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SUPREME COURT OF THE STATE OF WASHINGTON

LOWE'S HOME CENTERS, LLC,

Petitioner,

v.

DEPARTMENT OF REVENUE, STATE OF WASHINGTON,

Respondent.

**DEPARTMENT OF REVENUE'S ANSWER TO BRIEF OF
AMICUS CURIAE COUNCIL ON STATE TAXATION**

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I. INTRODUCTION

Lowe's is not entitled to a sales tax refund under the plain meaning of RCW 82.08.037 because it is not the person that "paid" the sales taxes for the buyers. Lowe's merely collected and remitted the sales taxes, which the buyers paid with borrowed funds. Amicus curiae Council on State Taxation (COST) raises a number of arguments supporting Lowe's' overly broad reading of the sales tax credit, but none is persuasive.

First, the facts of this case are not materially different from those in *Home Depot*. As in *Home Depot*, Lowe's never held any debt obligation from the buyer on the defaulted private label credit card accounts at issue. Thus, it had no basis for a bad debt refund.

Second, the Court of Appeals' decision does not "threaten inconsistency" in how the business and occupation (B&O) tax deduction for bad debts applies to other types of tax classifications. Regardless of the tax classification, RCW 82.04.4284 requires the "bad debts" for which a taxpayer claims a deduction to have been included in the measure of the B&O taxes "previously paid." Lowe's does not qualify for a B&O tax deduction because the B&O taxes it paid on the retail sales financed by the lender were for amounts it actually received, not bad debts.

Third, the Court of Appeals' decision is entirely consistent with the uniform bad debt rules of the Streamlined Sales and Use Tax Agreement

(SSUTA). Those rules limit sales tax recoveries to the amount of uncollectible sales taxes owed by the buyer to the seller. Notably, COST does not identify any appellate decision in the country that has endorsed Lowe's theory that a seller can qualify for a sales tax refund by contractually reimbursing a third-party lender's bad debt losses.

Finally, the tax policy considerations raised by COST do not justify the judicial expansion of the bad debt sales tax credit. RCW 82.08.037 allows retailers to recover the sales taxes they paid on their uncollectible sales receipts; its purpose is not to underwrite the credit risk assumed by banks that have no sales tax obligations to the State.

The Court should affirm.

II. ARGUMENT

A. **The Court of Appeals Correctly Held That RCW 82.08.037 Requires the "Seller" to Be the Person That "Paid" the Buyer's Sales Tax Debt Obligation**

Contrary to COST's claims, the Court of Appeals' correctly relied on *Home Depot, Inc. v. Department of Revenue*, 151 Wn. App. 909, 215 P.3d 222 (2009). In *Home Depot*, the Court of Appeals held that RCW 82.08.037 applies only to uncollectible sales tax debts owed by the buyer to the seller. *Id.* at 917. To qualify for a refund, the seller itself must be the person that incurred a bad debt loss on a retail sale. Home Depot did not qualify for a bad debt refund on defaulted private label credit card

accounts because the buyer's debt obligation to Home Depot was fully satisfied upon receipt of the settlement proceeds. While Home Depot paid service fees calculated, in part, to cover the lender's bad debt losses on a portfolio-wide basis, those payments were not for amounts the buyer owed to Home Depot. Thus, it was not eligible for a sales tax refund. *Id.* at 923.

The material facts of this case are the same as those in *Home Depot*. As in *Home Depot*, Lowe's did not own the credit card accounts. Instead, various banking subsidiaries of the General Electric Capital Corporation (the Bank) entered into debtor-creditor relationships with Lowe's customers, financed the transactions on the buyers' behalf, owned the accounts receivables, and wrote off the uncollectible debt obligations. The sole and exclusive right to receive payment from the buyers was "vested in the Bank." CP 136. In addition, like Home Depot, Lowe's received full payment for the retail sales financed by the Bank. Neither Home Depot nor Lowe's assumed the status of creditor with respect to the retail purchaser's defaulted credit card debt obligations.

