cobbled together by the Department from the legislative history or the structure of the statute's chapter.

Even if the statute were ambiguous, however, the legislative history of the deduction, subsequent amendments thereto, and the rules of construction all favor Skagit's definition of the term "instrumentality." In the event that the Court looks past the language of the statute, it will find little support for the Department's contentions.

1. The definition of "instrumentality" used in cases involving tax immunities rooted in the federal Constitution does not apply in circumstances concerning state tax deductions.

The question of whether Medicare patients and Medigap insurers are performing sufficient secondary or derivative government functions to insulate money paid to the Hospital from state taxation under McCulloch v. Maryland, 17 U.S. 316 (1819), is a far different question from whether these entities are making payments to Skagit as instrumentalities of the government within the meaning of a specific

Washington tax statute. Yet the Department ignores this distinction in its discussion of inapposite case law, which addresses the power of the States to tax the federal government.

For instance, in the primary case cited by the Department, United States v. City of Spokane, 918 F.2d 84 (9th Cir. 1990), the Ninth Circuit framed the issue presented as whether the Red Cross, a private entity, is sufficiently aligned with the federal government so as to become an instrumentality thereof fully immune under the federal Constitution from state taxation. The Court held that the Red Cross was an "instrumentality" of the federal government for purposes of evaluating whether the state could tax monies raised by the Red Cross in the first instance.

The definition used by the Ninth Circuit to assess the Red Cross's tax immunity, however, cannot be ported over to this dispute because this case does not concern constitutional limits on state taxation; rather, it concerns whether the Washington Legislature carved out a specific tax deduction for monies received from persons or entities acting in place of the government. Indeed, the Ninth Circuit explicitly rejected the argument that the meaning of "instrumentality" for intergovernmental tax immunity purposes could be equated to the

meaning of a government "instrumentality" in other contexts. Id. at 88. As the court explained, it is a "fallacy that a word which has a meaning in one context must have the selfsame meaning when transplanted to an entirely different context." Id.

The meaning of the word "instrumentality" can be limited depending on the context in which it has been examined. Compare City of Spokane, 918 F.2d 84 (holding that the Red Cross is a government instrumentality immune from local taxation), with Irwin Memorial Blood Bank v. American Nat'l Red Cross, 640 F.2d 1051 (9th Cir. 1981) (holding that the Red Cross is *not* a government instrumentality for purposes of the Freedom of Information Act). Since the question at bar is whether Washington created by legislative action a tax deduction for certain monies received by the Hospital,[2] the language of the statute must control the scope of the deduction, not the case law cited by the Department.

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[2] The Department's discussion of McAvoy v. Weber, 198 Wash. 370, 88 P.2d 448 (1939)—the only Washington authority cited by the Department on this score—is similarly distinguishable. In McAvoy, the court considered the term instrumentality in the context of private citizens suing out a writ of garnishment against a government-owned corporation, not whether the corporation was an instrumentality within the meaning of a specific statute-based tax deduction.

2. The definition advocated for by the department would render other terms within RCW 82.04.4297 superfluous.

The Legislature is presumed not to have used superfluous words and courts "are bound to accord meaning, if possible, to every word in a statute." In re Marriage of Barber, 106 Wn. App. 390, 394-395, 23 P.3d 1106 (2001). "Statutes are to be construed, wherever possible, so that no clause, sentence or word shall be superfluous, void, or insignificant." United Parcel Serv., Inc. v. Dep't of Revenue, 102 Wn.2d 355, 361, 687 P.2d 186 (1984). Courts may not rewrite or delete the plain language of an unambiguous statute. State v. Roggenkamp, 153 Wn.2d 614, 632, 106 P.3d 196 (2005).

RCW 82.04.4297 carves out a deduction from the B&O tax for monies received from the "United States or any instrumentality thereof," but the deduction also extends to amounts received from the "state of Washington or any ... political subdivision thereof." The Legislature's choice to refer to both government instrumentalities and political subdivisions (within the same statute) was deliberate and meaningful, and clearly establishes that these terms have separate meaning.

Placed in the context of the current dispute involving federal monies, it becomes clear that the Legislature intended the scope of the

deduction to extend beyond monies received from political subdivisions and to include payments from those entities acting in the government's stead.

