Cite as Det. No. 99-233E, 20 WTD 183 (2001)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

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| In the Matter of the Petition For Correction of Assessment | ) | F I N A L<br>E X E C U T I V E L E V E L<br>D E T E R M I N A T I O N |
| . . . | ) | Determination No. 99-233E |
| | ) | Registration No. . . .<br>FY. . ./Audit No. . . . |

[1] RULE 179; RCW 82.04.417: PUBLIC UTILITY TAX – REPEAL OF EXEMPTION -- SERVICE CHARGES -- CONTRIBUTIONS IN AID -- CAPITAL FACILITIES -- BONDED INDEBTEDNESS. The repeal of RCW 82.04.417 applies to all revenues received by a utility for engaging in the activity of providing electrical energy after the effective date of the repeal. Revenues which may have been formerly deductible from utility's gross income because they were received by the utility for reduction of bonded indebtedness are no longer deductible. Laws of 1993, ch. 25, §801, distinguishing Det. No. 87-63, 2 WTD 285 (1986); Det. No. 89-41, 8WTD 195 (1989) and Det. No. 89-451A.

[2] RULE 179; RCW 82.04.417: PUBLIC UTILITY TAX – REPEAL OF EXEMPTION -- SERVICE CHARGES -- CONTRIBUTIONS IN AID -- CAPITAL FACILITIES -- RETROACTIVITY. Repealing statutes are presumed to operate retroactively and terminate all rights dependent upon the repealed statute. *Lau v. Nelson*, 89 Wn.2d 772, 575 P.2s 719 (1978)

[3] RCW 82.04.417: PUBLIC UTILITY TAX -- STATUTORY CONSTRUCTION. If nothing in the plain meaning of a statute creates an ambiguity, no resort to legislative history is appropriate. If a statute is ambiguous, however, resort to legislative history appropriate. Successive legislative drafts, legislative bill reports and fiscal notes are useful sources of legislative intent.

Headnotes are provided as a convenience for the reader and are not in any way a part of the decision or in any way to be used in construing or interpreting this determination.

## NATURE OF ACTION:

This is an Executive Level appeal of the Audit Division's assessment of public utility tax on a portion of the taxpayer's gross income it uses to pay for capital costs. The taxpayer contends this income is exempt under RCW 82.04.417, despite the repeal of that section in 1993. According to the taxpayer, the repeal is not effective as to income obligated and pledged to repay bonds before the effective date of the repeal.[1]

## FACTS

Bianchi, [ALJ] -- In 1981, Public Utility District . . . (PUD) commenced construction on the . . . Hydroelectric Project, later renamed the . . . Hydroelectric Project. The PUD issued bonds in the amount of $. . . to finance the construction of the project in 1983. Commercial operation began on June 1, 1984. In 1986, the PUD refinanced the Project and some additional capital assets, such as distribution facilities, transformers and poles, through another bond issuance in the total amount of $. . . . In doing so, the PUD reduced its average interest rate from 11.5% per annum to 7.5%, realizing a $. . . savings per year.

On December 30, 1988, the PUD filed for a refund of public utility tax. As described in Det. No. 89-451, 8 WTD 195 (1989) and Det. No. 89-451A, the Department was urged to construe RCW 82.04.417 to permit the exemption of revenues received from the PUD's ratepayers that the PUD used to pay for capital costs. According to Det. No. 89-451, a meeting occurred on May 25, 1989, between the Department of Revenue (Department) and several public utilities, including the taxpayer. There, an agreement on the application of the "aid of construction" exemption at RCW 82.04.417 was reached.[2] The agreement had the effect of reducing the amount of public utility tax that would otherwise have been due. The exemption was not available to private (investor owned) utilities.

Four years later, the legislature repealed the exemption, effective July 1, 1993. The PUD initially stopped taking the exemption. The Department immediately took steps to reflect the repeal in the Department's rule, WAC 458-2-179 (Rule 179). During the hearings on the Department's revisions[3] to Rule 179, the PUD argued that the repeal of RCW 82.04.417 should not apply to revenues received from ratepayers that the PUD used to pay for projects entered into before the date of repeal.[4] In May and June of 1994, the PUD proceeded to take the exemption

[1] Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410.

[2] Whether or not the decision reached in Det. No. 87-63, 2 WTD 285 (1986) properly construed the exemption is moot given the statute's subsequent repeal. The Department will assume for purposes of this determination only that PUD would be entitled to exempt the revenues at issue under former RCW 82.04.417.

