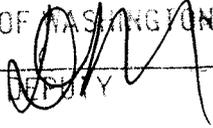


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STATE OF WASHINGTON
BY 

No. 37329-7-II

DIVISION II, COURT OF APPEALS
OF THE STATE OF WASHINGTON

ACTIVATE, INC.,

Plaintiff/Appellant

v.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,

Defendant/Respondent

ON APPEAL FROM THURSTON COUNTY SUPERIOR COURT
(Hon. Christine Pomeroy)

BRIEF OF APPELLANT

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ASSIGNMENTS OF ERROR

1. The trial court erred in granting summary judgment to the defendant Department of Revenue and dismissing plaintiff Activate, Inc.'s complaint for refund of taxes. CP 216-17.

2. The trial court erred in ruling that Activate did not qualify for the *regular* resale exemption (RCW 82.04.050(1)(a)) on its purchases of cellular telephones. CP 217.

3. The trial court erred when it did not rule, or ruled *sub silentio*, that the *special* telephone resale exemption (RCW 82.04.050(1)(e)) did not apply to Activate's purchases of cellular telephones. VRP 30-31. In either case, the court erred when it failed to find that the *special* telephone resale exemption applied to the facts of this case. *Id.*

STATEMENT OF ISSUES

The following issues pertain to the above assignments of error:

1. Did the trial court err in granting the Department of Revenue's Motion for Summary Judgment, which dismissed Activate's complaint for tax refund? (Assignment of Error 1.)

2. Did the trial court err in granting the Department's motion for summary judgment on the basis that Activate did not qualify for the *regular* resale exemption (RCW 82.04.050(1)(a))? (Assignment of Error 2.)

3. Did the trial court err when it failed to apply the *special* telephone resale exemption (RCW 82.04.050(1)(e)) to Activate's purchases of cellular telephones? (Assignment of Error 3.)

I.

INTRODUCTION

Activate is in the business of selling cellular telephones and wireless service plans. It makes sales in Washington through kiosks located in shopping malls. Activate will occasionally advertise or offer cellular telephones "free" or at "no charge" to potential customers as an inducement to promote the sale of wireless telephone service plans. The word "free" (as well as related words, "no charge," "given away") are in quotations throughout this brief to draw the Court's attention to the fact that, in these promotions the customer is required to agree to a two-year cellular service plan commitment in exchange for the "free" cellular telephone. The issue in this case is whether the telephones Activate purchased, placed in its inventory, and then sold or provided to retail customers under this type of promotion were exempt from Washington sales tax and use tax.

Two tax exemption statutes are at issue and both appear in the same statutory subsection, RCW 82.04.050(1). The question before the Court is whether either -- or both -- of these statutes apply to exempt the cellular telephones from tax under the facts of this case.

A well established principle of Washington tax law provides that tax exemptions are to be construed strictly and narrowly -- though fairly -- against the taxpayer and in favor of the taxing authority. But, such rule of construction applies only where the tax exemption is ambiguous or doubtful in application. Here, the language of the two statutory subsections at issue are plain and unambiguous. Because the primary objective of statutory construction is to carry out the Legislature's intent, the intent of an unambiguous statute is determined solely from the language of the statute.

Although discussed secondarily below subsection (e) of RCW 82.04.050(1), the *special* telephone resale exemption, is the principle statute at issue. This tax exemption was enacted specifically for persons -- like Activate -- engaged in telephone-related businesses. RCW 82.04.050(1)(e) excludes from the definition of the term "sale at retail" or "retail sale" purchases of tangible personal property (like cellular telephones) for the purpose of "providing" such property to consumers as part of "competitive telephone service" (a term that is further defined in RCW 82.04.065). Although extensively argued by the parties, the trial court did not address or expressly rule on this tax exemption.

Separately, subsection (a) of RCW 82.04.050(1), the *regular* resale exemption, sets forth another exclusion from the term "retail sale." This statute exempts from sales tax inventory purchased for the purpose of

resale as tangible personal property in the regular course of business without intervening use. The evidence before the trial court below showed that, even aside from the *special* telephone resale exemption described above, Activate purchased cellular telephones for the purpose of resale in the regular course of its business without making any intervening use of the telephones. Thus, the *regular* resale tax exemption is equally applicable to the facts of this case.

In the case of both tax exemptions, the cellular telephones at issue were inventory sold or “provided” to Activate’s retail consumers. The telephones were precisely the kind of tangible personal property that subparts (a) and (e) of RCW 82.04.050(1) intended to exempt from tax under the plain and unambiguous language of these statutes.

Activate has established its entitlement to the sales and use tax exemption for the cellular telephones in question. Accordingly, this Court should reverse, and remand for entry of a refund judgment in favor of Activate.

II.

STATEMENT OF THE CASE

A. Activate’s Business Is Selling Cellular Telephones, Related Equipment, And Wireless Service Contracts.

Activate sells cellular telephone equipment and wireless service plans in Washington. CP 187. Its retail business is conducted from kiosks located in shopping malls. *Id.* The cellular equipment Activate sells

includes telephones and related accessories. *Id.* The wireless service plans marketed by Activate were sold for, and on behalf of, Cingular Wireless. *Id.*¹ Activate sold the cellular telephones for its own account and received a commission on each cellular service plan it sold for AT&T. CP 188.

Activate runs promotions for the various cellular service plans offered by AT&T. CP 188. These promotions allowed retail customers to purchase a cellular telephone at a substantial, if not full, discount, provided the retail customer agreed to purchase one of AT&T's wireless calling plans. *Id.*

Each of Activate's retail customers was required to enter into *two* contracts if the customer wished to acquire a cellular telephone and initiate wireless service. CP 190. One contract was with Activate for providing the equipment (the cellular telephone) and setting up the wireless service. *Id.*; CP 194, 198. The second contract was with AT&T. CP 190, 196, 200. This latter contract was for the wireless service provided by AT&T in exchange for which the customer was required to pay a monthly service fee or charge (known as a Monthly Recurring Charge or ("MRC"))

¹ Within the periods at issue, Cingular merged with AT&T Wireless and the combined company is now known as AT&T Mobility. CP 187. Hereinafter, Cingular and AT&T Mobility will be referred to as "AT&T".

directly to AT&T. CP 190.² Any discount from the retail selling price of the cellular telephones Activate was willing to grant to its customers was determined solely by the consideration (commission) Activate received in exchange for the AT&T Personal Service Agreement executed by the retail customer. The greater the MRC, the more willing Activate was to discount, within limits, the cellular telephone. CP 191.

Activate purchased all cellular telephones from AT&T. CP 188. The circuitry of these telephones was “locked” or made proprietary to AT&T’s cellular telephone network. *Id.* Activate maintained a warehouse or distribution center at its headquarters in Beaverton, Oregon. *Id.* AT&T would deliver the telephones purchased by Activate to this warehouse where the phones were inventoried, and from there, Activate would distribute or transfer its inventory of phones to the retail kiosks where they were held for sale to customers. *Id.* Activate did not pay

² The key contracts in this dispute are the “Activate Agreement” and the AT&T “Personal Service Agreement.” For the Court’s convenience, these contracts are attached in the Appendix to this brief as Exhibits A through E. Exhibits A, C and E are copies of the Activate Agreement that are in the record at CP 194, 198, and 202. Exhibits B and D of the Appendix are copies of the AT&T Personal Service Agreement, which can be found in the record at CP 196 and 200. To protect the privacy of customers, the names and other identifying information about the customers has been redacted on all samples of actual customer documents and exhibits in the record.

Washington retail sales tax on purchases of cellular telephones from AT&T. *Id.*³

When Activate made a sale of both a cellular telephone and an AT&T wireless service plan, Activate and the customer would enter into the Activate Agreement, which was also an invoice showing the sale of both the telephone and the wireless plan chosen by the customer, plus applicable Washington sales tax. CP 194, 198; see Appendix, Exhibits A, C. Reprinted below is a sample of the invoice issued by Activate when a customer purchased an AT&T Digital Advantage “400 anytime minutes” wireless plan for \$39.99 per month from AT&T, plus a Nokia telephone at a discounted price of \$49.99:

QUANTITY	ITEM NO.	DESCRIPTION	PRICE	AMOUNT
1	2DA	AT&T DIGITAL ADVANTAGE \$39.99 400 anytime minutes	0.000	0.00
1	797553007258	Nokia 3360 07815592496	49.9900	49.99
			SUBTOTAL	49.99
			TAX	3.85
			TOTAL	53.84
			AMOUNT PAID	60.04

CP 198; see Appendix, Exhibit C.

Similarly, reprinted below is a sample invoice issued by Activate when the customer purchased an identical AT&T Digital Advantage “400

³ The sales tax did not apply to the telephones delivered by AT&T to Activate’s warehouse in Oregon for two reasons. First and foremost, the sale occurred in Oregon and that state does not impose a retail sales tax. Secondly, the phones were purchased and, at all times, held for resale. CP 188-89. Under Washington law, the retail sales tax does not apply to “[p]urchases for the purpose of resale as tangible personal property in the regular course of business without intervening use.” RCW 82.04.050(1)(a). This “resale exemption” will be discussed in greater detail later in this brief.

anytime minutes” wireless plan from AT&T for a monthly charge of \$39.99, and a different Nokia cellular telephone that was provided at a full retail price discount:

QUANTITY	ITEM NO.	DESCRIPTION	PRICE	AMOUNT
1	2DA	AT&T DIGITAL ADVANTAGE \$39.99 400 anytime minutes	0.000	0.00
1	797553006879	Nokia 5165 07809601444	0.000	0.00
			SUBTOTAL	0.00
			TAX	0.00
			TOTAL	0.00
			AMOUNT PAID	0.00

CP 194; see Appendix, Exhibit A.

The Activate Agreement contained a clear statement of the reason the discount was extended to the customer:

The price you paid for your wireless phone reflects a substantial discount off the phone. Activate receives a commission based on your activation and continuation of service for at least 180 consecutive days.

If prior to the expiration of 180 consecutive days, you cancel or alter your cellular service you may be subject to additional charges outlines below.

I agree to pay Activate \$200 plus applicable taxes as compensation for the commission that Activate would be required to repay the cellular provider. There may also be extra cancellation fees by your carrier.

In the event [that] collection is needed to enforce this agreement, I promise to pay, in addition to the amount due to Activate under this agreement, reasonable collection and/or attorney fees incurred by Activate.

