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-Supreme Court No. 98316-0

SUPREME COURT
OF THE STATE OF WASHINGTON

ADVANCED H2O, LLC & TYSON FRESH MEAT, INC.,

Petitioners,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Respondent.

**BRIEF OF *AMICUS CURIAE* THE ASSOCIATION OF
WASHINGTON BUSINESS IN SUPPORT OF PETITION FOR
REVIEW**

Robert A. Battles
WSBA No. 22163
ASSOCIATION OF WASHINGTON BUSINESS
1414 Cherry Street SE
Olympia, WA 98507
Telephone: (360) 943-1600

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I. INTRODUCTION

The Association of Washington Business “AWB” supports the review of the Court of Appeals’ published opinion in this matter. The Court of Appeals failed to follow statutory construction by substituting the clear statutory language with new words that affect the otherwise clear statutory language. Instead of enforcing the statute as passed by the legislature, the Court of Appeals inserted a common a dictionary definition of lease that ignores the clear legislative intent.

In addition, allowing the Court of Appeals decision to stand would result in a taxation system that would tax the item being sold twice. It would tax the entire sale which includes the packaging and again by separately taxing the packaging. This produces an unfair market to both the seller and the buyer. It also would create a system that is inconsistent with the current system, and the court does so without any legislative authority but by judicial legislation.

The Court may accept review of a decision of the Court of Appeals where “the petition involves an issue of substantial public interest that should be determined by the Supreme Court.” RAP 13.4(b)(4). The Court may also grant review when an opinion is in conflict with precedent,

supporting review under RAP 13.4(b)(1)-(2). AWB contends that the failure of the Court of Appeals to follow clear statutory language is an issue of substantial public interest.

The AWB respectfully requests the Court grant review of the Court of Appeals decision

II. IDENTITY AND INTEREST OF *AMICUS CURIAE*

Association of Washington Business (“AWB”) is Washington State’s principal representative of the state’s business community. AWB is the state’s oldest and largest general business membership federation, representing the interests of approximately 7,000 Washington companies who, in turn, employ over 700,000 employees, approximately one-quarter of the state’s workforce. AWB serves as both the state’s Chamber of Commerce and the manufacturing and technology association. AWB members are located throughout Washington, represent a broad array of industries, and range from sole proprietors to large, Washington-based corporations that do business across the country and around the world.

AWB members have a vested interest in the outcome of this matter. AWB members include companies who move products throughout the world. Those products are shipped in a variety of packaging some of which is leased. The published decision of the Court of Appeals has the

potential to create a system that taxes all packaging separate from the actual item. In addition, the decision by the Court of Appeals to substitute a dictionary definition for that of the legislature's clear statutory definition could result in the inconsistent decisions and assessments. AWB members rely on the consistent application of laws and when the court chooses to substitute its interpretation for the plain language of the statute it creates uncertainty and confusion.

III. ISSUES OF CONCERN TO *AMICUS CURIAE*

This brief addresses the substantive impact of the Court of Appeals' decision on Washington businesses. First, the court's opinion substitutes a dictionary definition for that of a statutory definition. It creates confusion where there was no confusion. It chose to substitute the definition of lease for sales and use tax purposes in RCW 82.04.040 with that of a common dictionary definition. This decision creates new requirements on business that the legislature never intended to exist based on the plain reading of the statute. The effect will be to inconsistently add cost to some products and not to others.

Further if this decision is upheld, its potential application to all packaging could create a system where the packaging of all products is separately taxed from the actual products. Consumers cost will go up for

no purpose other than the result of a double taxation on the product and package. Under historical tax administration, packaging has always been included in the overall cost of an item. This decision would separate those items and tax them individually. The state wishes to fundamentally change this principle for no legitimate purpose other than to increase the tax revenue without statutory authority. This creates an unfair market that ultimately penalizes consumers.

AWB members and citizens in the general public should not be arbitrarily taxed twice for packaging that is already taxed as part of the overall cost of the product.

IV. STATEMENT OF THE CASE

AWB adopts and joins in the Statement of the Case in the Petition for Review filed by Advanced H2O, LLC & Tyson Fresh Meats, Inc. in this matter.