[3] Taxpayers were notified of the impending change by filing of Preproposal Comments in the Washington State Register on August 17, 1993, WSR 93-17-081, and the first draft of the Department's proposed new rules on December 21, 1993. WSR 94-01-158.

[4] The PUD's objections voiced at the hearing were described in Letter of . . ., Ass't Dir., Audit Division, to . . ., Attorney for Taxpayer, February 26, 1998.

retroactively back to July 1, 1993, and thereafter deducted from its gross income on a monthly basis those revenues that were pledged for repayment of capital costs by the PUD.

The taxpayer was audited in 1997 for the period of January 1, 1994, through December 31, 1996. Audit issued a deficiency assessment of public utility tax against the PUD in the amount of $. . . for revenues the PUD used to pay debt service on capital costs of power facilities (Schedule 2) and $. . . for revenues the PUD used to pay debt service on capital costs of water facilities (Schedule 4), together with interest.[5] The taxpayer paid certain other assessed items. An adjusted assessment was issued on January 28, 1998.[6]

## TAXPAYER'S ARGUMENTS

The Project is a multi-purpose facility that provides both electrical power and water distribution, as well as fish enhancement services. The PUD currently estimates the cost of generating electricity at the facility, in light of environmental restraints, is three times what the power would cost on the open market. The PUD contends competing private utilities are not constrained by environmental sensitivities. The PUD fears that if the exemption is not allowed for this Project it may have to raise rates at a time when it is competing with new energy sources. The PUD believes such rate increases will drive away customers, leaving even fewer customers to pay the Project's fixed debt. Taxpayer described the current financial pressures on public utility districts caused by the upheaval in power sources and services as illustrated by *Association of Public Agency Customers, Inc. v. Bonneville Power Administration*, 126 F.3d 1158 (9th Cir. 1997). Further, PUD Commissioner . . . testified about the unfairness to Commissioners, forced to make difficult financing decisions based on the facts known to them at the time, only to have the bases of these decisions unilaterally changed ten years later. Taxpayer cited *PUD # 1 of Snohomish County v. Taxpayers of Snohomish County*, 78 Wn.2d 724, 730, 479 P.2d 61 (1971) for the principle that the good faith judgment of commissioners in the exercise of their duties must be accepted by courts, and suggested that a certain deference to the operation of public utilities was required by the case law.

The PUD described the bond issuance in some detail with the intent of showing the tax interferes with the contract rights of its bondholders. The taxpayer described the revenue bonds as contracts between the PUD and the bondholders. The obligation to repay the bonds was fixed from the date the bonds were issued. The amount of gross revenue pledged to repay the bonds was fixed at the time of issuance. Sections . . . of PUD's Resolutions No. . . ., dated November 17, 1993, and No. . . ., dated September 26, 1986. By statute controlling public utility financing, the lien of the pledge is binding as "against any parties having claims of any kind in tort,

[5] Audit No. . . . (July 15, 1997).

[6] The taxpayer paid the tax assessed for the disallowance of the deduction for energy efficiency programs (Schedule 3) and the deferred sales tax assessed (Schedule 6). The taxpayer separately litigated the assessment of deferred sales tax on tree trimming (Schedule 5), and so did not object to this assessment in this appeal. Auditor's Detail of Differences and Instructions to Taxpayer (July 15, 1997).

contract, or otherwise against a district irrespective of whether such parties had notice thereof." RCW 54.24.040.[7]

The PUD contends that unless legislation is clearly retroactive, it is to be interpreted as prospective only. The PUD contends that the repeal may not be interpreted to affect projects financed and completed before the repeal took effect. The taxpayer relies upon *In Re Burns*, 131 Wn.2d 104, 924 P.2d 1094 (1997), for the proposition that a statutory amendment must be interpreted prospectively if it impairs rights a party possessed when he or she acted, increases liability for past conduct, or imposes new duties with respect to completed transactions. According to the PUD, when the bonds were issued they were in the nature of a completed transaction. It takes the position that repeal of the exemption, if interpreted to apply to payments for those bonds, impaired the PUD's rights existing before the repeal, increased the PUD's liability for its past conduct and imposed a new duty on the PUD with regard to a completed transaction. Consistent with the maxim cited in *Burns* that elementary fairness demands that people be given the opportunity to know what the law is and conform their conduct to it, the PUD insists its situation is directly analogous to that in *Burns*. Still, the taxpayer admits that the returns it filed with the Department after the bonds were issued in 1983 until 1989 did not rely on the exemption because the Department had not at that time applied the exemption to these receipts.