I have filled out the credit card authorization . . . to induce the sale of the cellular product described with the intention of authorizing Activate to charge my credit card in the amount of \$200 if I fail to activate and maintain continuous service for 180 consecutive days. . . .

CP 194 and 198; Appendix, Exhibits A, C.

The AT&T Personal Service Agreement was the second contract the retail customer signed. CP 190-91. It contained similar language, advising the retail customer of the wireless service commitment:

THIS IS A TWO-YEAR AGREEMENT FOR WIRELESS SERVICES WITH AT&T WIRELESS (“AGREEMENT”). BY SIGNING BELOW, YOU AGREE TO BE BOUND TO THIS TWO-YEAR AGREEMENT EVEN IF ANOTHER TERM IS REFERENCED IN OTHER MATERIALS YOU HAVE RECEIVED. If you cancel your service before the end of the two-year term, you will be charged the early termination fee that is contained in your AT&T Wireless Calling Plan or Rate Plan (“Rate Plan”) brochure or promotional materials. This Agreement hereby incorporates by reference the Terms and Conditions and other information set forth in the AT&T Wireless Welcome Guide (or for GSM/GPRS customers, in the AT&T Wireless Quick Start Guide or online at www.attwireless.com/mobileinternet), the Rate Plan brochure and/or feature or promotional materials (collectively, “Sales Information”) that you were provided or, for GSM/GPRS customers, are online at www.attwireless.com/mobileinternet. By signing below, you acknowledge that you have received and reviewed the Terms and Conditions and Sales Information and that you agree to be bound by such Terms and Conditions and the Sales Information for the term of your Agreement. You will only be eligible to retain the promotional benefits that were provided in connection with the two-year term if you complete and return this Agreement within 60 days of activation.

CP 196, 200; Appendix, Exhibits B, D

All cellular telephones remained in their original packaging until purchased by Activate’s customers. CP 190. The telephones cannot be used until “activated” with the wireless service provider, AT&T, and phones were not activated until the retail customer actually committed by

executing the contract to the purchase of the telephone and initiated wireless service. CP 190.

Activate sold cellular telephones independent of the AT&T wireless plans. CP 188; see Appendix, Exhibit E. For example, if a customer lost a telephone or wished to upgrade his or her phone to a newer model or one with more features, the customer could purchase any of the phones carried by Activate. CP 191. The cellular telephones held for sale and sold by Activate, with or without an accompanying AT&T wireless plan, were all the same phones, drawn from the same inventory. *Id.* In other words, there were no special telephones offered or sold in the various promotions marketed by Activate.⁴

B. The Department Of Revenue Audited Activate And Assessed Use Tax On The Cellular Telephones “Given Away”.

The Department of Revenue’s Audit Division examined Activate’s business records for the period January 1, 2000 through December 31, 2003 (sometimes referred to herein as the “audit period”). CP 13-25. The audit assessed “use tax on phones given away to encourage customers to

⁴ CP 202 (Appendix, Exhibit E) is another sample invoice, this one for the sale of a cellular telephone only. In fact, the subject telephone in this example is the same model (Nokia 5165) that was the subject of the so-called “free” transaction in CP 194 (Appendix, Exhibit A). As noted above, during the audit period Activate would sell replacement telephones to existing AT&T network customers, e.g., when the original telephone was lost, stolen, damaged, or the customer simply wished to upgrade. CP 191. The replacement telephone was generally sold at full retail value without discount and this exhibit reflects the sale of a Nokia 5165 model at the then full retail selling price of \$99.99. *Id.*; CP 202; Appendix, Exhibit E.

sign up for cellular service through AT&T.” CP 15. The audit report explained:

To encourage customers to sign up for cellular phone service through AT&T, usually free phones are given away. For a cost, customers can upgrade to a phone with more features. At issue here is the phones given away.

CP 14.

The audit went on to state that, “Use tax is imposed on the privilege of using as a consumer any article of tangible personal property,” citing RCW 82.12.020(1). CP 14. Because “[c]ellular phones are tangible personal property” and the definition of consumer includes “any person who distributes any article of tangible personal property, the primary purpose of which is to promote the sale of services (such as the cellular telephone service),” the audit found that Activate was “the consumer upon whom use tax is imposed.” *Id.* The use tax was assessed under Schedule 7 of the audit report. CP 17-25. The total tax assessed was \$113,601 (plus interest). *Id.*

C. Activate’s Administrative Appeal Of The Audit And Assessment.

Activate appealed the audit report and tax assessment to the Appeals Division of the Department of Revenue. CP 27-28. Following an informal hearing before an administrative law judge (“ALJ”), Determination No. 05-0337 was issued. CP 62-68. Although the Appeals Division upheld the assessment, the ALJ expressly rejected the Audit

Division's assertion that the cellular telephone inventory constituted "promotional materials" under the Department's regulation, WAC § 458-20-17803 ("Rule 17803") ("We agree that the cellular phones are not promotional materials as defined in Rule 17803"). CP 65-66. Activate timely requested reconsideration of the determination (CP 70-78), which was subsequently denied by letter dated June 28, 2006. CP 80-81.

D. The Proceedings Before The Trial Court.

Activate paid the Department's assessment in full and on July 26, 2006, filed a de novo Complaint for Refund of Excise Taxes with the Thurston County Superior Court pursuant to RCW 82.32.180. CP 4-8. On September 13, 2007, the Department moved for summary judgment. CP 96-117. A hearing was held before the Honorable Christine Pomeroy on January 4, 2008. CP 216. Following oral argument (Verbatim Report of Proceedings ("VRP") 3-30), the trial court granted summary judgment to the Department (VRP 30-31).

During the summary judgment proceeding, including the written briefs (CP 96-116, 118-144, 204-213) and oral argument to the court at the January 4, 2008 hearing (VRP 3-30), the parties addressed both tax exemption statutes, i.e., subsections (1)(a) and (1)(e) of RCW 82.04.050, the *regular* resale exemption and the *special* telephone resale exemption. In the trial court's oral decision, however, the court addressed only the regular resale exemption (RCW 82.04.050(1)(a)), finding as follows:

To qualify for the resale exemption, Activate must show three things: It purchased the property for resale, it resold the property in its regular course of business, and it does not use the property before the resale. This is RCW 82.04.050(1)(a).

I find Activate has failed two of the requirements. First, I find it did not purchase the phones for resale. It purchased the phones from AT&T and then gave the phones away at no cost and with no compensation directly from the consumer as a marketing promotion; thus, Activate, I find, did not resell the cell phones by signing up consumers for the AT&T/Cingular service plan. Activate made intervening use of these phones by using it as part of the marketing promotion to attract consumer business.

At this point, I deny Activate's motion for summary judgment, I grant the department's. I wish you well. I'll sign an order to that effect in which you'll have 30 days to appeal.

VRP 30-31.⁵

An Order Granting Defendant Department of Revenue's Motion for Summary Judgment was entered at the conclusion of the hearing. CP 216-17. Activate then filed a Notice of Appeal to this Court on February 1, 2008. CP 218-22.

III.

STANDARD OF REVIEW

The trial court granted a motion for summary judgment brought by the defendant/respondent Department of Revenue. CP 216-17. The

⁵ The trial court found that the cellular telephones in question were used by Activate as a "marketing promotion. VRP 31. This is the opposite conclusion found by the Department's ALJ, who expressly held that the telephones were "not promotional materials." CP 65-66.

appellate courts “review orders granting summary judgment de novo.” Cerrillo v. Esparza, 158 Wn.2d 194, 199, 142 P. 3d 155 (2006) (citing Drinkwitz v. Alliant Techsystems, Inc., 140 Wn.2d 291, 295, 996 P. 2d 582 (2000); Marquis v. City of Spokane, 130 Wn.2d 97, 104-05, 922 P. 2d 43 (1996)); see Go2Net, Inc. v. FreeYellow.com, Inc., 158 Wn.2d 247, 252, 143 P. 3d 590 (2006) (“[a]n appellate court reviews a trial court’s decision on summary judgment de novo”) (citing Troxell v. Rainier Pub. Sch. Dist. No. 307, 154 Wn.2d 345, 350, 111 P. 3d 1173 (2005)).

In reviewing a summary judgment, the appellate court “performs the same inquiry as the trial court,” Aba Sheikh v. Choe, 156 Wn.2d 441, 447, 128 P. 3d 574 (2006) (quoting Jones v. Allstate Ins. Co., 146 Wn.2d 291, 300, 45 P. 3d 1068 (2002)), and must also “treat all facts and reasonable inferences in the light most favorable to . . . the nonmoving party,” Fitzpatrick v. Okanogan County, 143 Wn. App. 288, 294, 177 P. 3d 716 (2008) (citing Phillips v. King County, 136 Wn.2d 946, 956, 968 P. 2d 871 (1998); see Hill v. Sacred Heart Med. Ctr., 143 Wn. App. 438, 445, 177 P. 3d 1152 (2008) (“[w]e view the evidence and any inferences that may be drawn from that evidence in a light most favorable to the nonmoving party” (citing Miller v. Jacoby, 145 Wn.2d 65, 71, 33 P. 3d 68 (2001)); Young v. Key Pharms., Inc., 112 Wn.2d 216, 226, 770 P. 2d 182 (1989)). Activate was the nonmoving party in the proceedings

before the trial court below; therefore, all facts and reasonable inferences are to be viewed in a light most favorable to Activate.

This case also involves the interpretation of two subsections of a state statute. The Court reviews “issues of statutory interpretation de novo.” Cerrillo, 158 Wn.2d at 199 (citing Agrilink Foods, Inc. v. Dep’t of Revenue, 153 Wn.2d 392, 396, 103 P. 3d 1226 (2005)). Because review is de novo as to all issues, this Court is not bound by the trial court’s ruling.

IV.

ARGUMENT

A. **The Only Rule of Construction Applicable In This Case Is The Plain Meaning Rule.**

In statutory construction, the court’s objective is to ascertain and carry out the legislature’s intent. State ex rel. Citizens Against Tolls v. Murphy, 151 Wn.2d 226, 242, 88 P. 3d 375 (2004). If the statute’s meaning is plain on its face, the court must give effect to that meaning. *Id.* Moreover, where a statute is unambiguous the court must determine legislative intent from the language of the statute itself, and not from an administrative agency’s contrary interpretation. Agrilink Foods, 153 Wn.2d at 396.

