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STATE OF WASHINGTON

BY  DEPUTY

**NO. 43805-4-II**

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

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**TRACFONE WIRELESS, INC.,  
Appellant,**

**v.**

**WASHINGTON STATE DEPARTMENT OF REVENUE,  
Respondent.**

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APPEAL FROM THE THURSTON COUNTY SUPERIOR  
COURT

Case No.: 11-2-02437-4  
Honorable Thomas McPhee

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**REPLY BRIEF OF APPELLANT**

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## I. INTRODUCTION

The Department raises a flurry of arguments regarding why this Court cannot consider TracFone's request for declaratory relief. But TracFone has standing to request relief and presents a justiciable controversy. And the Department's substantive defense—that it is permissible for the Department to accept unlawful double taxes if the retailers collect them—is simply frivolous. The Department's procedural objections that it should be allowed to continue retaining non-tax money fail, and the Court should declare that it is unlawful to do so.

## II. ARGUMENT

### A. **The Department may not accept unlawful double tax even if it is collected by retailers.**

Excise tax may not be imposed on the E-911 tax. RCW 82.14B.030(6). In *TracFone Wireless, Inc. v. Dep't of Revenue*, 170 Wn.2d 273 (2010) ("*TracFone I*"), the Washington Supreme Court mandated that TracFone collect the E-911 tax, and allowed TracFone to "adjust[] its prepaid pricing or deduct [] minutes from the subscriber's account to pay the taxes", or collect the E-911 tax from the customer at the point of sale. *TracFone I*, 170 Wn.2d at 293 and n.12.) In a convoluted and mistaken argument, the Department claims that retailers must collect excise tax on the entire purchase price of a TracFone card, including the portion that is allocable to the E-911 tax—despite the prohibition against double taxation. And

the Department does more than passively accept these unlawful taxes: it has told retailers that they must collect them.

In so arguing, the Department mis-states the Supreme Court's guidance, claiming the Court allowed TracFone only to "collect the [E-911] tax directly from consumers by obtaining billing information when the card is activated," and implying the Court suggested retailers could not collect E-911 tax money from purchasers. (Response at 27, citing *TracFone I*, 170 Wn.2d at 292-93). But the Supreme Court said no such things. Nowhere in *TracFone I* is there any suggestion that TracFone has to undertake the onerous and completely unnecessary process of asking a retailer to charge a customer the retail price of a TracFone Card, impose retail excise tax, and then also collect the customer's billing information for TracFone to later impose the E-911 tax.

Instead, TracFone's price adjustment plan does exactly what the Supreme Court suggested: TracFone asks retailers to charge customers for both the retail price of the card and the E-911 tax at the point of sale. The portion of the retail cost that is the E-911 tax is not subject to excise tax. The Department theorizes that TracFone deviates from the Supreme Court's suggestion in *TracFone I* because "no money changes hands between TracFone and subscribers when a customer purchases an airtime card from a third-party retailer." (Response at 29.) Because TracFone and not the retailer is ultimately responsible for collection of the E-911 Tax,

according to the Department the retailer is “merely selling the card” and not collecting a tax. *Id.*

But even if the Supreme Court had not already expressly approved of TracFone’s plan to increase the wholesale cost to collect the tax, TracFone may delegate tax collection to retailers. *Whatcom County v. Taxpayers of Whatcom County Solid Waste Disposal Dist.*, 66 Wn. App. 284, 293 (1992)(collection of taxes may be delegated to agents). And the Supreme Court has approved retailers collecting the tax. In *TracFone I*, the Court noted that multiplying the amount of months on a TracFone Card by 20 cents “gives the amount that would have to be collected if the radio communications service company chose to collect the tax at the point of sale.” *TracFone I*, 170 Wn.2d at 293 n. 12. The Court knew that TracFone sold through retailers, and thus approved exactly what the Department claims is forbidden.

**B. RCW 82.08 does not authorize double taxation.**

The Department mistakenly asserts that RCW 82.08, the excise tax statute, authorizes double taxation. The Department claims that the definition of “sales price” in the excise tax statute supports its claim that excise tax must be imposed on the entire purchase price of a TracFone Card by a retailer. (Response at 30-31.) But the excise tax statute bolsters TracFone’s and not the Department’s position that the E-911 tax must be excluded. RCW

82.08.010(1)(b) establishes the method for excise tax calculation, and expressly excludes from excise tax “any taxes legally imposed directly on the consumer that are separately stated on the invoice, bill of sale, or similar document given to the purchaser[.]”

