

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	ASSIGNMENTS OF ERROR AND ISSUES	3
	1. The trial court erred in dismissing TracFone’s non-constitutional claims by finding that RCW 82.32.150 bars declaratory relief.	3
	2. The trial court erred in dismissing TracFone’s constitutional claims by finding that TracFone failed to allege sufficient injury to support its claim for declaratory judgment.	3
	3. The trial court erred in failing to declare that the Department’s acceptance of tax-on-a-tax money violates RCW 82.14B.030(6) and erred in failing to enjoin future collection. .	3
	4. The trial court erred in failing to declare that the Department’s unequal treatment of TracFone as compared to other telecommunications providers violates the Washington and United States Constitutions.	3
	5. The trial court erred in finding that TracFone did not collect a tax when it increased the purchase price of its cards to account for the E-911 tax assessment.	3
III.	STATEMENT OF THE CASE.....	5
	A. TracFone sells prepaid cell phone cards to retailers, who then sell them to Washington consumers.....	5
	B. The Washington Supreme Court ruled that TracFone can collect Washington’s E-911 Tax from its customers by increasing the purchase price of the TracFone Cards.....	5
	C. After <i>TracFone I</i> , TracFone implemented a plan to comply with the Supreme Court’s ruling.....	6
	D. Retailers who do not exclude the E-911 Tax from TracFone Cards’ purchase price when calculating the Sales and Use Tax erroneously collect and remit non-tax money to the Department..	7
	E. The Department has actual knowledge of the problem of retailers collecting and remitting non-tax funds, but refuses to act to avoid receipt of the erroneously collected funds.	7

F.	The Department’s actions significantly impact TracFone and Washington consumers.	8
G.	TracFone seeks a declaration that it is erroneous for retailers to collect and remit the tax-on-a-tax, and an injunction restraining the Department from collecting that non-tax money.	9
H.	The Superior Court dismissed TracFone’s complaint based upon an erroneous finding that TracFone sought prohibited injunctive relief and failed to allege sufficient injury to support a claim for declaratory judgment.	9
IV.	ARGUMENT	11
A.	Standard of Review	11
B.	The Department’s acceptance of tax-on-a-tax money from retailers violates RCW 82.14B.030(6)’s ban on collecting sales and use tax on the E-911 tax.	12
C.	TracFone’s requested declaration that retailers violate the E-911 Law’s tax-on-a-tax prohibition is not barred by RCW 82.32.150.	14
D.	TracFone’s request for declaratory and injunctive relief is not barred by RCW 82.32.180 because that statute applies only to taxpayers in refund suits.	17
E.	The trial court erred in finding, without a factual record, that the harm to TracFone was insufficient to grant declaratory relief. 18	
F.	The Department’s imposition of the tax-on-a-tax violates TracFone’s substantive due process and equal protection rights.	21
G.	The Department’s imposition of the tax-on-a-tax also violates TracFone’s procedural due process rights.	26
V.	CONCLUSION	28

**TABLE OF CASES, STATUTES AND OTHER
AUTHORITIES**

Cases

Berge v. Gorton, 88 Wn.2d 756, 762 (1977) 13

Billings v. United States, 232 U.S. 261 (1914) 24

Bravo v. Dolsen Cos., 125 Wn.2d 745, 750 (1995) 12

*Commonwealth of Kentucky Commercial Mobile Radio Service
Emergency Telecommunications Board v. TracFone Wireless,
Inc.*, No. 3:08-CV-660-H (W.D.Ky. Aug. 18, 2010)..... 27

Dep't of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 9-10
(2002) 16

DeRoche v. Ariz. Indus. Comm'n (In re DeRoche), 287 F.3d 751,
756 (9th Cir. 2002)..... 25

Dietz v. Doe, 131 Wn.2d 835, 842 (1997) 24

Drum v. Univ. Place Water Dist., 144 Wash. 585, 589 (1927) 29

E.g. Nelson v. Appleway Chevrolet, Inc., 160 Wn.2d 173, 178 (2007)
..... 21

Gaspar v. Peshastin Hi-Up Growers, 131 Wn. App. 630, 635 (2006)
..... 12

Gorman v. City of Woodinville, 175 Wn.2d 68, 71 (2012)..... 11

Hopkins v. Southern California Tel. Co., 275 U.S. 393 (1927)..... 27

Hopkins, 275 U.S. at 398 28

Hopkins, 275 U.S. at 399 30

Inland Empire Rural Electrification v. Dep't of Public Serv., 199
Wash. 527, 533 (1939)..... 21

Kinney v. Cook, 159 Wn.2d 837, 842 (2007)..... 11, 22

Kitsap-Mason Dairymen's Asso. v. Wash. State Tax Com., 77 Wn.2d
812, 813 (1970) 19

