No. 42558-1-II

DIVISION II, COURT OF APPEALS
OF THE STATE OF WASHINGTON

GRAYS HARBOR ENERGY LLC

Plaintiff/Appellant,

v.

GRAYS HARBOR COUNTY

Defendant/Respondent.

ON APPEAL FROM THURSTON COUNTY SUPERIOR COURT
(Hon. Carol Murphy)

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

Grays Harbor County makes four primary points:

- *First*, the County contends that Grays Harbor Energy is seeking an *exemption* from taxation, and that the property tax statutes provide no exemption for personal property during "new construction" or "construction in progress" (CIP). Except Grays Harbor Energy is *not* seeking a tax exemption for its personal property; rather, it is asking the Court to apply the plain and unambiguous language of a duly promulgated rule of the Department of Revenue, which states that the only property that is allowed to be assessed and taxed during "new construction" is *real property for which a building permit must be issued.* WAC 458-12-342(1). "New construction," of course, can consist of both real property and personal property, as this case so readily demonstrates. But by limiting assessments for new construction only to real property for which a building permit must be issued, Rule 342(1) mandates that all other property will not be assessed or taxed during this period. This is not an exemption from taxation, but a declaration of to which property the property tax can apply during new construction -- a rule based on established valuation principles that recognize that personal property has little or no value during "new construction."

- *Second*, the County says that other personal property assessment and taxation statutes must be read in conjunction with WAC 458-12-342(1) to ascertain the meaning of this regulation. The County is correct at least as a matter of approach, because rules of statutory interpretation and construction are to be applied when interpreting an agency regulation, and under our state's plain meaning rule of statutory interpretation courts look to related statutes to determine legislative intent about the provision in question. WAC 458-12-342(1) is the Department of Revenue's administrative interpretation of what may be assessed and taxed by counties during "new construction," and the Department is given wide latitude in the property tax assessment and taxation statutes (Title 84 RCW) to make this kind of determination. The Department is directed by law to exercise general supervision and control over county assessors and treasurers and their administration of the assessment and taxation of property in this state. RCW 84.08.010(1). This authority is intended to give broad direction to the county officials that, in the Department's judgment, is just and necessary, and includes the formulation of rules and regulations to govern the assessment of real and personal property. RCW 84.08.010(2), 84.08.070. Rule 342(1) is a regulation that interprets property tax statutes, and which recognizes that it makes no sense to tax personal property (such as the power generation machinery and equipment at issue here) when that property has little or no value until the structures that will contain it are completed. Rule 342(1) is a proper regulation promulgated by the Department under its statutory authority, and the County has no right to disregard its mandate.

- *Third*, the County insists that state law *requires* that Grays Harbor Energy's personal property be subject to assessment and taxation during "new construction." While the general rule may be that all property is subject to taxation unless specifically exempted, by the promulgation of Rule 342(1) the Department has set forth its understanding of how this general rule is to apply to new construction. Rule 342(1) is consistent with well-established valuation principles, which recognize that the value of personal property typically is not realized until it is fully installed and operational. This "highest and best use" valuation principle allows only real property to be assessed and taxed while property is in a state of new construction. This is a reasonable interpretation of generally accepted valuation practices, and it is one the Department has been authorized by the Legislature to make.

- *Finally*, the County argues that as an exemption from taxation WAC 458-12-342 must be interpreted in favor of taxation and against the taxpayer (Grays Harbor Energy) under rules of construction applicable to tax exemption or deduction statutes and regulations. But again, Rule 342(1) does not create an *exemption* from taxation; instead, it is a rule of tax *application* – how personal property is to be assessed and taxed during new construction. Under this default rule, any ambiguity in the regulation's terms (if the Court finds it to be ambiguous) must be interpreted *in favor* of Grays Harbor Energy and *against* the government authority attempting to impose the tax.

II. ARGUMENT IN REPLY

A. This Court's Prior Decision Confirmed That Grays Harbor Energy's Property Was "New Construction."

The County argues that this Court in *Grays Harbor Energy, LLC v. Grays Harbor County*, 151 Wn. App. 550, 213 P.3d 609 (2009), *rev.*

denied, 168 Wn.2d 1014, 227 P.3d 852 (2010) (*Grays Harbor Energy I*), "did not address Grays Harbor Energy's argument with respect to WAC 458-12-342(1)." County's Brief at 5. This Court held that Grays Harbor Energy is an "electric light and power company" under RCW 84.12.200(4), the classification of its property is controlled by RCW 84.12.280, and under that statute the property at issue here is personal property.[1] *Grays Harbor Energy I* at 554. Moreover, whether Grays Harbor Energy's personal property was taxable during CIP was squarely before this Court in the prior appeal. CP 309-344 are excerpts from pleadings in the record, showing that WAC 458-12-342 was before this Court in *Grays Harbor Energy I.* While this Court did not *expressly* address Grays Harbor Energy's argument on WAC 458-12-342(1), the implications of the Court's decision were nonetheless clear, and those implications are also consistent with the plain language of Rule 342(1).