V. ARGUMENT

The Court of Appeals erred in at least two ways.

A. The Court of Appeals' Opinion Ignores the Plain Meaning of the Statute when it Substituted a Common Dictionary Definition for the Definition Contained in the Statute.

When analyzing a statute, this Court has always looked first to the plain meaning of the statute. The legislature is presumed to know what it was doing when it enacted the law. *Lake v. Woodcreek Homeowners*

Ass'n, 169 Wn.2d 516, 526 (2010). The court will not read into a law any legislative intent if the law makes sense on its face.

In this case the law is very clear that the Court of Appeals chose to insert language into the statute that was not included by the legislature. The Court inserted its own interpretation of RCW 82.04.050(4)(b) ignoring the plain language of the statute. The Court should have reviewed the language, using the defined terms in the statute. Instead the court chose to insert common dictionary definitions into its construction of an otherwise unambiguous statute.

This Court has recognized the principle that a Legislature is presumed to mean exactly what it says and the courts should not add language when the legislative intent is clear on its face. *Wright v. Lyft, Inc*, 189 Wn. @d 718, 727 (2017). By substituting a common dictionary definition, the Court of Appeals failed to follow statutory construction.

Businesses and individuals rely on continuity in the law. It creates a level playing field for all parties involved. When the Court of Appeals substituted its own definition undermined the balance that is created in the system. If a business or individual or the state does not like the law, they can seek to have it changed but to have the Court of Appeals arbitrarily insert new requirements. Such judicial activity leads to an unfair system

that constantly changes the rules of the game and has a negative impact on business in Washington. Businesses need to be able to rely on clearly written laws as passed by the legislature; judicial legislation leaves businesses vulnerable. If the uncertainty becomes too great the result is loss of business and ultimately loss of jobs.

For this reason, AWB urges the Court to review and reverse the Court of Appeals' opinion.

B. The Court of Appeals' Decision Creates a System that Could Result in the Unfair Taxation of Every Sale Twice.

AWB is concerned with the Court of Appeals' apparent disregard that the packaging of items is included in the cost of the item. While this case involves the state applying a use tax on CHEP pallets that it uses to ship products to customers, the Court of Appeals opinion has the potential to affect every sale in the state of Washington that has external packaging. The Court of Appeals opinion results in the separate taxation of the "packaging" or pallets in this case. This means the state could levy a tax on the pallets (the packaging) as well as the product on the pallets.

It is a commonly understood that when a product is sold the packaging that it comes in is incorporated in the total price of the product. When a tax is assessed, the total price of the product is used to determine the tax. The Court of Appeals opinion would not only tax the full price of

the product but would allow the State to additionally tax the packaging separately. It would result in the packaging portion of the product to be taxed twice. Bifurcating the packaging into separate sales is fraught with mischief. For example, the Court of Appeals logic could lead to requiring the grocery store to charge a customer sales tax on the shelf price of the soda and also on the value of the carton (packaging) that has already been included in the shelf price of the soda. This question is better left to the legislature and not to the courts.

This would not only create an unfair market for businesses but also result in raising the cost on consumers. Businesses need to be able to count on a consistent interpretation and application of statutes. When the Court of Appeals decided to ignore the plain language of the statute it undermined the entire tax system as it relates to packaging. If this opinion is allowed to remain in force a business in Washington would have to assume that any law may potentially change, regardless of the plain, unambiguous language of the statute. If the uncertainty becomes too great, the result is loss of business and ultimately loss of jobs.

VI. CONCLUSION

For the reasons stated above, AWB urges the Court to accept the Advanced H2O, LLC, & Tyson Fresh Meats, Inc. Petition for Review and

reverse the Court of Appeals published opinion.

Dated: May 22, 2020.

THE ASSOCIATION OF WASHINGTON
BUSINESS

By  _____

Robert A. Battles WSBA No. 22163
General Counsel

The Association of Washington Business

ASSOCIATION OF WASHINGTON BUSINESS

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Address:
1414 CHERRY ST SE
OLYMPIA, WA, 98501-2341
Phone: 360-943-1600

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