According to COST, the "critical fact difference" is that Home Depot did not involve a "continuing debt" obligation relating to the retail sales financed by the Bank. COST Br. at 5. But the only relevant "debt" for purposes of the sales tax credit is the buyer's debt obligation to the seller. *See* RCW 82.08.050(8) (the sales tax owed by the buyer

“constitutes a debt from the buyer to the seller”). As in *Home Depot*, the buyer’s sales tax debt obligation to Lowe’s was fully satisfied on the purchases the buyer made using a private label credit card. There was no “continuing debt” between Lowe’s and its customers. Just like in *Home Depot*, the only “continuing debt” was the debt that existed between the purchaser and the Bank. Neither Lowe’s nor Home Depot had a debtor-creditor relationship with its customers. Instead, both retailers received cash payment of the full amount of the sales taxes owed by the buyer and remitted those collected taxes to the State. Like Home Depot, Lowe’s is not entitled to a sales tax refund under RCW 82.08.037 for sales taxes “previously paid” by its customers.

Unlike Home Depot, which paid fixed service fees on the private label credit card transactions, the amount of Lowe’s’ contractual liability to the Bank was measured, in part, by the Bank’s actual (rather than anticipated) bad debt losses. CP 140. That factual difference is immaterial.

The availability of a sales tax refund for bad debts does not turn on the formula or method by which a retailer chooses to compensate the Bank that operates its private label credit card program. RCW 82.08.037 applies only to unpaid debts owed by the buyer to the seller on a retail sale. *Home Depot*, 151 Wn. App. 921. The payments Lowe’s made in reimbursement of the Bank’s bad debts were not amounts the buyer owed to Lowe’s—

they were amounts Lowe's owed to the Bank.¹ Labeling that contractual consideration "guaranty payments" rather than "service fees" does not transform their character from a non-deductible cost of doing business into a deductible "bad debt" for purposes of RCW 82.08.037. *See* RCW 82.08.010(1)(a)(i) (disallowing reductions in the measure of the sales tax on account of a seller's costs or losses).

Like the dissenting opinion below, COST mistakes Lowe's contingent fee arrangement as a "guaranty" of its customers' credit card debt obligations to the Bank. COST Amicus Br. at 5. To the contrary, Lowe's did not "guarantee" any specific Washington retail customer's credit card loan with the credit card issuer. Instead, Lowe's "guaranteed" the Bank would attain its *net profit* margins on an *annual, nation-wide basis*, taking into account the entirety of the program revenues and expenses. CP 44, 140. The amount of the Bank's bad debt write-offs was simply one element of a complex formula used in settling the parties' profit-sharing agreement.

¹ In its financial disclosures to investors, Lowe's classified the revenues and expenses from its profit-sharing agreement in the same category as interchange fees on credit cards and other payment processing expenses. CP 44. An SEC examiner asked Lowe's to explain this treatment. Lowe's replied: "Lowe's considers the private label credit card a form of payment, similar to accepting MasterCard, Visa or American Express. Therefore, the costs associated with the private label credit card are similar to the costs associated with accepting MasterCard, Visa or American Express." *Id.* Credit card transaction fees and any other payment processing expenses are nondeductible costs of doing business as a retailer. WAC 458-20-108(5).

Like Home Depot, Lowe's was never at risk of nonpayment for any of the retail sales financed by the Bank. The only "risk of loss" Lowe's bore was the risk that its monthly "profit-sharing distributions" would be reduced, or, at worse, that it would have to make up for a shortfall in the Bank's "target" rate of return. CP 141. Lowe's' Sales Tax Director described the true nature of Lowe's purported "guaranty":

The PLCC Agreements further provided that profits from the program, including revenue paid by Cardholders related to interest payments, late payment fees, and other charges, was shared between [Lowe's] and the Banks on a set basis. Pursuant to the Bad Debt Guarantee, the Banks recovered payments directly from [Lowe's] relating to the net PLCC Bad Debts experienced during the Assessment Periods by making dollar-for-dollar reductions in [Lowe's'] monthly profit-sharing distributions due under the PLCC Agreements. To the extent fewer Cardholders defaulted on their PLCC accounts during a time period, [Lowe's'] distributions during that period directly increased. On the other hand, to the extent PLCC Bad Debts increased during a period, [Lowe's'] distributions correspondingly decreased for that period.