Orion Corp. v. State, 109 Wn.2d 621, 646-647 (1987) 25

Orwick v. Seattle, 103 Wn.2d 249, 254 (1984)..... 12

Pearson v. Vandermay, 67 Wn.2d 222, 232-33 (1965) 13

Philadelphia II v. Gregoire, 128 Wn.2d 707, 716 (1996) 24

Presbytery of Seattle v. King County, 114 Wn.2d 320, 330 (1990). 24

State ex rel. Namer Inv. Corp. v. Williams, 73 Wn.2d 1, 6-7 (1968)
..... 23

State ex rel. O'Connell v. Dubuque, 68 Wn.2d 553, 558 (1966) 21

TracFone I, 170 Wn.2d at 291 6

<i>TracFone I</i> , 170 Wn.2d at 291-93.....	14
<i>TracFone Wireless, Inc. v. Dep't of Revenue</i> , 170 Wn.2d 273 (2010)	5
<i>W.R. Grace & Co. v. Dep't of Revenue</i> , 137 Wn.2d 580, 599 (1999)	20
<i>Wright v. Jeckle</i> , 104 Wn. App. 478, 481 (2001)	12
Statutes	
RCW § 82.08.050.....	5, 19
RCW § 82.14B.030	5
RCW § 82.14B.030(6)	4, 6, 7
RCW § 82.32.180.....	29
RCW 7.24.020.....	20
RCW 82.14B.030(6)	3, 13, 15
RCW 82.32.150.....	3, 4, 9, 15, 16, 17
RCW 82.32.180.....	18, 19
RCW Ch. 7.24.....	16
RCW Ch. 7.40.....	15
Other Authority	
CR 12(b).....	11, 22
CR 12(b)(6)	3, 12, 13, 22, 26

I. INTRODUCTION

The Department of Revenue is prohibited by statute from collecting a tax-on-a-tax by imposing sales tax on the E-911 tax paid by telephone services consumers. Despite this clear prohibition, the Department continues to collect tax-on-a-tax money remitted by retailers of TracFone's prepaid wireless cards. In fact, the Department refuses to cooperate with TracFone's efforts to get retailers to comply with the law, going so far as to threaten tax prosecution of retailers who fail to remit tax-on-a-tax money.

Claiming that tax-on-a-tax money is simply a "business cost" to TracFone, the Department argued, and the Superior Court erroneously found, that TracFone cannot pursue judicial relief. But the authority cited by the Department and relied on by the Superior Court prohibits only injunctions against the collection of tax—which is not the sole relief sought by Tracfone. TracFone asks for a declaration that retailers should not collect or remit tax-on-a-tax money, and an injunction preventing the Department from keeping these non-tax funds erroneously remitted by retailers.

And as the Department admits, TracFone's requested injunctive relief is permitted where there is a constitutional basis for that relief, which there is here. TracFone contends that because the Department treats TracFone differently because it does not impose or accept tax-on-a-tax money from other telephone service providers, the Department's actions violate the Washington and

United States Constitution's equal protection and due process guarantees. The Superior Court erred in failing to reach TracFone's constitutional claims by wrongly imposing a substantial-harm barrier to declaratory relief. TracFone has been substantially harmed by the Department's actions, but even if TracFone was not, there is no requirement that TracFone must prove a particular amount of financial loss before asking for a declaration that the Department violates the constitution.

This Court should find that TracFone has alleged sufficient facts to proceed past the pleadings phase with its claims for declaratory and injunctive relief, and reverse and remand the matter for a hearing on the merits to allow TracFone to prove those claims.

II. ASSIGNMENTS OF ERROR AND ISSUES

A. Assignments of Error

- 1. The trial court erred in dismissing TracFone's non-constitutional claims by finding that RCW 82.32.150 bars declaratory relief.**
- 2. The trial court erred in dismissing TracFone's constitutional claims by finding that TracFone failed to allege sufficient injury to support its claim for declaratory judgment.**
- 3. The trial court erred in failing to declare that the Department's acceptance of tax-on-a-tax money violates RCW 82.14B.030(6) and erred in failing to enjoin future collection.**
- 4. The trial court erred in failing to declare that the Department's unequal treatment of TracFone as compared to other telecommunications providers violates the Washington and United States Constitutions.**
- 5. The trial court erred in finding that TracFone did not collect a tax when it increased the purchase price of its cards to account for the E-911 tax assessment.**

B. Issues Pertaining to Assignments of Error

- 1. Under CR 12(b)(6), a Washington court will not dismiss claims if hypothetical allegations exist, not inconsistent with the allegations of the complaint, upon which relief could be granted. TracFone's allegations could have entitled TracFone to relief on its declaratory judgment and injunctive relief claims. Did the trial court err in dismissing TracFone's claims?**
- 2. RCW 82.32.150 bars only injunctions restraining the collection of tax, not actions for**

declaratory judgment. TracFone seeks a declaratory judgment that the Department cannot keep non-tax money and an injunction preventing it from accepting more non-tax money in the future. Is TracFone allowed to seek relief?

3. A party must allege only a justiciable controversy, not a particular dollar amount in controversy, to pursue declaratory relief. TracFone asserted that its business was damaged by the Department's actions on a large scale. Did the trial court err by finding that TracFone failed to allege sufficient damage to pursue relief?
4. Substantive due process and equal protection rights are violated when a taxing authority thwarts public purpose and is unduly oppressive of a property owner. The Department's retention of money collected in violation of the clear statutory prohibition in RCW § 82.14B.030(6) against collecting double taxes puts TracFone at a competitive disadvantage. Has the Department violated TracFone's substantive due process and equal protection rights?
5. Procedural due process requires that an adversely affected party be given notice and an opportunity to be heard. TracFone apparently lacks standing to seek relief either at the agency level or through a tax refund suit. Does procedural due process require that TracFone have access to the only other venue for a hearing, which is a superior court declaratory judgment action?
6. Washington law requires that TracFone collect the E-911 tax by increasing the purchase price of its cards by the amount of the tax. The E-911 tax is then remitted to the Department. Did the trial court err in finding that charging sales tax on the increase in purchase price representing the E-911 tax is not the collection of tax?

