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Court of Appeals No. 39417-1-II

SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON
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TESORO REFINING & MARKETING COMPANY,

Respondent,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Appellant.

PETITION FOR REVIEW

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I. INDENTITY OF PETITIONER

Petitioner State of Washington, Department of Revenue, respondent in the Court of Appeals, respectfully requests that the Court accept review of the published decision terminating review in this case.

II. DECISION TO BE REVIEWED

The Department seeks review of the published decision in *Tesoro Ref. & Mktg. Co. v. Dep't of Revenue*, No. 39417-1-II, issued by the Court of Appeals, Division Two, on December 21, 2010. A copy of the decision is included in the Appendix.

III. ISSUES PRESENTED FOR REVIEW

1. Did the 1985 Legislature intend the deduction for "amounts derived from sales of fuel" in RCW 82.04.433 to apply only to amounts otherwise taxed for engaging in the activity of selling bunker fuel in Washington under the retailing and wholesaling B&O taxes in RCW 82.04.250 and 82.04.270, or was the deduction intended to apply, as the Court of Appeals held, "at the very least, against all chapter 82.04 RCW B&O taxes"?
2. The 2009 Legislature's curative amendment of RCW 82.04.433 unambiguously limited the deduction to amounts otherwise taxed for engaging in the activity of selling bunker fuel in Washington. If the 2009 amendment changed the intended meaning of the 1985 statute, does retroactive application of the 2009 amendment as intended by the Legislature violate the Due Process Clause of the United States Constitution, where it precludes refund claims by Tesoro and other crude oil refinery owners for manufacturing B&O taxes they paid during any open tax periods before the Governor signed the 2009 amendment?

IV. STATEMENT OF THE CASE

Tesoro owns and operates a crude oil refinery near Anacortes. CP 5, 9. The refinery processes crude oil received from domestic and foreign sources and intermediate feedstock received from other refineries. CP 9.

The primary petroleum products manufactured at the refinery are gasoline, diesel, and jet fuel, but the refinery also manufactures other petroleum products, including heavy fuel oils, propane, and asphalt. *Id.*

One of the heavy fuel oils manufactured at the refinery is marine bunker fuel (“bunker fuel”), a residual fuel oil that remains after gasoline and other distillate fuels are extracted from crude oil. CP 5, 9. It is used as a fuel by ships. CP 9.

From January 2000 through May 2004, Tesoro reported and paid B&O taxes on its business activities in Washington. CP 10, 35, 165-189. During those periods, Tesoro reported wholesaling B&O tax or retailing B&O tax on its *selling activities* in Washington. CP 165-189. Tesoro reported and paid manufacturing B&O tax on its *manufacturing activities* in Washington, including its manufacturing of bunker fuel. CP 10, 165-189. It claimed multiple activities tax credits under RCW 82.04.440(2) against its reported *selling* B&O tax liabilities for *manufacturing* B&O taxes it also reported and paid on the same products. CP 165-188. It did not identify any separate deduction it might have claimed under RCW 82.04.433 for sales of bunker fuel on any of those returns. CP 168-189.

During an audit of its records by the Department of Revenue’s Audit Division, Tesoro requested a refund of the *manufacturing* B&O taxes it paid from January 2000 through May 2004 for manufacturing bunker fuel in Washington, claiming it had been entitled to a deduction under RCW 82.04.433 against those manufacturing B&O taxes, but did not take it. CP 5, 10, 210. The Audit Division denied the refund request.

Id. Tesoro appealed the denial to the Department's Appeals Division, which also denied the refund request. *Id.* In February 2008, Tesoro then filed this refund action under RCW 82.32.180, seeking to apply RCW 82.04.433 to recover manufacturing B&O taxes it had paid from January 2000 through January 2008 for manufacturing bunker fuel. CP 4-7.

The bunker fuel deduction in RCW 82.04.433 was added to ESSB 4228 (1985) at the request of Pacific Northern Oil Corporation (Pacific Northern), which was then involved in litigation with the Department over "the existing export deduction" issue. *See* Br. of Resp't at 19. Pacific Northern was "engaged in the business of selling fuel to ships engaged in international trade." CP 290. Pacific Northern was a "[p]etroleum product reseller[.]" CP 283. It did not own or operate a crude oil refinery.

In March 1986, the Department amended two of its rules, WAC 458-20-193C and WAC 458-20-175, to reflect the effect of the new deduction on chapter 82.04 RCW. The Department added the following underscored language to the portion of WAC 458-20-193C addressing B&O taxes on "wholesaling and retailing":

Sales of tangible personal property, of ships stores, and supplies to operators of steamships, etc., are not deductible irrespective of the fact that the property will be consumed on the high seas, or outside the territorial jurisdiction of this state, or by a vessel engaged in conducting foreign commerce. However, 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.

Wash. St. Reg. 86-07-005 (copy attached in Appendix). The Department added no comparable language to the portion of WAC 458-20-193C

addressing B&O taxes on “extracting” and “manufacturing” because the enactment of RCW 82.04.433 had no effect on the manufacturing B&O tax imposed on Washington manufacturers of bunker fuel. Under the existing “multiple activities exemption” formerly in RCW 82.04.440, such manufacturers paid the manufacturing B&O tax only if they sold the bunker fuel “to points outside the state,” and the new bunker fuel deduction applied only to sales of bunker fuel in Washington.

In June 1987, the United States Supreme Court held that the “multiple activities exemption” unconstitutionally discriminated against interstate commerce. *Tyler Pipe Indus., Inc. v. Dep’t of Revenue*, 483 U.S. 232, 107 S. Ct. 2810, 97 L. Ed. 2d 199 (1987). The Legislature reacted to the decision in August 1987 by amending RCW 82.04.440, repealing the “multiple activities exemption” and replacing it with “multiple activities tax credits.” Under the amended version of RCW 82.04.440, Washington manufacturers that also sold their products in Washington were no longer exempt from paying the manufacturing B&O tax on the products. They now were required to report and pay *manufacturing* B&O tax—measured by the value of the products—on any products they *manufactured* in Washington. They also were required to report *wholesaling or retailing* B&O tax—measured by the gross proceeds of sales—on any products they *sold* in Washington. They then were permitted to claim a credit against the wholesaling or retailing B&O taxes they reported in the amount of any manufacturing B&O tax they actually paid on the same products. The effect of the new system of credits on Washington crude oil refineries was

that they would pay only one B&O tax on their manufacturing and selling activities in Washington—the *manufacturing* B&O tax—and they would owe no B&O taxes for selling any of the products they manufactured, including any bunker fuel.

