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DIVISION II

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STATE OF WASHINGTON

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NO. 40923-2-II

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

WELLS FARGO BANK, N.A.,

Appellant,

v.

DEPARTMENT OF REVENUE, STATE OF WASHINGTON,

Respondent.

WELLS FARGO'S OPENING BRIEF

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I. INTRODUCTION

RCW 82.32.060(4) requires the Department of Revenue (“Department”) to pay interest on tax refunds. Wells Fargo Bank, N.A. (“Wells Fargo”) made a refund request and, following an administrative hearing, entered into a settlement agreement with the Department that required the Department to refund certain taxes previously paid by Wells Fargo. Neither party discussed interest, and the settlement agreement was silent as to interest. The Department then refused to pay interest on the tax refund, despite the statutory requirement, arguing that none was due in the absence of a specific contractual agreement to pay it because the refund was the result of a settlement rather than a “determination” that the refund was due.

The Department’s position does not keep faith with the Legislature’s commitment to compensate taxpayers for the time-value of refunded tax dollars. The statute does not distinguish between types of refunds—it requires interest on all refunds and other tax recoveries. Under both the doctrine of waiver and contract principles, Wells Fargo is entitled to the benefit of the statute in the absence of a contractual disclaimer. Therefore, the trial court should be reversed and summary judgment granted to Wells Fargo.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in holding that RCW 82.32.060 does not require the payment of interest on tax refunds when those refunds are the result of a settlement agreement.

2. The trial court erred in holding that there was an implied waiver of interest in the settlement agreement between Wells Fargo and the Department.

3. The trial court erred in granting summary judgment to the Department and denying summary judgment to Wells Fargo based on the two errors above.

III. STATEMENT OF THE CASE

Wells Fargo pays business and occupation (“B&O”) tax on gross income from Washington business activities. For the period of June 1, 1996, through 1999 and for the years 2001 and 2002, Wells Fargo filed refund requests with the Department for certain B&O taxes. CP 81.

Some of these refund requests were granted and others were denied. The Department paid interest on the refunds it granted. CP 288. Wells Fargo filed an administrative appeal regarding the refund denials. *Id.*

At the administrative hearing on February 26, 2007, the parties discussed the possibility of settlement. CP 87-88, 97. On March 26,

2007, Wells Fargo submitted a written settlement offer, proposing that it receive a 100 percent refund for the tax allocation issue for which it had an estoppel argument, a 50 percent refund for the other apportionment issues, and conceding the other issues it had appealed. CP 178, 228-32. The settlement proposal did not address the question of interest.

The Department, after considering the matter for 11 months, responded to Wells Fargo's offer, proposing to give Wells Fargo a refund of 80 percent on the estoppel issue and 40 percent on the other apportionment issues. CP 108, 234. This counteroffer did not address interest.

Wells Fargo countered by proposing a 100 percent refund for the estoppel issue and 40 percent for the remaining apportionment issues. CP 236-37. This counteroffer did not address interest. The Department accepted. CP 110.

Neither party had raised the subject of interest. Andrew Gardner, Wells Fargo's in-house Tax Counsel who negotiated the agreement for Wells Fargo, assumed that interest would be paid on the agreed amounts because interest had been paid on refund amounts previously agreed to with the Department's Audit Division for these same tax years and because RCW 82.32.060 required the payment of interest. CP 239-40. Beth Anne Kreger, administrative law judge, who negotiated the

agreement for the Department, assumed that no interest would be paid because it had not been specifically requested. CP 107-08. Ms. Kreger believed that “interest needs to both be requested and formally negotiated.” CP 243.

The closing agreement, drafted by Ms. Kreger and dated March 12, 2008, recites that the amount of tax protested was \$4,383,658. CP 245. The closing agreement recites the amount to be refunded as \$1,997,685. CP 246. It says nothing about interest. The agreement confused the Department employee responsible for processing the refund:

I received this closing agreement this morning from TAA. From what I can tell, we are supposed to refund exactly \$1,997,685 in B&O tax. It mentions nothing about interest, so I am not sure if they are including it or not so I am assuming it is included in the amount above.

CP 249. Ms. Kreger replied: “The settlement amount did not include any interest and was calculated based solely on a compromise of B&O tax due for the second half of 1996 through 1999.” CP 251.

The Department paid Wells Fargo the agreed amount of the tax refund on or about April 1, 2008, but did not pay interest. Included with the check was the “Auditor’s Detail of Differences.” CP 253-56. It recited that the total tax adjustment was \$1,997,685, “Excluding Penalties and Interest.” CP 254.

On April 7, 2008, Mr. Gardner sent an e-mail to Ms. Kreger acknowledging receipt of the check and inquiring about interest. CP 258.

Ms. Kreger replied:

Interest is not automatically included in settlements. It is something that needs to be separately and specifically sought and then negotiated, which it was not in this case.

CP 260. Mr. Gardner then sent a letter citing the statutory requirement of refund interest and requesting that interest be paid as required. CP 239-40.

After further negotiations, Wells Fargo filed this action.

Following discovery, both parties moved for summary judgment.

The court granted the Department's motion and denied Wells Fargo's motion. CP 937-40.

IV. SUMMARY OF THE ARGUMENT

RCW 82.32.060 requires the payment of interest on all tax refunds. Neither the plain language of the statute nor the legislative history limit the right to interest in the instance of a settlement between the taxpayer and the Department. Moreover, the federal courts interpret a nearly identical statute to require the payment of interest on settlements absent a clear waiver.

Although the right to interest may be waived, Wells Fargo did not waive it in this case. When this dispute arose, both parties agreed that the settlement was utterly silent as to interest. Only when the dispute reached

court did the Department try to find some implied waiver in the settlement agreement.

Because the settlement agreement is a contract, contract interpretation principles apply. Contract principles require the payment of interest in this case for three reasons: (1) the statute provides the missing term in the contract, (2) the parties' course of dealing shows that interest was paid on other refunds that were part of the same request by Wells Fargo, and (3) public policy favors the payment of interest.

V. ARGUMENT

A. The Plain Language of RCW 82.32.060 Requires Payment of Interest on All Tax Refunds.

1. RCW 82.32.060(4) Expressly Calls for Interest on All Refunds Without Limitation.

RCW 82.32.060 mandates the payment of interest on *any* tax refund or other recovery. By its plain meaning, the allowance of interest is mandatory regardless whether the refund is awarded by a court against an unwilling Department, by the Department on its own motion, or by the Department upon an agreement with the taxpayer. The promise of interest is conditioned only on the fact of a refund.

RCW 82.32.060(1) establishes the right to a refund when a taxpayer has paid tax, penalties, or interest that is not due:

If, upon receipt of an application by a taxpayer for a refund or for an audit of the taxpayer's records, or upon

an examination of the returns or records of any taxpayer, it is determined by the department that within the statutory period for assessment of taxes, penalties, or interest prescribed by RCW 82.32.050 any amount of tax, penalty, or interest has been paid in excess of that properly due, the excess amount paid within, or attributable to, such period must be credited to the taxpayer's account or must be refunded to the taxpayer, at the taxpayer's option.

Subsection (4)(a) provides the right to interest on the amount of any refund:

Interest at the rate of three percent per annum *shall* be allowed by the department and by any court on the amount of *any* refund, credit, or other recovery allowed to a taxpayer for taxes, penalties, or interest paid by the taxpayer before January 1, 1992.

Id. (emphasis added). RCW 82.32.060(4)(b) then sets a different rate of interest for “refunds or credits of amounts paid or other recovery allowed to a taxpayer after December 31, 1991.” Thus, the statute clearly requires the Department to pay interest on any overpayment refunded to the taxpayer.

2. Other Statutes Do Not Impliedly Limit Interest to Refund Decisions on the Merits.

The Department will argue that RCW 82.32.060(4) does not apply to refunds made pursuant to a settlement agreement. In the trial court, the Department argued that interest is due only when a decision on the merits has been made in favor of the taxpayer. This argument is based on a misplaced urge to “harmonize” statutory provisions that do not conflict

and are, in fact, unrelated. The Department's argument for the exclusion of interest on settlement recoveries relied on the assertion that the word "determined" in subsection (1) of RCW 82.32.060 has a specialized meaning, referring only to a "determination" made by the Appeals Division of the Department pursuant to RCW 82.32.170 or to an Audit Division decision or some other unspecified on-the-merits decisions by the Department.

Not only is the form of the word different in these sections, but this argument does not bear up in light of either the history and structure of the statutes or the constitutional significance of a tax refund.

First, the uses of the term "determined" in RCW 82.32.060(1) and "determination" in RCW 82.32.170 do not have a common history, either with each other or with the interest provision. Indeed, the use of "determined," the central word in the Department's argument, long predates the time at which the Department began making "determinations." Neither usage was original to the Revenue Act of 1935. The use of "determined" was introduced in RCW 82.32.060 in a 1949 amendment, while the term "determination" in RCW 82.32.170 was introduced in 1967. The interest provision's plain meaning should not be diminished because of essentially unrelated amendments to other statutory provisions.

When the Legislature first enacted a right to refund of excessive taxes in the 1935 Act, the Legislature adopted a passive construction that was not dependent on any act of “determining.” The predecessor of RCW 82.32.060(1), as first enacted, read: “If, upon examination of any returns, it appears that a tax has been paid in excess of that properly due,” the excess amount shall be credited or refunded. 1935 Laws ch. 180, § 188. A 1949 amendment combined and amended parts of Sections 188 and 189 of the 1935 Act concerning refunds and provided language very similar to today’s RCW 82.32.060(1), including the phrase, “If . . . it shall be determined by the Tax Commission . . . that a tax has been paid in excess of that properly due” 1949 Laws ch. 228, § 21.

The predecessor of RCW 82.32.170 also did not employ the term “determination.” Instead, the state tax commission, the predecessor to the Department which combined the Department’s executive function with a quasi-judicial appellate role (now lodged in the Board of Tax Appeals), was authorized to hear appeal petitions and to “make such *order* as may appear to it just and lawful.” 1935 Laws ch. 180, § 199 (emphasis added).

This language was not changed until the 1967 act that created the Department. The 1967 legislation sought, in part, to separate certain of the administrative and quasi-judicial functions of the taxing authority. 1967 Laws ex sess. ch. 26, § 1. The act retained an administrative process

for refund requests, however, in RCW 82.32.170 as amended. *See id.*

§ 50. This section authorized taxpayers to apply by petition to the Department for a refund and to request a conference. The Legislature directed the Department to act on petitions as follows:

The department shall promptly consider the petition, and may grant or deny it. If denied, the petitioner shall be notified by mail thereof forthwith; if a conference is granted, the department shall notify the petitioner by mail of the time and place fixed therefor. After the hearing the department may make such determination as may appear to it just and lawful and shall *mail a copy* of its determination to the petitioner.

Id. (emphasis added). As used in this provision, the determination is a written instrument expressing a decision on a refund petition. It replaced the concept of an “order,” the instrument by which the Tax Commission expressed its decisions in response to petitions. There is no reason to suppose that this 1967 amendment introduced a new limitation on the meaning of “determined” as adopted in RCW 82.32.060(1)’s predecessor eighteen years earlier.

Second, the language concerning interest in RCW 82.32.060(4) – “Interest . . . shall be allowed . . . on the amount of any refund, credit, or other recovery allowed to a taxpayer” – was drafted independently of the other amendments and uses terms totally unlike theirs. The 1935 Act did not provide expressly for interest on refunds. In 1949, a number of

amendments to the Act were proposed in a bill (H.B. 415) that was introduced at the request of the Executive Branch. *See* H. Journal, 35th Legis., at 792 (Mar. 6, 1949) (noting the bill was “By Departmental Request”).¹ Section 21 of the bill, as stated above, combined certain refund provisions from Sections 188 and 189 of the 1935 Act. Importantly, this section of the bill initially contained a “No interest” clause. *See* H. Journal, 35th Legis., at 794. The House Committee on Revenue and Taxation, however, reported the bill with an amendment deleting the Executive Branch’s “No interest” clause and proposing the following substitute language:

Interest at the rate of three per cent (3%) per annum shall be allowed by the Tax Commission and by any court on the amount of any refund or recovery allowed to a taxpayer for taxes, penalties or interest paid by him after May 1, 1949, and interest at the same rate shall be allowed on any judgment recovered by a taxpayer after said date.