3. The legislative history of RCW 82.04.4297 supports a more expansive reading of the term "instrumentality."

The plain language of RCW 82.04.4297 proves that the Legislature intended a more expansive reading of the term than what was suggested by the Department. The only legislative history cited by the Department concerning the creation of the deduction is the 1979 Session Law and the Final Bill Report accompanying the legislation. Respondent's Brief at 14-15. The Bill Report described the new deduction as one for "[a]mounts received from the United States <u>or any governmental unit</u>…." Final Bill Report, Substitute H.B. 302. From this language, the Department concludes that "the deduction applies only to governmental payments." Respondent's Brief at 19. The final version of the law ultimately passed by the Legislature, however, provided that the deduction applies to amounts received from the United States or any instrumentality thereof or from the State of Washington or any Municipal corporation or political subdivision. Thus, the statute allows a deduction for not only payments received

from governmental units, but payments from instrumentalities or intermediaries thereof as well.

The Department would render the difference between the Bill and the plain language of the statute meaningless, but "[w]hen words in a statute are plain and unambiguous, this Court is required to assume the Legislature meant what it said and apply the statute as written." State ex rel. Evergreen Freedom Found. v. Wash. Educ. Ass'n, 140 Wn.2d 615, 631, 999 P.2d 602 (2000); Homestreet, 166 Wn.2d at 452. Here, the Legislature clearly and unambiguously included payments from the U.S. government and instrumentalities thereof, and not merely payments from governmental units, in the plain language of the statute. Thus, the language as written is the beginning and end of the Legislature's intent.

4. Subsequent amendments to RCW 82.04.4297 further define what constitutes an "instrumentality."

In 2001, the Legislature took the unusual step of codifying in RCW 82.04.4297 an explanation of what the section always meant. The 2001 legislation makes plain that the deduction under RCW 82.04.4297 always applied to monies received from the government and from entities or persons making payment on the government's behalf as instrumentalities thereof. See Appendix 1

(Timeline of Amendments to RCW 82.04.4297). The 2001 amendment added language to RCW 82.04.4297 to clarify that amounts received from the U.S. government included "amounts received from" managed-care organizations or other entities under contract to manage healthcare benefits under the Medicare statute. The Legislature added an explanation of the meaning of RCW 82.04.4297; the clarifying language was as follows:

> The legislature finds that the deduction under the business and occupation tax statutes for compensation from public entities for health or social welfare services <u>was intended to provide</u> government with greater purchasing power when government provides financial support for the provision of health or social welfare services to benefited classes of persons.
>
> The legislature further finds that the objective of these changes is again to extend the purchasing power of scarce government health care resources, but that this objective would be thwarted to a significant degree if the business and occupation tax deduction were lost by health or social welfare organizations solely on account of their participation in managed care for government-funded health programs. <u>In keeping with the original purpose of the health or social welfare deduction</u>, it is desirable to ensure that compensation received from government sources through contractual managed care programs also be deductible.

Laws of 2001, 2nd Spec. Sess., Ch. 23, § 1 (emphasis added).

A subsequent amendment followed in 2002, eliminating a deduction for Medicare deductibles and copayments received from

patients, but allowing a retroactive refund back to 1998 for amounts received "as compensation for healthcare services covered under the federal Medicare program." Laws of 2002, Ch. 314, § 2 (codified at RCW 82.04.4311). The Legislature stated that this retroactive amendment was necessary to put to rest the dispute between hospitals and the Department, explaining that "it would be inconsistent with the government function [of providing subsidized healthcare benefits because of age, disability or lack of income] to tax amounts received by a . . . nonprofit hospital . . . when the amounts are paid under a health service program subsidized by federal or state government. Further, the tax status of these amounts should not depend on whether the amounts are received directly from the qualifying program or through a managed care organization." Id.

In these subsequent changes to RCW 82.04.4297, the Legislature has clearly stated that (1) the purpose of the deduction under RCW 82.04.4297 has always been to provide the government with greater purchasing power of health or social welfare services, and (2) the Legislature intended for the deduction to extend to all monies received under a Medicare-health plan, even if the government only subsidizes the plan and does not pay 100-percent of the plan's costs.

The Department places great import upon the 2002 enactment of RCW 82.04.4311, which beginning in 2002, excluded from tax-deductible income amounts received from patients as copayments and deductibles. While it is true that patient copayments and deductibles ceased to be deductible beginning in 2002, the change did not take effect until after the tax period in dispute here.