On February 25, 2009, while Tesoro’s refund action was pending in superior court, Senate Bill 6096 was introduced. Senate Journal, 61st Leg., Reg. Sess., at 409 (Wash. 2009). The bill passed both houses on April 26, 2009, and was signed by the Governor on May 14, 2009.

Section 1 of SB 6096 noted that although the State “has historically collected tax” from bunker fuel manufacturers, “recently questions have arisen whether the manufacture of bunker fuel is subject to business and occupation tax under RCW 82.04.240.” Section 1 then declared: “Pursuant to this act, the activity is taxable under RCW 82.04.240.” Section 1 further explained:

The legislature finds that at the time the deduction allowed under RCW 82.04.433 was enacted in 1985, it was intended to apply only to the wholesaling or retailing of bunker fuel. In 1987 the legislature enacted the multiple activities tax credit in RCW 82.04.440. Enactment of the multiple activities tax credit resulted in changed tax liability for certain taxpayers. In particular, some taxpayers that engaged in activities that had been exempt under the prior multiple activities exemption became subject to tax on manufacturing activities upon enactment of the multiple activities credit in its place. The manufacturing of bunker fuel is one such activity.

Section 2 of the bill amended RCW 82.04.433 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.

Section 4 of the bill provided that the 2009 act “applies both prospectively and retroactively.”

On April 17, 2009, nine days before the Legislature passed SB 6096, Tesoro moved for partial summary judgment, limited to the legal issue whether the deduction allowed under RCW 82.04.433 extends to manufacturing B&O taxes paid for manufacturing bunker fuel. CP 12-228. The Department responded, opposing Tesoro’s request for relief and requesting summary judgment in favor of the Department. CP 229-284.

After oral argument on May 15, 2009, the trial court denied Tesoro’s motion, ruling that the deduction in RCW 82.04.433 as originally enacted in 1985 did not extend to manufacturing B&O taxes. The court granted summary judgment to the Department. RP 44-45; CP 316-319.

The Court of Appeals reversed the superior court’s summary judgment order. First, it held that because “the plain language of the statute does not restrict the deduction to exclude” manufacturing B&O taxes, “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.” Slip op. at 6. Second, it held that because the 2009 amendment “impermissibly attempts to reach back 24

years,” any retroactive application of the amendment “violates due process.” Slip op. at 11.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The decision of the Court of Appeals satisfies all the criteria for review under RAP 13.4(b)(1)-(4). It conflicts with decisions of this Court, conflicts with other decisions of the Court of Appeals, presents a significant federal constitutional issue, and presents issues of substantial public interest that should be determined by this Court.

A. The Decision Of The Court Of Appeals, In Its Approach To Construing RCW 82.04.433, Is In Conflict With Many Decisions Of This Court And The Court Of Appeals

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. The reasoning the Court of Appeals employed to arrive at its conclusion regarding the scope of the deduction in RCW 82.04.433, however, is unprecedented and inconsistent with every Washington appellate decision construing a B&O tax deduction provision since enactment of the Revenue Act of 1935. Accordingly, the Court of Appeals decision conflicts in principle with dozens of decisions by this Court and the Court of Appeals.

Both the former and current versions of RCW 82.04.433 begin with the following language: “In computing tax there may be deducted from the measure of tax” Virtually every other section in chapter 82.04 RCW labeled as a “deduction” also begins with this identical language or its equivalent. *See* RCW 82.04.4281-.43391. The identical language first appeared in the Revenue Act of 1935, in the section of that initial tax act authorizing B&O tax deductions. *See* Laws of 1935, ch. 180, § 12 (later codified as former RCW 82.04.430). As the Department explained to the Court of Appeals, the surrounding statutory context shows conclusively that the 1985 Legislature’s use of this introductory language in RCW 82.04.433 “merely signaled that the Legislature intended to enact a new deduction section in chapter 82.04 RCW— nothing more.” *See* Br. of Resp’t, at 4-8.

Every previous appellate court addressing a statutory construction problem involving a B&O tax deduction since 1935 apparently understood the obvious limited function of this introductory language, but the Court of Appeals here did not. In the critical paragraph of its decision explaining why it concluded that “the language of former RCW 82.04.433 is unambiguous” and that the 1985 Legislature intended the deduction to apply, “at the very least, against all chapter 82.04 RCW B&O taxes,” slip op. at 10, the Court of Appeals could not have more completely misapprehended the significance of this introductory language:

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 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 [Foods, Inc. v. Dep’t of Revenue], 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).*

Slip op. at 7-8 (italics added).

Until now, Washington appellate courts have correctly attributed no significance to the different “deduction” and “exemption” labels attached to the tax preferences appearing in the B&O tax chapter.¹ For example, in *Yakima Fruit Growers Ass’n v. Henneford*, 187 Wash. 252, 60 P.2d 62 (1936), this Court addressed the application of a “deduction” in Laws of 1935, ch. 180, § 12 (now codified in RCW 82.04.4287) and an “exemption” in Laws of 1935, ch. 180, § 11 (now codified as amended in RCW 82.04.330). After quoting the language of the “deduction” in section 12 (including its introductory language), this Court correctly held:

[The taxpayers], and all others performing similar services, are *expressly exempted by section 12* from the operation of the 1935 statute as to amounts derived as compensation for “the receiving,

¹ Indeed, Tesoro admitted in the Court of Appeals that there is no substantive difference between B&O tax “deductions” and B&O tax “exemptions.” In Tesoro’s words, they “have the same net effect—exclusion from tax[.]” Br. of Appellant, at 18 n.12. For “exemptions,” taxpayers generally are not expected to report the income even initially on their returns. For “deductions,” taxpayers are expected to “show their work.” They should report the income on their returns and then deduct the appropriate “amounts” in the correct spaces on the returns. But there is no penalty for a taxpayer failing to correctly fill out its tax return form as long as the taxpayer pays the amount of tax properly due or more.

washing, sorting and packing” of fruit which they handle and “the material and supplies used therein.” However, *section 12 does not exempt* [the taxpayers] as to amounts received for warehousing, cold storage, or sale of the fruit. . . . Under the provisions of title 2, c. 180, Laws 1935, all are subject to the occupation tax *unless exempted*. . . . The taxpayers are subject to the tax imposed as to their activities of warehousing, cold storage, and sale of fruit.

187 Wash. at 258-60 (italics added). Thus, this Court did not allow the taxpayers to deduct “from the measure of” the B&O taxes on their business activities of warehousing, cold storage, and sale of fruit the amounts they “derived” as compensation for receiving, washing, sorting, and packing the fruit or for “the material and supplies used therein,” even though the introductory language in section 12 was not “specifically limited to” title 2 of the 1935 act. This Court properly construed the “deduction” in section 12 as a partial B&O tax exemption limited to the activities of receiving, washing, sorting, and packing fruit.