Taxpayer further points out that it didn't know the repeal was pending, citing *In Re McGrath*, 191 Wash. 496, 71 P.2d 395 (1937), for the principle that the unexpected or novel nature of a tax might constitute an impairment of contract. *See also, Bates v McCleod,* 11 Wn.2d 648, 657, 120 P.2d 472 (1941).

Audit contends that any payments received by the PUD for capital contributions after the effective date of the repeal of RCW 82.04.417 may no longer be deducted, but denies this is a retroactive effect. The Department relies upon *Gandy v. State*, 57 Wn.2d 690, 359 P.2d 302 (1961), and *Japan Line v. McCaffree*, 88 Wn.2d 93, 558 P.2d 211 (1977), both of which addressed allegations that taxing statutes operated retroactively.

## ISSUES

1. Did the legislature intend RCW 82.04.417 to have continuing effect after it was repealed?

2. If not, was the repeal of RCW 82.04.417 an unconstitutional impairment of contracts or violation of due process?

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[7] The PUD implies, but does not directly argue, that the bondholders have a lien against any funds paid to the PUD earmarked for capital costs and that the lien is superior to any claim of the Department. Because there is no evidence the PUD does not have the ability to pay both the Department and its bondholders, we do not reach this issue, even assuming PUD has standing to raise it.

## DISCUSSION

1. Did the Legislature intend RCW 82.04.417 to have continuing effect after it was repealed?

[1] - [3] While the general rule is that statutes are presumed to operate prospectively, as to repealing acts, the presumption is different. Generally, repealing acts terminate all rights dependant upon the repealed statute. *Lau v. Nelson*, 89 Wn.2d 772, 774, 575 P.2d 719 (1978), overruled in part on other grounds in *Roberts v. Johnson*, 91 Wn.2d 182, 588 P.2d 201(1978).[8] "[T] he repealed statute, in regard to its operative effect, is considered as if it had never existed. Of course, the courts have no power to perpetuate a rule of law which the legislature has repealed." 73 Am Jur. 2d *Statutes*, § 384 (1998). "The effect of the repeal of a statute … is to destroy the effectiveness of the repealed act in futuro and to divest the right to proceed under the statute. Except as to proceedings past and closed, the statute is considered as if it had never existed." 1A Sutherland Statutory Construction, §23.33 (5th ed.1991). Thus, the presumption is that a repealer terminates any rights the taxpayer might have to the exemption.

Moreover, exemptions from taxation are construed strictly against the application of the exemption in order to preserve the uniformity of taxes. *Budget Rent-a-Car, Inc. v. Dept of Rev.*, 81 Wn.2d 171, 500 P.2d 749 (1972); 3A Sutherland Statutory Construction, §66.09 (5th ed. 1992). Where more than one reasonable meaning can be attributed to an exemption, the stricter construction must be adopted. *Crown Zellerbach v. State*, 45 Wn.2d 749, 278 P.2d 305 (1954). It follows that when more than one meaning can be given to a repeal of an exemption, any ambiguity should likewise be construed against exemption and in favor of taxation.

Although repealing statutes are presumed to operate retroactively, the taxpayer contends that the legislature did not intend this repeal to apply to projects where financing was fixed. Accordingly, we must still examine the legislature's intent in repealing the statute. *Lau v. Nelson*, 92 Wn.2d 823, 601 P.2d 527 (1979). Also, the repeal of a statute may not operate to destroy a vested right, or impose a liability that did not exist when the transaction occurred. *Lau*, 89 Wn.2d at 774-76; *Ettor v. Tacoma*, 228 U.S. 148 (1913).[9] As with prospective statutes, we must still examine the effect of the repeal on any existing liabilities and rights the taxpayer may have.

A. Plain Meaning of the Statute

The first step in determining whether the repeal of a statute was intended to be retroactive requires us to look to the plain language of the statute, and if that is ambiguous, to the act's legislative history. *Godfrey v. State*, 84 Wn.2d 959, 966, 530 P.2d 630 (1975).[10]

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[8] Repeal of host-guest statute reinstates common law requirement retroactively to cases arising before repeal but during limitation period.