Id. (italics deleted). The full House adopted the Committee’s amendment.

Id. at 795. Later that day, the House adopted another amendment to this section of the bill from the floor, altering the final phrase to read, “recovered by a taxpayer *for taxes, penalties or interest paid* after said date.” *Id.* at 799 (italics indicating the additional words). This language was ultimately in the bill as enacted, 1949 Laws ch. 228, § 21.

¹ Pertinent pages from the House Journal are attached hereto as Appendix A.

This interest clause was appended by the House Committee to a paragraph of Section 21 of the bill that related solely to judgments allowing recoveries, but it has no structural relationship to that paragraph alone because its substantive effect applies to refunds allowed by the Department as well. Its adoption in 1949 was an act by the Legislature independent of the Executive Branch's request. Given this history and structure, it makes no sense to limit the broad and express terms of the interest provision to "determinations" by the Department on the merits – the term "determination" was not even applied to appellate actions by the state tax commission at the time and was not used to describe administrative appellate decisions until the Department was created eighteen years later. Instead, the interest provision was *sui generis* and should be given its plain meaning without an artificial "harmonization."

Third, it is disingenuous to say that the Department's decision to allow a refund via settlement is not a "determination" – in the sense of a considered decision – that the taxpayer in question has paid excess tax (especially in this case when the Department allowed a 100% refund on one issue).

The Department is constitutionally barred from refunding "tax money collected validly." *Yakima v. Huza*, 67 Wn.2d 351, 359, 407 P.2d 815 (1965) (discussing Wash. Const. art. 8, §§ 5 & 7); *see also Seattle-*

King County Council of Camp Fire v. Department of Revenue, 105 Wn.2d 55, 60, 711 P.2d 300 (1985) (quoting *Huza*). Only if the statute itself is invalid, or if the Department has a “duty” to refund tax dollars because of an invalid application of the statute or otherwise, does the Department have constitutional authority to make tax refunds. *Huza*, 67 Wn.2d at 359, quoted in *Scarsella Bros., Inc. v. Department of Licensing*, 53 Wn.App. 882, 889, 771 P.2d 760 (1989). The closing agreement statutes, RCW 82.32.350 and .360, do not provide independent authority for refunds – they are only mechanisms by which the State may compromise a claim to reflect litigation risk. And litigation risk reflects likelihood of success on the merits. The Department’s decision to make a refund under a closing agreement is necessarily a determination *at a constitutional level* that a court would likely find the refund due.

Therefore, because of the constitutional limitations on refunds and the history and structural relationships among the refund and interest statutes, there is no basis for interpreting the interest provision other than according to its plain terms: interest must be allowed on “any refund, credit, or other recovery allowed to a taxpayer.” RCW 82.32.060(4)(a).

3. The Department's Argument Is Unreasonable Because It Disregards the Multiple and Informal Avenues for Refund.

Moreover, the practical problem is identifying when the Department is “determining” tax liability. The taxpayer may obtain a “determination” that it is entitled to a refund from the Appeals Division pursuant to RCW 82.32.170, but the taxpayer may also get a refund by filing an amended return with DOR’s Taxpayer Account Administration Division. CP 857. A taxpayer may also get a refund as part of an audit. The process consists of talking with the auditor or requesting a meeting with the auditor’s manager. CP 859-60. In either case, statutory interest is paid on the agreed refund. And some taxes are administered by other divisions, e.g., Compliance (use tax) and Special Programs (tobacco taxes). All these avenues can produce tax refunds without a document entitled “determination” or other express, analytical conclusion that a refund is due.

Per the testimony of Mary Barrett, the Assistant Director of the Appeals Division, taxpayers can even get interest in closing agreements when the Appeals Division decides to use a closing agreement for administrative efficiency. She testified:

A. If the supervisor agreed that the tax was wrongfully assessed . . . we could either issue a determination that says the assessment was improper and the taxpayer does not

owe this amount of money, or we could enter into a closing agreement that in essence said the same thing.

...

Q. In the case of a determination that said a refund was proper, interest would follow on that refund; is that true?

A. In a determination, yes.

Q. And if it was a closing agreement that did the same thing, would interest follow?

A. If the closing agreement was executed under the circumstance we just described where we could either make a finding and a determination that a refund was due, and we chose instead to do a closing agreement, then statutory interest would follow, but there are two types of closing agreements. . . . In a situation where we decided to enter into a closing agreement because we found that the tax was, for example, wrongfully paid and a refund was due, the closing agreement would include statutory interest. It would say that it was including statutory interest.

...

Q. Why might the department choose to enter into a closing agreement for zero versus a determination of zero?

A. The general reason is that the closing agreement is a quicker means to resolve the issue.

CP 274-75. Thus, the Department will pay interest on tax refunds that are memorialized in closing agreements at least some of the time. The Department's practice is to state in the closing agreement whether interest will be paid on the amount of the settlement or whether it is included in the settlement amount:

Q. Do closing agreements normally contain the words “including interest” someplace in the agreement shortly after the amount of the payment or refund?

A. Our boilerplate talks about resolving all matters at issue. That is not a quote. So we have a catchall phrase.

Q. So I understand that you have the catchall phrase. Do you still normally include words such as “including interest” in or near the actual amount of the refund?

...

A. [Taxes, penalties and interest] is in the document somewhere.

CP 275-76.

The Department’s practice confirms that “determine” should be given its ordinary meaning – “to fix conclusively or authoritatively.” *Webster’s Ninth Collegiate Dictionary* at 346 (1987). That can be done via several different administrative vehicles used by the Department, including a closing agreement. RCW 82.32.360, authorizing closing agreements, provides that “the agreement shall be final and conclusive as to tax liability or tax immunity covered thereby” Thus a closing agreement can conclusively “determine” the right to a refund. Importantly, RCW 82.32.360 does not say that the closing agreement is conclusive as to interest or as to any issue not “covered thereby.”

B. Federal Law Supports This Interpretation.

The IRS enters into closing agreements under statutory authority almost identical to RCW 82.32.350 and .360. Federal law is clear that interest is due on refunds allowed by closing agreement.

The following sets forth a comparison of these statutes to Internal Revenue Code (26 U.S.C.) § 7121, with Washington's differential language shown in bold, the IRC differential language shown in parentheses and italics, and common language shown in ordinary type:

82.32.350 Closing agreements authorized. (*Sec. 7121. Closing Agreements. (a) Authorization.—*) **The department may** (*The Secretary is authorized to*) enter into an agreement in writing with any person relating to the liability of such person (*or of the person or estate for whom he acts*) in respect of any (*internal revenue*) tax **imposed by any of the preceding chapters of this title** for any taxable period **or periods.**

82.34.360 Conclusive effect of agreements. (*(b) Finality.—*) **Upon approval of** (*If*) such agreement (*is approved by the Secretary (within such time as may be stated in such agreement, or later agreed to)*), **evidenced by execution thereof by the department of revenue and the person so agreeing,** the (*such*) agreement shall be final and conclusive **as to tax liability or tax immunity covered thereby,** and, except upon a showing of fraud or malfeasance, or **of** misrepresentation of a material fact:

(1) The case shall not be reopened as to the matters agreed upon, or the agreement modified, by any officer, employee, or agent of the **state, or the taxpayer** (*United States*), and

(2) In any suit, action(,) or proceeding, such agreement, or any determination, assessment, collection, payment,

abatement, refund, or credit made in accordance therewith, shall not be annulled, modified, set aside, or disregarded.

The only substantive difference between these statutes, other than the jurisdictions and taxes to which they apply, is the Washington Legislature's explicit statement that an authorized closing agreement shall be final and conclusive "**as to tax liability or tax immunity covered thereby.**" If this additional phrase has meaning, it is a limitation. It indicates that the agreement is *not* final and conclusive as to liabilities and immunities *not* covered by the agreement. Impliedly, if a party wishes to limit the effect of a statute in a Washington closing agreement, the limitation must be explicit.

But even the less specific federal law has been interpreted to require the payment of interest unless it is specifically waived in the closing agreement. In *Smith v. United States*, 850 F.2d 242 (5th Cir. 1988), the court held that a closing agreement, which explicitly concerned taxpayers' losses from a business venture and demonstrated that they had underpaid tax, did not negate the taxpayers' statutory liability for interest. "The limited scope of the closing agreement does not make it ambiguous, however, because the calculation of taxable income and the assessment of penalties and interest are *provided by law.*" *Id.* at 245 (emphasis added). Following *Smith*, the Sixth Circuit held that a closing agreement is limited

on its face and “there must be a specific waiver in the closing agreement” to cut off the IRS’s claim to interest. *In re Spendthrift Farm, Inc.*, 931 F.2d 405, 407 (6th Cir. 1991).

Thus, the comparison of the Washington and federal closing-agreement statutes shows by analogy that, absent an express term or extrinsic evidence that a party intended to waive a statutory right such as interest, Washington’s closing agreements generally only determine the matters specifically set forth therein and do not prejudice the application of the statutory obligations not addressed by the agreements.

C. Wells Fargo Did Not Waive Its Right to Interest.

A taxpayer may waive the right to interest, but must do so intentionally and voluntarily. *See Dombrosky v. Farmers Ins. Co.*, 84 Wn. App. 245, 255, 928 P.2d 1127 (1996), *rev. denied*, 131 Wn.2d 1018, 936 P.2d 417 (1997), noting:

The doctrine of waiver ordinarily applies to all rights or privileges to which a person is legally entitled. A waiver is the intentional and voluntary relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right. It may result from an express agreement, or be inferred from circumstances indicating an intent to waive. Thus waiver is essentially a matter of intention. Negligence, oversight or thoughtlessness does not create it. The intention to relinquish the right or advantage must be proved, and the burden is on the party claiming waiver.

Intent cannot be inferred from doubtful or ambiguous factors. *Wagner v. Wagner*, 95 Wn.2d 94, 102, 621 P.2d 1279 (1980)).

Here, Wells Fargo did not intend to waive interest. CP 239. The Department has the burden of proof to show intentional relinquishment, and Ms. Kreger has stated that interest was never raised or discussed during the settlement process. CP 108. Therefore, Wells Fargo is entitled to interest in accordance with the plain meaning of the statute.

At the time, the Department appeared to believe that interest must be specifically requested, rather than specifically disclaimed. Ms. Kreger, in more than one communication since the agreement was negotiated, has stated that a specific request is a precondition for interest. CP 243, 260. This position turns the doctrine of waiver on its head by requiring a taxpayer to request treatment that the statute affords automatically.

The Department later argued that paragraph 2 of the closing agreement contained a waiver of interest. That paragraph states:

Execution of this agreement by the Department and the Taxpayer operates as a dismissal with prejudice, of Taxpayer's petition for refund now pending before the Department's Appeals Division and as an unconditional waiver by the Taxpayer of any right to further challenge the assessments or the Department to pursue collection of the assessments.

CP 246.

This paragraph was drafted by the Department just as it customarily supplies the working draft for closing agreements, starting with templates it maintains. CP 122-23, 277-78, 283. While the paragraph expressly provides for dismissal of the appeal, the waiver language refers to “assessments.” In this case, however, the appeal did not arise from an assessment by the Department—it arose from a refund request—so the waiver language could not reasonably be understood to refer to interest.

Moreover, waiver requires clear intent. Both of the individuals that were involved in negotiating the settlement agreement testified that interest was never discussed. They agree that the settlement does not address interest. In response to an internal question, the Department’s representative stated:

The settlement amount did not include any interest and was calculated based solely on a compromise of B&O tax due for the second half of 1996 through 1999.

CP 251. In light of the clear agreement of the negotiators, the court should reject the Department’s after-the-fact attempts to find a waiver in the settlement itself.

D. Contract Interpretation Principles Also Establish That Interest Is a Term of the Contract.

A closing agreement between a taxpayer and the Department is a contract. *Riley Pleas, Inc. v. State*, 88 Wn.2d 933, 937-38, 568 P.2d 780 (1977). It is subject to judicial interpretation in the light of the language used and the circumstances surrounding its making. *Id.*² Both statutes and parol evidence should be used as “gap fillers” and both require that interest be implied in this case. The Court’s duty to supply reasonable terms to a contract leads to the same result.