In *Group Health Coop. v. Wash. State Tax Comm’n*, 72 Wn.2d 422, 433 P.2d 201 (1967), this Court addressed the “deductions” in former RCW 82.04.430(2) (now codified as amended in RCW 82.04.4282) and RCW 82.04.430(9) (now codified as amended in RCW 82.04.4289). This Court initially noted that the provisions of RCW 82.04.430(9) originated in Laws of 1935, ch. 180, § 11, “where they first appeared as an exemption.” 72 Wn.2d at 426 n.1. The tax preference “continued in the tax exemption category until 1945 when the legislature not only again amended its language but also changed it from a tax exemption provision to a tax deduction provision.” *Id.* Before directly considering the meaning of RCW 82.04.430(2) and (9), this Court explained:

[W]e attach no particular significance to the characterization of the statutory tax exclusions as “deductions” rather than “exemptions” insofar as the rules of statutory construction applicable here be concerned. Both a tax “exemption,” which does not amount to total immunity, and a “deduction” presuppose a taxable status and must be claimed by the taxpayer if he is to benefit from either. In connection with each, the burden of showing qualification for the tax benefit afforded likewise rests with the taxpayer. And, statutes which provide for either are, in case of doubt or ambiguity, to be construed strictly, though fairly and in keeping with the ordinary meaning of their language, against the taxpayer.

72 Wn.2d at 429.

By attaching controlling significance to the characterization of RCW 82.04.433 as a “deduction” and the form of the introductory language labeling it as such, the decision of the Court of Appeals conflicts in principle with *Yakima Fruit Growers Ass’n* and *Group Health Coop.*, along with dozens of other decisions of this Court and the Court of Appeals since 1935 that attached no significance to the precise language in the introductions to B&O tax deduction sections.²

Moreover, by holding that the introductory language in the former and current versions of RCW 82.04.433 and in most other “deduction” sections of chapter 82.04 RCW “unambiguously” refers “at the very least” to “all B&O taxes,” and by suggesting that the Legislature intended to

² See, e.g., *Simpson Inv. Co. v. Dep’t of Revenue*, 141 Wn.2d 139, 158-59, 3 P.3d 741 (2000) (referring to subsidiary dividend deduction in RCW 82.04.4281 interchangeably as an “exemption” and a “deduction”); *Dep’t of Revenue v. Sec. Pac. Bank*, 109 Wn. App. 795, 810-11, 38 P.3d 354 (2002) (referring to first mortgage interest deduction in RCW 82.04.4292 interchangeably as an “exemption” and a “deduction”); *Analytical Methods, Inc. v. Dep’t of Revenue*, 84 Wn. App. 236, 238, 928 P.2d 1123 (1996) (referring to deduction in RCW 82.04.4282 as an “exemption”); *Automobile Club of Wash. v. Dep’t of Revenue*, 27 Wn. App. 781, 786, 621 P.2d 760 (1980) (“The purpose of the dues deduction [in RCW 82.04.4282] is to exempt from taxation only revenue exacted for the privilege of membership.”).

permit taxpayers to claim all these deductions repeatedly to reduce all their B&O tax liabilities for any otherwise taxable activities, but also to claim these same deductions against taxes accrued under other RCW titles or chapters, the Court of Appeals ignored the firmly established principle that statutes should be construed to effect their purpose and to avoid unlikely, absurd, or strained consequences. *See, e.g., Sanders v. State*, 166 Wn.2d 164, 172, 207 P.3d 1245 (2009).³

B. The Reasoning Of The Court Of Appeals Supporting Its Due Process Holding Is Inconsistent With Several Decisions Of This Court

The holding of the Court of Appeals that retroactive application of the 2009 act violates due process 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). In *W.R. Grace*, a large group of corporate taxpayers made a substantive due process argument similar to Tesoro's in challenging the Legislature's retroactive statutory application of the system of multiple activities credits in RCW 82.04.440 as a remedy for the invalidation of the former multiple activities exemption in *Tyler Pipe*. The taxpayers had filed actions seeking full refunds of taxes they had paid as early as January 1980. 137 Wn.2d at 588-89. The Legislature enacted the amendment to RCW 82.04.440 in August 1987. *Id.* at 586. The taxpayers argued that retroactive

³ Curiously, Tesoro argued in the Court of Appeals that the introductory language "there may be deducted from the measure of tax" does not "resolve the question whether it is "eligible for the deduction," but nevertheless argued that "in computing tax" does. *See Br. of Appellant*, at 13-18 & n.12; *Appellant's Reply Br.* at 3-8 & n.5.

application of the 1987 amendment constituted a substantive due process violation because it “reach[ed] back too far in time.” *Id.* at 600.

This Court squarely rejected the taxpayers’ due process argument. Relying on *United States v. Carlton*, 512 U.S. 26, 114 S. Ct. 2018, 129 L. Ed. 2d 22 (1994), this Court concluded that the applicable due process test simply requires a “showing that the retroactive application of the legislation is itself justified by a rational legislative purpose.” 137 Wn.2d at 603 (quoting *Carlton*, 512 U.S. at 30-31). Since it had “previously approved the motives of the legislature as proper in enacting the 1987 credit law,” this Court held that “the rational legislative purpose which *Carlton* requires is present.” *Id.* at 603. This Court further held that the United States Supreme Court “has not set a specific duration to the retroactive effect of tax legislation, preferring to rely on legislative decisions in this context.” *Id.* Consistent with *W.R. Grace*, numerous federal and state courts in recent years have refused to strike down tax statutes or legislative tax rules with retroactive application periods longer than or comparable to the nine years at issue in this case.⁴