[9] City's liability to landowner is fixed at time of damage and repeal of landowner's right to compensation does not apply retroactively.

[10] Repeal of contributory negligence as bar to recovery applies retroactively to causes of action arising prior to repeal, but during the limitation period.

The final bill, Laws of 1993, ch. 25, § 801, stated simply:

> NEW SECTION. EXEMPTION OF AMOUNTS PAID TO POLITICAL SUBDIVISIONS FOR CAPITAL FACILITIES. RCW 82.04.417 and 1969 ex.s. c 156 § 1 are repealed.

The bill was Governor Lowry's request legislation containing many disparate sections with no unifying principle other than taxation. The bill was effective July 1, 1993. It contained no savings clause. Examination of the plain language of other portions of the bill adds nothing. Nothing in the plain language of the repealer clause suggests that the exemption was to have any continuing validity.

The plain language of the act repealed is consistent with the plain meaning of the repealer.

> The tax imposed by chapters 82.04 and 82.16 RCW shall not apply or be deemed to apply to amounts or value paid or contributed to any county, city, town, political subdivision, or municipal or quasi municipal corporation of the state of Washington representing payments of special assessments or installments thereof and interests and penalties thereon, charges in lieu of assessments, or any other charges, payments or contributions representing a share of the cost of capital facilities constructed or to be constructed or for the retirement of obligations and payment of interest thereon issued for capital purposes.
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> Service charges shall not be included in this exemption even though used wholly or in part for capital purposes.

RCW 82.04.417 (Emphasis added). As the emphasized sections above clarify, the original act exempted (1) payments of special assessments or similar charges (2) received by municipal corporations (3) for certain capital facilities. It did not exempt the cost of capital facilities. This language supports the Department's view that the act applied to payments received by utilities, not the incurring of debt by utilities. *See* Det. No. 96-255, 16 WTD 138, 157 (1996). RCW 82.04.417, as originally enacted, did not deny exemption for qualifying payments related to qualifying construction, where the construction began prior to the effective date of the exemption. The exemption was based on the time the payment was received. Likewise, the repeal is effectively triggered by the same events that triggered the act itself, receipt of payments, not the date the PUD debt may have been incurred.

B. Legislative History and Other Secondary Sources

Even assuming ambiguity in the repealer legislation, the legislative history and other secondary sources make clear the exemption was to have no future application. The first versions of the bill in

both the House (HB 2112) and the Senate (SB 5967) reworded the exemption to apply only to payments for capital construction that were for utility services.[11] The original bill read:

> Sec. 801 RCW 82.04.417 and 1969 ex.s. c 156 § s 1 are each amended to read as follows:
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> The tax imposed by chapters 82.04 and 82.16 shall not apply or be deemed to apply to amounts or value paid or contributed to any county, city, town. Political subdivision, or municipal or quasi municipal corporation of the state of Washington representing payments of special assessments or installments thereof and interest ((s)) and penalties thereon, charges in lieu of assessments, or any other charges, payments or contributions representing a share of the costs of capital facilities constructed or to be constructed for utility services or for the retirement of obligations and payment of interest thereon issued for capital purposes for the provision of utility services
>
> ~~Service charges shall not be included in this exemption even though used wholly or in part for capital purposes~~.
>
> This exemption shall not apply to income used to pay costs deductible under RCW 82.16.055.

The fiscal note, dated April 12, 1993, for the first House and Senate bills stated:

> The amendment is intended to restrict the deduction to those entities (mainly municipal utilities) which have been taking the deduction and not allow its expansion to other activities.

Had that version passed, the income a municipal utility received and used to repay the bonds would have continued to be tax-free, not because bonds for capital construction had already been issued, but because the utility in question was already taking the exemption. As the fiscal note correctly identified, had that version passed, there would have been no fiscal change caused by the amendment because it would have merely continued the then current utilization of the act.

The final version of the bill, previously quoted, repealed the exemption altogether. The fiscal note attached to the final version identified a $19.2 million revenue increase if the exemption were removed entirely instead of simply prohibiting new applications. If the fiscal impact of leaving the exemption in place for public entities already using it was zero, then the substantial fiscal savings identified in the final bill had to come from the entities already taking the exemption.