Moreover, the Department's argument on this score is logically inconsistent. It asks on the one hand, "why would the Legislature amend RCW 82.04.4297 in 2001 to include a deduction for Medicare payments received from government intermediaries if that right already existed?" While on the other hand, it asks us not to consider why the Legislature would have removed a deduction for patient copayments and deductibles if that deduction did not already exist. These competing arguments cannot be reconciled under the Department's theories concerning the recent amendments to RCW 82.04.4297.

5. A more expansive reading of the term "instrumentality" will not upset the larger statutory scheme and lead to absurd results.

The Department's concern about absurd results is overblown. First, the notion that the Legislature created two separate statutory deductions dealing with Medicare copayments and deductibles paid by

patients is not so "absurd" as to warrant rewriting the words of the statute and ignoring the plain language as written.

Second, to the extent that a conflict exists between RCWs 82.04.4297 and .4311, the Court has developed additional cannon's of construction to deal with the wording found in competing statutes. See, e.g., Tunstall ex rel. Tunstall v. Bergeson, 141 Wn.2d 201, 211, 5 P.3d 691 (2000) ("Another well-established principle of statutory construction provides that apparently conflicting statutes must be reconciled to give effect to each of them."); Hallauer v. Spectrum Prop., Inc., 143 Wn.2d 126, 146, 18 P.3d 540 (2001) ("If the statutes irreconcilably conflict, the more specific statute will prevail, unless there is legislative intent that the more general statute controls."). Thus, despite the Department's argument, taxpayers and the Department are not lost if the statutes are somehow deemed "incongruous" as the Department argues.

Finally, since the limits found in RCW 82.04.4311's did not take effect until after the tax period in question, the conflict with RCW 82.04.4297 described by the Department was not yet ripe and could not possibly lead to an absurd result when .4297 was the only statute in effect.

E. The Department Impermissibly Assessed Interest Against Skagit.

1. Interest cannot be assessed because Skagit enjoys sovereign immunity.

Under longstanding Washington law, "the state cannot, without its consent, be held to interest on its debts." Spier v. Dep't of Labor & Indus., 176 Wash. 374, 377, 29 P.2d 679 (1934) (barring post-judgment interest in a worker's compensation lawsuit). This rule applies when, as is the case here, a political subdivision of the state "exercise[s] ... those governmental powers and duties imposed upon [it] as representing the state." Kelso v. City of Tacoma, 63 Wn.2d 913, 916, 390 P.2d 2 (1964).

The Department does not dispute, nor can it, that Skagit is a municipal corporation and, thus, a political subdivision of Washington carrying out a specific state-sanctioned mission. See HTK Mgmt., L.L.C. v. Seattle Popular Monorail Auth., 155 Wn.2d 612, 627-628, 121 P.3d 1166 (2005) ("A municipal corporation is defined as 'a body politic established by law as an agency of the state.'"). Skagit was organized and charted under Washington law "to own and operate hospitals and other health care facilities and to provide hospital services and other health care services for the residents of such districts

and other persons." RCW 70.44.003. Skagit acts as a representative of the State in exercising those powers conferred upon it by the Legislature. It is in the exercise of these powers that Skagit shares in the sovereign immunity of the State. And while the State has made Skagit liable for the payment of B&O taxes, the Legislature has not specifically waived Skagit's immunity from the assessment of interest on those taxes.

The statutes of general application highlighted by the Department do not waive sovereign immunity. See, State v. Thiessen, 88 Wn. App. 827, 946 P.2d 1207 (1997) ("A statutory waiver of sovereign immunity as to interest will apply only in those circumstances specifically delineated by statute."). This is a long standing rule in Washington. For example, courts have held that the State is not liable for postjudgment interest under RCW 4.56.110 ("Interest on Judgments") on its tortious conduct. See e.g., Jenkins v. Wash. State Dep't of Social & Health Servs., 160 Wn.2d 287, 302, 157 P.3d 388 (2007). This is so despite the blanket waiver of sovereign immunity for tort actions that was enacted in the 1960s ("Torts Claims Act," RCW 4.92). The same is true here in that the State did not consent to a blanket waiver of sovereign immunity with respect to interest on

B&O tax assessments simply by making hospital districts liable for the B&O tax.

Nor has the Legislature waived the doctrine of sovereign immunity as specifically applied to municipal corporations. To the contrary, the Legislature enacted RCW 4.96.030, dealing with interest on debts owed by municipal corporations, which simply refers to RCW 4.56.115. RCW 4.56.115 allows interest on tort judgments only.

