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Division II
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NO. 50409-0-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Respondent,

v.

GAMESTOP, INC. and SOCOM, LLC,

Appellants.

PETITION FOR REVIEW BY THE SUPREME COURT

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I. IDENTITY OF PETITIONERS

GameStop, Inc. and SOCOM, LLC (together "GameStop") seek review of a decision of the Court of Appeals reversing a ruling by the Board of Tax Appeals ("BTA").

II. CITATION TO THE COURT OF APPEALS DECISION

Division Two of the Court of Appeals filed a published decision on March 19, 2019, in case number 50409-0-II, which superseded a prior decision on October 30, 2018. A copy of the original and superseding opinions are attached hereto as Appendix A.

III. INTRODUCTION

In 1984, Washington voters approved a sales tax exclusion for trade-ins. The exclusion has become a part of the fabric of the car sales industry: trade-in programs are a staple of car dealerships in our state. Washington voters didn't restrict the exclusion to vehicle transactions. RCW 82.08.010(1)(a)(i) excludes sales tax for all "separately stated trade-in property of a like kind." The law encourages a secondary market for property, one that promotes more resale and recirculation of used property and less waste. Car dealerships are incentivized to take trade-ins and resell the used cars, creating a more robust market of used vehicles for those who can't afford to buy new.

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That's exactly what Gamestop's trade-in program does for the video game industry: it creates a more robust market for used video gaming components for those who can't afford the latest from Nintendo, Sony, or Microsoft. Trade-in programs like Gamestop's also help reduce electronic waste through reuse and resale of used gaming components that might otherwise end up in landfills. These kinds of trade-in programs benefit consumers and the environment thanks in part to the sales tax exclusion.

The Department of Revenue (the "Department") is trying to strip Gamestop and its customers of the tax benefit for trade-ins through an overly narrow interpretation of the law. The Washington State Board of Tax Appeals ("BTA") appropriately rejected the Department's position and held that RCW 82.08.010(1)(a)(i)'s sales tax exclusion applies to Gamestop's trade-in program. The Department challenged the BTA's sound ruling on three grounds. First, the Department asserted the BTA was wrong to conclude that video game consoles, accessories, and games all fall within the same general category of property. Second, the Department asserted that GameStop's trade-ins were not "separately stated" because the customer receipts did not identify the specific property traded-in, even though that information could be identified in the event of an audit. Third, the Department argued that a trade-in needed to be part of

the same transaction as the acquisition of like-kind property to qualify for the exclusion, in effect requiring contemporaneous transfers.

On the Department's first two points, the Court of Appeals erred. And on the question of what constitutes "like kind" property, that mistake has far-reaching implications for trade-in programs throughout the state. The opinion espouses a narrow and confusing interpretation of "like kind" property. The decision uses the Department's inapt analogy to computer software and hardware to conclude that video game systems are similarly comprised of those two distinct property classifications. Not so. The analogy breaks down based on a proper understanding of video gaming products. Some video game systems are completely integrated, some partially, some not at all. Some can be cleaved into separate software and hardware components; some cannot. The Court of Appeals' analysis fails to capture the complex realities of gaming systems. In doing so, the decision undermines the incentive to offer trade-in programs for used electronics, which are a key part of the growing effort to reduce electronic waste.

Equally problematic is the decision's failure to provide a workable standard for determining when property is of a like kind. The decision rests on a forced distinction between the *possible* functions of "video game software" and "video game hardware." The decision explores the

many non-gaming functions that some consoles are capable of performing. That focus on differing *possible* uses of property opens the door to question whether any two products are of a like kind. A baseball bat could be used as a weapon; does that make it a different kind of property than a soccer ball? Possible functions don't provide a good way to categorize products. The Court should accept review to determine an appropriate, workable standard.

In its initial decision, the Court of Appeals properly rejected the Department's request to create a simultaneous transaction requirement for trade-ins to qualify for the tax exclusion. There's simply nothing in the statute to support the Department's position on this point. The Court of Appeals' decision would have stricken a rule issued by the Department, in effect imposing a same-day requirement for trade-ins to qualify for the sales tax exclusion. However, at the Department's request, the Court of Appeals withdrew that part of its decision as "unnecessary." App. A at 1, n. 1. That change was a mistake. By withdrawing that portion of the decision, the Court of Appeals left a cloud over the many trade-in programs that utilize stored value cards. Stored value cards provide flexibility to consumers who may want to trade in property before they're ready or able to acquire anything in return. The technology associated with these stored value cards allows sellers and customers to track trade-

ins that occur in separate transactions and apply the sales tax exclusion when appropriate. This Court should at a minimum accept review to provide much needed clarity on that issue.

IV. ISSUES PRESENTED FOR REVIEW

Did the BTA correctly conclude (and did the Court of Appeals err reversing) that video game components—such as consoles, controllers, and games—are property of a like kind subject to the sales tax exclusion for trade-ins under RCW 82.08.010(1)(a)(i)?

Did the BTA correctly conclude (and did the Court of Appeals err reversing) that property under Gamestop's trade-in program was "separately stated" as that term is used in RCW 82.08.010(1)(a)(i)?

Did the BTA correctly conclude that trade-ins need not occur contemporaneously to qualify for the trade-in exclusion under 82.08.010(1)(a)(i), and did the Court of Appeals err in withdrawing its affirmation of that conclusion, which provides critical guidance on the use of stored value cards for trade-ins?

V. STATEMENT OF THE CASE

A. The Sales Tax Exclusion for Trade-in Property

Washington imposes a retail sales tax on the sale of tangible personal property to consumers. The measure of the tax is the property's "selling price," or "sales price," as defined in RCW 82.08.010(1)(a)(i).

Originally, the value of trade-in property was included as part of the selling price paid by the buyer. *See Olympic Motors, Inc, v. McCroskey*, 15 Wn.2d 665, 671, 132 P.2d 355 (1942) ("When a seller takes used articles in trade [that] trade-in constitutes a portion of the consideration paid by the purchaser to the seller."). Washington voters, however, decided to change that. In 1984 the citizens of Washington passed Initiative 464, which stated "[s]hall the value of trade-ins of like kind property be excluded from the selling price for the sales tax computation?" When that voter initiative passed by a sizable margin the definition of "selling price" was amended to exclude "trade-in property of like kind." *See* Laws of 1985, ch. 2.

Under the trade-in exclusion, the value of trade-in property is deducted from the price of the newly purchased property before assessing retail sales tax on the purchase. The exclusion encourages retailers to offer trade-in programs like the Gamestop one at issue in this case.

B. GameStop's Trade-in Program

GameStop is a retailer of new and used video game equipment, including consoles, controllers, accessories, games, and other related components. GameStop offers a trade-in program to consumers that allows customers to trade used gaming products for cash or in-store credit. When a consumer chooses to receive in-store credit—either as an

immediate offset to another purchase or as credits loaded onto a stored-value card and subsequently uses those credits to purchase video game components—GameStop treats the transaction as a trade-in subject to the Washington tax exclusion. *Id.,* FOF 11-13. These stored value cards cannot be redeemed for cash and cannot be purchased from GameStop for cash. *Id.,* FOF 13.

Typically, customers purchase both gaming hardware and software. The purchase of a console, a controller, and a number of video games is a substantial investment. Accordingly, a cost-sensitive customer who wants to upgrade to newer hardware will likely trade in all components of his or her previous system, including the console, accessories, and games. By trading in a used Sony PlayStation 4, for example, for a $250 credit, the customer would receive a meaningful offset against the outlay for the purchase of a new Xbox One console, controller, and game. *Id.*, FOF 19.

GameStop's trade-in program provides its customers with "'a unique value proposition… generally unavailable at mass merchants, toy stores and consumer electronics retailers.' Each year, [GameStop] provides approximately $1.2 billion in trade-in credits. The trade-in program allows GameStop to acquire an inventory of used video game

products' that it can "resell to [its] more value-oriented customers.'" *Id.*, FOF 16.

C. Procedural Background

This case arises from the Department's audits of GameStop for periods January 2006 through December 2010 (for GameStop, Inc.) and January 2008 through December 2010 (for Socom, LLC). AR 244, 254. As a result of the audits, the Department assessed a substantial sum for uncollected retail sales tax derived from the Department's position regarding the applicability of the trade-in exclusion. AR 264, 272.

The Department concluded that GameStop had improperly claimed the trade-in exclusion in three respects: (1) the trade-in of video game software on the purchase of video game hardware (consoles and accessories); (2) the trade-in of video game hardware on the purchase of video game software; and (3) the use of trade-in credits from a stored-value card. AR 246. GameStop timely petitioned the Department's Appeals Division for review. AR 260, 267. After the Appeals Division denied GameStop relief, it sought review from the BTA. AR 387.