CP 454-455.

Because the profitability of the program usually exceeded the Bank's target rate of return, it actually generated additional income for Lowe's. The most Lowe's stood to lose was 7% of the Bank's loan receivables, which was the maximum amount of bad debts for which Lowe's was "responsible." CP 140. In other words, the Bank guaranteed Lowe's would receive no less than 93% of the Bank's total gross

receivables on a national, portfolio-wide basis, and Lowe's guaranteed the Bank would reach its target rate of return on that same basis.

The Court of Appeals correctly held that Lowe's' contractual liabilities to the Bank do not qualify as "bad debts" within the meaning of RCW 82.08.037. The sales tax credit guarantees a seller's recovery of the sales taxes it was required to remit on the buyer's behalf to the State, if the buyer fails to repay the seller. The statute does not guarantee the seller will recover any part of the "sales price" that ultimately proves uncollectible, much less uncollectible amounts a customer owed to a third-party lender, and which the seller contractually agreed to absorb. Lowe's was no more entitled to a sales tax refund than was Home Depot.

B. The Court of Appeals' Decision Does Not Undermine "Uniformity" in Applying the B&O Tax Deduction to Different Taxpayers or Tax Classifications

COST asserts the Court of Appeals' decision "threatens inconsistency" in how the B&O tax deduction for bad debts applies to retailers and other types of taxpayers, but it does not explain how that might be so. COST Br. at 1. To the extent COST's argument is that the Court of Appeals' decision fails to recognize that RCW 82.04.4284 applies to all tax classifications, or that the decision somehow creates different standards for retailers and other types of taxpayers, it is mistaken.

In holding that only a “seller” that “paid” the sales taxes can qualify for a refund under RCW 82.08.037, the Court of Appeals did not state or imply the B&O tax deduction for bad debts also is limited to sellers. The Court of Appeals’ majority clearly understood that RCW 82.08.037 and RCW 82.04.4284 are different statutes. The majority explained that its analysis “focuses on Lowe’s retail sales tax exemption [sic] claim because the parties’ briefing and legal authority focused almost exclusively on the retail sales tax issue.” *Lowe’s Home Centers, LLC v. Dep’t of Revenue*, 5 Wn. App. 2d 211, 223 n.7, 425 P.3d 959 (2018). COST’s vague assertion that the Court of Appeals’ decision “threatens” to create a “disconnect” between the treatment of retailers and other types of businesses for B&O purposes lacks merit. COST Br. at 8.

To illustrate the threatened inconsistency, COST describes a hypothetical scenario involving a Washington manufacturer that sells software to a foreign purchaser. In COST’s hypothetical, the manufacturer’s customer arranges to pay for the goods through a “direct-pay letter of credit,” which is a bank-issued negotiable instrument commonly used as a form of payment in international trading. COST Br. at 9. COST posits that the manufacturer acts as guarantor of the customer’s debt obligation to the bank that issued the letter of credit. According to COST, if the manufacturer is required to make good on its

guaranty, it could claim a B&O tax deduction to the extent of the manufacturing B&O taxes it had paid on the guaranteed debt.

COST's hypothetical does not demonstrate any inconsistency in how the bad debt statutes apply to retailers and other taxpayers under the Court of Appeals' interpretation of RCW 82.08.037 or RCW 82.04.4284. The manufacturer's loss is analogous to that of a seller that incurred a bad debt loss as a result of a bounced check or a credit-card chargeback. Like a bank check or credit card, the "direct-pay letter of credit" described by Lowe's is a type of payment instrument. If the manufacturer must repay the settlement proceeds as a result of the buyer's default, the manufacturer would own an account receivable for the unpaid customer debt obligation, just as the seller owns the account receivable arising as a result of a bad check or chargeback. Both the manufacturer and the seller could deduct those uncollectible accounts receivable from the measure of the B&O taxes "previously paid" on the transactions. RCW 82.04.4284.

