NO. 93646-3

SUPREME COURT OF THE STATE OF WASHINGTON

RHONDA L. DUNCAN, d/b/a THE COMPASSIONATE KITCHEN,

Petitioner,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Respondent.

ANSWER TO PETITION FOR DISCRETIONARY REVIEW

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I. INTRODUCTION

Prescription drugs are exempt from retail sales tax pursuant to RCW 82.08.0281. Medical marijuana is not a prescription drug. The Court of Appeals correctly rejected the application of the prescription drug sales tax exemption to medical marijuana sales that took place in 2009. The Court correctly concluded that the medical authorizations, which indicated only that a patient may benefit from using marijuana, did not meet the statutory definition of "prescription."

In seeking this Court's review, Rhonda Duncan, d/b/a The Compassionate Kitchen (Duncan), fails to address the considerations governing acceptance of review in RAP 13.4(b)(1)-(4). Instead, Duncan argues the Court of Appeals engaged in an erroneous statutory interpretation of the prescription exemption statute, and that the Court's analysis amounts to a "general issue of public interest." Pet. at 4. Not only has Duncan failed to show that any of the RAP 13.4(b) criteria warrant this Court's review of the Court of Appeals' well-reasoned decision, the Legislature has amended the medical marijuana statutes in the intervening years and created an entirely different tax scheme for medical marijuana sales. The Court should deny discretionary review.

II. COUNTERSTATEMENT OF THE ISSUE

Did the Court of Appeals correctly conclude that Duncan's 2009 sales of medical marijuana, a drug that could not legally be prescribed under state or federal law, were not sales of prescription drugs exempt from sales tax under RCW 82.08.0281?

III. COUNTERSTATEMENT OF THE CASE

A. Medical Marijuana In Washington.

In 1998, Washington voters adopted Initiative 692, Laws of 1999, ch. 2, which provided an affirmative defense for qualifying medical marijuana users to what would otherwise be criminal offenses for medical marijuana production, possession, and use. Former RCW 69.51A.040(2)-(3) (2010). To qualify for the affirmative defense, the individual had to be a Washington resident diagnosed with a terminal or debilitating medical condition by a Washington licensed healthcare professional. *Id.* The healthcare professional would need to have advised the patient of the benefits and risks of the medical use of marijuana, and provided the patient with an authorization to possess marijuana. The authorization, also known as "valid documentation," would have indicated that "in the opinion of the healthcare professional, the patient could benefit from the medical use of marijuana." Former RCW 69.51A.010(7) (2010). If all of these conditions were satisfied, the qualifying patient could possess no

more than a 60-day supply of marijuana, and assert an affirmative defense against a criminal prosecution for possession of marijuana. Former RCW 69.51A.040(2)-(3)(b) (2007). These provisions were codified as the Washington State Medical Use of Cannabis Act (MUCA), RCW 69.51A.

Although this case is governed by the law at it existed in 2009, when Duncan's tax liability accrued, the law has continued to evolve. The Legislature amended the MUCA in 2011 to create a comprehensive regulatory scheme under which all patients, physicians, producers, processors, and dispensers could be securely and confidentially registered in a database maintained by the Washington Department of Health. Laws of 2011, ch. 181, § 901 (later vetoed). But Governor Gregoire vetoed 36 of the bill's 58 sections, including those creating a state registration system. *See id.* at 1374-76 (Governor's veto message). In addition to the registration system, the bill authorized collective gardens and clarified that local jurisdictions retain their zoning power over medical marijuana activities. Laws of 2011, ch. 181, § 1102 (codified at RCW 69.51A.140).

In 2015, the Legislature accomplished what the Governor's veto excised from the 2011 act, creating a comprehensive regulatory scheme for the medical use of marijuana. Laws of 2015, ch. 70. It created a medical marijuana authorization database and recognition card. *See id.*, §§ 17, 19. Retail stores offering sales of medical marijuana will now be

licensed and regulated. *See id.*, § 10. For the first time, the authorization from the healthcare professional will include the "amount of marijuana recommended for the qualifying patient." *See id.*, § 18. Notably for this case, the Legislature made clear in 2015 that authorizations for the use of medical marijuana are not prescriptions. *See id.*, § 17 (amending RCW 69.51A.010(7) and adding a new section (c) that provides: "An authorization is not a prescription as defined in RCW 69.50.101."); *see also* Laws of 2015, 2d Spec. Sess., ch. 4, § 101(b) (intent section of related legislation emphasizing that it is "imperative to distinguish that the authorization for medical use of marijuana is different from a valid prescription provided by a doctor to a patient"). This new regulatory scheme went into effect on July 1, 2016. *Id.*

B. Duncan's Business & Tax Refund Claim.

In 2008, Rhonda Duncan began selling marijuana for medical use. Administrative Record (AR) at 71, 77. When Duncan failed to pay state taxes, the Department began proceedings to collect delinquent taxes. AR at 71. She closed the business. *Id.* In 2009, she began selling marijuana under a different tax reporting account and operating with the business name "The Compassionate Kitchen." AR at 77, 78, 88. She did not collect sales tax from customers on sales of medical marijuana in 2009. AR at 80,

86. Instead, she paid the sales tax herself "on all 2009 transactions involving medical marijuana." AR at 42.

In September 2010, Duncan requested guidance from the Department on how she should collect and report taxes on the sales of medical marijuana. AR at 88. The Department issued a letter ruling stating that "sales of medical marijuana are considered retail sales. As such, the gross income earned is subject to the retailing business and occupation (B&O) tax. The gross amount charged to the customer is also subject to the retail sales tax." AR at 90. The Department further ruled that "sales of medical marijuana are not eligible for the prescription drug sales tax exemption." *Id.*

In 2010, the Department also sent a letter to approximately 90 medical marijuana businesses and interested organizations and associations, informing them that sales tax was due on all sales of medical marijuana, and that such sales did not qualify for the exemption as a prescription under RCW 82.08.0281. AR at 95-96. The Department also posted the information on its website and issued a Special Notice entitled, "Sales of Medical Cannabis Remain Subject To Sales Tax," apprising the public that sales of medical marijuana were subject to tax. AR at 93, 98.