The Department's position on this issue is not supported by this Court's decision in Morrison-Knudsen v. Dep't of Revenue , 6 Wn. App. 306, 493 P.2d 802 (1972). Morrison was a sales and use tax case, not a B&O case. Further, Morrison concerned contract obligations arising between a state agency (the Department of Transportation) and its vendor, Morrison. The Court did not address the sovereign immunity issues presented in this case, because it analyzed the case entirely as a contract claim between a buyer and the seller. Morrison does not hold sway here because there are no similar contractual rights between the Department and Skagit.

In any event, the Washington Attorney General has already determined that interest cannot be assessed on tax deficiencies levied against a state agency. AGO 51-53 No. 355 (1952) (An irrigation tax

assessment cannot be collected from a school district because a state agency "is not liable for interest imposed on[the] assessment.").

In ruling that interest cannot be assessed in situations such as that presented here, the AG noted (citing case law from other states) that "[i]nterest is not a part of an assessment, but is in effect a penalty imposed for nonpayment, and as such is not a part of the obligation." Id. "The only amount public property is liable for is the amount assessed to it, and no delinquency that will carry with it additional interest or penalty can accrue against public property." Id.

All state agencies, including the Department, are bound by opinions issued by the Attorney General because the Attorney General is the ultimate arbiter of law for the legislative branch of our state Government.[3]

2. The Board's findings concerning the cause for the delayed payment are not supported by substantial evidence.

This Court must reverse an agency finding of fact if the finding "is not supported by evidence that is substantial when viewed in light of the whole record before the court...." Heinmiller v. Dep't of Health, 127 Wn.2d 595, 607, 903 P.2d 433 (1995) (citing RCW 34.05.570(3)(e).

[3] The Attorney General is "the legal adviser of the state officers," and virtually all state agencies, including the Department of Revenue. Const. Art. III, § 21; see also RCW 43.10.040.

In its opening brief, Skagit highlights the myriad ways in which the Board's finding that Skagit was at fault for the delayed payment are unsupported by substantial evidence (Appellant's Brief at 28-31). In fact, the evidence presented by Skagit of the Department's delay appears in sufficient quantum to persuade a fair-minded person of the truth of Skagit's claim that the delay was caused by the Department's (in)action, and militates towards a finding in Skagit's favor. For example, the Board's ninth finding of fact ("waiver of even partial interest would require the Board to micromanage the Department") is entirely unsupported by evidence on the record. The Department does not contest this truth in its brief, and how the Board reached this finding remains a mystery. Moreover, the Board abdicates its role as finder of fact by conceding a measure of fault on the part of the Department for the delay, but nonetheless electing not to do the work of parsing through a finding of comparative fault.

Washington law provides a mandatory waiver or cancellation of interest if the taxpayer is not the root cause of the delay. See RCW 82.32.105(1), .105(3)(b). Here, the Department's delays in finishing the audits, issuing assessments, revisions, and appeals were for the Department's own benefit as it trudged along correcting its

previous mistakes. These delays have hurt Skagit and imposing the payment of interest amounts that were artificially inflated by the Department's frivolity should, therefore, be waived.

F. Skagit is Entitled to an Award of Fees and Costs.

The argument for fees should be as succinct as possible, so that it does not detract from the underlying merits of the appeal. Washington Appellate Practice Deskbook § 19.7(12) (Wash. State Bar Assoc. 3d ed. 2005. RAP 18.1 requires that the party requesting fees "devote a section of its opening brief to the request for the fees or expenses." To the extent that the Court finds an award of fees is warranted, the procedural requirements of RAP 18.1 are met because Skagit included a request for fees in its opening brief.

As for the substantive claim of fees, RCW 4.84.030 entitles Skagit to its attorney fees should this Court reverse the Board's order. Even without the specific authorization for fees as set out in RCW 4.84.030, the Court may award fees on equitable grounds as it sees fit. See, e.g., State ex rel. Macri v. City of Bremerton, 8 Wn.2d 93, 111 P.2d 612 (1941).

The Department concedes that if Skagit prevails on appeal, Skagit is entitled to appellate costs under RAP 14.3.