B. The Plain Language of WAC 458-12-342(1) Directs That Only Real Property for Which a Building Permit Is Required Is Subject to Assessment and Taxation During "New Construction"; Grays Harbor Energy's Power Generation Machinery and Equipment Is Personal Property and Therefore Was Not Subject to Assessment or Taxation in the Years 2004 Through 2007 Because It Was During New Construction.

"Rules of statutory construction apply to administrative rules and regulations." *State v. Burke*, 92 Wn.2d 474, 478, 598 P.2d 395 (1979). "As in statutory interpretation, where a regulation is clear and

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[1] RCW 84.12.280 states in relevant part that "all of the operating property other than lands and buildings of electric light and power companies . . . shall be assessed and taxed as personal property"

unambiguous, words in a regulation are given their plain and ordinary meaning unless a contrary intent appears." *Silverstreak, Inc. v. Dep't of Labor & Indus.*, 159 Wn.2d 868, 881, 154 P.3d 891 (2007) (citing *In re Estate of Little*, 106 Wn.2d 269, 283, 721 P.2d 950 (1986); *Hewson Constr., Inc. v. Reintree Corp.*, 101 Wn.2d 819, 826, 685 P.2d 1062 (1984)).

The plain language of WAC 458-12-342(1), titled "New Construction -- Assessment," provides direction to county assessors in their assessments of "new construction" for property taxation purposes:

- *First*, any "new construction" subject to assessment must be covered under the provisions of RCW 36.21.070 and 36.21.080. These statutes address the appraisal of *buildings* covered under building permits (RCW 36.21.070), as well as when such building are to be placed on the assessment rolls (RCW 36.21.080). Consistent with these statutes, WAC 458-19-005(p) is a Department of Revenue regulation that defines "new construction" to mean "the construction or alteration of any property for which a building permit was issued, or should have been issued, . . . which results in an increase in the value of the property."

- *Second*, relying on RCW 36.21.080 "new construction" must be "assessed at its true and fair value as of July 31st each year regardless of its percentage of completion." WAC 458-12-342(1). This is a deviation from the normal practice of assessing real property as of January 1 each year. RCW 84.40.020.

- *Third*, if "new construction continues after July 31 of any year, the increase in value of the property due to the new construction that occurs between August 1 of that year through July 31 of the following year is added to the assessment roll as 'new construction' in the following year." WAC 458-12-342(1).

- *Fourth*, "new construction" is defined to mean "only . . . *real property . . . for which a building permit was issued or should have been issued*[.]" *Id.* (emphasis added). This provision is clear and unambiguous: The only "new construction" is subject to assessment is (1) real property (2) for which a building permit was issued or should have been issued.

The property at issue here consisted of power generation machinery and equipment, which was not subject to any building permits. The undisputed evidence before the trial court established that there were four buildings within the Grays Harbor Energy property covered by building permits -- (i) the office/control room building, (ii) the warehouse, (iii) the water treatment building, and (iv) the gas regulation building. CP 67 (Donovan Declaration (04/06/2011) § 25). The remaining property, including certain modular control equipment cabins, were not considered "buildings"; instead, they were part of the electrical power generating plant, and they were not themselves the subject of a building permit. *Id.* The provisions in Rule 342(1) for assessing property as "new construction" thus applied only to the four buildings at the Grays Harbor Energy plant site covered under the building permits.

If both real property subject to building permits and other (personal) property not covered by building permits were subject to assessment as "new construction" -- as the County contends -- there would be no need for Rule 342(1) to include the statement limiting "new construction" to "only . . . real property... for which a building permit was issued or should have been issued." The County's interpretation effectively reads the language "[n]ew construction as used in this section refers only to real property . . ." completely out of the regulation, which flies in the face of the rule that courts must avoid interpreting a statute in a manner that renders any word superfluous. *Satterlee v. Dep't of Soc. & Health Servs.*, 131 Wn. App. 97, 105 125 P.3d 1003 (2006) (citing *McGinnis v. State*, 152 Wn.2d 639, 646, 99 P.3d 1240 (2004)) ("[W]e [will] render no word in a statute superfluous").