III. STATEMENT OF THE CASE

A. TracFone sells prepaid cell phone cards to retailers, who then sell them to Washington consumers.

TracFone sells prepaid cell phones and prepaid cell phone cards (collectively, the “TracFone Cards”). (CP 5.) The TracFone Cards contain a block of cell phone minutes, which are loaded onto a prepaid phone when a TracFone customer purchases airtime. (Id.) TracFone sells the TracFone Cards wholesale to retailers, who then market the TracFone Cards to consumers at retail. (CP 19.) TracFone’s retailers then collect Washington’s excise sales and use tax (the “Sales and Use Tax”) on retail sales of the TracFone Cards. (Id.); *See also* RCW § 82.08.050. The retailers then remit the Sales and Use Tax to the Department. (CP 20.)

B. The Washington Supreme Court ruled that TracFone can collect Washington’s E-911 Tax from its customers by increasing the purchase price of the TracFone Cards.

Washington imposes a tax on consumers of cell phone services to fund emergency 911 services (the “E-911 Tax”). (CP 70); RCW § 82.14B.030. The Washington Supreme Court has interpreted the E-911 Tax law to require TracFone to collect that tax from its customers and remit the E-911 Tax to the Department. *See TracFone Wireless, Inc. v. Dep’t of Revenue*, 170 Wn.2d 273 (2010) (“*TracFone I*”).

The E-911 Tax is distinct from the Sales and Use Tax. The E-911 Tax law forbids imposing the Sales and Use Tax on the E-911

Tax. (CP 71); RCW § 82.14B.030(6). In other words, the Department cannot collect a tax on a tax. In *TracFone I*, the Supreme Court expressly ruled that TracFone may “collect” the E-911 Tax by “adjusting its prepaid pricing” so as to include the E-911 Tax in the amount charged to customers. *TracFone I*, 170 Wn.2d at 291. In approving that collection method, the Supreme Court stated specifically how to perform the calculation: “All that is necessary is to take this ascertainable period of time, in months, and multiply by 20 cents.” *Id.* at 293. That 20 cents per month is the E-911 tax, which may be collected from TracFone’s customers.

C. After *TracFone I*, TracFone implemented a plan to comply with the Supreme Court’s ruling.

In accordance with the Supreme Court’s direction, TracFone developed the Price Adjustment Plan under which it would adjust the price of its products to include the E-911 Tax. (CP 71.) Under the Price Adjustment Plan, TracFone adjusts its prepaid pricing by calculating the E-911 Tax due for each TracFone Card, thereby causing an amount attributable to the E-911 Tax to be included in the final purchase price of the TracFone Cards. (*Id.*) To avoid imposing a Sales and Use Tax on the E-911 Tax, retailers must exclude the E-911 portion of the TracFone Cards’ retail purchase price when calculating and collecting the Sales and Use Tax. (CP 20.)

D. Retailers who do not exclude the E-911 Tax from TracFone Cards' purchase price when calculating the Sales and Use Tax erroneously collect and remit non-tax money to the Department.

Unless retailers segregate the E-911 Tax from the retail purchase price of the TracFone Cards, they calculate the Sales and Use Tax due based on the entire purchase price of the TracFone Cards, including the amount of the E-911 Tax. (CP 20.) This results in collection by those retailers of Sales and Use Tax on the E-911 portion of the TracFone Cards' sale price (the Tax-on-a-tax) and the remission to the Department of an unlawful tax-on-a-tax for all TracFone Cards, to the detriment of substantial numbers of Washington consumers. (CP 5.)

E. The Department has actual knowledge of the problem of retailers collecting and remitting non-tax funds, but refuses to act to avoid receipt of the erroneously collected funds.

TracFone has repeatedly and vociferously advised the Department of the Price Adjustment Plan and the problem of retailers erroneously collecting and remitting non-tax funds. (CP 20.) Despite the clear statutory prohibition in RCW § 82.14B.030(6) on collecting double taxes, the Department has refused to take action to avoid knowingly accepting non-tax funds remitted by retailers of the TracFone Cards. (CP 6.)

Instead, the Department states affirmatively that it will accept and retain the tax-on-a-tax funds, which violates the rights of consumers and negatively impacts TracFone's business. (CP 39.)

The Department asserts the official position that any retailer that excludes the portion of the TracFone Cards' purchase price allocable to the E-911 Tax when calculating the Sales and Use Tax does so at its own peril, and that the Department may pursue them for failure to remit the required Sales and Use Tax. (CP 39.)

By contrast, the Department adopted a policy that sellers of prepaid wireless services who sell their services over the Internet to Washington consumers should only collect a retail sales tax from their customers that is based on an amount that excludes the E-911 Tax. The Department adopted the same policy for providers of post-paid wireless services. (CP 72.)