The Department claims that because, in the Department’s view, retailers are not authorized to collect the E-911 tax, any E-911 taxes collected as part of a retail transaction are not “legally imposed directly on the consumer.” But even if the Department were correct that TracFone cannot use an agent to collect taxes—which it is not—RCW 82.14B.040 imposes the E-911 Tax on the consumer, and the method of collection does nothing to alter that imposition.

The Department also claims that because the TracFone Cards are sold at retail, the E-911 Tax will not be “separately stated on the invoice, bill of sale, or similar document given to the purchaser” as required by RCW 82.08.010(1)(b). (Response at 32.) But RCW 82.08.010(1)(b) is a general statute exempting any tax imposed on the consumer from excise tax imposition, and requiring that any tax so exempted be separately stated on an invoice. A specific statute supersedes a general statute where they cover the same subject matter. *Goldmark v. McKenna*, 172 Wn.2d 568, 579 n.4 (2011). RCW 82.14B.040 is a specific statute exempting the E-911 tax from excise tax imposition, and only requires that the E-911 tax be separately stated if an invoice is issued. *TracFone I*, 170 Wn.2d at 290 (“While this language shows legislative intent that the tax is to

be stated separately in a billing statement, neither statute requires that a statement must be sent.”)

Further, the Department’s argument assumes facts not in the record. TracFone alleged that the “amount of the purchase price of the TracFone Cards that is allocable to TracFone’s collection of the E-911 Tax” should be excluded from excise tax calculations. (CP 71-72.) Nowhere is there evidence that this allocable amount is not reflected in a statement to the consumer.

Similarly, the Department’s claim that the E-911 tax is a “seller’s cost of the property sold” and therefore subject to excise tax by RCW 82.08.010(1)(a) fails. RCW 82.14B.040 expressly makes the consumer, and not TracFone, responsible for the cost of the E-911 tax. A cost expressly imposed on the consumer cannot be a “seller’s cost”.

The Department’s theory, supported only in a footnote, that excise tax is not imposed on the E-911 tax when the Department demands full excise-tax on the retail cost of a TracFone Card because the consumer may bear the economic cost but does not suffer tax imposition is both merely a semantic distinction and simply wrong. The Department cites to authority that holds only that a State tax imposed directly on a business, such as the B&O tax, may not be avoided when the business works for the federal government. (Response at p. 29 n.8.) Extrapolating from this completely inapposite legal principle, the Department claims that the retail

excise tax is not “imposed” on the E-911 tax when the consumer pays and that the consumer merely unfairly bears the economic burden.<sup>1</sup> But TracFone does not rely on the economic burden placed on the consumer. TracFone objects to unlawful excise tax on the amount of the purchase price that is allocable to TracFone’s collection of the E-911 tax. (CP 71-72.) That non-tax money is paid directly by the consumer.

**C. The Department’s collection and retention of unlawful tax-on-a-tax money violates TracFone’s due process rights.**

TracFone is entitled to judicial review of its constitutional claims. The Department claims otherwise by asserting that the Department correctly told retailers they must collect excise tax on the entire amount of the purchase price. (Response at 35.) But this circular reasoning—that the Court need not reach the constitutional issues because the Department is right about them—fails. As set forth in Section (A) TracFone’s customers do not need to pay excise tax on the E-911 tax, and the Department incorrectly advised retailers to the contrary.

The Department separately claims that TracFone states only a disagreement regarding statutory interpretation, not a substantive due process objection. But a substantive due process claim must only

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<sup>1</sup> The Department’s claim that this Court should sanction an unfair economic burden on consumers is troubling, at the least.

allege that government action is unreasonable and results in the deprivation of life, liberty, or property. *State ex rel. Namer Inv. Corp. v. Williams*, 73 Wn.2d 1, 6-7 (1968). TracFone alleges that the Department's actions deprive TracFone of substantial revenue. And the Department's actions are unreasonable. The Department not only seeks to retain unlawful tax-on-a-tax money, but unfairly distinguishes between TracFone's method of tax collection (collecting via retailers) from competitors who collect the tax from consumers over the Internet.