Unlike in the case of a bounced check, credit card chargeback, or COST's hypothetical scenario involving a direct-pay line of credit, the buyer's default on its credit card debt obligations to the Bank did not result in any kind of debt obligation from the buyer to Lowe's on the retail sales financed by the Bank. As did the dissenting opinion, COST mistakes Lowe's contractual agreement with the Bank as a "guaranty" of the

cardholder's credit card debts. The Bank's actual bad debt losses were simply one of the line-item "program expenses" the parties took into account for purposes of settling their profit-sharing agreement. CP 130.

If Lowe's had truly acted as the "guarantor" of its customer's debt obligation to the Bank, its books and records would reflect the existence of an unpaid debt obligation from the buyer. They don't. During an audit of Lowe's' books and records, an IRS examiner asked: "When GE writes off an account as uncollectible what documentation do they provide you and what entry, if any do you make on your books to reflect the write off?" CP 945. Lowe's replied: "GE owns the receivable and we do not make an entry when an account is uncollectible." *Id.* In deposition testimony, Lowe's' Sales Tax Director testified that the Bank "has the receivables and liabilities, along with anything else on their books, and Lowe's does not have a receivable or liability on its books and records at all" with respect to the bad debts written off by the Bank. CP 113.

Lowe's did not actually "guarantee" any credit card debts arising from any identifiable Washington retail sale transactions. Lowe's did not "step into the shoes" of the Bank. *See Lowe's*, 5 Wn. App. at 232. Thus, Lowe's does not qualify for a refund of the B&O taxes it paid on purchases its customers made using a private label credit card because Lowe's never held an unpaid debt on those transactions.

To the extent COST's argument is that the Court of Appeals' interpretation of RCW 82.08.037 is problematic because it may yield inconsistent results in applying the sales tax credit and the B&O tax deduction to some hypothetical bank-financed retail sale, its argument lacks merit. The possibility that a seller may qualify for a refund of the retailing B&O taxes it paid on a bank-financed retail sale, yet not qualify for a sales tax refund on the same transaction, does not, as COST contends, demonstrate statutory "incoherence," or otherwise justify disregarding the "architecture of restrictions" the Legislature established in enacting RCW 82.08.037.

Since the B&O tax was first enacted in 1935, Washington taxpayers have been allowed to recover the B&O taxes they "previously paid" on taxable income that proved uncollectible. *See* Laws of 1935, ch. 180, § 12(d). In contrast, no one was entitled to a sales tax refund for bad debts until 1982. In view of the strict liability the sales tax laws imposed on sellers, this Court held in 1942 that a seller could not recover the sales taxes they had paid on uncollectible accounts, even if the seller qualified for a B&O tax refund on those same accounts. *Olympic Motors Inc. v. McCroskey*, 15 Wn.2d 665, 132 P.2d 355 (1942). The Legislature enacted RCW 82.08.037 to remedy the situation.

COST is correct that many of the statutory provisions pertinent to

the sales tax credit are not relevant to interpreting the B&O tax deduction statute. It does not follow, however, that Section 166 of the federal income tax code is the only relevant “closely related statute” for purposes of a plain meaning analysis of either the sales tax credit or the B&O tax deduction. *See* COST Br. at 8.

No provision of Washington’s tax code authorizes a refund of sales taxes paid by a third-party lender. Under RCW 82.08.037, only a “seller” is entitled to a sales tax refund for bad debts, and only for the sales tax portion of its credit losses on a retail sale. These are not “extra-statutory requirements,” as COST contends. RCW 82.08.037 and RCW 82.04.4284 are different statutes in different RCW chapters, enacted and amended at different times, for different reasons, and with somewhat different language. That the two statutes might yield different results is not an example of statutory “incoherence.”

