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SUPREME COURT OF THE STATE OF WASHINGTON

HOMESTREET, INC., et al.,

Petitioners,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Respondent.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

HomeStreet, Inc., Homestreet Capital Corporation, and HomeStreet Bank (“the servicers”) seek review of the decision of Division II of the Court of Appeals in *HomeStreet, Inc. v. Dep’t of Revenue*, ___ Wn. App. ___, 162 P.3d 458 (2007). RCW 82.04.4292 provides a deduction from the business and occupation tax for a limited form of income received by banks and other financial businesses:

In computing tax, there may be deducted from the measure of tax by those engaged in banking, loan, security or other financial businesses, amounts derived from interest received on investments or loans primarily secured by first mortgages or trust deeds on nontransient residential properties.

The servicers receive non-interest income in the form of servicing fees in exchange for providing mortgage loan administration services to the owners of the loans. This case presents the issue whether this non-interest contractual fee income is deductible under this statute.

II. RESTATEMENT OF THE ISSUE PRESENTED

Under RCW 82.04.4292, may mortgage servicers deduct contractual fees they receive in exchange for performing services for secondary market mortgage loan purchasers?

III. STATEMENT OF THE CASE

Division II’s opinion contains a fair and accurate statement of the case. *See* 162 P.3d at 460-63. Instead of rebutting every inaccurate or

misleading description in the servicers' argumentative statement of the case,¹ the Department simply refers the Court to Division II's opinion.

IV. REASONS WHY REVIEW SHOULD BE DENIED

A. Division II's Decision Is Not In Conflict With Any Decision Of This Court.

The servicers seem to contend that this decision conflicts with *Scoccolo Const., Inc. v. City of Renton*, 158 Wn.2d 506, 516, 145 P.3d 371 (2006), *State v. Roggenkamp*, 153 Wn.2d 614, 632, 106 P.3d 196 (2005), *Agrilink v. Dep't of Revenue*, 153 Wn.2d 392, 396, 103 P.3d 1226 (2005), and *United Parcel Serv., Inc. v. Dep't of Revenue*, 102 Wn.2d 355, 361, 687 P.2d 186 (1984), thereby warranting review under RAP 13.4(b)(1).
Pet. at 8-11.

Before this case, RCW 82.04.4292 had been interpreted by the Washington appellate courts only once, in *Dep't of Revenue v. Sec. Pac. Bank*, 109 Wn. App. 795, 38 P.3d 354 (2002). The servicers do not argue that Division II's decision in this case conflicts with *Sec. Pac. Bank*. See Pet. at 4, 7-14. Indeed, the servicers' petition quotes from a statement in *Security Pac. Bank* that the purpose of RCW 82.04.4292 was "to stimulate the residential housing market by making residential loans available to home buyers at lower cost through the vehicle of a B&O tax [deduction] on interest income received by home mortgage lenders." 109 Wn. App. at

¹ See RAP 13.4(c)(6), 13.4(e), 10(a)(5).

804 (italics added).² Division II's decision in *HomeStreet* that RCW 82.04.4292 allows mortgage lenders "to deduct interest income from qualifying home loans" but does not allow servicers to deduct fee income "from servicing loans" is entirely consistent with its interpretation of RCW 82.04.4292 in *Sec. Pac. Bank*.³ Therefore, because the servicers do not claim that review is appropriate under RAP 13.4(b)(2), they in effect admit that Division II's decision does not actually conflict with any decision of this Court or of the Court of Appeals.

Instead of identifying any genuine conflict with a decision of this Court construing RCW 82.04.4292 or any related B&O tax deduction statute, the servicers argue that Division II's decision "disregard[s]" the "plain language" of RCW 82.04.4292 and thus "conflicts with and undermines well-settled principles of statutory construction" and "sows confusion in the interpretation of tax statutes." Pet. at 7-8. The servicers seem to contend that Division II's alleged misapplication of rules of statutory construction in its decision creates a "conflict" within the meaning of RAP 13.4(b)(1) with the four decisions of this Court they cite. The servicers' arguments for review based on RAP 13.4(b)(1) are unsound.