Thus, if the Department’s interpretation of RCW 82.04.050(1), either subsection (a) or (e) or both, is contrary to the statute’s plain language, this Court is not obligated to uphold it. Pierce County v. State, ___ Wn. App. ___, 185 P. 3d 594, 631 (2008). Further, when a statute is

clear and unambiguous on its face, the Court determines its meaning from the statute's language alone and the Court may not consider legislative history. Pierce Co., Id. (citing C.J.C. v. Corp. of the Catholic Bishop of Yakima, 138 Wn.2d 699, 708, 985 P. 2d 262 (1999)).

A second rule of statutory construction is equally important here. This rule has special application to tax statutes and, in particular, tax exemption statutes.⁶ The rule states that a tax exemption statute is to “be construed strictly, though fairly and in keeping with the ordinary meaning of [its] language, against the taxpayer.” Group Health Coop. of Puget Sound, Inc. v. Washington State Tax Comm’n, 72 Wn.2d 422, 429, 433 P. 2d 201 (1967). The Department will, no doubt, trot out this venerable rule. But this rule only applies when the tax exemption statute creates “doubt or ambiguity.” Group Health, at 429; see Sacred Heart Medical Center v. Department of Revenue, 88 Wn. App. 632, 637, 946 P. 2d 409 (1997). On the other hand, where a statute is not ambiguous this rule of strict construction against the taxpayer does not apply; instead, the meaning of a plain and unambiguous statute to be applied by the Court

⁶ RCW 82.04.050(1)(a) and (1)(e) are in a statute that defines the term “sale at retail” or “retail sale”. For the Court’s convenience, a copy of RCW 82.04.050, as in effect during the audit period (Laws of 2002, ch. 178 § 1), is included in the Appendix to this brief as Exhibit F. On its face, RCW 82.04.050 is not explicitly a tax exemption statute but a definitional statute. However, in defining the term “sale at retail” or “retail sale” RCW 82.04.050 creates exceptions from what would otherwise fall within the definition of the term. The two subsections of RCW 82.04.050 at issue here (subsections (1)(a) and (1)(e)) are, for all practical purposes, tax exemptions since they create exclusions from the statutory definition.

must “be derived from the wording of the statute itself.” Sacred Heart, at 639 (quoting Bellevue Fire Fighters Local 1604 v. City of Bellevue, 100 Wn.2d 748, 750, 675 P. 2d 592 (1984)).

B. Activate Satisfied Each And Every Requirement To Qualify For The Resale Exemption.

1. Activate Purchased Cellular Telephones For Resale In The Regular Course Of Its Business.

The undisputed evidence in this case is that Activate sold cellular telephones and wireless service plans to customers in Washington during the audit period. CP 187. The cellular telephones were purchased by Activate from AT&T. CP 188. The telephones were shipped by AT&T to Activate’s warehouse in Beaverton, Oregon and from there, the phones were distributed to Activate’s retail locations, including kiosks in shopping malls in Washington, where at all times they were inventory held for sale or resale to customers. *Id.*⁷

RCW 82.04.050(1)(a) provides an exclusion from the term “sale at retail” or “retail sale” for property purchased “for the purpose of resale as tangible personal property in the regular course of business without intervening use by such person.” Focusing on the first three of the four

⁷ There was never an instance where Activate “gave away” a telephone, as if equivalent to a “gift.” The cellular telephones, at all times inventory for resale while in the possession of Activate, were transferred to retail customers only in return for an executed AT&T wireless service agreement. The fact that the telephone was not a “gift” was explicitly stated in the Activate Agreement, in which the customer was advised, “The price you paid for your wireless phone reflects a substantial discount off the phone”. CP 194, 198; Appendix, Exhibits A, C.

requirements of the resale exemption (the fourth requirement, “without intervening use,” will be addressed in the next section of this brief), the cellular telephones in question meet each requirement for exemption under this subsection:

- First, the telephones were purchased “for the purpose of resale.” Activate’s business, in part, is the sale of cellular telephones. CP 187. Activate purchased the telephones from AT&T. CP 188. The phones were in Activate’s inventory for resale either at its central warehouse in Oregon, or in the retail locations, and at all times they were for sale to customers. *Id.* The cellular telephones were purchased for the purpose of resale, as contemplated by RCW 82.04.050(1)(a).
- Second, the cellular telephones themselves were unquestionably “tangible personal property.”
- Third, the cellular telephones were sold “in the regular course” of Activate’s business. As described above, a major part of Activate’s business was the sale of cellular telephone equipment. CP 187. The cellular telephones were thus sold in the regular course of Activate’s business, again, as contemplated by RCW 82.04.050(1)(a).

The trial court ruled that Activate “did not purchase the phones for resale”; instead, the court found that Activate “purchased the phones from

AT&T and then gave the phones away at no cost with no compensation directly from the consumer as a marketing promotion.” VRP 31.⁸ In this ruling, the court apparently found that there was no “sale” of the cellular telephones by Activate to its customers, since the telephones were “given away” as a marketing promotion. The court also held that Activate received no compensation for the phones. These conclusions were error.

The word “sale” is specifically defined in the Revenue Act (Title 82 RCW). The Court is “bound to apply legislative definitions included in a statute.” G-P Gypsum Corp. v. State Revenue, __ Wn.App. __, 183 P. 3d 1109, 1112 (2008) (citing Am. Cont’l Ins. Co. v. Steen, 151 Wn.2d 512, 518, 91 P. 3d 864 (2004)). Thus, the focus of the Court’s inquiry is the meaning of the word “sale” in RCW 82.04.040.

Under the Revenue Act “sale” means “any transfer of the ownership of, title to, or possession of property for a valuable consideration.” RCW 82.04.040. The trial court ignored this definition when it ruled there was no “sale” by Activate of these telephones. The fully discounted or “free” telephones met each and every requirement of “sale” under RCW 82.04.040, thereby qualifying the phones as being “resold” under the resale exemption (RCW 82.04.050(1)(a)).

⁸ As noted previously (see, n.5, supra), this conclusion of the trial court is at odds with the conclusion of the ALJ in the informal departmental administrative appeal, in which the ALJ ruled “that the cellular phones are not promotional materials.” CP 65-66.

There are two elements to a “sale” under RCW 82.04.040: (1) transfer of ownership, title or possession of property (2) for valuable consideration. If Activate satisfied these two requirements it made a “sale” of the telephone to its customer under the Revenue Act (Title 82 RCW), which in turn satisfied the “resale” part of RCW 82.04.050(1)(a). Did Activate “transfer . . . ownership of, title to, or possession” of the “free” telephones, thereby satisfying the first element of a “sale”? The answer is yes. The property in question was cellular telephones. These telephones were tangible personal property and proprietary to a specific network carrier, AT&T. CP 188. The phone appeared as a separate item on Activate’s invoices to customers (CP 194, 198, 202; see Appendix, Exhibits A, C, E) and the transfers of the phones from Activate to the customers were memorialized consistent with two written agreements -- the Activate Agreement (CP 194, 198; see Appendix, Exhibits A, C) and the AT&T Agreement (CP 196, 200; see Appendix, Exhibits B, D) entered into between each customer, AT&T and Activate. Before the trial court below, the Department did not dispute this requirement and presumably conceded that the first element of a “sale” -- “transfer of the ownership of, title to, or possession of property” (the cellular telephones) from Activate to the customers -- was present here.

The second requirement for there to be a “sale” under RCW 82.04.040, is the presence of “a valuable consideration.” Was there “a

valuable consideration” received by Activate, thereby satisfying the second element of “sale”? Activate again says yes; but the Department below said no, stating: “Activate received no payment for the giveaway phones.” CP 99. The trial court appears to have adopted the Department’s view when it held that Activate received “no compensation directly from the consumer.” VRP 31. Both the Department and the court misunderstood the transaction and, more importantly, they misapplied and misconstrued the legal requirements of consideration.

In Labriola v. Pollard Group, Inc., 152 Wn.2d 828, 100 P. 3d 791 (2004), the Supreme Court defined valuable consideration:

... Consideration is “any act, forbearance, creation, modification or destruction of a legal relationship, or return promise given in exchange.” *King v. Riveland*, 125 Wn.2d 500, 505, 886 P.2d 160 (1994). Consideration is a bargained-for exchange of promises. *Williams Fruit Co. v. Hanover Ins. Co.*, 3 Wn. App. 276, 281, 474 P.2d 577 (1970). The *Restatement (Second) of Contracts* states:

(1) To constitute consideration, a performance or a return promise must be bargained for.

(2) A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.

(3) The performance may consist of

- (a) an act other than a promise, or
- (b) a forbearance, or
- (c) the creation, modification, or destruction of a legal relation.

Restatement (Second) of Contracts § 71(1)-(3)
(1981).

Courts generally do not inquire into the adequacy of consideration and instead utilize a legal sufficiency test. *Browning v. Johnson*, 70 Wn.2d 145, 147, 422 P. 2d 314, 430 P. 2d 591 (1967). Legal sufficiency “is concerned not with comparative value but with that which will support a promise.” *Id.*

Labriola at 833-34.

Thus, under the common law, consideration is “any act [or] creation . . . of a legal relationship, or return promise given in exchange.” Labriola, 152 Wn.2d at 833 (quoting King v. Riveland, 125 Wn.2d at 505). Consideration is “a bargained-for exchange of promises.” Labriola at 833 (citing Williams Fruit Co., 3 Wn. App. at 281). Here, the customer promised to purchase a wireless service plan for a certain period of time from AT&T. CP 188, 196, 200; see also, Appendix, Exhibits B, D. That legally binding promise entitled Activate to specific rights, which Activate could convert to measurable monetary value (a commission from AT&T). CP 188. This right was clearly set forth in the Activate Agreement: “Activate receives a commission based on your activation and continuation of service for at least 180 consecutive day[s].” CP 194, 198; Appendix, Exhibits A, C.⁹ In exchange for the retail customer’s promise,

⁹ Further, if the customer did not maintain the AT&T wireless service for at least 180 consecutive days, the customer must pay Activate for the lost commission:

If prior to the expiration of 180 consecutive days, you cancel or alter your cellular service you may be subject to additional charges outlined below.

(Footnote continued on next page)

the customer received a wireless service plan from AT&T and Activate discounted the sale of its cellular telephones to the customer, either in part (CP 198; Appendix, Exhibit C) or in full measure (CP 194; Appendix, Exhibit A). The transaction involved three parties -- the customer, AT&T and Activate -- and there was valuable consideration or a bargained-for exchange flowing in each direction, and as to each party. The amount of the discount extended by Activate was also proportional to the value of the consideration received from AT&T and the retail customer.