In 2011, federal authorities raided Duncan's business, which she then closed. AR at 78. She subsequently submitted an amended return for

the January-December 2009 tax period and requested a refund of sales taxes she had remitted for that period. AR at 100-02. The Department denied the refund request, and she appealed that decision to the Department's appeals division, which issued a determination upholding the denial of the refund. AR at 104-09. Duncan timely appealed to the Board of Tax Appeals. AR at 202.

At the Board, the sole issue Duncan presented was whether, "pursuant to RCW 82.08.0281, the retail sale or distribution of medicinal marijuana is tax exempt." AR at 164. The Board granted summary judgment to the Department, rejecting Duncan's claim that sales of medicinal marijuana qualified for the sales tax exemption under RCW 82.08.0281. AR at 31-39. The Board concluded: Because the exemption in RCW 82.08.0281(1) applies to "sales of drugs . . . dispensed . . . pursuant to a prescription," the Board determines as a matter of law that the exemption cannot apply to the Taxpayer's sales of medical marijuana and that her refund request must therefore be denied." AR at 37.

C. The Superior Court And Court Of Appeals Decisions.

On judicial review, the Spokane County Superior Court reversed the Board's order, holding that the Board erroneously interpreted or applied the law. CP at 91-92. The court interpreted RCW 82.08.0281(1) as

exempting from retail sales tax medical marijuana sales made pursuant to RCW 69.51A. *Id.*

The Department appealed. The Court of Appeals issued an unpublished decision reversing the superior court and affirming the Board of Tax Appeals. *See* Appendix 1. The Court of Appeals concluded that the statutory exemption for the sales of drugs for human use dispensed to patients pursuant to a prescription in RCW 82.08.0281(1) and (4)(a) did not apply to the sales of marijuana for medical use.

The Court reviewed the version of the prescription drug exemption under RCW 82.08.0281 in effect in 2009, which stated:

> (1) The tax levied by RCW 82.08.020 shall not apply to sales of drugs for human use dispensed or to be dispensed to patients, pursuant to a prescription.
> . . .
> (4) The definitions in this subsection apply throughout this section.
> (a) "Prescription" means an order, formula, or recipe issued in any form of oral, written, electronic, or other means of transmission by a duly licensed practitioner authorized by the laws of this state to prescribe.

See Appendix 2.

The Court rejected Duncan's contention that medical marijuana sales qualified as prescriptions under the statute. Duncan argued that the sales met the three conditions: (1) the healthcare authorization was an "order, formula, or recipe," (2) "given by a duly licensed practitioner," (3)

who was "authorized under the laws of the state to prescribe." Duncan's Response Br. at 6. The Court reached the same conclusions as the Board: as a matter of law, construing the statute's plain meaning and related statutes and provisions of the same act in which the provision is found, the healthcare authorization is not a prescription, medical marijuana is not prescribed, and the sale of medical marijuana is not exempt from retail sales tax as a prescription drug sale under RCW 82.08.0281.

IV. REASONS WHY THIS COURT SHOULD DENY REVIEW

Duncan's petition fails to address the grounds under RAP 13.4(b)(1)-(4) that guide the Court in determining whether to grant discretionary review. Therefore, her petition should be denied. But, even if the Court were to consider her petition in light of RAP 13.4(b), her petition does not meet the required criteria and should be denied.

A. The Unpublished Court Of Appeals Decision Does Not Conflict With Either Supreme Court Or Court Of Appeals Decisions.

The first two considerations outlined in RAP 13.4(b) apply if the petition presents a conflict with a Supreme Court or Court of Appeals decision. Neither of these criteria is met. The appellate courts have not addressed whether in the context of the sales tax exemption for prescription drugs, RCW 82.08.0281, sales of medical marijuana qualify

for the exemption.[1] In interpreting the statute, the Court of Appeals applied the rules of statutory construction consistent with established precedent. The case does not present a conflict with the Supreme Court decisions or among the divisions of the Court of Appeals.

B. Duncan's Petition Fails To Present A Significant Question Of Law Under The State Or Federal Constitution.

This case does not present either a federal or state constitutional issue under RAP 13.4(b)(3). Duncan's petition challenges only the Court's application and construction of the prescription exemption statute. The Court of Appeals properly and correctly applied established precedent and the rules of statutory construction. Duncan thus fails to meet this third consideration.

C. Duncan's Petition Fails To Demonstrate An Issue Of Substantial Public Interest That Should Be Determined By The Supreme Court.

Duncan urges this Court to accept discretionary review "to clarify the rules governing the determination of when a statue [sic] is ambiguous and when a non-ambiguous statute's definitional terms may be interpreted

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[1] A petition for direct review involving the identical issue of whether sales of medical marijuana qualify for the sales tax exemption under RCW 82.08.0281 is pending before this Court in three consolidated cases: Rainier Xpress Inc. v. Dep't of Revenue; Triple C. Collective LLC v. Dep' of Revenue, and Green Collar Club v. Dep't of Revenue. These cases have been consolidated on appeal under Supreme Court docket number 92992-1. The briefs have yet to be filed in this matter. The superior court denied the refund claims in these three cases, concluding consistently with the Board of Tax Appeals and the Court of Appeals in this case, that sales of medical marijuana do not qualify for the sales tax exemption for prescription drugs. *See* Rainier Xpress Inc. v. Dep't of Revenue, Notice of Appeal, Ex.1.

by resort to extraneous sources." Pet. at 18. The Court of Appeals correctly applied the general rules of statutory construction in determining whether sales of medical marijuana qualified as a "prescription" under RCW 82.08.0281(4)(a). This case does not present an issue of substantial public interest that should be interpreted by this Court.

