Supreme Court No. _____

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

Court of Appeals No. 58492-1-II

BETTER BUSINESS BUREAU
GREAT WEST & THE PACIFIC,

Petitioner,

v.

DEPARTMENT OF REVENUE

Respondent.

PETITION FOR REVIEW

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I. INTRODUCTION, PETITIONER, AND CITATION TO OPINION

Petitioner, the independent regional branch of Better Business Bureau that services all consumers and businesses across much of the western United States, asks this Court to accept review of the Court of Appeals' unpublished[1] decision in *Better Business Bureau Great West & the Pacific*, No. 58492-1-II issued on September 10, 2024 (attached as Appendix A) ("Opinion").

In affirming the trial court's full disposition of this matter, the Court of Appeals utilized an approach to burden shifting that is foreign to CR 56(c) and the well-articulated standards established by this Court. It held that, in seeking full summary adjudication in a tax case, DOR need only show as an evidentiary matter that a taxpayer is not entitled to a

[1] On September 30, 2024, the Department of Revenue ("DOR"), moved for publication (attached as Appendix B) of the opinion arguing that it resolves three issues of first impression, including the issues raised in this Petition.

deduction in the *full* amount claimed. Not that a taxpayer is wholly precluded from a deduction, rather only a *portion* of the claim is not warranted.

According to the Court of Appeals, once the DOR shows that some portion of the deduction is not allowable, the burden then shifts to the non-movant taxpayer to show "it qualified for the tax deduction and to quantify what amount of its dues qualified for the deduction." It further concluded that, absent such a showing by the non-movant taxpayer, "DOR may *presume* that the entire amount of membership dues is taxable," and therefore the trial court may fully dispose of a taxpayer's tax refund claim in favor of DOR as a matter of law. (Emphasis added).

In essence, the Court of Appeals articulates for the first time that DOR's burden of production as the movant on summary judgment in tax cases is significantly less stringent than under the established summary judgment rules, i.e., that

the moving party must demonstrate the absence of any genuine dispute of material fact.

II. ISSUE PRESENTED FOR REVIEW

Whether the Court of Appeals erred in affirming summary judgment in full in favor of movant DOR when its factual presentation admittedly only established that some unspecified portion of the taxpayer's refund claim should be disallowed?

III. STATEMENT OF THE CASE

Petitioner, the Better Business Bureau Great West & Pacific ("BBB"), is a non-profit business league, devoted to protecting ethical and truthful business conduct in the Greater Northwest and surrounding areas since 1919. BBB's public service is ubiquitous in American life. It provides services to all consumers and businesses across its area of operations free of charge—regardless of their affiliation with BBB.

BBB's operations—which largely service the general public—have long been heavily funded by accredited business

membership dues. For example, in 2017, these dues accounted for over 87% of BBB's total revenue and covered 91% of its total operating costs; however, almost 77% of consumer complaints opened, as well as closed, related to non-member businesses. *See* CP 830; 861–862.

"Accreditation" by BBB is on an invitation-only basis. Upon acceptance of an invitation, accredited businesses must agree to comply with the BBB Code of Business Practices and pay annual dues, which are charged for purposes of supporting BBB's efforts to fulfill its mission of advancing marketplace trust.

Once a member, an accredited business may display BBB's seal and its BBB rating, and identify itself as an

accredited business—both online and in the brick-and-mortar world.[2]

BBB has always deducted the dues paid by its Washington State members from its tax base when computing its Washington B&O tax obligation, as it is entitled to pursuant to RCW 82.04.4282 (and its predecessor Former RCW 82.04.430(2), Laws of 1977, 1st Ex. Sess., ch. 105, § 1)).

DOR previously attempted to charge BBB for B&O tax on membership dues in the 1970s. However, in 1981, Thurston County Superior Court Judge Doran determined[3] that BBB's membership dues were fully deductible under Former RCW

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[2] Though it mentioned other membership benefits in its summary judgment motion, DOR focused factually on members' right to display their affiliation with BBB to the public as indicating that membership conferred "some value" to members.

[3] *Tacoma Better Business Bureau, Inc. v. State of Washington, Department of Revenue,* No. 78-2-00347-5 (Thurston Cnty. Wash. Super. Ct. 1981). CP 1020–1025. The Tacoma Better Business Bureau was a predecessor entity of BBB.

82.04.430(2) because the overwhelming majority of the services rendered by BBB were for non-members and the general public.

Thereafter, DOR took no issue with BBB's reporting until 2019 when DOR personnel encouraged BBB to seek a binding ruling concerning its reporting position. The binding ruling stated that, based on "[a] review of [BBB's] website," all of its dues were subject to B&O tax. On administrative appeal, despite noting that the value of many of the "services" identified in the binding ruling were likely deductible (CP 912–913), ARHD sustained the ruling.

DOR then audited BBB for tax year 2017, resulting in DOR assessing B&O tax on the full amount of BBB's 2017 membership dues. BBB paid the additional tax and filed a refund action in Thurston County Superior Court.

DOR moved for summary judgment,[4] arguing that DOR

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[4] BBB also filed a motion for partial summary judgment, contending that principles of *res judicata* and/or equitable estoppel should apply, citing Judge Doran's decision.

was entitled to fully prevail as a matter of law because BBB members receive "*something* of significant value." (CP 800) (emphasis added). RCW 82.04.4282 provides that "[i]f dues are in exchange for any significant amount of goods or services rendered by the recipient thereof to members . . . the *value* of such goods or services shall not be considered as a deduction under this section." (Emphasis added). Though the statute requires a determination of "value" of goods or services received by members, DOR made no showing of the *value* of the *something* received by BBB members.

In opposition, BBB contended that Judge Doran's prior determination was controlling, attaching a copy of his Findings of Fact and Conclusions of Law and offering declarations of BBB executives who stated that BBB's operations had not materially changed from those operations considered by Judge Doran. Though the statutory language provides that deductibility is *not* an all-or-nothing proposition (i.e., provision of *some* value to members does not wholly preclude a

deduction), the trial court granted DOR's motion in full, determining that "the membership dues do confer a value for a service and, therefore, are subject to the tax and not appropriately deducted." RP Vol. 3 (July 7, 2023) at 47.

BBB appealed the trial court's decision, arguing that DOR had not met its burden on summary judgment to demonstrate the absence of a genuine dispute of material fact. BBB contended that DOR's factual showing—that BBB members may receive "*something*" of "significant value"—was insufficient to wholly preclude a deduction under RCW 82.04.4282 as a matter of law. Further, BBB argued that DOR's admissions in briefing and in the record that BBB's dues may be partially deductible was alone sufficient to preclude full summary adjudication.

Despite acknowledging DOR's admissions (Opinion, at 17), the Court of Appeals upheld the trial court's full dismissal of BBB's claims based on a newly articulated summary judgment standard for tax cases.

IV. REASONS TO ACCEPT REVIEW

The Court of Appeals' new articulation of the standards of summary judgment in tax cases severely departs from the standards well-established by this Court. In tax cases, taxpayers seek from the court a determination as to the excludability, deductibility, or character (retailing, wholesaling, etc.) of their income. In the face of a DOR motion for summary judgment, non-moving taxpayers must now fully prove the entire factual predicate for the specific treatment they seek, or else their case will be fully dismissed in favor of a DOR "presumption."

In Washington, Thurston County Superior Court, which is appealable to Division II of the Court of Appeals, is the exclusive venue for tax refund cases. RCW 82.32.180. Accordingly, the Court of Appeals' decision impacts all taxpayers and all tax refund litigation in Washington.

Though the Court of Appeals opinion was initially issued with unpublished status, DOR agrees that the Opinion

treads new ground. In its Motion to Publish,[5] DOR summarizes the new standard for summary judgment in tax cases as: (1) DOR "bore the initial burden of showing . . . as to whether . . . membership dues were *wholly* deductible" (emphasis added); (2) then, "the burden shift[s] to [the taxpayer] 'to show it qualified for the tax deduction and to quantify what amount of its dues qualified for the deduction'; and (3) absent such a showing by the taxpayer, "[DOR] may presume that the full amount is taxable." DOR characterizes this new, looser standard for summary judgment as "an expan[sion] [of] [the Court of Appeals'] prior holding in *Automobile Club of Washington v. Department of Revenue*, 27 Wn. App. 781 (1980)." App'x B, at 4–5.

