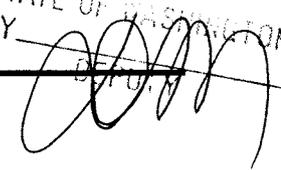


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**COURT OF APPEALS, DIVISION
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ACTIVATE, INC.,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Respondent.

BRIEF OF RESPONDENT

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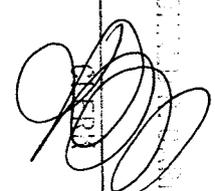
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I. INTRODUCTION

This case presents the intersection of state sales and use tax with the marketing and sales practices of today's cellular telephone industry. The tax questions arise from Activate, Inc.'s practice of giving some cellular telephones without charge to customers who agree to enter into a contract with a third-party provider for wireless telephone service. Activate argues its purchase and use of these cellular telephones as a promotional device is tax exempt, under two different exemptions. The Department of Revenue believes otherwise, as did the trial court.

The parties' briefs discuss what it means for an item to be "free," whether a "sale" for tax purposes requires a price greater than \$0.00, and whether a required "charge" can be "no charge." Under the plain language of the applicable statutes, including statutory definitions, and the ordinary meaning of undefined words in those statutes, the Court should conclude that Activate owed use tax on these cellular telephones. The trial court's order granting the Department summary judgment should be affirmed.

II. STATEMENT OF ISSUES

The Department of Revenue assessed use tax on Activate for cellular telephones Activate gave to customers without charge, in return for the customer's commitment to purchase wireless telephone service

from a third-party service provider. Activate argues it is exempt from use tax on either of two bases, the resale exemption or the competitive telephone service exemption. Did the trial court properly grant summary judgment to the Department because:

1. Activate did not “resell” the telephones it provided to customers without charge, and therefore is not entitled to the resale exemption under RCW 82.04.050(1)(a); and
2. Activate did not provide the cellular telephones to customers with a “separate charge,” and therefore is not entitled to the competitive telephone service exemption under RCW 82.04.050(1)(e)?

III. STATEMENT OF THE CASE

From kiosks located in shopping malls in Oregon and Washington,¹ Activate makes retail sales of cellular telephones and cellular telephone accessories and serves as a representative for AT&T/Cingular (“AT&T”), earning commission on the extended cellular telephone service agreements Activate’s customers enter into with third-party provider AT&T. See CP 5 at ¶¶ 4-5; CP 186-92.

The Department’s Audit Division audited Activate for the period January 1, 2000, through December 31, 2003. CP 4 at ¶ 1; CP 13 at 1. During that period, Activate purchased cellular telephones from

¹ Activate “is a corporation organized under the laws of the State of Oregon with its principal place of business in Beaverton, Oregon.” CP 4 at ¶ 1; CP 187 at ¶ 5.

manufacturers or suppliers in Oregon, specifically AT&T, and did not pay sales tax on its purchase of the cellular telephones. CP 5-6 at ¶¶ 5, 9; CP 188-89. Oregon has no sales tax. In the course of auditing Activate, the Department learned that Activate had not resold all of the phones purchased from its suppliers, but rather had given a portion of its inventory to customers “without an additional or separate charge” when the customers agreed to sign an extended service agreement with AT&T. CP 5 at ¶ 6; CP 13-16. Activate charged customers only for the “enhanced” phones—that is, those “upgraded . . . with more features”—and collected sales tax on those transactions, but Activate received no payment for the giveaway phones and collected no sales tax on them. CP 5 at ¶ 6; see CP 13-25.

According to Activate’s Controller, the offer of a “free” cellular telephone “was a promotional device used to attract customers. We have found that this type of offer – the provision of a telephone with the purchase of a Plan – is a useful and valuable marketing tool for Activate.” CP 189. Activate made this offer only if the customer agreed to sign a contract with Activate and a contract for a wireless service from AT&T, with a service commitment of sufficient length and a monthly recurring charge of a sufficient amount to justify what amounted to a 100% discount on the cellular telephone. CP 191; see CP 194, 196 (Exhibits 1 and 2).

Sometimes Activate sold cellular telephones with no discount or with a partial discount. CP 188 at ¶ 12, 190-91 at ¶¶ 21-24.

Customers paid the same price for wireless telephone service from AT&T whether or not they received a free or discounted cellular telephone from Activate. The wireless service plan price was set by AT&T,² not Activate. See CP 30; CP 84.

The auditor assessed use tax on the inventory of phones Activate purchased from suppliers and gave free of charge to customers who signed up for AT&T calling plans through Activate. See CP 6 at ¶ 10; CP 13-25.

Activate pursued an administrative appeal of the assessments. CP 27-28. The Department's Appeals Division upheld the assessment. CP 62-68; CP 80-81.

In July 2006 Activate paid the full assessment of \$131,794.29 and filed a refund claim under RCW 82.32.180 in Thurston County Superior Court. CP 7 at ¶ 14. The Department filed a motion for summary judgment in September 2007. CP 96-116. In its response, Activate requested summary judgment in its favor. CP 121, 144. On January 4, 2008, Judge Christine Pomeroy granted the Department's motion and

² "As an authorized dealer [Activate] agrees to offer and obtain orders for AT&T/Cingular under authorized rate plans. [Activate] solicits subscriber subscriptions strictly in accordance with AT&T/Cingular enrollment procedures and subject to AT&T/Cingular's acceptance or rejection." CP 70.

denied Activate's motion. CP 215, 216-17. Activate timely filed a notice of appeal with this Court. CP 218.