Thus, Activate's customers were required to enter into two contracts if they wished to initiate wireless service and receive a discounted cellular telephone. CP 190. The first contract bound the retail customer to Activate -- this for providing the customer equipment and setting up the wireless service. *Id*; see CP 194, 198; see also, Appendix, Exhibits A, C. The second contract bound the retail customer to AT&T for the provision of wireless service pursuant to a service commitment of one or two years and payment by the retail customer of the Monthly Recurring Charge. CP 190; see CP 196, 200; see also, Appendix, Exhibits B, D.¹⁰ In those instances in which a customer was sold a fully discounted or "free" telephone (CP 194; Appendix, Exhibit A) -- and even in the

I agree to pay Activate \$200 plus applicable taxes as compensation for the commission that Activate would be required to repay the cellular provider.

CP 194, 198; Appendix, Exhibits A, C.

¹⁰ In the sample transactions, the wireless service commitment was two years.

transaction where the customer purchased a partially discounted telephone (CP 198; Appendix, Exhibit C) -- the transaction was completed only if the customer agreed to the two contracts, the Activate Agreement (CP 194, 198; Appendix, Exhibits A, C) and the AT&T Agreement (CP 196, 200; Appendix, Exhibits B, D), and the monthly wireless plan purchased by the customer was deemed sufficient to justify the discount Activate was willing to extend. CP 191. In the case of a “free” telephone, the discount was 100 percent and the net phone cost to the retail customer was thus \$0.00. The trial court’s finding that there was “no compensation directly from the consumer” and, hence, no “valuable consideration” and no “sale” (RCW 82.04.040), ignores the inherent value of the executed AT&T service agreement that Activate sold along with the cellular telephone, for which Activate received a commission from AT&T. Thus the court misinterpreted RCW 82.04.040, the definition of “sale.”

Further, there is no requirement in RCW 82.04.040 that the consideration, if strictly in terms of money, must come directly from the retail customer. The statute states that a sale is “any transfer of the ownership of, title to, or possession of property for a valuable consideration.” RCW 82.040.040 (emphasis added). Stated differently, the definition of “sale” does not say that the consideration must come from the person to whom ownership, title or possession of the property is transferred. Instead, the consideration in terms of “money” could come

from any source, the only requirement being that the consideration be “valuable” (a point already covered above) in exchange for the transfer of ownership, title or possession of property. Activate receives something of definite and known value, in this instance an executed AT&T service agreement, which Activate then converts to “money” from AT&T in the form of a commission.

Hence, the source of the consideration for the cellular telephone came from AT&T through the commission it paid to Activate. This is the “valuable consideration” received by Activate in the transaction, and which was received in exchange for transferring ownership, title and possession of the cellular telephone, which Activate owned prior to selling it to the customer.

The trial court’s finding that the fully discounted or “free” telephone was not “compensation directly from the consumer” or “valuable consideration” may also be a misunderstanding or misinterpretation by the court of the adequacy -- not the existence -- of the consideration. But, as Labriola and the cases cited therein provide, courts do not “inquire into the adequacy of consideration and instead utilize a legal sufficiency test.” Labriola, 152 Wn.2d at 834 (citing Browning, 70 Wn.2d at 147). “Legal sufficiency ‘is concerned not with [the] comparative value but with that which will support a *promise*.’” Labriola, *Id.* (quoting Browning, *Id.*) (emphasis added). Here, Activate *promised* to

provide the customer a cellular telephone at a partially or fully discounted price. AT&T *promised* to provide wireless service to the customer. The customer *promised* to keep the wireless plan in place for a certain length of time (two years) and pay AT&T a monthly service fee (\$39.99 for 400 “anytime” minutes). See CP 194, 198; Appendix, Exhibits A, C. AT&T *promised* to pay Activate a commission for arranging the customer’s purchase of the wireless service. These facts more than support the legal sufficiency test described in Labriola, which in turn satisfied the requirement for valuable consideration sufficient to constitute a “sale” under RCW 82.04.040.

In summary, the trial court erred in finding that there was no “sale” even when a fully discounted or “free” telephone may have been the subject of the transaction. As a point of fact, the first three elements of a “sale” (RCW 82.04.040) and “resale” (RCW 82.04.050(1)(a)) were conclusively present and established here.

2. Activate Made No Intervening Use Of The Telephones.

The fourth and final requirement to qualify a transaction for the resale exemption (RCW 82.04.050(1)(a)) requires that the purchaser make no “intervening use” of the tangible personal property, in this case the cellular telephones.

RCW 82.04.050(1)(a) allows a person to purchase tangible personal property without payment of sales tax if the property purchased is

“for the purpose of resale . . . in the regular course of business” -- all of which has been established thus far -- and also “without intervening use by such person” (emphasis added). The undisputed facts are that the cellular telephones remained in their original packaging: (i) at the time of the original purchase and delivery by AT&T to Activate, (ii) while the telephones were in storage in Activate’s warehouse in Beaverton, Oregon, and (iii) after the phones were distributed or transferred by Activate to its retail locations. CP 188, 190. At the retail locations (i.e., the kiosks in Washington shopping malls) the telephones were again inventoried and stocked for sale to customers. CP 188. The cellular telephones remained as inventory and in their original packaging until purchased by customers. CP 190. The telephones could not be used until they were “activated” and no telephone was ever activated until a retail customer actually purchased the telephone and initiated wireless service, i.e., after the two contracts were signed. CP 189-191.

The undisputed evidence further showed that Activate sold cellular telephones independent of the AT&T wireless plans. CP 188, 202; see Appendix, Exhibit E. If a customer lost a telephone or wished to upgrade his or her phone to a newer model or one with more features, the customer could purchase any of the phones carried by Activate including phones that may be subject to a “free” promotion. CP 191. Thus, all cellular telephones held for resale in the regular course of business and sold by

Activate could be sold with or without an accompanying AT&T wireless plan. *Id.* There were no special telephones sold in any of the various promotions offered by Activate other than the phones purchased by Activate from AT&T for resale. In other words, the telephones that were sold simultaneously with a wireless service plan were the same cellular telephones sold individually and independently by Activate. *Id.* These facts clearly and conclusively show that Activate not only purchased tangible personal property for resale in the regular course of business, but that there was no “intervening use” of these telephones by Activate, even when the phones were sold along with a wireless service plan for a charge of \$0.00.

The trial court found that “Activate made intervening use of these phones by using [them] as part of the marketing promotion to attract consumer business.” VRP 31. In other words, the court found that the mere act of advertising a product in a special promotion constituted “intervening use.” This conclusion is interesting and quite novel; however, there is no support for it in fact or law.

The most recent decision addressing “intervening use” is Mayflower Park Hotel, Inc. v. Department of Revenue, 123 Wn. App. 628, 98 P.3d 534 (2004), *review denied* 154 Wn.2d 1022 (2005). In Mayflower, the question was whether a hotel used or consumed; -- i.e., made “intervening use” -- of hotel guest room furnishings and amenities

“in the course of furnishing lodging” Mayflower, 132 Wn.2d at 632. Lodging is defined as a “sale at retail” or “retail sale” in Washington (RCW 82.04.050(2)(f)) and the guest room furnishings and amenities at issue included beds, bedding, couches, chairs, furniture and bathroom supplies. *Id.* at 629-630. This Court held that the “hotel ‘uses or consumes’ such items . . . when it puts them in its rooms for the comfort of its guests.” *Id.* at 632. These facts and this holding are not applicable to, and are clearly distinguishable from, Activate’s case. Unlike the Mayflower Park Hotel where the guest room furnishings and furniture were in each guest room and the bathroom amenities were removed from storage and placed in the individual hotel guest rooms “for the comfort of . . . guests”, Activate does not put the cellular telephones anywhere other than in its inventory held for resale. The telephones were not removed from inventory until a sale to the customer had taken place. The telephones were left in their original packing until there was a sale and phones could not be used by the customer until they were activated, which was after the sale was completed. The Mayflower decision does not support “intervening use” by Activate of the telephones in question here.

Another recent “intervening use” decision of this Court is Seattle FilmWorks, Inc. v. Department of Revenue, 106 Wn. App. 448, 24 P. 3d 460 (2001), *review denied*, 145 Wn.2d 1009 (2001). In this case, Seattle FilmWorks conducted a significant portion of its film processing and

photographic service business by mail. FilmWorks, 106 Wn. App. at 450. FilmWorks would print customer information on forms sent to customers in its mail-order business. *Id.* at 451. The issue was whether FilmWorks was liable for use tax on these forms “because it put the forms to an intervening use as a consumer by printing customer information on them before sending them to customers.” *Id.* at 458. The Court held that, “Printing customer information on the forms was an act that benefited FilmWorks by making the forms useful to it if the customers returned the forms with their subsequent orders” and “printing the customer information on the forms was an intervening act”. *Id.* at 459 (emphasis added). The Court found that “FilmWorks altered the order forms for its own use: to facilitate its communication with customers and to facilitate order tracking.” *Id.* at 460-61. The Court further found that “[i]n doing so, it ‘used’ the forms” and “there was an intervening use”, making FilmWorks liable for use tax. *Id.* These facts are likewise distinguishable from Activate’s facts:

- First, Activate does nothing to alter the cellular telephones. It does not “activate” the telephones until a “sale” (RCW 82.04.040) has been made and the undisputed facts disclosed that the phones stayed in their original packaging until title passed to the customers.

- Second, Activate did nothing to the cellular telephones that benefited or made the telephones more useful to Activate. It is true that Activate promoted the “free” telephones through advertising.¹¹ But, the Department cannot point to one instance where the mere act of advertising or promoting an article constituted “intervening use” of that article. If this were the case, retailers would be liable for use tax on every item that is promoted in advertisements. Car dealers, Macy’s (formerly The Bon Marche) and Nordstrom would be liable for use tax on all of the products they advertise in newspapers and on the Internet. This is not true and the Department will readily concede that the mere act of advertising or promoting a product does not constitute intervening use.

Furthermore, and even more to the point, the record evidences other instances where retailers offer a “free” item with the purchase of

¹¹ As a point of fact, all advertising wherein the word “free” was utilized was also accompanied by an asterisk (*), the significance of which was to notify the potential retail customer to the fact that the cellular telephone was not truly “free,” but required a two-year service agreement. As explained by cellphonecarriers.com:

Is A Free Cellular Phone a Myth?