The County argues that WAC 458-12-342 does not address the assessment or taxation of personal property; instead, the County believes Rule 342 is a regulation that applies only to real property during "new construction" and which leaves the County free to tax personal property. County's Brief at 5-11. This argument ignores the statutory authority under which the rule was promulgated, and the plain language of the rule itself. The rule states that taxation of property under new construction extends only to real property for which a building permit must be issued, and this rule was promulgated under statutory authority that allows the Department to tell county assessors what property they may tax and when they may tax it. If the Department's regulation intended personal property to be fully taxable during new construction, it would have added personal property to the rule. Because Rule 342(1) does not include personal property within its provisions, the County is asking this Court to add those words. But doing so would violate the rule of interpretation prohibiting courts from adding words or clauses to an unambiguous statute or rule when the statute or rule does not include that language. *State v. Kintz*, 169 Wn.2d 537, 549-550, 238 P.3d 470 (2010) (citing *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003); *State v. Thompson*, 151 Wn.2d 793, 800-01, 92 P.3d 228 (2004)).

If all property of any kind is subject to assessment during new construction, why does the rule distinguish between real and personal property in this fashion, and declare that only real property for which a building permit must be issued qualifies as new construction? And if both real and personal property is taxable during CIP, why did the County previously insist on classifying *all* of Grays Harbor Energy's property as real property while the plant was only partially constructed? The answers to these questions are obvious: because WAC 458-12-342(1) precluded the County from assessing personal property while the plant was "new construction," and in an attempt to evade this limitation the County attempted to reclassify personal property as real property.

This conclusion is confirmed by the County's prior arguments in this litigation. Up to the time this Court rendered its decision, the County argued that *all* of Grays Harbor Energy's assets were real property. That argument would not have been necessary if all property, both real and personal, was assessable and taxable during construction in process (CIP). There was no reason for the County to take such a position unless the personal property was for some reason *not* subject to assessment -- and that reason, it by now should be clear, was the plain and unambiguous mandate of Rule 342(1).

C. Rule 342(1) Is Based on a Common Sense View of Assessment Practices, and Well-Established Principles of Valuation.

Rule 342(1) constitutes the recognition by the Department of Revenue that personal property, like the power generation machinery and equipment here, has little or no value while in a new construction status. Both the undisputed facts in this case and general principles of valuation support this conclusion.

During the four tax assessment years (2004-2007) in question some of the equipment was partially installed, like the two General Electric 7241FA combustion turbine generators, CP 48 (Donovan Declaration 03/13/2007 ¶ 8), but most of the equipment was still crated and located in two storage warehouses, or on a ten acre laydown area at the project site (CP 50 (*id.* ¶ 12). In other words: The personal property was in bits and pieces all over the place, and of no actual *use* to Grays Harbor Energy.

The undisputed evidence before the trial court was also that if the project was terminated, *i.e.*, construction permanently deferred, the project site would have to have been cleaned up, the land returned to its original condition, and all of the equipment would have been scrapped. CP 52, 53 (*id.* ¶¶ 19, 21). If the power generation equipment in question that was strewn all over the project site had value that could be assessed, as the County contends, why would that equipment have been scrapped had the project been terminated? At the time the project was acquired in 2005, Grays Harbor Energy believed that that the two partially assembled combustion turbine generators did have some value in the used equipment (secondary) marketplace. *Id.* (¶ 18). But it turned out that even this equipment had little or no value, in the secondary market or otherwise, because the costs to disassemble, pack, and move the turbine generators was equal to or more than the value of the machinery as scrap. CP 188 (Donovan Declaration (06/29/2011) ¶ 8). These facts confirm specifically what WAC 458-12-342(1) recognizes generally -- that personal property in an uninstalled, partially installed, or non-operating state suffers from substantial functional obsolescence.[2]

Accordingly, the facts of this case confirm why it is entirely reasonable and a matter of economic common sense to exclude personal property from property assessment and collection during new construction. This rule of assessment is also consistent with the statement

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[2] The term "functional obsolescence" is defined to mean:

> "a reduction in utility of the structure, or of one or more of its components, resulting from the decreased capacity of the structure or component to perform the function for which it is intended . . . It is labeled 'functional obsolescence' because it reflects the fact that the structural component is outmoded or inefficient, judged by current market standards of performance or acceptability." B. Boyce & W. Kinnard, Jr., *Appraising Real Property* 298 (1984).