As the taxpayer correctly notes, the final House Bill Report for ESSB 5967 stated the eventual cost to the state of allowing this exemption to continue could rise from the original estimate of $80,000 to $45 million "if public entities continue to find additional expenses that are eligible for this deduction." The taxpayer conjectures that the discrepancy between the reference to $45 million and

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[11] Successive legislative drafts, legislative bill reports and fiscal notes are useful in determining legislative intent. E.g., *Spokane Cty. Health Dist. V. Brockett*, 120 Wn.2d 140, 839 P.2d 324 (1992); *Bellevue Firefighters Local 1604 v. City of Bellevue*, 100 Wn.2d 748, 675 P.2d 592 (1984); *Young v. Estate of Snell By and Through Platis*, 134 Wn.2d 267, 280, 948 P.2d 1291 (1997); *City of Ellensburg v. State*, 118 Wn.2d 709, 826 P.2d 1081 (1992); Japan *Line v McCaffree*, 88 Wn.2d at 95; Det. No, 96-255, 16 WTD 138 (1996).

the $19.2 million identified in the final fiscal note must have meant that some revenues used by the PUDs or others to pay for some projects continued to be exempt.

The context of the report does not support such a conclusion. The estimate of $45 million referred to tax that could be lost in the future years if the Department's current practice continued and revenues related to additional types of expenses were allowed to be exempted. The $45 million estimate showed how the exemption would balloon over time from a very small initial impact in 1969, not that any revenues would be exempt after repeal. The fiscal note attached to the bill did not estimate a $45 million revenue loss.

Finally, the taxpayer raises the 1992 study of exemptions published biennially by the Department of Revenue as required by RCW 43.06.400. *Tax Exemptions – 1992*, Department of Revenue (1992). In that publication, the Department stated that removal of the exemption would not likely have any fiscal impact because "it is presumed that the public utility tax was not intended to tax receipts of local government utility operations, which represent reimbursement for capital facilities." *Id.* at 124. The Report implied the exemption at RCW 82.04.417 and the definitions of the measure of the public utility tax itself were redundant so that repeal of the exemption alone would create no fiscal impact as long as the definitions in the public utility tax were not changed.

This Report did not address the specific bill before the legislature in 1993. There is no indication that the Report was considered as part of the legislative history of this bill. It is not referenced by the bill or in any reports on the bill. Further, it relied upon an assumption that the fiscal notes attached to the bill rebutted. [12]

Moreover, the Department's formal interpretation of the effect of the repeal, as opposed to the presumption mentioned in the Report, was contained in Rule 179 as amended in July of 1994. That rule clarified that the exemption is not available after the effective date of the 1993 act:

> (8) Exemption of amounts or value paid or contributed to any county, city, town, political subdivision, or municipal corporation for capital facilities. RCW 82.04.417 previously provided an exemption from the public utility tax and the business and occupation tax for amounts received by cities, counties, towns, political subdivisions, or municipal corporations representing contributions for capital facilities. These contributions are often referred to as "contributions in aid of construction." This law was repealed

[12] Except for charges for new hook ups and the like, the assumption of the Report is incorrect. When the Report was issued, Department policy, as enunciated by Det. No. 87-63, 2 WTD 285 (1986)(issued February 27, 1987) and Det. No. 89-451, 8 WTD 195 (1989), permitted utilities to deduct income set aside to pay for capital construction projects. The reasoning of those determinations, however, was based upon interpretations of RCW 82.04.417, not the measure of the public utility tax in RCW 82.16.010. The Supreme Court has held the public utility tax applies to the gross income of the business even if that income was used to finance capital expansion of the system. Only reimbursements for installation costs arising prior to delivery of utility service, such as hook up charges, were considered not gross revenues from the operation of the business. *Kennewick* v. *State*, 67 Wn.2d 589, 591-92, 409 P.2d 138 (1965).

> effective July 1, 1993, and this exemption is no longer available after that date. (See chapter 25, Laws of 1993 sp.s.).

Nothing in the legislative history of the repeal or the evidence from other sources demonstrate the legislature intended to allow the exemption for repayments for capital construction to continue after the effective date of the act. Even if the repealer was ambiguous, the secondary sources fail to support PUD's claim. If some support could be gleaned from the secondary sources, at best the result would be ambiguity. Under standard rules of interpretation, the repealer would be construed in favor of taxation, and against exemption in such a circumstance.