I don’t know about you, but growing up, my mother told me nothing is for free. With all these advertisements, specials and deals announcing “FREE CELLULAR PHONES”, are they really free?

The answer of course is no. What is meant by a free cellular phone deal is that by purchasing a cellular service plan of one year or more, a cellular provider will give you a phone to use with your plan. In a sense, the advertisements should read “Commit to a year or more of cellular service and we will include the phone for no additional cost.”

See <http://www.cellphonecarriers.com/free-cellular-phone.html>.

another item and Activate challenges the Department to point to any authority that says these “free” items are subject to use tax. CP 165-68. The record in this case includes an Office Depot advertisement showing numerous “free” advertised and promoted items: “FREE Canon Printer with purchase of a computer” (CP 165), “FREE Camera Bag with purchase of a digital camera” (*Id.*), and “FREE Software Kit” with purchase of two HP ink cartridges or one combo pack (CP 166). To this one could add: “FREE Cellular Telephone with purchase of AT&T wireless plan.” Is it the Department’s or trial court’s position that Office Depot made “intervening use” of the Canon Printer, the camera bag, and the software kit by “using” them as part of a marketing promotion to attract consumer business such that the items were subject to use tax? This is what the trial court ruled (VRP 31) and if the tax is owed on the cellular telephones in Activate’s case, it is owed by Office Depot on the Canon Printer, Camera Bag and Software Kit, too. Such a ruling would be a surprise not only to Office Deposit, but every retailer in the state of Washington offering “free” items in the marketing and promotion of their products. This Court can certainly take judicial notice of the fact that this type of “free” promotion happens every day in the retail world and that no sales or use tax is payable on “free” items. Why? Because the Department’s own regulation, WAC section 458-20-116, defines a “premium” as “an item offered free of charge or at a reduced price to

prospective customers as an inducement to buy” and sales of so-called “premiums” “to persons who pass title to the premium along with other articles . . . sold by them” are “sales for resale (wholesale sales) and not subject to retail sales tax”. WAC 458-20-116(2)(b), (3)(b).

In short, there is no intervening use of any of these items -- whether they be printers, camera bags, software, or cellular telephones. Instead, all of the items were purchased for resale and were sold to customers for valuable consideration. In these promotions, a retailer like Office Depot or Activate is, for all intents and purposes, merely discounting the item(s) being sold. In Office Depot’s case, the store is discounting the combined price of the computer and printer by the retail price of the printer. In this case, Activate is reducing the commission it receives on the transaction by the retail selling price of the cellular telephone. Ultimately, what is involved here is retail marketing -- the offering of discounts to customers -- and not “intervening use” of any of these items by the retailers themselves.

In conclusion, Activate satisfied each of the four requirements to qualify the cellular telephones offered fully discounted or “free” under the subject promotions if the customer also purchased an AT&T wireless plan. The cellular telephones were thus:

- purchased for the purpose of resale
- as tangible personal property

- in the regular course of business
- without intervening use.

As such, the telephones were exempt from retail sales tax under RCW 82.04.050(1)(a).¹²

¹² The Department's auditor took the position, relying on RCW 82.12.020(1), that Activate was a "consumer" of the cellular telephones because it "distributed" them with "the primary purpose . . . to promote the sale of services," that being the wireless telephone service. CP 14. This argument is misplaced. The Department's own regulation, WAC 458-20-116, and also a published decision (Determination No. 91-177, 11 WTD 219 (1991) ("Det. 91-177") (CP 174-184)) of the Department, demonstrate that the use tax would apply in this situation under RCW 82.12.020(1) only when tangible personal property is "given away" and there is no corresponding "sale" of a service.

As a preliminary matter, RCW 82.12.020(1) was intended to apply when a person distributed a product to promote a sale. For example, in the past tobacco companies distributed "free" tobacco products at rodeos to promote the sale of those products. The tobacco company paid use tax on these "free samples". Similarly, companies give away products -- like candy, gum and soft drinks -- on street corners in downtown Seattle and in shopping centers and malls throughout the state. These products are likewise subject to use tax under RCW 82.12.020(1).

Be that as it may, in Det. 91-177 a camping club sold memberships. CP 175. To promote the sale of memberships the club purchased "gift items" which were "given away free of charge to . . . potential customers who submitted themselves to a sales presentation." CP 176. No purchase was necessary to receive the gifts, which the Department called "premiums" consistent with Rule 116. *Id.*; WAC 458-20-116(2)(b). A Department auditor assessed use tax on the "premiums" because they "were given away for promotional purposes so are subject to use tax." *Id.*

Det. 91-177 upheld the assessment of use tax, but only on those "premiums" or "free" gift items in which the potential customer did not purchase a camping membership. But, with respect to premiums when a membership was purchased, Det. 91-177 stated:

In those cases where the taxpayer does sell something such as a membership to a prospective customer to whom a premium has been given, a resale has occurred and, consistent with both Rule 116 and [former] ETB 341, no sales/use tax would be owed.

CP 181 (emphasis and bracketed inclusion added).

(Footnote continued on next page)

C. **RCW 82.04.050(1)(e) Plainly And Unambiguously Grants Activate A Tax Exemption For Cellular Telephones Activate Was “Providing” To Customers.**

Independent of the regular resale exemption (RCW 82.04.050(1)(a)) discussed above, a second subsection of RCW 82.04.050(1) is equally, if not more, applicable to exempt these cellular telephones from sales and use tax. This is an exemption granted exclusively to taxpayers like Activate.¹³

RCW 82.04.050(1)(e) states that the term “sale at retail” or “retail sale” does not include any “sale to a person who presents a resale certificate under RCW 82.04.470 and who . . . (e) purchases for the purpose of providing the property to consumers as part of competitive telephone service, as defined in RCW 82.04.065” (emphasis added).¹⁴ Thus, this separate subsection of the definition of the term “sale at retail” or “retail sale” excludes any sale to a person who purchases certain

Det. 91-177 is significant because it holds that where a taxpayer actually does sell something to a person “to whom a premium has been given, a resale has occurred,” and neither the sales tax nor use tax will apply. *Id.* In Activate’s case, customers do not receive a “gift” – i.e., a “giveaway” or “free” telephone -- unless they agree to purchase a wireless plan. In other words, Activate always sells something -- the wireless plan -- whenever a “free” telephone is “given away.” This is precisely parallel to the customers who purchased camping memberships in Det. 91-177, which held that a resale of the so-called “premium” took place whenever a camping membership was actually purchased. The Department’s own Det. 91-177 is contrary to its position in this case and supports Activate’s position that no sales or use tax is due in its situation.

¹³ Under the rule that a specific statute prevails over a general statute, Activate believes the RCW 82.04.050(1)(e) tax exemption applies first and foremost. Estate of Black, 153 Wn.2d 152, 164, 102 P.3d 796 (2004) (“When more than one statute applies, the specific statute will supercede the general statute”) (citing Hallauer v. Spectrum Props., Inc., 143 Wn.2d 126, 146, 18 P.3d 540 (2001)).

¹⁴ As noted above, the trial court did not rule on this separate exemption or it ruled, *sub silentio*, that subsection (1)(e) of RCW 82.040.050 was inapplicable.

telephone equipment for resale, where the person is “providing” that equipment to consumers. The property “provided” to consumers must be equipment that falls within the definition of the term “competitive telephone service.” This latter term, defined in RCW 82.04.065, means “telecommunications equipment or apparatus, . . . if the equipment or apparatus is of a type which can be provided by persons that are not subject to regulation as telephone companies under Title 80 RCW and for which a separate charge is made.” RCW 82.04.065(1).¹⁵

Thus, to determine whether a particular transaction falls within the *special* telephone exception to the definition of “retail sale” set forth in RCW 82.04.050(1)(e), six requirements must be met:

- (1) a resale certificate must be presented,
- (2) by a person who purchases the property for the purpose of “providing” the property to consumers,
- (3) as part of “competitive telephone service,”
- (4) which term is defined in RCW 82.04.065 to mean telecommunications equipment,

¹⁵ Under RCW 80.36.370(4), any company that sells “customer premises equipment” is not a telephone company regulated by the Washington State Utilities and Transportation Commission (“UTC”) under Title 80 RCW. Activate sells customer premises equipment -- cellular telephones, apparatus and related equipment -- and, therefore, it is not a telephone company regulated by the UTC. The Department agrees that Activate is a non-regulated telephone company selling customer premises equipment. See CP 113 (“Activate’s free phones are a type of equipment that can be provided by non-regulated telephone companies”).

- (5) of a type which can be provided by persons not subject to regulation as a telephone company, and
- (6) for which a separate charge is made.

The six elements necessary to qualify Activate's purchases of cellular telephones for the *special* telephone equipment "resale" exemption were satisfied here. The Department does not dispute the first requirement, presentation of a resale certificate; nor the second requirement, Activate is a person selling or providing telephones to consumers. The telephones were "provided" as part of competitive telephone service and they were clearly and unmistakably telecommunications equipment (thereby satisfying the third and fourth requirements). Activate is not subject to regulation as a telephone company under Title 80 RCW (fifth requirement), and both Activate and the Department agree as to this fact, too. See n. 15, supra. The question boils down to whether Activate makes a "separate charge" for the cellular telephones "given away" (the sixth requirement) to qualify Activate's purchases of telephones for the special telephone resale exemption (RCW 82.04050(1)(e)).

The Department does dispute this last requirement, arguing that the "giveaway phones are [not] telephone equipment 'for which a *separate charge is made.*'" CP 113 (citing RCW 82.04.065(1)) (Department's *italic emphasis*). The Department contends that the customer invoice

(CP 194) that describes the telephone (“Nokia 5165”) and lists the price at “\$0.00” is not a “separate charge” but a “notation of the absence of any charge.” CP 212. Not only is the Department splitting hairs over semantics (as it has done throughout these proceedings), it misapplies and misinterprets the “separate charge” requirement.

As previously explained, CP 194 (Appendix, Exhibit A) is a sample invoice from a transaction that occurred during the audit period where a fully discounted, “free” or “giveaway” telephone was “provided” to the customer. CP 190. This invoice shows that Activate made a “separate charge” (RCW 82.04.065(1)) to the customer for the telephone, a charge of \$0.00, thereby satisfying the “separate charge” requirement in the definition of “competitive telephone service” under RCW 82.04.065(1), and ultimate exemption under RCW 82.04.050(1)(e).