⁴ See, e.g., *Montana Rail Link, Inc. v. United States*, 76 F.3d 991, 993-95 (9th Cir. 1996) (seven years); *Smith v. Sears, Roebuck & Co.*, 672 So. 2d 794, 796, 799 (Ala. Civ. App. 1995) (more than eight years); *Maples v. McDonald*, 668 So. 2d 790, 792-93 (Ala. Civ. App. 1995) (more than eight years); *Miller v. Johnson Controls, Inc.*, 296 S.W.3d 392, 400-401, 416 (Ky. 2009) (at least nine years), *cert. denied*, 130 S. Ct. 3324 (2010); *King v. Campbell County*, 217 S.W.3d 862, 866-67, 869-70 (Ky. Ct. App. 2006) (nineteen years); *General Motors Corp. v. Dep’t of Treasury*, ___ N.W.2d ___, 2010 WL 4260095 (Mich. App. 2010) (eleven years); *GMAC LLC v. Dep’t of Treasury*, 286 Mich. App. 365, 376-80, 781 N.W.2d 310 (2009) (seven years), *appeal denied*, 486 Mich. 961, 782 N.W.2d 770 (2010); *Moran Towing Corp. v. Urbach*, 1 A.D.3d 722, 768 N.Y.S.2d 33 (2003) (thirteen years); *Astoria Fed. Sav. & Loan v. State*, 222 A.D.2d 36, 644 N.Y.S.2d 926, 933-34 (1996) (seven years); *U.S. Bancorp v. Dep’t of Revenue*, 337 Or. 625, 103 P.3d 85, 91-93 (2004) (seven years; legislative rule), *cert. denied*, 546 U.S. 813

The interpretation of *United States v. Carlton* by the Court of Appeals in this case cannot be reconciled with this Court's interpretation of that opinion in *W.R. Grace*. The Court of Appeals decision should be reviewed by this Court because it conflicts with this Court's decision in *W.R. Grace*, which the Court of Appeals neglected to discuss at all.⁵

In its discussion of *United States v. Carlton*, the Court of Appeals states that "the legislative history of the 2009 act shows the recent amendment was in direct response to Tesoro's refund request." Slip op. at 13. The Court of Appeals further states: "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." Slip op. at 14. After conceding that "identifying and correcting significant fiscal losses is a legitimate legislative purpose," the Court of Appeals nevertheless held "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." *Id.* (italics added).⁶

(2005); *Atlantic Richfield Co. v. Dep't of Revenue*, 14 Or. Tax 212, 213-14, 217-20 (1997) (more than eight years), *aff'd per curiam*, 327 Or. 144, 958 P.2d 840 (1998).

⁵ In support of its argument that Tesoro's substantive due process challenge to the 2009 act "fails under controlling precedent from both the United States Supreme Court and the Washington Supreme Court," the Department discussed *W.R. Grace* and this Court's interpretation of the *Carlton* opinion in that case at some length. See Br. of Respondent at 44-47. Thus, the failure of the Court of Appeals to even mention *W.R. Grace* is perplexing.

⁶ The Court of Appeals was incorrect to suggest that the retroactive application period in this case was 24 years. The earliest tax payment for which Tesoro seeks a refund actually occurred nine years and one month before the Governor signed SB 6096. SB 6096 did not amend or create any exception to the normal limitation periods for either tax assessments or tax refunds in RCW 82.32.050(4) and RCW 82.32.060(1)-(2).

The Court of Appeals decision therefore seems to hold that any retroactive amendment of a tax statute, if enacted in response to a refund lawsuit, constitutes “improper taxpayer targeting” that violates the Due Process Clause of the Fourteenth Amendment. If that is what the Court of Appeals meant, its decision is squarely in conflict with decisions of this Court in addition to *W.R. Grace* rejecting similar due process challenges to retroactive statutory amendments that affected pending lawsuits.

For example, in *Wash. State Farm Bureau Fed'n v. Gregoire*, 162 Wn.2d 284, 174 P.3d 1142 (2007), 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. The Governor signed it into law two days before the trial court hearing on cross-motions for summary judgment. 162 Wn.2d at 298, 303-04. In response to the Farm Bureau’s contention that the retroactivity of the 2006 amendment violated due process, this Court held: “No one has a vested right in any general rule of law or policy of legislation which gives an entitlement to insist that it remain unchanged for one’s own benefit.” *Id.* at 304-05 (quoting *Johnson v. Continental West, Inc.*, 99 Wn.2d 555, 563, 663 P.2d 482 (1983)).⁷

The decision of the Court of Appeals similarly conflicts with this Court’s decision in *Haberman v. Wash. Pub. Power Supply Sys.*, 109

⁷ In *United States v. Carlton*, the United States Supreme Court held that this general principle applies equally to tax legislation: “Tax legislation is not a promise, and a taxpayer has no vested right in the Internal Revenue Code.” 512 U.S. at 33.

Wn.2d 107, 744 P.2d 1032 (1987). In response to the intervenor institutional bondholders' argument that "retroactive application of RCW 21.20.430(7) violate[d] their state and federal due process rights," this Court squarely held that the argument was "without merit." 109 Wn.2d at 142. Because a person generally "has no vested right in the continuation of existing statutory law" and the intervenors had "no claim of entitlement to the pre-amendment terms of RCW 21.20.430(7)," the retroactive application of the amended statute did not "implicate any interest protected by state or federal due process guarantees." *Id.* at 143.

In its effort to distinguish *United States v. Carlton*, the Court of Appeals stated that the deduction statute at issue was enacted in 1985 and the Legislature "has had ample opportunity since 1985 to restrict its applicability to only retail and wholesale B&O tax." Slip op. at 13. In making this statement, the Court of Appeals apparently embraced Tesoro's argument that the Legislature "is presumed to know" that the Department had issued three *unpublished* determinations erroneously applying the deduction in RCW 82.04.433 to the manufacturing B&O tax—determinations that directly conflicted with the Department's formal public amendment of WAC 458-20-193C in March 1986 plainly limiting the deduction to the wholesaling and retailing B&O taxes. See Appellant's Br. at 39.

The Court of Appeals seems to attribute to Washington's legislators powers of both omniscience and clairvoyance. Until Tesoro's refund lawsuit was filed, no legislator would have had any reason or

ability to know the minute details about how certain Department employees were applying the bunker fuel deduction statute to individual taxpayers. Moreover, no legislator in 1985 could predict that the Court of Appeals in 2010 would overturn the Department's contemporaneous administrative construction of RCW 82.04.433 reflected in WAC 458-20-193C. Tesoro's arguments about the Legislature's supposed knowledge of three later unpublished determinations strain credulity.⁸ They also conflict in principle with decisions of both this Court and the Court of Appeals holding that the Legislature will not be deemed to have "silently acquiesced" in an administrative interpretation unless proof is offered that the Legislature was "conscious or aware of" the interpretation. *Pringle v. State*, 77 Wn.2d 569, 574, 464 P.2d 425 (1970); see *Children's Hosp. & Med. Ctr. v. Dep't of Health*, 95 Wn.App. 858, 870-71, 975 P.2d 567 (1999).