Duncan sought a sales tax exemption from collecting sales tax for the sales of marijuana for medical use. Taxation is the general rule, and exemptions are the exception. *Budget Rent-A-Car v. Dep't of Revenue*, 81 Wn.2d 171, 174, 500 P.2d 764 (1972) ("Exemptions to a tax law must be narrowly construed"). The Court of Appeals appropriately applied this Court's established precedent in placing the burden of showing the qualification for the benefit of a tax exemption with the taxpayer. Opinion at 6 (citing *Group Health Co-op. of Puget Sound, Inc. v. Washington State Tax Comm'n*, 72 Wn.2d 422, 429, 433 P.2d 201 (1967)).

The Court of Appeals also applied this Court's established precedent in construing the plain meaning of the statute: "Under the 'plain meaning' rule, examination of the statute in which the provision at issue is found, as well as related statutes or other provisions of the same act in which the provision is found, is appropriate as part of the determination whether a plain meaning can be ascertained." Opinion at 5-6 (citing *City of Seattle v. Allison,* 148 Wn.2d 75, 81, 59 P.3d 85 (2002) (quoting

Department of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002))).

Relying on this Court's precedent as its starting point, the Court of Appeals began by examining the statutory language for the sales tax exemption to those drugs "dispensed to patients pursuant to a prescription." RCW 82.08.0281(1). "Prescription" under the statute means "an order, formula, or recipe issued in any form of oral, written, electronic, or other means of transmission by a duly licensed practitioner authorized by the laws of this state to prescribe." RCW 82.08.0281(4)(a).

Applying this statutory definition, the Court deemed the statute plain and unambiguous that "practitioners authorized by the laws of this state to prescribe" did not include authorizations to use marijuana for medical use. The Court concluded that "no duly licensed practitioner in Washington can legally prescribe marijuana," following this Court's precedent that marijuana cannot be legally prescribed or filled by a pharmacist. Opinion at 10 (discussing *Seeley v. State,* 132 Wn.2d 776, 783, 940 P.2d 604 (1997) ("Marijuana cannot be legally prescribed, nor can a prescription for marijuana be filled by a pharmacist in Washington. . . .")). Further, Duncan had conceded that medical marijuana authorizations were not prescriptions within the meaning of the controlled substances statutes. Opinion at 4, 7; Duncan Response Br. at 1.

The Court of Appeals did not, however, end its analysis there. It further opined that even if it were to consider the language "by a duly licensed practitioner authorized by the laws of this state to prescribe" as ambiguous, the principles of statutory interpretation would support the Department and Board of Tax Appeal's construction. Opinion at 11. The Court turned to legislative history to confirm that "prescription" would have to be a drug a licensed practitioner would be authorized to prescribe. Opinion at 12-13. Because marijuana cannot be prescribed pursuant to federal or state law, there is no exemption from sales tax for the sale of medical marijuana. The Court of Appeals analysis did not depart from established precedent in construing the statute.

The Court of Appeals next addressed Duncan's argument that the authorization qualified as a prescription because it was an "an order, formula or recipe." Opinion at 13. As these terms were not defined in the statute, the Court of Appeals properly construed the words in the context of medical usage. As the Court pointed out, Duncan cited no authority that a "prescription in common parlance need not contain specifics." Opinion at 14. The Court referred to medical dictionaries to define the terms "an order, formula, or recipe." Opinion at 14-15. The Court relied on this Court's precedent when it decided to apply the technical meaning of the terms. "Where words carry special significance in a particular field, the

courts should resort to a technical definition. *See Tingey v. Haisch,* 159 Wn.2d 652, 658, 152 P.3d 1020 (2007)." Opinion at 15. The Court concluded that the medical marijuana authorization under these definitions did not constitute an "order, formula, or recipe." As the Court held:

> Medical marijuana authorizations do not require or direct anyone to dispense marijuana. They do not specify or mandate treatment or services. They do not prescribe ingredients, proportions, or directions for compounding.

Opinion at 16.

Although Duncan takes exception to the Court's construction of the statute, she fails to address to this Court how the Court of Appeals' method of interpretation, consistent with established precedent, involves an issue of substantial importance.

This case also fails to raise an issue of substantial public interest because the Legislature has amended the law, effective July 1, 2016, to exempt sales of marijuana for medical use from the sales tax.[2] Laws of 2015, 2d Spec. Sess., ch.4, § 207 (adding a new section to RCW 82.08.). In addition to the changed circumstances, this subsequent legislation also supports the conclusion that before the change in the law, sales of medical marijuana were subject to sales tax. Duncan's petition fails to demonstrate

[2] Although the Legislature is allowing medical marijuana to be sold exempt from the retail sales tax starting in July 2016, the Legislature allowed no exemption for retail sales of medical marijuana from the marijuana excise tax. Effective July 1, 2015, that tax is 37% of the selling price. Laws of 2015, 2d Spec. Sess., ch. 4, § 205(1)(a), §1605. The marijuana excise tax was not in effect during the 2009 tax year at issue here.

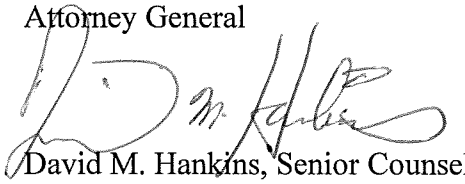
that the issue of statutory construction is of a substantial public interest that must be decided by this Court.

V. CONCLUSION

Duncan does not identify or explain why any of this Court's criteria for discretionary review are met, because none are. This case involved straightforward statutory interpretation, and the Court of Appeals issued a thorough, logical opinion that is entirely consistent with this Court's precedent. This Court should deny review.