The Department attempts to distinguish *Namer* by noting that the *Namer* court found that excise tax was properly imposed on the entire amount of a lease. (Response at 38.) But this factual distinction has no bearing on *Namer*'s holding that TracFone must merely allege unreasonable action and deprivation of property. In *Namer*, excise tax was properly levied on the "actual consideration paid or delivered" for the transfer of real property. By extension, the Department claims, it is correct to charge excise tax on the entire purchase price of a TracFone card. But RCW 82.14B.030(6) specifically exempts the E-911 tax from excise tax calculation. No such exemption was present in *Namer*.

Similarly, the Department's attempt to distinguish *Hopkins* fails. (Response at 39, citing *Hopkins v. Southern California Tel. Co.*, 275 U.S. 393 (1927). In *Hopkins*, the Supreme Court found standing to assert a substantive due process claim when a local

statute conflicted with the state constitution. That TracFone relies on a statutory prohibition rather than the Washington constitution does not affect TracFone's right to request relief: ignoring RCW 82.14B.030(6) is unreasonable, and TracFone has standing to contest that unreasonable action because, like the plaintiff in *Hopkins*, TracFone has alleged harm stemming from it.

**D. The Department violates TracFone's equal protection rights because only TracFone, and not other telecommunications companies, suffer from the unlawful tax-on-a-tax.**

A policy violates equal protection guarantees when it subjects those within the same class to unequal taxation. *Hopkins*, 275 U.S. at 398-99. The Department claims that TracFone is treated equally because all radio communications service companies are required to remit the E-911 tax. (Response at 42). But TracFone does not object to remitting the E-911 tax. It objects to unlawful collection of the excise tax on that payment. TracFone alleges, and the Department does not contest, that TracFone is treated differently in this respect than other radio communications service companies.

The Department next argues that equal protection does not apply to its treatment of TracFone because the Legislature can impose a tax that disproportionately affects one method of doing business. But that is only true where the businesses are in different classes. *Sonitrol Northwest v. Seattle*, 84 Wn.2d 588, 590 (1974). The Department wisely does not challenge TracFone's assertion that

all radio telecommunication service companies are in the same class: It is the Legislature, not the Department, that decides business classification for tax purposes. *UPS v. State*, 102 Wn.2d 355, 368 (1984). As the Washington Supreme Court has recognized, in the telecommunications arena the Legislature must do so “on a competitively neutral basis.” *TracFone I*, 170 Wn.2d at 294. Adhering to this maxim, the Legislature treats all telecommunications service companies the same: no excise tax can be imposed on the E-911 tax.

**E. RCW 82.32.150 and .180 do not bar TracFone’s request for declaratory relief because this is not a tax refund suit.**

TracFone is also entitled to pursue its nonconstitutional claims. The Department argues that TracFone cannot sue to challenge retailers’ erroneous collection and remittance, or the Department’s knowing acceptance, of monies mistakenly collected by the retailers from consumers because TracFone has not paid any tax. This argument is a red herring—TracFone is not a taxpayer and is not seeking a refund.

RCW 82.32.180 provides “[a]ny person...having paid any tax as required and feeling aggrieved by the amount of the tax may appeal to the superior court of Thurston county.” As the Department admits, TracFone is not seeking a refund and the Department did not assess any taxes on TracFone. Nor arguably could TracFone be a party to a suit for refund of the excise tax—TracFone is a wholesaler

and is not one of the statutorily enumerated parties liable as a taxpayer for the excise tax associated with the TracFone Cards. RCW 82.08.050.

Similarly, the Department's argument that RCW 82.32.150 bars TracFone from asserting any claims because TracFone has not paid the excise tax at issue fails. RCW 82.32.150 provides that "All taxes, penalties, and interest shall be paid in full before any action may be instituted in any court to contest all or any part of such taxes, penalties, or interest." This section simply does not apply. TracFone is not contesting all or any part of a tax imposed on TracFone. It challenges the collection of non-tax money. Even if the Department were correct that the unlawful tax-on-a-tax monies had to be paid first, they have been so paid: the retailers have collected and remitted excise tax on the E-911 tax. The Department fails to allege—and cannot allege—that TracFone or any party is withholding money from the Department.

**F. Declaratory relief is not barred by RCW 82.32.150.**

The Department separately claims that RCW 82.32.150 bars both injunctive and declaratory relief. But RCW 82.32.150 only bars an action to "restrain or enjoin the collection of any tax" and does not bar declaratory relief. The Department's reliance on federal authority to claim that this Court should add words to the statute fails.