F. The Department's actions significantly impact TracFone and Washington consumers.

The impact of the Department's disparate treatment of prepaid wireless services sold at retail results in TracFone's customers being charged excessive retail sales tax on a massive scale, seriously impacting TracFone's ability to compete with post-paid providers and prepaid providers who sell their services over the internet. (CP 20.) This competitive disadvantage causes 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.)

G. TracFone seeks a declaration that it is erroneous for retailers to collect and remit the tax-on-a-tax, and an injunction restraining the Department from collecting that non-tax money.

TracFone seeks declaratory relief in the form of a ruling that retailers violate the E-911 Tax law's prohibition on charging sales tax on top of the E-911 tax when they calculate the Sales and Use Tax based on the entire purchase price of TracFone Cards. (CP 76.) TracFone also seeks an injunction restraining the Department from collecting those non-tax funds erroneously submitted by retailers. (Id.)

H. The Superior Court dismissed TracFone's complaint based upon an erroneous finding that TracFone sought prohibited injunctive relief and failed to allege sufficient injury to support a claim for declaratory judgment.

The Department filed two successive motions for judgment on the pleadings. On February 17, 2012, the Superior Court dismissed TracFone's claims that the Department violated Washington law by finding that RCW 82.32.150 barred declaratory relief. The Court concluded that even though RCW 82.32.150 only expressly bars injunctive relief not based on constitutional grounds, declaratory judgment and injunctive relief are essentially synonymous for purposes of that statute. Thus, the Court ruled that TracFone could only proceed with its declaratory judgment and injunctive relief claims if it could adduce constitutional grounds for those claims. The Court granted TracFone leave to amend to add allegations establishing constitutional grounds for those claims.

TracFone did so, and the Department brought a second motion to dismiss.

At the June 22, 2012 hearing on the Department's second motion to dismiss, the Superior Court dismissed TracFone's declaratory judgment and injunctive relief claims without reaching the question of whether TracFone stated a constitutional basis for those claims. The Court found that TracFone failed to allege sufficient injury to merit injunctive relief or a declaratory judgment. The trial court disregarded the allegations in TracFone's complaint that the Department's unlawful taxation practices cause TracFone a competitive disadvantage costing TracFone millions of dollars annually, and refused to grant TracFone an evidentiary hearing to substantiate those allegations, noting instead that the case should go up on appeal earlier than later:

[I]t seems to me that to delay this decision further, to permit TracFone to submit evidence about a complicated issue of the financial impact upon this slight increase in the retail price of its cards would simply be an unnecessary use of the court's time and the parties' resources. I think this case should go up sooner rather than later, and my decision here clears the way for that to happen.

(July 13, 2012 TR at 48:4-50:4.) TracFone filed a timely notice of appeal.

IV. ARGUMENT

A. Standard of Review

This Court reviews the Superior Court's dismissal de novo. *Gorman v. City of Woodinville*, 175 Wn.2d 68, 71 (2012). Motions to dismiss under CR 12(b) are disfavored and courts presume that they should be denied. *Kinney v. Cook*, 159 Wn.2d 837, 842 (2007) (“Dismissal is warranted only if the court concludes, beyond a reasonable doubt, that the plaintiff cannot prove any set of facts which would justify recovery.... A motion to dismiss is granted sparingly and with care and, as a practical matter, only in the unusual case in which plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief.”) When considering a motion to dismiss, a court is required to accept all the plaintiff's allegations as true, and draw all possible inferences in favor of the plaintiff's claims. *Id.* at 842; *see also Wright v. Jeckle*, 104 Wn. App. 478, 481 (2001) (“We accept the plaintiffs' allegations and any reasonable inferences as true. And for that reason CR 12(b)(6) motions should be granted sparingly and with care.”)

If the court could hypothetically grant any relief on plaintiffs' claims, the court must deny a defendant's motion to dismiss. *Orwick v. Seattle*, 103 Wn.2d 249, 254 (1984) (“Dismissal for failure to state a claim may be granted only if it appears beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint,

which would entitle the plaintiff to relief.”). When deciding whether any factual theory could exist that would entitle the claimant to relief, courts consider facts not included in the complaint, including hypothetical facts—even hypothetical facts raised for the first time on appeal. *Bravo v. Dolsen Cos.*, 125 Wn.2d 745, 750 (1995); *See also Gaspar v. Peshastin Hi-Up Growers*, 131 Wn. App. 630, 635 (2006) (“Dismissal under CR 12 is appropriate only if it is beyond doubt that the plaintiff can prove no facts that would justify recovery. In making this determination, the court must presume that the plaintiff’s allegations are true and may consider hypothetical facts that are not included in the record.”); *Berge v. Gorton*, 88 Wn.2d 756, 762 (1977) (“[T]he complaint cannot be dismissed upon a CR 12(b)(6) motion if it is found to adequately allege a claim based upon some theory other than that advanced by the plaintiffs.”); *Pearson v. Vandermay*, 67 Wn.2d 222, 232-33 (1965) (reversing a judgment on the pleadings where the existence of a disputed factual issue became apparent through counsels’ conflicting statements at the motion hearing).

B. The Department’s acceptance of tax-on-a-tax money from retailers violates RCW 82.14B.030(6)’s ban on collecting sales and use tax on the E-911 tax.