DOR views the Court of Appeal's opinion here as

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[5] Though BBB disagrees with the merits of the Court of Appeals' opinion, it does not contest that the opinion meets the criteria for publication under RAP 12.3(d). Accordingly, the Opinion will likely be published.

reducing the burden of production incumbent on DOR as the movant in summary adjudication of tax cases, as well as imposing a heightened burden on taxpayers as non-movants. It is apparent DOR intends to use these newly-minted standards in future tax refund litigation—which, in practice, would result in a lower evidentiary showing required of DOR as the movant, and the imposition of a new requirement for non-movant taxpayers to make a full evidentiary showing (far in advance of trial) to preserve their right to have their day in court.

V. ARGUMENT

A. The Structure and Function of RCW 82.04.4282

Since the permanent enactment of Washington's B&O tax in 1935, the tax law has contained a deduction for bona fide dues. *See* Laws of 1935, ch. 180, § 12(b). In relevant part, RCW 82.04.4282 provides, "[i]n computing tax there may be deducted from the measure of tax amounts derived

from bona fide . . . (2) dues."

Concerning bona fide dues specifically, however, the statute provides an exception to deductibility. In relevant part, it reads, "[i]f dues are in exchange for any significant amount of goods or services rendered by the recipient thereof to members . . . the **value** of such goods or services **shall not be considered as a deduction** under this section." *Id*. (emphasis added).

Accordingly, RCW 82.04.4282 provides that the deduction for bona fide dues is not an all-or-nothing proposition. Put another way, the furnishing of *any* "significant amount of goods or services" to dues-paying members does not entirely preclude a dues-receiving organization from entitlement to a deduction. Rather, such furnishing merely *reduces* the total deductible amount by the *value* of those goods or services provided to taxpayers' members.

The fact that RCW 82.04.4282 does not operate as an all-or-nothing proposition is not in dispute, and DOR's regulations and interpretive statements provide specific rules for determining the value of goods or services conferred for purposes of reducing the amount of the dues deduction. DOR's former regulations (which were in effect during the tax period at issue) contained a "cost of production" method for quantifying the value of goods or services for purposes of the deduction. *See* Former WAC 458-20-183(4)(c)(ii)(B). The methodology provided that a taxpayer's actual direct and indirect costs associated with providing such goods or services are used to determine the taxable portion of the member dues received, i.e., quantifying the "value" reduction amount of the dues deduction. Similarly, current guidance provides a methodology for quantifying the amount by which a taxpayer should reduce its dues deduction as well. *See* Excise Tax Advisory 3230.2021.

Thus, although a taxpayer may provide its members

some "significant amount of goods or services" in partial exchange for dues, RCW 82.04.4282 still entitles the taxpayer to a deduction, provided the value of goods or services rendered to its members does not equal or exceed the total dues it received. For example, assume a member pays annual dues of $50 to an organization, and the organization sends the member a mug. The organization's total cost to acquire the mug and ship it to the member was $5.[6] RCW 82.04.4282 does not do away completely with the organization's deduction because of the mug. Rather, it—in combination with DOR's "cost of production" method—reduces the deduction amount of $50 by $5 (i.e., the quantified value of the mug), resulting in the organization's entitlement to a $45 deduction pursuant to RCW 82.04.4282.

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[6] Of course, the quantification of "value" is more difficult when dealing with more complicated types of goods or services.

B. The Well-Established Summary Judgment Standards of Review

The rules governing whether a case may be disposed of on summary adjudication are well-trod in both Washington caselaw and American jurisprudence at large.

"The purpose of a summary judgment is to avoid a useless trial. It permits the trial court to cut through formal allegations and grant relief when it appears from uncontroverted facts . . . that there are no genuine issues as to any material fact." *State ex rel. Bond v. State*, 62 Wn.2d 487, 490 (1963) (citing *Preston v. Duncan*, 55 Wn.2d 678 (1960)). This Court long ago observed that,

> [t]he summary judgment rule will best serve its purposes when we all, bench and bar alike, become aware that . . . '[s]ummary judgment procedure is not a catch penny contrivance to take unwary litigants into its toils and deprive them of a trial, it is a liberal measure, liberally designed for arriving at the truth. Its purpose is not to cut litigants off from their right of trial by jury *if they really have evidence which they will offer on a trial*, it is to carefully test this out, in

> advance of trial *by inquiring and determining whether such evidence exists*.

Preston, 55 Wn.2d at 682 (citing *Whitaker v. Coleman*, 115 F.2d 305 (5th Cir. 1940) (emphasis in original). "A trial is not useless but absolutely necessary where there is a genuine issue as to any material fact." *Id*. at 681; *see also* CR 56(c); *Elcon Const., Inc. v. Eastern Washington University*, 174 Wn.2d 157 (2012).

In supporting a motion for summary judgment, the moving party bears the burden of demonstrating the absence of a genuine dispute of material fact. *Ranger Ins. Co. v. Pierce Cnty.*, 164 Wn.2d 545, 552 (2008). A court must review the facts and reasonable inferences thereon in the light most favorable to the non-moving party. *Jones v. Dep't of Health*, 170 Wn.2d 338, 352 (2010). "The moving party is held to a strict standard. Any doubts as to the existence of a genuine issue of material fact is resolved against the moving party." *Atherton Condominium Ass'n v. Blume Dev. Co.*, 115 Wn.2d

506, 516 (1990). Summary judgment can be granted only if "reasonable persons could reach but one conclusion." *Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 70 (2007).

In reviewing summary adjudication in cases where the non-movant bears the burden at trial, like tax cases, this Court has made clear the allocation of the ultimate burden "matters not." *State ex rel. Bond v. State*, 62 Wn.2d 487, 490 (1963). "In seeking a summary judgment, the moving party always has the burden of proving, by uncontroverted facts, that no genuine issue as to any material fact exists." *Id.* "If the moving party fails to sustain this burden, it is unnecessary for the nonmoving party to submit affidavits or other materials." *Hash v. Children's Orthopedic Hosp. & Medical Ctr.*, 110 Wn.2d 912 (1988) (citing *Graves v. P.J. Taggares Co.*, 94 Wn.2d 298 (1980)).

In *Hash v. Children's Orthopedic Hospital & Medical Center*, 110 Wn.2d 912 (1988), this Court discussed the

absolute necessity that movants adequately establish that no genuine issue as to any material fact exists in support of their requests for summary judgment[7]—irrespective of the factual predicate submitted by non-movants in response—and the fashion by which courts are required to draw reasonable inference in favor of non-movants. In *Hash*, a patient undergoing physical therapy for arthritis sustained a leg fracture. Hash sued the hospital, alleging negligence. The hospital moved for summary judgment, supported by two affidavits concerning physical therapy's standard of care. A rheumatologist's affidavit stated that the "vigorous" physical therapy program conformed with the standard of care and that a fracture can occur even if the appropriate standard of care was met. Hash provided no evidence in opposition; rather, she argued the hospital's evidence was insufficient to establish

[7] *See also State ex rel. Bond*, 62 Wn.2d at 490 ("Where the issues of laches has been properly raised, [movant-defendant] must establish that there is no laches or reasonable inference thereof to be drawn from the undisputed facts").

there were no genuine issues of material fact and argued that *res ipsa loquitur*[8] was sufficient to raise such an issue. *Hash*, 110 Wn.2d at 913–915. The trial court granted summary judgment in favor of the hospital, but the Court of Appeals reversed, holding that the hospital's affidavits were insufficient because they did not address how the fracture occurred. *Id*. at 914–15.