COST argues that when the Legislature amended RCW 82.08.037 in 2010, it did not also amend RCW 82.04.4284. COST Br. at 11 n.2. Based on that “divergence in legislative treatment,” COST concludes the “essential criteria” in both statutes “are just two: 1) that the taxpayer paid the tax and 2) suffered a deductible bad debt for federal tax purposes on account of the taxed transaction or activity.” Even if these were the

only requirements for claiming the retail sales tax credit and the B&O tax deduction, Lowe's would not qualify for a refund under either statute.

Lowe's does not qualify for a sales tax refund because it is not the person that "paid" the sales tax. Lowe's merely collected and remitted the tax. Lowe's does not qualify for a B&O tax refund because it did not have a deductible bad debt on any of the retail sale transactions financed by the Bank. The bad debts Lowe's purportedly incurred merely reduced the amount of *additional* financing income it was entitled to receive under its profit-sharing agreement with the Bank.

Lowe's' profit-sharing agreement is a separate and distinct taxable business activity involving different parties, a different tax classification, and a different tax rate. If Lowe's previously had reported its gross income and paid B&O taxes on its allocated share of the Bank's accrued loan receivables, it might have been entitled to recover some of those taxes under RCW 82.04.4284. But Lowe's was not entitled to deduct its profit-sharing bad debts from the measure of the retailing B&O taxes it paid on its retail sales because it had no uncollectible sales receipts on those transactions.

C. The Court of Appeals' Decision Is Entirely Consistent With the SSUTA's Uniform Bad Debt Rules

There is no merit to COST's argument that the Court of Appeals'

interpretation of RCW 82.08.037 “casts doubt” on Washington’s good standing as a member of the SSUTA. COST Br. at 11. To the contrary, the decision below reflects the consensus view on how the SSUTA’s bad debt rules are to be interpreted and applied, as directed by the Legislature. *See* RCW 82.03.230(3). In *Home Depot* and in this case, the Court of Appeals properly followed the lead of the many state court decisions from other SSUTA member states in holding that RCW 82.08.037 does not apply to contractual indemnity payments sellers make to cover a third-party lender’s bad debt losses on private label credit card accounts.

The requirement that the seller is the person that paid the sales taxes for the buyer and to whom the debt is owed inheres in the text of the SSUTA’s bad debt rules. First, the SSUTA ties the availability of a refund to “the federal definition of ‘bad debt.’” SSUTA § 320.B. The pertinent federal regulation defines a “bona fide debt” as “a debt which arises from a debtor-creditor relationship based upon a valid and enforceable obligation to pay a fixed or determinable sum of money.” 26 C.F.R. § 1.166-1(a). A deduction is allowed only for bad debts “owed to the taxpayer.” *Id.* The subsection of the regulation dealing with deductions taken as a “guarantor, surety, or indemnitor,” on which Lowe’s relies, does not change that definition. Rather, it explains when a taxpayer can deduct a contractual payment indemnifying a third party’s bad debt.

The SSUTA requires the bad debt was “written off as uncollectible in the claimant’s books and records.” SSUTA § 320.C. This requirement clearly infers ownership of the unpaid debt. Unlike Lowe’s and the dissenting opinion below, COST agrees that RCW 82.08.037 requires the seller/claimant to be the person that wrote off the bad debt as uncollectible. COST Br. at 12. But COST incorrectly asserts Lowe’s meets that requirement, presumably due to Lowe’s vague references to “entries” it made in its books and records “reflecting” the consequences of its so-called “Bad Debt Guarantee.” CP 455.

The record is clear: the Bank is the entity that wrote off the bad debts. CP 52, 113, 945. Lowe’s never held any debts on its books for amounts owed by the buyer on its retail sales. Whatever entries Lowe’s made in its books reflecting its “Bad Debt Guaranty” were not “written off as uncollectible” within the meaning of the SSUTA’s uniform bad debt rules or WAC 458-20-196, as the Court of Appeals correctly held. CP 113. *See Ally Financial, Inc. v. State Treasurer*, 918 N.W.2d 662, 672 (Mi. 2018) (A “write-off” is “an internal recognition by a lender that an account is worthless after attempts at collection have failed”).