1. RCW 82.32.060 Should Supply the Missing Interest Term.

Parties are presumed to contract with reference to existing statutes. *In re Estate of Clise*, 64 Wn.2d 320, 391 P.2d 547 (1964). A statute that affects the subject matter of a contract is automatically incorporated into the contract and becomes a part thereof. *Dopps v. Alderman*, 12 Wn.2d 268, 273-74, 121 P.2d 388 (1942). If the parties to a contract wish to provide for different legal principles to govern their contractual relationship, they must be expressly set forth in the contract. Absent a clear intent to the contrary disclosed by the contract, the general law will govern. *Wagner*, 95 Wn.2d at 98-99.

² See also *Smith v. United States*, *supra*, 850 F.2d at 245 (Under federal law, a “closing agreement is interpreted under ordinary principles of contract law.”) (footnote omitted).

Here, the contract makes no provision for the payment or waiver of interest. Both parties understood that interest was a statutory requirement established by the Legislature. RCW 82.32.060(4) was part of the statutory platform from which the parties' contracting began. For the Department to maintain that interest does not apply in the absence of a specific administrative grant ignores fundamental contract law and the force of the statute.

2. Parol Evidence Shows That Interest Should Be Paid Here.

Parol evidence may supply a term on which a written agreement is silent but which is essential to the contract. *In re Estate of Garrity*, 22 Wn.2d 391, 156 P.2d 217 (1945). A court interpreting a contract may consider the relevant evidence of the situation and relations of the parties, the subject matter of the transaction, preliminary negotiations and statements made in those negotiations, trade usage, and the course of dealing between the parties. *Diamond B Constructors, Inc. v. Granite Falls School Dist.*, 117 Wn. App. 157, 161, 70 P.3d 966 (2003).

In this case, the parties' course of dealing requires the payment of interest. Wells Fargo had previously dealt with the Audit Division of the Department on the question of interest in the course of processing these same tax refund requests. When the Audit Division had agreed on some

issues with Wells Fargo, it had issued the refund plus statutory interest. CP 288-95. Wells Fargo had not had to make a prior, specific request for interest. The Audit Division's documents included a voucher notice stating "Interest . . . is included;" an annual credit tax assessment for each of 1996, 1997, and 1998 noting the amount of interest credit; and supporting schedules that each contained a summary line stating, "Total Tax Adjustment (Excluding Penalties and Interest)." *Id.* Later, the Department's Appeals Division had agreed to refund 100 percent of the requested amount on one issue for two tax years and 40 percent on another issue for the other years.³ The Department gave Wells Fargo no indication during settlement discussions or in the draft closing agreement that an agreement as to tax liability with the Appeals Division was any different from an agreement with the Audit Division. In these circumstances, the prior course of dealing, which had been aligned exactly with the underlying statute, imbued the subsequent Appeals Division negotiations and the closing agreement with an implied interest obligation. And, in fact, the refund agreed to by the Appeals Division was accompanied by an Audit Division schedule in the same format as with the partial refunds, again stating "Total Tax Adjustment (Excluding Penalties and Interest)." CP 254.

³ The Appeals Division concedes that interest is normally paid when the Department agrees to a 100 percent refund. CP 273-74.

3. Interest Is Reasonable Here Because It Serves the Public Interest.

When there is no indication from the contract, the parties' conduct, or the surrounding circumstances that the parties considered or agreed upon an issue that is essential to a determination of their rights and duties, the court has a duty to supply a term that is reasonable under the circumstances. RESTATEMENT (SECOND) OF CONTRACTS § 204 (1981); *see also Schortmann v. United States*, 82 Fed. Cl. 1, 10 (2008). Thus, even if RCW 82.32.060(4) were not incorporated per se into each closing agreement that is silent on interest, the statute would still mandate payment of interest because it provides the Court with the reasonable term that the Court has a duty to supply. When there is a statute as specific as RCW 82.32.060(4), requiring the payment of interest on “any refund, credit, or other recovery allowed to a taxpayer,” the Legislature has clearly indicated that the payment of interest serves a public interest. It has promised taxpayers interest on their tax refunds as a matter of common justice. “[O]ne who has had the use of money owing to another should in justice make compensation for its wrongful detention.” *Prier v. Refrigeration Engineering Co.*, 74 Wn.2d 25, 32, 442 P.2d 621 (1968).

The Department itself recognizes the equity and reasonableness of allowing refund interest as a policy matter. In a major 1991 report to the

Legislature, “Washington State Taxpayer Rights and Responsibilities,” the Department identified a series of rights that “are fundamental to fair and equitable tax administration.” CP 34. Among these rights is a right “to fair interest rates.” CP 35. The Department recommended that the Legislature amend the then-existing statutes to eliminate a significant disparity between rates for deficiency interest and refund interest by “adopting rates that correspond to the market rates *for use of money.*” CP 41 (emphasis added). It said its “request legislation . . . would result in rates that correspond to the market rates for borrowing and saving money.” CP 50. These changes were enacted by 1991 Laws ch. 142, §§ 9-11.

Compensatory interest is a simple, reasonable, and equitable foundation for relations between private parties and between taxpayers and the State alike. In observing the court’s duty under the RESTATEMENT OF CONTRACTS and this state’s authorities to supply missing essential terms of this closing agreement, supplying an interest obligation pursuant to RCW 82.32.060(4) is the only reasonable option.

Moreover, the public interest requires that any ambiguity in the closing agreement be construed against the Department for two reasons. First, the Department drafts the agreement and thus is in the best position to avoid the ambiguity, and second, allowing the Department to gain

advantage from a contractual ambiguity would encourage further ambiguity.

The Department customarily supplies the working draft for closing agreements, maintaining templates for that purpose. CP 122-23, 275-76, 283. Although the taxpayer may suggest changes, the Department exerts a great deal of control over the settlement process. CP 122. Thus, the Department is in the best position to avoid ambiguities by adopting clear template language.

Express language would prevent misunderstandings. The Department concedes that interest is paid on some closing agreement refunds, though not on others.

If the closing agreement was executed under the circumstance we just described where we could either make a finding and a determination that a refund was due, and we chose instead to do a closing agreement, then statutory interest would follow, but there are two types of closing agreements.

CP 274. The distinction seems to be whether the Department believes that the refund is justified under the law or whether it is justified to settle litigation risk. As any attorney knows, there is not a bright line between the two. The distinction is not likely to be understood by the taxpayer and could lead to misunderstandings such as the one here.⁴ Moreover, failing

⁴ This is particularly true where, as here, there is a 100 percent refund on at least some of the issues.

to enforce the statutory interest obligation in this case will inevitably encourage the Department to reach fewer explicit judgments on the merits of refund requests. The Department should be required to make its judgment clear.

Finally, if the Department can omit terms and then later argue that the terms were or were not part of the agreement, there would be an incentive for ambiguity. The Department was at least negligent in this case. Ms. Kreger believed, contrary to the plain language of the statute, that interest needs to be requested by the taxpayer. CP 107-08, 243. Her internal communications evidenced this belief by stating that interest was not included in the settlement amount,⁵ not recognizing that this statement itself is ambiguous. Had she included the phrase “including interest” after the refund amount, it would have been clear that the settlement amount compromised statutory interest as well as tax. Allowing the Department to profit from its mistakes will not lead to clearer agreements.

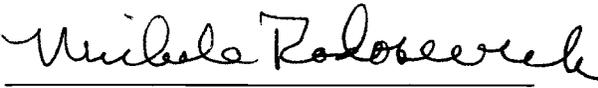
⁵ See CP 251, 286.

VI. CONCLUSION

For the above reasons, this Court should reverse the trial court and grant summary judgment to Wells Fargo.

RESPECTFULLY SUBMITTED this 22nd day of September,
2010.

Davis Wright Tremaine LLP
Attorneys for Wells Fargo Bank, N.A.

By 

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The undersigned certifies under penalty of perjury under the laws of the State of Washington that on September 22nd, 2010, I caused to be served in the manner noted below a copy of Wells Fargo's Opening Brief on counsel of record:

Rosann Fitzpatrick
Assistant Attorney General
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Via U.S. Mail and Electronic
Mail

DATED this 22nd day of September, 2010.



Michele Radosevich

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APPENDIX A

HOUSE JOURNAL

OF THE

Thirty-First Legislature

OF THE

STATE OF WASHINGTON

AT

Olympia, the State Capital

Convened January 10, 1949

Adjourned Sine Die March 10, 1949



CHAS. W. HODDE, Speaker
S. R. HOLCOMB, Chief Clerk
MARIE R. DAVIS, Asst. to the Chief Clerk
MATT VERTIN, Asst. Chief Clerk
HAIDEE BRAWFORD, Minute Clerk
RUTH MASCHNER, Journal Clerk

OLYMPIA, WASH.
STATE PRINTING PLANT
1949

Senate Bill No. 12, having received the constitutional majority, was declared passed.

There being no objection, the title of the bill was ordered to stand as the title of the act.

On motion of Mr. Sutherland, Senate Bill No. 12 was ordered immediately transmitted to the Senate.

MOTIONS

Mr. Holliday moved that the House dispense with further proceedings under the call of the House.

The motion was lost.

On motion of Mr. Anderson (B. Roy), Mr. Kinnear was excused for the purpose of a conference in the Senate.

On motion of Mr. Comfort, Mr. Hofmeister and Mr. Knoblauch were excused for fifteen minutes to attend a meeting in the Senate.

Mr. Simmons moved that Mr. Simmons be excused until 4:10 p. m.

The motion was lost.

Mr. Jones (John R.) moved that Mr. Simmons be excused until 4:15 p. m.

The motion was carried.

House Bill No. 415, by Representative Olson (By Departmental Request) Revising certain definitions, exemptions and administrative provisions of Revenue Act of 1935, as amended and declaring an emergency.

House of Representatives,
Olympia, Wash., March 1, 1949.

MR. SPEAKER:

We, a majority of your Committee on Revenue and Taxation, to whom was referred House Bill No. 415, revising certain definitions, exemptions and administrative provisions of Revenue Act of 1935, as amended and declaring an emergency, have had the same under consideration, and we respectfully report the same back to the House with the recommendation that it do pass with the following amendments:

In section 1, page 1, line 25 of the original bill, being page 1, line 15 of the printed bill, after the word "person" and before the word "engaging" insert the following: "*except persons taxable under paragraph (2) of subsection (d) below*"

In section 1, page 2, line 7 of the original bill, being page 2, line 3 of the printed bill, after the letter "(d)" and before the word "Upon" insert the following: "*(1)*"

In section 1, page 2, immediately following line 12 of the original bill, being page 2, line 7 of the printed bill, insert the following additional paragraph:

"*(2) Upon every person engaging within this state in the business of manufacturing wheat into flour; as to such persons the amount of tax with respect to such business shall be equal to the value of the flour manufactured, multiplied by the rate of one-eighth of one per cent.*"

In section 2, page 9, line 14 of the original bill, being page 5, line 43 of the printed bill, after the word "Washington" strike the period (.) and insert in lieu thereof a semicolon (;)

Amend the bill by adding thereto on page 9 of the original bill, being page 6 of the printed bill, an additional section immediately following section 2, to be designated section 2-A, reading as follows:

"Sec. 2-A. Section 6, Chapter 180, Laws of 1935, as last amended by section 3, Chapter 156, Laws of 1943, is amended to read as follows:

"Section 6. Every person engaging in activities which are within the purview of the provisions of two or more of paragraphs (a), (b), (c), (d), (e), (f), and (g) of section 4, shall be taxable under each paragraph applicable to the activities engaged in: *Provided, however, That persons taxable under paragraphs (a) * * * (b) or (d) (2) of said section shall not be taxable under paragraphs (c) or (e) of said section with respect to making sales at retail or wholesale of products extracted or manufactured within this state by such persons.*"

In section 3, page 9, line 26 of the original bill, being page 6, line 8 of the printed bill, after the comma (,) following the word "retail" and before the word "except" insert the following: "to which shall be added all subsidies and bonuses received from the purchaser or from any other person with respect to the extraction, manufacture, or sale of such products or by-products by the seller,"

In section 3, page 10, line 6 of the original bill, being page 6, line 17 of the printed bill, strike the period (.) following the word "taxpayers", insert in lieu thereof a comma (,) and add the following: "plus the amount of subsidies or bonuses ordinarily payable by the purchaser or by any third person with respect to the extraction, manufacture, or sale of such products."