² In *Sec. Pac. Bank*, Division II also stated that RCW 82.04.4292 "creates an interest deduction for 'those engaged in banking, loan, security or other financial businesses[.]'" *Id.* (italics added).

³ In *Sec. Pac. Bank*, Division II stated: "Mortgage companies originate real estate mortgage loans. They earn their money primarily from origination fees charged to customers and from servicing the loans, not from interest earned on the mortgage loans." 109 Wn. App. at 798 (italics added).

So-called “rules” of statutory construction are “not statements of law.” They are merely “rules in aid of construing legislation and an aid in the process of determining legislative intent.”⁴ “Every statute is an independent communication, for which either the intended or understood meaning may be different. For this reason, a decision on a point of

⁴ *Johnson v. Continental West, Inc.*, 99 Wn.2d 555, 559, 663 P.2d 482 (1983); accord *Weinberger v. Rossi*, 456 U.S. 25, 28, 102 S. Ct. 1510, 71 L. Ed. 2d 715 (1982) (“Simply because the question presented is entirely one of statutory construction does not mean that the question necessarily admits of an easy answer. Chief Justice Marshall long ago observed that ‘[w]here the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived[.]’”); *Watt v. Alaska*, 451 U.S. 259, 265-66, 101 S. Ct. 1673, 68 L. Ed. 2d 80 (1981) (“We agree with the Secretary that ‘[t]he starting point in every case involving construction of a statute is the language itself.’ But ascertainment of the meaning apparent on the face of a single statute need not end the inquiry. This is because the plain-meaning rule is ‘rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists.’”); *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221, 73 S. Ct. 227, 97 L. Ed. 260 (1952) (“What Congress has made the allowable unit of prosecution—the only issue before us—cannot be answered merely by a literal reading of the penalizing sections. Generalities about statutory construction help us little. They are not rules of law but merely axioms of experience. They do not solve the special difficulties in construing a particular statute. The variables render every problem of statutory construction unique.”); *Boston Sand & Gravel Co. v. United States*, 278 U.S. 41, 48, 49 S. Ct. 52, 73 L. Ed. 170 (1928) (“It is said that when the meaning of language is plain we are not to resort to evidence in order to raise doubts. That is rather an axiom of experience than a rule of law and does not preclude consideration of persuasive evidence if it exists. If Congress has been accustomed to use a certain phrase with a more limited meaning than might be attributed to it by common practice it would be arbitrary to refuse to consider that fact when we come to interpret a statute.”); Morell E. Mullins, Sr., *Tools, Not Rules: The Heuristic Nature of Statutory Interpretation*, 30 J. Legis. 1, 68 (2003) (“[T]he concepts and tools of statutory interpretation are NOT “rules” in the sense of being substantive rules having the force and effect of law. If the concepts and tools of statutory interpretation were substantive rules having the force and effect of law, they would indeed be incoherent and make no sense. There is too much conflict and tension among them to be “rules” which have fixed substantive content and hierarchy.”).

statutory construction has little relevance as a precedent for the construction of any other statute.”⁵

The simplistic “plain meaning” and “surplusage” arguments the servicers present do not demonstrate that Division II’s decision is in conflict with any of the four decisions they cite. The servicers criticize Division II’s opinion for “recit[ing] three pages of rules of construction that would apply only if the statute were ambiguous,” Pet. at 9, but then selectively rely on another such “rule of construction,” the fallible presumption that the Legislature does not use surplus words,⁶ as the foundation for their “plain meaning” argument. Pet. at 10. None of the four decisions the servicers cite construed RCW 82.04.4292 or language in any other tax statute similar to that in RCW 82.04.4292. The statutory construction issues in those four cases were completely different than the statutory construction issue in this case.