The statute does not define the words “separate” or “charge,” or the term “separate charge.” “When a statute fails to define a term, a court may rely on the ordinary meaning of the word as stated in a dictionary.” State v. Klein, 156 Wn.2d 103, 116, 124 P. 3d 644 (2005) (citing Budget Rent A Car Corp. v. Dep’t of Licensing, 144 Wn.2d 889, 899, 31 P. 3d 1174 (2001)). There is no question that in CP 194 (Appendix, Exhibit A) the amount \$0.00 is separately stated. So, the key word to be defined in the term “separate charge” is the word “charge.” The American Heritage Dictionary of the English Language, New College Edition (1979) at 226,

defines “charge”: “To set or ask (a given amount) as a price.” Black’s Law Dictionary at 294 (Revised Fourth Edition 1968) provides a similar definition: “In commercial transactions, to bill or invoice” (citing George M. Jones Co. v. Canadian Nat. Ry. Co., D.C. Mich., 14 F.2d 852, 855 (1926)). Activate’s “charge” of “\$0.00” for the telephone under the special promotion fell squarely within these definitions.

The \$0.00 amount is “set”; it is also the “asked for” price. That the price is “set” at \$0.00 is not indicative that it is not a “separate charge.” In this, the first decade of the 21st Century, there is very little economic difference between a charge of \$0.00 and a charge of \$0.01 (one cent), but when stated on a bill or invoice they are clearly and unmistakably both “separate charges.” The Department appears to argue that a “charge” must be a price greater than \$0.00, but the above definitions do not support this position. This would mean a “charge” of one cent (\$0.01), as in the above example, would qualify the transaction for the subsection (1)(e) exemption but a price of \$0.00 does not. This position is flawed, does not recognize economic reality, and conflicts with the plain language of the statute.

A separate charge of \$0.00 also satisfies the Black’s Law Dictionary definition of the word “charge -- “to bill or invoice.” CP 194 (Appendix, Exhibit A) is clearly a billing or invoice. It just happens to state an amount due in this instance of \$0.00 for the cellular telephone, rather than \$49.99 (CP 198; Appendix, Exhibit C) or \$99.99 (CP 202;

Appendix, Exhibit E). There is simply no requirement in any of these dictionary definitions that the charge be greater than zero. Furthermore, if the charge was greater than \$0.00 the transaction would unquestionably qualify for the *regular* resale exemption under RCW 82.04.050(1)(a) under the Department's own interpretation. This would make RCW 82.04.050(1)(e), creating a *special* resale exemption for certain telephone equipment, mere surplusage. Sacred Heart, 88 Wn. App. at 639. "Such an interpretation is contrary to a basic maxim of statutory construction: Whenever possible, a statute must be interpreted so as to give all of its language meaning." Sacred Heart at 639 (citing Xieng v. Peoples Nat'l Bank, 120 Wn.2d 512, 530, 844 P.2d 389 (1993)).

Another key to interpreting RCW 82.04.050(1)(e), and determining whether Activate is entitled to the special telephone resale exemption for the cellular telephones purchased from AT&T, is ascertaining the meaning of the word "providing." The statute says that if the telephone equipment is purchased "for the purpose of providing the property to consumers as part of competitive telephone service" it falls outside the definition of "retail sale" and is exempt from tax. RCW 82.04.050(1)(e) (emphasis added). The word "providing" is likewise not defined in the statute and resort to the common dictionary definition is also appropriate here. State v. Klein, 156 Wn.2d at 116. "Providing" is a derivative of the word "provide," which is defined to mean "[t]o furnish, supply." The American

Heritage Dictionary of the English Language, New College Edition (1979) at 1053. Whether the cellular telephones are “fully discounted,” “free,” sold at “no charge” or “given away” to retail customers, they were clearly “furnished” or “supplied” to customers under the common dictionary definition of the word “provide” or “providing.” It is also important to note that, unlike the regular resale exemption discussed above, there is no requirement that the telephones be sold to the retail customers; instead, the phones are only required to be provided, i.e., furnished or supplied, to customers. This is a clear distinction from the requirements of the resale exemption (RCW 82.04.050(1)(a)).

Furthermore, in interpreting these statutes the Court must harmonize the “providing” language in RCW 82.04.050(1)(e), which clearly does not contemplate a “sale” of the telephones, with the “separate charge” language in the definition of “competitive telephone service” which, as shown, is an inherent part of the special telephone resale exemption.¹⁶ If the separate charge requirement in the definition of competitive telephone service meant a charge greater than \$0.00, then the transaction would unquestionably qualify for the resale exemption and the

¹⁶ See Lewis County, 113 Wn. App. 142, 150, 53 P. 3d 44 (2002), (“Statutes should be harmonized, when possible [citing State ex. re. Evergreen Freedom Found, 140 Wn.2d at 639; Harmon v. Dep’t of Soc. & Health Servs., 134 Wn.2d 523, 542, 951 P.2d 770 (1998)], so that each is given force and effect [citing Harman v. Pierce County Bldg. Dep’t., 106 Wn.2d 32, 36, 720 P.2d 433 (1986); Int’l Commercial Collectors, Inc. v. Carver, 99 Wn.2d 302, 307, 661 P.2d 976 (1983)]”)

special telephone exemption would be redundant and unnecessary. The only way to make sense out of both exemptions -- the regular resale exemption and the special telephone resale exemption -- and to harmonize them, is to assume a “separate charge” of \$0.00, as required by RCW 82.04.050(1)(e) and RCW 82.04.065(1), is perfectly acceptable in qualifying a customer transaction for the special telephone exemption. This is also what the Legislature intended in enacting RCW 82.04.050(1)(e), when it cross-referenced RCW 82.04.065 in the statute. See Lewis County, 113 Wn. App. at 148, (citing Kitsap County v. Moore, 144 Wn.2d 292, 26 P. 3d 931 (2001)); State ex rel. Evergreen Freedom Found. v. Wash. Educ. Ass’n, 140 Wn.2d 615, 999 P. 2d 602 (2000); State v. Refuerzo, 102 Wn. App. 341, 348, 7 P. 3d 847 (2000).

In summary, the trial court failed to address RCW 82.04.050(1)(e) in any meaningful way. And, the Department’s argument that “Activate’s giveaway phones are not telephone equipment ‘for which a *separate charge is made*’” (CP 113 (emphasis in original)) is also in error, as the common dictionary definitions of the key words “charge” and “providing” so clearly demonstrate. Activate thus met the requirements for exemption under the special telephone resale exemption (RCW 82.04.050(1)(e)). The trial court failed to grasp the significance of, and did not address, this statute in its ruling. It is unclear whether that was on purpose, or a *sub*

silentio rejection of RCW 82.04.050(1)(e)'s application to this case. In either case the court erred.

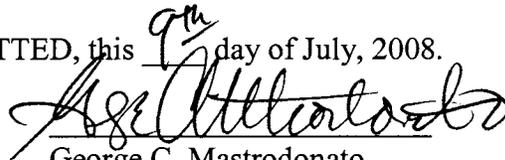
This Court is not bound by the trial court's ruling. Therefore, apart from the *regular* resale exemption (RCW 82.04.050(1)(a)), subsection (1)(e) of RCW 82.04.050, the *special* telephone resale exemption, independently allows Activate to exempt the cellular telephones in question from sales and use tax.

V.

CONCLUSION

To conclude, the Court should apply the plain language of both subsections (1)(a) and (1)(e) of RCW 82.04.050 and rule that Activate's inventory of cellular telephones Activate purchased from AT&T and then resold or provided to its customers were exempt from sales tax and use tax. Activate met each and every requirement of these statutes to exempt its inventory of telephones from tax. The trial court below should be reversed and ordered to enter a refund judgment in favor of Activate.

RESPECTFULLY SUBMITTED, this ^{9th} day of July, 2008.



George C. Mastrodonato
WSBA No. 7483

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Seattle, WA 98101

Telephone: (206) 903-8800

Facsimile: (206) 903-8820

*Attorneys for Plaintiff/Appellant
Activate, Inc.*

DECLARATION OF SERVICE

I certify that on the date set forth below I served a copy of the foregoing Brief of Appellant via United States Mail, postage prepaid, on the Respondent's counsel of record, as follows:

Donald F. Cofer, Senior Counsel
Heidi A. Irvin, Assistant Attorney General
Attorney General/Revenue Division
P.O. Box 40123
Olympia, WA 98504-0123

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

DATED this 9th day of July, 2008.



Kristi Hartman

FILED
COURT OF APPEALS
DIVISION II
08 JUL -9 PM 2:44
STATE OF WASHINGTON
BY _____
DEPUTY

APPENDIX

EXHIBIT A
CP 194

Activate - 203
 8700 NE Vancouver DR
 Vancouver, WA 98662
 (360) 944-5253

at 0000 BILLING ENDS 14TH - 2 YEAR AGREEMENT

SALE NO	177137	SALE DATE	05/09/02	Nathan B	
QUANTITY	ITEM NO	DESCRIPTION		PRICE	AMOUNT
1	2DA	AT&T DIGITAL ADVANTAGE \$39 99 400 anytime minutes		0 0000	0 00
1	797553006879	NOKIA 5165 07809601444		0 0000	0 00

The price you paid for your wireless phone reflects a substantial discount off the phone. Activate receives a commission based on your activation and continuation of service for at least 180 consecutive days.

If prior to the expiration of 180 consecutive days, you cancel or alter your cellular service you may be subject to additional charges outlined below.

I agree to pay Activate \$200 plus applicable taxes as compensation for the commission that Activate would be required to repay the cellular provider. There may also be extra cancellation fees by your carrier.

In the event the collection is needed to enforce this agreement, I promise to pay, in addition to the amount due to Activate under this agreement, reasonable collection and/or attorney fees incurred by Activate.

I have filled out the credit card authorization to the right to induce the sale of the cellular product described with the intention of authorizing Activate to charge my credit card in the amount of \$200 if I fail to activate and maintain continuous service for 180 consecutive days.

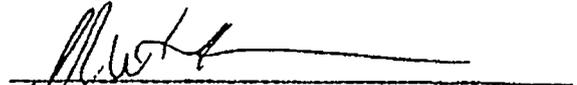
I authorize Activate to obtain information relative to my account and cellular service from my cellular provider and consent to the obtaining of my credit history.

RETURN POLICY Exchanges accepted within 30 days or 30 minutes use whichever comes first. Original receipt and ALL original packing required. NOTE: returns or exchange do not effect wireless carrier contract. no warranty available on promotional items.

