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MAR 10 2011
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

No. 85556-1

SUPREME COURT
OF THE STATE OF WASHINGTON

TESORO REFINING AND MARKETING COMPANY,

Respondent

v.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,

Petitioner

ON PETITION FOR REVIEW FROM DIVISION II
OF THE COURT OF APPEALS

ANSWER TO PETITION FOR REVIEW

George C. Mastrodonato
WSBA No. 7483
Michael B. King
WSBA No. 14405
CARNEY BADLEY SPELLMAN, P.S.
701 Fifth Ave., Suite 3600
Seattle, WA 98104-7010
Telephone: (206) 622-8020
Facsimile: (206) 467-8215

*Attorneys for Respondent
Tesoro Refining and Marketing Company*

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TESORO'S ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF ANSWERING PARTY

Respondent Tesoro Refining and Marketing Company (“Tesoro”) submits this answer to the Petition for Review of the State of Washington, Department of Revenue (the “Department” or “DOR”).

II. SUMMARY OF REASONS FOR DENYING REVIEW

The Court of Appeals held¹ that the plain meaning of former RCW 82.04.433,² the bunker fuel B&O tax deduction statute, entitled Tesoro to deduct amounts derived from sales of bunker fuel from its manufacturing B&O tax liability, and that a 2009 amendment to the statute³ which eliminated that deduction could not be applied retroactively to deprive Tesoro of refunds to which it was otherwise entitled. The Court of

¹ A copy of the court’s Slip Opinion is attached as Appendix A.

² The former statute (RCW 82.04.433) read in its entirety as follows:

(1) In computing tax there may be deducted from the measure of tax amounts derived from sales of fuel for consumption outside the territorial waters of the United States, by vessels used primarily in foreign commerce.

(2) Nothing in this section shall be construed to imply that amounts which may be deducted under this section were taxable under Title 82 RCW prior to the enactment of this section. [Laws of 1985 ch. 471 § 16.]

³ The amended statute, in bill draft form, provided as follows:

(1) In computing tax there may be deducted from the measure of tax imposed under RCW 82.04.250 and 82.04.270 amounts derived from sales of fuel for consumption outside the territorial waters of the United States, by vessels used primarily in foreign commerce.

(2) ~~((Nothing in this section shall be construed to imply that amounts which may be deducted under this section were taxable under Title 82 RCW prior to the enactment of this section.))~~ The deduction in subsection (1) of this section does not apply with respect to the tax imposed under RCW 82.04.240, whether the value of the fuel under that tax is measured by the gross proceeds derived from the sale thereof or otherwise under RCW 82.04.450.

Laws of 2009 ch. 494 § 2 (Senate Bill 6096). A copy of the session law is attached as App. B.

Appeals refused to countenance the Department's attempt to abrogate its longstanding interpretation of the statute, under which Tesoro was indisputably entitled to the deduction – an attempt that extended to persuading the Legislature to rewrite the statute, declare that rewrite a mere “clarification” supposedly consistent with the Legislature's original intent, and make the rewrite retroactive *24 years back* to the date of the statute's enactment in 1985.

Prior to Tesoro seeking to take the B&O tax deduction on its sales of bunker fuel, the Department had for over 20 years ruled that the deduction applied to sales of bunker fuel identical to Tesoro's sales. But when Tesoro sought the deduction the Department reversed itself, compelling Tesoro to seek refund relief from the courts. As Tesoro's refund action was approaching a decision by the Thurston County Superior Court, the Department persuaded the Legislature to “clarify” the original intent of the bunker fuel statute – a “clarification” that proved to dovetail perfectly with the new interpretation used by the Department to justify denying the deduction to Tesoro. The “clarification” went into effect one day before the trial court was set to rule on Tesoro's motion for summary judgment, and included a retroactivity clause making the “clarification” retroactive to 1985. The purpose of the retroactivity clause was obvious: to avoid having to refund taxes unlawfully collected from Tesoro. The trial court steered clear of whether the “clarification” was legal, instead ruling in favor of the Department's new reading of the statute; the Court of Appeals reversed.

- Statutory Interpretation. The Court of Appeals ruled that, under the plain language of the 1985 bunker fuel deduction statute, Tesoro was entitled to the deduction. The Department contends that the Court of Appeals' decision conflicts with this Court's decisions on statutory interpretation. In fact, the Court of Appeals was careful to adhere to those decisions, most notably *HomeStreet, Inc. v. Department of Revenue*, 166 Wn.2d 444, 210 P.3d 297 (2009). In *HomeStreet*, this Court interpreted operative language in another B&O tax deduction statute *identical* to the operative language in the bunker fuel deduction statute; the Court of Appeals found *HomeStreet* controlling. Incredibly, after ignoring *HomeStreet* in its briefing to the Court of Appeals, the Department ignores it again in its Petition to this Court.

- Retroactivity. Because the Court of Appeals found that the plain language of the statute entitled Tesoro to deduct sales of bunker fuel from its B&O tax liability, the court was required to address the Legislature's attempt at a retroactive "clarification" that would deprive Tesoro of its refund. Rejecting the Legislature's attempt to impose a 24 year retroactivity period, the Court of Appeals relied on this Court's decision in *State v. Pacific Tel. & Tel. Co.*, 9 Wn.2d 11, 113 P.2d 542 (1941), in which this Court rejected an attempt to make a state tax retroactive for 4 years. The Court of Appeals also found the United States Supreme Court's decision in *United States v. Carlton*, 512 U.S. 26, 114 S. Ct. 2018, 129 L. Ed. 2d 22 (1994), upholding a 1 year retroactivity provision, clearly distinguishable from the Legislature's attempt to make its "clarification" retroactive for 24 years. The Department frames the

issue as one arising under *Carlton* and progeny, as if this Court had not previously spoken to the issue decades before in *Pacific Telephone*. Indeed, one will search the Department's Petition in vain for one word about this Court's decision in *Pacific Telephone*, even though that decision is squarely on point and was expressly relied upon by the Court of Appeals.

Review is not warranted. There is no conflict with any decision of this Court (RAP 13.4(b)(1)) or of the Court of Appeals (RAP 13.4(b)(2)); the Court of Appeals correctly applied *HomeStreet* to resolve the statutory interpretation issue, and *Pacific Telephone* to resolve the retroactivity issue. Nor does the outcome of this case present either an issue of substantial public interest (RAP 13.4(b)(4)) or a significant constitutional issue (RAP 13.4(b)(3)). The resolution of the statutory interpretation issue is grounded on a decision of this Court virtually "on all fours" with the facts of this case, while the resolution of the retroactivity issue is grounded on a decision of this Court establishing a Washington rule of fairness to taxpayers that avoids the need to entangle our state's retroactivity jurisprudence in the ever growing post-*Carlton* case law thicket.

III. COUNTERSTATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the Court of Appeals properly interpreted former RCW 82.04.433 under this Court's plain meaning rule of statutory interpretation.

2. Whether the Court of Appeals properly applied this Court's retroactivity case law to invalidate the retroactivity clause at issue in this case.

Tesoro does not seek review of any issue, and asks this Court to deny review of the issues raised in the Department's Petition for Review.

IV. COUNTERSTATEMENT OF FACTS

The Court of Appeals' decision accurately summarizes the facts. Tesoro restates and supplements those facts, as follows:

Tesoro owns and operates an oil refinery in Anacortes, Washington. Slip Opinion ("Op") at 2; CP 4, 9. Tesoro acquired the Anacortes refinery in 1998. CP 11. One of the products manufactured at this refinery is marine bunker fuel, a residual fuel oil that remains after gasoline and distillate fuel are extracted from crude oil. Op. at 2; CP 9. Bunker fuel is primarily sold to ocean-going ships and vessels. *Id.*

The time period at issue in this case is December 1, 1999, through December 31, 2007. Op. at 2; CP 10-11. During this period Tesoro made more than 9,700 sales of bunker fuel to vessels engaged in foreign commerce for consumption outside the territorial waters of the United States. *Id.*; CP 10. As required under Washington law, Tesoro reported its sales of bunker fuel on both the Manufacturing B&O tax line and Wholesaling or Retailing B&O tax line on its monthly excise tax returns. Op. at 2; CP 10. Then, pursuant to Schedule C of the return, Tesoro took a multiple activities tax credit, former RCW 82.04.440 (2007), for the wholesaling or retailing B&O tax that was otherwise payable. Op. at 2-3; *see id.* at 3, n.1, for an explanation of the credits.