Weyerhaeuser Co. v. Easter, 126 Wn.2d 370, 377, n.3, 894 P.2d 1290 (1995) (edit's the court's). Machinery and equipment that is not installed or is partially installed, still in crates, or laid out on the ground at a project site, is in a state of functional obsolescence because it is unquestionably "inefficient" and clearly cannot "perform the function for which it is intended."

of the International Association of Assessing Officers (IAAO) that the highest and best use of assets like power generation equipment are as "fully installed and operational to [their] maximum productivity." *Standards on Valuation of Personal Property* (2005) at 8. When personal property is partially installed, boxed or crated, in storage warehouses, or laying out on the ground at a project site, the equipment has no value other than as scrap, as the undisputed evidence before the trial court disclosed. This is especially true here, where the property is part of a complex industrial facility that was specifically designed and engineered to operate on this site. The Department of Revenue itself acknowledges this point in its published literature, giving similar instructions elsewhere on the assessment and taxation of personal property:

> **What is the basis for . . . personal property assessment?**
> The assessment of personal property is based on the market value to the current owner or user of that property. Personal property is assessed at what is known as the "retail trade level" – which is the value it has to the current owner *after it is installed and in use*.

http://dor.wa.gov/content/findtaxesandrates/propertytax/prop_busproperty value.aspx (emphasis added).

Thus, WAC 458-12-342(1) recognizes that the economic value of personal property that is in a state of new construction is rightfully to be postponed until the equipment is assembled and operational. Before that point in time, the property has little or no value. The regulation is a rule of reason and economic common sense which directs when the property tax may be applied at all -- *not* a tax exemption as characterized by the County.

The County points to other discussion in the IAAO publication (excerpts of which were attached to the County's brief as Appendix B) which states "that '[t]he cost, sales comparison, and income approaches should be considered in the appraisal of personal property as long as the market within the trade level is in equilibrium.'" County's Brief at 18 (quoting *Standard on Valuation of Personal Property* at 8). From this, the County concludes:

> In assessing personal property during construction of an unfinished facility, the cost approach is most favored. "Costs used in the cost approach can be original construction cost, new or used acquisition cost, replacement, or reproduction costs."

Id. The County's reliance on these statements in the IAAO publication is misplaced. These are clearly general statements of valuation which must be adapted to the facts of the case at hand. Indeed, the type of equipment at issue in this case (new construction) is actually addressed elsewhere in the IAAO publication that the County relies on and attaches to its brief. In discussing a proper audit and appraisal (assessment) of a taxpayer's property, IAAO states:

> Attention should be directed to standby equipment, permanently idled equipment, retired or fully depreciated equipment, and *uninstalled equipment*. Regardless of book value, such equipment and inventory should be listed and valued unless specifically exempted. *Idle,* retired, abandoned, or fully depreciated property *may not have a value-in-use and may be reported on the company's books as having $0.00 value, but the property may have a value-in-exchange. The amount of value-in-exchange should be determined based on market research of used machinery and equipment of similar use and condition. The status of personal property as of the assessment date is critical to determining an item's assessability or taxability . . . .*

County's Brief, App. B at 7 (emphasis added).

It is clear from these guidelines that "uninstalled" and "idle" equipment requires special attention. Such equipment "may not have a value-in-use and may be reported on the company's books as having $0.00 value, but the property *may* have a value-in-exchange" (emphasis added). The key word here is "may." Grays Harbor Energy's books have always recorded the equipment at its cost ($20,753,32) (CP 72) but for property tax assessment and taxation purposes the "value-in-exchange" of the equipment is zero ($0.00). Indeed, following Grays Harbor Energy's acquisition of the property on March 24, 2005, this is how the equipment was reported to the County on the Personal Property Listing form. *See* CP 70-93.[3] As Mr. Donovan's declaration showed, the "value-in-exchange" of the two turbine generators was thought to represent the entire purchase price of the personal property. CP 52 (Donovan Decl. (03/13/07) ¶¶ 18, 19). And Grays Harbor Energy considered the remainder of the personal property as having $0.00 value because it would have to be scrapped if the project was terminated. *Id.* ¶ 19. These conclusions were based on Grays Harbor Energy's knowledge as an owner, investor, and developer of power generation facilities (CP 47 (Donovan Decl.) (03/13/07) ¶ 5) which would make it knowledgeable about the market "[for] used machinery and equipment of similar use and condition."

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[3] CP 72 shows the purchase price ($20,753,328) allocated one hundred percent to the two General Electric gas turbine generators, which at the time was thought to be the only equipment having any value.

The County's approach, on the other hand, was nothing more than a simplistic, straightforward application of the cost of the equipment without any consideration for "value-in-use" or "value-in-exchange." But that approach was severely flawed. The County's assessment of this equipment (in the amount of $97,545,000 (CP 5)) was based on the *former owner*, Duke Energy's, cost to acquire this equipment. But, as noted, Grays Harbor Energy's cost to acquire this power generating equipment was only $20,753,328. There is no authority -- in IAAO or otherwise -- that would allow a county assessor to attribute a *prior owner's* cost of property to the value of that same property that was subject to an arm's length sale and happens to be idle and uninstalled in the hands of the current owner. As the IAAO states, the value of "uninstalled" and "idle" equipment is to "be determined based on market research of used machinery and equipment of similar use and condition." As stated, the evidence before the trial court was that this used machinery and equipment had $0.00 value. And that is what WAC 458-12-342(1) recognizes as the rule for personal property, especially uninstalled and idle industrial machinery and equipment, during "new construction."