In section 5, page 12, line 7 of the original bill, being page 7, line 20 of the printed bill, after the word "transporting" and before the word "property" insert the words "therein or therewith"

In section 5, page 12, line 14 of the original bill, being page 7, line 26 of the printed bill, at the end of the line and of the paragraph, add the following two paragraphs:

"(l) Sales of motor vehicles and trallers to be used for the purpose of transporting therein persons or property for hire in interstate or foreign commerce: Provided, That the purchaser must be the holder of a carrier permit issued by the Interstate Commerce Commission, and that said vehicles will first move upon the highways of this state from the point of delivery in this state to a point outside of this state under the authority of a one-transit permit issued by the Director of Licenses pursuant to the provisions of section 17, Chapter 188, Laws of 1937, as amended by section 15, Chapter 200, Laws of 1947, or any law amendatory thereto:"

"(m) Sales of motor vehicles and trailers to non-residents of this state for use outside of this state, even though delivery be made within this state, but only when (1) said vehicles or trailers will be taken from the point of delivery in this state directly to a point outside this state under the authority of a one-transit permit issued by the Director of Licenses pursuant to the provisions of section 17, Chapter 188, Laws of 1937, as amended by section 15, Chapter 200, Laws of 1947, or any law amendatory thereto, or (2) said motor vehicles and trailers will be registered and licensed immediately under the law of the state of the purchaser's residence and will not be required to be registered and licensed under the laws of this state."

In section 8, page 14, line 30 of the original bill, being page 8, line 43 of the printed bill, after the semicolon (;) following the word "state" and before the words "or in respect" insert the following: "or in respect to the use by a non-resident of this state of a motor vehicle which is registered or licensed under the laws of the state of his residence and which is not required to be registered or licensed under the laws of this state;"

In section 8, page 15, line 17 of the original bill, being page 9, line 13 of the printed bill, after the word "transporting" and before the word "property" insert the following: "therein or therewith"

In section 8, page 15, line 24 of the original bill, being page 9, line 18 of the printed bill, after the semicolon (;) following the word "commerce" add the following: "and in respect to the use of any motor vehicle or trailer while being operated under the authority of a one-transit permit issued by the Director of Licenses pursuant to the statutory provisions cited in section 19 (l) of this act;"

In section 8, page 16, line 20 of the original bill, being page 9, line 38 of the printed bill, strike the period (.) following the word "same" at the end of the line, and insert in lieu thereof a semicolon (;)

In section 13, page 22, line 31 of the original bill, being page 13, line 16 of the printed bill, following the word "fraction" and before the words "of the intended" insert the word "thereof"

In section 15, page 27, line 11 of the original bill, being page 15, line 33 of the printed bill, at the end of the line after the period (.) following the word "thereof" add the following: "The keeping of any unstamped articles coming within the provisions of this title shall be prima facie evidence of the intent to violate the provisions of this title."

In section 16, page 27, line 15 of the original bill, being page 15, line 36 of the printed bill, after the word "articles", and before the words "herein are" strike the word "taxes" and insert in lieu thereof the word "taxed"

In section 18, page 29, lines 2 to 9, inclusive, of the original bill, being page 16,

lines 31 to 37, inclusive, of the printed bill, strike the entire paragraph and substitute in lieu thereof the following:

"(a) Upon every person engaging within this state in business as an operator of any pin-ball machine, iron claw machine, traveling crane or other similar mechanical device wherein the element of skill, or a combination of the elements of chance and skill is involved in determining a payout to the player, as to such persons the amount of the tax on such business shall be equal to the gross operating income of the business multiplied by the rate of * * * * * twenty-five per cent * * * * * : *Provided, That this paragraph shall not be applicable to devices which require more than one operation by the player and where the result of any such operation by the player is determined by chance alone,*"

In section 18, page 29, lines 10 to 17, inclusive, of the original bill, being page 16, lines 38 to 43, inclusive, of the printed bill, strike the entire paragraph and substitute in lieu thereof the following:

"(b) Upon every person engaging within this state in business as an operator of (1) any mechanical device wherein only the element of chance determines a pay-out to the player, or (2) any mechanical device which requires more than one operation by the player and where the result of any such operation by the player is determined by chance alone, without regard to whether or not an element of skill is involved in any other operation of the device by the player; as to such persons the amount of tax on such business shall be equal to the gross operating income of the business multiplied by the rate of forty per cent."

In section 21, page 32, line 7 of the original bill, being page 18, line 19 of the printed bill, beginning with the words "No interest" strike the entire sentence down to and including the period (.) following the word "taxpayer" on page 32, line 11 of the original bill, being page 18, line 22 of the printed bill and insert in lieu thereof the following: "*Interest at the rate of three per cent (3%) per annum shall be allowed by the Tax Commission and by any court on the amount of any refund or recovery allowed to a taxpayer for taxes, penalties or interest paid by him after May 1, 1949, and interest at the same rate shall be allowed on any judgment recovered by a taxpayer after said date.*"

In the first line of the title of the original bill and of the printed bill, after the comma (,) following the figure "5" and before the figure "7", insert the following: "6,"

OLE H. OLSON, Chairman.

We concur in this report: B. Roy Anderson, Robert E. Blair, Charles M. Carroll, Paul Coughlin, Wesley Eldridge, Clayton Farrington, Arthur R. Paulsen, George V. Powell, G. Frank Rhodes, Loomis J. Shadbolt, Vernon A. Smith, Dailly S. Wyatt.

House of Representatives.
Olympia, Wash., March 1, 1949.

MR. SPEAKER:

We, a minority of your Committee on Revenue and Taxation, to whom was referred House Bill No. 415, revising certain definitions, exemptions and administrative provisions of Revenue Act of 1935, as amended and declaring an emergency, have had the same under consideration, and we respectfully report the same back to the House with the recommendation that it do not pass. _____, Chairman.

We concur in this report: Arthur L. Callow, A. B. Comfort, Wilbur G. Hallauer, Louis E. Hofmeister.

House Bill No. 415 was read the second time by sections.

On motion of Mr. Olson, the first three committee amendments were adopted.

Mr. Coughlin moved the adoption of the following amendment:

Amend section 1, line 6, page 2 of the printed bill, after the word "rate" strike the words "one one-hundredth of one per cent" and substitute the words "one one-eighth of one per cent"

Debate ensued.

Mr. Mardesich moved that the amendment be laid on the table without taking the bill with it.

The motion was carried.

On motion of Mr. Olson, the 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th and 13th committee amendments were adopted.

Mr. Olson moved the adoption of the following amendment:

In section 8, page 16, line 24 of the original bill, being page 9, line 41 of the printed bill, strike the period (.) at the end of the line, insert in lieu thereof a semicolon (;) and add the following paragraph:

"(k) In respect to the use of fuel by the extractor or manufacturer thereof when used directly in the operation of the particular extractive operation or manufacturing plant which produced or manufactured the same."

The motion was carried and the amendment was adopted.

MOTION

On motion of Mr. Comfort, Mr. Ball and Mr. Neill were excused from the call of the House for work in the engrossing room.

MOTION

On motion of Mr. Comfort, Mr. Thompson and Miss Kelley were excused from the call of the House for work in the engrossing room.

On motion of Mr. Olson, the 14th, 15th and 16th committee amendments were adopted.

Mr. Olson moved the adoption of the committee amendment to section 18, page 29, lines 2 to 9 inclusive, of the original bill.

Mr. Allen moved that the amendment be laid on the table without taking the bill with it.

Debate ensued.

Mr. Ford demanded the previous question and the demand was sustained. Division was called for and the motion by Mr. Allen was lost on a rising vote.

The motion by Mr. Olson was carried and the committee amendment was adopted.

On motion of Mr. Olson, the committee amendment to section 18, page 29, lines 10 to 17 inclusive, of the original bill was adopted.

On motion of Mr. Olson, the following amendment was adopted:

In section 21, page 31, line 29 of the original bill, being page 18, line 12 of the printed bill, strike the period (.) following the words "same period" and add the following: *"Provided, That notwithstanding the foregoing limitations there shall be refunded or credited to taxpayers engaged in the performance of the United States Government contracts or subcontracts the amount of any tax paid, measured by that portion of the amounts received from the United States, which taxpayer is required by contract or applicable Federal statute to refund or credit to the United States, if claim for such refund is filed by the taxpayer with the Tax Commission within one year of the date that the amount of the refund or credit due to the United States is finally determined and filed within four years of the date on which the tax was paid: Provided, further, That no interest shall be allowed on such refund."*

On motion of Mr. Olson, the committee amendment to section 21, page 32, line 7 of the original bill was adopted.

Mr. Coughlin moved the adoption of the following amendment:

Amend section 2, line 27, page 3 of the printed bill, after the period (.) following the word "prescribe", add the following: *"The term 'sale at retail' or 'retail sale' shall be construed to include the sale of or charges paid for the dissemination or distribution of advertising or advertising material, whether by newspaper, magazine, periodical, billboard, circular, handbill, radio broadcast, television broadcast, or any other advertising medium whatsoever."*

MOTION

On motion of Mr. Ford, the House dispensed with further proceedings under the call of the House.

MOTION

On motion of Mr. Ford, the House was declared at recess until eight o'clock p. m.

EVENING SESSION

The Speaker called the House to order at eight o'clock p. m.

The Clerk called the roll and all members were present except Representatives Carroll, Carty, Forshee, Hallauer, Hillyer, Hofmeister, Holliday, King, Miller (C. C.), Nunamaker, Rasmussen, Ridgway, Rosenberg, Sisson, Smith (Vernon A.), Thompson, Wenberg (Oscar), Woodall, Wyatt, and Zent, Representatives Forshee and Wyatt having been previously excused.

MOTION

On motion of Mrs. Hansen, the House reverted to the fifth order of business for the purpose of receiving committee reports.

REPORTS OF STANDING COMMITTEES

House of Representatives,
Olympia, Wash., March 5, 1949.

MR. SPEAKER:

We, of your Committee on Engrossment and Enrollment, to whom was referred Enrolled House Bill No. 52, have compared same with the engrossed bill and find it correctly enrolled.

A. B. COMFORT, *Chairman*.

I concur in this report: James P. Dillard.

House of Representatives,
Olympia, Wash., March 6, 1949.

MR. SPEAKER:

We, of your Committee on Engrossment and Enrollment, to whom was referred Enrolled House Bill No. 96; also

Enrolled Substitute House Bill No. 108; also

Enrolled House Bill No. 193; also

Enrolled House Bill No. 232, have compared same with the engrossed and substitute bills and find them correctly enrolled.

A. B. COMFORT, *Chairman*.

I concur in this report: Howard T. Ball.

House of Representatives,
Olympia, Wash., March 6, 1949.

MR. SPEAKER:

We, of your Committee on Engrossment and Enrollment, to whom was referred Enrolled House Bill No. 165; also

Enrolled Substitute House Bill No. 221; also

Enrolled House Bill No. 291; also

Enrolled House Bill No. 555, have compared same with the original, substitute and engrossed bills and find them correctly enrolled.

A. B. COMFORT, *Chairman*.

We concur in this report: G. Frank Rhodes, Daily S. Wyatt.

Engrossed Senate Bill No. 27 (reported by Committee on Cities and Counties):

Do pass as amended.

Passed to second reading.

House Bill No. 161; also
 House Bill No. 222; also
 House Bill No. 254; also
 House Bill No. 265; also
 House Bill No. 269, and the same are herewith transmitted.

HERBERT H. SIELER, *Secretary.*

The Speaker announced he was about to sign House Bill No. 52; also
 House Bill No. 96; also
 Substitute House Bill No. 108; also
 House Bill No. 165; also
 House Bill No. 193; also
 Substitute House Bill No. 221; also
 House Bill No. 232; also
 House Bill No. 291; also
 House Bill No. 555; also
 Senate Bill No. 73; also
 Senate Bill No. 133; also
 Senate Bill No. 148; also
 Senate Bill No. 165; also
 Senate Bill No. 278; also
 Senate Bill No. 350; also
 Senate Bill No. 351; also
 Senate Bill No. 353.

The House resumed consideration of bills on second reading.

SECOND READING OF BILLS

The House resumed consideration of House Bill No. 415.

The Speaker declared the question before the House to be the motion by Mr. Coughlin to adopt the amendment to section 2, line 27, page 3 of the printed bill.

Debate ensued.

Mr. Dillard moved that the amendment be laid on the table without taking the bill with it.

Division was called for and the motion was carried on a rising vote.