C. Even if the repeal is applied prospectively only, the PUD is not entitled to continue taking this exemption.

1. The precipitating event occurred after the effective date of the repeal

Despite the presumption that repealing acts are retroactive and the lack of evidence that the Legislature intended the repeal to be prospective, [the] PUD cites *In Re Estate of Burns*, *supra*, for the proposition that RCW 82.04.417 should apply since failure to apply the exemption contravenes vested rights or imposes new liabilities on past acts. That case held the retroactive effect of statutes is disfavored because of the unfairness of impairing a vested right or creating a new obligation with respect to past transactions. Citing very broad language from *Landgraft v. USI Film Prods.*, 511 U.S. 244, 265 (1994), the *Burns* Court said "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly." 131 Wn.2d at 110. In arguing that the statute should not be construed to apply to revenues received by [the] PUD and used to make payments on bonds that have already been issued, the [PUD] relies heavily upon this case.

*Burns* involved a 1993 statutory amendment that replaced a $50,000 exemption from a Medicaid beneficiary's estate with a $2,000 exemption. The appellant was the estate of a Medicaid beneficiary who died after the act was amended but who had received benefits before the act was amended. Seeking to recoup benefits paid, DSHS argued the new exemption should be construed as prospective only, because it only applied to *estates* created after the effective date of the act. In other words, the new law regulated the obligations of the estate, not the beneficiary. The estate, on the other hand, argued that to apply the new act to the estate of this beneficiary would attach new legal consequences to the decedent's acceptance of benefits and impose duties on the beneficiary that did not exist when she applied for the benefits. It impaired her vested right to receive medical assistance without encumbering her estate's assets with an obligation to repay. Thus the estate argued that the exemption should be interpreted to apply only to benefits received after the effective date of the statute.[13]

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[13] Statutes do not have retroactive effect merely because some of the acts necessary for their interpretation occur prior to the acts' effective dates. *Aetna Life Insurance Co. v. Washington Life and Disability Insurance Guaranty Association*, 83 Wn.2d 523, 520 P.2d 162 (1974). There the fact that a new statute that based the amount of contributions to a guaranty fund upon premiums collected by insurance companies prior to the effective date of the act did not make the act retroactive. The guaranty fund could be drawn down only in the event of an order of

To determine which of the events precipitated the application of the amendment (the precipitating event), the Court looked to the plain language of the statute. In doing so, the Court concluded that the activity regulated by the statute was the creation of debt and the collection of that debt from an estate. Therefore, the Court agreed with the appellant that the beneficiary's receipt of benefits was the precipitating event. Reducing the exemption changed the legal relationship between recipient and DSHS. Thus it affected a property right held by the beneficiary when she accepted the benefits and interfered with her informed choice. She could have chosen to accept fewer services had she known her estate would have to repay them.

In an effort to bring itself under the *Burns* analysis, the PUD says that it undertook to issue bonds the financial viability of which rested upon receipt of an exemption. Had the PUD not been entitled to the exemption, it argues it might have financed the project in another way perhaps paying entirely out of current revenues rather than amortizing the costs over thirty years. Thus the issuance of the bonds was said to be like Burns' acceptance of Medicaid benefits. Taxpayer argues, as did the Medicaid beneficiary in *Burns*, that it is fundamentally unfair to have been deprived of the ability to make informed decisions.

The PUD's analogy to *Burns* does not hold. The PUD first determined the appropriate financing and issued the bonds in 1983. It refinanced the Project in 1986. The Department's interpretation of RCW 82.04.417 applying the exemption to the taxpayer's facts was not issued until 1989. Det. No. 89-451. The PUD counters that the Department's interpretation should be considered as though it was part of the exemption when it was originally passed, as is the case when the Supreme Court construes statutes. *See e.g., State v. Regan*, 97 Wn.2d 47, 640 P.2d 725 (1982).[14] Whether or not relation back of the Department's statutory construction in determinations would be required in the event of a claim for refund for periods prior to 1989 is not before us. Here the taxpayer claims that it *relied* on the exemption to make an informed choice about financing the project. The facts are clear that the decision to issue the bonds was made before this exemption was ever made applicable to the PUD and could not have been in reliance upon it. In any event, PUD provided no evidence that it specifically relied on RCW 82.04.417 when it issued its bonds.