Former RCW 82.04.433(1) (*i.e.*, the statute as it existed prior to the 2009 “clarification” amendment, *see* n.2, *supra*) permitted a deduction from tax for “amounts derived from sales” of certain fuel. Op. at 3. Bunker fuel is a qualifying fuel. *Id.* A DOR rule, WAC 458-20-175 (Rule 175), provides that under former RCW 82.04.433, in order to take the deduction, a seller like Tesoro must obtain a certificate signed by the buyer for each qualifying sale of fuel. Op. at 3, n.2.

Following a detailed review of the first DOR audit of the refinery after Tesoro acquired ownership (*see* CP 11), and having duly obtained the requisite certificates for each sale for which it claimed entitlement to the deduction, Tesoro requested a partial refund of \$2,550,867 in B&O taxes it paid on bunker fuel manufactured and sold during the period of December 1, 1999 through April 30, 2004. Op. at 4. DOR’s Audit Division denied Tesoro’s refund request. *Id.* Tesoro then filed an informal administrative appeal and DOR’s Appeals Division also denied Tesoro’s refund request, on the basis that the tax deduction did not apply to taxes paid under the manufacturing B&O tax but only to taxes paid under the wholesaling and retailing B&O tax classifications. *Id.*; CP 210-219. While the administrative appeal was pending Tesoro continued to pay an additional \$4,128,997 in B&O taxes between May 1, 2004 and December 31, 2007, on sales of bunker fuel for use in vessels engaged in foreign commerce outside the territorial waters of the United States. Op.

at 4. Tesoro's total refund amount for these combined periods is \$6,679,864 (excluding interest). *Id.*, n.5.⁴

Following the DOR Appeals Division determination, Tesoro appealed to Thurston County Superior Court. Op. at 4; CP 4-7. Tesoro moved for partial summary judgment, seeking an order that as a manufacturer and seller of bunker fuel it qualified for the former RCW 82.04.433 deduction and was entitled to a refund of B&O taxes paid during the refund period through 2007. Op. at 5; CP 12-33. DOR cross-moved for summary judgment. CP 229-270. The day before the trial court was set to hear these motions, the Governor signed off on the "clarification" amendment to RCW 82.04.433. Op. at 4-5 (citing Laws of 2009, ch. 494, § 2-6). The amendment added language to the statute limiting its applicability to wholesalers and retailers of qualifying fuel. Op. at 5 (citing amended RCW 82.04.433). The amendment also provided that it applied "both prospectively and retroactively." *Id.*; Laws of 2009, ch. 494, § 4.

On May 15, 2009, the trial court heard Tesoro's motion and entered an order granting summary judgment to the Department, finding

⁴ Following the enactment of RCW 82.04.433 in 1985 and continuing until the Department said the deduction did not apply to Tesoro's sales of bunker fuel, DOR interpreted the statute consistent with Tesoro's interpretation and the Court of Appeals' decision. The Department ruled *three times* that the deduction applied regardless of whether the tax paid "is Retailing B&O, Wholesaling B&O, Manufacturing B&O, or whatever." CP 294. The first determination was issued to Sound Refining, Inc., in 1988. CP 294. The second and third were issued in 1993, one to U.S. Oil and Refining Co. (CP 221-225) and another to Pacific Northern Oil Corporation (CP 295). All came to the same conclusion: "RCW 82.04.433 was intended to be a deduction against *any* B&O tax" (emphasis added) (CP 295).

that former RCW 82.04.433 extended only to retailing and wholesaling B&O taxes, not to manufacturing B&O taxes, and that Tesoro was not entitled to a refund. Op. at 5; CP 316-319. The court did not address the 2009 amendment that had become effective one day earlier, beyond stating that the Legislature “certainly has made a can of worms one way or the other.” VRP at 45. Tesoro appealed, and the Court of Appeals reversed, holding that the plain language of former RCW 82.04.433 entitled a refinery to deduct amounts derived from sales of qualifying products against its manufacturing B&O taxes, and that the 2009 amendment could not be applied retroactively to deny Tesoro a refund on the taxes it paid for years preceding the amendment dating back to 1999. Op. at 2.

V. WHY REVIEW SHOULD BE DENIED

A. The Decision of the Court of Appeals Does Not Conflict With Decisions of This Court or of the Court of Appeals.

1. Statutory Interpretation.

The Department begins its plea for review by stating that the “reasoning the Court of Appeals employed to arrive at its conclusion regarding the scope of the deduction in RCW 82.04.433 ... is unprecedented and inconsistent with *every* Washington appellate decision construing a B&O tax deduction provision since enactment of the Revenue Act of 1935” and therefore the “decision conflicts in principle with *dozens* of decisions by this Court and the Court of Appeals.” DOR Pet. at 7 (emphasis added). Preceding this sweeping characterization of the law was the following assertion of fact:

Until this case, no taxpayer had ever challenged in any appellate court the Department's implementation of RCW 82.04.433. The portion of the Court of Appeals decision interpreting the 1985 Legislature's intent in enacting the statute therefore does not conflict directly with any previous decision of this Court or the Court of Appeals involving RCW 82.04.433.

Id.

Of course, the reason no refinery taxpayer before Tesoro had ever challenged the Department's interpretation of RCW 82.04.433 in any appellate court was because *no refinery taxpayer ever had to do so under the Department's prior interpretation of the statute*. In 1988, three years after the bunker fuel deduction statute was enacted, the Department determined that the deduction was applicable to sales made by manufacturers and refiners of the fuel, and this interpretation was followed by two more rulings of the DOR in 1993, both to the same effect. *See* n.4, *supra*. In short, Tesoro was compelled to go to court only because the Department denied Tesoro the deduction for sales *identical* to those for which the deduction had previously been allowed, and Tesoro had to seek relief from an appellate court only because the trial court allowed the Department to walk away from its prior interpretation under which Tesoro was entitled to the deduction.

The Department's claim, that the Court of Appeals ignored "dozens of decisions by this Court and the Court of Appeals" when it interpreted former RCW 82.04.433 consistent with the Department's prior interpretation, is baseless. The Court of Appeals expressly applied the rule that a court must give effect to a statute's plain meaning. *Op.* at 6 (citing and quoting *Cerrillo v. Esparza*, 158 Wn.2d 194, 201, 142 P.3d 155 (2006) (quoting *Kilian v. Atkinson*, 147 Wn.2d 16, 20, 50 P.3d 638

(2002) (“If a statute is clear on its face, its meaning is to be derived from the language of the statute alone”); *Agrilink Foods, Inc. v. Dep’t of Revenue*, 153 Wn.2d 392, 396, 103 P.3d 1226 (2005))). The Court of Appeals also expressly applied our state’s more recent approach to “ascertaining the ‘plain meaning’ of a statute,” under which a court must look “not only to the ordinary meaning of the language at issue but also to the general context of the statute, related provisions, and the statutory scheme as a whole.” Op. at 6-7 (citing *Belleau Woods II, LLC v. City of Bellingham*, 150 Wn. App. 228, 240, 208 P.3d 5, review denied, 167 Wn.2d 1014 (2009); see *G-P Gypsum Corporation v. Department of Revenue*, 169 Wn.2d 304, 310, 237 P.3d 256 (2010) (relying on statement of legislative purpose to ascertain plain meaning of statute); *Dep’t of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 10, 43 P.3d 4 (2002) (a statute’s plain meaning should be “discerned from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question”).

The key language of former RCW 82.04.433 provided:

In computing tax there may be deducted from the measure of tax amounts derived from sales of fuel for consumption outside the territorial waters of the United States, by vessels used primarily in foreign commerce.