⁵ 2A Norman A. Singer, *Statutes and Statutory Construction* § 45.15 (6th rev. ed. 2000); see also *State v. Watson*, 160 Wn.2d 1, 12 n.4, 154 P.3d 909 (2007) (“The rule of lenity is a tool of statutory construction[.]”); *State v. Leighton*, 155 Wn.2d 563, 570, 120 P.3d 936 (2005) (“The merger doctrine is a tool of statutory construction[.]”); *State v. Freeman*, 153 Wn.2d 765, 772, 777, 108 P.3d 753 (2005) (“[T]he merger doctrine is another aid in determining legislative intent[.]”); *id.* at 777 (“Another tool for determining legislative intent in the context of double jeopardy is the merger doctrine.”); *Simpson Inv. Co. v. Dep’t of Revenue*, 141 Wn.2d 139, 153, 3 P.3d 741 (2000) (referring to “the interpretive tool of ejusdem generis”); *United States v. Jin Fuey Moy*, 241 U.S. 394, 402, 36 S. Ct. 658, 60 L. Ed. 1061 (1916) (“Every question of construction is unique, and an argument that would prevail in one case may be inadequate in another.”).

⁶ See generally Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. Chi. L. Rev. 800, 812 (1983) (criticizing the presumption as based upon unrealistic assumptions about the legislative process).

1. Division II’s decision is not in conflict with *State v. Roggenkamp*.

Roggenkamp was a criminal case—not a tax case—in which the issue presented was the meaning of the phrase “in a reckless manner” as used in the vehicular homicide and vehicular assault statutes, RCW 46.61.520 and RCW 46.61.522. For several reasons, the majority held that the phrase meant “in a rash or heedless manner, indifferent to the consequences.” 153 Wn.2d at 621-30. The dissent, cited by the servicers in their petition, accused the majority of “disregard[ing] unambiguous statutory language by adhering to inapposite precedent,” arguing that legislative intent “is derived solely from the plain language of the statute if it is unambiguous, accepting that the legislature means precisely what it says,” that courts may not “rewrite or add statutory language” or “delete language from an unambiguous statute,” and that statutes “must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.” 153 Wn.2d at 631-33. The majority and dissenting opinions in *Roggenkamp* illustrate that no so-called “rules of statutory construction” are rules of law. Thus, Division II’s decision does not conflict with *Roggenkamp*.

2. Division II’s decision is not in conflict with *Scoccolo Const., Inc. v. City of Renton*.

Scoccolo Construction was a contract dispute in which a construction company sued a city for damages stemming from delays in the completion of a street-widening project, including delays caused by utility companies operating under franchise agreements with the city. The

primary issue in *Scoccolo Construction* concerned a “no-damages-for-delay” clause pertaining to delays caused by utility companies in the construction contract between the construction company and the city. The statutory construction issue presented was whether the utilities were “persons acting for the contractee” (the city) within the meaning of RCW 4.24.360, which provides that “[a]ny clause in a construction contract . . . which purports to waive, release, or extinguish the rights of a contractor, subcontractor, or supplier to damages or an equitable adjustment arising out of unreasonable delay in performance which delay is caused by the acts or omissions of the contractee or persons acting for the contractee is against public policy and is void and unenforceable.”

This Court construed RCW 4.24.360 as extending to the delays caused by the utility companies, holding that they were “persons acting for” the city. 158 Wn.2d at 515-19. In the course of its opinion, the Court recited the principles that the primary objective of statutory construction is to “ascertain and give effect to the intent of the Legislature,” and that “to determine legislative intent, we begin with the statute’s plain language and ordinary meaning.” The Court then stated that plain language “does not require construction.” *Id.* at 515-16.

Like *Roggenkamp*, *Scoccolo Construction* was not a tax decision. This Court did not construe statutory language similar to that in RCW 82.04.4292. The statutory construction issue in *Scoccolo Construction* was totally unrelated to the statutory construction issue in this case. Therefore, Division II’s decision does not conflict with that case.