C. The Decision Of The Court Of Appeals Involves A Significant Question Of Federal Constitutional Law That This Court Should Address

Whenever the Court of Appeals has held that a tax statute passed by the Legislature and approved by the Governor is unconstitutional, such a case almost certainly presents a significant issue of constitutional law justifying this Court's further review of that issue under RAP 13.4(b)(3). Cf. RAP 4.2(a)(2) (authorizing direct review by this Court of a case in

⁸ Unpublished determinations are confidential "tax information" that generally cannot be disclosed without the taxpayer's permission. See RCW 82.32.330(3)(j). Unpublished determinations are not regarded as precedents by the Department. See RCW 82.32.410.

which the trial court has held a statute or tax unconstitutional). A proper showing of respect for the coequal branches of government suggests that this Court should independently conduct review of any statute that the Court of Appeals has declared unconstitutional and refused to enforce, particularly where the analysis of the Court of Appeals supporting its conclusion is as questionable as it is in this case. *See, e.g., Hale v. Wellpinit Sch. Dist. No. 49*, 165 Wn.2d 494, 500, 509-10, 198 P.3d 1021 (2009) (case involving retroactive statute and presenting separation of powers issue presented a significant question of law under the state constitution).

Moreover, this particular constitutional question has national ramifications. Corporate taxpayers across the country have continued to challenge retroactive tax statutes as violations of the federal Due Process Clause even after the United States Supreme Court issued its *Carlton* decision, and even though the Court continues to deny petitions to revisit this issue.⁹ A decision by this Court is necessary to reestablish the proper application of *Carlton* in Washington.

⁹ Two days ago, the Court again denied a petition for certiorari involving a tax statute with indefinite retroactive reach for tax refunds that was applied by the Michigan courts to deny refunds to the taxpayer for tax periods up to five years before the statute's enactment. *Ford Motor Credit Co. v. Dep't of Treasury*, 2010 WL 99050 (Mich. App. 2010) (unpublished mem.), *appeal denied*, 486 Mich. 962, 782 N.W.2d 771 (2010), *cert. denied*, ___ U.S. ___ (Jan. 18, 2011) (No. 10-481). In its reply brief in support of its petition for certiorari, the taxpayer cited the Court of Appeals decision in *Tesoro* to argue that there is "growing confusion in the lower courts on the scope of this Court's decision in *Carlton* and due process limits on retroactive tax legislation." Reply Brief of Petitioners at 9-10, *Ford Motor Credit* (No. 10-481), *available at* <http://sblog.s3.amazonaws.com/wp-content/uploads/2011/01/01-14-Ford-Motor-Credit-Company-Petitioners-reply.pdf> (last visited January 18, 2011).

D. The Petition Involves Issues Of Substantial Public Importance That Should Be Determined By This Court

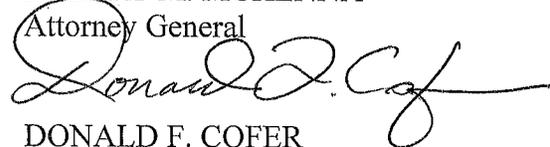
Both the statutory construction issue and the due process issue also are issues of substantial public importance warranting review by this Court under RAP 13.4(b)(4). The statutory construction analysis used by the Court of Appeals will generate more litigation over the meaning of other B&O deductions due to the introductory language common to nearly all such sections. The due process analysis used by the Court of Appeals will leave the Legislature with conflicting messages from our appellate courts concerning its power to enact retroactive civil statutes in general. These are serious problems created by the decision of the Court of Appeals, justifying further review by this Court.

VI. CONCLUSION

This Court should accept review, reverse the Court of Appeals decision, and reinstate the summary judgment granted to the Department.

RESPECTFULLY SUBMITTED this 20th day of January, 2011.

ROBERT M. MCKENNA
Attorney General



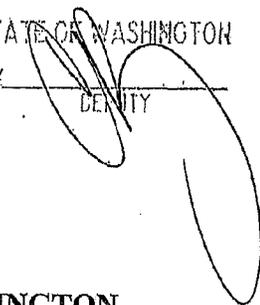
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APPENDIX

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STATE OF WASHINGTON

BY  DEPUTY

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

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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.

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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.

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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.

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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

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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

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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.

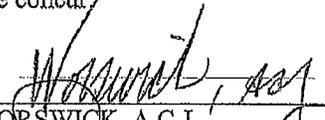
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The order granting DOR summary judgment is reversed and we remand for further proceedings consistent with this opinion.

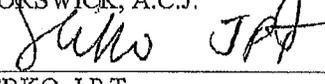


QUINN-BRINTNALL, J.

We concur:



WORSWICK, A.C.J.



SERKO, J.P.T.

(2) If the individual presents medical evidence to the CSO, a referral to SSA is required:)) When an individual has applied for Title II or Title XVI benefits and the SSA has denied the application solely because of a failure to meet blindness or disability criteria under Title II or Title XVI, the SSA denial shall be binding on the department, unless:

(1) The SSA denial is under appeals in the reconsideration stage, the SSA's administrative fair hearing process, the SSA's appeals council, or the federal courts; or

(2) The applicant's medical condition has changed since the SSA denial was issued.

WSR 86-07-005
ADOPTED RULES
DEPARTMENT OF REVENUE
(Order ET 86-3—Filed March 6, 1986)

I, Matthew J. Coyle, acting director of the Department of Revenue, do promulgate and adopt at Olympia, Washington, the annexed rules relating to:

- | | |
|---------------------|--|
| Amd WAC 458-20-210 | Sales of agricultural products by persons producing the same. |
| Amd WAC 458-20-175 | Persons engaged in the business of operating as a private or common carrier by air, rail or water in interstate or foreign commerce. |
| Amd WAC 458-20-193C | Imports and exports—Sales of goods from or to persons in foreign countries. |

This action is taken pursuant to Notice No. WSR 86-03-043 filed with the code reviser on January 14, 1986. These rules shall take effect thirty days after they are filed with the code reviser pursuant to RCW 34.04.040(2).

This rule is promulgated under the general rule-making authority of the Department of Revenue as authorized in RCW 82.32.300.

The undersigned hereby declares that the agency has complied with the provisions of the Open Public Meetings Act (chapter 42.30 RCW), the Administrative Procedure Act (chapter 34.04 RCW) and the State Register Act (chapter 34.08 RCW) in the adoption of these rules.

APPROVED AND ADOPTED March 6, 1986.

By Matthew J. Coyle
Acting Director

AMENDATORY SECTION (Amending Order ET 83-1, filed 3/30/83)

WAC 458-20-210 SALES OF ((FARM)) AGRICULTURAL PRODUCTS BY ((FARMERS)) PERSONS PRODUCING THE SAME. The term "((farm)) agricultural products" as used herein means ((all farm products such as poultry, livestock, fruit, vegetables and grains)) any agricultural or horticultural produce or crop, including any animal, bird, fish, or insect, or the milk, eggs, wool, fur, meat, honey, or other substance obtained therefrom: PROVIDED, That "fish" as used herein means fish which are cultivated and raised entirely within confined rearing areas on land owned by the person so raising the same or on land in which the person has a present right of possession.