Following a hearing under the Administrative Procedure Act, the BTA issued a final decision (AR 33) overturning the Department's audit findings. The BTA concluded that the trade-in exclusion applied to all of the disputed sales transactions and sided with GameStop on each of the

three issues raised by this Petition. The Department filed a petition for review with the Thurston County Superior Court. CP 4. On May 18, 2017, the superior court entered an order reversing the BTA. CP 38. GameStop timely appealed. CP 48. On October 30, 2018, the Court of Appeals issued an opinion overturning the BTA in part and affirming in part. App. A. The opinion overturned the BTA's findings (1) that video game components are property of a like kind; and (2) that receipts for trade-ins need to identify the specific property even if that information is otherwise available. *Id.* The opinion affirmed the BTA's conclusion that trade-ins need not occur in a single, simultaneous transaction to qualify for the sales tax exclusion. *Id.*

The Department filed a motion for reconsideration on the one point it lost, rearguing the merits and asking, in the alternative, that the Court of Appeals' ruling on that issue be withdrawn as unnecessary dicta. On March 19, 2019, the Court of Appeals granted reconsideration on the alternative ground, withdrawing its decision on that issue as "unnecessary." App. A at 1, n. 1.

VI. ARGUMENT

This Court should accept review because the Court of Appeals' published decision reversing the BTA raises issues of substantial public interest. RAP 13.4(b)(4). *First*, the Court of Appeals takes an overly

narrow view of what constitutes "like kind" property subject to the trade-in exclusion from sales tax. That narrow construction of the law is contrary to the broad incentive that Washington voters created for sellers to offer trade-in programs that benefit consumers and the environment. What's worse, the decision fails to provide a readable roadmap for trade-in programs going forward. *Second*, by withdrawing the Court of Appeals' sound decision that the trade-in exclusion from sales tax does not require single, simultaneous transactions, the decision leaves a cloud over popular, consumer-friendly stored value card programs.

A. The Decision Undermines Trade-in Programs That Benefit Washington Consumers and the Environment

GameStop's quintessential trade-in program is exactly the kind of consumer-friendly service that voters would have expected to benefit from the trade-in exclusion. The Court of Appeals' decision improperly deprives Gamestop and its customers of the tax benefit for the program, which promotes availability and utilization of used goods, and helps reduce harmful waste. The decision reaches this erroneous result based on an inappropriately narrow and unworkable interpretation of what constitutes property of a "like kind" subject to the trade-in exclusion provided in RCW 82.08.010(1)(a)(i).

The Court of Appeals erroneously adopted, almost wholesale, the Department's classification of video game systems as two different kinds of property: consoles and the games played on those consoles. This finding is contrary to the Department's own rules regarding what constitutes like kind property, and fails to recognize the principal, integrated functioning of video game systems.

RCW 82.08.010(1)(a)(i) does not define "like kind" property but the Department has in a rule interpreted the statute:

> The term "property of like kind" means articles of tangible personal property of the same ***generic classification***. It refers to the class and kind of property, not to its grade or quality. The term includes all property within a ***general classification rather than within a specific category in the classification.***

WAC 458-20-247(5) (emphasis added). On the face of the rule, the different components of video game systems clearly fall within the same general classification as video game components. The rule goes on to provide examples:

> Thus, as examples, it means furniture for furniture, motor vehicles for motor vehicles, licensed recreational land vehicles for licensed recreational land vehicles, appliances for appliances, auto parts for auto parts, and audio/video equipment for audio/video equipment. These general

> classifications are determined by the nature
> of the property and its function or use.

The rule recognizes that auto parts is an appropriate general classification for a universe of different products (mufflers, carburetors, belts, et al.) that are all used together in the same kind of larger system (automobiles), and audio/visual equipment is an appropriate general classification for another such universe. So too, gaming components is an appropriate general classification for a universe of different products (consoles, accessories, games, et al.) that are all used together in the same kind of larger system (gaming).

The Court of Appeals reached its improper conclusion that video game systems are comprised of two kinds of property by latching onto an inapt analogy made by the Department. The Department argues that because its own rule, WAC 458-20-247, treats computer hardware and software as different kinds of property, video game systems should also be cleaved into hardware and software. They shouldn't. Video game systems come in many shapes, sizes, and combinations of consoles, controllers, accessories, games, and other components. Some consoles come with games installed; some don't. Some games require game-specific hardware accessories such as controllers or headsets; some don't. This diversity of video game systems continues to grow over time.

What doesn't change is that the video game systems are all comprised of some mix of gaming components. And video game systems—unlike computer systems—have a single primary function: gaming.

The Court of Appeals' artificial distinction between video game software and hardware fails to capture all sorts of video game systems that defy that two-bucket categorization. Is the popular pocket pacman player—a fully integrated gaming system that consumers can use only to play pacman—"video game software," "video game hardware," both, or neither? What about a console that comes with a few games installed but allows for the purchase of others? The Court of Appeals' decision provides no way to classify fully or partially integrated systems and many other gaming components (like accessories and hardware extensions custom-made for and sold along with specific games). The decision's inapt hardware-software classification undermines trade-in programs for electronics in the gaming industry, and likely many others.

The decision also promulgates a highly problematic standard for assessing when property is of a like kind. The Court of Appeals focused on the *possible* functions of video game consoles as compared to the games to explain its determination that they are different kinds of property. The decision notes that some video game consoles allow users to browse the internet, stream media, or perform other non-gaming

functions; the games themselves cannot perform these kinds of secondary functions. But surely the trade-in exclusion wasn't intended to differentiate property based on all *possible* functions. Some new cars have sophisticated integrated entertainment systems. Does that possible entertainment function of a new vehicle make it a different kind of property than older cars with no AV systems installed? That cannot be what the voters intended when they passed this trade-in exclusion.

Video game systems are principally intended for recreational use and their components work together as part of an integrated gaming system. To the extent the function of a product is used to assess whether it is of like kind to another, it should be the *primary* function, not *possible* function that controls that analysis. And the primary function of gaming components—consoles, games, controllers, and other accessories—are the same.

The Court should accept review to correct the Court of Appeals mistakes. Doing so would help restore the incentive for electronics trade-in programs in a time when there is a growing concern with electronic waste in our state and around the country. *See, e.g.*, RCW 70.95N (Washington's electronic product recycling statute). Trade-in programs encourage consumers to recirculate and keep durable products in use when they still have value. They also help discourage waste, which is

increasingly an issue with electronics that consumers frequently upgrade long before the electronics reach the end of their usable life. Trade-in programs like Gamestop's promotes better utilization of goods, and also more availability of lower priced used products for those who can't always afford to buy new. Absent intervention by this Court, the Court of Appeals' decision will jeopardize consumer friendly trade-in programs throughout the state that are helping keep goods out of landfill.

B. The Decision Leaves a Cloud Over Popular Stored Value Card Programs

The Court of Appeals initially reached the right conclusion that trade-ins don't have to occur in a single transaction with the acquisition of like-kind property to qualify for the sales tax exclusion. The subsequent withdrawal of that ruling in the published decision threatens the widespread use of consumer-friendly stored value card programs like Gamestop's.

Nothing in RCW 82.08.010(1)(a)(i) requires that the trade-in be contemporaneous with the new purchase. The Department has nonetheless persisted in arguing that the use of stored value cards to facilitate non-contemporaneous trade-ins puts all of those transactions outside the scope of the trade-in exclusion. This distortion of the

exclusion has no support in the language of the statute or a common sense understanding of its intended scope.

Nothing in the statute's definition of "selling price" requires that trade-ins be part of a contemporaneous, single transaction with the purchase of other items. In fact, neither the statute nor the Department's own rule states that the consideration for the "separately stated trade-in property of like kind" be immediately applied to the purchase of like-kind property. WAC 458-20-247(4) provides:

> **(4) Trade-in as consideration.** Property traded in must be consideration delivered by the buyer to the seller. The sales documents must identify the tangible personal property being purchased and the trade-in property being delivered to the seller. ***This does not require simultaneous transfers of the property being traded in and the property being purchased,*** but it does require that the delivery of the trade-in and the purchase be components of a single transaction.

(emphasis added). GameStop's use of stored-value cards allows merchandise to be traded in prior to the purchase of other merchandise, but the stored value is clearly "consideration" for the newly-purchased item.

Throughout this case, the Department has failed to identify any legitimate, principled reason for its artificially narrow reading of the statute on this point. The requirement of a single transaction—in effect

simultaneity—would undercut the value of trade-in programs, which encourage the reuse and recirculation of durable products and democratize access to products through discounts for older used versions. With no discernible countervailing reason to preclude non-contemporaneous transactions, the BTA's conclusion was in line with the letter and spirit of the trade-in exclusion.