3. Division II's decision is not in conflict with *United Parcel Serv., Inc. v. Dep't of Revenue*.

The servicers argue that Division II's decision conflicts with *United Parcel Service*, citing it for the proposition that “[s]tatutes are to be construed, wherever possible, so that no clause, sentence or word shall be superfluous, void, or insignificant.” Pet. at 10. The statutory construction issue decided in *United Parcel Service* was whether certain package delivery vehicles used by the taxpayer in its business qualified for a use tax exemption in RCW 82.12.0254, which extended to “any motor vehicle or trailer . . . used in substantial part . . . for transporting therein persons or property for hire across the boundaries of this state” 102 Wn.2d at 357, 360-63. The taxpayer argued that this language merely required that a vehicle be used in substantial part to carry property which will cross or has crossed a state boundary. The Department argued that the exemption was intended to apply only to motor vehicles that actually cross the boundaries of this state while carrying persons or property for hire.

This Court concluded that the language of the statute favored the Department's interpretation, reasoning that the taxpayer's argument that only the persons or property need cross state lines ignored the word “therein,” and cited the proposition quoted by the servicers. The Court gave other reasons as well, however, for rejecting the taxpayer's interpretation of the statute, including the principle that tax exemptions are narrowly construed, which the Court described as “[c]entral to our

disposition.” *Id.* at 360.⁷ Since the Court in *United Parcel Service* held that the taxpayer did not qualify for a use tax exemption under a statute with entirely different language than that in RCW 82.04.4292, there is no basis for the servicers’ assertion that Division II’s decision conflicts with *United Parcel Service*. If anything, *United Parcel Service* supports Division II’s decision.

4. Division II’s decision is not in conflict with *Agrilink v. Dep’t of Revenue*.

The statutory construction issue decided in *Agrilink* was whether canned chili products the taxpayer manufactured qualified for the preferential B&O tax rate in RCW 82.04.260(4), which reads:

Upon every person engaging in this state in the business of slaughtering, breaking and/or processing perishable meat products and/or selling the same at wholesale only and not at retail; as to such persons the tax imposed shall be equal to the gross proceeds derived from such sales multiplied by the rate of 0.138 percent.

153 Wn.2d at 394-95. *Agrilink*’s manufacturing process converted “raw meat into a nonperishable finished product.” *Id.* at 394.

This Court held that “by its plain language, RCW 82.04.260(4) does not include a perishable finished product requirement.” 153 Wn.2d at 397. First, the Court noted the absence of any “express language establishing such a requirement,” reasoning that the Legislature “might

⁷ This Court cited *Group Health Coop. v. State Tax Comm’n*, 72 Wn.2d 422, 429, 433 P.2d 201 (1967), in support of that principle. Division II’s decision follows *United Parcel Service* by citing *Group Health Coop.* for the same principle. 162 P.3d at 466-67.

have done so by using a number of alternative constructions.” *Id.* Next, because RCW 82.04.260(1) did “focus on the finished product,”⁸ the Court reasoned that the Legislature “would have done so in the same manner” if it had “intended to include a finished product requirement in RCW 82.04.260(4).” *Id.*⁹ Finally, the Court reasoned that the term “and/or” is “commonly understood to allow for a disjunctive reading.” Thus, the Court concluded, “‘processing’ alone qualifies Agrilink” for the preferential tax rate “because the second ‘and/or’ negates any requirement that a taxpayer must also sell a ‘perishable meat product.’” *Id.*

Unlike the statutes before the Court in *Roggenkamp*, *Scoccolo Construction*, and *United Parcel Service*, RCW 82.04.260(4) at least contained the words “derived from.”¹⁰ However, the Court’s opinion in *Agrilink* did not discuss the meaning of the words “derived from such sales” in RCW 82.04.260(4). Instead, the Court focused exclusively on the words “processing perishable meat products” and the term “and/or” in the first clause of RCW 82.04.260(4) and on the different language in

⁸ The Court stated that RCW 82.04.260(1)(a) “speaks of ‘[w]heat into flour,’” and cited RCW 82.04.260(1)(b), describing it as “setting the tax rate on the state of seafood products at the completion of the manufacturing process.”