In affirming the Court of Appeal's reversal, this Court noted the record only showed that the fracture was sustained during physical therapy; it did not contain any evidence showing *how* the fracture occurred. Further, the Court noted that, based on the rheumatologist's statement that a fracture could be sustained during physical therapy when a therapist is *not* negligent, a reasonable inference—resolved (as it must be)

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[8] Similar here, BBB's opposition was based largely on collateral estoppel, providing testimony by affidavit that its operations had not materially changed from those that Judge Doran considered to present no bar to full deductibility in 1981.

in Hash's favor—could be drawn that a fracture could also be sustained when a therapist *is* negligent. This Court ultimately found that "it [is] impossible to uphold a ruling that there is no genuine issue as to any material fact when the record contains all questions and no facts." *Id*. at 916.

Similar here, the record below leaves significant questions begging for answers. DOR merely asserted that BBB's members received *something* of value in the abstract, which the trial court accepted as sufficient, without making any determination as to the *extent* of the value received. The fact that some value may have been received by members is alone not a sufficient showing under the plain language of RCW 82.04.4282 and the regulations implementing that statute to fully disallow the deduction. Since the deduction is merely reduced by the value of goods and services received by members—not completely disallowed upon conferring *any* value to members—a lesser deduction is still available even when a taxpayer provides its due-paying members something

of value. Like the rheumatologist's statement in *Hash*, DOR's argument that "some value" was provided to members, when viewed in the light most favorable to the non-movant, begets an inference that the value was *not* in an amount sufficient to deny a deduction in full. In fact, in light of: (1) the fact that both DOR and its lawyers freely admitted that BBB likely qualified for some amount of deduction; and (2) the bulk of the consumer disputes handled by the BBB involved non-members, the proper inference is that the amount of value was significantly less than the amount of the dues received. The amount of the value provided to members is a material fact upon which litigation concerning entitlement to the deduction under RCW 82.04.4282 depends. *See Barrie v. Hosts of America, Inc.*, 94 Wn.2d 640, 642 (1980). Accordingly, DOR did not meet its burden of showing that there is no issue of material fact, and summary judgment—when applying the well-established standards of review—was inappropriate.

C. The Court of Appeals' Newly Articulated Summary Judgment Standards in Tax Cases is Irreconcilable with the Standards Established by This Court and Severely Impacts Taxpayers' Right to Trial by Jury

Rather than contend with the adequacy of DOR's evidentiary showing pursuant to the Civil Rules as the movant on summary judgment, the Court of Appeals completely reallocated the burdens on movants and non-movants in tax cases. Under the rule set out in this case, when DOR is seeking **full** summary adjudication as the movant, it need only make a minimal evidentiary showing that the taxpayer is not entitled to the full amount of the refund claimed. Then, the burden shifts to the non-movant taxpayer, which can only be met by fully proving up their case at the summary judgment stage—otherwise DOR's presumption is (somehow) dispositive.[9]

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[9] As expressed in its Motion to Publish, DOR interprets the Court of Appeals' opinion similarly. App. B at 4–5.

1. The Court of Appeals' New Initial Burden of the Movant in Tax Cases—DOR as Movant Must Merely Present Evidence that Suggests a Non-Movant Taxpayer is Not Entitled to Its Entire Claim

In its opinion, the Court of Appeals states, "DOR bore the initial burden to show there was no genuine issue of material fact as to whether BBB's membership dues were ***wholly*** deductible under RCW 82.04.4282." Opinion, at 13 (emphasis added). "DOR claimed that businesses received ***things of value*** from BBB in exchange for paying membership dues . . . Thus, DOR met its initial burden to show that BBB was not entitled to a deduction of its ***total*** revenue from membership dues." *Id*. (emphasis added).

The Court of Appeals' new approach to DOR's burden of proof as the movant on summary judgment can only be described as a logical fallacy—evidence of a part proves the whole. Since RCW 82.04.4282 provides that a taxpayer's deduction for bona fide dues received is merely *reduced* by the

amount of value conferred upon its members (rather than made completely unavailable), the presence of some unquantified value conferred (as is all that was shown in support of DOR's motion for summary judgment) is plainly not a sufficient factual basis upon which it can be concluded that no deduction is available as a matter of law and, therefore, BBB's claims could be summarily disposed of in full. Under CR 56(c), as the moving party, DOR had to show factually: (1) there was a value conferred upon BBB's members; and (2) the value was of an amount *equal to or in excess of* BBB's total dues received in 2017, which was over $10 million.

Only by making such a showing could DOR provide a sufficient factual predicate to reduce the deduction to zero under RCW 82.04.4282 and be entitled to full summary judgment. Further, under the operative summary judgment standard, DOR's admission that BBB's dues may be partially deductible and DOR's administrative determination (contained

within the record below (CP 912–913)) noting that the value of many of the member benefits at issue should not reduce BBB's deduction—both of which the Court of Appeals noted in its Opinion (at 13)—are on their face sufficient to preclude summary judgment.

The striking departure by the Court of Appeals from the established allocation of burdens in summary judgment proceedings becomes more apparent when applying the approach to other tax deductions within RCW Title 82. For example, RCW 82.04.4339 provides a deduction for amounts received by non-profits from certain governmental entities for salmon recovery grants. In a tax refund case where a non-profit is arguing that it is entitled to a deduction under RCW 82.04.4339, the rule announced by the Court of Appeals would allow DOR to obtain summary judgment if it could show that *any portion* of the total grant amount received by the non-profit (and claimed as a deduction) related to trout ecosystem recovery, rather than salmon recovery, and the

non-profit was unable to fully prove its entitlement to the remainder of the deduction at the summary judgment stage.

Based on the normal allocation of burdens in summary judgment proceedings, DOR's meager evidentiary showing would be insufficient to fulfill DOR's burden. It leaves open the obvious question, "What is the basis of the other grants received?," and when viewed in the light most favorable to the non-movant, the appropriate inference is they relate to salmon ecosystem recovery. *See Hash*, 110 Wn.2d at 916.

Under the Court of Appeals' new formulation, however, DOR need not present facts related to the remaining grant amounts; a mere showing that some facts exist that cast doubt on the non-profit's entitlement to the **full** (not **any**) refund claimed in its complaint would successfully shift the burden to the non-profit.

2. The Court of Appeals Places a Significant New Burden on the Non-Movant in Tax Cases—Taxpayer Must Fully Present Evidence Supporting its Claim at the Summary Judgment Stage

The Court of Appeals stated, "once DOR met its initial burden, the burden shifted to BBB . . . BBB had the burden to show it qualified for the tax deduction and to quantify what amount of its dues qualified for the deduction." Opinion, at 14. Applying this new allocation, the Court of Appeals concluded, "BBB failed to present specific facts or sufficient evidence showing that ***all*** of the membership dues it received . . . were paid solely 'for the privilege of membership.'" *Id*. (emphasis added).

Applying the established standards for summary judgment, DOR had the burden of presenting evidence showing that **all** of the membership dues BBB received were returned to members as valuable goods and/or services. However, under the Court of Appeals' new formulation, that requirement is flipped on its head: if DOR presents *some*

evidence supporting its position with respect to a portion of the deduction, the non-moving party is compelled to fully prove its case—well in advance of trial.

BBB, like many other taxpayers, requested a trial by jury. The Washington Constitution states, "the right of trial by jury shall remain inviolate." Wash. Const. art. 1, § 21. Similarly, litigants are guaranteed the right to a jury trial under the Federal Constitution. U.S. Const. amend. VII. The Court of Appeals' new approach short-circuits that right for tax cases.

Upon receipt of a motion by DOR containing some factual support with respect to a portion of their claim, taxpayers are compelled to present a full factual case to the bench—not a jury—well in advance of trial. Judges, rather than juries, then probe whether "specific facts or sufficient evidence" was presented by the non-movant in a compressed time frame to support "all" of the taxpayer's claim.