In Washington, injunctive relief and declaratory relief are distinct causes of action created by different statutes. Restraining orders and injunctions are specific causes of action, codified at RCW Ch. 7.40. Declaratory relief is a separate cause of action, codified in RCW Ch. 7.24. In the federal system, the federal statute’s broad prohibition includes not only enjoinder, but also any ruling that “suspended or restrained” a state tax. *Cal. v. Grace Brethren Church*, 457 U.S. 393, 407 (1982). By contrast, RCW 82.32.150 is different—it only prohibits a “restraining order or injunction.” RCW 82.32.150.

Similarly, the Department’s reliance on readily-distinguishable Minnesota law does not help it. In *M.A. Mortenson Co. v. Minnesota Comm’r of Revenue*, 470 N.W.2d 126, 130 (Minn. Ct. App. 1991), a construction company sought a declaratory judgment that a county and not the construction company was the actual owner of a parcel of real property, and therefore no tax liability existed. The Mississippi Supreme Court found that even though the construction company sought declaratory relief, because “the declaratory relief sought [] would bar the assessment or collection of taxes” if the County was the actual owner, the suit was equivalent to a request for an injunction against the collection of tax and barred.

The Department’s reliance on *Booker Auction* is similarly mistaken. (Response, p. 18, *Booker Auction Co. v. Dep’t of Revenue*,

158 Wn. App. 84 (2010).) In *Booker*, a taxpayer contested a Department reporting instruction requiring the assessment of a tax without paying the tax. TracFone is not contesting the payment of a tax, nor the Department's assessment of a tax.

Similarly, *AOL, LLC v. Dep't of Revenue*, 149 Wn. App. 533 (2009) does not aid the Department's argument. In *AOL*, plaintiff AOL paid one portion of a tax assessment and then sought relief relating to the entire assessment. Relying on RCW 82.32.150's requirement that "All taxes, penalties, and interest shall be paid in full before any action may be instituted in any court to contest all or any part of such taxes, penalties, or interest," the court held that AOL could not pay one portion of the tax and then contest the entire amount. *Id.* at 546 (emphasis added). *AOL* is inapposite. TracFone does not seek relief related to a past assessment and there are thus no taxes to be paid in full. Instead, TracFone seeks a declaration that retailers may not remit, and the Department may not accept, future non-tax money.

The State's reliance on *Weber v. School Dist. No. 7 of Yakima Cnty*, 185 Wash 697 (1936) is mystifying. In *Weber*, a school district sued tax commissioners individually, rather than the State. The District paid taxes allegedly due into the court registry, and sought injunctive relief related to collection. *Weber* has no bearing on this case. TracFone has not sued the Director of the Department personally, and has not deposited tax funds into the registry of this

court. It seeks declaratory, not injunctive, relief. And the dispute is not over a tax allegedly due: TracFone seeks relief related to non-tax monies mistakenly accepted by the Department.

The Department's sole justification for barring declaratory relief is that allowing declaratory suits disrupts the tax stream. The Department's policy arguments regarding disruptions to the tax stream fail. TracFone asks for a declaratory judgment regarding *non-tax* money: the Department is not entitled to accept tax-on-a-tax revenue, and the revenue stream is not disrupted by stopping the Department from unlawfully accepting a windfall.

Further, even if TracFone was asking for relief from tax collection, there is no disruption to the flow of revenue from TracFone's declaratory judgment request. By contrast, an injunctive suit or withholding contested tax does disrupt the revenue stream: the collection of taxes is delayed until the litigation is resolved. But here, the Department continues to demand, and retailers continue to pay, excise tax. And TracFone continues to submit required documentation that the E-911 tax is also collected and paid.

**G. TracFone has standing under the Uniform Declaratory Judgments Act**

The Department claims that TracFone does not have standing to object to the Department's unlawful acceptance of non-tax money because TracFone cannot demonstrate a direct impact. (Response at 19-24.) But in order to have standing, TracFone must merely allege

“harm personal to” TracFone that is “substantial rather than speculative or abstract.” *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 802 (2004).

TracFone alleged that the Department’s actions seriously impacted TracFone’s ability to compete with post-paid providers and prepaid providers who sell their services over the Internet. (CP 72.) TracFone further alleged that this competitive disadvantage caused actual and substantial injury to TracFone’s business, including the potential for tens of millions of dollars of lost business in Washington each year. (CP 72.) This is exactly the type of harm that provides standing to seek declaratory relief.