Op. at 7 (quoting former RCW 82.04.433(1)). Reading the plain meaning of these words and the context in which they appear, the Court of Appeals concluded that “[b]ecause the plain language of the statute does not restrict the deduction to exclude manufacturers and manufacturing B&O taxes, . . . former RCW 82.04.433 unambiguously allow[s] a company that

both manufactured and sold bunker fuel to take a tax deduction for amounts derived from those sales.” Op. at 6.

The Department argues that, because virtually every other deduction section in the B&O tax chapter begins with “[i]n computing tax,” this introductory language merely means that “the Legislature intended [in 1985] to enact a new deduction section in chapter 82.04 RCW – nothing more.” DOR Pet. at 8 (citing DOR Br. to Court of Appeals at 4-8). The Department then launches into a discussion of tax “deductions” and tax “exemptions” (DOR Pet. at 9-12), citing and addressing *Yakima Fruit Growers Ass’n v. Henneford*, 187 Wash. 252, 60 P.2d 62 (1936) (DOR Pet. At 9) and *Group Health Coop. v. Wash. State Tax Comm’n*, 72 Wn.2d 422, 433 P.2d 201 (1967) (DOR Pet. at 10-11), among others (*see id.*, p. 11, n.2). This discussion, however, has absolutely nothing to do with the point the Court of Appeals was making about the intended scope of former RCW 82.04.433(1). While the Court did *compare* the introductory language of other B&O tax exemption and credit statutes to deduction statutes (like former RCW 82.04.433), it did so only to show that “the ‘In computing tax’ language of former RCW 82.04.433 unambiguously refers to . . . all B&O taxes.” Op. at 8 (citing *Agrilink*, 153 Wn.2d at 397, for the rule that “where the legislature uses certain language in one instance, and different language in another, there is a difference in legislative intent”).

The Department also tries to use its own Rule 175 to argue that former RCW 82.04.433 limited the deduction to selling (wholesaling or retailing) B&O taxes. Rule 175, however, merely stated the obvious

historical fact that “on July 1, 1985, a statutory business and occupation tax deduction became effective for sales of fuel for consumption outside the territorial waters of the United States by vessels used primarily in foreign commerce.” WAC 458-20-175. In making this argument from the language of the rule, the Department is really urging the addition of the words “wholesaling and retailing” into former RCW 82.04.433(1) itself, so that the introductory language would read, “[i]n computing *wholesaling and retailing* tax.” The Court of Appeals correctly answered this contention, based on this Court’s decisions: “[A] department regulation cannot alter the plain language to resolve an ambiguity that does not exist on the face of the statute,” holding that this would add language to an otherwise unambiguous statute (Op. at 8 (citing *Cerrillo*, 158 Wn.2d at 201, and *Kilian*, 147 Wn.2d at 20) and thus would go “too far” (citing *HomeStreet*, 166 Wn.2d at 454) (“DOR went ‘too far’ when it argued that the court should determine that a statute distinguished between different types of interest revenue depending on the purpose of the interest when the statute only required ‘interest’ to be received”).

The Court of Appeals also noted that the Department’s present position, including its reading of Rule 175, “conflicts with its own previous determinations that it could not deny a manufacturer the deduction by artificially limiting the statute’s applicability to only wholesalers and retailers.” Op. at 8-9. Moreover, if the 1985 statute limited the deduction to B&O taxes paid under the wholesaling and retailing classifications, there should never have been a need for the 2009 “clarifying” amendment, which rewrote the statute so that it actually said

what the Department claims it has always said. The Legislature presumed to find that this “clarification” was consistent with the intent of the 1985 statute, yet the Department has never adequately explained how the Legislature could plausibly make such a finding when it conflicts with the Department’s prior *contemporaneous* interpretation of the statute and is put forth in support of an amendment that indisputably changes the plain meaning of the statute.⁵

Finally, although the Department asserts a conflict with decisions of this Court and of the Court of Appeals, the Department fails to address this Court’s recent decision in *HomeStreet*. This omission is truly remarkable, given the Court of Appeals expressly held that *HomeStreet* was controlling on the issue of the bunker fuel deduction statute’s plain meaning because *HomeStreet* determined the plain meaning of the operative language – “amounts derived from” – also found in the bunker fuel deduction statute:

Former RCW 82.04.433 . . . provides a deduction for the “amounts derived from sales” of qualifying products from the “measure of tax” without specifying *which* measure of tax it may be applied against. The term “derived from” is not defined in the B&O tax statutes, but our Supreme Court recently defined the term as “to take or receive esp. from a source.” *Homestreet*, 166 Wn.2d at 453 (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 608 (2002)). Here, Tesoro has proven by Rule 175 certificates and,

⁵ There were 24 years and 16 legislative sessions between the original enactment of the statute and the 2009 “clarifying” amendment. Only five legislators present in 1985 were still in the Legislature in 2009 (Senators McCaslin, Hargrove, Jacobsen, Haugen and Brad Owen, a senator in 1985 and now the Lt. Governor and President of the Senate). The sole sponsor of SB 6096, Senator Rodney Tom, was first elected to the Legislature in 2003 and in 1985 was completing his senior year at the University of Washington. *See* Appendix to Tesoro’s Opening Brief to Court of Appeals, Exhibit C.

it is undisputed, the amount at issue was “received” from sales to vessels for use primarily in foreign commerce as required under former RCW 82.04.433. That a different methodology is employed to calculate Tesoro’s initial manufacturing B&O tax liability does not affect this analysis.

Accordingly, we hold that the language of former RCW 82.04.433 is unambiguous.

Op. at 10-11 (the Court’s emphasis).

2. Retroactivity.

State v. Pacific Tel. & Tel. Co., *supra* (9 Wn.2d 11) involved a statute enacted in 1939 which presumed to apply the use tax to transactions that took place between April 30, 1935, and the effective date of the act – a retroactive period of four years. *Id.* at 16 (citing § 3, chapter 9, Laws of 1939, subd. (b), p. 17). The taxpayer challenged the Legislature’s right “to provide for the collection of the tax as far back as April 30, 1935.” 9 Wn.2d at 17. This Court held that “[t]he retroactive feature of the statute . . . cannot be sustained.” *Id.* The period of retroactivity in *Pacific Telephone* was 4 years; the period of retroactivity here is 24 years. Even if one were to consider only the retroactive effect of amended RCW 82.04.433 on Tesoro’s refund claim, which begins with taxes accruing from 1999 through 2007, a period of two to nine years is covered – the earlier years more than double the period disallowed in *Pacific Telephone*. The Court of Appeals expressly grounded its decision on the authority of *Pacific Telephone*, yet the Department says absolutely nothing about the decision in its Petition.

Before the Court of Appeals the Department argued that under *United States v. Carlton*, 512 U.S. 26, 114 S. Ct. 2018, 129 L. Ed. 2d 22 (1994), “the due process clause does not impose any fixed limit on the

retroactive reach of tax statutes.” Op. at 12 (court’s emphasis). The Court of Appeals quite rightly called this proposition “misguided.” *Id.* The true holding in *Carlton* was that retroactive tax legislation that deprives taxpayers of property interests such as tax refunds or credits available under pre-existing law does not violate due process if it is supported by a legitimate purpose and *the period of retroactivity is “modest.”* See *Carlton*, 512 U.S. at 32 (emphasis added). The retroactive measure at issue in *Carlton* was an amendment passed by Congress in 1987 to a deduction in the federal estate tax which had first been enacted in October 1986. 512 U.S. at 32. As the Court of Appeals correctly stated, the Supreme Court applied a minimum due process standard “‘supported by a legitimate legislative purpose furthered by rational means’.” Op. at 13 (citing *Carlton*, 512 U.S. at 30-31 (quoting *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729, 104 S. Ct. 2709, 81 L. Ed. 2d 601 (1984))). Applying this test, the Supreme Court held: (1) “the 1987 amendment, enacted just 14 months after the 1986 deduction, was intended as a curative measure that could be ‘reasonably viewed as a [correction of] a mistake in the original 1986 provision that would have created a significant and unanticipated revenue loss;” (2) “there was ‘no plausible contention that Congress acted with an improper motive, as by targeting [the taxpayer];” and (3) “‘Congress acted promptly and established only a modest period of retroactivity.’” See *Carlton*, 512 U.S. at 32.