The Court of Appeals' initial decision couldn't have been more clear and helpful on this point: "RCW 82.08.010(1)(a)(i) is subject only to one interpretation—that a trade-in of personal property is not subject to any timing requirements." App. A at 15-16. That decision would have stricken the conflicting rule issued by the Department that requires trade-in to be documented on the same day as the acquisition of like-kind property to qualify for the sales tax exclusion. WAC 458-20-247(4). The initial opinion would have given comfort to the many sellers that use stored value cards to allow consumers to trade in property then acquire something at a later date. By retracting its decision on this point as "unnecessary," the Court of Appeals leaves the future of these ubiquitous stored value card programs hanging in the balance. This Court should accept review to provide needed clarity that stands to benefit businesses and consumers using stored value cards.

By withdrawing this portion of the decision, sellers like Gamestop are left without guidance on whether they can continue offering their stored value card programs subject to the sales tax exclusion.

VII. CONCLUSION

The Court should accept review to address the issues of substantial public importance raised by this case. The Court of Appeals' decision improperly undermines the sales tax exclusion for trade-in programs that reduce waste by promoting recirculation of used goods.

RESPECTFULLY SUBMITTED this 18th day of April, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that I caused the document to which this certificate is attached to be delivered to the following as indicated:

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APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

October 30, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON DEPARTMENT OF REVENUE, Respondent, v. GAMESTOP, INC. and SOCOM, LLC, Appellants.	No. 50409-0-II PUBLISHED OPINION

WORSWICK, J. — GameStop Corporation (GameStop) is a video game software and hardware retailer that offers a trade-in program where customers may trade in used merchandise and receive store credit for the value of their merchandise. GameStop appeals a superior court order that reversed the Board of Tax Appeals (Board). The superior court ruled that the Department of Revenue had correctly assessed retail sales tax on certain transactions where customers made a trade of video game hardware and software or where a customer purchased store merchandise with store credit earned from a prior trade-in of property.

We hold that (1) video game hardware and video game software are not "property of like kind" under RCW 82.08.010(1)(a)(i) and WAC 458-20-247(5), (2) GameStop's records do not properly identify "separately stated trade-in property" as required by RCW 82.08.010(1)(a)(i), and (3) the single transaction requirement of WAC 458-20-247(4) is invalid to the extent it conflicts with RCW 82.08.010(1)(a)(i). Accordingly, we reverse the Board's decision amending GameStop's retail sales tax assessments and remand for further proceedings.

FACTS

GameStop Inc. and SOCOM LLC are wholly-owned affiliates of GameStop Corporation. Through these two affiliates, GameStop operates approximately 82 retail stores in Washington. GameStop is a retailer of new and used video game software, hardware, and accessories, as well as computer software and other merchandise. GameStop offers its customers a trade-in program in which a customer may trade in used merchandise and elect to receive either cash or store credit for the value of the used merchandise.

When a customer chooses to receive store credit, the credit may be used on an immediate purchase of GameStop merchandise, or the value of the traded-in property may be placed on a stored-value card as a credit to be used at a later date. The store credit may be used only for the purchase of new or used GameStop merchandise.

When a customer uses his or her store credit on an immediate purchase of merchandise, GameStop's sales documents identify the specific merchandise the customer traded in. But when a customer uses the store credit at a later date, GameStop's sales documents state only the amount of store credit applied toward the purchase and do not identify the merchandise that had been traded in. Nonetheless, GameStop can determine what specific merchandise was traded in through its computerized business records.

Washington imposes retail sales tax on each retail sale of tangible personal property. RCW 82.08.020(1)(a). However, "separately stated trade-in property of like kind" is excluded from the calculation of retail sales tax.[1] RCW 82.08.010(1)(a)(i).

[1] Both the Board and the parties are in agreement that the term "separately stated" means that the sales documents for a trade-in transaction provide a specific entry that identifies the property traded in.

The Department promulgated WAC 458-20-247 (Rule 247) to aid in its enforcement of this retail sales tax exclusion. Rule 247 provides that the delivery of trade-in property and the purchase of other merchandise must "be components of a single transaction." WAC 458-20-247(4). Rule 247 also states that "property of like kind" is defined as property within the same generic classification. WAC 458-20-247(5). Rule 247 specifically states that a trade of computer hardware for computer software is not an exchange of property of like kind. WAC 458-20-247(5).

GameStop concluded that a number of its trade-in transactions fell within the retail sales tax exclusion in RCW 82.08.010(1)(a)(i). From 2006 through 2010, GameStop did not charge retail sales tax on transactions where: (1) a customer traded in video game software and used the store credit toward the purchase of video game hardware, (2) a customer traded in video game hardware and used the store credit toward the purchase of video game software, and (3) a customer used store credit from a prior trade-in on a later purchase of merchandise.[2]

In 2012, the Department audited GameStop for the January 2006 through December 2010 tax periods. The Department concluded that GameStop improperly claimed the trade-in exclusion on transactions where a customer traded in video game software and used the store credit toward the purchase of video game hardware (and vice versa), as well as transactions involving the use of store credit from a prior trade-in on a later purchase. The Department assessed GameStop approximately $3,200,000 in additional taxes and interest.

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[2] A trade of video game software for hardware and a trade of video game hardware for software form the basis of the "property of like kind" issue. The use of prior credit towards a later purchase forms the basis of the single transaction and "separately stated trade-in property" issues.

GameStop appealed the assessment to the Department's Appeals Division.[3] The Department denied GameStop's appeal, and GameStop then appealed to the Board.

The Board held an evidentiary hearing. Michael Nichols, GameStop's Treasurer and Senior Vice President of International Finance, testified that when a customer accepted store credit for the value of their traded-in merchandise, the customer could use the store credit toward a future purchase at GameStop. Nichols also testified that video game consoles perform functions, such as playing DVDs and music, as well as streaming content from the Internet. Nichols also stated that video games did not perform similar functions as game consoles. Following the hearing, the Board entered its final decision, which included findings of fact and conclusions of law.

The Board decided that the transactions at issue were entitled to the retail sales tax exclusion under RCW 82.08.010(1)(a)(i), reasoning that video game hardware and video game software were "property of like kind" under RCW 82.08.010(1)(a)(i) and Rule 247(5). Clerk's Papers (CP) at 28. It determined that video game hardware and video game software fell within the general classification of "gaming components" and that "[g]aming hardware (consoles and controllers) and gaming software (video games) are interdependent components of an integrated system" that are bound together in their function and use. CP at 26-27.

Further, the Board decided that purchases made with store credit that had been earned from a prior trade-in were "separately stated" for purposes of RCW 82.08.010(1)(a)(i). Noting that RCW 82.08.010(1)(a)(i) and Rule 247(4) require the consideration for a trade-in of like kind

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[3] The Department audited GameStop Inc. for the January 2006 to December 2010 reporting periods and audited SOCOM LLC for the January 2008 to December 2010 reporting periods. The audits resulted in assessments of additional retail sales tax for both entities, which both administratively appealed. The Department's appeals division consolidated the two appeals.

property be separately stated in the transaction, the Board reasoned that GameStop met this requirement. Because GameStop's sales documents separately identified the new or used merchandise purchased, as well as the store credit derived from the prior trade-in of property, the Board considered GameStop's record system compliant with RCW 82.08.010(1)(a)(i) and Rule 247(4). Finally, the Board concluded that a purchase of merchandise with store credit that was earned in a prior trade-in was part of a single transaction under RCW 82.08.010(1)(a)(i) and Rule 247(4).

The Board ordered that the retail sales taxes assessed to GameStop be amended because the transactions at issue were entitled to the trade-in retail sales tax exclusion under RCW 82.08.010(1)(a)(i). The Department filed a petition in superior court seeking judicial review of the Board's final decision. The superior court entered an order reversing the Board's order. GameStop appeals.[4]

ANALYSIS

The Department argues that the Board erred in ordering the Department to amend GameStop's retail sales tax assessments because (1) the Board misapplied the law by concluding that video game hardware and video game software are "property of like kind" under RCW 82.08.010(1)(a)(i) and Rule 247(5), (2) the Board misinterpreted the law by concluding that the retail sales tax exclusion prescribed by RCW 82.08.010(1)(a)(i) and Rule 247(4) applies to transactions where a customer purchases store merchandise by redeeming store credit earned

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[4] Although GameStop appeals from the superior court's reversal of the Board's order, the Department bears the burden of showing that the Board erred in ordering that the Department amend the additional taxes assessed to GameStop. RCW 34.05.570(3)(e); *Steven Klein, Inc. v. Dep't of Revenue*, 183 Wn.2d 889, 896, 357 P.3d 59 (2015).

from a prior trade-in of used merchandise, and (3) the Board misinterpreted the law by concluding that store credit from a prior trade-in is "separately stated trade-in property" under RCW 82.08.010(1)(a)(i).[5] Because we hold that video game hardware and video game software are not "property of like kind" under RCW 82.08.010(1)(a)(i) and Rule 247(5) and that GameStop did not comply with the "separately stated trade-in property" requirement of RCW 82.08.010(1)(a)(i), we reverse the Board's decision amending GameStop's retail sales tax assessments. We disagree with the Department's other arguments. Thus, we reverse the Board's decision and remand for further proceedings.