((All farmers)) Persons engaging in the business of making retail sales of ((farm)) agricultural products produced by them are required to apply for and obtain a certificate of registration. The certificate shall remain valid as long as the ((taxpayer)) person remains in business.

BUSINESS AND OCCUPATION TAX

((Farmers are not subject to tax under the wholesaling classification of the business and occupation tax upon)) Persons making wholesale sales of ((farm)) agricultural products ((which have been raised)) produced by them upon land owned by or leased to them are not subject to the business and occupation tax. This exemption does not extend to sales of manufactured or extracted products (see WAC 458-20-135 and 458-20-136)((, nor to the taking, cultivating, or raising of Christmas trees or timber)).

((Farmers)) Retail sales of agricultural products by persons producing the same are subject to tax under the retailing classification of the business and occupation tax ((upon sales of farm products when the farmer)). Thus, tax is due by any such person who holds himself out to the public as a seller by:

- (1) Conducting a roadside stand or a stand displaying ((farm)) agricultural products for sale at retail;
- (2) Posting signs on his premises, or through other forms of advertising soliciting sales at retail;
- (3) Operating a regular delivery route from which ((farm)) agricultural products are sold from door to door; or
- (4) Maintaining an established place of business for the purpose of making retail sales of ((farm)) agricultural products.

((Farmers)) Persons selling ((farm)) agricultural products not ((raised)) produced by them, should obtain information from the department of revenue with respect to their tax liability.

RETAIL SALES TAX

((All farmers)) Persons selling agricultural products produced by them are required to collect the retail sales tax upon all retail sales made by them, except sales of food products exempt under WAC 458-20-244((, when the farmer holds himself out to the public as a seller in any of the ways described above)).

AMENDATORY SECTION (Amending Order ET 83-16, filed 3/15/83)

WAC 458-20-175 PERSONS ENGAGED IN THE BUSINESS OF OPERATING AS A PRIVATE OR COMMON CARRIER BY AIR, RAIL OR WATER IN INTERSTATE OR FOREIGN COMMERCE. The term "private carrier" means every carrier, other than a common carrier, engaged in the business of transporting persons or property for hire.

The term "watercraft" includes every type of floating equipment which is designed for the purpose of carrying therein or therewith persons or cargo. It includes tow boats, but it does not include floating dry docks, dredges or pile drivers, or any other similar equipment.

The term "carrier property" means airplanes, locomotives, railroad cars or water craft, and component parts of the same.

The term "component part" includes all tangible personal property which is attached to and a part of carrier property. It also includes spare parts which are designed for ultimate attachment to carrier property. The said term does not include furnishings of any kind which are not attached to the carrier property nor does it include consumable supplies. For example, it does not include, among other things, bedding, linen, table and kitchen ware, tables, chairs, ice for icing perishables or refrigerator cars or cooling systems, fuel or lubricants.

"Such persons," and "such businesses" mean the persons and businesses described in the title of this rule.

BUSINESS AND OCCUPATION TAX, PUBLIC UTILITY TAX

Persons engaged in such businesses are not subject to business tax or utility tax with respect to operating income received for transporting persons or property in interstate or foreign commerce. (See WAC 458-20-193.)

When such persons also engage in intrastate business activities they become taxable at the rates and in the manner stated in WAC 458-20-179, 458-20-181 and 458-20-193. For example, such persons are taxable under the retailing business tax classification upon the gross proceeds of sales of tangible personal property, including sales of meals, when such sales are made within this state.

Persons selling tangible personal property to, or performing services for, others engaged in such businesses, are taxable to the same extent as they are taxable with respect to sales of property or services made to other persons in this state. However, 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. In order to qualify for this deduction sellers must take a certificate signed by the buyer or the buyer's agent stating: The name of the vessel for which the fuel is purchased; that the vessel is primarily used in foreign commerce; and, the amount of fuel purchased which will be consumed outside of the territorial waters of the United States. 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. The following is an acceptable certificate form:

FOREIGN FUEL EXEMPTION CERTIFICATE

SELLER: _____ VESSEL: _____

WE HEREBY CERTIFY that this purchase of (kind and amount of product) from (seller) will be consumed as fuel outside the territorial waters of the United States by the above-named vessel. We further certify that said vessel is used primarily in foreign commerce and that none of the fuel purchased will be consumed within the territorial boundaries of the State of Washington.

DATED _____, 19____
Purchaser _____
Purchaser's Agent _____
By: _____
Title or Office _____

When a completed certification such as this 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.

RETAIL SALES TAX

Sales of meals (including those sold to employees, see WAC 458-20-119) and retail sales of other tangible personal property, made by such persons, are subject to the retail sales tax when such sales are made within this state.

By reason of specific exemptions contained in RCW 82.08.0261 and 82.08.0262 the retail sales tax does not apply upon the following sales:

- (1) Sales of airplanes, locomotives, railroad cars, or watercraft for use in conducting interstate or foreign commerce by transporting therein or therewith property and persons for hire;
(2) Sales of tangible personal property which becomes a component part of such carrier property in the course of constructing, repairing, cleaning, altering or improving the same;
(3) Sales of or charges made for labor or services rendered with respect to the constructing, repairing, cleaning, altering or improving of such carrier property;
(4) Sales of any tangible personal property other than the type referred to in 1 and 2 above, for use by the purchaser in connection with such businesses, provided that any actual use thereof in this state shall, at the time of actual use, be subject to the use tax.

Except as to sales of or charges made for labor or services rendered with respect to the constructing, repairing, cleaning, altering or improving of carrier property, the foregoing exemptions are limited to sales of tangible personal property. Hence the retail sales tax applies upon the sales of or charges made for labor or services rendered in respect to (1) the installing, repairing, cleaning, altering, imprinting or improving of any other type of tangible personal property; and in respect to (2) the constructing, repairing, decorating or improving of new or existing buildings or other structures. Thus the retail sales tax applies upon the charge made for repairing within this state of such things as switches, frogs, office equipment, or any other property which is not carrier property. It also applies upon the charge made for laundering linen and bedding. The tax also applies upon the charge made for constructing buildings, such as depots, wharves and hangars, or for repairing, decorating or improving the same.