The Court of Appeals quite rightly ruled that “the facts of *Carlton* are readily distinguishable from the instant case”:

Here, the deduction statute at issue, RCW 82.04.433, was enacted in 1985. The legislature has had ample opportunity since 1985 to restrict its applicability to only retail and wholesale B&O tax. DOR attempts to analogize the instant case with *Carlton* by framing the 2009 amendment as a “clarifying amendment.” But the legislature may not apply a “clarification” retroactively for 24 years when it is in direct conflict with the reasonable expectations of qualifying taxpayers.

* * * *

[H]ere the legislative history of the 2009 act shows the recent amendment was in direct response to Tesoro’s refund request. The “intent” language of the amendment refers to recent “questions” regarding a manufacturer’s ability to take the deduction. LAWS OF 2009, ch. 494, § 1. DOR’s Fiscal Note to S.B. 6096 also refers to Tesoro’s lawsuit [quotation and citation omitted]. . . . The direct references to Tesoro’s lawsuit and the fact that the 2009 act became effective the day before trial was set to begin evidences the type of improper taxpayer targeting identified by the *Carlton* Court. 512 U.S. at 32-33.

* * * *

There is no colorable argument to suggest a legislative act creating a 24-year retroactive tax period is “prompt” or establishes a “modest period of retroactivity.” *Carlton*, 512 U.S. at 32-33. We recognize that identifying and correcting significant fiscal losses is a legitimate legislative purpose. But we hold that it is not reasonable for the legislature to enact a retroactive amendment spanning 24 years in direct response to a taxpayer’s refund lawsuit. *See State v. Pac. Tel. & Tel. Co.*, 9 Wn.2d 11, 17, 113 P.2d 542 (1941) (Washington legislature’s attempt to create a four-year tax retroactivity period exceeded “limited or permissible retroactivity” which extends “to prior but recent transactions” (quoting *Welch v. Henry*, 223 Wis. 319, 326, 271 N.W. 68 (1937))).

Op. at 13-14.

The Court of Appeals thus had ample justification for distinguishing *Carlton* and declaring the 2009 retroactivity clause invalid under this Court’s decision in *Pacific Telephone*. The Department ignores the Court of Appeals’ reliance on *Pacific Telephone* and instead asserts that the Court of Appeals’ decision “squarely conflicts with this Court’s decision in *W.R. Grace & Co. v. Dep’t of Revenue*, 137 Wn.2d 580, 602-

03, 973 P.2d 1011, *cert. denied*, 528 U.S. 950 (1999),” contending that the due process argument Tesoro made to the Court of Appeals was rejected by this Court in *W.R. Grace*. DOR Pet. at 12. This contention is meritless.

In *W.R. Grace*, this Court upheld the Legislature’s enactment of tax credits that taxpayers were allowed to take instead of receiving refunds. The legislation in question followed an earlier decision of the U.S. Supreme Court, *Tyler Pipe Industries, Inc. v. State Department of Revenue*, 483 U.S. 232, 1075 S. Ct. 2810, 97 L. Ed. 2d 199 (1987), which held that the multiple activities B&O tax exemption statute (former RCW 82.04.440) was unconstitutional, a ruling that applied retroactively. The tax credit was enacted by the Legislature 49 days after *Tyler Pipe* was decided by the U.S. Supreme Court, also to be applied retroactively. This Court upheld the retroactive tax credits in *W.R. Grace*, which was deemed to cure the illegality of the tax as originally imposed. *W.R. Grace*, 137 Wn.2d at 595-596 (citing and quoting *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 110 S. Ct. 2238, 110 L. Ed. 2d 17 (1990)); *see Op.* at 3, n.1.

Here, the legality of former RCW 82.04.433 has never been a question. Nor was the Legislature intending to put any alternative remedy in place for Tesoro or any other refinery when the statute was amended in 2009 to eliminate the deduction. Instead, and as the Court of Appeals recognized, the Legislature intended to take away Tesoro’s right to relief from what was plainly an illegal denial of the deduction under the language of the prior statute, as well as the Department’s prior

interpretation of that statute. Unlike for the taxpayers in *W.R. Grace*, there was no credit or other meaningful alternative retroactive relief provided to Tesoro; the whole point of the 2009 amendment was to deny Tesoro *any* relief and allow the Department to keep the monies it never should have collected from Tesoro in the first place. In sum, there is a substantial difference between *W.R. Grace* and this case, and *W.R. Grace* is not in conflict with the Court of Appeals' decision.

The Department also contends that the decision of the Court of Appeals conflicts with *Washington State Farm Bureau Fed'n v. Gregoire*, 162 Wn.2d 284, 174 P.3d 1142 (2007). The Department alleges that "this Court held that a retroactive amendment of the fiscal year 2006 expenditure limit, enacted in response to the Farm Bureau's lawsuit, was a valid exercise of the Legislature's plenary power to enact laws." DOR Pet. at 15. Tesoro, however, has never challenged the general authority of the Legislature to enact retroactive laws, nor did the Court of Appeals presume to invalidate the retroactive measure at issue here on such a basis. Instead, the Court of Appeals ruled that the Legislature's authority to enact an amendment to RCW 82.04.433 that was to be retroactive for a period going back 24 years was a violation of fairness principles recognized and applied by this Court's decision in *Pacific Telephone*, in which this Court struck down an attempt by the Legislature to make a tax retroactive for a period going back 4 years. In *Farm Bureau*, the challenge was to a 2006 amendment to a budget bill enacted *just the year before* (2005) and related to the state's fiscal year 2006 budget. See 162 Wn.2d at 303. The upholding of this *de minimus* period of retroactivity is well within the

guidelines for “modest” periods of retroactivity set forth in *Carlton*, see 512 U.S. at 32, and consistent with the Court of Appeals’ application of *Pacific Telephone* to strike down the 24 year period of retroactivity at issue here.

B. The Court of Appeals’ Decision Does Not Involve A Significant Issue of Constitutional Law.

The Department contends that the striking down of the “clarifying” amendment’s retroactivity provision presents “a significant issue of constitutional law justifying this Court’s further review . . . under RAP 13.4(b)(3).” DOR Pet. at 17. The Court of Appeals, however, merely applied this Court’s invalidation of a 4 year retroactivity period in *Pacific Telephone* to invalidate a 24 year retroactivity period. The Department contends that the issue of retroactivity has “national ramifications,” insisting that “[a] decision by this Court is necessary to reestablish the proper application of *Carlton* in Washington.” DOR Pet. at 18. The Court of Appeals, however, did not take sides in the national debate over the true meaning of *Carlton*, but simply distinguished that case on its (clearly distinguishable) facts and rested its decision instead on a decision of this Court – *Pacific Telephone* – that predates *Carlton* by over 50 years. The Court of Appeals thus wisely stayed out of the ever-growing *Carlton* thicket, and this Court may – and should – do the same.

C. The Court of Appeals’ Decision Does Not Involve Issues of Substantial Public Importance.

The Department finally contends that the statutory interpretation and retroactivity issues involve matters of substantial public interest and therefore warrant review under RAP 13.4(b)(4). DOR Pet. at 19. This

argument is a patent makeweight. The Court of Appeals expressly based its resolution of the statutory interpretation and retroactivity issues on specific decisions of this Court (*HomeStreet, Pacific Telephone*), and the Department made no effort to show that the Court of Appeals erred in applying those decisions. Nor is it likely that the Legislature would be so brazen as to make another run at imposing a retroactivity period as patently indefensible as the 24 year period tried out here. Review is not warranted under RAP 13.4(b)(4).

VI. CONCLUSION

Nothing about the decision of the Court of Appeals warrants review by this Court. The Department's petition should be denied.

RESPECTFULLY SUBMITTED this 9th day of March, 2011.