I. Legal Principles

Appeals from the Board are governed by the Administrative Procedure Act (APA), chapter 34.05 RCW. *Steven Klein, Inc.*, 183 Wn.2d at 895. We will reverse a Board's decision if it is based on an erroneous interpretation or application of the law. RCW 34.05.570(3)(d); *Steven Klein, Inc.*, 183 Wn.2d at 895. When reviewing the Board's decision, we sit in the same position as the superior court. *Dep't of Revenue v. Sec. Pac. Bank of Wash. Nat'l Ass'n*, 109 Wn. App. 795, 802, 38 P.3d 354 (2002). The burden of demonstrating the invalidity of the Board's

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[5] The Department also argues that we should reject the Board's finding of fact 12 because it is not supported by substantial evidence. The Department admits that "this finding is not significant for purposes of deciding this appeal." Br. of Resp't (Department) at 38. Finding of fact 12 states that a customer who chooses to exchange merchandise for store credit "is choosing to trade his or her used merchandise for new or used in-store merchandise." Administrative Record at 36. We agree with the Department that this finding is insignificant, and we also hold that sufficient evidence supports it. Nichols testified that GameStop customers can purchase only store merchandise with the store credit and may purchase either new or used store merchandise. We find this evidence sufficient to persuade a fair-minded person of its truth. *Pilchuck Contractors, Inc. v. Dep't of Labor & Indus.*, 170 Wn. App. 514, 517, 286 P.3d 383 (2012).

decision is on the party asserting invalidity. RCW 34.05.570(3)(e); *Steven Klein, Inc.*, 183 Wn.2d at 896.

We review the Board's decisions based on statutory interpretation de novo. *Tesoro Ref. & Mktg. Co. v. Dep't of Revenue*, 173 Wn.2d 551, 556, 269 P.3d 1013 (2012). The primary goal of statutory interpretation is to determine and implement the legislature's intent. *Tesoro*, 173 Wn.2d at 556. To determine the legislature's intent, we first look to the plain language of the statute to discern its plain meaning. *Tesoro*, 173 Wn.2d at 556. "We discern the plain meaning from the ordinary meaning of the language at issue, the statute's context, related provisions, and the statutory scheme as a whole." *Dep't of Revenue v Sprint Spectrum, LP.*, 174 Wn. App. 645, 658, 302 P.3d 1280 (2013).

If the plain language of the statute is subject only to one interpretation, it is unambiguous and we give effect to the statute's plain meaning as an expression of legislative intent. *Tesoro*, 173 Wn.2d at 556; *Skagit Cty. Pub. Hosp. Dist. No. 1 v. Dep't of Revenue*, 158 Wn. App. 426, 437, 242 P.3d 909 (2010). We cannot add words to an unambiguous statute. *Dot Foods, Inc. v. Dep't of Revenue*, 166 Wn.2d 912, 921, 215 P.3d 185 (2009). If, however, the plain language of the statute is susceptible to two or more reasonable interpretations, the statute is ambiguous. *Agrilink Foods, Inc. v. Dep't of Revenue*, 153 Wn.2d 392, 396, 103 P.3d 1226 (2005). We give substantial weight to the Department's interpretation of an ambiguous statute. *Dep't of Revenue v. Bi-Mor, Inc.*, 171 Wn. App. 197, 202, 286 P.3d 417 (2012).

The Department may prescribe regulations to enforce the tax code. RCW 82.32.300. We give great deference to the Department's interpretation of its own regulations, especially where the legislature has silently acquiesced over a long period to the Department's construction. *In re Sehome Park Care Center, Inc.*, 127 Wn.2d 774, 780, 903 P.2d 443 (1995); *First Student, Inc. v.*

Dep't of Revenue, __ Wn. App. __, 423 P.3d 921, 930 (2018). However, the Department's interpretation is not binding on this court. *Dep't of Labor & Indus. v. Granger*, 159 Wn.2d 752, 764, 153 P.3d 839 (2007).

We presume that a regulation is valid if it is reasonably consistent with the statute it implements. *Pierce Cty. v. State*, 144 Wn. App. 783, 836, 185 P.3d 594 (2008). But the Department does not have the power to promulgate regulations that amend or change legislative enactments. *Pierce Cty.*, 144 Wn. App. at 836. Consequently, regulations that are inconsistent with the statutes they implement are invalid. *Granger*, 159 Wn.2d at 764.

Under Washington's tax code, retail sales tax is imposed on each retail sale of tangible personal property. RCW 82.08.020(1)(a). The retail sales tax is calculated based on the "sales price" of the item sold. RCW 82.08.010(1)(a)(i), .020(1)(a). Under RCW 82.08.010(1)(a)(i), the "sales price" is "the total amount of consideration, except separately stated trade-in property of like kind, including cash, credit, property, and services, for which tangible personal property . . . [is] sold." Accordingly, separately stated trade-in property of like kind is exempt from retail sales tax. RCW 82.08.010(1)(a)(i).

The Department promulgated Rule 247, which provides in relevant part:

> (4) **Trade-in as consideration.** Property traded in must be consideration delivered by the buyer to the seller. The sales documents must identify the tangible personal property being purchased and trade-in property being delivered to the seller. This does not require simultaneous transfers of the property being traded in and the property being purchased, but it does require that the delivery of the trade-in and the purchase be components of a single transaction. Sales documents, executed not later than the date the trade-in property is delivered to the seller, must identify the property purchased and the trade-in property . . . .
>
> (5) **Property of like kind.** The term "property of like kind" means articles of tangible personal property of the same generic classification. It refers to the class and kind of property, not to its grade or quality. The term includes all property within a general classification rather than within a specific category in the

> classification. . . . These general classifications are determined by the nature of the property and its function or use. . . .
>
> . . . The exclusion of the value of property traded in, however, does not include such things as a motorcycle for a boat, a diamond ring for a television set, a battery for lumber, *computer hardware for computer software*, or farm machinery (including tractors and self-propelled combines) for a car.

(Emphasis added.)

II. PROPERTY OF LIKE KIND

The Department argues that the Board erred in ordering the Department to amend GameStop's retail sales tax assessments because the Board misapplied the law by concluding that video game hardware and video game software are "property of like kind" under RCW 82.08.010(1)(a)(i) and Rule 247(5). We agree.

Under RCW 82.08.010(1)(a)(i), "separately stated trade-in property of like kind" is excluded from the calculation of retail sales tax. Rule 247(5) provides that "property of like kind" means

> articles of tangible personal property of the same generic classification. It refers to the class and kind of property, not to its grade or quality. The term includes all property within a general classification rather than within a specific category in the classification. . . . These general classifications are determined by the nature of the property and its function and use.

Rule 247(5) specifically states that a trade of computer hardware and computer software is not a trade of like kind property.

The language of Rule 247(5) regarding computer hardware and software appears to have derived from a Department of Revenue administrative decision. Wash. Dep't of Revenue, Determination No. 91-044, 10 Wash. Tax Dec. 395 (1990). Although administrative decisions are not binding on this court, we recognize certain decisions of the Board as persuasive authority.

N. Cent. Wash. Respiratory Care Servs., Inc. v. Dep't of Revenue, 165 Wn. App 616, 635, 268 P.3d 972 (2011).

In Determination No. 91-044, the taxpayer argued that computer hardware and software should be generically classified as a "computer system" as defined in WAC 458-20-15501 (Rule 155.01) and, therefore, were like-kind property under Rule 247.[6] Determination No. 91-044, at 2. However, the administrative law judge ruled that software and hardware are not property of like kind under Rule 247 because software and hardware do not serve the same purpose nor are they property of the same general class. Determination No. 91-044, at 6. "Hardware is generally the mechanical and electronic parts of a computer; software (programs) is generally the instructions that command the hardware." Determination No. 91-044, at 6.

Here, during the Board's evidentiary hearing, Nichols testified that video game consoles perform a number of functions, including playing DVDs and music, as well as streaming Internet content. Nichols also stated that video game software cannot perform those same functions. In its final decision, the Board determined that video game hardware and video game software were "property of like kind" under RCW 82.08.010(1)(a)(i) and Rule 247(5) because they fall within the same general classification of "gaming components." The Board reasoned that because video game hardware and video game software are components of an integrated system, they necessarily performed the same function and use.

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[6] Rule 155.01 defines a "computer system" as a "functional unit, consisting of one or more computers and associated software . . . ." WAC 458-20-15501(1)(b).