III. CONCLUSION

Skagit respectfully requests the Court to reverse the Board of Tax Appeals' final decision, and the Superior Court order affirming that decision and remand for entry of judgment in Skagit's favor for the refund sought plus pre-judgment interest, court costs, and applicable attorney's fees, if any. Skagit also asks for an award of any applicable appellate costs and attorney's fees under RAP 14.3 and RAP 18.1.

DATED this 8th day of February, 2010.

GARVEY SCHUBERT BARER

By _____

Carla M. DewBerry, WSBA #15746
Roger L. Hillman, WSBA #18643
Jamal N. Whitehead, WSBA #39818
Attorneys for Appellant Skagit County Public Hospital

CERTIFICATE OF SERVICE

I, Joni Lagenour, certify under penalty of perjury under the laws of the State of Washington that I caused the original of the foregoing APPELLANT'S REPLY BRIEF to be filed with the Washington State Court of Appeals, Division Two, by U.S. Mail, on February 8, 2010, at the address listed below:

Clerk/Administrator
Washington State Court of Appeals,
Division Two
950 Broadway, Suite 300
Tacoma, WA 98402-4454

I further certify under penalty of perjury under the laws of the State of Washington that I caused a copy of the foregoing APPELLANT'S REPLY BRIEF to be served, via U.S. Mail and e-mail, on February 8, 2010, on the Attorneys for Respondent listed below:

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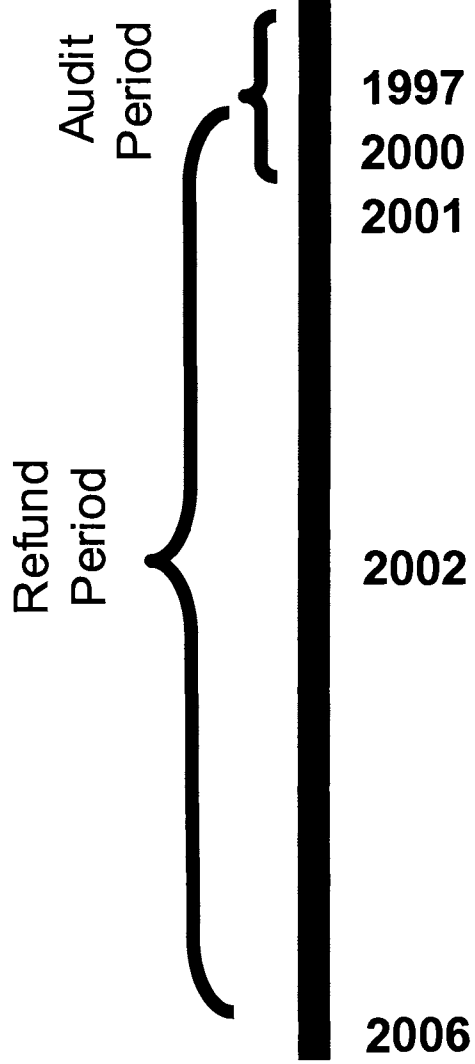
COURT OF APPEALS
DIVISION II
10 FEB -9 PM 1:00
STATE OF WASHINGTON
BY
DEPUTY

Dated at Seattle, Washington, this 8th day of February, 2010.

Joni Lagenour, Legal Assistant

SEA_DOCS:949586.3



1980 **RCW 82.04.430(16)** adopted.

Deduction allowed from payments from US or instrumentality

1988 **RCW 82.04.430(16)** recodified at **.4297** and following added:

Deduction allowed from payments from US or instrumentality ". . . except deductions are not allowed under this section for amounts that are received under an employee benefit plan."

1997

2000

2001 **RCW .4297** amended by adding the following:

"For purposes of this section, 'amounts received from' includes amounts received . . . from a managed care organization or other entity that is under contract to manage health care benefits for the federal Medicare program . . . to the extent that these amounts are received as compensation for health care services within the scope of benefits covered by the pertinent government health care program."

2002 **RCW .4297** amended and **.4311** adopted and refund/waiver established.

.4297 now provides – Deduction allowed for payments from US or instrumentalities . . . "except deductions are not allowed under this section for amounts that are received under an employee benefit plan." *(Back to 1988.)*

.4311 now provides – Deduction allowed amounts received as "compensation for health care services covered under the federal Medicare program . . . The deduction authorized by this section does not apply to amounts received from patient copayments or patient deductibles."

Refund/waiver authorized from 1998 forward.

2006

Appendix 1