George C. Mastrodonato
WSBA No. 7483

Michael B. King
WSBA No. 14405

*Attorneys for Respondent
Tesoro Refining and Marketing Company*

APPENDICES

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| Appendix A | December 21, 2010 published opinion, <i>Tesoro Refining and Marketing Company v. State of Washington, Department of Revenue</i> , Court of Appeals, Div. II, Case No. 39417-1-II |
| Appendix B | LAWS OF 2009 ch. 494 (Senate Bill 6096) |

APPENDIX A

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DIVISION II

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STATE OF WASHINGTON

BY _____
CLERK

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

TESORO REFINING AND MARKETING
COMPANY,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT
OF REVENUE,

Respondent.

No. 39417-1-II

PUBLISHED OPINION

QUINN-BRINTNALL, J. — Tesoro Refining and Marketing Co. appeals a trial court's decision granting summary judgment to the Department of Revenue (DOR) denying Tesoro a tax refund. Tesoro argues that the statute governing the relevant deduction, former RCW 82.04.433 (1985), unambiguously entitles a manufacturer that also sells certain products to take a deduction against its business and occupation (B&O) tax liability. Tesoro also argues that the retroactive application of the 2009 amendment of former RCW 82.04.433 would violate due process. DOR argues that because the statute is limited to amounts received from the activity of selling qualified products, the deduction could not have been intended to be applied against

manufacturing B&O taxes. Thus, DOR asserts that retroactive enforcement of the 2009 amendment would not violate due process because the “clarifying amendment” did not change the meaning of the statute. Because the plain language of former RCW 82.04.433 entitles a refinery to a deduction of amounts derived from sales of qualifying products against its manufacturing B&O taxes and the 2009 amendment may not apply retroactively 24 years, we reverse the trial court’s order granting DOR summary judgment and remand for further proceedings consistent with this opinion.

FACTS

Tesoro is a Delaware corporation which owns and operates an oil refinery in Anacortes, Washington. One of the refinery’s products is marine bunker fuel, a residual fuel oil that remains after gasoline and distillate fuel are extracted from crude oil. Bunker fuel is primarily sold to ocean-going ships and vessels. Tesoro manufactures and sells bunker fuel in its Anacortes refinery and also sells bunker fuel directly to vessels in Port Angeles, Washington.

During the time period at issue, December 1, 1999 to December 31, 2007, Tesoro made more than 9,700 sales of bunker fuel to vessels engaged in foreign commerce for consumption outside the territorial waters of the United States. Tesoro reported its sales of bunker fuel on both the “Manufacturing” line and “Wholesaling and Retailing” line of its monthly tax returns as required under Washington State law. Then, pursuant to Schedule C of the return, Tesoro took a

multiple activities tax credit, former RCW 82.04.440 (2007), for B&O taxes that were otherwise payable.¹

Former RCW 82.04.433(1) permitted a deduction from “tax amounts derived from sales of [a qualifying] fuel.” Bunker fuel is a qualifying fuel. WAC 458-20-175 (Rule 175)² provides that under (former and current) RCW 82.04.433, in order to take the deduction, a seller must obtain a certificate signed by the buyer for each qualifying sale of fuel. Tesoro collected the requisite certificates for each sale that it contends it was entitled to deduct under former RCW 82.04.433.

¹ Under the previous tax exemption scheme, a company which both manufactured and sold products paid wholesale or retailing B&O tax but was exempted entirely from manufacturing B&O tax. *See generally Tyler Pipe Indus., Inc. v. Dep’t of Revenue*, 483 U.S. 232, 207 S. Ct. 2810, 97 L. Ed. 2d 199 (1987) (discussing the history of the Washington B&O tax and the multitude of constitutional challenges against it). In 1987, the Supreme Court of the United States held that the Washington State multiple activities tax exemption scheme was unconstitutional as a violation of the commerce clause. *Tyler Pipe*, 483 U.S. at 248.

In response to the *Tyler Pipe* decision, the Washington legislature designed the multiple activity tax credit (MATC) scheme which, among other things, flipped the reporting requirements for B&O tax credits or exemptions. Thus, under MATC, while Tesoro is technically liable for both manufacturing and selling B&O taxes, the manufacturing B&O taxes are credited against the selling B&O tax in computing total B&O tax liability. Former RCW 82.04.440(2) (2007).

² Rule 175 states,

[O]n July 1, 1985, a statutory business and occupation tax deduction became effective for sales of fuel for consumption outside the territorial waters of the United States by vessels used primarily in foreign commerce. In order to qualify for this deduction sellers must take a certificate signed by the buyer or the buyer’s agent. . . . Sellers must exercise good faith in accepting such certificates and are required to add their own signed statement to the certificate to the effect that to the best of their knowledge the information contained in the certificate is correct.

When a completed certification . . . is taken in good faith by the seller, the sale is exempt of business and occupation tax, whether made at wholesale or retail, and even though the fuel is delivered to the buyer in this state.

Pursuant to former RCW 82.04.433, Tesoro initially requested a partial refund of \$2,550,867 in B&O taxes paid on bunker fuel manufactured and sold during the period of December 1, 1999 through April 30, 2004.³ DOR's Audit Division denied Tesoro's refund request. DOR's Appeals Division also denied Tesoro's refund request on the basis that the tax deduction did not apply to manufacturer B&O tax but only to wholesaler and retailer B&O tax.⁴ Tesoro continued to pay an additional \$4,128,997 in B&O taxes between May 1, 2004 and December 31, 2007, on sales of bunker fuel for use in vessels engaged in foreign commerce outside the territorial waters of the United States.⁵

On February 11, 2008, Tesoro appealed DOR's Appeals Division determination in Thurston County Superior Court. The day before trial was set to begin, the legislature amended

³ Former RCW 82.32.060(1) (2004), governing credits and refunds of excess taxes paid, provides that "no refund or credit shall be made for taxes . . . paid more than four years prior to the beginning of the calendar year in which the refund application is made or examination of records is completed." We assume that Tesoro timely filed its refund application.

⁴ Tesoro and other refiners that both manufacture and sell bunker fuel have higher manufacturing B&O tax liability than selling B&O tax liability. Under MATC, the refineries' manufacturing B&O tax liability may only be credited against the total amount of wholesaling or retailing B&O tax liability. Former RCW 82.04.440(2) (2007). Thus, the taxpayers remain liable for and pay any excess manufacturing B&O taxes. By requesting a refund, Tesoro seeks the former RCW 82.04.433 deduction for amounts derived from *sales* of fuel against the *manufacturing* B&O taxes it paid.

⁵ Thus, Tesoro contends it is entitled to a total refund amount of approximately \$6,679,864.

former RCW 82.04.433.⁶ LAWS OF 2009, ch. 494, § 2-6. The amendment added language to the statute clearly limiting its applicability to wholesalers and retailers of qualifying fuel. RCW 82.04.433. The amendment also added language declaring, “This act applies both prospectively and retroactively.” LAWS OF 2009, ch. 494, § 4. Nevertheless, Tesoro moved for partial summary judgment, seeking an order declaring that Tesoro, as a manufacturer and seller of bunker fuel, qualified for the former RCW 82.04.433 deduction and was entitled to a refund of B&O taxes paid. DOR filed a cross motion for summary judgment.

On May 15, 2009, the trial court entered an order granting summary judgment to DOR, finding that former RCW 82.04.433 extended only to retailing and wholesaling B&O taxes, not to manufacturing B&O taxes, and that Tesoro was not entitled to a refund. Tesoro timely appeals.

DISCUSSION

We review summary judgments de novo. *Torgerson v. One Lincoln Tower, LLC*, 166 Wn.2d 510, 517, 210 P.3d 318 (2009) (citing *Troxell v. Rainier Pub. Sch. Dist. No. 307*, 154 Wn.2d 345, 350, 119 P.3d 1173 (2005)). 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. CR

⁶ RCW 82.04.433, as amended, states,

(1) In computing tax there may be deducted from the measure of tax imposed under RCW 82.04.250 [retailers] and 82.04.270 [wholesalers] amounts derived from sales of fuel for consumption outside the territorial waters of the United States, by vessels used primarily in foreign commerce.