On motion of Mr. Powell, the following amendment was adopted:

Amend the committee amendment to section 21, page 18, line 19 of the printed bill, adopted March 6, 1949, in the last line of the amendment after the word "taxpayer" and before the word "after" insert the following: "*for taxes, penalties or interest paid*"

On motion of Mr. Olson, the committee amendment to the title was adopted. House Bill No. 415 was passed to third reading and ordered engrossed.

Senate Bill No. 78, by Senator Lindsay:

Authorizing fire protection districts to put fire departments under civil service.

The bill was read the second time by sections.

On motion of Mr. Dillard, the rules were suspended, Senate Bill No. 78 was advanced to third reading, the second reading considered the third, and the bill was placed on final passage.

The Speaker declared the question before the House to be the final passage of Senate Bill No. 78.

Debate ensued.

Mr. Roderick demanded the previous question and the demand was sustained.

The motion by Mrs. Hansen was lost and the amendment to the committee amendment was not adopted.

The Speaker (Mr. Ford presiding) declared the question before the House to be the motion by Mrs. Hansen to adopt the committee amendment.

The motion was carried and the committee amendment as amended was adopted.

On motion of Mr. Riley, the rules were suspended, Engrossed House Bill No. 525 was advanced to third reading, the second reading considered the third, and the bill was placed on final passage.

The Clerk called the roll on the final passage of Engrossed House Bill No. 525, and the bill passed the House by the following vote: Yeas, 96; nays, 0; absent or not voting, 3.

Those voting yea were: Representatives Adams, Allen, Anderson (B. Roy), Anderson (Eva), Ball, Bargreen, Bassett, Beierlein, Bergevin, Bernethy, Blair, Boede, Brown (Gordon J.), Brown (Henry A.), Brown (Vaughan), Buse, Callow, Carmichael, Carroll, Comfort, Cory, Coughlin, Dillard, Donohue, Eldridge, Farrington, Ford, Forshee, Frayn, Gallagher (Bernard J.), Gallagher (Michael J.), Gordon, Hallauer, Hansen, Henderson, Hillyer, Hoefel, Hofmeister, Holliday, Hoopingarner, Jeffreys, Johnston, Jones (John R.), Jones (Mrs. Vincent F.), Kelley, King, Kinnear, Knoblauch, Kupka, Lester, Mardesich, McPherson, Miller (C. C.), Miller (Clyde J.), Miller (Floyd C.), Mohr, Morris, Neill, Nunamaker, O'Brien, Olson, Paulsen, Pedersen, Powell, Rasmussen, Raugust, Rhodes, Ridgway, Riley, Roderick, Rosenberg, Sandison, Schumann, Shadbolt, Shannon, Simmons, Sisson, Smiley, Smith (Ralph A.), Smith (Vernon A.), Sprague, Stonecipher, Sutherland, Testu, Thompson, Vane, Washington, Watson, Wedekind, Wilson, Winberg (Andrew), Woodall, Wyatt, Young, Zent, Mr. Speaker—96.

Those absent or not voting were: Representatives Carty, Foster, Wenberg (Oscar)—3.

Engrossed House Bill No. 525, having received the constitutional majority, was declared passed.

There being no objection, the title of the bill was ordered to stand as the title of the act.

THIRD READING OF BILLS

Engrossed House Bill No. 415, by Representative Olson (by Departmental Request):

Revising certain definitions, exemptions and administrative provisions of Revenue Act of 1935, as amended, and declaring an emergency.

Mr. Hodde moved that the rules be suspended and the bill returned to second reading for the purpose of amendment.

The motion was carried.

SECOND READING OF BILLS

Engrossed House Bill No. 415 was re-read the second time by sections.

Mr. Hodde moved the adoption of the following amendment:

In section 1, page 1, line 10 of the engrossed bill, being line 3 of the printed bill, strike all the matter in said section following "Section 4." and insert in lieu thereof the following:

"From and after the first day of May, 1935, there is hereby levied and there shall be collected from every person a tax for the act or privilege of engaging in business activities. Such tax shall be measured by the application of rates against value of products, gross proceeds of sales, or gross income of the business, as the case may be, as follows:

"(a) Upon every person engaging within this state in business as an extractor; as to such persons the amount of the tax with respect to such business shall be equal to the value of the products, *including by-products*, extracted for sale or for commercial or industrial use, multiplied by the rate of * * * * *three-eighths* of one per cent;

"The measure of the tax is the value of the products, *including by-products*, so extracted, regardless of the place of sale or the fact that deliveries may be made to points outside the state;

"(b) Upon every person *except persons taxable under paragraph (2) of subsection (d) below* engaging within this state in business as a manufacturer; as to such persons the amount of the tax with respect to such business shall be equal to the value of the products, *including by-products*, manufactured, multiplied by the rate of * * * * *three eighths* of one per cent;

"The measure of the tax is the value of the products, *including by-products*, so manufactured regardless of the place of sale or the fact that deliveries may be made to points outside the state;

"(c) Upon every person engaging within this state in the business of making sales at retail; as to such persons, the amount of tax with respect to such business shall be equal to the gross proceeds of sales of the business, multiplied by the rate of * * * * *three-eighths* of one per cent;

"(d) (1) Upon every person engaging within this state in the business of buying wheat, oats, corn and barley, but not including any manufactured or processed products thereof, and selling the same at wholesale; the tax herein imposed shall be equal to the gross proceeds derived from such sales multiplied by the rate of one one-hundredth of one per cent;

"(2) Upon every person engaging within this state in the business of manufacturing wheat into flour; as to such persons the amount of tax with respect to such business shall be equal to the value of the flour manufactured, multiplied by the rate of one-eighth of one per cent;

"(e) Upon every person *except persons taxable under subsection (d) above* engaging within this state in the business of making sales at wholesale; as to such persons the amount of tax with respect to such business shall be equal to the gross proceeds of sales of such business multiplied by the rate of * * * * *three-eighths* of one per cent;

"(f) Upon every person engaging within this state in the business of: (1) printing, and of publishing newspapers, periodicals or magazines; (2) building, repairing or improving any publicly owned street, place, road, highway, bridge or trestle which is used or to be used, primarily for foot or vehicular traffic; as to such persons, the amount of tax on such business shall be equal to the gross income of the business multiplied by the rate of * * * * *three-eighths* of one per cent;

"(g) Upon every person engaging within this state in the business of practicing any of the following professions under license granted by this state: *medicine, surgery, osteopathy, chiropractic, drugless therapeutics, and dentistry*; as to such persons the amount of tax with respect to such business shall be equal to the gross income of the business multiplied by the rate of one per cent;

"(h) Upon every person engaging within this state in any business activity other than or in addition to those enumerated in subsections (a), (b), (d), (e) * * * * , (f) and (g) above; as to such persons the amount of tax on account of such activities shall be equal to the gross income of the business multiplied by the rate of * * * * *three* per cent. This subsection includes, among others, and without limiting the scope hereof (whether or not title to materials used in the performance of such business passes to another by accession, confusion or other than by outright sale), persons engaging in the business of rendering any type of service which does not constitute a 'sale at retail' or a 'sale at wholesale' as defined herein and which is not enumerated in subsections (a), (b), (c), (d), (e), (f) and (g) above."

Debate ensued.

Mr. Comfort moved the adoption of the following amendment to the amendment by Mr. Hodde:

Amend the House amendment to section 1, on page 2, in line 3 of subsection (g), of the mimeographed amendment, after the colon (:) and before the word "medicine" insert the following: "insurance agency,"

Mr. Rasmussen moved the previous question and the demand was sustained.

The motion was carried and the amendment by Mr. Comfort to the amendment by Mr. Hodde was adopted.

Debate ensued.

Mr. Johnston moved the adoption of the following amendment to the amendment by Mr. Hodde:

Amend subsection (g), page 2, line 3 of the mimeographed amendment by Mr. Hodde, after the word "surgery" insert the words: "practice of law,"

Debate ensued.

Mr. Rasmussen moved that the amendment by Mr. Johnston be laid on the table without taking the bill with it.

The motion was carried.

Mr. Young moved the adoption of the following amendment to the amendment by Mr. Hodde:

Amend subsection (g), line 3 of the mimeographed amendment by Mr. Hodde, after the word "surgery," insert the word "barber,"

Mr. Rosenberg moved that the amendment be laid on the table without taking the bill with it.

The motion was carried.

On motion of Mr. Brown (Vaughan) Mr. Nunamaker was excused from the call of the House.

Mr. Woodall moved the adoption of the following amendment to the amendment by Mr. Hodde:

Amend subsection (h), line 12 of the mimeographed amendment by Mr. Hodde, before the words "per cent" strike the word "three" and insert in lieu thereof the word "one"

POINT OF INFORMATION

Mr. Powell:

"Mr. Speaker, I would like to ask Mr. Hodde a question."

The Speaker (Mr. Ford presiding):

"Does the gentleman yield?"

Mr. Hodde:

"Yes."

Mr. Powell:

"Do you have any objection to an amendment which would clarify the fact that this 3% tax can be passed on to the ultimate consumer?"

Mr. Hodde:

"It is not in this amendment, but in one further down on the bill. That is our intention."

Mr. Rasmussen moved that the amendment by Mr. Woodall be laid on the table without taking the bill with it.

The motion was carried.

Mr. Henderson moved the adoption of the following amendment to the amendment by Mr. Comfort:

Amend subsection (g), line 3, page 2 of the mimeographed amendment, after the word "state:" strike the adopted amendment to the mimeographed amendment by Mr. Comfort, "insurance agency" and reinsert a colon (:)

RULING BY THE SPEAKER

The Speaker (Mr. Ford presiding):

"The Speaker will have to rule the amendment is out of order under the provisions of Rule 136, Reed's Parliamentary Rules."

Mr. Lester moved the adoption of the following amendment to the amendment by Mr. Hodde:

Amend subsection (g), line 3, page 2 of the mimeographed amendment, following the word "surgery," insert the word "veterinary,"

Debate ensued.

Mr. Rasmussen moved that the amendment by Mr. Lester be laid on the table without taking the bill with it.

Debate ensued.

The motion was carried.

Mr. Rasmussen demanded the previous question and the demand was sustained.

The Speaker (Mr. Ford presiding) declared the question before the House to be the motion by Mr. Hodde to adopt his amendment as amended.

The Clerk called the roll on the motion by Mr. Hodde to adopt his amendment to section 1, as amended, and the motion was carried by the following vote: Yeas, 74; nays, 21; absent or not voting, 4.

Those voting yea were: Representatives Adams, Allen, Anderson (B. Roy); Anderson (Eva); Ball, Bargreen, Bassett, Beierlein, Bergevin, Bernethy, Blair, Boede, Brown (Henry A.), Buse, Callow, Carmichael, Comfort, Cory, Dillard, Donohue, Eldridge, Ford, Frayn, Gordon, Hansen, Henderson, Hoefel, Hofmeister, Holliday, Hoopingarner, Jeffreys, Johnston, Jones (Mrs. Vincent F.), Kelley, King, Kinnear, Knoblauch, Kupka, Mardesich, McPherson, Miller (C. C.), Miller (Clyde J.), Miller (Floyd C.), Mohr, Morris, Neill, O'Brien, Pedersen, Powell, Rasmussen, Raugust, Rhodes, Ridgway, Riley, Rosenberg, Sandison, Shannon, Simmons, Smiley, Smith (Ralph A.), Smith (Vernon A.), Sprague, Stonecipher, Sutherland, Testu, Thompson, Vane, Washington, Watson, Wedekind, Winberg (Andrew), Wyatt, Zent, Mr. Speaker—74.

Those voting nay were: Representatives Brown (Gordon J.), Brown (Vaughan), Carroll, Coughlin, Farrington, Forshee, Gallagher (Bernard J.), Gallagher (Michael J.), Hallauer, Hillyer, Jones (John R.), Lester, Olson, Paulsen, Roderick, Schumann, Shadbolt, Sisson, Wilson, Woodall, Young—21.

Those absent or not voting were: Representatives Carty, Foster, Nunamaker, Wenberg (Oscar)—4.

On motion of Mr. Rasmussen, Mr. Wenberg (Oscar) was excused from the call of the House.

Mr. Hodde moved the adoption of the following amendment:

In section 2, page 4, line 17 of the engrossed bill, being page 3, line 14 of the printed bill, after the word and figures "4 (f) (2)" strike the remainder of the sentence and insert in lieu thereof the following: ", * * * * section 4 (g) and section 4 (h) hereof."