The core issue in this case is simple. The Department may not collect Sales and Use Tax on the E-911 Tax. RCW 82.14B.030(6) provides:

(b) Enhanced 911 operational costs.

...

(6) A state enhanced 911 excise tax is imposed on all radio access lines whose place of primary use is located within the state in an amount of twenty-five cents per month for each radio access line. [] The tax imposed under this section is not subject to the state sales and use tax or any local tax.

(emphasis added). The Supreme Court held that TracFone's customers must pay the E-911 tax, and that TracFone could collect the tax by increasing the total sales price of the TracFone Cards. *TracFone I*, 170 Wn.2d at 291-93. Retailers could then remit E-911 tax to the department, as well as the sales tax attributable to the purchase price other than the portion comprising the E-911 tax.

But if a retailer refuses to or cannot segregate the E-911 Tax from the total purchase price of a TracFone card, and instead collects sales tax on the entire amount, the Department receives non-tax money—the unlawful tax-on-a-tax portion of the purchase price.

The Department does not claim that it is entitled to non-tax money. But, surprisingly, the Department claims that its windfall of non-tax money is simply a “business cost” to TracFone. (CP 86.) And the Department does far more than passively accept funds it is not entitled to receive; the Department's official position is that any retailer that excludes the portion of the TracFone Cards' purchase price allocable to the E-911 Tax when calculating the Sales and Use Tax does so at its own peril, and that the Department may pursue them for failure to remit the required Sales and Use Tax. (CP 39.)

Retailers are thus placed in a bind: either violate RCW 82.14B.030(6), or risk enforcement action by the Department. Unsurprisingly, the retailers unanimously opt to remit excess money to the Department.

C. TracFone’s requested declaration that retailers violate the E-911 Law’s tax-on-a-tax prohibition is not barred by RCW 82.32.150.

TracFone sought declaratory relief that the Department was misapplying the E-911 tax law’s mandate that double taxation not occur. The Superior Court found erroneously that RCW 82.32.150 prevents TracFone from bringing its action seeking declaratory relief absent constitutional grounds. But RCW 82.32.150 does not prohibit declaratory judgment actions relating to taxation—only certain injunctive relief actions:

No restraining order or injunction shall be granted or issued by any court or judge *to restrain or enjoin the collection of any tax* or penalty or any part thereof, except upon the ground that the assessment thereof was in violation of the Constitution of the United States or that of the state.

RCW 82.32.150.

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. The Department’s claim that a statutory declaratory relief action is encompassed within the meaning of RCW

82.32.150's use of the terms "restraining order or injunction" violates the plain language interpretation of RCW 82.32.150. *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9-10 (2002) ("[I]f the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent."). If the legislature had intended RCW 82.32.150 to also bar actions brought under the declaratory judgment act, it would have referred to such actions expressly. It did not and they are not barred.

Nor do the policies behind RCW 82.32.150's prohibition on orders or injunctions to restrain or enjoin the collection of any tax or penalty apply to actions for declaratory judgment. The Department argued that RCW 82.32.150's restriction on restraining orders or injunctions "supports society's strong interest in the efficient collection of taxes by preventing tax disputes from delaying payment of taxes into the public treasury (perhaps for many years)." (Motion at 5:17-19.) But TracFone's declaratory relief action would not "delay[] payment of taxes into the public treasury." Instead, it clearly seeks relief relating to monies which are forbidden from being taxed under Washington law. Nothing about TracFone's declaratory relief action would delay the payment of taxes during its pendency and the policies supporting the ban on injunctive relief under RCW 82.32.150 simply do not apply.

TracFone's declaratory relief action does not challenge the Department's imposition or collection of the E-911 Tax nor the Department's collection or imposition of the Sales and Use Tax. Instead, TracFone asks this Court to declare that when *retailers*—not the Department—erroneously calculate Sales and Use Tax based on the entire purchase price of a TracFone Card, and they do so even when part of that purchase price is allocable to the E911 Tax, they are wrong. And the Department should not retain non-tax money that is mistakenly transmitted to it by retailers.

TracFone's request for injunctive relief also does not violate RCW 82.32.150 because it does not seek to prohibit the Department from collecting a bona fide tax: it seeks to prohibit the Department from retaining funds expressly defined by statute as *non-tax* money. Holding otherwise allows the Department to collect and retain money it is not entitled to, without judicial review. Neither TracFone nor consumers have paid a tax by retailers erroneously remitting non-tax money and therefore cannot challenge the Department's actions as taxpayers. And, if the superior court is correct, then neither can TracFone nor any party seek declaratory or injunctive relief that the Department is retaining non-tax money.

D. TracFone’s request for declaratory and injunctive relief is not barred by RCW 82.32.180 because that statute applies only to taxpayers in refund suits.

The trial court also erroneously relied on RCW 82.32.180 in finding that TracFone’s nonconstitutional claims were barred. RCW 82.32.180 prohibits taxpayers from seeking a refund unless the challenged tax is paid. This was a red herring—Tracfone is not a taxpayer of the Sales and Use Tax, and it is not seeking a refund.