(2) The deduction in subsection (1) of this section does not apply with respect to the tax imposed under RCW 82.04.240 [manufacturers], whether the value of the fuel under that tax is measured by the gross proceeds derived from the sale thereof or otherwise under RCW 82.04.450 [retailers].

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56(c). A party against whom a claim is asserted may move for a summary judgment in his favor as to all or any part thereof. CR 56(b). Whether former RCW 82.04.433 applies to manufacturing B&O taxes is a question of law we review de novo. *W. Telepage, Inc. v. City of Tacoma Dep't of Financing*, 140 Wn.2d 599, 607, 998 P.2d 884 (2000) (statutory interpretation is a question of law, which an appellate court reviews de novo).

~~The fact that Tesoro engages in the activity of selling is uncontested. DOR~~ acknowledges that Tesoro sells bunker fuel to vessels engaged in foreign commerce outside the territorial waters of the United States. The relevant issue, therefore, is whether the plain language of former RCW 82.04.433 limits the applicability of the deduction to only sales, whether wholesale or retail, B&O taxes. Because the plain language of the statute does not restrict the deduction to exclude manufacturers and manufacturing B&O taxes, we hold that former RCW 82.04.433 unambiguously allowed a company that both manufactured and sold bunker fuel to take a tax deduction for amounts derived from those sales.

UNAMBIGUOUS LANGUAGE OF FORMER RCW 82.04.433

In order to ascertain the meaning of RCW [82.04.433], we look first to its language. If the language is not ambiguous, we give effect to its plain meaning. "If a statute is clear on its face, its meaning is to be derived from the language of the statute alone." If a statute is ambiguous, we employ tools of statutory construction to ascertain its meaning. A statute is ambiguous if it is "susceptible to two or more reasonable interpretations, but a statute is not ambiguous merely because different interpretations are conceivable." . . . Thus, when a statute is not ambiguous, only a plain language analysis of a statute is appropriate.

Cerrillo v. Esparza, 158 Wn.2d 194, 201, 142 P.3d 155 (2006) (internal quotation marks omitted) (quoting *Kilian v. Atkinson*, 147 Wn.2d 16, 20, 50 P.3d 638 (2002); *Agrilink Foods, Inc. v. Dep't of Revenue*, 153 Wn.2d 392, 396, 103 P.3d 1226 (2005)). In ascertaining the "plain meaning" of a statute, we look not only to the ordinary meaning of the language at issue but also

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to the general context of the statute, related provisions, and the statutory scheme as a whole. *Belleau Woods II, LLC v. City of Bellingham*, 150 Wn. App. 228, 240, 208 P.3d 5, review denied, 167 Wn.2d 1014 (2009). And, where statutory language is plain and unambiguous, we will “glean the legislative intent from the words of the statute itself, regardless of contrary interpretation by an administrative agency.” *Agrilink*, 153 Wn.2d at 396 (citing *Bravo v. Dolsen Cos.*, 125 Wn.2d 745, 752, 888 P.2d 147 (1995)).

Former RCW 82.04.433(1) states,

In computing tax there may be deducted from the measure of tax amounts derived from sales of fuel for consumption outside the territorial waters of the United States, by vessels used primarily in foreign commerce.

First, Tesoro argues that the language, “In computing tax there may be deducted from the measure of tax,” refers to all B&O taxes. Br. of Appellant at 13. DOR argues that the phrase, “In computing tax,” could not possibly apply to *any* B&O tax because it is language simply indicating that the legislature intends to create a tax deduction of some kind. Specifically, DOR argues that by creating a deduction for the “activity of *selling* bunker fuel,” there is no “hint” that the legislature intended the deduction be taken when computing manufacturing B&O tax liability.⁷ Br. of Resp’t at 9.

Chapter 82.04 RCW lists the definitions, measures of tax, tax percentages, exemptions, deductions, and credits with respect to B&O taxes. RCW 82.04.4281 through .43391 list B&O tax deductions, nearly all of which begin with the language, “In computing tax.” This language can be contrasted with the language found in nearly all B&O tax exemption statutes—“This

⁷ DOR urges this court to consider the additional “intent” language of the 2009 amendment in construing legislative intent, but we do not consider legislative intent because we do not hold the plain language of former RCW 82.04.433 is ambiguous. LAWS OF 2009, ch. 494, § 1; see *Cerrillo*, 158 Wn.2d at 202 (citing *Agrilink*, 153 Wn.2d at 396).

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chapter does not apply to”—and tax credit statutes—“In computing tax imposed under this chapter.” RCW 82.04.310-.427 (exemptions); RCW 82.04.434-.4495 (credits). Because the legislature specifically limited the B&O tax exemptions and credits, but not the deductions, to chapter 82.04 RCW, we hold that the “In computing tax” language of former RCW 82.04.433 unambiguously refers to, at the very least, all B&O taxes. *See Agrilink*, 153 Wn.2d at 397 (when the legislature uses certain language in one instance, and different language in another, there is a difference in legislative intent).

But DOR urges this court to limit the deduction in former RCW 82.04.433 to wholesaling and retailing taxes. In support of its argument, DOR points to department rules and regulations that evince intent to limit the deduction to B&O taxes on the activity of selling. Because the statutory language is clear, a department regulation cannot alter the plain language to resolve an ambiguity that does not exist on the face of the statute. We do not “add language to an unambiguous statute even if [we] believe[] the Legislature intended something else but did not adequately express it.” *Cerrillo*, 158 Wn.2d at 201 (quoting *Kilian*, 147 Wn.2d at 20). DOR’s argument that this court should add the words “wholesale and retail B&O tax” into former RCW 82.04.433 goes “too far.” *See Homestreet, Inc. v. Dep’t of Revenue*, 166 Wn.2d 444, 454, 210 P.3d 297 (2009) (DOR went “too far” when it argued that the court should determine that a statute distinguished between different types of interest revenue depending on the purpose of the interest when the statute only required “interest” to be received).

Moreover, DOR’s contention conflicts with its own previous determinations that it could not deny a manufacturer the deduction by artificially limiting the statute’s applicability to only wholesalers and retailers. For example, in 1988, DOR made a determination that the former RCW 82.04.433 deduction may properly be taken against retailing, wholesaling, and

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manufacturing B&O taxes. Clerk's Papers (CP) at 294-95. Then, in 1993, DOR made a determination that when a taxpayer derived amounts from qualified sales of bunker fuel, DOR could not limit the former RCW 82.04.433 deduction to wholesalers or retailers and exclude manufacturers. CP at 221.25. The fact that DOR appears to have allowed refiners (manufacturers) who sold qualifying fuel to take the deduction is further evidenced by its recognition that the 2009 amendment would cure "a potential *ongoing* estimated revenue loss of \$4.75 million in the biennium ending in Fiscal Year 2011." Agency Fiscal Note to S.B. 6096, at 2, 61st Leg., Reg. Sess. (Wash. 2009) (prepared by DOR) (emphasis added).

Second, DOR asserts that because RCW 82.04.240, imposing manufacturer B&O taxes, provides the "measure of the tax" to be "the value of the products . . . so manufactured," the legislature clearly intended the tax to be imposed only against a company's manufacturing "business activity." We agree. One method prescribed to calculate "the value of products" is by determination of "the gross proceeds derived from the sale thereof whether such sale is at wholesale or at retail." RCW 82.04.450(1). DOR appears to claim that the phrase "amount derived from sales" of bunker fuel under former RCW 82.04.433 cannot be used interchangeably with the "measure of tax" imposed on manufacturers in Washington State or "gross proceeds derived from [sales]" because the former RCW 82.04.433 deduction was intended to relieve taxpayers only from B&O taxes on the *activity* of selling bunker fuel. Br. of Resp't at 10-11; *see* RCW 82.04.240, .450.