The motion was carried and the amendment was adopted.

On motion of Mr. Hodde, the following amendment was adopted:

In section 2, page 8, line 30 of the engrossed bill, being page 5, line 32 of the printed bill, after the word and figure "section 4 (g)" insert the following: "or section 4 (h)"

On motion of Mr. Hodde, the following amendment was adopted:

In section 2-A, page 9, line 24 of the engrossed bill, being line 7 of the House committee amendment thereto, after the comma (,) following "(f)" strike the word and letter "and (g)" and insert in lieu thereof: "* * * * (g) and (h)"

On motion of Mr. Hodde, the following amendment was adopted:

On page 10, line 20 of the engrossed bill, being page 6, line 18 of the printed bill, immediately following section 3 insert a new section to be known as "section 3-A" to read as follows:

"Sec. 3-A. Section 14, Chapter 180, Laws of 1935, is amended to read as follows:

"Section 14. It is not the purpose of this title that the taxes herein levied upon persons engaging in business shall be construed as taxes upon the purchasers or customers, but it is the intention that such taxes shall be levied upon, and collectible from, the person engaging in the business activities herein designated and that such taxes shall constitute a part of the operating overhead of such persons engaging in business: *Provided, That this section shall not apply to taxes levied by section 4 (h).*"

On motion of Mr. Powell, the following amendment to the amendment by Mr. Hodde was adopted:

Amend the amendment by Mr. Hodde inserting a new section 3-A, strike the period (.) at the end of the underscored matter, insert in lieu thereof a comma (,) and add the following: "*which shall be construed as taxes upon the purchasers or customers and collectible by the taxpayer.*"

Mr. Hodde moved the adoption of the following amendment:

In section 18, page 29, lines 14 to 21, inclusive, of the engrossed bill, being the House committee amendment on page 16 to sub-paragraph (a) of the printed bill, strike the whole of subparagraph (a) and insert in lieu thereof the following:

"(a) Upon every person engaging within this state in business as an operator of any pinball machine, iron claw machine, traveling crane or other similar mechanical device wherein the element of skill or a combination of the elements of chance and skill is involved in determining a payout to the player, as to such persons the amount of tax on such business shall be equal to the gross operating income of the business multiplied by the rate of twenty per cent: *Provided, That this paragraph shall not be applicable to devices which require more than one operation by the player and where the result of any such operation by the player is determined by chance alone;*"

The motion was carried and the amendment was adopted.

On motion of Mr. Kinnear, the following amendment was adopted:

On page 40, line 2 of the engrossed bill, being page 22, line 35 of the printed bill, immediately following section 28 add a new section to be known as "section 29", to read as follows:

"Sec. 29. The rates of tax imposed in section 1 hereof shall be reduced on April 1, 1951 to the respective rates of tax in effect on April 30, 1949."

Amend the bill further by renumbering sections 29 and 30 to read "Sec. 30" and "Sec. 31".

On motion of Mr. Powell, the following amendment was adopted:

Immediately following the new section 29 on page 40 of the engrossed bill, being page 22 of the printed bill, add a new section to be known as "section 30" to read as follows:

"Sec. 30. The increase in rates of tax established by section 1 of this act shall not be applied against any value of products, gross proceeds of sales, or gross income of the business, as the case may be, realized under contracts entered into prior to March 10, 1949 and which do not permit the taxpayer to take such increase in rates of tax into account in fixing the amount due to the taxpayer thereunder."

Amend the bill further by renumbering the new section 30 to read "Sec. 31" and new section 31 to read "Sec. 32".

Mr. Carroll moved the adoption of the following amendment:

Amend the bill by adding two new sections to be known as "section 31" and "section 32", to read as follows:

"Sec. 31. Chapter 180, Laws of 1935, as amended, is further amended by adding thereto a new title to be designated Title XVII, reading as follows:

"Title XVII. Tax on Net Income.

"Section 159. For the purposes of this title unless otherwise required by context:

"(a) 'Person' means every natural person, fiduciary and corporation required to file a return with the Federal Government for federal income tax purposes;

"(b) 'Fiduciary' means a guardian, trustee, executor, administrator, receiver or any person, whether individual or corporate, acting in any fiduciary capacity for any person, trust or estate;

"(c) 'Corporation' includes corporations, joint stock companies, associations or common law trusts organized or conducted for profit; it includes both domestic and foreign corporations;

"(d) 'Domestic corporation' means any corporation organized and existing under the laws of this state;

"(e) 'Foreign corporation' means any corporation organized and existing under the laws of any other state or any country other than the United States;

"(f) 'Taxpayer' means any person domiciled in, earning income in, or doing business in this state and subject to the tax imposed by this title;

"(g) 'Doing business' includes any transaction or transactions within this state by any taxpayer in the course of his or its business or activity;

"(h) 'Income year' means the calendar year, or any fiscal year ending during such calendar year upon the basis of which net income is computed. Income year includes in the case of a return for a fractional part of a year the period for which such return is made. The first income year under this title shall end December 31, 1949, or in the case of a fiscal year on the last day of any month other than December, 1949, and after the effective date of the tax hereby imposed.

"Section 160. There is hereby levied and shall be collected from every taxpayer for the privilege of receiving income or doing business in this state a tax computed at the rate of two per cent (2%) of his or its net income received from and after May 1, 1949.

"Section 161. For the purposes of this title 'net income' shall mean, in the case of an individual or fiduciary, the amount of 'adjusted gross income' of the taxpayer, and in the cases of corporations, the amount of 'corporate net income' of the taxpayer, as defined in Sections 21(a) and 23(n) of the Federal Income Tax Code and shown by the return of the taxpayer to the Federal Government for federal personal or corporate income tax purposes for the same income year, after applying to such 'adjusted gross income' or 'corporate net income,' as the case may be, a deduction therefrom of one thousand dollars (\$1,000) to each taxpayer: *Provided*, That a taxpayer engaged in business within and without this state shall be taxed only on such income as is derived from business transacted and property located within this state. The amount of such income allocable to the State of Washington may be determined by an apportionment and separate accounting by the taxpayer when in the judgment of the Tax Commission such method will reasonably reflect the income properly assignable to this state, but otherwise the portion of the net income allocable to this state shall be determined by an apportionment on the basis of sales, purchases, expenses of manufacturing, payroll, value and situs of tangible property, or by reference to any combination of these or other factors, or by such other method as is fairly calculated to assign to the state, the portion of the entire net income of the taxpayer reasonably attributable to this state. The Tax Commission shall prescribe uniform and equitable rules and regulations to determine proper apportionment of the net income of such taxpayer to this state: *Provided further*, That in the calculation of capital gains and

losses in computing net income of a taxpayer, before applying the deduction of one thousand dollars (\$1,000), May 1, 1949 shall be used as the base date: *Provided further*, That in determining net income, income in the form of interest on securities of the Federal Government, whether they be direct or guaranteed obligations, shall first be excluded from the 'adjusted gross income' of the person and the 'corporate net income' of the corporation.

"Section 162. The first tax under this title shall be due and payable on or before March 15, 1950 for the income year ending December 31, 1949 or for any fiscal year ending during the income year beginning May 1, 1949 and ending December 31, 1949, and thereafter the tax shall be due and payable on or before March 15 for the preceding calendar year, if the taxpayer's accounting is on a calendar year basis; and on or before the fifteenth day of the third month following the close of the fiscal year if the taxpayer's accounting is on a fiscal year basis: *Provided*, That the Tax Commission may prescribe equitable rules and regulations for withholding at the source of the tax due from persons receiving salaries or wages, in which case the withheld remuneration shall be remitted monthly to the commission by employers, and as to income of such persons in excess of salaries or wages and income of other taxpayers the Tax Commission is authorized to formulate plans whereby the taxes may be paid in monthly or quarterly installments on estimates prepared at the beginning of the income year with adjustments to be made on or before the annual tax payment date.

"Section 163. The Tax Commission shall prescribe and furnish to taxpayers blank forms of reports and returns required under this title together with instructions as to their use and is authorized to require that each taxpayer furnish with his or its annual return a copy of the income tax return to the Bureau of Internal Revenue of the Federal Government. The commission is also authorized to make all such rules and regulations as may be necessary to effectuate and carry out the purposes of this title.

"Section 164. The state hereby pre-empt's the field of taxing incomes and no county, city, town, school district or other political subdivision of the state having the power to tax persons or property shall hereafter levy or collect any tax upon or measured by net income.

"Section 165. If the commission shall be of the opinion that any taxpayer has failed to include in a return filed, either intentionally or through error, any item of income which should be included under the provisions of this title, it may require from such taxpayer a return, or supplementary return, under oath, in such form as it shall prescribe, of all items of income which the taxpayer received during the year for which the return is made. If from a supplementary return, or otherwise, the commission finds that any items of income includible under this title, have been omitted from the original return, it may require the items so omitted to be disclosed to it, under oath of the taxpayer, and to be added to the original return.

"Section 166. If a taxpayer, with the approval of the commission changes the income year on the basis of which his or its net income is computed, he or it shall, at such time and in such manner as the commission may prescribe, make a separate return of net income received during the period intervening between the end of its former income year and the beginning of its new income year.

"Section 167. (a) Any taxpayer capable of exercising either directly or indirectly substantially the entire control of the business of another taxpayer, either by ownership or control of substantially the entire capital stock of such other taxpayer or otherwise, under regulations prescribed by the commission, may be permitted to make a consolidated return, showing the consolidated net income and such other information as the commission may require in order to compute the net income properly attributable to the state and to impose the tax upon the taxpayers concerned;

"(b) The commission may permit the filing of a consolidated return where substantially the entire control of two or more taxpayers liable to tax under this title is exercised by the same interests.

"(c) Where the commission has reason to believe that any taxpayer so conducts its business as either directly or indirectly to distort the true net income and the net income properly attributable to the state, whether by the arbitrary shifting of income, through price fixing, charges for service or otherwise, whereby the net income is arbitrarily assigned to one or another unit in a group of taxpayers carrying on business under a substantially common control or to one or another unit of the business of a taxpayer, it may require such facts as it deems necessary for the proper computation of the entire net income and the net income properly attributable to the state and in

determining the same the commission shall have regard to the fair profits which would normally arise from the conduct of the business.

"Section 168. All of the provisions of Title XVII of this act, except sections 187 and 197 shall have full force and application with respect to the taxes imposed under this title.

"Sec. 32. This act is necessary for the immediate support of the state government and its existing public institutions and shall take effect immediately."

Mr. Zent moved that the amendment be laid on the table without taking the bill with it.

The motion was lost.

Mr. O'Brien demanded the previous question and the demand was sustained.

Division was called for. The motion by Mr. Carroll was carried and the amendment was adopted.

The Speaker (Mr. Ford presiding) declared the House to be at ease for a few moments.

The Speaker (Mr. Ford presiding) called the House to order.

MOTION FOR RECONSIDERATION

Mrs. Hansen:

"Mr. Speaker, having voted on the prevailing side, I now move to reconsider the vote by which the amendment by Mr. Carroll to Engrossed House Bill No. 415 was adopted."

RECONSIDERATION

The Speaker (Mr. Ford presiding):

"A vote 'Aye' will be to reconsider the vote by which the amendment by Mr. Carroll was adopted."

Mr. Dillard demanded the previous question and the demand was sustained.

The motion by Mrs. Hansen to reconsider the amendment was carried.

The Speaker (Mr. Ford presiding) declared the question before the House to be the motion by Mr. Carroll to adopt the amendment.

Debate ensued.

Mr. Rasmussen demanded the previous question but the demand was not sustained.

Debate ensued.

Mr. Rosenberg moved that the amendment by Mr. Carroll be laid on the table without taking the bill with it.

The motion was carried.

PERSONAL PRIVILEGE

Mr. Carroll:

"Point of personal privilege, Mr. Speaker."

The Speaker (Mr. Ford presiding):

"Only if you are bothered by some of your colleagues."

Mr. Carroll:

"I am."

RULING BY THE SPEAKER

The Speaker (Mr. Ford presiding):

"The Speaker will rule you are out of order, Mr. Carroll."

Mr. Rosenberg moved that Mr. Carroll be allowed three minutes to speak.

The motion was carried.