RCW 82.32.180 provides that “[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 admitted to the trial court, TracFone is not seeking a refund. (CP 16.) Nor arguably could TracFone be a party to a suit for refund of the Sales and Use Tax—TracFone is a wholesaler and is not one of the statutorily enumerated parties liable as a taxpayer for the Sales and Use Tax associated with the TracFone Cards. RCW § 82.08.050; *Kitsap-Mason Dairymen’s Asso. v. Wash. State Tax Com.*, 77 Wn.2d 812, 813 (1970) (“Net retail sales were determined by deducting non-taxable sales...[including]...wholesale transactions.”)

TracFone is not contesting an already-paid or already-assessed tax. It seeks a declaration that retailers violate the E-911 law’s tax-on-a-tax prohibition when they calculate Sales and Use Tax on the entire price of a TracFone Card, including the portion

allocable to the E-911 Tax, and then remit non-tax money to the Department.

Put simply, the tax-on-a-tax funds are not taxes; the Department does not impose or assess them. Retailers who collect and remit them do so as a function of their erroneous Sales and Use Tax calculation. And, as the Department admits, this is not a tax refund suit. Therefore, RCW 82.32.180's requirement that a taxpayer (which TracFone is not) pay a disputed tax before bringing a refund suit (which this is not) does not apply.

E. The trial court erred in finding, without a factual record, that the harm to TracFone was insufficient to grant declaratory relief.

The trial court declined to address TracFone's constitutional arguments by finding, as a matter of law, that TracFone failed to prove sufficient damage and therefore could not seek a declaratory ruling. (June 22, 2012 RP at 48:4-50:4). The court found:

[I]t seems to me that to delay this decision further, to permit TracFone to submit evidence about a complicated issue of the financial impact upon this slight increase in the retail price of its cards would simply be an unnecessary use of the court's time and the parties' resources.

(Id.) This ruling is in error. RCW 7.24.020 governs declaratory judgment, and provides:

A person [] whose rights, status or other legal relations are affected by a statute [] may have determined any question of

construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

The right to anticipatorily dispute tax-related issues on constitutional grounds has been recently confirmed by the Washington Supreme Court. *W.R. Grace & Co. v. Dep't of Revenue*, 137 Wn.2d 580, 599 (1999) (“The taxpayers have a right to challenge the imposition of an unconstitutional tax and such a right is preserved both in prepayment or postpayment settings.”) As explained below, TracFone’s constitutional rights of substantive due process, procedural due process, and equal protection would be violated by the Department’s collection and retention of the tax-on-a-tax.

TracFone need only allege a justiciable controversy, not a particular dollar amount, in order to obtain declaratory relief. *State ex rel. O'Connell v. Dubuque*, 68 Wn.2d 553, 558 (1966). A justiciable controversy requires only that TracFone have an “existing and genuine, as distinguished from theoretical” right. *Id.* There is no requirement that TracFone prove *any* financial loss; a declaratory judgment may issue setting the rights of parties even if no amount is in controversy. *Inland Empire Rural Electrification v. Dep't of Public Serv.*, 199 Wash. 527, 533 (1939)(Whether rural electrical cooperative was regulated as a public utility ripe for relief). And in tax cases, the court weighs only whether an injury occurred,

not the amount of the injury. *E.g. Nelson v. Appleway Chevrolet, Inc.*, 160 Wn.2d 173, 178 (2007)(declaring \$79.23 tax imposition unlawful).

Further, even if the amount of damages was at issue, the trial court erred by failing to either accept TracFone's allegations of harm in the complaint as true, or allowing TracFone an opportunity to prove them. TracFone is entitled to rely on the factual allegations in the complaint in responding to a CR 12(b)(6) motion, unless the trial court converts the hearing to a summary judgment proceeding. CR 12(b); *Kinney v. Cook*, 159 Wn.2d 837, 842 (2007)("The court presumes all facts alleged in the plaintiff's complaint are true and may consider hypothetical facts supporting the plaintiff's claims.") If it is so converted, TracFone is entitled to present evidence substantiating its claims. CR 12(b).

TracFone alleged in its pleadings that the Department's actions caused the collection of unlawful tax-on-a-tax money on a massive scale, seriously impacting 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.)

TracFone was prepared to present evidence substantiating its claims. (June 22, 2012 RP at 34:14-35:7.) Rather than rely on the

facts presented in the complaint or allow TracFone to present evidence substantiating them, the trial court conducted its own evaluation of the merits of TracFone's claims—completely without any evidentiary review—and wrongly concluded that TracFone would suffer insufficient injury to merit declaratory judgment. (June 22, 2012 RP at 48:4-50:4.)

F. The Department's imposition of the tax-on-a-tax violates TracFone's substantive due process and equal protection rights.

The substantive due process and equal protection provisions of both the state and federal constitutions require that a taxing authority's determinations about what property tax may be levied upon must be reasonable:

Due process, equal protection and the privileges and immunities clauses of the federal and state constitutions impose general requirements of reasonableness in the classification of persons and property to which a tax is applicable.

State ex rel. Namer Inv. Corp. v. Williams, 73 Wn.2d 1, 6-7 (1968).
“Taxation must have relation to some subject-matter actually within the jurisdiction of the taxing power, otherwise it violates the constitutional guaranty against the taking of property without due process of law.” *Billings v. United States*, 232 U.S. 261 (1914).