RESPECTFULLY SUBMITTED this 17th day of October, 2016.

ROBERT W. FERGUSON
Attorney General



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

DATED this 17th day of October, 2016, at Tumwater, WA.

Julie Johnson, Legal Assistant

APPENDIX 1

FILED
AUGUST 18, 2016
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

RHONDA L. DUNCAN d/b/a THE COMPASSIONATE KITCHEN, Respondent, v. STATE OF WASHINGTON DEPARTMENT OF REVENUE, Appellant.	)	No. 33245-4-III UNPUBLISHED OPINION

SIDDOWAY, J. — At issue in this appeal is whether the retail sale in 2009 of medical marijuana was exempt from retail sales tax as a prescribed drug. We agree with the Department of Revenue and the Board of Tax Appeals that it was not. We reverse the superior court's contrary decision, thereby reinstating the Department's denial of Rhonda Duncan's request for a refund of retail sales tax she paid for that period.

FACTS AND PROCEDURAL BACKGROUND

In 2008, Rhonda Duncan opened a medical marijuana dispensary doing business as The Compassionate Kitchen. Believing that her method of operation was not subject to retail sales taxation, she did not collect sales tax on transactions with customers.[1] But

[1] In seeking a tax refund, Ms. Duncan asserted she provided consultation services on the medical use of cannabis in exchange for donations. She claimed to have provided medical cannabis to her customers free of charge. She abandoned that argument in

in light of the Department's contrary view, she reported retail sales revenue in 2009 and paid the required tax.

In 2011, Ms. Duncan filed an amended return for the January-December 2009 tax period and requested a refund of the $19,312.38 she had paid. The Department denied the refund request, and Ms. Duncan appealed to the Department's appeal division. It affirmed denial of the refund.

Ms. Duncan appealed to the Board of Tax Appeals. The only issue before the Board was whether pursuant to former RCW 82.08.0281 (2004)[2]—an exemption from retail sales tax for drugs dispensed to patients pursuant to a prescription—her sale of medical marijuana in 2009 had been tax exempt. In response to a motion for summary judgment, the Board ruled that the exemption provided by former RCW 82.08.0281 did not apply to sales of medical marijuana and affirmed the Department's denial of the refund request.

Ms. Duncan sought judicial review of the Board's decision by the Spokane County Superior Court. It concluded the sales were exempt from retail sales tax and reversed the Board. The Department appeals.

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proceedings before the Board.

[2] An amendment in 2014 substituted language that the retail sales tax "does not apply" to such drug sales for prior language that it "shall not apply." LAWS OF 2014, ch. 140, § 19.

ANALYSIS

Statutory background

In 1971, the Washington Legislature enacted the Uniform Controlled Substances Act, chapter 69.50 RCW (UCSA), which made it a crime to manufacture, deliver, or possess marijuana. RCW 69.50.401-.445. The same activities are criminalized under federal law. 21 U.S.C. ch. 13; *Cannabis Action Coal. v. City of Kent*, 183 Wn.2d 219, 222, 351 P.3d 151 (2015).

In the 1998 general election, Washington voters approved Initiative 692 (I-692), which became effective December 3, 1998, and was later codified at chapter 69.51A RCW. Initiative 692, LAWS OF 1999, ch. 2. "By passing [I-692], the people of Washington intended that '[q]ualifying patients with terminal or debilitating illnesses who, in the judgment of their physicians, would benefit from the medical use of marijuana, shall not be found guilty of a crime under state law for their possession and limited use of marijuana.'" *State v. Fry*, 168 Wn.2d 1, 6-7, 228 P.3d 1 (2010) (second alteration in original) (quoting former RCW 69.51A.005 (1999)). RCW 69.51.040(1) created an affirmative defense to the crimes of providing or possessing marijuana used by qualifying patients.

In order to assert the affirmative defense, a qualifying patient or designated marijuana provider was required to present the patient's "valid documentation" to any law enforcement official questioning the asserted medical use of marijuana. Former

RCW 69.51A.040(4)(c). The definition of "valid documentation" has been amended since 1998; most recently, the legislature has replaced the term with "authorization." *See* LAWS OF 2015, ch. 70, § 17 (substituting "authorization" for "valid documentation") *codified as* RCW 69.51A.010(7).

Notwithstanding the amendments, the substance of the required documentation has remained the same. Relevant here, "valid documentation" was defined in 2009 as:

> A statement signed by a qualifying patient's physician . . . which states that, in the physician's professional opinion, the patient may benefit from the medical use of marijuana.

Former RCW 69.51A.010(5)(a) (2007).

Based on the law's requirement for a written physician authorization, Ms. Duncan argues that her sales of medical marijuana in 2009 were exempt from retail sales tax under RCW 82.08.0281(1), which exempts sales of drugs for human use dispensed "pursuant to a prescription." She concedes that medical marijuana authorizations are not "prescriptions" under the UCSA. *See* RCW 69.50.308 (identifying the requisites to dispensing a controlled substance). But she contends that the retail sales tax exemption provided by RCW 82.08.0281 uses a definition of "prescription" that is broader than that used by laws dealing with controlled substances—broad enough to encompass her customers' medical marijuana authorizations.

Standard of review and construction of tax statutes

The Administrative Procedure Act, chapter 34.05 RCW (APA) authorizes courts to grant relief from an agency order in an adjudicative proceeding in nine enumerated instances; here, Ms. Duncan obtained superior court review on the basis that the Board had "erroneously interpreted or applied the law." RCW 34.05.570(3)(d); Clerk's Papers (CP) at 92. Challenges to an agency's interpretation or application of the law are reviewed de novo. *Dep't of Revenue v. Bi-Mor, Inc.*, 171 Wn. App. 197, 202, 286 P.3d 417 (2012).