We hold that video game software and video game hardware are not property of like kind because software and hardware do not perform the same function or use.[7] RCW 82.08.010(1)(a)(i) does not define the term "property of like kind." Rule 247(5) states that property of like kind is tangible personal property with the same generic classification. To determine whether tangible personal property has the same generic classification, we look to the "nature of the property and its function or use." WAC 458-20-247(5).

Although video game software and video game hardware are employed together, they do not perform the same function or use. Video game hardware contains a computer system that is made up of mechanical and electronic parts and includes a computer processing unit, graphics processing unit, and memory. On the other hand, video game software provides commands to the hardware and directs its operation so that a video game may function. The use of video game hardware does not require the use of video game software.

In addition, video game software performs the discrete function of allowing a video game to play on a console. A console can be used for a number of other independent functions, like Internet streaming. Moreover, video game software and video game hardware are a subcategory of computer software and computer hardware, and Rule 247(5) explicitly provides that computer hardware and computer software do not have the same function and purpose.[8] Further, the legislature has never changed RCW 82.08.010(1)(a)(i) in response to Rule 247(5).

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[7] The Department characterizes the Board's decision regarding like kind property as creating a new "interdependent components" standard, then argues that the Board misapplied this new standard. Because the Board did not create a new standard, and because we reverse the Board's decision regarding whether software and hardware are property of like kind, we do not address this argument.

[8] The parties do not argue that Rule 247(5) is inconsistent with RCW 82.08.010(1)(a)(i).

Because video game software and video game hardware are not within the same generic classification, they are not "property of like kind." Thus, the Board misapplied the law in determining that video game software and video game hardware are property of like kind for purposes of RCW 82.08.010(1)(a)(i) and Rule 247(5).

III. SEPARATELY STATED TRADE-IN PROPERTY

The Department also argues that the Board erred in ordering the Department to amend GameStop's retail sales tax assessments because the Board misinterpreted the law by concluding that store credit from a prior trade-in is "'separately stated' trade-in property" under RCW 82.08.010(1)(a)(i).[9] Br. of Resp't (Department) at 39-42. We agree.

We employ traditional rules of grammar in determining the plain language of a statute. *State v. Bunker*, 169 Wn.2d 571, 578, 238 P.3d 487 (2010). RCW 82.08.010(1)(a)(i) states in relevant part:

> "Selling price" includes "sales price." "Sales price" means the total amount of consideration, except separately stated trade-in property of like kind, including cash, credit, property, and services, for which tangible personal property, extended warranties, digital goods, digital codes, digital automated services, or other services or anything else defined as a "retail sale" under RCW 82.04.050 are sold, leased, or rented, valued in money, whether received in money or otherwise.

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[9] The Department also assigns error to finding of fact 15, which provides:

> When the trade-in credit is loaded onto a stored-value card and used at a later date, the sales invoice pertaining to the subsequent purchase of merchandise identifies the new purchases and states the separate amount of trade-in credit that is being applied as an offset. The Taxpayer maintains computerized business records from which the Taxpayer (or an auditor) can identify each item of trade-in property that generated the credit on the stored-value card.

Clerk's Papers (CP) at 23. An appellant's brief must include arguments supporting the issues presented for review and citations to legal authority. RAP 10.3(a)(6). Because the Department does not provide argument suggesting that the Board's finding was erroneous and does not provide citation to authority, we do not consider this assignment of error.

To determine the plain meaning of RCW 82.08.010(1)(a)(i), it is helpful to examine the grammatical structure of the statute. *See Bunker*, 169 Wn.2d at 578. Here, "except separately stated trade-in property of like kind" is a parenthetical phrase offset by commas. "A comma serves many functions, but its purpose always is to set a phrase apart from the rest of the sentence." *E. Gig Harbor Improvement Ass'n v. Pierce Cty.*, 106 Wn.2d 707, 713, 724 P.2d 1009 (1986). Because this parenthetical phrase is set off by commas, it acts independently, providing an exception to "the total amount of consideration" for the sales price. As a result, "the total amount of consideration" includes "cash, credit, property, and services." The statute unambiguously identifies what is included in the sales price (cash, credit, property, and services), and thus subject to taxation, and what is not (separately stated trade-in property of like kind).

When a GameStop customer trades in used merchandise and chooses to receive store credit for the value of the used merchandise, the customer may either use the credit immediately or at a later date. When a customer chooses to use his or her store credit on the purchase of store merchandise at a later date, GameStop's sales documents state the amount of store credit previously earned, but not the specific merchandise traded in. The Board determined that purchases made with store credit were separately stated amounts under RCW 82.08.010(1)(a)(i), even where GameStop's sales documents did not separately identify the property that was traded in.

The Board's interpretation of RCW 82.08.010(1)(a)(i) as merely requiring that "sales documents separately identify the consideration derived from the trade-in property" is divergent from the plain meaning of the statute. CP at 26. The statute does not state "except separately

stated trade-in *value*." Rather, "except separately-stated trade in *property* of like kind" includes only the property traded in.

Moreover, the Board's interpretation of RCW 82.08.010(1)(a)(i) defeats the purpose of the separately stated requirement. The parties agree that the "separately stated" requirement's purpose is to facilitate the Department's audit of a taxpayer's records. GameStop does not dispute that the sales documents at the time of the sale do not separately state the traded in property. Nonetheless, it argues that it has fulfilled the separately stated requirement because the trade-in property is listed at the time of the trade-in transaction. But if a GameStop customer were to trade in a combination of games and a console for credit and then apply a portion of that credit towards a subsequent purchase of merchandise, GameStop's record system would not be able to attribute the specific credit used to the games or the console traded-in.[10]

Because the traded-in merchandise is not separately stated on the subsequent sales receipts as required by RCW 82.08.010(1)(a)(i), it is unknown which portions of the credit used were traded in game-for-game or console-for-game. This ambiguity in GameStop's records prevents an accurate accounting of transactions involving store credit. As such, GameStop's record system does not comport with RCW 82.08.010(1)(a)(i).

[10] For example, a customer could trade in a mixture of games and consoles for store credit, then return at a later time to use some of that credit, but also trade in additional merchandise to add to his credit balance. Then the customer could return again to purchase additional merchandise. At some point, because the traded-in merchandise is not separately stated on the subsequent sales receipts as required by RCW 82.08.010(1)(a)(i), GameStop's record-keeping system would be unable to determine which type of merchandise was represented on the customer's credit balance.

IV. SINGLE TRANSACTION[11]

The Department also argues that the Board erred in ordering the Department to amend GameStop's retail sales tax assessments because the tax exclusion does not apply because the purchase of merchandise with store credit that was earned in a prior trade-in is not part of a "single transaction" under Rule 247(4). GameStop contends that we need not resolve whether there was a single transaction because Rule 247(4)'s single transaction requirement conflicts with RCW 82.08.010(1)(a)(i). We agree with GameStop.

RCW 82.08.010(1)(a)(i) defines the term "sales price" as "the total amount of consideration, except separately stated trade-in property of like kind, including cash, credit, property, and services, for which tangible personal property . . . [is] sold." Rule 247(4) provides:

> Property traded in must be consideration delivered by the buyer to the seller. . . . This does not require simultaneous transfers of the property being traded in and the property being purchased, but it does require that the delivery of the trade-in and the purchase be components of a single transaction. Sales documents, executed not later than the date the trade-in property is delivered to the seller, must identify the property purchased and the trade-in property . . . .

By its plain language, RCW 82.08.010(1)(a)(i) excludes "separately stated trade-in property of like kind" from the calculation of retail sales tax. RCW 82.08.010(1)(a)(i) does not state when the trade-in property must be delivered or when the purchase of like-kind property must take place. In addition, RCW 82.08.010(1)(a)(i) makes no mention of the transaction requirements for the trade-in. As a result, the plain meaning of RCW 82.08.010(1)(a)(i) is subject only to one interpretation—that a trade-in of personal property is not subject to any

[11] To the extent that some GameStop transactions at issue meet the "separately stated" requirement of RCW 82.08.010(1)(a)(i) but fail the single transaction requirement of Rule 247(4), we address the argument.

timing requirements. Accordingly, RCW 82.08.010(1)(a)(i) is unambiguous insofar as it relates to the timing requirements of the trade-in transaction.

The Department states that Rule 247(4)'s interpretation of RCW 82.08.010(1)(a)(i) is entitled to considerable deference.[12] Rule 247(4) implements and interprets RCW 82.08.010(1)(a)(i), and it requires that a trade-in and subsequent purchase of property be part of a single transaction that takes place on the same day. Although we give great deference to the Department's interpretation of its regulations, a Department cannot enforce regulations that effectively amend a statute. *Pierce Cty.*, 144 Wn. App. at 836.