⁹ *See also id.* at 399 (“Had the Legislature intended to [require a perishable finished product], it could have done so with relative ease (as exemplified in surrounding subsections), but it did not. We therefore decline to read into RCW 82.04.260(4) that which is absent.”).

¹⁰ The second clause of RCW 82.04.260(4) read: “as to *such persons* the tax imposed shall be equal to the gross proceeds *derived from such sales* multiplied by the rate of 0.138 percent.” (Italics added.) In context, the language “such sales” cannot refer to anything other than “selling the same at wholesale only and not at retail” in the first clause of the statute. Similarly, there is no apparent referent in RCW 82.04.260(4) for “the same” other than “perishable meat products.”

RCW 82.04.260(1).¹¹ Thus, Division II's decision does not conflict with the holding in *Agrilink*.

5. Division II's decision is not in conflict with *Korlund v. Dyncorp Tri-Cities Servs., Inc.*

The servicers also seem to contend that this decision conflicts with *Korlund v. Dyncorp Tri-Cities Servs., Inc.*, 156 Wn.2d 168, 177, 125 P.3d 119 (2005), which recites the well-settled principles under CR 56(c) that summary judgment “is proper if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law” and that “[t]he facts and reasonable inferences therefrom are construed most favorably to the nonmoving party.” The servicers argue that Division II “appears to have based” its decision on “factual inferences” that are “contrary to the record” and contrary to the principle that factual inferences from the record evidence should favor the nonmoving party. Thus, the servicers seem to argue that these alleged “factual inferences” bring Division II's decision into conflict with *Korlund* and other decisions of this Court reviewing summary judgments granted under CR 56(c), thereby warranting review under RAP 13.4(b)(1). Pet. at 11-13.

The servicers identify only three such alleged improper “factual inferences” by Division II in support of this argument for review. All three appear in the following paragraph in Division II's opinion:

¹¹ The Court apparently concluded that the language in the second clause of RCW 82.04.260(4) provided no insight into what business activities the Legislature intended to qualify for the preferential tax rate because the second clause addressed only the “measure” of the tax rather than the “subject” of the tax. See 153 Wn.2d at 398-99.

When HomeStreet or any mortgage lender originates a mortgage loan, it creates a relationship between itself and the borrower by allowing the borrower to use its money in return for interest on its capital. This relationship falls squarely within the statutory tax deduction. But when HomeStreet sells the loan on the secondary market, *it recovers the capital it invested* and the borrower is no longer paying HomeStreet for using its money. And, in servicing retained sales, HomeStreet retains only the right to provide loan servicing for the purchaser of the loan and to be compensated for those services. Although HomeStreet has clearly established that servicing rights are a marketable asset, *this asset is no longer directly related to the borrower's use of HomeStreet's capital, and, as evidenced by the servicing contracts between HomeStreet and the loan purchasers, the direct relationship between the borrower and HomeStreet is severed.*

162 P.3d at 466 (italics added; footnote omitted).

The servicers contend that the italicized language in the third sentence means that Division II concluded “without any citation to the record” that their sales of loans on the secondary market with servicing retained resulted in “a full recovery of” their capital invested in the loans. Pet. at 11. In other words, they seem to suggest that this italicized language means Division II somehow inferred from the record that they had sold every single loan for a price equal to or higher than the remaining principal balance of that loan, thereby “fully recovering” the money originally advanced to the borrower.

This argument is based on a strained and unreasonable interpretation of Division II's opinion. None of the parties in this case ever have argued that servicing fees qualify for the deduction in RCW 82.04.4292 if, but only if, the originating lender's selling price for a particular loan was less than the loan's principal balance. Nor would that

be a reasonable interpretation of the statute. Nothing else in Division II's opinion suggests that it intended to draw such a distinction. Instead, this paragraph merely explains that once a loan is sold on the secondary market, the seller is no longer entitled to earn interest from the borrower. *See* 162 P.3d at 459 (“We hold that when HomeStreet sold qualifying loans on the secondary market, it no longer received interest and was not entitled, under RCW 82.04.4292, to a deduction from its income in calculating its B&O tax obligation.”).