In *Nelson v. Appleway Chevrolet, Inc.*, 160 Wn.2d 173, 178 (2007), the Court held that an individual had standing to object to a car dealership’s imposition of a \$79.23 surcharge to recoup Business and Occupations tax. The Court found standing because the plaintiff was (1) within the zone of interest protected by statute and (2) suffered an injury in fact, economic or otherwise. *Id.* at 186. The Court rejected an argument that because the tax was aimed at businesses a consumer could not object to its imposition, holding that “the B&O tax is meant to be a tax on businesses. But Nelson paid Appleway’s tax for Appleway. This is precisely what RCW 82.04.500 forbids. Therefore, Nelson is within the zone of interest protected by the statute.” *Id.* Like TracFone here, the plaintiff in *Nelson* was not the party ultimately responsible for the tax. The

dealership in *Nelson*—and the consumer here—is ultimately charged with payment. See RCW 82.14B.040 (“The state enhanced 911 excise tax and the county enhanced 911 excise tax on switched access lines must be collected from the subscriber.”) But because TracFone is harmed by the Department’s actions, TracFone may seek declaratory relief, just like the *Nelson* plaintiff was entitled to court review because he was forced to unlawfully pay.

The Department’s citations to authority undermine rather than support the Department’s claim that TracFone does not have standing. The superior court dismissed TracFone’s complaint on the pleadings, ignoring the maxim that facts in the complaint must be presumed true. By contrast, in *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 412 (2001), a jury rejected a claim by an RV show operator that the Department of Licensing’s enforcement action against an unlicensed RV dealer directly damaged the operator. Absent that factual finding—that the operator was harmed—the operator did not have standing to pursue declaratory claims. But here, TracFone alleged substantial harm, and the trial court erroneously dismissed the matter on the pleadings. See also *Wash. Beauty College v. Huse*, 195 Wash. 160, 162 (1938)(“no evidence has been placed in the record” to support allegations of harm)(emphasis added); *Postema v. Snohomish County*, 83 Wn. App. 574, 585 (1996)(potential harm to real property too

speculative, given that there was *no evidence in the record* that the property was reduced in value.)

Similarly, in *Yakima County Fire Prot. Dist. No. 12 v. Yakima*, 122 Wn.2d 371, 379 (1993), the Supreme Court ruled that a fire district did not have standing to challenge a city requirement that homeowners agree to future annexation. The Court noted that because the District's interests were only implicated when and if annexation actually occurred and found that the potential impact on the District was insufficient to confer standing. TracFone is harmed by the Department's unlawful retention of non-tax money now. TracFone is at a competitive disadvantage because it must charge unfairly higher rates than its business competitors.

### **III. CONCLUSION**

The Department goes to great lengths to persuade this Court that it should not consider the substance of TracFone's arguments, spending the majority of its briefing arguing whether TracFone has standing and presents a justiciable controversy. TracFone does have standing and this Court should resolve the very real controversy between the Department and TracFone. And the Department's focus on why this Court should not consider the substantive issue belies the weakness of the Department's defense. The Legislature has flatly prohibited the Department from accepting double taxes, and the Supreme Court has expressly told TracFone that TracFone can

collect the E-911 tax from its consumers by raising the retail price. The Department's attempt to demand a windfall from retailers on a convoluted and mistaken theory that it is not double tax if the retailers collect it should be rejected, and a declaratory judgment entered that the Department may not demand or retain unlawful tax-on-a-tax money.

DATED this 8th day of March, 2012.

Respectfully Submitted,

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**SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THURSTON COUNTY**

TRACFONE WIRELESS, INC., a Delaware corporation,

Plaintiff,

v.

WASHINGTON STATE DEPARTMENT OF REVENUE,

Defendant.

Superior Court Case No. 11-2-02437-4

Court of Appeals Case No. 48503-4-II

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on March 8, 2013, I caused the foregoing

• **REPLY BRIEF OF APPELLANT**

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1 I certify under penalty of perjury under the laws of the United States and the State  
2 of Washington that the foregoing is true and correct and that this certificate was executed  
3 on March 8, 2013, at Seattle, Washington.



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5 Sarah Skaggs

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