3. If a Non-Movant Taxpayer Fails to Fully Support its Claim in Opposition to Summary Judgment, the Court of Appeals Applies a Dispositive Presumption

The Court of Appeals stated that, if non-movant taxpayers fail to meet this newly articulated burden, "DOR may presume that the entire amount of membership dues is taxable." Opinion, at 15. It then concluded that, "[e]ven if these services are tax-deductible, which we do not decide, DOR can presume that the entire amount of dues is taxable because BBB did not attempt to segregate the portion of dues that covers expenses 'incident to providing the privilege of membership.'" As a result, the Court of Appeals affirmed the trial court's full denial of BBB's refund claim.

The Court of Appeals cited no statutory authority supporting its assertion that DOR's presumption should be given any weight by a court in tax refund litigation—let alone at the summary judgment stage. Indeed, trials in all tax refund cases are *de novo*. RCW 82.32.180; *Antio, LLC v.*

Dep't of Revenue, 26 Wn. App. 2d 129, 135 (2023).

In support of the notion that DOR could make this presumption, the Court of Appeals only cited its own prior decision, *Auto. Club of Wash. v. Dep't of Revenue*, 27 Wn. App. 781 (1980). However, the *Auto. Club* court provided no reasoning or support[10] for the notion that DOR's "presumption" on a matter has controlling weight in tax refund litigation. It appears to have created this presumption out of whole cloth.[11]

Application of this dispositive presumption makes getting to a jury a challenging task, significantly eroding the

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[10] The *Auto. Club* court cited to RCW 82.32.180 as support. However, Former RCW 82.32.180 (as well as the current version) makes no reference to any presumption; rather, RCW 82.32.180 lays out the procedure for tax refund litigation, including that trial is *de novo* and that the burden at trial rests with taxpayers. *See* Laws of 1971, ch. 81, § 148; RCW 82.32.180.

[11] The *Auto. Club* court's decision dealt with Former RCW 82.04.430(2), which did not include the "deduction reduction" clause in RCW 82.04.4282 at issue here. *See id.* at n. 1.

right to trial by jury. *See* Wash. Const. art. 1, § 21; U.S. Const. amend. VII. Under the Court of Appeals new formulation, the DOR can move for full summary judgment with evidence that there is no genuine issue of material fact with respect to a small portion of the taxpayer's claim.[12] If the trial court considers the taxpayer's factual presentation in opposition inadequate to fully (not just partially) support the remainder of taxpayer's claims, it then applies the Court of Appeals "presumption," resulting in a DOR victory.[13] Accordingly, the mere filing of a Motion for Summary Judgment by DOR will often operate to foreclose taxpayer's access to trial by jury.

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[12] Ordinarily, such a showing would entitle DOR to partial summary judgment.

[13] While the Court of Appeals applied the new rule to the deduction for dues here, it did not base its holding on any specific feature of the dues deduction. Thus, the new rule presumably would apply to any tax issue where the DOR has evidence suggesting the taxpayer is not entitled to the full refund sought.

VI. CONCLUSION

Petitioner respectfully requests that this Court accept review of this matter and issue a decision in its favor.

RESPECTFULLY SUBMITTED this 10th day of October, 2024.

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CERTIFICATE OF COMPLIANCE

Pursuant to RAP 18.17(b) & (c), I, John Colvin, certify that the accompanying Petition for Review, which was prepared using CG Times 14-point typeface, contains 4,981 words, excluding the parts of the document exempted from word count by RAP 18.17(c). This certificate was prepared in reliance on the word-count function of the word-processing system (Microsoft Word) that was used to prepare the document.

DATED this 10th day of October, 2024, at Seattle, Washington.

COLVIN + HALLETT, P.S.

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CERTIFICATE OF SERVICE

I, Daniela Garduno, certify that I caused to be served a copy of this document via certified mail, return receipt requested, and via electronic mail, as mutually consented to by the parties' counsel under an Electronic Service Agreement pursuant to GR 30(b)(4), on 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 10th day of October, 2024, at Seattle,

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Appendix A

Filed
Washington State
Court of Appeals
Division Two

September 10, 2024

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

BETTER BUSINESS BUREAU GREAT WEST[†] & THE PACIFIC, Appellant, v. WASHINGTON STATE DEPARTMENT OF REVENUE, Respondent.	No. 58492-1-II UNPUBLISHED OPINION

CHE, J. — The Better Business Bureau Great West and the Pacific (BBB) appeals the trial court's grant of the Department of Revenue's (DOR) motion for summary judgment, denial of BBB's motion for partial summary judgment, grant of the DOR's protective order, and denial of BBB's motion to compel discovery.

BBB sought a refund of business and occupation (B&O) taxes paid in 2017. BBB claimed that the accreditation fees (membership dues) it received from its members were "bona fide dues" under RCW 82.04.4282 and thus fully deductible from its gross income. The DOR maintained that because BBB failed to provide any evidence showing what portion, if any, of the membership dues qualified for the deduction, the membership dues are fully taxable. The parties also disputed whether a DOR memo related to BBB's taxability should be redacted and disclosed in discovery. The parties filed cross motions for summary judgment. The trial court granted the

[†] Also captioned as Better Business Bureau Northwest.

DOR's motion for summary judgment, denied BBB's motion for partial summary judgment, granted the DOR's protective order, and denied BBB's motion to compel discovery.

BBB argues that summary judgment was inappropriate because (1) collateral estoppel bars the DOR's claim; (2) the ability to display BBB's seal, the members' rating, and the members' accreditation status does not confer a "significant amount" of goods or services to members; and (3) the DOR admitted the existence of a genuine issue of material fact—that a portion of the dues was tax deductible. BBB also argues that the trial court erred in denying its motion to compel discovery of the memo because it was discoverable under CR 26 and 34.

We hold (1) collateral estoppel does not apply, (2) the trial court did not err in granting summary judgment in favor of the DOR, and (3) the memo is wholly exempt from disclosure.

Accordingly, we affirm the trial court's grant of the DOR's motions for summary judgment and protective order, and its denial of BBB's motions for partial summary judgment and to compel discovery.

FACTS

A. *Tax Ruling and Tax Refund Action*

BBB is a non-profit corporation that provides to businesses and consumers in various states, including Washington, services to promote the "'creation of a community of trustworthy businesses,'" protection of consumers, and encouragement of best business practices, among other things. Clerk's Papers (CP) at 3.

BBB offers accredited membership to businesses. BBB collects annual membership dues. Once BBB accepts a member, BBB generally authorizes the member to advertise its BBB accreditation and use BBB trademarks. Among other benefits, members may display their

accreditation plaque and decal, use the BBB seal, advertise its BBB rating, and identify as an accredited business in online and offline advertising.

In 2019, the DOR requested BBB to verify its active non-reporting status. BBB requested a tax ruling from the DOR. The DOR issued its ruling, concluding that under RCW 82.04.4282, BBB's membership dues are paid in exchange for "significant services" and are therefore subject to B&O tax. CP at 76.

BBB requested the DOR to conduct an administrative review of the tax ruling. Attached to its request, BBB included the findings of fact and conclusions of law from a 1981 trial court decision (1981 ruling). In that case, BBB and the DOR litigated the issue of whether BBB's membership dues qualified for a tax deduction under RCW 82.04.4282(2). In its 1981 ruling, the trial court determined BBB showed its entitlement to a B&O tax deduction for all dues received. The trial court found the dues were bona fide dues that "[were] not for or graduated upon the amount of services rendered to the member or members." CP at 87.

The DOR affirmed its 2019 tax ruling. In its determination, the DOR concluded that "some" of BBB's services are "not significant services provided in exchange for the membership fee because they are not services that [BBB's] members would pay a charge for in the marketplace." CP at 912. These tax-deductible services included listing members in BBB's online business directory, populating customer reviews for online business listings, and using the "request a quote feature." CP at 913. The DOR further concluded that BBB provides its members "two services of a significant value: accreditation and discount advertising." CP at 913.

The DOR determined that since BBB "has not submitted evidence of the portion of its dues that cover the expenses for providing the privileges of membership . . . the DOR presumes that the entire amount of dues income is taxable." CP at 913. BBB did not file an appeal of the DOR's determination.