"In reviewing a superior court's final order on review of a Board decision, an appellate court applies the standards of the [APA] directly to the record before the agency, sitting in the same position as the superior court." *Honesty in Envtl. Analysis & Legis. v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd.*, 96 Wn. App. 522, 526, 979 P.2d 864 (1999). We do not give deference to the superior court's ruling. *Verizon Nw., Inc. v. Emp't Sec. Dep't*, 164 Wn.2d 909, 915, 194 P.3d 255 (2008).

In this case, the Board's task and our own is to construe the breadth of RCW 82.08.0281, including its definition of the term "prescription." "The court's fundamental objective in construing a statute is to ascertain and carry out the legislature's intent." *Arborwood Idaho, LLC v. City of Kennewick*, 151 Wn.2d 359, 367, 89 P.3d 217 (2004). "'Under the "plain meaning" rule, examination of the statute in which the provision at issue is found, as well as related statutes or other provisions of the same act in which the

provision is found, is appropriate as part of the determination whether a plain meaning can be ascertained.'" *City of Seattle v. Allison*, 148 Wn.2d 75, 81, 59 P.3d 85 (2002) (quoting *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 10, 43 P.3d 4 (2002)). Where the meaning of a statute is plain and unambiguous on its face, the court must give effect to that plain meaning. *Overlake Hosp. Ass'n v. Dep't of Health*, 170 Wn.2d 43, 52, 239 P.3d 1095 (2010). Only if a statute is ambiguous will we give substantial weight to the agency's interpretation of the statute it administers—here, the Department's interpretation. *Bi-Mor*, 171 Wn. App. at 202.

Because the statute we construe is a tax exemption, the burden of showing qualification for the tax benefit rests with the taxpayer. *Group Health Coop. of Puget Sound, Inc. v. Wash. State Tax Comm'n*, 72 Wn.2d 422, 429, 433 P.2d 201 (1967). Statutes providing for either exemptions or deductions "are, in case of doubt or ambiguity, to be construed strictly, though fairly and in keeping with the ordinary meaning of their language, against the taxpayer." *Id.* (citing *Crown Zellerbach Corp. v. State*, 45 Wn.2d 749, 278 P.2d 305 (1954); *Helvering v. Ohio Leather Co.*, 317 U.S. 102, 63 S. Ct. 103, 87 L. Ed. 113 (1942)).

Tax provisions at issue

Under RCW 82.08.020, a retail sales tax is levied on each retail sale of tangible personal property unless a specific statute exempts the transaction from the tax. RCW

82.08.020; RCW 82.04.050. In 2009, the statutory exemption for the sale of prescribed drugs provided:

> The tax levied by RCW 82.08.020 shall not apply to sales of drugs for human use dispensed or to be dispensed to patients, pursuant to a prescription.

Former RCW 82.08.0281(1) (2004). "Prescription" is a defined term for purposes of the exemption:

> "Prescription" means an order, formula, or recipe issued in any form of oral, written, electronic, or other means of transmission by a duly licensed practitioner authorized by the laws of this state to prescribe.

RCW 82.08.0281(4)(a).

As previously noted, Ms. Duncan concedes that a medical marijuana authorization is not a "prescription" within the meaning of controlled substance statutes. As pointed out by the Department, this is no accident. A physician would violate UCSA and commit a crime by "prescribing" marijuana as the term is used in UCSA. Both federal and state statutes list marijuana as a schedule I controlled substance. Former RCW 69.50.204(c)(14) (2008); 21 C.F.R. § 1308.11(d)(19). And

> [c]ontrolled substances listed in schedule I under federal law may not be prescribed or dispensed anywhere in the United States unless a specific registration to do so is obtained to use the substance for research purposes. *See* 21 U.S.C. §§ 822-23, 872 (1981). *Marijuana cannot be legally prescribed, nor can a prescription for marijuana be filled by a pharmacist in Washington unless a federal registration is granted.*

Seeley v. State, 132 Wn.2d 776, 783, 940 P.2d 604 (1997) (emphasis added); RCW 69.50.308 (2001) (identifying the only manner in which controlled substances may be dispensed).

We agree with Ms. Duncan that we construe "prescription" for retail sales tax purposes based on its definition by RCW 82.09.0281(4)(a), however, not by how it is defined elsewhere. "It is an axiom of statutory interpretation that where a term is defined we will use that definition." *United States v. Hoffman*, 154 Wn.2d 730, 741, 116 P.3d 999 (2005).

The Department argues there are two grounds on which we should conclude that a medical marijuana authorization is not a "prescription" as defined by RCW 82.08.0281(4)(a). One—the argument adopted by the Board—is that a physician's medical marijuana authorization is not "issued . . . by a duly licensed practitioner authorized by the laws of this state to prescribe." The other is that a medical marijuana authorization is not an "order, formula, or recipe." We turn first to the reasoning that persuaded the Board.

Practitioners "authorized by [law] to prescribe"

The Department persuaded the Board that a medical marijuana authorization is not a "prescription" in light of the last clause of the statutory definition: that it be issued "by a duly licensed practitioner *authorized by the laws of this state to prescribe*." RCW 82.08.0281(4)(a) (emphasis added). Ms. Duncan argues that plainly read, the definition

merely provides that as long as a practitioner is authorized by Washington law to prescribe *something*, then the exemption applies to any order he or she issues—legally or illegally—for a drug to be dispensed to a patient. "Everyone knows that Al Capone, for example, was nailed for income-tax evasion, not for the bootlegging, loan-sharking, extortion and prostitution that generated the income." *United States v. Ytem*, 255 F.3d 394, 397 (7th Cir. 2001).

The Department's argument persuaded the Board, whose final decision characterized Ms. Duncan's reading as "either circular or vague." CP at 27.