Rule 247(4)'s single transaction and same day sale requirements are contrary to the plain language of RCW 82.08.010(1)(a)(i), because the statute makes no mention of the timing of the trade-in transaction. Moreover, the Department's interpretation would require this court to add words to RCW 82.08.010(1)(a)(i), and we cannot add words to an unambiguous statute. *Dot Foods*, 166 Wn.2d at 921. Because Rule 247(4) is inconsistent with RCW 82.08.010(1)(a)(i), the regulation is invalid to the extent that it conflicts with the plain language of the statute. *Granger*, 159 Wn.2d at 764.

CONCLUSION

We hold that video game hardware and video game software are not "property of like kind" under RCW 82.08.010(1)(a)(i) and Rule 247(5) and that GameStop did not comply with the "separately stated trade-in property" requirement of RCW 82.08.010(1)(a)(i). Accordingly,

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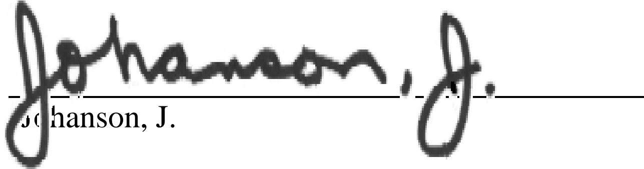
[12] The Department also notes that the Board improperly relied on an out-of-state case to support its conclusion that the retail sales tax exclusion prescribed by RCW 82.08.010(1)(a)(i) and Rule 247(4) applied to transactions where a customer purchases store merchandise by redeeming store credit earned from a prior trade-in of used merchandise. We review the Board's decision de novo and need not address the Board's rationale. *Tesoro Ref. & Mktg. Co.*, 173 Wn.2d at 556.

we reverse the Board's decision amending GameStop's retail sales tax assessments and remand for further proceedings consistent with this opinion.

Worswick, P.J.

We concur:



Johanson, J.

Melnick, J.

Filed
Washington State
Court of Appeals
Division Two

March 19, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON DEPARTMENT OF REVENUE, Respondent, v. GAMESTOP, INC. and SOCOM, LLC, Appellants.	No. 50409-0-II PUBLISHED OPINION

WORSWICK, J. — GameStop Corporation (GameStop) is a video game software and hardware retailer that offers a trade-in program where customers may trade in used merchandise and receive store credit for the value of their merchandise. GameStop appeals a superior court order that reversed the Board of Tax Appeals (Board). The superior court ruled that the Department of Revenue had correctly assessed retail sales tax on certain transactions where customers made a trade of video game hardware and software or where a customer purchased store merchandise with store credit earned from a prior trade-in of property.

We hold that video game hardware and video game software are not "property of like kind" under RCW 82.08.010(1)(a)(i) and WAC 458-20-247(5), and GameStop's records do not properly identify "separately stated trade-in property" as required by RCW 82.08.010(1)(a)(i).[1]

[1] GameStop also argues that the single transaction requirement of WAC 458-20-247(4) is invalid because it conflicts with RCW 82.08.010(1)(a)(i). Because we do not need to resolve this question to decide the case, we do not address this argument.

Accordingly, we reverse the Board's decision amending GameStop's retail sales tax assessments and remand for further proceedings.

FACTS

GameStop Inc. and SOCOM LLC are wholly-owned affiliates of GameStop Corporation. Through these two affiliates, GameStop operates approximately 82 retail stores in Washington. GameStop is a retailer of new and used video game software, hardware, and accessories, as well as computer software and other merchandise. GameStop offers its customers a trade-in program in which a customer may trade in used merchandise and elect to receive either cash or store credit for the value of the used merchandise.

When a customer chooses to receive store credit, the credit may be used on an immediate purchase of GameStop merchandise, or the value of the traded-in property may be placed on a stored-value card as a credit to be used at a later date. The store credit may be used only for the purchase of new or used GameStop merchandise.

When a customer uses his or her store credit on an immediate purchase of merchandise, GameStop's sales documents identify the specific merchandise the customer traded in. But when a customer uses the store credit at a later date, GameStop's sales documents state only the amount of store credit applied toward the purchase and do not identify the merchandise that had been traded in. Nonetheless, GameStop can determine what specific merchandise was traded in through its computerized business records.

Washington imposes retail sales tax on each retail sale of tangible personal property. RCW 82.08.020(1)(a). However, "separately stated trade-in property of like kind" is excluded from the calculation of retail sales tax.[2] RCW 82.08.010(1)(a)(i).

The Department promulgated WAC 458-20-247 (Rule 247) to aid in its enforcement of this retail sales tax exclusion. Rule 247 provides that the delivery of trade-in property and the purchase of other merchandise must "be components of a single transaction." WAC 458-20-247(4). Rule 247 also states that "property of like kind" is defined as property within the same generic classification. WAC 458-20-247(5). Rule 247 specifically states that a trade of computer hardware for computer software is not an exchange of property of like kind. WAC 458-20-247(5).

GameStop concluded that a number of its trade-in transactions fell within the retail sales tax exclusion in RCW 82.08.010(1)(a)(i). From 2006 through 2010, GameStop did not charge retail sales tax on transactions where: (1) a customer traded in video game software and used the store credit toward the purchase of video game hardware, (2) a customer traded in video game hardware and used the store credit toward the purchase of video game software, and (3) a customer used store credit from a prior trade-in on a later purchase of merchandise.[3]

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[2] Both the Board and the parties are in agreement that the term "separately stated" means that the sales documents for a trade-in transaction provide a specific entry that identifies the property traded in.

[3] A trade of video game software for hardware and a trade of video game hardware for software form the basis of the "property of like kind" issue. The use of prior credit towards a later purchase forms the basis of the "separately stated trade-in property" issue.

In 2012, the Department audited GameStop for the January 2006 through December 2010 tax periods. The Department concluded that GameStop improperly claimed the trade-in exclusion on transactions where a customer traded in video game software and used the store credit toward the purchase of video game hardware (and vice versa), as well as transactions involving the use of store credit from a prior trade-in on a later purchase. The Department assessed GameStop approximately $3,200,000 in additional taxes and interest.

GameStop appealed the assessment to the Department's Appeals Division.[4] The Department denied GameStop's appeal, and GameStop then appealed to the Board.

The Board held an evidentiary hearing. Michael Nichols, GameStop's Treasurer and Senior Vice President of International Finance, testified that when a customer accepted store credit for the value of their traded-in merchandise, the customer could use the store credit toward a future purchase at GameStop. Nichols also testified that video game consoles perform functions, such as playing DVDs and music, as well as streaming content from the Internet. Nichols also stated that video games did not perform similar functions as game consoles. Following the hearing, the Board entered its final decision, which included findings of fact and conclusions of law.

The Board decided that the transactions at issue were entitled to the retail sales tax exclusion under RCW 82.08.010(1)(a)(i), reasoning that video game hardware and video game software were "property of like kind" under RCW 82.08.010(1)(a)(i) and Rule 247(5). Clerk's

[4] The Department audited GameStop Inc. for the January 2006 to December 2010 reporting periods and audited SOCOM LLC for the January 2008 to December 2010 reporting periods. The audits resulted in assessments of additional retail sales tax for both entities, which both administratively appealed. The Department's appeals division consolidated the two appeals.

Papers (CP) at 28. It determined that video game hardware and video game software fell within the general classification of "gaming components" and that "[g]aming hardware (consoles and controllers) and gaming software (video games) are interdependent components of an integrated system" that are bound together in their function and use. CP at 26-27.

Further, the Board decided that purchases made with store credit that had been earned from a prior trade-in were "separately stated" for purposes of RCW 82.08.010(1)(a)(i). Noting that RCW 82.08.010(1)(a)(i) and Rule 247(4) require the consideration for a trade-in of like kind property be separately stated in the transaction, the Board reasoned that GameStop met this requirement. Because GameStop's sales documents separately identified the new or used merchandise purchased, as well as the store credit derived from the prior trade-in of property, the Board considered GameStop's record system compliant with RCW 82.08.010(1)(a)(i) and Rule 247(4). Finally, the Board concluded that a purchase of merchandise with store credit that was earned in a prior trade-in was part of a single transaction under RCW 82.08.010(1)(a)(i) and Rule 247(4).