D. State Statutes Give the Department of Revenue Authority to Supervise County Assessors, Including the Power to Formulate Rules and Regulations That Order and Direct the Assessors in Their Assessment Practices.

WAC 458-12-342 is a duly adopted rule of the Department of Revenue. *See* WSR 05-14-106, § 458-12-342, filed 6/30/05, effective 7/31/05; WSR 93-08-049, § 458-12-342, filed 4/2/93, effective 5/3/93; WSR 83-22-004 (Order PT 83-6), § 458-12-342, filed 10/20/83. Chapter

84.08 RCW sets forth the powers and duties of the Department of Revenue in the area of property taxes. Specifically, the Department is required to:

> Exercise general supervision and control of the administration of the assessment and tax laws of the state, over county assessors . . . in the performance of their duties relating to taxation, and perform any act or give any order or direction to any . . . county assessor . . . as to the valuation of any property, or class or classes of property in any county . . . or as to any other matter relating to the administration of the assessment and taxation laws of the state, which, in the department's judgment may seem just and necessary . . . .

RCW 84.08.010(1). In the course of exercising these powers of general supervision, the Department is also required to:

> Formulate such *rules* and processes for the assessment of both real and personal property for purposes of taxation as are best calculated to secure uniform assessment of property of like kind and value in the various taxing units of the state, and relative uniformity between properties of different kinds and values in the same taxing unit.

RCW 84.08.010(2) (emphasis added).[4]

In addition, "It shall be the duty of every public officer to comply with any lawful . . . rule or regulation of the department of revenue made under the provisions of this title [84 RCW]." RCW 84.08.120. The county assessor is indisputably a "public officer" as contemplated by this statute. *See* RCW 36.16.030 ("in every county there shall be elected from among the qualified voters of the county a county assessor").

These statutes make it abundantly clear that the powers delegated to the Department of Revenue by the Legislature are broad and include the

[4] RCW 84.08.070 provides an additional grant of authority to the Department to "make such rules and regulations as may be necessary to carry out the powers granted by this chapter [84.08 RCW] . . . ."

authority to adopt rules and regulations that county assessors as public officers are duty-bound to follow. In *Ridder v. Dep't of Revenue*, 43 Wn. App. 21, 714 P.2d 717 (1986), Division I upheld a Department regulation that provided for the retrospective adjustment of counties' certified levy amounts. In that case the court observed that while "the Department's authority is restricted to the provisions of existing law and that it has no power to act independent of the guidelines and standards set forth in the tax code" (*Ridder*, *supra* at 26 (citing *Burlington Northern, Inc. v. Johnston*, 89 Wn.2d 321, 572 P.2d 1085 (1977); *State ex rel. Barlow v. Kinnear*, 70 Wn.2d 482, 423 P.2d 937 (1967)), the court nevertheless found that the Department's authority emanating from RCW 84.08.010 to promulgate a rule that had retroactive effect could not be questioned:

> It can hardly be questioned that in the sweeping language of RCW 84.08.010 and .060, the Legislature intended to authorize the Department to take action consistent with the language of the taxing statutes to achieve uniformity and equality in the tax system. In light of article 7, section 1 of the state constitution, requiring uniformity in taxation, the legislative language should be liberally interpreted to achieve that goal. *Burlington Northern, Inc. v. Johnston, supra.*

Ridder, 43 Wn. App. at 28.

Likewise, in *Boeing Co. v. King County*, 75 Wn.2d 160, 449 P.2d 404 (1969), Boeing challenged the authority of the State Tax Commissioner (predecessor agency to the Department of Revenue) to reconvene a county board of equalization for the purpose of examining a prior year's personal property tax assessment. Boeing argued that there was no statutory authority to support the Tax Commissioner's reconvening of the county board. The Supreme Court rejected this contention, again relying on the broad delegation of authority given to the Commission (now the Department):

> It is evident that the sweeping grants of power contained in RCW 84.08.060 were intentional. The legislature recognized the need for an agency clothed with sufficient supervisory authority to ensure "equality of taxation and uniformity of administration" in a tax structure badly fractionalized by 39 different county units. *State ex rel. Barlow v. Kinnear*, 70 Wn.2d 482, 423 P.2d 937 (1967).