However, the cost of installing, repairing, cleaning, altering, imprinting or improving of tangible personal

property prior to its initial use by the carrier is considered as part of the initial cost of the property involved and therefore exempt from the sales tax. Thus, for example, the treating of railroad ties prior to their initial use is considered as part of the original cost of the ties and therefore exempt from the sales tax under RCW 82.08.0261.

EXEMPTION CERTIFICATES REQUIRED. Persons selling tangible personal property or performing services which come within any of the foregoing exemptions are required to obtain from the purchaser, or his authorized agent, a certificate evidencing the exempt nature of the transaction. This certificate must identify the operator of the carrier by name and by its department of revenue registration number, if registered, and if not registered, by address.

The certificate may be in blanket form—that is, may certify as to all future purchases, or individual certificates may be made for each purchase. Also the certificate may be incorporated in or stamped upon the purchase order.

The certificate should be in substantially the following form:

EXEMPTION CERTIFICATE

WE HEREBY CERTIFY that all the tangible personal property to be purchased from you will be for use in connection with our business of operating as a (private or common) carrier by (air, rail or water) in (interstate or foreign) commerce; that all (airplanes, locomotives, railroad cars or water craft) or component parts thereof, to be constructed, repaired, cleaned, altered or improved by you, will be used in conducting (interstate or foreign) commerce; and that all such sales are entitled to exemption from the Retail Sales Tax under the provisions of RCW 82.08.0261 and 82.08.0262.

Dated, 19...
.....
(Purchaser)

By
(Title—Officer or Agent)

Address

Department of Revenue Registration No.
.....

USE TAX

The use tax does not apply upon the use of airplanes, locomotives, railroad cars or watercraft, including component parts thereof, which are used primarily in conducting such businesses.

"Actual use within this state," as used in RCW 82.08.0261 does not include use of durable goods aboard carrier property while engaged in interstate or foreign commerce. Thus the use tax does not apply upon the use of furnishings and equipment (whether attached to the carrier or not) intended for use aboard carrier property while operating partly within and partly without this state. Included herein are such items as bedding, table

linen and wares, kitchen equipment, tables and chairs, hand tools, hawsers, life preservers, parachutes, and other durable goods which are necessary, convenient or desirable for the proper operation of such carrier property.

The use tax does apply upon the actual use within this state of all other types of tangible personal property purchased at retail and upon which the sales tax has not been paid. Included herein are all consumable goods for use on and placed aboard carrier property while within this state, but only to the extent of that portion consumed herein. Thus the tax applies upon the use of the amount consumed in this state of ice, fuel and lubricants which are placed aboard in this state, and upon food supplies or catered meals placed aboard carrier property in this state and served to customers in this state by transportation companies when the meals so served are included in the charge for transportation. (The retail sales tax must be collected upon separate sales within this state of meals or other tangible personal property.) The tax does not apply upon the use within this state of any part of consumable goods for use on carrier property and placed aboard outside this state.

Liability for the use tax arises at the time of actual use thereof in this state.

Due to the difficulty in many cases of determining at the time of purchase whether or not the property purchased or a part thereof will be put to use in this state and due to the resulting accounting problems involved, persons engaged in the business of operating as private or common carriers by air, rail or water in interstate or foreign commerce will be permitted to pay the use tax directly to the department of revenue rather than to the seller, and such sellers are relieved of the liability for the collection of such tax. This permission is limited, however, to persons duly registered with the department. The registration number given on the certificate which will be furnished to the seller ordinarily will be sufficient evidence that the purchaser is properly registered.

As to persons operating in interstate or foreign commerce as carriers by air, rail or water who are not registered with the department and who, therefore, are not regularly filing tax returns with the department, sellers of durable goods must either collect the use tax at the time of the sale or require from such purchasers a further certificate to the effect that no part of the subject matter of the sale is for actual use in this state.

Similarly, where consumable goods, such as ice, bunker fuel, or lubricants are purchased by or for carriers not registered with the department, and delivered on board a carrier regularly engaged in interstate or foreign commerce for consumption while both within and without the territorial boundaries of the state of Washington, the seller is required to collect from the buyer the amount of use tax applicable to that portion of the products sold which will be consumed within this state.

It will be presumed that the entire amount of the goods purchased will be consumed within this state unless the seller obtains from the buyer a certificate certifying as to the amount thereof which will be consumed while within the territorial boundaries hereof.

The certificate shall be made by the master or chief engineer of the carrier, or by some other person known

by the seller to be competent to make the same, and shall be substantially in the following form:

CERTIFICATE

..... Seller Purchaser
..... Name of Carrier Name of Owner or Agent

The undersigned does hereby certify as follows:

(1) The purchaser has this day purchased from the seller in the State of Washington certain amounts of (type of goods purchased) and has taken delivery thereof aboard said carrier for its exclusive use while regularly engaged in transporting persons or property for profit in interstate or foreign commerce.

(2) While the said carrier is within the territorial boundaries of the state of Washington, it will consume the following amounts of the commodities purchased:

-barrels of fuel oil
-gallons of lubricants
-pounds of grease
-other consumable goods

Dated, 19...

.....
Name
.....
Office or Title

AMENDATORY SECTION (Amending Order ET 83-16, filed 3/15/83)

WAC 458-20-193C IMPORTS AND EXPORTS—SALES OF GOODS FROM OR TO PERSONS IN FOREIGN COUNTRIES.

((Rule 193-F)) WAC 458-20-193((F)) deals with interstate and foreign commerce and is published in four separate parts:

- Part A. Sales of goods originating in Washington to persons in other states.
- Part B. Sales of goods originating in other states to persons in Washington.
- Part C. Imports and exports: Sales of goods from or to persons in foreign countries.
- Part D. Transportation, communication, public utility activities, or other services in interstate or foreign commerce.

Part C.

FOREIGN COMMERCE

Foreign commerce means that commerce which involves the purchase, sale or exchange of property and its transportation from a state or territory of the United States to a foreign country, or from a foreign country to a state or territory of the United States.

IMPORTS. An import is an article which comes from a foreign country (not from a state, territory or possession of the United States) for the first time into the taxing jurisdiction of a state.

Taxation of such goods is impermissible while the goods are still in the process of importation, i.e., while they are still in import transportation. Further, such goods are not subject to taxation if the imports are merely flowing through this state on their way to a destination in some other state.

EXPORTS. An export is an article which originates within the taxing jurisdiction of the state destined for a purchaser in a foreign country. Thus ships stores and supplies are not exports.

BUSINESS AND OCCUPATION TAX

WHOLESALE AND RETAILING.