The [PUD] argues that it could have changed the method of financing had it known the exemption was going to be repealed. The [PUD] was on notice as soon as the exemption was repealed that the exemption no longer applied. The Department in its rulemaking did not adopt

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liquidation entered after the effective date of the act. In *Aetna* the precipitating event was determined to be the order of liquidation, not the collection of premiums. In *Bates*, 11 Wn.2d at 654, a new unemployment compensation statute defined an employer as one who employed more than eight employees in the year prior to the effective date of the act. In *Bates* the precipitating event was employment of persons after the effective date of the act, not the employment of eight persons in the previous year. This reference did not make the act retroactive legislation, it merely enlarged the class subject to the act.

[14] This rule normally applies to only to construction of a statute by a court of last resort, *State v. Regan, supra*, not an administrative interpretation.

PUD's position, and in its rule stated that the exemption was not applicable after July 1, 1993. The taxpayer made a conscious choice to start taking the exemption again a year later rather than attempt to refinance the Project then. If there had been any way to change the financing, the PUD could have done so in 1993, and in any year since then.

The [PUD] further argues that the repeal is unfair because the PUD could have financed the projects out of other revenues had it known the income received from ratepayers for capital costs would be taxable. It is difficult to credit this allegation. The PUD provided no evidence that such funds were available to it. Nor could it have used other revenues tax- free. Revenues received by the PUD are taxable unless exempt. If revenue received by the PUD had not been used to repay capital construction costs, then it would have been included in gross income and taxed accordingly.

More relevant to the facts of this case is the case of *Gandy v. State, supra*. *Gandy* involved a new statute extending retail sales tax to leases of personal property. The Court held that applying the statute to existing leases was not improper because a lease is a series of transactions—the exchange of rental payments for the enjoyment of continued possession. The tax only applied to payments made after the effective date of the statute where the lessee is actually in possession of the property. It would not apply if the lessee lost possession. Because the act only applied to payments of consideration after the effective date of the taxing statute it had no improper retroactive effect.

[The PUD] attempts to distinguish *Gandy* by arguing that even it recognized the result would have been different if the lessor's obligation to pay <u>all</u> the lease payments arose before the act was passed.

> If the act of taking possession fixed the obligation of the lessee to make all of his rental payments, it would be difficult to dispute the appellants' contention [that the act had a retroactive effect of attaching new legal consequences to past acts].

*Id.* at 695. Because its own obligation to pay its bondholders was entirely fixed before the exemption was repealed, the [PUD] contends it comes under the *Gandy* exception. While the quoted statement from Gandy is dicta, the Court went on to explain, that if signing the lease and taking initial possession fixed all payments under the lease, the tax would have been due on the whole lease, regardless of whether the lessee actually had possession during the lease term. This would have been unfair as applied to a lessee who was not in possession during the entire lease term. Where the tax applied only to periods in the future in which the lessee actually paid for and received possession, no unfair retroactive effect resulted. In the case before us, the tax applies only to payments actually received after the effective date of the repeal. The fact that the PUD's payments to its bondholders may have been fixed at an earlier date is not relevant. The act before us repeals the exemption only for payments received by the PUD *after* its effective date, just like *Gandy* imposes a tax only for periods after the effective date where the lessee actually pays for and receives possession.

The *Gandy* Court also pointed out the one purpose of the act was to establish uniformity in the taxation of all lessees of the personal property. This need for uniformity also compelled the Court to construe the tax as applying to leases signed both before and after the effective date of the act. Here, as in *Gandy*, the interests of achieving tax uniformity between public utilities and private utilities are served by construing this repeal to apply to all projects after the effective date.

We also reiterate, the [PUD] is seeking to exempt receipts from its customers from tax. RCW 82.04.417 did not entitle the [PUD] to a deduction for amounts [the PUD] paid. Rather, it entitled the [PUD] to exempt amounts the [PUD] *received*. The customers'obligations to pay the [PUD] after the repeal were not fixed prior to the repeal. They were dependent upon each customer's electric consumption multiplied by rates, which could be adjusted to compensate the [PUD] for additional costs, such as taxes.