The DOR subsequently audited BBB and assessed $139,653.45 in B&O taxes against BBB for the 2017 tax period. BBB paid the B&O taxes, which prompted BBB to file this tax refund action for the 2017 tax period.[1] BBB claimed its membership dues were "bona fide dues" under RCW 82.04.4282 and thus deductible from its B&O tax liability. CP at 32.

B. *Discovery*

The parties engaged in discovery. Among other requested documents, the DOR withheld a two-page memo written by a tax information specialist, which was a "very quick and brief summary of information about [BBB] and [the DOR's] thoughts about [BBB's] taxability." CP at 441. The DOR asserted a privilege under RCW 82.32.330, stating the memo "[d]iscusses Confidential Tax Information of another taxpayer, and therefore [is] precluded from disclosure." CP at 67.

The DOR subsequently moved for a protective order under CR 26(c) to withhold the memo in its entirety. BBB moved to compel discovery of the memo under CR 26 and 34. The trial court heard oral argument on the parties' cross-discovery motions, granted the DOR's motion, and denied BBB's motion.

[1] In January 2022, BBB amended its complaint, seeking to obtain a tax refund for amounts paid in the 2017 tax period, rather than the 2016 tax period.

The trial court issued a protective order on the grounds that RCW 82.32.330 protects the memo from production in its entirety. The trial court entered an order consistent with its ruling at oral argument.

C. *Summary Judgment Motions*

The DOR moved for summary judgment, seeking a determination that BBB did not show that its membership dues were fully deductible under RCW 82.04.4282 for the 2017 tax period. The DOR argued that while bona fide dues are generally deductible under RCW 82.04.4282, they are not deductible when paid "'in exchange for any significant amount of goods or services rendered by the [taxpayer] to members.'" CP at 786 (alteration in original) (quoting RCW 82.04.4282). The DOR asserted that businesses received things of value from BBB in exchange for paying membership dues, such as a license to advertise their BBB accreditation status and BBB rating, and the use of BBB's trademarked seal in online and offline advertising. The DOR also distinguished this case from the 1981 ruling, stating that "accredited businesses at that time were prohibited from advertising their BBB membership, the main benefit they receive today." CP at 787.

BBB responded that the DOR's motion should be denied based on res judicata and collateral estoppel grounds. BBB argued that its membership dues were not subject to B&O tax because the issue had previously been decided in 1981 and there had been no material change in the law or facts since the trial court entered its 1981 ruling. Specifically, BBB asserted that there had been no change in its business operations. BBB also argued that under RCW 82.04.4282, its membership dues were not subject to B&O tax because BBB did not provide a significant amount of goods or services to members without any additional charge to its members.

The DOR, in its reply in support of its own motion for summary judgment noted that BBB did not address that it now provided to businesses, in exchange for paying membership dues, a significant amount of goods or services in the form of a license to advertise BBB accreditation and the right to use BBB trademarks.

BBB moved for partial summary judgment, seeking a determination that the doctrines of collateral estoppel and res judicata apply to the matter. BBB argued that its existing practices were "virtually identical" to its practices at the time of the 1981 ruling and that the substantive facts had not materially changed since then. CP at 969. BBB also argued that the parties and the issue in dispute are the same, and that the statutory authority at issue had not substantively changed since the 1981 ruling. Throughout its motion, BBB relied on the declarations of the current president and CEO of BBB and the past president and CEO from 1981-2013. In particular, BBB cited to the past president's statement that "[b]ased on [his] personal knowledge, there has been no change in BBB's operations insofar as they relate to the facts that were at issue in the [1981 ruling] and in the present lawsuit." CP at 1035. BBB did not present facts about the breakdown of the dues it received nor facts about how it applied the dues to its different services offered to members or the public.

The DOR filed a response to BBB's motion for partial summary judgment, in which it argued that BBB failed to establish facts to show the doctrines of collateral estoppel and res judicata applied. In particular, the DOR noted BBB's conclusory declarations and inability to show identical issues, subject matter, and cause of action between the 1981 ruling and present case. It also argued that a substantive fact had materially changed since the 1981 ruling—BBB members were no longer prohibited from advertising their BBB membership, as they were at the

time of the 1981 ruling. In BBB's reply, it emphasized that its business operations had not changed since 1981 and asserted that it is the DOR's burden to establish material changes to BBB's business operations between the 1981 ruling and the 2017 tax period.

At oral argument on both parties' motions, the trial court held that the doctrines of collateral estoppel and res judicata are inapplicable because BBB did not show that there is no genuine issue of material fact as to whether the issues presented are identical to those in the 1981 ruling.

The trial court noted a finding in the 1981 ruling that "'no member may advertise the fact that [their] business is a member of [BBB]'" and found that that was not the case in the present matter where "we have many official documents from [BBB] that describe . . . the encouragement and the description that [identifying as a BBB accredited business] is a value." Rep. of Proc. (RP) (July 7, 2023) at 45-46 (quoting 1981 ruling). The trial court also noted,

> Neither the moving party nor the responding party can rely on conclusory declarations. And while a person making a declaration may have personal knowledge or firsthand information, that alone doesn't raise a material fact or establish a material fact. And, in this case, both of [BBB's] declarations are conclusory and don't include any details describing the basis for the assertions and don't include any bureau documents that support the assertion. . . .
>
> . . . [The declarations] simply don't have sufficient factual support.

RP (July 7, 2023) at 44.

The trial court found that BBB was not entitled to a tax deduction under RCW 82.04.4282 because "the membership dues do confer a value for a service and, therefore, are subject to the tax and not appropriately deducted." RP (July 7, 2023) at 48. The court also found there was no genuine issue of material fact precluding summary judgment.

The trial court granted the DOR's motion for summary judgment and denied BBB's motion for partial summary judgment.

BBB appeals.

ANALYSIS

BBB argues that the trial court erred in granting summary judgment in favor of the DOR because collateral estoppel bars the DOR's claim, the court misapplied RCW 82.04.4282, and genuine issues of material fact exist. BBB also argues that the trial court erred in denying its motion to compel discovery of the memo because it was discoverable under CR 26 and 34.

We review summary judgment orders de novo. *Fite v. Mudd*, 19 Wn. App. 2d 917, 926, 498 P.3d 538 (2021). Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id*. We review the facts and draw reasonable inferences in the light most favorable to the non-moving party. *Mudd*, 19 Wn. App. 2d at 926. A genuine issue of material fact exists where reasonable minds could disagree on the facts that control the outcome of the litigation. *Johnson v. Lake Cushman Maint. Co.*, 5 Wn. App. 2d 765, 778, 425 P.3d 560 (2018).

"Where there are no disputed issues of material fact and the issue is how the tax statutes and regulations apply to the facts of the case, we treat the issue as a question of law and review the decision de novo." *Royal Oaks Country Club v. Dep't of Revenue*, 25 Wn. App. 2d 468, 474, 523 P.3d 1198 (2023), *aff'd*, 2 Wn.3d 562 (2024).

The moving party has the "initial burden to show there is no genuine issue of material fact." *Sartin v. Estate of McPike*, 15 Wn. App. 2d 163, 172, 475 P.3d 522 (2020). A moving defendant can meet this burden by showing the plaintiff cannot support their claim with any

evidence. *Id*. The burden then "shifts to the plaintiff to present specific facts that reveal a genuine issue of material fact." *Id*. If a plaintiff does not show sufficient evidence to create a genuine issue of material fact "about an essential element on which [they] will have the burden of proof at trial," summary judgment is appropriate. *Id*. "Conclusory statements of fact are insufficient to defeat a summary judgment motion." *Hamblin v. Castillo Garcia*, 23 Wn. App. 2d 814, 831, 517 P.3d 1080 (2022), *review denied*, 200 Wn.2d 1029 (2023).

I. APPLICATION OF COLLATERAL ESTOPPEL

A. *Legal Principles*

We review whether collateral estoppel applies de novo. *Worland v. Kitsap County*, 29 Wn. App. 818, 824, 546 P.3d 446 (2024).