The Board ordered that the retail sales taxes assessed to GameStop be amended because the transactions at issue were entitled to the trade-in retail sales tax exclusion under RCW 82.08.010(1)(a)(i). The Department filed a petition in superior court seeking judicial review of the Board's final decision. The superior court entered an order reversing the Board's order. GameStop appeals.[5]

[5] Although GameStop appeals from the superior court's reversal of the Board's order, the Department bears the burden of showing that the Board erred in ordering that the Department

ANALYSIS

The Department argues that the Board erred in ordering the Department to amend GameStop's retail sales tax assessments because (1) the Board misapplied the law by concluding that video game hardware and video game software are "property of like kind" under RCW 82.08.010(1)(a)(i) and Rule 247(5), (2) the Board misinterpreted the law by concluding that the retail sales tax exclusion prescribed by RCW 82.08.010(1)(a)(i) and Rule 247(4) applies to transactions where a customer purchases store merchandise by redeeming store credit earned from a prior trade-in of used merchandise, and (3) the Board misinterpreted the law by concluding that store credit from a prior trade-in is "separately stated trade-in property" under RCW 82.08.010(1)(a)(i).[6] Because we hold that video game hardware and video game software are not "property of like kind" under RCW 82.08.010(1)(a)(i) and Rule 247(5) and that GameStop did not comply with the "separately stated trade-in property" requirement of RCW 82.08.010(1)(a)(i), we reverse the Board's decision amending GameStop's retail sales tax

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amend the additional taxes assessed to GameStop. RCW 34.05.570(3)(e); *Steven Klein, Inc. v. Dep't of Revenue*, 183 Wn.2d 889, 896, 357 P.3d 59 (2015).

[6] The Department also argues that we should reject the Board's finding of fact 12 because it is not supported by substantial evidence. The Department admits that "this finding is not significant for purposes of deciding this appeal." Br. of Resp't (Department) at 38. Finding of fact 12 states that a customer who chooses to exchange merchandise for store credit "is choosing to trade his or her used merchandise for new or used in-store merchandise." Administrative Record at 36. We agree with the Department that this finding is insignificant, and we also hold that sufficient evidence supports it. Nichols testified that GameStop customers can purchase only store merchandise with the store credit and may purchase either new or used store merchandise. We find this evidence sufficient to persuade a fair-minded person of its truth. *Pilchuck Contractors, Inc. v. Dep't of Labor & Indus.*, 170 Wn. App. 514, 517, 286 P.3d 383 (2012).

assessments. We disagree with the Department's other arguments. Thus, we reverse the Board's decision and remand for further proceedings.

I. LEGAL PRINCIPLES

Appeals from the Board are governed by the Administrative Procedure Act (APA), chapter 34.05 RCW. *Steven Klein, Inc.*, 183 Wn.2d at 895. We will reverse a Board's decision if it is based on an erroneous interpretation or application of the law. RCW 34.05.570(3)(d); *Steven Klein, Inc.*, 183 Wn.2d at 895. When reviewing the Board's decision, we sit in the same position as the superior court. *Dep't of Revenue v. Sec. Pac. Bank of Wash. Nat'l Ass'n*, 109 Wn. App. 795, 802, 38 P.3d 354 (2002). The burden of demonstrating the invalidity of the Board's decision is on the party asserting invalidity. RCW 34.05.570(3)(e); *Steven Klein, Inc.*, 183 Wn.2d at 896.

We review the Board's decisions based on statutory interpretation de novo. *Tesoro Ref. & Mktg. Co. v. Dep't of Revenue*, 173 Wn.2d 551, 556, 269 P.3d 1013 (2012). The primary goal of statutory interpretation is to determine and implement the legislature's intent. *Tesoro*, 173 Wn.2d at 556. To determine the legislature's intent, we first look to the plain language of the statute to discern its plain meaning. *Tesoro*, 173 Wn.2d at 556. "We discern the plain meaning from the ordinary meaning of the language at issue, the statute's context, related provisions, and the statutory scheme as a whole." *Dep't of Revenue v Sprint Spectrum, LP.*, 174 Wn. App. 645, 658, 302 P.3d 1280 (2013).

If the plain language of the statute is subject only to one interpretation, it is unambiguous and we give effect to the statute's plain meaning as an expression of legislative intent. *Tesoro*, 173 Wn.2d at 556; *Skagit Cty. Pub. Hosp. Dist. No. 1 v. Dep't of Revenue*, 158 Wn. App. 426,

437, 242 P.3d 909 (2010). We cannot add words to an unambiguous statute. *Dot Foods, Inc. v. Dep't of Revenue*, 166 Wn.2d 912, 921, 215 P.3d 185 (2009). If, however, the plain language of the statute is susceptible to two or more reasonable interpretations, the statute is ambiguous. *Agrilink Foods, Inc. v. Dep't of Revenue*, 153 Wn.2d 392, 396, 103 P.3d 1226 (2005). We give substantial weight to the Department's interpretation of an ambiguous statute. *Dep't of Revenue v. Bi-Mor, Inc.*, 171 Wn. App. 197, 202, 286 P.3d 417 (2012).

The Department may prescribe regulations to enforce the tax code. RCW 82.32.300. We give great deference to the Department's interpretation of its own regulations, especially where the legislature has silently acquiesced over a long period to the Department's construction. *In re Sehome Park Care Center, Inc.*, 127 Wn.2d 774, 780, 903 P.2d 443 (1995); *First Student, Inc. v. Dep't of Revenue*, 4 Wn. App. 2d 857, 872, 423 P.3d 921(2018). However, the Department's interpretation is not binding on this court. *Dep't of Labor & Indus. v. Granger*, 159 Wn.2d 752, 764, 153 P.3d 839 (2007).

We presume that a regulation is valid if it is reasonably consistent with the statute it implements. *Pierce Cty. v. State*, 144 Wn. App. 783, 836, 185 P.3d 594 (2008). But the Department does not have the power to promulgate regulations that amend or change legislative enactments. *Pierce Cty.*, 144 Wn. App. at 836. Consequently, regulations that are inconsistent with the statutes they implement are invalid. *Granger*, 159 Wn.2d at 764.

Under Washington's tax code, retail sales tax is imposed on each retail sale of tangible personal property. RCW 82.08.020(1)(a). The retail sales tax is calculated based on the "sales price" of the item sold. RCW 82.08.010(1)(a)(i), .020(1)(a). Under RCW 82.08.010(1)(a)(i), the "sales price" is "the total amount of consideration, except separately stated trade-in property of

like kind, including cash, credit, property, and services, for which tangible personal property . . . [is] sold." Accordingly, separately stated trade-in property of like kind is exempt from retail sales tax. RCW 82.08.010(1)(a)(i).

The Department promulgated Rule 247, which provides in relevant part:

> (4) **Trade-in as consideration.** Property traded in must be consideration delivered by the buyer to the seller. The sales documents must identify the tangible personal property being purchased and trade-in property being delivered to the seller. This does not require simultaneous transfers of the property being traded in and the property being purchased, but it does require that the delivery of the trade-in and the purchase be components of a single transaction. Sales documents, executed not later than the date the trade-in property is delivered to the seller, must identify the property purchased and the trade-in property . . . .
>
> (5) **Property of like kind.** The term "property of like kind" means articles of tangible personal property of the same generic classification. It refers to the class and kind of property, not to its grade or quality. The term includes all property within a general classification rather than within a specific category in the classification. . . . These general classifications are determined by the nature of the property and its function or use. . . .
>
> . . . The exclusion of the value of property traded in, however, does not include such things as a motorcycle for a boat, a diamond ring for a television set, a battery for lumber, *computer hardware for computer software*, or farm machinery (including tractors and self-propelled combines) for a car.

(Emphasis added.)

II. Property of Like Kind

The Department argues that the Board erred in ordering the Department to amend GameStop's retail sales tax assessments because the Board misapplied the law by concluding that video game hardware and video game software are "property of like kind" under RCW 82.08.010(1)(a)(i) and Rule 247(5). We agree.

Under RCW 82.08.010(1)(a)(i), "separately stated trade-in property of like kind" is excluded from the calculation of retail sales tax. Rule 247(5) provides that "property of like kind" means

> articles of tangible personal property of the same generic classification. It refers to the class and kind of property, not to its grade or quality. The term includes all property within a general classification rather than within a specific category in the classification. . . . These general classifications are determined by the nature of the property and its function and use.

Rule 247(5) specifically states that a trade of computer hardware and computer software is not a trade of like kind property.

The language of Rule 247(5) regarding computer hardware and software appears to have derived from a Department of Revenue administrative decision. Wash. Dep't of Revenue, Determination No. 91-044, 10 Wash. Tax Dec. 395 (1990). Although administrative decisions are not binding on this court, we recognize certain decisions of the Board as persuasive authority. *N. Cent. Wash. Respiratory Care Servs., Inc. v. Dep't of Revenue*, 165 Wn. App 616, 635, 268 P.3d 972 (2011).