2. The repeal does not impair vested rights or interfere with contractual obligations.

Even where the legislature intends retroactive application, a statute may not be given retroactive effect where to do so would interfere with vested rights. *Gillis v. King County*, 42 Wn.2d 373, 376, 255 P.2d 546 (1953); *Real Progress, Inc. v. Seattle*, 91 Wash. App. 833, 841, 963 P.2d 890 (1998). Only if the Department were attempting to assess tax on income received *prior to* the effective date of the repeal would this repeal truly have had a retroactive effect. But no vested rights are implicated here. Vested rights involve more than a mere expectation; the right must have become "a title, legal or equitable, to the present of future enjoyment of property." *Miebach v. Colasurdo*, 102 Wn.2d 170, 181, 685 P.2d 1074 (1984). As the United States Supreme Court has pointed out, "Tax legislation is not a promise, and a taxpayer has no vested right in the Internal Revenue Code." *United States v. Carlton*, 512 U.S. 26, 33 (1994). The legislature has broad plenary powers to levy taxes, exempt property, extend or limit time for payments. See *Gasaway v. State*, 52 Wash. 444, 451, 100 P. 991 (1909).

The facts before us are very similar to those of *East Saginaw Salt Manuf. Co. v. City of East Saginaw*, 80 U.S. 373, 378-79 (1871). There the United States Supreme Court recognized that a state's exemption from taxation designed to encourage the creation of companies to produce salt was not a contractual promise, but a mere legislative policy which could be repealed. Thus, even if the PUD had relied upon the exemption when it entered into its financing, such reliance would not have been reasonable, and would not have entitled it to continue taking the exemption after repeal.

We note that even retroactive application of taxes has been approved against claims of violation of due process or impairment of contract where the tax was imposed for the general support of government and was not a novel tax. *Japan Line*, 88 Wn.2d at 97. The funds generated by the tax at issue here were for the general support of government and the public utility tax itself was not novel, but had been in existence since 1935. The exemption, however, was both controversial and, as applied to the costs of power and water production, had existed for only four years. That the [PUD] may not have expected the repeal of the exemption does not make the resulting public utility tax a novel tax, like that in *In Re McGrath's Estate, supra.*

Our courts have addressed a similar issue many times in usury cases. *See Cazzanigi, v. General Electric Credit Corporation*, 132 Wn.2d 433, 938 P.2d 819 (1997) and cases cited therein. There, the Court held that a repeal of a law limiting the rate of interest merely allows the original obligation of the parties to be enforced. A similar effect applies here. Repealing the exemption merely allows the original tax to be applied.

The repeal of the instant exemption does not require the PUD to pay any additional amounts to its bondholders. It does not change the legal relationship between the bondholders and the PUD. Although it may affect the amount of funds the PUD would otherwise have had, all else being equal, to pay the bonds, the PUD had no more than an expectation that the funds it received would remain sufficient to pay the bondholders. The PUD's expectation that taxes will remain the same, any more than its labor and material costs or other costs will remain the same, is not a reasonable expectation.[15]

In its objection, dated June 16, 1999, to the proposed determination, Taxpayer contends that its obligations were "locked in" by Washington state ten years before the repeal took place under the provisions of RCW 54.24.030 when the bonds were originally issued. Fundamentally, the taxpayer is arguing that it can preclude the state from imposing taxes simply through its choice of a financing mechanism. This is not so. Washington law does not require a PUD to operate as it has chosen to do. RCW 54.24.030 grants PUDs the power when it issues revenue bonds to create a special fund for the purpose of defraying the cost of the utility. The fact that the exercise of this power requires the PUD to pay a fixed percentage of its income toward bond repayment, and that that requirement may be legally enforced by its bondholders in no way insulates the PUD from any additional costs it may incur during the repayment period. The payments required under the authority of RCW 54.24.030 *are fixed as to the bondholders, not fixed as to all entities to whom the PUD may owe additional obligations.*

## DECISION

The repeal of RCW 82.04.417 removed the exemption of payments received by the taxpayer after July 1, 1993 and used to pay for capital construction costs. The appeal of the assessment is denied.

DATED this 30th day of August, 1999.

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[15] [The] PUD's argument also lacks credibility for other reasons. Logically applied, [the] PUD's theory could restrict application of any tax increase, state or local, which affected the revenue stream previously pledged by a business to secure a loan. [The] PUD's theory could be applied to restrict application of PUD rate increases. Yet [the] PUD offered no example whereby the PUD itself refused to enforce a general rate increase to the extent it affected the revenue stream of any PUD business customer who had a loan secured by that business' revenue stream. We have been cited no example where the state, or any county or city, or any utility restrained the application of a new tax, tax increase or rate increase to any taxpayer on the grounds that its business revenue stream was pledged as loan security, and that revenue stream was now being affected. We have been cited no cases in which a court imposed such a result, either.