The trial court declined to address TracFone's constitutional claims because it erroneously found that TracFone could not obtain

declaratory relief. In the interest of judicial economy, an appellate court should resolve contested issues of law before remand. *Dietz v. Doe*, 131 Wn.2d 835, 842 (1997)(“judicial economy is best served if we remand this case to the trial court with instructions as to the rule of law”); *Philadelphia II v. Gregoire*, 128 Wn.2d 707, 716 (1996). Accordingly, TracFone requests that this Court find that the Department’s actions as alleged in the complaint violate TracFone’s constitutional rights.

To determine whether a regulation violates due process, Washington courts engage in a three-prong due process test which asks: (1) whether the regulation is aimed at achieving a legitimate public purpose; (2) whether it uses means that are reasonably necessary to achieve that purpose; and (3) whether it is unduly oppressive on the property owner. *Presbytery of Seattle v. King County*, 114 Wn.2d 320, 330 (1990); *see also Orion Corp. v. State*, 109 Wn.2d 621, 646-647 (1987) (“Under the classic, 3-pronged, substantive due process test of reasonableness, a police power action must be reasonably necessary to serve a legitimate state interest”).

The Department’s acceptance of Sales and Use Tax on the portion of a TracFone Card’s purchase price allocable to the E-911 Tax is *per se* unreasonable, arbitrary and capricious—as well as a violation of public purpose as expressed in Washington statutes—because it directly violates the E-911 law’s prohibition on charging

tax on the E-911 Tax. “A tax on a tax is the fabled ultimate dream of a taxing authority, but we know (or hope we know) that this is a fable.” *DeRoche v. Ariz. Indus. Comm’n (In re DeRoche)*, 287 F.3d 751, 756 (9th Cir. 2002). As an unreasonable determination about the classification of property upon which the Sales and Use tax can be based, the Department’s action in this regard is a violation of TracFone’s substantive due process and equal protection rights.

The facts of *Namer* are instructive. In that case, the taxpayer—an owner of real property—sought to have a memorandum of understanding recorded on the title of that property. 73 Wn.2d. 1. The auditor refused to record the memorandum and claimed that the taxpayer must first pay the 1% excise tax associated with an unexercised lease option on that property. The taxpayer sued to enjoin the auditor to record the requested memorandum of understanding, arguing that it violated substantive due process and equal protection principles to charge an excise tax on an unexercised lease option. Though the trial court entered judgment for the auditor, the Supreme Court reversed, siding with the taxpayer:

The basis for any excise tax to be levied, then, must be the actual consideration paid or delivered or contracted to be paid or delivered in exchange for the ultimate transfer of the designated interest in real property. It is against the background of this definition of ‘selling price’ that a number of our previous cases arising out of RCW 28.45 have been decided.

Id. at 9-10. As in *Namer*, TracFone seeks an injunction on the basis that, according to constitutional substantive due process and equal

protection principles, the Sales and Use Tax cannot be based on certain property—specifically E-911 taxes. Therefore, TracFone has a valid constitutional basis for seeking an injunction, and its claims should not be dismissed under CR 12(b)(6).

Recently, the District Court for the Western District of Kentucky issued an opinion concerning TracFone’s Cards – and like *Namer*, concluded that it is unreasonable to impose the tax. In *Commonwealth of Kentucky Commercial Mobile Radio Service Emergency Telecommunications Board v. TracFone Wireless, Inc.*, No. 3:08-CV-660-H (W.D.Ky. Aug. 18, 2010), the court provided as follows:

According to TracFone, if it built the [emergency 911 service] fee into its suggested retail price, the retailers would automatically charge sales tax on the full retail price and, thus, would tax the fee... TracFone has not convinced the Court that building the fee into its retail price without exposing the customers to an unauthorized tax is a difficult, not to mention impossible, task.

Id. The court determined that a tax on Kentucky’s equivalent of the E-911 tax would be “unauthorized.” *Id.* This is yet another indication that the Department’s imposition of the tax-on-a-tax is *per se* unreasonable, arbitrary and capricious.

Another case, *Hopkins v. Southern California Tel. Co.*, 275 U.S. 393 (1927) is directly on point. In *Hopkins*, a California county tax authority sought to impose an excise property tax on handsets leased by a telephone company for its customers’ use. But the

California Constitution required telephone companies to pay a tax based on a percentage of gross revenues, and provided that tax was in lieu of any other state or local property taxes. *Hopkins*, 275 U.S. at 398 (“Such taxes shall be in lieu of all other taxes and licenses, State, county and municipal, upon the property above enumerated of such companies except as otherwise in this section provided.”) The *Hopkins* court stated that the imposition of a local property tax that was expressly prohibited by the California Constitution raised a question under the equal protection clause of the federal constitution and was unlawful. *Id.* at 398-399, 403 (“[W]e must conclude that the bill set forth claims of right under the Federal Constitution sufficiently substantial to give the trial court jurisdiction of the cause....[T]he Fourteenth Amendment protects those within the same class against unequal taxation; all are entitled to like treatment.”) The Department’s conduct mirrors the allegations in *Hopkins*—the Department seeks to impose a sales tax on the portion of the TracFone Cards’ purchase price allocable to the E-911 Tax, which is directly contrary to the E-911 Tax law’s prohibition on charging sales tax on the E-911 Tax. This constitutes a violation of state and federal equal protection and substantive due process protections.