> First, if the Taxpayer is contending that the definition requires only the authority to prescribe the order itself, the Taxpayer is ignoring the ordinary meaning of the verb "to prescribe": "to direct, designate, or order the use of as a remedy <the doctor *prescribed* quinine>." Practitioners do not prescribe a prescription; they prescribe medications. Second, if the Taxpayer is arguing that the practitioner need only have the authority under state law to prescribe *something*, then, as the Department observes, the Taxpayer is "interpret[ing] this last phrase in a vacuum" and "employ[ing] a simplistic reading" of the statute.

And:

> The Board concludes that, by its plain meaning, the statute defines a "prescription" as an order issued by a practitioner who is authorized to prescribe the drugs or devices referenced in that order.

Id. at 27-28 (alterations in original) (footnotes omitted).

We do not entirely agree. The verb "to prescribe" can be both transitive and intransitive. A transitive verb is one that must take a direct object, while an intransitive verb does not. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2428, 1186 (1993).

The transitive use of "to prescribe" is the one that the Board characterizes as its "ordinary meaning;" it means "**3 :** to direct, designate, or order the use of as a remedy <the doctor *prescribed* quinine>." *Id.* at 1792. The object of the transitive verb "to prescribe" is the substance being prescribed.

Yet "to prescribe" can also mean "**2 :** to lay down a rule: give directions: DICTATE, DIRECT **3 a :** to write or give medical prescriptions <~ for a patient> **b :** to give advice in the manner of a doctor giving a medical prescription." *Id.* This form does not take a direct object. So we cannot reject Ms. Duncan's argument on the basis that use of the verb "to prescribe" always implicates the substance being prescribed.

We agree with the Board, however, that it is not reasonable to read the prescribed drug exemption in a vacuum. The legislature has exempted from retail sales taxation only those drugs that are "dispensed to patients," "by a duly licensed practitioner authorized . . . to prescribe." RCW 82.08.0281(1), (4)(a). No duly licensed practitioner in Washington can legally prescribe marijuana. We may look to related statutes when determining a statute's plain meaning, *City of Seattle*, 148 Wn.2d at 81 (citing *Campbell & Gwinn, LLC*, 146 Wn.2d at 10), and we must avoid constructions that yield unlikely, absurd or strained consequences. *Kilian v. Atkinson*, 147 Wn.2d 16, 21, 50 P.3d 638 (2002). In carrying out our fundamental objective of ascertaining and carrying out the legislature's purpose, we cannot overlook the unlikelihood—indeed, the absurdity—that the legislature required a prescription to be issued by a "duly-licensed practitioner

authorized by the laws of this state to prescribe" but didn't care whether the prescription was illegal.

And the fact that criminals are liable for taxes on ill-gotten gains does not undercut our conclusion. It is not unlikely or absurd to infer a legislative intent to tax revenue or income from a criminal activity. It *is* unlikely and absurd to infer a legislative intent to bestow a tax benefit on such activity.

The Board concluded that the last clause of the definition plainly means that a "prescription" is an order issued by a practitioner authorized to prescribe the drug he or she prescribes. We are inclined to agree, but even if we found ambiguity, several principles would then support the Department's construction.[3] As earlier discussed, tax

[3] Ms. Duncan invokes the nearest-reasonable-referent canon of construction that, while not applied in plain meaning analysis, can be applied where a statute is ambiguous. *Overlake*, 170 Wn.2d at 52. It provides that "'[w]hen the syntax involves something other than a parallel series of nouns or verbs, a prepositive or postpositive modifier normally applies only to the nearest reasonable referent.'" *Goldberg v. Companion Life Ins. Co.*, 910 F. Supp. 2d 1350, 1353 (M.D. Fla. 2012) (quoting ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 152-53 (2012)). Ms. Duncan argues the canon requires that we read the phrase "authorized by the laws of this state to prescribe" as modifying only "licensed practitioner," not the substance that the practitioner prescribes. As pointed out by the Board, however, her reliance on the canon "is unnecessary, since the Department also reads the phrase 'authorized . . . to prescribe' as modifying the word 'practitioner.'" CP at 27 (alteration in original).

exemptions, if ambiguous, are construed strictly, though fairly, against the taxpayer. *Group Health*, 72 Wn.2d at 429. Where a tax statute is ambiguous, we give substantial weight to the Department's interpretation. *Bi-Mor*, 171 Wn. App. at 202.

Finally, legislative history predating the tax period at issue supports the Department's interpretation of the statute's plain meaning. Before 2004, RCW 82.08.0281(4)(a) provided that a "prescription" was issued "by a duly licensed practitioner authorized by the laws of this state." By amendment in 2004, the legislature added two concluding words, "authorized by the laws of this state *to prescribe*." Former RCW 82.08.0281(4)(a) (LAWS OF 2004, ch. 153, § 108) (emphasis added). According to the Senate Bill Report, which described the legislation as intended to correct "errors, omissions, and inconsistencies," "[a] prescription for items or drugs that are exempt must be prescribed by a person whose license authorizes him or her to prescribe the item or drugs." S.B. REP. ON S.B. 6515, at 1, 3, 58th Leg., Reg. Sess. (Wash. 2004).

Bill reports may be relevant in the interpretation of a statute being enacted. *Dep't of Labor & Indus. v. Landon*, 117 Wn.2d 122, 127, 814 P.2d 626 (1991). For periods after the effective date of the change, the 2004 amendment and bill report support the Department's interpretation of "prescription" as requiring issuance by a practitioner

authorized to prescribe the drug prescribed.[4]

For the reasons stated, the Board properly concluded that sales of medical marijuana were not exempt from retail sales tax in 2009.

Order, formula, or recipe

The Department also argues that a medical marijuana authorization is not an "order, formula, or recipe" as required by the retail sales tax provision's definition of "prescription," since an authorization "merely indicates that 'in the health care professional's professional opinion, the patient may benefit from the medical use of marijuana.'" Br. of Appellant at 22 (quoting former RCW 69.51A.010(5). It "does not indicate the type of product, the quantity, or dosage, all elements of a prescription." *Id.* at 23.