Mr. Coughlin moved the adoption of the following amendment:

Amend the bill by adding a new section to be known as "section 31", to read as follows:

"Sec. 31. As used in this act:

"(a) 'Trade stimulator' means any board, spindle or other device containing a number of receptacles, in which are placed or to which are attached, slips of paper, cards or other substance in a capsule or otherwise, and upon which are written, painted or printed numbers, figures, insignia, characters, symbols, or combination thereof, and which may be punched or drawn or torn off from said board, device or spindle upon payment of a consideration, and a prize award may be obtained thereby.

"(b) 'Commission' means the state tax commission.

"(c) 'Distributor' means any person engaged in the business of selling, offering for sale, producing, manufacturing, jobbing, importing for sale or use, consuming, handling, removing, giving away or otherwise distributing any trade stimulator.

"(d) 'Person' means any individual, firm, copartnership, corporation, club or association, whether mutual, cooperative, fraternal, non-profit, or otherwise.

"The commission, upon application duly made, shall issue a distributor's license to any person who is a citizen and resident of this state upon payment to the commission of an annual license fee of one hundred dollars.

"Before use in any retail place of business, each trade stimulator shall have affixed thereto a stamp issued by the commission as follows:

"(a) When the trade stimulator contains five hundred or less purchases for the consideration of five cents per purchase, it shall require a twenty-five cent stamp.

"(b) When the trade stimulator contains one thousand or less purchases for the consideration of five cents per purchase, it shall require a fifty cent stamp.

"(c) When the trade stimulator contains fifteen hundred or less purchases for the consideration of five cents per purchase, it shall require a seventy-five cent stamp.

"(d) When the trade stimulator contains more than fifteen hundred purchases for the consideration of five cents per purchase, it shall require a one dollar stamp, and an additional twenty-five cent stamp for every five hundred purchases, or fraction thereof, over two thousand purchases.

"(e) The price of the above stamps is based upon a consideration of five cents per purchase and if said consideration for the purchase is ten cents, the stamp shall be double the amount as above set forth; if said consideration is fifteen cents per purchase, the stamp shall be three times the amount as above set forth; if said consideration is twenty cents per purchase, the stamp shall be four times the amount above set forth; if the consideration is twenty-five cents or more per purchase, then the stamp shall be five times the amount as above set forth.

"(f) If the consideration for the purchases varies on a single trade stimulator, the average consideration payable for the purchases shall be the determining factor in fixing the amount of the stamps required.

"All monies received by the commission for the licensing of distributors and retailers and for the sale of stamps, shall be placed in the general fund.

"Trade stimulators are declared to be lawful, and any person violating any of the provisions of this act shall be guilty of a gross misdemeanor.

"Each of the following acts is hereby declared to be a violation hereof:

"(a) To use or have in possession knowingly or intentionally any forged or counterfeit stamps;

"(b) For any person other than the tax commission or its duly authorized agent to sell any stamp provided herein;

"(c) To use any stamp more than once or to have in one's possession any stamp that has been used;

"(d) For any person to have in use in any place of business any trade stimulator unless the same shall have the proper stamp attached thereto;

"(e) For any person to perform any of the functions of a distributor without having a valid distributor's license;

"(f) To allow a minor to make a purchase from any trade stimulator.

"The commission is authorized to hold hearings concerning any violation of any of the provisions of this act and if the evidence proves an offense has been committed, the commission may enter an order suspending or revoking the license of the violator; and at such hearing the alleged violator shall be accorded all the rights of due process of law.

"The taxes imposed by this act shall be in addition to any and all other licenses, taxes and excises levied or imposed by the state or any municipal subdivision thereof.

"The tax commission of the state shall administer this act and in such administration shall have all the powers and duties conferred upon it by Titles XVIII, XIX, and XX, Chapter 180, Laws of 1935, as amended, and the provisions thereof in regard to the assessment, collection, refund, lien, enforcement and allocation of taxes imposed by that act shall equally apply, where applicable, to the assessment, collection, refund, lien, enforcement and allocation of the taxes herein imposed.

"The commission is authorized to prepare and obtain the necessary registration certificates for licenses hereunder, stamps and other forms required for application and effective administration of this act."

Debate ensued.

Mr. Rasmussen moved that the amendment by Mr. Coughlin be laid on the table without taking the bill with it.

Mr. Coughlin demanded a roll call but the demand was not sustained.

The motion by Mr. Rasmussen was carried and the amendment by Mr. Coughlin was laid on the table.

On motion of Mr. Hodde, the following amendment to the title was adopted:

Amend the title, strike the whole thereof and insert in lieu thereof the following: "An Act relating to revenue and taxation; revising the rates of the tax imposed by section 4, Chapter 180, Laws of 1935, as amended, and making additional classifications in said section; revising certain definitions in said Chapter 180, as amended, and adding certain definitions thereto; revising certain provisions relative to the application, administration and enforcement of said Chapter 180, as amended; providing certain additional exemptions in said Chapter 180, as amended; clarifying certain of the provisions of said Chapter 180, as amended; amending sections 4, 5, 6, 7, 14, 16, 19, 21, 31, 32, 35, 37, 40, 53, 82, 83, 87, 91, 92, 96, 99, 188, 189, 191, 192, 193, 202, 203, and 219 of said Chapter 180, as amended; repealing section 14 (a) of said Chapter 180, as amended; adding a section 204-A to said Chapter 180, as amended; and declaring an emergency and providing that this act shall take effect May 1, 1949."

The House resumed consideration of bills on third reading.

THIRD READING OF BILLS

MOTION

On motion of Mr. Rasmussen, the rules were suspended, Re-Engrossed House Bill No. 415 was advanced to third reading, the second reading considered the third, and the bill was placed on final passage.

The Clerk called the roll on the final passage of Re-Engrossed House Bill No. 415, and the bill passed the House by the following vote: Yeas, 74; nays, 22; absent or not voting, 3.

Those voting yea were: Representatives Adams, Allen, Anderson (B. Roy), Anderson (Eva), Ball, Bargreen, Bassett, Bergevin, Bernethy, Blair, Boede, Brown (Henry A.), Brown (Vaughan), Buse, Callow, Carmichael, Carty, Comfort, Cory, Dillard, Donohue, Eldridge, Farrington, Ford, Forshee, Frayn, Gallagher (Bernard J.), Gallagher (Michael J.), Hansen, Henderson, Hoefel, Holliday, Hoopingarner, Jeffreys, Jones (Mrs. Vincent F.), Kelley, King, Kinnear, Knoblauch, Kupka, Mardesich, McPherson, Miller (C. C.), Miller (Clyde J.), Miller (Floyd C.), Mohr, Morris, Neill, O'Brien, Pedersen, Powell, Rasmussen, Raugust, Rhodes, Ridgway, Riley, Rosenberg, Sandison, Shannon, Simmons, Smiley, Smith (Ralph A.), Sprague, Testu, Thompson, Vane, Washington, Watson, Wedekind, Wilson, Winberg (Andrew), Wyatt, Zent, Mr. Speaker—74.

Those voting nay were: Representatives Beierlein, Brown (Gordon J.), Carroll, Coughlin, Gordon, Hallauer, Hillyer, Hofmeister, Johnston, Jones

(John R.), Lester, Olson, Paulsen, Roderick, Schumann, Shadbolt, Sisson, Smith (Vernon A.), Stonecipher, Sutherland, Woodall, Young—22.

Those absent or not voting were: Representatives Foster, Nunamaker, Wenberg (Oscar)—3.

Re-Engrossed House Bill No. 415, having received the constitutional majority, was declared passed.

There being no objection, the title of the bill was ordered to stand as the title of the act.

Mr. Rasmussen moved that Re-Engrossed House Bill No. 415 be ordered immediately transmitted to the Senate.

MOTION

On motion of Mr. Rasmussen, the House dispensed with further proceedings under the call of the House.

The Speaker (Mr. Ford presiding) declared the House to be at ease until the next sound of the gavel.

The Speaker called the House to order.

On motion of Mr. Rasmussen, the House reverted to the fourth order of business.

RESOLUTION

By Mr. King:

Be It Resolved, By the House of Representatives of the State of Washington, in Legislative Session assembled:

WHEREAS, The health of millions of Americans is inadequately safeguarded at the present time; and

WHEREAS, The American Medical Association has failed to present to the American people an adequate health program; and

WHEREAS, President Truman, during the Presidential campaign, promised an adequate health program for all the people and has now presented to Congress legislation implementing his program,

Now, Therefore, *Be It Resolved*, By the House of Representatives of the State of Washington, that the Honorable Harry S. Truman, President of the United States, be commended for his courageous fight in behalf of the health of the people of our country; and

Be It Further Resolved, That the Chief Clerk of the House of Representatives of the State of Washington transmit this resolution to the Honorable Harry S. Truman, and that a copy thereof be sent to each member of the Congressional delegation from the State of Washington.

Mr. King moved the adoption of the resolution.

Division was called for. The motion was carried and the resolution was adopted on a rising vote.

REPORT OF ENROLLMENT

House of Representatives,
Olympia, Wash., March 10, 1949.

MR. SPEAKER:

We, of your Committee on Engrossment and Enrollment, to whom was referred Enrolled House Bill No. 561, have compared same with the engrossed bill and find it correctly enrolled.

A. B. COMFORT, Chairman.

We concur in this report: Robert E. Blair, Clayton Farrington.

(C. C.), Miller (Clyde J.), Miller (Floyd C.), Mohr, Neill, Nunamaker, O'Brien, Olson, Paulsen, Pedersen, Raugust, Rhodes, Riley, Roderick, Rosenberg, Sandison, Simmons, Smiley, Smith (Ralph A.), Sutherland, Testu, Thompson, Vane, Washington, Watson, Wedekind, Wilson, Winberg (Andrew), Wyatt, Young, Mr. Speaker—72.

Those voting nay were: Representatives Comfort, Cory, Hallauer, Henderson, Jeffreys, Powell, Rasmussen, Schumann, Shadbolt, Shannon, Sisson, Smith (Vernon A.), Sprague, Stonecipher, Zent—15.

Those absent or not voting were: Representatives Blair, Boede, Dillard, Forshee, Foster, Gordon, Hoefel, Hofmeister, Morris, Ridgway, Wenberg (Oscar), Woodall—12.

Engrossed House Bill No. 526, having received the constitutional majority, was declared passed.

There being no objection, the title of the bill was ordered to stand as the title of the act.

On motion of Mr. Riley, Engrossed House Bill No. 526 was ordered immediately transmitted to the Senate.

MESSAGES FROM THE SENATE

Senate Chamber,
Olympia, Wash., March 10, 1949.

MR. SPEAKER:

The Senate has passed: Re-Engrossed House Bill No. 415, with the following amendments:

Amend section 1, page 1, line 14 of the re-engrossed bill, strike all the matter in said section following the words "Section 4." and insert in lieu thereof the following:

"From and after the first day of May, 1935, there is hereby levied and there shall be collected from every person a tax for the act or privilege of engaging in business activities. Such tax shall be measured by the application of rates against value of products, gross proceeds of sales, or gross income of the business, as the case may be, as follows:

"(a) Upon every person engaging within this state in business as an extractor; as to such persons the amount of the tax with respect to such business shall be equal to the value of the products, *including by-products*, extracted for sale or for commercial or industrial use, multiplied by the rate of one-quarter of one per cent;

"The measure of the tax is the value of the products, *including by-products*, so extracted, regardless of the place of sale or the fact that deliveries may be made to points outside the state;

"(b) Upon every person *except persons taxable under paragraph (2) of subsection (d)* below engaging within this state in business as a manufacturer; as to such persons the amount of the tax with respect to such business shall be equal to the value of the products, *including by-products*, manufactured, multiplied by the rate of one-quarter of one per cent;

"The measure of the tax is the value of the products, *including by-products*, so manufactured regardless of the place of sale or the fact that deliveries may be made to points outside the state;

"(c) Upon every person engaging within this state in the business of making sales at retail; as to such persons, the amount of tax with respect to such business shall be equal to the gross proceeds of sales of the business, multiplied by the rate of one-quarter of one per cent;

"(d) (1) Upon every person engaging within this state in the business of buying wheat, oats, corn and barley, but not including any manufactured or processed products thereof, and selling the same at wholesale; the tax herein imposed shall be equal to the gross proceeds derived from such sales multiplied by the rate of one one-hundredth of one per cent;

"(d) (2) Upon every person engaging within this state in the business of manufacturing wheat into flour; as to such persons the amount of tax with respect to such business shall be equal to the value of the flour manufactured, multiplied by the rate of one-eighth of one per cent:

"(e) Upon every person except persons taxable under sub-section (d) above engaging within this state in the business of making sales at wholesale; as to such persons the amount of tax with respect to such business shall be equal to the gross proceeds of sales of such business multiplied by the rate of one-quarter of one per cent;

"(f) Upon every person engaging within this state in the business of: (1) Printing, and of publishing newspapers, periodicals or magazines; (2) building, repairing or improving any publicly owned street, place, road, highway, bridge or trestle which is used, or to be used, primarily for foot or vehicular traffic; as to such persons, the amount of tax on such business shall be equal to the gross income of the business multiplied by the rate of one-quarter of one per cent;

"(g) Upon every person engaging within this state in any business activity other than or in addition to those enumerated in subsections (a), (b), (c), (d), (e) and (f) above; as to such persons the amount of tax on account of such activities shall be equal to the gross income of the business multiplied by the rate of one-half of one per cent. This subsection includes, among others, and without limiting the scope hereof (whether or not title to materials used in the performance of such businesses passes to another by accession, confusion or other than by outright sale), persons engaged in the business of rendering any type of service which does not constitute a 'sale at retail' or a 'sale at wholesale' as defined herein."