Collateral estoppel precludes the same parties from relitigating an issue in a subsequent lawsuit. *Christensen v. Grant County Hosp. Dist. No. 1*, 152 Wn.2d 299, 306, 96 P.3d 957 (2004). The second claim is always different from the first claim, but for purposes of collateral estoppel, "'[w]hat matters is whether *facts* established in the first proceeding foreclose the second claim.'" *Worland*, 29 Wn. App. at 826 (alteration in original) (quoting *Scholz v. Wash. State Patrol*, 3 Wn. App. 2d 584, 597, 416 P.3d 1261 (2018)).

The party claiming collateral estoppel must prove four elements:

> "(1) identical issues; (2) a final judgment on the merits; (3) the party against whom the plea is asserted must have been a party to or in privity with a party to the prior adjudication; and (4) application of the doctrine must not work an injustice on the party against whom the doctrine is to be applied."

Billings v. Town of Steilacoom, 2 Wn. App. 2d 1, 15, 408 P.3d 1123 (2017) (internal quotation marks omitted) (quoting *Hadley v. Maxwell*, 144 Wn.2d 306, 311-12, 27 P.3d 600 (2001)).

Under *Dot Foods, Inc. v. Department of Revenue* (*Dot Foods* II), a party claiming collateral estoppel fails to satisfy the first element—identical issues—when the facts are distinguishable between the present case and the prior judgment. *See* 185 Wn.2d 239, 254-56, 372 P.3d 747 (2016). Different tax periods constitute a factual change. *See id.* at 254-55. "[C]ollateral estoppel does not apply to subsequent taxing periods that were not previously adjudicated." *Id.*at 257.

B. *Collateral Estoppel Does Not Apply*

As a preliminary matter, BBB argues the trial court erred when it denied BBB's motion for partial summary judgment because collateral estoppel applies here.[2] Specifically, BBB contends that there are no significant factual differences between the 2017 tax period and the 1981 ruling, which prevents the DOR from assessing B&O taxes against BBB. We disagree.

In *Dot Foods* II, Dot Foods challenged the retroactive application of an amended tax statute, claiming that under the theory of collateral estoppel, the DOR could not impose B&O taxes for a specific taxable period because the period was encompassed by a judgment in a prior decision in *Dot Foods, Inc. v. Department of Revenue*, 166 Wn.2d 912, 215 P.3d 185 (2009) (*Dot Foods* I). 185 Wn.2d at 253-54. Our Supreme Court determined that collateral estoppel did not apply because Dot Foods failed to show that the issue decided in *Dot Foods* I was identical to the issue presented in *Dot Foods* II. *Id.* at 254.

First, the Court found the tax period in both cases differed—*Dot Foods* I involved a refund request for tax periods from January 2000 through April 2006, while *Dot Foods* II

[2] BBB asserts, "The Department [does] not dispute that elements 2-4 are met." Br. of Appellant at 50 n.14. The Department does not address this in its response brief. The parties appear to contest only element 1.

involved a refund request for tax periods from May 2006 through December 2007. *Id*. Next, the Court ruled that tax appeals are limited to specific taxes and associated time periods. *Id.* at 255. And while the appeals in both cases concerned the same taxable activity, they involved different tax periods, giving rise to separate causes of action for collateral estoppel purposes. *Id*. The Court reasoned that the facts following *Dot Foods* I "were not static, factually or legally," because "[f]actually, a different tax period was at issue, and legally, there was an intervening change in the law that narrowed the scope of the exemption." *Id.* at 256-57. The Court determined that "collateral estoppel does not apply to subsequent taxing periods that were not previously adjudicated." *Id*.

Here, BBB asserts that the 1981 ruling should extend to the 2017 tax period because the prior tax appeal already adjudicated BBB's exempt status under RCW 82.04.4282, and there are no significant factual changes since the 1981 ruling. BBB appears to argue that *Dot Foods* II stands for the proposition that collateral estoppel is inappropriate only when there is a change in the law *and* the facts. We disagree. In *Dot Foods* II, the Court focused its analysis on whether the facts following *Dot Foods* I were "*static*, factually *or* legally." *Id.* at 256 (emphasis added). Notably, this is written in the disjunctive.

Contrary to BBB's assertion, the facts have not remained static since 1981 because it is no longer the case that members are prohibited from advertising the fact their business is a member of BBB. Additionally, different tax periods are at issue. While the 1981 ruling and the present case concern the same taxable activity, they involve different tax periods, giving rise to separate causes of action for collateral estoppel purposes. Thus, BBB cannot prove the first element—identical issues—of its collateral estoppel claim.

We hold the trial court did not err when it denied BBB's motion for partial summary judgment because collateral estoppel does not apply here. We now consider the remainder of BBB's claims.

II. APPLICATION OF RCW 82.04.4282

A. *Legal Principles*

Under RCW 82.04.4282, dues are generally tax-deductible. But

> [i]f dues are in exchange for any significant amount of goods or services rendered by the recipient thereof to members without any additional charge to the member, or if the dues are graduated upon the amount of goods or services rendered, the value of such goods or services shall not be considered as a deduction under this section.

RCW 82.04.4282. In other words, the dues deduction "exempt[s] from taxation only revenue exacted for the privilege of membership." *Auto. Club of Wash. v. Dep't of Revenue*, 27 Wn. App. 781, 786, 621 P.2d 760 (1980).

In a tax deduction claim, the taxpayer has the burden to show they are qualified for the deduction. *Grp. Health Co-op. of Puget Sound, Inc. v. Wash. State Tax Comm'n*, 72 Wn.2d 422, 429, 433 P.2d 201 (1967). Revenue statutes that confer a tax deduction benefit are narrowly construed against the taxpayer. *See Analytical Methods, Inc. v. Dep't of Revenue*, 84 Wn. App. 236, 241, 928 P.2d 1123 (1996).

Where a portion of dues received by the taxpayer covers expenses "incident to providing the privilege of membership," that portion is deductible, and the taxpayer must attempt to segregate these expenses. *See Auto. Club of Wash.*, 27 Wn. App. at 786. Absent the taxpayer's attempt to segregate these expenses, the DOR "may presume that the entire amount [of dues] is taxable." *Id* at 786-87.

B. *The Trial Court Did Not Err in Granting Summary Judgment in Favor of the DOR*

BBB argues the trial court should have denied the DOR's motion for summary judgment because the trial court misapplied RCW 82.04.4282. Specifically, BBB contends the DOR failed to quantify the "significant value" members received within the meaning of RCW 82.04.4282. BBB also argues its members' ability to display BBB's seal, their BBB rating, and the fact they are an accredited member of BBB does not confer a "significant amount" of goods or services to members. Br. of Appellant at 40. Lastly, BBB argues summary judgment was improper because the DOR admitted a genuine issue of material fact—that a portion of the dues was tax deductible. We disagree that the trial court erred by granting summary judgment in favor of the DOR.

The DOR bore the initial burden to show there was no genuine issue of material fact as to whether BBB's membership dues were wholly deductible under RCW 82.04.4282. The DOR asserted that while bona fide dues are generally deductible under RCW 82.04.4282, they are not deductible when paid "'in exchange for any significant amount of goods or services rendered by the [taxpayer] to members.'" CP at 786 (alteration in original) (quoting RCW 82.04.4282). The DOR claimed that businesses received things of value from BBB in exchange for paying membership dues, such as a license to advertise their BBB accreditation status and BBB rating, and the use of BBB's trademarked seal in online and offline advertising. Thus, the DOR met its initial burden to show that BBB was not entitled to a deduction of its total revenue from membership dues.

BBB contends the DOR had to quantify the value of the dues that are not deductible. To that end, BBB asserts, "The Department [has] not submitted any evidence as to the actual value of the purported goods and services provided to [BBB's] members." Br. of Appellant at 30

(underline omitted). But BBB provides no citations to legal authority in support of its contention that the DOR must prove the actual value of the purported goods and services BBB provides to its members. *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962) ("Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none."); *see also* RAP 10.3(a)(6).