The servicers also contend that the italicized language in the last sentence of the paragraph is contrary to the “undisputed record.” Pet. at 12. They argue that their servicing assets are “created by and directly tied to the borrower’s use of HomeStreet’s capital.” Of course, there can be no servicing rights or obligations in the absence of an originated loan requiring servicing by someone. So in that limited sense the servicers’ servicing assets originally were “created by” the borrower’s use of their capital as to any loans that they originated.¹² However, the undisputed record shows that their servicing assets actually are created and governed exclusively by the servicing contracts they entered into to receive servicing fees in exchange for servicing the loans.

The servicers further argue that the “undisputed record” shows they are the only persons with “a direct relationship with” the borrowers.

¹² As Division II noted in its opinion, the record shows that the servicers did not originate all the loans that they serviced and for which they received servicing fee income at issue in this case. *See* 162 P.3d at 460 & nn.5&11.

Pet. at 12-13. This argument mischaracterizes what Division II says in the quoted paragraph. The “relationship” to which the court refers in that paragraph obviously is a creditor-debtor relationship. See 162 P.3d at 459. When an originating lender sells a loan and assigns its rights in the loan to the purchaser, the purchaser of the loan becomes the new creditor.¹³ The purchaser therefore is entitled to any loan payments collected by the servicer on its behalf.¹⁴

Division II certainly does not suggest in the quoted paragraph that a servicer has no direct contact with mortgage borrowers or that a servicer has no other sort of “relationship” with the borrowers. At the beginning of its opinion, Division II accurately describes what servicing consists of:

When servicing [loans], HomeStreet receives the loan payments directly from the borrowers, posts these payments, generally oversees the loans, receives information from the borrowers, pays required taxes and insurance payments, collects on delinquent accounts, prepares statements, and otherwise administers the loan[s]. As part of its servicing obligations, HomeStreet may also be required to process foreclosures and bankruptcies.

162 P.3d at 459 n.1.¹⁵ Division II is stating instead that “the servicing contracts between [the servicers] and the loan purchasers” plainly show

¹³ See *Dep’t of Revenue v. Sec. Pac. Bank*, 109 Wn. App. 795, 809-11, 38 P.3d 354 (2002). In *Sec. Pac. Bank*, Division II concluded: “The mortgage companies assigned the loans to Security during the warehouse phase (i.e., the period *after the mortgage company assigned the loan* to Security, but *before the loan was sold on the secondary market*). Therefore, any interest Security earned on these loans (*during that time*) is deductible under RCW 82.04.4292.” *Id.* at 810-11 (italics added).

¹⁴ See *In re Texas Mortgage Servs. Corp.*, 761 F.2d 1068, 1070 nn.3&4 (5th Cir. 1985); *In re LiTenda Mortgage Corp.*, 246 B.R. 185, 192-94 (Bankr. D.N.J. 2000), *aff’d*, 276 F.3d 578 (3d Cir. 2001); *In re Cambridge Mortgage Corp.*, 92 B.R. 145, 149, 151 (Bankr. D.S.C. 1988).

¹⁵ See *In re Texas Mortgage Servs. Corp.*, 761 F.2d 1068, 1070 nn.3&4 (5th Cir. 1985); *W. Sec. Co. v. Nat’l Reserve Life Ins. Co.*, 570 F.2d 269, 270 n.3 (8th Cir. 1978).

that the servicers retained no ownership interest in the loans at issue that they sold on the secondary market. *See* 162 P.3d at 460-61 & n.9, 465-66.

At the outset of its analysis, Division II demonstrated that it was quite familiar with the principles governing appellate review of summary judgment orders that this Court recited in *Korlund*. It stated:

We review an order of summary judgment de novo, engaging “in the same inquiry as the trial court, [and] treating all facts and reasonable inferences from the facts in the light most favorable to the nonmoving party.” Summary judgment is appropriate only if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. “Where, as here, the parties do not dispute the material facts, [we] will affirm an order on summary judgment if the moving party is entitled to judgment as a matter of law.”