Third, the SSUTA requires excluding bad debts attributable to financing charges or interest, sales or use taxes charged on the purchase price, expenses incurred trying to collect any debt, and the value of repossessed property. SSUTA § 320.B. The effect of these exclusions is to

limit the bad debt deduction to the uncollectible portion of the seller's taxable sales receipts. *Ally Financial*, 918 N.W.2d at 670 n.31, 672 (the value of repossessed property and any other "consideration" received by the seller is excluded from the measure of the sales tax deduction).

The amounts Lowe's deducted on its federal tax returns were not for uncollectible sales receipts—they were for payments that replaced the Bank's unrealized financing income. By its terms, the SSUTA disallows sales tax refunds on bad debts attributable to uncollectible financing income or anything other than a seller's uncollectible sales receipts. If Lowe's had itself extended credit to its customers, it could not have claimed any sales tax credits for its bad debt losses from uncollectible financing charges. Allowing Lowe's to claim sales tax credits for bad debts that reduced the profit-sharing distributions it received from the Bank would contravene the SSUTA's exclusions.

Consistent with the SSUTA's purpose to bring about greater national uniformity in the interpretation and administration of state taxing statutes, SSUTA member states have been practically speaking with one voice in rejecting similar tax refund actions brought by retailers trying to recover sales taxes they did not pay on uncollectible accounts they do not own. Three recent decisions are particularly notable.

In rejecting a refund claim involving similar facts, the Supreme

Court of Vermont, which is a SSUTA member state, observed that “the overwhelming majority of courts” addressing the issue have held that “third-party bad debt does not entitle the retailer or creditor to reclaim sales tax.” *Citibank (South Dakota), N.A. v. Dep’t of Taxes*, 149 A.3d 149, 156 (Vt. 2016). Although Missouri is not a SSUTA member state, its tax regulation on bad debts is very similar to the SSUTA’s rules and RCW 82.08.037. *See Circuit City Stores, Inc. v. Director of Revenue*, 438 S.W.3d 397, 400 (Mo. 2014). The Missouri Supreme Court rejected the same arguments Lowe’s makes here in trying to distinguish its arrangement with the Bank from the *Home Depot* fact pattern. *Id.* at 403 (“the rules regarding who must pay the tax and who is entitled to a refund cannot vary depending on what extra-statutory contractual arrangements a particular retailer chooses to make with a bank”). An appellate court in Tennessee, which is a SSUTA member state, also rejected retailer arguments that its revenue-sharing agreement with a bank provided the basis for a refund, stating: “The risk that the private label credit card program will be less profitable than anticipated does not qualify as a bad debt.” *Sears, Roebuck & Co. v. Comm’r of Revenue*, No. M201402567COAR3CV, 2016 WL 2866141 (Tenn. Ct. App. May 11, 2016), *application for permission to appeal denied* (Tenn. Sept. 23, 2016).

Although it claims the Court of Appeals’ opinion is inconsistent

with other SSUTA states, COST has not identified any appellate decision in the country that has endorsed Lowe's "guaranty" theory of entitlement to a sales tax refund.² Instead, COST relies on immaterial factual differences in the compensation arrangement Lowe's negotiated with the Bank from the one addressed in *Home Depot*, and resorts to tax policy considerations that purportedly support its expansive interpretation of the sales tax credit. In fact, it is COST's proposed interpretation that would put Washington out-of-step with other SSUTA states.

COST's statement of the legislative intent of RCW 82.08.037 reflects the tax policy it prefers rather than the one the Legislature enacted. According to COST, the statute's purpose is to allow sales tax refunds "on a transaction that purchasers ultimately fail to fully pay." COST Br. at 5.