Moreover, once the DOR met its initial burden, the burden shifted to BBB to provide specific facts that reveal a genuine issue of material fact or to show that the DOR is not entitled to judgment as a matter of law. Here, BBB had the burden to show it qualified for the tax deduction and to quantify what amount of its dues qualified for the deduction. But, in response, BBB failed to present specific facts or sufficient evidence showing that all of the membership dues it received from Washington-based accredited businesses during the tax period were paid solely "for the privilege of membership."

Indeed, BBB was in the best position to provide that information but BBB did not present admissible evidence to create a genuine issue of material fact. BBB did not assign value to its goods or services, let alone attempt to segregate the portion of dues received by its members that covered expenses made for the privilege of membership. Rather, BBB relied on two declarations to show that its existing practices were "virtually identical" to its practices at the time of the 1981 ruling and that the substantive facts had not materially changed since then. These declarations contained conclusory statements and were thus insufficient to create a genuine issue of material fact.

Absent BBB putting forth evidence showing its attempt to segregate these expenses, the DOR may presume that the entire amount of membership dues is taxable. *Auto. Club of Wash.*, 27 Wn. App. at 786-87. BBB has not pointed to any case to support that the DOR bears the burden of proving the value of the dues that are not deductible. Rather, BBB had this burden but did not meet it.

BBB also argues a member's ability to display BBB's seal, the member's rating, and the fact they are an accredited member of BBB does not confer a "significant amount" of goods or services to members. Br. of Appellant at 40. When we construe a statute, we begin by looking to the statute's plain meaning. *Sligar v. Odell*, 156 Wn. App. 720, 727, 233 P.3d 914 (2010). To discern the plain meaning of a word undefined by the statute, we may look to its dictionary definition. *Id.*

Here, "significant amount" of goods or services is undefined by RCW 82.04.4282, so we look to its dictionary definition. "Significant" means "having or likely to have influence or effect **:** deserving to be considered **:** IMPORTANT, WEIGHTY, NOTABLE" and "amount" means "the total number or quantity." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 72, 2116 (2002).

BBB contends that the accredited businesses' "ability to display their BBB rating or the fact that it is an accredited member *must* be found to [not] confer a 'significant amount' of benefit," because of the 1981 ruling's import. Br. of Appellant at 41 (emphasis added). But BBB provides no citations to authority in support of its contention that we are bound by a ruling in a prior tax appeal adjudicating a different tax period than at issue here. *DeHeer*, 60 Wn.2d at 126; *see also* RAP 10.3(a)(6).

Next, BBB argues that the accredited businesses' ability to advertise their BBB rating does not confer a significant value because it is an ordinary and expected privilege of membership involving the "'free flow of information'" and the "ability to identify oneself as a member of an organization." Br. of Appellant at 43. But BBB's argument is insufficient to defeat summary judgment because BBB does not offer supporting evidence as to how the businesses' ability to advertise their BBB rating is an expenditure of bona fide dues by BBB "'in furtherance of the free flow of information among members.'" *See* CP at 912.

Additionally, BBB asserts that the accredited businesses' ability to use "indicia of membership" cannot possibly carry a significant value warranting a reduction of the deduction under RCW 82.04.4282. Br. of Appellant at 44 n.13. In other words, BBB likens its members' ability to advertise their BBB rating and use BBB's trademarks with "the ability to identify [themselves] as a member of an organization," which it contends is not a significant amount of goods or services. Br. of Appellant at 44. But this comparison alone does not constitute sufficient evidence to create a genuine issue of material fact about whether BBB's goods or services conferred significant value to its members.

As the DOR points out, facts support that there is much value in BBB accreditation and BBB's trademarks, which comes from BBB's recognizability in the marketplace to consumers who, generally, are "more likely to purchase from a company designated as a BBB Accredited Business." CP at 881. Indeed, BBB describes its trademark seal as "a symbol of trust" that accreditation authorizes businesses to display on their websites, business cards, marketing materials, company vehicles, and storefronts. CP at 881. Moreover, BBB appears to offer its members the following services at no additional cost: accreditation, personalized marketing tools

(e.g., intranet access, webinars), co-branding and sponsorship programs, neutral third-party mediation and arbitration, Accredited Business Hotline, exclusive FedEx shipping and business services discount, and "Consumer Use of [Taxpayer].org to search for businesses," among other services. CP at 909.

Even viewing the facts and drawing reasonable inferences in the light most favorable to BBB, the record does not show that BBB presented facts that create a genuine issue of material fact on whether BBB offered goods or services of significant value to its members in exchange for membership dues. BBB also does not show that, as a matter of law, the DOR is not entitled to judgment. Thus, even if a member's ability to advertise the BBB rating and use BBB's trademarks can be characterized as an indicia of membership, BBB nonetheless does not satisfy its burden on summary judgment.

Lastly, BBB argues the DOR admitted a genuine issue of material fact—that a portion of the dues was tax deductible.[3] The DOR does not dispute that BBB's dues may be partially deductible. Furthermore, it is undisputed that at least some of the services BBB offers to its members in exchange for dues require an additional charge to members. In the DOR's tax ruling, it concluded that "some" of BBB's services are "not significant services provided in exchange for the membership fee because they are not services that [BBB's] members would pay a charge for in the marketplace." CP at 912. These tax-deductible services included listing members in BBB's online business directory, populating customer reviews for online business listings, and using the "request a quote feature." CP at 913. Even if these services are tax-

[3] BBB does not explicitly argue that a genuine issue of material fact exists, and to the extent that it does, BBB did not challenge the trial court's finding that there were no genuine issues of material fact.

deductible, which we do not decide, the DOR can presume that the entire amount of dues is taxable because BBB did not attempt to segregate the portion of dues that covers expenses "incident to providing the privilege of membership." *Auto. Club of Wash.*, 27 Wn. App. at 786.

BBB did not present any admissible evidence showing that all or a portion of the membership fees it received from Washington-based accredited businesses during the 2017 tax period were paid solely "for the privilege of membership." Therefore, there is no genuine issue of material fact on whether BBB's membership dues were wholly deductible under RCW 82.04.4282, and the DOR was entitled to judgment as a matter of law. Thus, we hold the trial court did not err in granting summary judgment in favor of the DOR.

III. DISCOVERY

A. *Legal Principles*

We review discovery orders, including the trial court's denial of a motion to compel discovery, for an abuse of discretion. *State v. Johnson & Johnson*, 27 Wn. App. 2d 646, 662, 536 P.3d 204 (2023), *review denied*, 2 Wn.3d 1019 (2024). A trial court abuses its discretion when its decision is based on untenable grounds or untenable reasons, or is manifestly unreasonable. *Id.*

Under CR 26(b)(1), "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." Under CR 34, a party may make a request for production of documents and electronically store information, among other things, within the scope of CR 26(b).

"Returns and tax information are confidential and *privileged*, and except as authorized by this section, neither the department of revenue nor any other person may disclose any return or

tax information." RCW 82.32.330(2) (emphasis added). "'Disclose' means to make known to any person in any manner whatever a return or tax information." RCW 82.32.330(1)(a).

RCW 82.32.330(l)(c) provides in part, "Except as provided by RCW 82.32.410, nothing in this chapter requires any person possessing data, material, or documents made confidential and privileged by this section to delete information from such data, material, or documents so as to permit its disclosure."

Under RCW 82.32.330(1)(c)(v), "[D]ata received by, recorded by, prepared by, furnished to, or collected by the department of revenue with respect to the determination of the existence, or possible existence, of liability, or the amount thereof, of a person under the laws of this state for a tax, penalty, interest, fine, forfeiture, or other imposition, or offense" constitutes "tax information" and is therefore not required to be redacted but is wholly exempt from disclosure. *See generally Miller v. Dep't of Revenue*, 27 Wn. App. 2d 415, 428-29, 532 P.3d 187 (2023).