Boeing at 165-66.[5]

The authority delegated to the Department of Revenue to supervise the county assessors, to have control over the administration of the assessment and tax laws, to give orders and direction to county assessors, and to formulate rules and regulations for the assessment of real and personal property throughout the state is sufficiently broad to authorize a regulation governing the scope of assessment and taxation of property during periods of new construction. Otherwise, as the Supreme Court warned in *Boeing*, 39 different county officials would implement their own ideas about assessment practices each within their tax fiefdoms, the result of which would be to assess and tax new construction up to 39 different ways.

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[5] While RCW 84.08.010 describes the Department of Revenue's powers of general supervision and rule-making authority "over county assessors, . . . boards of equalization, . . . boards of county commissioners, county treasurers and county auditors and all other county officers, in the performance of their duties relating to taxation" or "to the valuation of property" or "as to any other matter relating to the administration of the assessment and taxation laws of the state," RCW 84.08.060 contains additional powers of the Department over county boards of equalization.

By its terms, Rule 342(1) establishes a consistent and uniform assessment and valuation practice for "new construction," which is binding on all of the counties. Under the regulation, real property can be added to the assessment rolls during new construction if a building permit is required for such property, but personal property must wait until construction is completed, the personal property is installed, and it is operational. This application avoids the myriad of possible assessments by the county assessors that would otherwise occur from nonuniform personal property assessment practices if the counties were left to decide for themselves what personal property is taxable during CIP, and what property is not. Because the Department is given power by RCW 84.08.010(2) and 84.08.070 to promulgate rules for the direction and guidance by the county assessors in their assessment duties and practices, and Rule 342(1) was issued in accordance with that authority, the County must adhere to its strictures and limitations.[6]

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[6] "Administrative agencies have those powers expressly granted to them and those necessarily implied from their statutory delegation of authority." *Tuerk v. Dep't of Licensing*, 123 Wn.2d 120, 124-25, 864 P.2d 1382 (1994) (citing *Metro. Seattle v. Pub. Employment Relations Comm'n*, 118 Wn.2d 621, 633, 826 P.2d 158 (1992)). "An agency charged with the administration and enforcement of a statute may interpret ambiguities within the statutory language, through the rule making process." *Edelman v. State ex rel. Pub. Disclosure Comm'n*, 152 Wn.2d 584, 590, 99 P.3d 386 (2004). "Legislative authorization for an agency to interpret the law under which the agency operates and to make known to the public its interpretation of that law is normally implied from the powers expressly granted to the agency by the legislature. Every legislature wants agencies to determine the meaning of the law they must enforce and to inform the public of their interpretations so that members of the public may follow the law." Arthur Earl Bonfield, State Administrative Rule Making § 6.9.1, at 280 (1986) (footnote omitted). "Administrative regulations of this kind are to be given great weight in resolving doubtful meanings of tax laws." *Fisher Flouring Mills Co. v. State*, 35 Wn.2d 482, 492, 213 P.2d 938 (1950) (citing 3 Sutherland, Statutory Construction (3rd ed.) § 6709).

E. The Various Authorities Cited in the County's Brief Do Not Support the County's Arguments.

The County cites *Fifteen-O-One Fourth Ave. Ltd. Partnership v. Dep't of Revenue*, 49 Wn. App. 300, 301, 742 P.2d 747 (1987), for the proposition that "new construction" as addressed in WAC 458-12-342(1) applies only to real property and has nothing to do with personal property. In *Fifteen-O-One* the taxpayer challenged on constitutional uniformity grounds (Const. art. 7, § 2, Amendment 14) the right of a county assessor to place newly constructed improvements to real property on the tax assessment rolls up to August 31 each year based on the value of the improvements as of July 31 of that year (RCW 36.21.080), when other real property is valued as of January 1 of each year (RCW 84.40.020). *Id.* at 301. The court found the statute valid and constitutional. *Id.* at 310. *Fifteen-O-One* thus only dealt with whether the assessor may value new construction as *real property* through July 31 of the assessment year, had nothing to do with personal property, and avails the County not at all in this case.

The County also cites Department of Revenue rule WAC 458-12-115 (Rule 115) to support its position that personal property is subject to assessment and taxation even as "new construction." Rule 115 implements RCW 84.40.020, and states "that personal property shall be listed and assessed in the county where situated as of 12 noon on January 1st of each year, and with respect to goods in transit to this State, the fact they may be in their original package on the date of assessment is immaterial." County's Brief at 8-9.[7] From this the County concludes that "WAC 458-12-115 contains no provision recognizing any exemption from personal property assessment where a taxpayer intends to use or actually uses personal property in construction." *Id.*