To the extent possible, we give effect to all statutes or provisions governing the same subject matter. *In re Estate of Kerr*, 134 Wn.2d 328, 335-37, 949 P.2d 810 (1998). It is the court's duty to reconcile apparently conflicting statutes and to give effect to each of them, if this

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can be achieved without distortion of the language used. *Tommy P. v. Bd. of County Comm'rs of Spokane County*, 97 Wn.2d 385, 391-92, 645 P.2d 697 (1982).

In the instant case, there is no conflict among the plain texts of former RCW 82.04.433, RCW 82.04.240, and RCW 82.04.450. RCW 82.04.240 unambiguously imposes B&O tax for manufacturers of products. RCW 82.04.450 prescribes methods for determining the value of manufactured products for purposes of calculating manufacturer B&O tax liability. Former RCW 82.04.433 then provides a deduction for the "amounts derived from sales" of qualifying products from the "measure of tax" without specifying *which* measure of tax it may be applied against. The term "derived from" is not defined in the B&O tax statutes, but our Supreme Court recently defined the term as "to take or receive esp. from a source." *Homestreet*, 166 Wn.2d at 453 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 608 (2002)). Here, Tesoro has proven by Rule 175 certificates and, it is undisputed, the amount at issue was "received" from sales to vessels for use primarily in foreign commerce as required under former RCW 82.04.433. That a different methodology is employed to calculate Tesoro's initial manufacturing B&O tax liability does not affect this analysis.

Accordingly, we hold that the language of former RCW 82.04.433 is unambiguous. The plain language of the statute shows (1) a deduction was intended; (2) the deduction applies, at the very least, against all chapter 82.04 RCW B&O taxes; (3) the deduction was for an amount "derived from" or taken as a result of qualifying sales to vessels used primarily in foreign commerce; and (4) in order to take the deduction, a seller must have complied with the certificate requirements in Rule 175.

TESORO QUALIFIES FOR THE DEDUCTION UNDER FORMER RCW 82.04.433

Tesoro has the burden of proving its entitlement to the former RCW 82.04.433 B&O tax deduction. *Browning v. Dep't of Revenue*, 47 Wn. App. 55, 57, 733 P.2d 594 (1987) (citing *Rainier Bancorp. v. Dep't of Revenue*, 96 Wn.2d 669, 638 P.2d 575 (1982)). It is undisputed that Tesoro engaged in "sales of fuel for consumption outside the territorial waters of the United States, by vessels used primarily in foreign commerce" as required under former RCW 82.04.433(1). Tesoro paid approximately \$6,679,864 in B&O taxes directly related to those sales and fully complied with the Rule 175 certificate requirements.

Accordingly, because Tesoro has successfully met its burden, we hold that it is entitled to a refund of B&O taxes paid that could have been deducted under former RCW 82.04.433.

RETROACTIVE APPLICABILITY OF RCW 82.04.433, AS AMENDED

For the first time on appeal, Tesoro argues that retroactive application of RCW 82.04.433 violates due process because the amendment impermissibly attempts to reach back 24 years. DOR contends that the 2009 amendment does not violate due process because the amendment, enacted to "clarify" the 1985 statute, made no change to the meaning of former RCW 82.04.433.

We agree with Tesoro that the 24-year retroactivity clause violates due process.

Generally, an issue cannot be raised for the first time on appeal unless it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3). The appellant must show actual prejudice in order to establish that the error is "manifest." *State v. Munguia*, 107 Wn. App. 328, 340, 26 P.3d 1017 (2001) (citing *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995)), review denied, 145 Wn.2d 1023 (2002). Merely that a tax act is retroactive in operation is not of itself sufficient to justify a holding that the act is unconstitutional. *Japan Line, Ltd. v.*

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McCaffree, 88 Wn.2d 93, 96, 558 P.2d 211 (1977) (quoting *Bates v. McLeod*, 11 Wn.2d 648, 656, 120 P.2d 472 (1941)).

DOR relies on *United States v. Carlton*, 512 U.S. 26, 114 S. Ct. 2018, 129 L. Ed. 2d 22 (1994), for the proposition that the due process clause does not impose *any* fixed limit on the retroactive reach of tax statutes. DOR's reliance on *Carlton*, however, is misguided. In *Carlton*, Congress amended a provision of a federal estate tax statute by limiting the availability of a deduction to specific stock ownership plans. 512 U.S. at 27. The deduction had been initially created in October 1986, and the amendment passed just over one year later in December 1987. *Carlton*, 512 U.S. at 27-29.

The *Carlton* Court stated that the due process standard to be applied to tax statutes with retroactive effect is the same as that generally applied to retroactive economic legislation:

“Provided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches.”

512 U.S. at 30-31 (quoting *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729, 104 S. Ct. 2709, 81 L. Ed. 2d. 601 (1984)). Applying this relatively minimal standard, the *Carlton* Court held that the 1987 amendment, enacted just 14 months after the 1986 deduction, was intended as a curative measure that could be “reasonably viewed as a [correction of] a mistake in the original 1986 provision that would have created a significant and unanticipated revenue loss.” 512 U.S. at 32. The Court highlighted that there was “no plausible contention that Congress acted with an improper motive, as by targeting [the taxpayer].” *Carlton*, 512 U.S. at 32. The *Carlton* Court further held that “Congress acted promptly and established only a modest period of retroactivity.” 512 U.S. at 32. In doing so, the Supreme Court stated,

[I]n *United States v. Darusmont*, [449 U.S. 292, 101 S. Ct. 549, 66 L. Ed. 2d 513 (1981), we noted] that Congress “almost without exception” has given general revenue statutes effective dates prior to the dates of actual enactment. This “customary congressional practice” generally has been “*confined to short and limited periods required by the practicalities of producing national legislation.*”

512 U.S. at 32-33 (emphasis added) (quoting *Darusmont*, 449 U.S. at 296-97).

The facts of *Carlton* are readily distinguishable from the instant case. Here, the deduction statute at issue, RCW 82.04.433, was enacted in 1985. The legislature has had ample opportunity since 1985 to restrict its applicability to only retail and wholesale B&O tax. DOR attempts to analogize the instant case with *Carlton* by framing the 2009 amendment as a “clarifying amendment.” But the legislature may not apply a “clarification” retroactively for 24 years when it is in direct conflict with the reasonable expectations of qualifying taxpayers. *Carlton*, 512 U.S. at 29-30 (the two factors paramount in determining whether retroactive application of a tax violates due process are (1) whether the taxpayer had actual or constructive notice that the tax statute would be retroactively amended, and (2) whether the taxpayer reasonably relied to his detriment on pre-amendment law); *Bates*, 11 Wn.2d at 656 (even when a tax has been imposed for the support of the general government, it has been held that, if it is novel in character, a retroactive application may be subject to constitutional objection as being violative of due process).

And, unlike in *Carlton*, here the legislative history of the 2009 act shows the recent amendment was in direct response to Tesoro’s refund request. The “intent” language of the amendment refers to recent “questions” regarding a manufacturer’s ability to take the deduction. LAWS OF 2009, ch. 494, § 1. DOR’s Fiscal Note to S.B. 6096 also refers to Tesoro’s lawsuit:

A manufacturer of bunker fuel has brought a refund lawsuit against the Department, contending that the bunker fuel deduction may be claimed against its

manufacturing B&O tax liability for manufacturing the bunker fuel. The lawsuit is currently pending in Thurston County Superior Court.

....
If the pending lawsuit is resolved in favor of [Tesoro], enactment of this bill will prevent a potential ongoing estimated revenue loss of \$4.75 million in the biennium ending in Fiscal Year 2011, \$5.7 million in the biennium ending in Fiscal Year 2103 [sic], and \$5.8 million in the biennium ending in Fiscal Year 2015.

Agency Fiscal Note to S.B. 6096, at 2. The direct references to Tesoro's lawsuit and the fact that the 2009 act became effective the day before trial was set to begin evidences the type of improper taxpayer targeting identified by the *Carlton* Court. 512 U.S. at 32-33.