SUBTOTAL 0 00
 TAX 0 00
 TOTAL 0 00
 AMOUNT PAID 0 00

I understand and agree to the terms of this Agreement


 Customer Signature


 Activate Signature

0-000000194

SCANNED

EXHIBIT B
CP 196

EXHIBIT C
CP 198

Activate - 203
 8700 NE Vancouver DR
 Vancouver, WA 98662
 (360) 944-5253

at 0000 BILLING ENDS 14TH - 2 YEAR CONTRACT

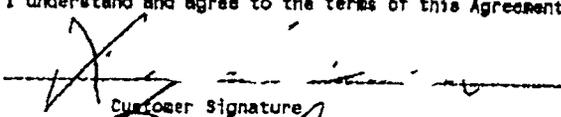
QUANTITY	ITEM NO	DESCRIPTION	PRICE	AMOUNT
1	2DA	AT&T DIGITAL ADVANTAGE 399 99 400 anytime minutes	0 0000	0 00
1	797553007258	Nokia 3360 07815592496	49 9900	49 99

The price you paid for your wireless phone reflects a substantial discount off the phone. Activate receives a commission based on your activation and continuation of service for at least 180 consecutive days. If prior to the expiration of 180 consecutive days, you cancel or alter your cellular service you may be subject to additional charges outlined below. I agree to pay Activate \$200 plus applicable taxes as compensation for the commission that Activate would be required to repay the cellular provider. There may also be extra cancellation fees by your carrier. In the event the collection is needed to enforce this agreement, I promise to pay, in addition to the amount due to Activate under this agreement, reasonable collection and/or attorney fees incurred by Activate. I have filled out the credit card authorization to the right to induce the sale of the cellular product described with the intention of authorizing Activate to charge my credit card in the amount of \$200 if I fail to activate and maintain continuous service for 180 consecutive days. I authorize Activate to obtain information relative to my account cellular service from my cellular provider and consent to the obtaining of my credit history.

IRK POLICY Exchanges accepted within 30 days or 30 minutes use whichever is first. Original receipt and ALL original packing required. NOTE: Returns or exchange do not effect wireless carrier contract. No warranty available on promotional items.

	SUBTOTAL	49 99
	TAX	3 85
	TOTAL	53 84
CASH	AMOUNT PAID	60 04

I understand and agree to the terms of this Agreement


 Customer Signature


 Activate Signature

0-000000198

SCANNED

EXHIBIT D
CP 200



AT&T Wireless

Personal Service Agreement

ACCOUNT INFORMATION

New Account Add to Account Account Resp Change Refer to Account ESN Change
 TDMA GSM

Account #

Wireless Phone Number

PERSONAL ACCOUNT INFORMATION

Bill to Home Business

Customer Name (Subscriber) _____

Home Address _____

City _____ State _____ Zip _____

Company Name _____

Business Address _____

Please Complete if Bill To Address is Different From Home Address

City _____ State _____ Zip _____

THIS IS A TWO-YEAR AGREEMENT FOR WIRELESS SERVICES WITH AT&T WIRELESS ("AGREEMENT") BY SIGNING BELOW, YOU AGREE TO BE BOUND TO THIS TWO-YEAR AGREEMENT EVEN IF ANOTHER TERM IS REFERENCED IN OTHER MATERIALS YOU HAVE RECEIVED. If you cancel your service before the end of the two-year term, you will be charged the early termination fee that is contained in your AT&T Wireless Calling Plan or Rate Plan ("Rate Plan") brochure or promotional materials. This Agreement hereby incorporates by reference the Terms and Conditions and other information set forth in the AT&T Wireless Welcome Guide (or for GSM/GPRS customers, in the AT&T Wireless Quick Start Guide or online at www.attwireless.com/mobileinternet), the Rate Plan brochure and/or feature or promotional materials (collectively, "Sales Information") that you were provided or, for GSM/GPRS customers, are online at www.attwireless.com/mobileinternet. By signing below, you acknowledge that you have received and reviewed the Terms and Conditions and Sales Information and that you agree to be bound by such Terms and Conditions and the Sales Information for the term of your Agreement. You will only be eligible to retain the promotional benefits that were provided in connection with the two-year term if you complete and return this Agreement within 60 days of activation.

By signing below, you confirm the truth and completeness of the above information

Signature _____

Date (mo./day/yr) 05/11/02

SERVICE INFORMATION

Welcome Guide Version

Date (mo./day/yr)



Ln-Subscriber Agreement/MN/VI 12/01
Change Code: New
NAT01-2261

SCANNED

0-000000200
120404

EXHIBIT E
CP 202

Activate - 203
 8700 NE Vancouver DR
 Vancouver, WA 98662
 (360) 944-5253

Ext 0000

SALE NO	177353	SALE DATE	05/12/02	Nathan B	
QUANTITY	ITEM NO	DESCRIPTION	PRICE	AMOUNT	
1	797553006862	Nokia 5165 EPW 07404484162	99 9900	99 99	

The price you paid for your wireless phone reflects a substantial discount off the phone. Activate receives a commission based on your activation and continuation of service for at least 180 consecutive days.

If prior to the expiration of 180 consecutive days, you cancel or alter your cellular service you may be subject to additional charges outlined below.

I agree to pay Activate \$200 plus applicable taxes as compensation for the commission that Activate would be required to repay the cellular provider. There may also be extra cancellation fees by your carrier.

In the event the collection is needed to enforce this agreement, I promise to pay, in addition to the amount due to Activate under this agreement, reasonable collection and/or attorney fees incurred by Activate.

I have filled out the credit card authorization to the right to induce the sale of the cellular product described with the intention of authorizing Activate to charge my credit card in the amount of \$200 if I fail to activate and maintain continuous service for 180 consecutive days.

I authorize Activate to obtain information relative to my account and cellular service from my cellular provider and consent to the obtaining of my credit history.

RETURN POLICY Exchanges accepted within 30 days or 30 minutes use whichever comes first. Original receipt and ALL original packing required. **NOTE** returns or exchange do not effect wireless carrier contract. no warranty available on promotional items.

SUBTOTAL	99 99
TAX	7 70
TOTAL	107 69
VISA AMOUNT PAID	107 69

I understand and agree to the terms of this Agreement

 Customer Signature

 Activate Signature

0-000000202

SCANNED

EXHIBIT F
RCW 82.04.050
(2002 Ed.)

82.04.050 "Sale at retail," "retail sale." (1) "Sale at retail" or "retail sale" means every sale of tangible personal property (including articles produced, fabricated, or imprinted) to all persons irrespective of the nature of their business and including, among others, without limiting the scope hereof, persons who install, repair, clean, alter, improve, construct, or decorate real or personal property of or for consumers other than a sale to a person who presents a resale certificate under RCW 82.04.470 and who:

(a) Purchases for the purpose of resale as tangible personal property in the regular course of business without intervening use by such person, but a purchase for the purpose of resale by a regional transit authority under RCW 81.112.300 is not a sale for resale; or

(b) Installs, repairs, cleans, alters, imprints, improves, constructs, or decorates real or personal property of or for consumers, if such tangible personal property becomes an ingredient or component of such real or personal property without intervening use by such person; or

(c) Purchases for the purpose of consuming the property purchased in producing for sale a new article of tangible personal property or substance, of which such property becomes an ingredient or component or is a chemical used in processing, when the primary purpose of such chemical is to create a chemical reaction directly through contact with an ingredient of a new article being produced for sale; or

(d) Purchases for the purpose of consuming the property purchased in producing ferrosilicon which is subsequently used in producing magnesium for sale, if the primary purpose of such property is to create a chemical reaction directly through contact with an ingredient of ferrosilicon; or

(e) Purchases for the purpose of providing the property to consumers as part of competitive telephone service, as defined in RCW 82.04.065. The term shall include every sale of tangible personal property which is used or consumed or to be used or consumed in the performance of any activity classified as a "sale at retail" or "retail sale" even though such property is resold or utilized as provided in (a), (b), (c), (d), or (e) of this subsection following such use. The term also means every sale of tangible personal property to persons engaged in any business which is taxable under RCW 82.04.280 (2) and (7) and 82.04.290.

(2) The term "sale at retail" or "retail sale" shall include the sale of or charge made for tangible personal property consumed and/or for labor and services rendered in respect to the following:

(a) The installing, repairing, cleaning, altering, imprinting, or improving of tangible personal property of or for consumers, including charges made for the mere use of facilities in respect thereto, but excluding charges made for the use of coin-operated laundry facilities when such facilities are situated in an apartment house, rooming house, or mobile home park for the exclusive use of the tenants thereof, and also excluding sales of laundry service to non-profit health care facilities, and excluding services rendered in respect to live animals, birds and insects;

(b) The constructing, repairing, decorating, or improving of new or existing buildings or other structures under, upon, or above real property of or for consumers, including the installing or attaching of any article of tangible personal property therein or thereto, whether or not such personal property becomes a part of the realty by virtue of installation, and shall also include the sale of services or charges made for the clearing of land and the moving of earth excepting the mere leveling of land used in commercial farming or agriculture;

(c) The charge for labor and services rendered in respect to constructing, repairing, or improving any structure upon, above, or under any real property owned by an owner who conveys the property by title, possession, or any other means to the person performing such construction, repair, or improvement for the purpose of performing such construction, repair, or improvement and the property is then reconveyed by title, possession, or any other means to the original owner;

(d) The sale of or charge made for labor and services rendered in respect to the cleaning, fumigating, razing or moving of existing buildings or structures, but shall not include the charge made for janitorial services; and for purposes of this section the term "janitorial services" shall mean those cleaning and caretaking services ordinarily performed by commercial janitor service businesses including, but not limited to, wall and window washing, floor cleaning and waxing, and the cleaning in place of rugs, drapes and upholstery. The term "janitorial services" does not include painting, papering, repairing, furnace or septic tank cleaning, snow removal or sandblasting;

(e) The sale of or charge made for labor and services rendered in respect to automobile towing and similar automotive transportation services, but not in respect to those required to report and pay taxes under chapter 82.16 RCW;

(f) The sale of and charge made for the furnishing of lodging and all other services by a hotel, rooming house, tourist court, motel, trailer camp, and the granting of any similar license to use real property, as distinguished from the renting or leasing of real property, and it shall be presumed that the occupancy of real property for a continuous period of one month or more constitutes a rental or lease of real property and not a mere license to use or enjoy the same. For the purposes of this subsection, it shall be presumed that the sale of and charge made for the furnishing of lodging for a continuous period of one month or more to a person is a rental or lease of real property and not a mere license to enjoy the same;

(g) The sale of or charge made for tangible personal property, labor and services to persons taxable under (a), (b), (c), (d), (e), and (f) of this subsection when such sales or charges are for property, labor and services which are used

or consumed in whole or in part by such persons in the performance of any activity defined as a "sale at retail" or "retail sale" even though such property, labor and services may be resold after such use or consumption. Nothing contained in this subsection shall be construed to modify subsection (1) of this section and nothing contained in subsection (1) of this section shall be construed to modify this subsection.