There are two problems with this argument. First, by its own terms WAC 458-12-115 is a general assessment regulation, which merely directs that all personal property be valued as of January 1 each year. WAC 458-12-342, on the other hand, is a *specific* regulation dealing with new construction. It is a well-established rule of statutory interpretation, as well as interpretation of agency regulations, that the provisions of a *specific* statute (regulation) will prevail if there is a conflict with the provisions of a *general* statute (regulation). *Fifteen-O-One*, 49 Wn. App. at 302-303 (citing *Muije v. Dep't of Social and Health Servs.*, 97 Wn.2d 451, 645 P.2d 1086 (1982)). In this case, Rule 342 is the more specific regulation and it prevails over the regulation (Rule 115) that expresses the general assessment rule. Second, by the very terms of Rule 115 as quoted by the County, the regulation deals with the assessment of goods in transit. This case is *not* about goods in transit. The power generation equipment was not in transit; instead, it was already at the project site partially installed, in storage, or laid out on 10 acres of land.

The County also says Grays Harbor Energy's interpretation of WAC 458-12-342(1) conflicts with another Department of Revenue

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[7] RCW 84.40.020 states in pertinent part that, "All personal property in this state subject to taxation shall be listed and assessed every year, with reference to its value and ownership on the first day of January of the year in which it is assessed."

regulation, WAC 458-12-310, "which addresses valuation of personal property, but does not exempt personal property in either 'new construction' or 'work in progress[,]'" and which states that "'Work in process in the hands of the processor or manufacturer shall be valued at the stage of production where found (costs to date) or cost to a competitor.'" County's Brief at 9 (quoting WAC 458-12-310). The County concludes "[t]his rule fails to make any mention of exempting personal property assessment or taxation during either 'new construction' or 'work in progress.'" *Id.* But WAC 458-12-310, like Rule 115, has nothing to do with power generation equipment of the type at issue here. Instead, Rule 310 specifically addresses the value of manufactured products in the production stream.

The County also states that its position is supported by still *another* Department of Revenue rule, which states "that '[a]ll property located in Washington is subject to assessment and taxation, except property expressly exempted from taxation by law,' and '[p]roperty shall be exempted from taxation only when the legislature has created an exemption by clear and explicit language." County's Brief at 10 (citing WAC 458-16-100(2)). But this is again a departmental regulation of *general* application that must be read together with the Department's *specific* regulation on "new construction" (WAC 458-12-342), and the latter takes precedence here. *Fifteen-O-One*, 49 Wn. App. at 302-303.

The County also argues that WAC 458-12-060 supports its position. County's Brief at 15. This regulation likewise does not apply.

It states, "[t]his rule provides information about the listing of personal property subject to ad valorem taxation." WAC 458-12-060(1). Later in the chapter, the regulations provide that when it comes to "new construction" only real property is subject to taxation. WAC 458-12-342(1). Thus, Rule 342(1) qualifies the listing requirements of WAC 458-12-060.[8]

Finally, the County relies on the Department of Revenue's "published reference manual addressing personal property assessment and taxation that construction in progress . . . assets are valued at 100 percent of cost until placed in service." County's Response at 10 (citing Sec. 1.11, *Personal Property Manual for Washington State* (September 2009)).[9] The County argues that "considerable deference must be given to [the Department's] interpretation as the agency charged with enforcing the statute." County's Brief at 10-11 (citing *Harley H. Hoppe & Associates, Inc. v. King County*, 162 Wn. App. 40, 54, 255 P.3d 819, *rev. denied*, 172 Wn.2d 1019, 262 P.3d 64 (2011), citing *S. Martinelli Co., Inc. v. Dept. of Revenue*, 80 Wn. App. 930, 937, 912 P.2d 521 (1996)). This particular publication of the Department of Revenue, however, is entitled to no deference. The manual is a general publication of the Department and was

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[8] WAC 458-12-060(1) further states "[t]his rule also provides specific information about the listing of personal property by manufacturers." GHE is not a manufacturer because for property tax purposes it is a public utility under Chapter 84.12 RCW.

[9] Appendix A to the County's brief included excerpts from the *Personal Property Manual for Washington State*. Except for the cover page (CP 262) and page 1 7 (CP 263), the remainder of Appendix A is not part of the record in this case and should be disregarded by the Court because it was not evidence submitted to the trial court. *See* RAP 10.3(a)(8).

not adopted as a formal rule pursuant to RCW 84.08.010(2) or 84.08.070, or even as an interpretative or policy statement under RCW 34.05.230 -- and even if were to be construed as an interpretative or policy statement, the manual can at most be "advisory only," RCW 34.05.230(1), and still entitled to no deference.[10]

Moreover, if the instructions in this manual are read the way the County wants them to be read, then they are at-odds with WAC 458-12-342(1), the statutes underlying that rule, *and* long-established Washington case law.[11] While courts may give "weight to an agency's interpretation of the law," courts will not "do so where the interpretations are inconsistent and not conclusive." *Glen Park Associates, L.L.C. v. Dep't of Revenue*, 119 Wn. App. 481, 492, 82 P.3d 664 (2003), *rev. denied*, 152 Wn.2d 1016, 101 P.3d 107 (2004) (citing *Western Ag Land Partners v.*

[10] Agency interpretative or policy statements must also be submitted "to the code reviser for publication in the Washington State Register." RCW 34.05.230(4). There is no evidence that the Department's manual satisfied this requirement.