Ms. Duncan responds that a practitioner's order of a drug—a prescription in "the common parlance," as she describes it—"can be terse affairs," with "[DRUG] PRN" or

[4] The Department also relies on subsequent legislation explicitly excluding marijuana from the definition of drugs exempted from retail sales tax, which it argues was an intended clarification, LAWS OF 2014, ch. 140, § 19; and on 2015 amendments to chapters 69.51A and 82.02 RCW that clarified that a medical marijuana "authorization is not a prescription as defined in RCW 69.50.101," and explicitly exempted qualifying sales of medical marijuana from retail sales tax. RCW 69.51A.010(1)(c) (amended by LAWS OF 2015, ch. 70, § 17(7)(c), effective July 24, 2015); RCW 82.08.9998 (amended by LAWS OF 2015, 2d Spec. Sess., ch. 4, § 207, effective July 1, 2015). Ms. Duncan responds that these amendments "point out [her] argument quite nicely: without the amending language," she argues, "a grammatical fair-reading of the statute as it existed in 2009-10 excludes medical marijuana from taxation." Br. of Resp't at 11.

"as needed" sufficing. Br. of Resp't at 5, 7. She cites no authority in asserting that a prescription in common parlance need not contain specifics. As the Department points out, federal law requires that medical orders for dispensing controlled substances be specific:

> All prescriptions for controlled substances shall be dated as of, and signed on, the day when issued and shall bear the full name and address of the patient, *the drug name, strength, dosage form, quantity prescribed, directions for use*, and the name, address and registration number of the practitioner.

Reply Br. at 4-5 (emphasis added) (citing 21 C.F.R. § 1306.05(a) (2015)).

And terse or not, there is still a difference between what Ms. Duncan characterizes as an order or prescription ("marijuana as needed") and a medical marijuana authorization ("patient may benefit from the medical use of marijuana"). The former is an instruction or directive to take marijuana as needed; the latter is a declaration of the practitioner's professional opinion.

The distinction is borne out by relevant dictionaries. The ordinary meaning of "order" is "to give orders to : COMMAND . . . : require or direct (something) to be done." WEBSTER'S, *supra*, at 1588. As a medical term, "order" is defined by *Taber's Cyclopedic Medical Dictionary* as meaning:

> Instructions from a health care provider specifying patient treatment and care. A directive mandating the delivery of specific patient care services.

TABER'S CYCLOPEDIC MEDICAL DICTIONARY 1678 (22d ed. 2013).

We conclude that the technical meanings of "order," "formula," and "recipe" are the appropriate meanings to apply. Where words carry special significance in a particular field, the court should resort to a technical definition. *See Tingey v. Haisch*, 159 Wn.2d 652, 658, 152 P.3d 1020 (2007). Because the exemption from retail sales tax is for "drugs for human use dispensed or to be dispensed to patients, pursuant to a prescription" issued by a "duly licensed practitioner," we are dealing with a particular field: the practice of medicine. RCW 82.08.0281(1); (4)(a).

Both *Taber's* and *Stedman's*[5] define "formula." *Taber's* defines it as "[a] rule prescribing ingredients and proportions for the preparation of a compound," and *Stedman's* defines it as "[a] recipe or prescription containing directions for the compounding of a medicinal preparation." TABER'S, *supra*, at 960; STEDMAN'S, *supra*, at 762.

Both medical dictionaries define "recipe." *Taber's* defines it, "Take, indicated by the sign ℞. **2.** A prescription or formula for a medicine. SEE: *prescription*." TABER'S, *supra*, at 1995. *Stedman's* defines it, "The superscription of a prescription, usually indicated by the sign ℞. **2.** A prescription or formula." STEDMAN'S, *supra*, at 1654.[6]

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[5] STEDMAN'S MEDICAL DICTIONARY (28th ed. 2005).

[6] "Prescription," which both *Taber's* and *Stedman's* use in defining "recipe," is itself defined by both dictionaries. *Taber's* defines it as:

> A written direction or order for dispensing and administering drugs. It is signed by a physician, dentist, or other practitioner licensed by law to

"Valid documentation" under former RCW 69.51A.010(5)(a) is not a command, instruction, or directive. Medical marijuana authorizations do not require or direct anyone to dispense marijuana. They do not specify or mandate treatment or services. They do not prescribe ingredients, proportions, or directions for compounding. There is no ℞ sign on the medical marijuana authorization forms in use in 2009. *See* Administrative Record at 111, 113. "Valid documentation"—stating only that a patient may benefit from the use of marijuana—is not an "order, formula, or recipe."

> prescribe such a drug. Historically, a prescription consists of four main parts:
> 1. *Superscription*, represented by the symbol ℞, which signifies *Recipe*, meaning "take"
> 2. *Inscription*, containing the ingredients
> 3. *Subscription*, directions to the dispenser how to prepare the drugs
> 4. *Signature*, directions to the patient how to take the dosage; the physician's signature, address, and telephone number; the date; and whether the prescription may be refilled. When applicable, the physician's Drug Enforcement Administration number must be included.

TABER'S, *supra*, at 1901.

> A written formula for the preparation and administration of any remedy. **2.** A medicinal preparation compounded according to formulated directions, said to consist of four parts: 1) *superscription*, consisting of the word *recipe*, take, or its sign, ℞; 2) *inscription*, the main part of the p., containing the names and amounts of the drugs ordered; 3) *subscription*, directions for mixing the ingredients and designation of the form (pill, powder, solution, etc.) in which the drug is to be made, usually beginning with the word, *misce*, mix, or its abbreviation, M.; 4) *signature*, directions to the patient regarding the dose and times of taking the remedy, preceded by the word *signa*, designate, or its abbreviation, S. or Sig.

STEDMAN'S, *supra*, at 1556-57.