² COST cites to an unpublished decision from the Oklahoma Court of Civil Appeals and implies it somehow supports Lowe's bad debt refund claim. COST Br. at 13, n.13. It does not. The Oklahoma Tax Commission rejected Lowe's claim on the ground that Lowe's could not prove the "correct" amount of its sales tax deductions for bad debts. *Sales and Use Tax Protest of Lowe's Home Ctrs., Inc.*, No. P-09-195-H (Okla. Tax Comm'n Order May 17, 2018) (Appendix A to DOR's Answer to Amici, filed December 28, 2018). In its final decision, the Tax Commission elected not to revisit a preliminary legal ruling that the federal bad debt deductions Lowe's took as a "guarantor" fell within the plain meaning of "bad debts" for purposes of Oklahoma's sales tax deduction. *Id.* at 2-3. Thus, the issue was not addressed on appeal. But the Tax Commission expressed obvious misgivings about its preliminary ruling and pointedly left the issue open for reconsideration for future tax periods. Lowe's experience in Oklahoma demonstrates that RCW 82.08.037 cannot reasonably be read as applying to a seller's contractual indemnity payments to a third party lender. *See* DOR Resp. Br. at 40-42 (explaining why Lowe's could not meet its burden of proving the "correct" amount of its refund claim even if its guaranty theory were valid). Contractual payments are, by definition, paid in exchange for valuable consideration. The SSUTA's exclusions are designed to exclude all "consideration" a seller received from the scope of the bad debt deduction. *Ally Financial*, 918 N.W.2d at 670 n.31, 672. Lowe's cannot account for the value it received in exchange for its contractual indemnity payments.

What COST ignores is that the only transaction relevant to the sales tax credit for bad debts is the retail sale between Lowe's and its customer. It is irrelevant if a customer borrows money for its purchase, and then later fails to repay the loan. RCW 82.08.037 does not by implication extend to contractual indemnity payments sellers make to third party lenders.

COST's description of the legislative intent would suggest a seller that accepts a *general-use bank credit card* in payment for a retail sale would be entitled to a sales tax refund if the purchaser later defaults on its debt to the credit card issuer. The seller would have remitted sales tax to the Department, and the purchaser would "ultimately fail to pay" the lender. Not a single state would allow a seller to claim a sales tax refund for that kind of credit card transaction, although the report commissioned by COST seems to think they should.³

This Court should decline COST's invitation to expand the bad debt statutes by judicial construction. The sales tax credit for bad debts represents a legislative policy choice that, as between the seller and the State, the State will bear the risk of loss as to the sales tax portion of a credit sale. RCW 82.08.037 does not guarantee the investment risk assumed by credit card companies or other lenders that have no sales tax

³ See William F. Fox, State Tax Research Institute, *Sales Tax Policy Considerations for Private Label Credit Card Defaults* (2015), at 2-3, 6, 8 & n.14.

collection obligation to the State. Allowing Lowe's to recover sales taxes or retailing B&O taxes on the bad debt deductions it took for its contractual payments to the Bank would transform the bad debt statutes from a limited remedy for sellers that paid taxes on sale proceeds they never received into a tax subsidy of the private label credit card industry.

III. CONCLUSION

Washington's bad debt tax statutes allow taxpayers to recover the excise taxes they paid on amounts previously reported as taxable gross income that proved uncollectible. Lowe's does not qualify for a sales tax refund under RCW 82.08.037 because it did not "pay" the tax: it merely collected and remitted the tax. Lowe's does not qualify for B&O tax refund under RCW 82.04.4284 because Lowe's did not incur bad debts on the retail sales for which it paid B&O taxes. This Court should affirm.

RESPECTFULLY SUBMITTED this 14th day of May, 2019.

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PROOF OF SERVICE

I certify that on May 14, 2019, I electronically filed this document with the Clerk of the Court using the Washington State Appellate Courts' e-file portal, which will send notification of such filing to all counsel of record at the following:

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

DATED this 14th day of May, 2019, at Tumwater, WA.


Jamie Falter, Legal Assistant

ATTORNEY GENERAL'S OFFICE - REVENUE & FINANCE DIVISION

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Appellate Court Case Number: 96383-5
Appellate Court Case Title: Lowe's Home Centers, LLC v. Department of Revenue, State of Washington
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