162 P.3d at 464 (citations omitted). Division II properly applied those principles in deciding this case.¹⁶

Division II’s decision does not conflict with *Korlund* or any other decision of this Court reviewing a summary judgment order under CR 56(c). There is no merit in the servicers’ argument that discretionary review of Division II’s decision is warranted under RAP 13.4(b)(1).

B. The Servicers’ Petition Does Not Present An Issue Of Substantial Public Interest That Should Be Determined By The Supreme Court.

The servicers argue that Division II’s alleged misapplication of rules of statutory construction in its decision also presents “an issue of

¹⁶ As Division II’s opinion notes at the outset, the facts upon which it based its decision were “from the uncontested information the parties provided at summary judgment unless otherwise noted.” 162 P.3d at 459 n.2.

substantial public importance” that should be reviewed by this Court under RAP 13.4(b)(4). They contend that Division II’s alleged “failure to apply this Court’s precedent” will have a “widespread, negative impact,” in the form of a “substantial tax increase,” on mortgage lenders and participants in the secondary market, “including litigants in other cases stayed pending possible Supreme Court review of this case.” Pet. at 8, 13-14.

First, as explained above, Division II did not “fail to apply” any of this Court’s precedents. Before this decision, the only appellate court precedent interpreting RCW 82.04.4292 was Division II’s previous decision in *Dep’t of Revenue v. Sec. Pac. Bank*, 109 Wn. App. 795, 38 P.3d 354 (2002). Division II’s decision in this case is entirely consistent with its interpretation of RCW 82.04.4292 in *Sec. Pac. Bank*.

Second, the servicers’ “substantial tax increase” argument assumes that the Legislature intended to permit financial businesses to deduct non-interest income when it enacted the deduction in 1970. *See* Br. of Resp. at 11-19. For more than 37 years, the Department consistently has interpreted the statute to be limited to interest income. *See id.* at 17-19; WAC 458-20-146. The Legislature never has questioned that interpretation. Unless that interpretation is incorrect, servicers should have been reporting this servicing fee income as taxable ever since 1970.

Third, the servicers assert that Division II’s interpretation of RCW 82.04.4292 would make “Fannie Mae and other guaranty organizations” subject to Washington B&O tax “on their revenue from guaranty fees[.]” Pet. at 14. This simply is incorrect. Fannie Mae, Freddie Mac, and

Ginnie Mae are the principal “guaranty organizations” for mortgage-backed securities.¹⁷ Federal statutes exempt all three organizations from the B&O tax on their income from guaranty fees.¹⁸ Therefore, this decision cannot affect those organizations.

Under Division II’s interpretation of RCW 82.04.4292, secondary market purchasers of first mortgage loans continue to be exempt from B&O tax on any interest they receive from the mortgage loans they have purchased. Therefore, it is difficult to understand which unidentified “other participants in secondary market transactions” the servicers contend will be “negatively impacted” by this decision, unless they mean only other servicers of mortgage loans sold to secondary market investors.

Fourth, the servicers seem to imply that this decision should be reviewed under RAP 13.4(b)(4) merely because a few other refund actions relating to RCW 82.04.4292 currently are pending in the superior courts. It is hardly unusual that there will be other similarly situated taxpayers affected by a published appellate court tax decision. The nature of tax cases and the doctrine of stare decisis necessarily mean that every published appellate court decision interpreting a tax statute is likely to affect the tax liabilities of some taxpayers in addition to the litigants.

The flawed logic underlying the servicers’ argument would suggest that virtually all published Court of Appeals tax decisions should be

¹⁷ See, e.g., Dep’t of Treasury, Office of Fed. Hous. Enter. Oversight & Sec. & Exch. Comm’n, *Staff Report: Enhancing Disclosure in the Mortgage-Backed Securities Markets 5-15* (2003), available at <http://www.ustreas.gov/press/releases/docs/disclosure.pdf>.