Amend section 2, line 27, page 4 of the re-engrossed bill, after the words and figures "4 (f) (2)" strike the remainder of the sentence and insert in lieu thereof the following: "and section 4 (g) hereof"

Amend section 2, line 1 of page 9 of the re-engrossed bill strike the words and figures "or section 4 (h)"

Amend section 2-A, line 27, page 9 of the re-engrossed bill, after the comma (,) following "(f)" strike the word and letters " * * * * (g) and (h)" and insert in lieu thereof the words "and (g)"

Amend section 3-A, line 24, page 10 through and including line 3, page 11 of the re-engrossed bill by striking the whole thereof.

Amend section 29, lines 2 through 4, inclusive, page 40 of the re-engrossed bill by striking the whole thereof.

Amend section 30, lines 5 through 10, inclusive, page 40, of the re-engrossed bill, by striking the whole thereof and renumber section 31 and section 32 to read "Sec. 29" and "Sec. 30"

Amend the title, by striking the whole thereof and insert in lieu thereof the following:

"An Act relating to revenue and taxation; amending sections 4, 5, 6, 7, 16, 19, 21, 31, 32, 35, 37, 40, 53, 82, 83, 87, 91, 92, 99, 188, 189, 191, 192, 193, 202, 203, and 219 of Chapter 180, Laws of 1935, as amended; repealing section 14 (a), Chapter 180, Laws of 1935, as amended; adding a section 204-A to said Chapter 180, Laws of 1935, as amended; and declaring an emergency and providing that this act shall take effect May 1, 1949.", and the same is herewith transmitted.

HERBERT H. SIELER, Secretary.

MOTION

On motion of Mr. Ford, the House refused to concur in the Senate amendments to Re-Engrossed House Bill No. 415, and asked the Senate to recede therefrom.

Senate Chamber,
Olympia, Wash., March 10, 1949.

MR. SPEAKER:

The Senate has passed: Engrossed House Bill No. 525, with the following amendments:

Following the words and figures "March 31, 1951, except as otherwise provided." in line 31, page 1, of the engrossed bill, strike the balance of the bill and insert in lieu thereof the following:

"FROM THE GENERAL FUND

LOCAL IMPROVEMENT ASSESSMENTS:

Sundry municipalities, for local improvement assessments against state-owned lands as follows: *Provided*, That the payments for local improvement assessments

MOTION

Mr. Ford moved that the House request the Senate to return Re-Engrossed House Bill No. 415 for the purpose of concurring in the Senate amendments thereto.

The motion was carried.

The Speaker declared the House to be at ease.

The Speaker called the House to order.

MESSAGE FROM THE SENATE

Senate Chamber,
Olympia, Wash., March 10, 1949.

MR. SPEAKER:

The Senate has adopted the report of the Conference Committee to whom was referred Engrossed House Bill No. 502, with Senate amendments thereto and has granted said committee the powers of Free Conference, and the report of the Conference Committee is herewith transmitted.

HERBERT H. SIELER, *Secretary*.

REPORT OF CONFERENCE COMMITTEE

Olympia, Wash., March 10, 1949.

MR. PRESIDENT:

MR. SPEAKER:

We, of your Conference Committee, to whom was referred Engrossed House Bill No. 502, entitled: "An Act providing funds for the construction of public school plant facilities; authorizing the issuance and sale of state general obligation bonds and the levy of taxes to pay said bonds; making an appropriation and providing for submission of this act to a vote of the people.", have had the same under consideration, and we are unable to agree and ask for the powers of Free Conference.

Senate Members

VIRGIL LEE
ROSS W. EARLYWINE
DAVID C. COWEN

House Members

A. B. COMFORT
ROBERT M. FORD
OLE H. OLSON

MOTION

On motion of Mr. Olson, the House adopted the report of the Conference Committee on Engrossed House Bill No. 502, and granted the committee the powers of Free Conference.

MESSAGES FROM THE SENATE

Senate Chamber,
Olympia, Wash., March 10, 1949.

MR. SPEAKER:

The Senate has granted the request of the House for the return of Re-Engrossed House Bill No. 415 for the purpose of concurring in the Senate amendments, and said bill is herewith transmitted.

HERBERT H. SIELER, *Secretary*.

MOTION

On motion of Mr. Olson, the House concurred in the Senate amendments to Re-Engrossed House Bill No. 415.

The Speaker declared the question before the House to be the final passage of Re-Engrossed House Bill No. 415, as amended by the Senate.

The Clerk called the roll on the final passage of Re-Engrossed House Bill No. 415, as amended by the Senate, and the bill passed the House by the following vote: Yeas, 76; nays, 7; absent or not voting, 16.

Those voting yea were: Representatives Adams, Anderson (B. Roy), Anderson (Eva), Ball, Bargreen, Bassett, Beierlein, Bergevin, Bernethy, Blair, Boede, Brown (Henry A.), Buse, Callow, Carmichael, Carroll, Carty, Comfort, Coughlin, Dillard, Donohue, Eldridge, Farrington, Ford, Forshee, Gallagher (Bernard

J.), Gallagher (Michael J.), Gordon, Hallauer, Hansen, Henderson, Hillyer, Hoefel, Holliday, Hoopingarner, Jeffreys, Jones (John R.), Jones (Mrs. Vincent F.), Kelley, King, Knoblauch, Kupka, Mardesich, McPherson, Miller (C. C.), Miller (Clyde J.), Miller (Floyd C.), Mohr, Morris, Neill, Olson, Pedersen, Raugust, Rhodes, Roderick, Rosenberg, Sandison, Schumann, Shadbolt, Simmons, Sisson, Smith (Ralph A.), Smith (Vernon A.), Sprague, Stonecipher, Sutherland, Testu, Thompson, Vane, Washington, Wedekind, Wenberg (Oscar), Woodall, Wyatt, Zent, Mr. Speaker—76.

Those voting nay were: Representatives Brown (Gordon J.), Brown (Vaughan), Nunamaker, Rasmussen, Smiley, Winberg (Andrew), Young—7.

Those absent or not voting were: Representatives Allen, Cory, Foster, Frayn, Hofmeister, Johnston, Kinnear, Lester, O'Brien, Paulsen, Powell, Ridgway, Riley, Shannon, Watson, Wilson—16.

Re-Engrossed House Bill No. 415, having received the constitutional majority, was declared passed as amended by the Senate.

MESSAGE FROM THE SENATE

Senate Chamber,
Olympia, Wash., March 10, 1949.

MR. SPEAKER:

The Senate has adopted the report of the Free Conference Committee on Engrossed House Bill No. 502 and the Senate amendments thereto, and has passed the bill as amended by the Free Conference Committee, and copies of the Free Conference Report together with the bill are herewith transmitted.

HERBERT H. STELER, *Secretary*.

REPORT OF FREE CONFERENCE COMMITTEE

Olympia, Wash., March 10, 1949.

MR. PRESIDENT:

MR. SPEAKER:

We, of your Free Conference Committee, to whom was referred Engrossed House Bill No. 502, entitled: "An Act providing funds for the construction of public school plant facilities; authorizing the issuance and sale of state general obligation bonds and the levy of taxes to pay said bonds; making an appropriation and providing for submission of this act to a vote of the people.", have had the same under consideration, and we recommend that the Senate recede from its amendments to said bill and that said bill do pass with the following amendments:

In section 1, page 1, line 21 of the engrossed bill, after the word "shall" and before the word "contain" insert the following: "pledge the full faith and credit of the State of Washington and"

In section 4, page 2, line 8 of the engrossed bill, after the abbreviation and figure "Sec. 4." strike the balance of the section and insert in lieu thereof the following: "The Public School Building Bond Redemption Fund is hereby created in the State Treasury, which fund shall be exclusively devoted to the payment of interest on and retirement of the bonds authorized by this act. The State Finance Committee shall, on or before June 30th of each year, certify to the State Treasurer the amount needed in the ensuing twelve (12) months to meet bond retirement and interest requirements and the State Treasurer shall thereupon deposit such amount in said Public School Building Bond Redemption Fund from moneys transmitted to the State Treasurer by the Tax Commission and certified by the Tax Commission to be sales tax collections and such amount certified by the State Finance Committee to the State Treasurer shall be a first and prior charge against all retail sales tax revenues of the State of Washington.

"The owner and holder of each of said bonds or the trustee for any of the bonds may by mandamus or other appropriate proceeding require and compel the transfer and payment of funds as directed herein."

In section 7, page 2, lines 26 and 27 of the engrossed bill, after the words "at the" in line 26 strike the following: "next general election, whether regularly or specially called" and insert in lieu thereof: "general election to be held in this state on the Tuesday next succeeding the first Monday in November, 1950"

Engrossed House Bill No. 504, having received the constitutional majority, was declared passed as amended by the Senate.

The Speaker declared the House to be at ease until the next sound of the gavel.

The Speaker called the House to order.

REPORTS OF ENROLLMENT

House of Representatives,
Olympia, Wash., March 10, 1949.

MR. SPEAKER:

We, of your Committee on Engrossment and Enrollment, to whom was referred Enrolled House Bill No. 415, have compared same with the re-engrossed bill and find it correctly enrolled.

A. B. COMFORT, *Chairman*.

We concur in this report: Jeanette Testu, Daily S. Wyatt.

House of Representatives,
Olympia, Wash., March 10, 1949.

MR. SPEAKER:

We, of your Committee on Engrossment and Enrollment, to whom was referred Enrolled House Bill No. 502, have compared same with the engrossed bill and Free Conference Committee Report and find it correctly enrolled.

A. B. COMFORT, *Chairman*.

We concur in this report: Howard T. Ball, Carl F. Mohr.

House of Representatives,
Olympia, Wash., March 10, 1949.

MR. SPEAKER:

We, of your Committee on Engrossment and Enrollment, to whom was referred Enrolled House Bill No. 503, have compared same with the engrossed bill and find it correctly enrolled.

A. B. COMFORT, *Chairman*.

We concur in this report: Howard T. Ball, Carl F. Mohr.

House of Representatives,
Olympia, Wash., March 10, 1949.

MR. SPEAKER:

We, of your Committee on Engrossment and Enrollment, to whom was referred Enrolled House Bill No. 504, have compared same with the engrossed bill and find it correctly enrolled.

A. B. COMFORT, *Chairman*.

We concur in this report: Howard T. Ball, Carl F. Mohr.

The Speaker announced he was about to sign House Bill No. 415; also House Bill No. 502; also House Bill No. 503; also House Bill No. 504.

MOTION

Mrs. Anderson (Eva) moved that a letter of thanks be written to Mr. and Mrs. Knoblauch of Sumner for the fine rhubarb sauce presented to the members of the House.

The motion was carried.

The Speaker appointed Mrs. Anderson to draft the communication.

MESSAGES FROM THE SENATE

Senate Chamber,
Olympia, Wash., March 10, 1949.

MR. SPEAKER:

The President has signed: House Bill No. 415; also House Bill No. 502; also House Bill No. 503; also House Bill No. 504, and the same are herewith transmitted.

HERBERT H. SIELER, *Secretary*.