For this additional reason, Ms. Duncan cannot establish that her retail sales fell within the exemption from taxation provided by RCW 82.08.0281.

The superior court's order is reversed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Siddoway, J.

WE CONCUR:

Korsmo, J.

Pennell, J.

APPENDIX 2

(ii) Control, guide, measure, tune, verify, align, regulate, test, or physically support blood, bone, or tissue; and

(iii) Protect the health and safety of employees or others present during research on, procuring, testing, processing, storing, packaging, distributing, or using blood, bone, or tissue.

(b) "Chemical" means any catalyst, solvent, water, acid, oil, or other additive that physically or chemically interacts with blood, bone, or tissue.

(c) "Materials" means any item of tangible personal property, including, but not limited to, bags, packs, collecting sets, filtering materials, testing reagents, antisera, and refrigerants used or consumed in performing research on, procuring, testing, processing, storing, packaging, distributing, or using blood, bone, or tissue.

(d) "Research" means basic and applied research that has as its objective the design, development, refinement, testing, marketing, or commercialization of a product, service, or process.

(e) The definitions in RCW 82.04.324 apply to this section. [2004 c 82 § 2; 1995 2nd sp.s. c 9 § 4.]

Effective date—1995 2nd sp.s. c 9: See note following RCW 84.36.035.

82.08.02806 Exemptions—Sales of human blood, tissue, organs, bodies, or body parts for medical research and quality control testing. The tax levied by RCW 82.08.020 shall not apply to sales of human blood, tissue, organs, bodies, or body parts for medical research and quality control testing purposes. [1996 c 141 § 1.]

Effective date—1996 c 141: "This act shall take effect July 1, 1996." [1996 c 141 § 3.]

82.08.02807 Exemptions—Sales to organ procurement organization. The tax levied by RCW 82.08.020 shall not apply to the sales of medical supplies, chemicals, or materials to an organ procurement organization exempt under RCW 82.04.326. The definitions of medical supplies, chemicals, and materials in *RCW 82.04.324 apply to this section. This exemption does not apply to the sale of construction materials, office equipment, building equipment, administrative supplies, or vehicles. [2002 c 113 § 2.]

***Reviser's note:** RCW 82.04.324 was amended by 2004 c 82 § 1, deleting the definitions of "medical supplies," "chemicals," and "materials."

Effective date—2002 c 113: See note following RCW 82.04.326.

82.08.0281 Exemptions—Sales of prescription drugs. (1) The tax levied by RCW 82.08.020 shall not apply to sales of drugs for human use dispensed or to be dispensed to patients, pursuant to a prescription.

(2) The tax levied by RCW 82.08.020 shall not apply to sales of drugs or devices used for family planning purposes, including the prevention of conception, for human use dispensed or to be dispensed to patients, pursuant to a prescription.

(3) The tax levied by RCW 82.08.020 shall not apply to sales of drugs and devices used for family planning purposes, including the prevention of conception, for human use supplied by a family planning clinic that is under contract with the department of health to provide family planning services.

(4) The definitions in this subsection apply throughout this section.

(a) "Prescription" means an order, formula, or recipe issued in any form of oral, written, electronic, or other means of transmission by a duly licensed practitioner authorized by the laws of this state to prescribe.

(b) "Drug" means a compound, substance, or preparation, and any component of a compound, substance, or preparation, other than food and food ingredients, dietary supplements, or alcoholic beverages:

(i) Recognized in the official United States pharmacopoeia, official homeopathic pharmacopoeia of the United States, or official national formulary, or any supplement to any of them; or

(ii) Intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease; or

(iii) Intended to affect the structure or any function of the body.

(c) "Over-the-counter drug" means a drug that contains a label that identifies the product as a drug required by 21 C.F.R. Sec. 201.66, as amended or renumbered on January 1, 2003. The label includes:

(i) A "drug facts" panel; or

(ii) A statement of the "active ingredient(s)" with a list of those ingredients contained in the compound, substance, or preparation. [2004 c 153 § 108; 2003 c 168 § 403; 1993 sp.s. c 25 § 308; 1980 c 37 § 46. Formerly RCW 82.08.030(28).]

Retroactive effective date—Effective date—2004 c 153: See note following RCW 82.08.0293.

Effective dates—Part headings not law—2003 c 168: See notes following RCW 82.08.010.

Finding—1993 sp.s. c 25: "The legislature finds that prevention is a significant element in the reduction of health care costs. The legislature further finds that taxing some physician prescriptions and not others is unfair to patients. It is, therefore, the intent of the legislature to remove the taxes from prescriptions issued for family planning purposes." [1993 sp.s. c 25 § 307.]

Severability—Effective dates—Part headings, captions not law—1993 sp.s. c 25: See notes following RCW 82.04.230.

Intent—1980 c 37: See note following RCW 82.04.4281.

82.08.0282 Exemptions—Sales of returnable containers for beverages and foods. The tax levied by RCW 82.08.020 shall not apply to sales of returnable containers for beverages and foods, including but not limited to soft drinks, milk, beer, and mixers. [1980 c 37 § 47. Formerly RCW 82.08.030(29).]

Intent—1980 c 37: See note following RCW 82.04.4281.

82.08.0283 Exemptions—Certain medical items. (1) The tax levied by RCW 82.08.020 shall not apply to sales of:

(a) Prosthetic devices prescribed, fitted, or furnished for an individual by a person licensed under the laws of this state to prescribe, fit, or furnish prosthetic devices, and the components of such prosthetic devices;

(b) Medicines of mineral, animal, and botanical origin prescribed, administered, dispensed, or used in the treatment of an individual by a person licensed under chapter 18.36A RCW; and

(c) Medically prescribed oxygen, including, but not limited to, oxygen concentrator systems, oxygen enricher systems, liquid oxygen systems, and gaseous, bottled oxygen

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