The result of the Department’s equal protection violations is that consumers of post-paid cell services are treated more favorably. They are billed retroactively for cell services, and the E-911 Tax is

presented separately on the bill. The sales tax is calculated on an amount that excludes the E-911 Tax. This is a clear violation of TracFone's equal protection right to have its prepaid services treated as favorably as post-paid services.

G. The Department's imposition of the tax-on-a-tax also violates TracFone's procedural due process rights.

The procedural due process requirements of both the state and federal constitutions mandate that a taxpayer must be afforded notice and an opportunity to be heard by an unbiased tribunal with respect to the imposition of a tax. *Drum v. Univ. Place Water Dist.*, 144 Wash. 585, 589 (1927). TracFone is not a taxpayer on which the Sales and Use Tax is imposed. Therefore, TracFone does not appear to have standing to dispute the Department's imposition of a Sales and Use Tax on the E-911 Tax either at the agency level or through a tax refund suit under RCW § 82.32.180. That leaves TracFone with no due process opportunity to object to the Department's imposition of Sales and Use Tax on the E-911 Tax—other than via this lawsuit.

Hopkins squarely addressed these circumstances. There, the Supreme Court ruled that due process entitled the taxpayer telecommunications company to an injunction against an unlawful tax because it had no standing to contest the tax through a tax refund suit.

Petitioners maintain that under §§ 3804 and 3819, California Political Code, respondents could have

protected their rights by paying the assessed tax and bringing actions to recover. But whether either of these sections applies in circumstances like those here presented is far from certain. Section 3819 gives a remedy to the owner; and *Warren v. San Francisco*, 150 Cal. 167, intimates quite strongly that it applies only to actual owners. Whether the lessee who has paid taxes upon the owners' property can recover under § 3804 is also questionable.

Hopkins, 275 U.S. at 399. As in *Hopkins*, TracFone's right to procedural due process should entitle it to bring an action to enjoin the Department's unlawful tax-on-a-tax or seek declaratory relief with respect to that practice. Without such an action, TracFone, like the taxpayer telecommunications company in *Hopkins*, would have no ability to assert its rights.

The Department argued that TracFone "seeks to transform its lack of standing into a procedural due process claim." (CP 89.) This misses the point. The FAC notes that "[u]nless TracFone is able to challenge the DOR's unlawful conduct before this Court, it will have no opportunity to be heard by an unbiased tribunal about the DOR's wrongful conduct." (CP 73.) TracFone is adversely affected by the imposition of the tax-on-a-tax, even though it is not a taxpayer on which that tax is imposed. Accordingly, procedural due process requires that TracFone have a forum in which to air its grievances. Because TracFone apparently lacks standing either at the agency level or through a tax refund suit, it *must* be able to challenge the tax-on-a-tax in a declaratory and injunctive action. Its lack of standing in *other* venues requires access to *this* venue.

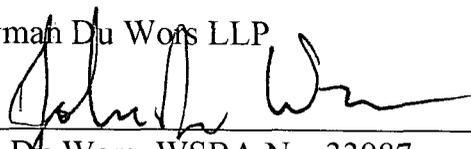
V. CONCLUSION

The Department receives a windfall of unlawful tax-on-a-tax money every time a retailer remits Sales and Use Tax on the E-911 Tax. Rather than working with TracFone to ensure that taxes are fairly paid rather than overcollected, the Department raised a smorgasbord of procedural reasons why unlawful taxation should be just “a cost of doing business” for TracFone. But TracFone is entitled to a hearing on its claims, and the Superior Court erred in finding otherwise. This Court should reverse and remand for trial.

DATED this 6th day of December, 2012.

Respectfully Submitted,

Newman Du Wors LLP

By: 

John Du Wors, WSBA No. 33987

Keith Scully, WSBA No. 28677

1201 Third Avenue, Suite 1600

Seattle, Washington 98101

Telephone Number (206) 274-2800

Facsimile Number (206) 274-2801

FILED
COURT OF APPEALS
DIVISION II

2012 DEC -6 PM 3: 36

STATE OF WASHINGTON

BY _____
DEPUTY

1
2
3
4
5
6
7 **SUPERIOR COURT OF THE STATE OF WASHINGTON**
8 **IN AND FOR THURSTON COUNTY**

9 TRACFONE WIRELESS, INC., a Delaware
10 corporation,

11 Plaintiff,

12 v.

13 WASHINGTON STATE DEPARTMENT
14 OF REVENUE,

15 Defendant.

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

Court of Appeals Case No. 48503-4-II

16
17 **CERTIFICATE OF SERVICE**

18 The undersigned hereby certifies that on December 6, 2012, I caused the foregoing

19 • **BRIEF OF APPELLANT**

20 to be served via the method(s) listed below on the following parties:

21 **Via email to:**

22 **David M. Hankins**

23 **Heidi A. Irvin**

24 **Julie Johnson**

25 Washington Dept of Revenue

26 7141 Cleanwater Drive SW

27 P.O. Box 40123

28 Olympia, WA 98504-0123

david.hankins@atg.wa.gov

heidii@atg.wa.gov

JulieJ@atg.wa.gov

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 December 6, 2012, at Seattle, Washington.

4 
5 _____
6 Lindsey Rowson

7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28