In Determination No. 91-044, the taxpayer argued that computer hardware and software should be generically classified as a "computer system" as defined in WAC 458-20-15501 (Rule 155.01) and, therefore, were like-kind property under Rule 247.[7] Determination No. 91-044, at 2. However, the administrative law judge ruled that software and hardware are not property of like kind under Rule 247 because software and hardware do not serve the same purpose nor are

[7] Rule 155.01 defines a "computer system" as a "functional unit, consisting of one or more computers and associated software . . . ." WAC 458-20-15501(1)(b).

they property of the same general class. Determination No. 91-044, at 6. “Hardware is generally the mechanical and electronic parts of a computer; software (programs) is generally the instructions that command the hardware.” Determination No. 91-044, at 6.

Here, during the Board’s evidentiary hearing, Nichols testified that video game consoles perform a number of functions, including playing DVDs and music, as well as streaming Internet content. Nichols also stated that video game software cannot perform those same functions. In its final decision, the Board determined that video game hardware and video game software were “property of like kind” under RCW 82.08.010(1)(a)(i) and Rule 247(5) because they fall within the same general classification of “gaming components.” The Board reasoned that because video game hardware and video game software are components of an integrated system, they necessarily performed the same function and use.

We hold that video game software and video game hardware are not property of like kind because software and hardware do not perform the same function or use.[8] RCW 82.08.010(1)(a)(i) does not define the term “property of like kind.” Rule 247(5) states that property of like kind is tangible personal property with the same generic classification. To determine whether tangible personal property has the same generic classification, we look to the “nature of the property and its function or use.” WAC 458-20-247(5).

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[8] The Department characterizes the Board’s decision regarding like kind property as creating a new “interdependent components” standard, then argues that the Board misapplied this new standard. Because the Board did not create a new standard, and because we reverse the Board’s decision regarding whether software and hardware are property of like kind, we do not address this argument.

Although video game software and video game hardware are employed together, they do not perform the same function or use. Video game hardware contains a computer system that is made up of mechanical and electronic parts and includes a computer processing unit, graphics processing unit, and memory. On the other hand, video game software provides commands to the hardware and directs its operation so that a video game may function. The use of video game hardware does not require the use of video game software.

In addition, video game software performs the discrete function of allowing a video game to play on a console. A console can be used for a number of other independent functions, like Internet streaming. Moreover, video game software and video game hardware are a subcategory of computer software and computer hardware, and Rule 247(5) explicitly provides that computer hardware and computer software do not have the same function and purpose.[9] Further, the legislature has never changed RCW 82.08.010(1)(a)(i) in response to Rule 247(5).

Because video game software and video game hardware are not within the same generic classification, they are not "property of like kind." Thus, the Board misapplied the law in determining that video game software and video game hardware are property of like kind for purposes of RCW 82.08.010(1)(a)(i) and Rule 247(5).

III. SEPARATELY STATED TRADE-IN PROPERTY

The Department also argues that the Board erred in ordering the Department to amend GameStop's retail sales tax assessments because the Board misinterpreted the law by concluding

[9] The parties do not argue that Rule 247(5) is inconsistent with RCW 82.08.010(1)(a)(i).

that store credit from a prior trade-in is "'separately stated' trade-in property" under RCW 82.08.010(1)(a)(i).[10] Br. of Resp't (Department) at 39-42. We agree.

We employ traditional rules of grammar in determining the plain language of a statute. *State v. Bunker*, 169 Wn.2d 571, 578, 238 P.3d 487 (2010). RCW 82.08.010(1)(a)(i) states in relevant part:

> "Selling price" includes "sales price." "Sales price" means the total amount of consideration, except separately stated trade-in property of like kind, including cash, credit, property, and services, for which tangible personal property, extended warranties, digital goods, digital codes, digital automated services, or other services or anything else defined as a "retail sale" under RCW 82.04.050 are sold, leased, or rented, valued in money, whether received in money or otherwise.

To determine the plain meaning of RCW 82.08.010(1)(a)(i), it is helpful to examine the grammatical structure of the statute. *See Bunker*, 169 Wn.2d at 578. Here, "except separately stated trade-in property of like kind" is a parenthetical phrase offset by commas. "A comma serves many functions, but its purpose always is to set a phrase apart from the rest of the sentence." *E. Gig Harbor Improvement Ass'n v. Pierce Cty.*, 106 Wn.2d 707, 713, 724 P.2d

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[10] The Department also assigns error to finding of fact 15, which provides:

> When the trade-in credit is loaded onto a stored-value card and used at a later date, the sales invoice pertaining to the subsequent purchase of merchandise identifies the new purchases and states the separate amount of trade-in credit that is being applied as an offset. The Taxpayer maintains computerized business records from which the Taxpayer (or an auditor) can identify each item of trade-in property that generated the credit on the stored-value card.

Clerk's Papers (CP) at 23. An appellant's brief must include arguments supporting the issues presented for review and citations to legal authority. RAP 10.3(a)(6). Because the Department does not provide argument suggesting that the Board's finding was erroneous and does not provide citation to authority, we do not consider this assignment of error.

1009 (1986). Because this parenthetical phrase is set off by commas, it acts independently, providing an exception to "the total amount of consideration" for the sales price. As a result, "the total amount of consideration" includes "cash, credit, property, and services." The statute unambiguously identifies what is included in the sales price (cash, credit, property, and services), and thus subject to taxation, and what is not (separately stated trade-in property of like kind).

When a GameStop customer trades in used merchandise and chooses to receive store credit for the value of the used merchandise, the customer may either use the credit immediately or at a later date. When a customer chooses to use his or her store credit on the purchase of store merchandise at a later date, GameStop's sales documents state the amount of store credit previously earned, but not the specific merchandise traded in. The Board determined that purchases made with store credit were separately stated amounts under RCW 82.08.010(1)(a)(i), even where GameStop's sales documents did not separately identify the property that was traded in.

The Board's interpretation of RCW 82.08.010(1)(a)(i) as merely requiring that "sales documents separately identify the consideration derived from the trade-in property" is divergent from the plain meaning of the statute. CP at 26. The statute does not state "except separately stated trade-in *value*." Rather, "except separately-stated trade in *property* of like kind" includes only the property traded in.

Moreover, the Board's interpretation of RCW 82.08.010(1)(a)(i) defeats the purpose of the separately stated requirement. The parties agree that the "separately stated" requirement's purpose is to facilitate the Department's audit of a taxpayer's records. GameStop does not dispute that the sales documents at the time of the sale do not separately state the traded in

property. Nonetheless, it argues that it has fulfilled the separately stated requirement because the trade-in property is listed at the time of the trade-in transaction. But if a GameStop customer were to trade in a combination of games and a console for credit and then apply a portion of that credit towards a subsequent purchase of merchandise, GameStop's record system would not be able to attribute the specific credit used to the games or the console traded in.[11]

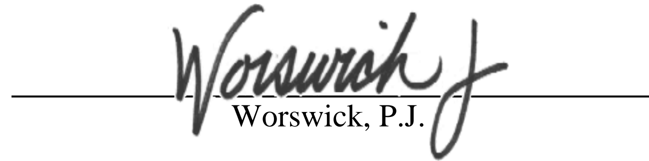
Because the traded-in merchandise is not separately stated on the subsequent sales receipts as required by RCW 82.08.010(1)(a)(i), it is unknown which portions of the credit used were traded in game-for-game or console-for-game. This ambiguity in GameStop's records prevents an accurate accounting of transactions involving store credit. As such, GameStop's record system does not comport with RCW 82.08.010(1)(a)(i).

CONCLUSION

We hold that video game hardware and video game software are not "property of like kind" under RCW 82.08.010(1)(a)(i) and Rule 247(5) and that GameStop did not comply with the "separately stated trade-in property" requirement of RCW 82.08.010(1)(a)(i). Accordingly,

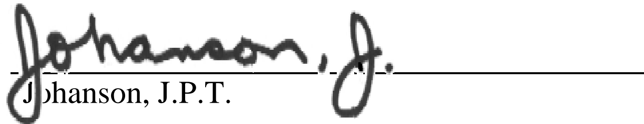
[11] For example, a customer could trade in a mixture of games and consoles for store credit, then return at a later time to use some of that credit, but also trade in additional merchandise to add to his credit balance. Then the customer could return again to purchase additional merchandise. At some point, because the traded-in merchandise is not separately stated on the subsequent sales receipts as required by RCW 82.08.010(1)(a)(i), GameStop's record-keeping system would be unable to determine which type of merchandise was represented on the customer's credit balance.

we reverse the Board's decision amending GameStop's retail sales tax assessments and remand for further proceedings consistent with this opinion.

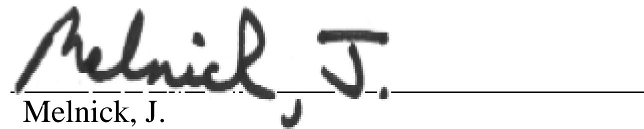


Worswick, P.J.

We concur:



Johanson, J.P.T.



Melnick, J.

DAVIS WRIGHT TREMAINE LLP

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