¹⁸ See 12 U.S.C. §§ 1452(e), 1716b, 1717(a)(2)(A), (B), 1723a(c)(1), (2).

further reviewed by this Court under RAP 13.4(b)(4). This Court, however, routinely denies review of published Court of Appeals decisions involving disputes between taxpayers and tax agencies over the proper interpretation of tax statutes or ordinances.¹⁹ The servicers offer no persuasive arguments why the statutory construction issue in this case is more important than those in any other tax cases.

There is no sound basis for the servicers' argument that this decision "involves an issue of substantial public interest that should be determined by the Supreme Court" under RAP 13.4(b)(4).

V. CONCLUSION

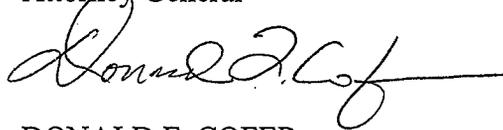
Division II's unanimous decision affirming the superior court's summary judgment in favor of the Department is carefully reasoned and correctly interprets and applies RCW 82.04.4292. This decision does not

¹⁹ See, e.g., *Aaro Med. Supplies, Inc. v. Dep't of Revenue*, 132 Wn. App. 709, 132 P.3d 1143 (2006), review denied, 159 Wn.2d 1013 (2007); *Matheson v. Liquor Control Bd.*, 132 Wn. App. 280, 130 P.3d 897, review denied, 158 Wn.2d 1023 (2006); *Texaco Ref. & Mktg., Inc. v. Dep't of Revenue*, 131 Wn. App. 385, 127 P.3d 771, review denied, 158 Wn.2d 1012 (2006); *Sprint Spectrum, L.P./Sprint PCS v. City of Seattle*, 131 Wn. App. 339, 127 P.3d 755, review denied, 158 Wn.2d 1015 (2006); *Bercier v. Kiga*, 127 Wn. App. 809, 103 P.3d 232 (2004), review denied, 155 Wn.2d 1015 (2005); *Mayflower Park Hotel, Inc. v. Dep't of Revenue*, 123 Wn. App. 628, 98 P.3d 534 (2004), review denied, 154 Wn.2d 1022 (2005); *Glen Park Assocs. v. Dep't of Revenue*, 119 Wn. App. 481, 82 P.3d 664 (2003), review denied, 152 Wn.2d 1016 (2004); *Pilcher v. Dep't of Revenue*, 112 Wn. App. 428, 49 P.3d 947 (2002), review denied, 149 Wn.2d 1004 (2003); *Gen. Motors Corp. v. City of Seattle, Fin. Dep't*, 107 Wn. App. 42, 25 P.3d 1022, review denied, 145 Wn.2d 1014 (2001); *Seattle FilmWorks, Inc. v. Dep't of Revenue*, 106 Wn. App. 448, 24 P.3d 460, review denied, 145 Wn.2d 1009 (2001); *McLane Co. v. Dep't of Revenue*, 105 Wn. App. 409, 19 P.3d 1119, review denied, 145 Wn.2d 1005 (2001); *Stroh Brewery Co. v. Dep't of Revenue*, 104 Wn. App. 235, 15 P.3d 692, review denied, 144 Wn.2d 1002 (2001); *Lacey Nursing Ctr., Inc. v. Dep't of Revenue*, 103 Wn. App. 169, 11 P.3d 839 (2000), review denied, 144 Wn.2d 1008 (2001); *Port of Seattle v. Dep't of Revenue*, 101 Wn. App. 106, 1 P.3d 607, review denied, 142 Wn.2d 1012 (2000); *Steuwe v. Dep't of Revenue*, 98 Wn. App. 947, 991 P.2d 634, review denied, 141 Wn.2d 1015 (2000).

satisfy any of the criteria for accepting review in RAP 13.4(b). The Court should deny the petition for discretionary review.

RESPECTFULLY SUBMITTED this 8th day of October, 2007.

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A handwritten signature in black ink, appearing to read "Donald F. Cofer", written over a horizontal line.

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