(3) The term "sale at retail" or "retail sale" shall include the sale of or charge made for personal, business, or professional services including amounts designated as interest, rents, fees, admission, and other service emoluments however designated, received by persons engaging in the following business activities:

(a) Amusement and recreation services including but not limited to golf, pool, billiards, skating, bowling, ski lifts and tows, day trips for sightseeing purposes, and others, when provided to consumers;

(b) Abstract, title insurance, and escrow services;

(c) Credit bureau services;

(d) Automobile parking and storage garage services;

(e) Landscape maintenance and horticultural services but excluding (i) horticultural services provided to farmers and (ii) pruning, trimming, repairing, removing, and clearing of trees and brush near electric transmission or distribution lines or equipment, if performed by or at the direction of an electric utility;

(f) Service charges associated with tickets to professional sporting events; and

(g) The following personal services: Physical fitness services, tanning salon services, tattoo parlor services, steam bath services, turkish bath services, escort services, and dating services.

(4) The term shall also include the renting or leasing of tangible personal property to consumers and the rental of equipment with an operator.

(5) The term shall also include the providing of telephone service, as defined in RCW 82.04.065, to consumers.

(6) The term shall also include the sale of canned software other than a sale to a person who presents a resale certificate under RCW 82.04.470, regardless of the method of delivery to the end user, but shall not include custom software or the customization of canned software.

(7) The term shall not include the sale of or charge made for labor and services rendered in respect to the building, repairing, or improving of any street, place, road, highway, easement, right of way, mass public transportation terminal or parking facility, bridge, tunnel, or trestle which is owned by a municipal corporation or political subdivision of the state or by the United States and which is used or to be used primarily for foot or vehicular traffic including mass transportation vehicles of any kind.

(8) The term shall also not include sales of chemical sprays or washes to persons for the purpose of postharvest treatment of fruit for the prevention of scald, fungus, mold, or decay, nor shall it include sales of feed, seed, seedlings, fertilizer, agents for enhanced pollination including insects such as bees, and spray materials to: (a) Persons who participate in the federal conservation reserve program, the environmental quality incentives program, the wetlands reserve program, and the wildlife habitat incentives program, or their successors administered by the United States depart-

ment of agriculture; (b) farmers for the purpose of producing for sale any agricultural product; and (c) farmers acting under cooperative habitat development or access contracts with an organization exempt from federal income tax under 26 U.S.C. Sec. 501(c)(3) or the Washington state department of fish and wildlife to produce or improve wildlife habitat on land that the farmer owns or leases.

(9) The term shall not include the sale of or charge made for labor and services rendered in respect to the constructing, repairing, decorating, or improving of new or existing buildings or other structures under, upon, or above real property of or for the United States, any instrumentality thereof, or a county or city housing authority created pursuant to chapter 35.82 RCW, including the installing, or attaching of any article of tangible personal property therein or thereto, whether or not such personal property becomes a part of the realty by virtue of installation. Nor shall the term include the sale of services or charges made for the clearing of land and the moving of earth of or for the United States, any instrumentality thereof, or a county or city housing authority. Nor shall the term include the sale of services or charges made for cleaning up for the United States, or its instrumentalities, radioactive waste and other byproducts of weapons production and nuclear research and development.

(10) Until July 1, 2003, the term shall not include the sale of or charge made for labor and services rendered for environmental remedial action as defined in RCW 82.04.2635(2). [2002 c 178 § 1; 2000 2nd sp.s. c 4 § 23. Prior: 1998 c 332 § 2; 1998 c 315 § 1; 1998 c 308 § 1; 1998 c 275 § 1; 1997 c 127 § 1; prior: 1996 c 148 § 1; 1996 c 112 § 1; 1995 1st sp.s. c 12 § 2; 1995 c 39 § 2; 1993 sp.s. c 25 § 301; 1988 c 253 § 1; prior: 1987 c 285 § 1; 1987 c 23 § 2; 1986 c 231 § 1; 1983 2nd ex.s. c 3 § 25; 1981 c 144 § 3; 1975 1st ex.s. c 291 § 5; 1975 1st ex.s. c 90 § 1; 1973 1st ex.s. c 145 § 1; 1971 ex.s. c 299 § 3; 1971 ex.s. c 281 § 1; 1970 ex.s. c 8 § 1; prior: 1969 ex.s. c 262 § 30; 1969 ex.s. c 255 § 3; 1967 ex.s. c 149 § 4; 1965 ex.s. c 173 § 1; 1963 c 7 § 1; prior: 1961 ex.s. c 24 § 1; 1961 c 293 § 1; 1961 c 15 § 82.04.050; prior: 1959 ex.s. c 5 § 2; 1957 c 279 § 1; 1955 c 389 § 6; 1953 c 91 § 3; 1951 2nd ex.s. c 28 § 3; 1949 c 228 § 2, part; 1945 c 249 § 1, part; 1943 c 156 § 2, part; 1941 c 178 § 2, part; 1939 c 225 § 2, part; 1937 c 227 § 2, part; 1935 c 180 § 5, part; Rem. Supp. 1949 § 8370-5, part.]

Retroactive application—Effective date—2002 c 178: See notes following RCW 67.28.180.

Findings—Construction—2000 2nd sp.s. c 4 §§ 18-30: See notes following RCW 81.112.300.

Findings—Intent—Effective date—1998 c 332: See notes following RCW 82.04.29001.

Effective dates—1998 c 308: "(1) Sections 1 through 4 of this act take effect July 1, 1998.

(2) Section 5 of this act takes effect July 1, 2003." [1998 c 308 § 6.]

Effective date—1998 c 275: "This act takes effect July 1, 1998." [1998 c 275 § 2.]

Effective date—1997 c 127: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect July 1, 1997." [1997 c 127 § 2.]

Severability—1996 c 148: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1996 c 148 § 7.]

Effective date—1996 c 148: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and shall take effect April 1, 1996." [1996 c 148 § 8.]

Effective date—1996 c 112: "This act shall take effect July 1, 1996." [1996 c 112 § 5.]

Intent—1995 1st sp.s. c 12: "It is the intent of the legislature that massage services be recognized as health care practitioners for the purposes of business and occupation tax application. To achieve this intent massage services are being removed from the definition of sale at retail and retail sale." [1995 1st sp.s. c 12 § 1.]

Effective date—1995 1st sp.s. c 12: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and shall take effect July 1, 1995." [1995 1st sp.s. c 12 § 5.]

Effective date—1995 c 39: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and shall take effect July 1, 1995." [1995 c 39 § 3.]

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

Construction—Severability—Effective dates—1983 2nd ex.s. c 3: See notes following RCW 82.04.255.

Intent—Severability—Effective date—1981 c 144: See notes following RCW 82.16.010.

Application to preexisting contracts—1975 1st ex.s. c 291; 1975 1st ex.s. c 90: See note following RCW 82.12.010.

Effective dates—1975 1st ex.s. c 291: "This 1975 amendatory act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing institutions, and shall take effect immediately: PROVIDED, That sections 8 and 26 through 43 of this amendatory act shall be effective on and after January 1, 1976: PROVIDED FURTHER, That sections 2, 3, and 4, and subsections (1) and (2) of section 24 shall be effective on and after January 1, 1977: AND PROVIDED FURTHER, That subsections (3) through (15) of section 24 shall be effective on and after January 1, 1978." [1975 1st ex.s. c 291 § 46.]

Severability—1975 1st ex.s. c 291: "If any provision of this 1975 amendatory act, or its application to any person or circumstance is held invalid, the remainder of the act, or the application of the provision to other persons or circumstances is not affected." [1975 1st ex.s. c 291 § 45.]

Effective date—1975 1st ex.s. c 90: "This 1975 amendatory act is necessary for the immediate preservation of the public peace, health and safety, the support of the state government and its existing public institutions, and shall take effect July 1, 1975." [1975 1st ex.s. c 90 § 5.]

Effective date—1973 1st ex.s. c 145: "This act is necessary for the immediate preservation of the public peace, health and safety, the support of the state government and its existing public institutions, and shall take effect July 1, 1973." [1973 1st ex.s. c 145 § 2.]

Effective dates—1971 ex.s. c 299: "This 1971 amendatory act is necessary for the immediate preservation of the public peace, health and safety, the support of the state government and its existing public institutions, and shall take effect as follows:

(1) Sections 1 through 12, 15 through 34 and 53 shall take effect July 1, 1971;

(2) Sections 13, 14, and 77 and 78 shall take effect June 1, 1971; and

(3) Sections 35 through 52 and 54 through 76 shall take effect as provided in section 53." [1971 ex.s. c 299 § 79.]

Severability—1971 ex.s. c 299: "If any phrase, clause, subsection or section of this 1971 amendatory act shall be declared unconstitutional or invalid by any court of competent jurisdiction, it shall be conclusively presumed that the legislature would have enacted this 1971 amendatory act without the phrase, clause, subsection or section so held unconstitutional or invalid and the remainder of the act shall not be affected as a result of said part being held unconstitutional or invalid." [1971 ex.s. c 299 § 78.]

Construction—Severability—1969 ex.s. c 255: See notes following RCW 35.58.272.

Effective date—1967 ex.s. c 149: "This act is necessary for the immediate preservation of the public peace, health and safety, the support of the state government and its existing public institutions, and shall take effect July 1, 1967." [1967 ex.s. c 149 § 65.]

Effective date—1965 ex.s. c 173: "This act is necessary for the immediate preservation of the public peace, health and safety, the support of the state government and its existing public institutions, and shall take effect June 1, 1965." [1965 ex.s. c 173 § 33.]

Credit for retail sales or use taxes paid to other jurisdictions with respect to property used: RCW 82.12.035.

"Services rendered in respect to" defined: RCW 82.04.051.