[11] The Department of Revenue instructs in the personal property tax manual to "Value construction in progress assets at 100 percent of cost until placed in service." Appendix A to County's Brief, p. 1 7. These instructions are in conflict with RCW 84.40.030, which states that "All property shall be valued at one hundred percent of its *true and fair value* in money" (emphasis added). They are also inconsistent with the IAAO statement at 7, regarding "value-in-use" and "value-in-exchange." More importantly, a fundamental principal of valuation holds that "cost" is not necessarily equal to "true and fair value." In *Metropolitan Bldg. Co. v. King County*, 62 Wash. 409, 113 P. 1114 (1911), the court was asked to determine the proper methodology for assessing a 50-year lease of state land upon which the lessee erected buildings, which became the property of the state when erected. The lessee invested approximately $1 million into the improvements. *Id.* at 410. The county contended that the proper basis for the assessment should be measured by the lessee's investment (cost). *Id.* The court disagreed and held that if the lessee "were compelled to pay [property tax] upon the amount of its investment, the tax would be grossly excessive," concluding that "an assessment based upon the value of the improvements or the amount invested . . . was erroneous." *Id.* at 412. Thus, for more than 100 years the courts of this state have adhered to the valuation principal that cost does not equal value.

Dep't of Revenue, 43 Wn. App. 167, 171, 716 P.2d 310 (1986)). Here, an advisory document lacking the authority of a rule conflicts with a rule under whose language Grays Harbor Energy is clearly entitled to prevail, and which is consistent with long-established Washington law. The manual not only is entitled to no deference -- the manual should be dismissed as plainly in conflict with long-established Washington law.

F. Ambiguity in the Controlling Regulation (WAC 458-12-342) Is to Be Resolved in Favor of Grays Harbor Energy, the Taxpayer and Not the County, Because This Is a Tax Incidence Case and Not a Tax Exemption Case.

The County contends that Grays Harbor Energy is seeking an exemption from property tax for its power generation equipment, thereby calling into play the rule that exemptions from tax are to be strictly and narrowly construed against the taxpayer and in favor of the state. But no exemption from tax is sought here by Grays Harbor Energy. This is quite plainly an incidence case -- does the property tax apply to the power generation equipment owned by Grays Harbor Energy while that equipment was in an uninstalled or partially installed and non-operating condition during new construction? And in an incidence case, the rule of construction is the *opposite* from the rule in exemption cases -- all doubts must be resolved in favor of the taxpayer and against the taxing authority.[12]

[12] *Qwest Corp. v. City of Bellevue*, 161 Wn.2d 353, 364, 166 P.3d 667 (2007) (quoting *Estate of Hemphill v. Dep't of Revenue*, 153 Wn.2d 544, 552, 105 P.3d 391 (2005)) ("Ambiguities in taxing statutes are construed most strongly against the government and in favor of the taxpayer" (internal quotation marks omitted)).

III. CONCLUSION

This Court should rule that under WAC 458-12-342(1) only real property was assessable and taxable while property is "new construction," and accordingly, reverse the trial court and remand for the calculation and determination of the refunds owed to Grays Harbor Energy for overpaid property taxes in the years 2005 through 2008.

RESPECTFULLY SUBMITTED this 2nd day of August, 2012.

CARNEY BADLEY SPELLMAN, P.S.

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STATE OF WASHINGTON

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NO. 42558-1-II

DIVISION II, COURT OF APPEALS
OF THE STATE OF WASHINGTON

GRAYS HARBOR ENERGY LLC, Plaintiff/Appellant, v. GRAYS HARBOR COUNTY, Defendant/Respondent.	DECLARATION OF SERVICE

I, Patti Saiden, hereby declare as follows:

On August 3, 2012, I caused to be served via U.S. Mail, a true and correct copy of *Appellant's Reply Brief* and *Declaration of Service* upon the following:

James G. Baker, Senior Deputy
Grays Harbor County Prosecuting Attorney
102 W Broadway, Room 102
Montesano, WA 98563
Email: Jbaker@co.grays-harbor.wa.us

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

DATED this 3rd day of August, 2012.

Patti Saiden

Patti Saiden, Legal Assistant