B. *The Memo Is Wholly Exempt From Disclosure*

BBB argues the memo was discoverable under CR 26 and 34. BBB contends that RCW 82.32.330(l)(c) does not "completely insulate the Department from redacting information so as to permit its disclosure in connection with production obligations *outside* the context of RCW Chapter 82.32."[4] Br. of Appellant at 55. The DOR argues that the memo contains tax information regarding another taxpayer, making the memo privileged and therefore exempt from disclosure. We agree with the DOR.

[4] BBB argues for the first time in its reply brief that the redaction clause in RCW 82.32.330(l)(c) and the obligation to disclose discovery under CR 26 and 34 implicates separation of powers concerns. We decline to consider this argument. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) ("An issue raised and argued for the first time in a reply brief is too late to warrant consideration.").

Under RCW 82.32.330(1)(c)(v), the memo constitutes tax information because it was prepared by the DOR to help determine BBB's tax liability and it contained the tax information of another taxpayer. Though BBB contends that the memo "contains non-privileged materials," under RCW 82.32.330(2), "tax information is confidential and *privileged*." (Emphasis added.) Thus, under RCW 82.32.330(1)(c)(v), the memo does not need to be redacted but is wholly exempt from disclosure.

We hold the trial court did not abuse its discretion when it granted the DOR's protective order and denied BBB's motion to compel discovery of the memo.

CONCLUSION

Accordingly, we affirm the trial court's grant of the DOR's motions for summary judgment and protective order, and its denial of BBB's motions for partial summary judgment and to compel discovery.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Che, J.

We concur:

Maxa, J.

Veljacic, A.C.J.

Appendix B

NO. 58492-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

BETTER BUSINESS BUREAU GREAT WEST & THE PACIFIC, Appellant, v. WASHINGTON STATE DEPARTMENT OF REVENUE, Respondent.	**DEPARTMENT OF REVENUE'S MOTION TO PUBLISH**

I. IDENTITY OF MOVING PARTY

The moving party is the Respondent, Washington State Department of Revenue (Department).

II. STATEMENT OF RELIEF SOUGHT

Pursuant to RAP 12.3(e), the Department moves the Court to publish its opinion in this matter (hereinafter "*Better Business Bureau* decision"), which was filed on September 10, 2024 (attached as Appendix A).

III. GROUNDS FOR PUBLICATION

The Department requests the Court publish the *Better Business Bureau* decision because it clarifies established legal principles and provides guidance on a legal privilege that is of general public interest to taxpayers, satisfying the criteria in RAP 12.3(d)(2) and (d)(3). First, the decision clarifies that the taxpayer has the burden of showing not only that it qualifies for the deduction under RCW 82.04.4282, but also the amount of its dues it claims qualifies for the deduction. In addition, the decision provides useful guidance in defining what a "significant amount" of goods or services means under RCW 82.04.4282.

Finally, the decision clarifies that records privileged under RCW 82.32.330 may be withheld in the discovery context. As the first Washington appellate opinion addressing the issue, the Court's application of this privilege to discovery materials and rejection of the Better Business Bureau's redaction request provides helpful guidance for the Department

and for taxpayers who provide confidential information to the Department. The decision therefore satisfies the criteria for publication in RAP 12.3(d)(2) and (d)(3). In sum, publication of the decision would provide a useful precedent for the Department and the general public.

A. RAP 12.3(d) Sets Forth the Criteria for Determining Whether an Opinion Should Be Published

RAP 12.3(d) provides guidance for the Court in determining whether an opinion has precedential value and should be published in the Washington Appellate Reports. The panel should consider at least the following criteria:

(1) Whether the decision determines an unsettled or new question of law or constitutional principle; (2) whether the decision modifies, clarifies or reverses an established principle of law; (3) whether a decision is of general public interest or importance; or (4) whether a case is in conflict with a prior opinion of the Court of Appeals. RAP 12.3(d). Here, the decision merits publication under subsections (2) and (3).

B. The Criteria for Publication are Met

1. The Court clarifies the parties' burdens in applying the dues deduction in RCW 82.04.4282

The *Better Business Bureau* decision addresses each party's burden in the context of a tax refund action in which a taxpayer is claiming the membership dues deduction in RCW 82.04.4282. The opinion first confirms the established principle that in moving for summary judgment in the tax refund, the Department bore the initial burden of showing there was no genuine issue of material fact as to whether the Better Business Bureau's membership dues were wholly deductible under RCW 82.04.4282. Slip Op. at 13.

But importantly, the decision clarifies that the Department did not bear the burden of quantifying the value of the dues that are not deductible, i.e., proving the amount of gross income that *was* subject to the business and occupation tax. *Id*. at 13. And it further clarifies that once the Department made the initial showing, the burden shifted to the Better Business Bureau "to show it qualified for the tax deduction and

to quantify what amount of its dues qualified for the deduction." *Id*. at 14. By providing additional analysis regarding the parties' burdens in litigation, the decision expands on this Court's prior holding in *Automobile Club of Washington v. Department of Revenue*, 27 Wn. App. 781, 786-87, 621 P.2d 760 (1980), that absent a taxpayer's segregation of deductible expenses the Department may presume that the full amount is taxable. Because the decision clarifies these important points about the parties' burdens in this context, it satisfies the criteria in RAP 12.3(d)(2).

2. The Court clarifies the meaning of an undefined phrase in RCW 82.04.4282

In addition to clarifying the parties' burdens with respect to proving the applicability of the tax deduction in RCW 82.04.4282, the Court's decision also clarifies the meaning of "significant amount" of goods and services in that statute. The statute provides in relevant part, "[i]f dues are in exchange for any *significant amount* of goods or services rendered by the recipient thereof to members without any additional charge to

the member, … the value of such goods or services shall not be considered as a deduction under this section." RCW 82.04.4282 (emphasis added). Because the statute does not define "significant amount," the Court defined that phrase with reference to the dictionary definitions of "significant" and "amount." Slip Op. at 15. The Court's clarification of the plain meaning of that phrase would provide useful guidance in future cases where that issue is disputed. Therefore, publication of the decision on this issue satisfies the criteria in RAP 12.3(d)(2).

3. The Court clarifies that RCW 82.32.330(1)(c)'s no-redaction clause applies to privileged records in the discovery context

Finally, the Court's decision provides an important discussion about the applicability of RCW 82.32.330(1)(c)'s no-redaction clause in the context of discovery. The decision clarifies that data, materials, or documents meeting the definition of "tax information" is privileged and confidential, and "is therefore not required to be redacted but is wholly exempt from disclosure." Slip Op. at 19.

The Court's rejection of the Better Business Bureau's argument that the Department must redact confidential tax information to permit disclosure in the discovery context is an important legal development. To date, the only published appellate opinion addressing the no-redaction clause in RCW 82.32.330 arose in the public records context. *Miller v. Dep't of Revenue*, 27 Wn. App. 2d 415, 428-29, 532 P.3d 187 (2023). As the first Washington appellate decision applying the no-redaction clause to discovery, publication is warranted under RAP 12.3(d)(2). Because the Department holds records pertaining to virtually every business in Washington, this decision regarding the confidentiality and protection of those records is also of general public interest and importance under RAP 12.3(d)(3).

IV. CONCLUSION

For the foregoing reasons, the Department respectfully requests that this Court publish the *Better Business Bureau* decision.

This document contains 1,003 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 30th day of September, 2024.

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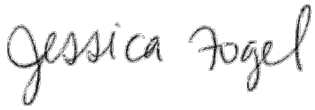

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PROOF OF SERVICE

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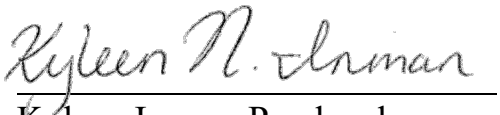
I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 30th day of September, 2024, at Tumwater, WA.



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October 10, 2024 - 4:31 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	58492-1
Appellate Court Case Title:	Better Business Bureau Great West and the Pacific, Appellant v State Dept. of Revenue, Respondent
Superior Court Case Number:	21-2-01542-9

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