There is no colorable argument to suggest a legislative act creating a 24-year retroactive tax period is "prompt" or establishes a "modest period of retroactivity." *Carlton*, 512 U.S. at 32-33. We recognize that identifying and correcting significant fiscal losses is a legitimate legislative purpose. But we hold that it is not reasonable for the legislature to enact a retroactive amendment spanning 24 years in direct response to a taxpayer's refund lawsuit. *See State v. Pac. Tel. & Tel. Co.*, 9 Wn.2d 11, 17, 113 P.2d 542 (1941) (Washington legislature's attempt to create a four-year tax retroactivity period exceeded "limited or permissible retroactivity" which extends "to prior but recent transactions" (quoting *Welch v. Henry*, 223 Wis. 319, 326, 271 N.W. 68 (1937))). Here, DOR recognized that multiple activity taxpayers, like Tesoro, have been entitled to take the former RCW 82.04.433 deduction, resulting in "ongoing" revenue losses for the State. Agency Fiscal Note to S.B. 6096, at 2. Thus, under Washington law, because such an imposition of the B&O tax is "novel" against manufacturer-sellers of bunker fuel, RCW 82.04.433 cannot be applied retroactively. *Bates*, 11 Wn.2d at 656.

Tesoro has met its burden to show actual prejudice against it. *Munguia*, 107 Wn. App. at 340. Nothing in the plain language of former RCW 82.04.433 suggests a refinery that both

manufactures and sells bunker fuel is precluded from enjoying the benefit of the former RCW 82.04.433 deduction from its B&O taxes. Accordingly, we hold that the 24-year period is well beyond the limit of permissible retroactivity and retroactive enforcement of the amendment would violate due process. *Pac. Tel.*, 9 Wn.2d at 17.

PROSPECTIVE APPLICABILITY OF RCW 82.04.433, AS AMENDED

~~Also, for the first time on appeal, Tesoro argues that the 2009 amendment is invalid prospectively because the bill did not receive a two-thirds supermajority vote of both houses of the legislature required for passage of a bill to raise taxes. Former RCW 43.135.035 (2005). Generally, the unconstitutionality of a law is not ripe for review unless the person seeking review is harmed by the part of the law alleged to be unconstitutional. *State v. Ziegenfuss*, 118 Wn. App. 110, 113, 74 P.3d 1205 (2003), *review denied*, 151 Wn.2d 1016 (2004). Here, we have held that the 2009 amendment of RCW 82.04.433 applies only to tax obligations after its enactment. Tesoro challenges a denial of its refund claim for the period from December 1, 1999 to December 31, 2007. Thus, Tesoro was not harmed by the prospective application of the 2009 amendment during the refund period and the issue of whether the 2009 amendment is unconstitutional for failure to comply with former RCW 43.135.035 is not ripe for review.⁸~~

⁸ During oral argument, DOR cited *Brown v. Owen*, 165 Wn.2d 706, 206 P.3d 310 (2009), regarding the constitutionality of a voter initiative requiring a legislative supermajority to raise taxes. We note that in *Brown*, our Supreme Court expressly declined to address the constitutionality of the supermajority requirement. 165 Wn.2d at 711. Because we hold the issue is not ripe for our review, we also decline to address this issue.

No. 39417-1-II

The order granting DOR summary judgment is reversed and we remand for further proceedings consistent with this opinion.

Quinn-Brintnall, J.

QUINN-BRINTNALL, J.

We concur:

Worswick, A.C.J.

WORSWICK, A.C.J.

Serko, J.P.T.

SERKO, J.P.T.

APPENDIX B

CERTIFICATION OF ENROLLMENT

SENATE BILL 6096

Chapter 494, Laws of 2009

61st Legislature
2009 Regular Session

BUSINESS AND OCCUPATION TAX--BUNKER FUEL

EFFECTIVE DATE: 05/14/09

Passed by the Senate April 26, 2009
YEAS 29 NAYS 19

BRAD OWEN

President of the Senate

Passed by the House April 26, 2009
YEAS 51 NAYS 45

FRANK CHOPP

Speaker of the House of Representatives

Approved May 14, 2009, 12:14 p.m.

CHRISTINE GREGOIRE

Governor of the State of Washington

CERTIFICATE

I, Thomas Hoemann, Secretary of the Senate of the State of Washington, do hereby certify that the attached is SENATE BILL 6096 as passed by the Senate and the House of Representatives on the dates hereon set forth.

THOMAS HOEMANN

Secretary

FILED

May 18, 2009

Secretary of State
State of Washington

SENATE BILL 6096

Passed Legislature - 2009 Regular Session

State of Washington

61st Legislature

2009 Regular Session

By Senator Tom

Read first time 02/25/09. Referred to Committee on Ways & Means.

1 AN ACT Relating to the taxation of the manufacturing and selling of
2 fuel for consumption outside the waters of the United States by vessels
3 in foreign commerce; amending RCW 82.04.433; creating new sections; and
4 declaring an emergency.

5 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

6 NEW SECTION. **Sec. 1.** (1) Through this act the legislature intends
7 to address the taxation of persons manufacturing and/or selling bunker
8 fuel. Bunker fuel is fuel intended for consumption outside the waters
9 of the United States by vessels in foreign commerce. Although the
10 state has historically collected tax from bunker fuel manufacturers,
11 recently questions have arisen whether the manufacture of bunker fuel
12 is subject to business and occupation tax under RCW 82.04.240.
13 Pursuant to this act, the activity is taxable under RCW 82.04.240.

14 (2) The legislature finds that at the time the deduction allowed
15 under RCW 82.04.433 was enacted in 1985, it was intended to apply only
16 to the wholesaling or retailing of bunker fuel. In 1987 the
17 legislature enacted the multiple activities tax credit in RCW
18 82.04.440. Enactment of the multiple activities tax credit resulted in
19 changed tax liability for certain taxpayers. In particular, some

1 taxpayers that engaged in activities that had been exempt under the
2 prior multiple activities exemption became subject to tax on
3 manufacturing activities upon enactment of the multiple activities tax
4 credit in its place. The manufacturing of bunker fuel is one such
5 activity.

6 **Sec. 2.** RCW 82.04.433 and 1985 c 471 s 16 are each amended to read
7 as follows:

8 (1) In computing tax there may be deducted from the measure of tax
9 imposed under RCW 82.04.250 and 82.04.270 amounts derived from sales of
10 fuel for consumption outside the territorial waters of the United
11 States, by vessels used primarily in foreign commerce.

12 ~~(2) ((Nothing in this section shall be construed to imply that~~
13 ~~amounts which may be deducted under this section were taxable under~~
14 ~~Title 82 RCW prior to the enactment of this section.))~~ The deduction in
15 subsection (1) of this section does not apply with respect to the tax
16 imposed under RCW 82.04.240, whether the value of the fuel under that
17 tax is measured by the gross proceeds derived from the sale thereof or
18 otherwise under RCW 82.04.450.

19 NEW SECTION. **Sec. 3.** The department of revenue must take any
20 actions that are necessary to ensure that its rules and other
21 interpretive statements are consistent with this act.

22 NEW SECTION. **Sec. 4.** This act applies both prospectively and
23 retroactively.

24 NEW SECTION. **Sec. 5.** If any provision of this act or its
25 application to any person or circumstance is held invalid, the
26 remainder of the act or the application of the provision to other
27 persons or circumstances is not affected.

28 NEW SECTION. **Sec. 6.** This act is necessary for the immediate
29 preservation of the public peace, health, or safety, or support of the
30 state government and its existing public institutions, and takes effect
31 immediately.

Passed by the Senate April 26, 2009.

Passed by the House April 26, 2009.

Approved by the Governor May 14, 2009.

Filed in Office of Secretary of State May 18, 2009.

DECLARATION OF SERVICE

I certify that I served a copy of the foregoing Answer to Petition for Review on the date set forth below via U.S. Mail, postage prepaid, on the Respondent's counsel of record, as follows:

Donald F. Cofer
Senior Counsel
Attorney General/Revenue Division
P.O. Box 40123
Olympia, WA 98504-0123

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 9th day of March, 2011 at Seattle, Washington.


Claire Uhler