IMPORTS. Sales of imports by an importer or his agent are not taxable and a deduction will be allowed with respect to the sales of such goods, if at the time of sale such goods are still in the process of import transportation. Immunity from tax does not extend: (1) To the sale of imports to Washington customers by the importer thereof or by any person after completion of importation whether or not the goods are in the original unbroken package or container; nor (2) to the sale of imports subsequent to the time they have been placed in use in this state for the purpose for which they were imported; nor (3) to sales of products which, although imports, have been processed or handled within this state or its territorial waters.

EXPORTS. A deduction is allowed with respect to export sales when as a necessary incident to the contract of sale the seller agrees to, and does deliver the goods (1) to the buyer at a foreign destination; or (2) to a carrier consigned to and for transportation to a foreign destination; or (3) to the buyer at shipside or aboard the buyer's vessel or other vehicle of transportation under circumstances where it is clear that the process of exportation of the goods has begun, and such exportation will not necessarily be deemed to have begun if the goods are merely in storage awaiting shipment, even though there is reasonable certainty that the goods will be exported. The intention to export, as evidenced for example, by financial and contractual relationships does not indicate "certainty of export" if the goods have not commenced their journey abroad; there must be an actual entrance of the goods into the export stream.

In all circumstances there must be (a) a certainty of export and (b) the process of export must have started.

It is of no importance that title and/or possession of the goods pass in this state so long as delivery is made directly into the export channel. To be tax exempt upon export sales, the seller must document the fact that he placed the goods into the export process. That may be shown by the seller obtaining and keeping in his files any one of the following documentary evidence:

- (1) A bona fide bill of lading in which the seller is shipper/consignor and by which the carrier agrees to transport the goods sold to the foreign buyer/consignee at a foreign destination; or
- (2) A copy of the shipper's export declaration, showing that the seller was the exporter of the goods sold; or
- (3) Documents consisting of:

(a) Purchase orders or contracts of sale which show that the seller is required to get the goods into the export stream, e.g., "f.a.s. vessel;" and

(b) Local delivery receipts, tripsheets, waybills, warehouse releases, etc., reflecting how and when the goods were delivered into the export stream; and

(c) When available, United States export or customs clearance documents showing that the goods were actually exported; and

(d) When available, records showing that the goods were packaged, numbered, or otherwise handled in a way which is exclusively attributable to goods for export.

Thus, where the seller actually delivers the goods into the export stream and retains such records as above set forth, the tax does not apply. It is not sufficient to show that the goods ultimately reached a foreign destination; but rather, the seller must show that he was required to, and did put the goods into the export process.

Sales of tangible personal property, of ships stores, and supplies to operators of steamships, etc., are not deductible irrespective of the fact that the property will be consumed on the high seas, or outside the territorial jurisdiction of this state, or by a vessel engaged in conducting foreign commerce. However, 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. In order to qualify for this deduction sellers must take a certificate signed by the buyer or the buyer's agent stating: The name of the vessel for which the fuel is purchased; that the vessel is primarily used in foreign commerce; and, the amount of fuel purchased which will be consumed outside of the territorial waters of the United States. 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 best of their knowledge the information contained in the certificate is correct. The following is an acceptable certificate form:

FOREIGN FUEL EXEMPTION CERTIFICATE

SELLER: _____ VESSEL: _____

WE HEREBY CERTIFY that this purchase of (kind and amount of product) from (seller) will be consumed as fuel outside the territorial waters of the United States by the above-named vessel. We further certify that said vessel is used primarily in foreign commerce and that none of the fuel purchased will be consumed within the territorial boundaries of the State of Washington.

DATED _____, 19 _____

Purchaser

Purchaser's Agent

By: _____

Title or Office

When a completed certification such as this 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.

EXTRACTING, MANUFACTURING. Persons engaged in these activities in Washington and who transfer or make delivery of articles produced to points outside the state are subject to business tax under the extracting or manufacturing classification and are not subject to business tax under the retailing or wholesaling classification. See also ((~~Rules 135 and 136~~))WAC 458-20-135 and 458-20-136((~~†~~)). The activities taxed occur entirely within the state, are inherently local, and are conducted prior to the commercial journey. The tax is measured by the value of products as determined by the selling price. See ((~~Rule 112~~))WAC 458-20-112((~~†~~)). It is immaterial that the value so determined includes an additional increment of value because the sale occurs outside the state.

RETAIL SALES TAX

The same principles apply to the retail sales tax as are set forth for business and occupation tax above, except that certain statutory exemptions may apply. (See ((~~Rules 174, 175, 176, 177, 238 and 239~~))WAC 458-20-174, 458-20-175, 458-20-176, 458-20-177, 458-20-238 and 458-20-239((~~†~~)).

USE TAX

The use tax is imposed upon the use, including storage, of all tangible personal property acquired for any use or consumption in this state unless specifically exempt by statute.

WSR 86-07-006

ADOPTED RULES

DEPARTMENT OF REVENUE

[Order ET 86-4—Filed March 6, 1986]

I, Matthew J. Coyle, acting director of the Department of Revenue, do promulgate and adopt at Olympia, Washington, the annexed rules relating to artistic or cultural organizations, new section WAC 458-20-249.

This action is taken pursuant to Notice No. WSR 86-03-042 filed with the code reviser on January 14, 1986. These rules shall take effect thirty days after they are filed with the code reviser pursuant to RCW 34.04.040(2).

This rule is promulgated under the general rule-making authority of the Department of Revenue as authorized in RCW 82.32.300.

The undersigned hereby declares that the agency has complied with the provisions of the Open Public Meetings Act (chapter 42.30 RCW), the Administrative Procedure Act (chapter 34.04 RCW) and the State Register Act (chapter 34.08 RCW) in the adoption of these rules.

APPROVED AND ADOPTED March 6, 1986.

By Matthew J. Coyle
Acting Director

CHAPTER 494

[Senate Bill 6096]

BUSINESS AND OCCUPATION TAX—BUNKER FUEL

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

Be it enacted by the Legislature of the State of Washington:

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

(2) The legislature finds that at the time the deduction allowed under RCW 82.04.433 was enacted in 1985, it was intended to apply only to the wholesaling or retailing of bunker fuel. In 1987 the legislature enacted the multiple activities tax credit in RCW 82.04.440. Enactment of the multiple activities tax credit resulted in changed tax liability for certain taxpayers. In particular, some taxpayers that engaged in activities that had been exempt under the prior multiple activities exemption became subject to tax on manufacturing activities upon enactment of the multiple activities tax credit in its place. The manufacturing of bunker fuel is one such activity.

Sec. 2. RCW 82.04.433 and 1985 c 471 s 16 are each amended to read 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.

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

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

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

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

Ch. 494

WASHINGTON LAWS, 2009

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.