IV. ARGUMENT

The factual scenario in this case is relatively simple: Activate purchases cellular telephones from AT&T in Oregon. Activate sells some of those cellular telephones; it provides others to customers free of charge if the customer agrees to purchase wireless telephone service from AT&T in a duration or monthly charge amount that renders sufficient benefits to Activate in the form of commissions from AT&T. The tax question in this case also is relatively simple: Are the telephones Activate gives to customers without charge subject to use tax, or, as Activate asserts, exempt from the tax?

Despite the relative simplicity of the facts and the tax question, the devil lies in the details. The legal issues in this case primarily turn on the statutory definitions of "use," "consumer," and "retail sale," all of which have a scope beyond the common meaning of those terms. But although these statutory definitions are detailed and extend in scope beyond a common dictionary meaning of those words, the statutory language is not ambiguous. Under the plain language of the relevant statutes, Activate owed use tax on the cellular telephones it provided to customers without charge, and neither of the two exemptions on which Activate relies apply.

The standard of review is de novo, and this Court may affirm the summary judgment order on any basis supported by the record. See Int'l Brotherhood of Elec. Workers, Local No. 46 v. Trig Elec. Constr. Co., 142 Wn.2d 431, 435, 13 P.3d 622 (2000); Redding v. Virginia Mason Med. Ctr., 75 Wn. App. 424, 426, 878 P.2d 483 (1994).³

When construing the requirements in the statutes applicable to this case, the Court should avoid strained, unlikely, or unrealistic interpretations. Bour v. Johnson, 122 Wn.2d 829, 835, 864 P.2d 380 (1993). Instead, courts should give statutes “a rational, sensible construction” that produces a “sensible result” consistent with legislative intent. See State v. Thomas, 121 Wn.2d 504, 512, 851 P.2d 673 (1993) (first quotation); Washington Util. & Transp. Comm'n v. United Cartage, Inc., 28 Wn. App. 90, 97, 621 P.2d 217, review denied, 95 Wn.2d 1017 (1981) (second quotation). In other words, courts have no obligation to throw out common sense in the guise of plain language analysis.

³ Activate asks this Court to view the evidence and inferences in the record in a light most favorable to Activate, because the Department was the initial moving party. Appellant's Brief at 14-15. Activate also requested summary judgment from the trial court, and on appeal, asks this Court to reverse the trial court's order and direct the trial court to enter judgment for Activate. CP 121, 144, 215; Appellant's Brief at 4, 43. When considering whether to affirm summary judgment for the Department, the Court should draw all reasonable inferences from the evidence in a light favorable to Activate. When considering whether to direct the trial court to enter summary judgment for Activate, the Court should draw reasonable inferences in a light favorable to the Department. Burris v. General Ins. Co. of America, 16 Wn. App. 73, 75-76, 553 P.2d 125, review denied, 87 Wn.2d 1014 (1976).

Regarding tax statutes, taxation generally is the rule; exemptions and deductions are the exception. United Parcel Serv., Inc. v. Dep't of Revenue, 102 Wn.2d 355, 360, 687 P.2d 186 (1984); see also Budget Rent-A-Car of Washington-Oregon, Inc. v. Dep't of Revenue, 81 Wn.2d 171, 174-75, 500 P.2d 764 (1972). The taxpayer has the burden of establishing its eligibility for tax exemptions, and the exemption should be interpreted narrowly. Simpson Inv. Co. v. Dep't of Revenue, 141 Wn.2d 139, 149, 3 P.3d 741 (2000); Lacey Nursing Ctr., Inc. v. Dep't of Revenue, 128 Wn.2d 40, 53, 905 P.2d 338 (1995); Stroh Brewery Co. v. Dep't of Revenue, 104 Wn. App. 235, 240, 15 P.3d 692, review denied, 144 Wn.2d 1002 (2001).⁴ Activate cannot establish its eligibility for the two tax exemptions at issue.

A. The Department Properly Assessed Use Tax On Cellular Telephones Activate Gave To Customers Free Of Charge.

Use tax is a companion tax to the retail sales tax. It is imposed when a seller has not collected the retail sales tax. See RCW 82.08.020(1) (retail sales tax);⁵ RCW 82.12.020(1) (use tax); WAC 458-20-178(2);

⁴ The Department believes the statutes at issue here are not ambiguous, but if the Court determines they are, ambiguous tax exemptions are construed "strictly, though fairly and in keeping with the ordinary meaning of their language, against the taxpayer." Stroh Brewery, 104 Wn. App. at 240.

⁵ Statutory citations in this brief are to the current version of the statute in the Revised Code of Washington. Some of the subsections indicated are different from the subsection the provisions would have been in during the tax period in this case, 2000 - 2003. The text of the provisions indicated is identical, however, to the earlier versions of

Glen Park Associates, LLC v. Dep't of Revenue, 119 Wn. App. 481, 484 n.1, 82 P.3d 664, 667 (2003), review denied, 152 Wn.2d 1016 (2004).⁶

The intent of use tax is “to tax the privilege of using all tangible property within the state on which sales tax has not been paid.” Sacred Heart Med. Ctr. v. Dep't of Revenue, 88 Wn. App. 632, 638, 946 P.2d 409 (1997).⁷

The use tax rate is determined by the applicable retail sales tax rate. RCW 82.12.020(5). The measure of the tax is the “value of the article used,” which generally is its purchase price. RCW 82.12.010(2)(a); RCW 82.12.020(5).

RCW 82.12.020(1) imposes use tax on “every person in this state a tax or excise for the privilege of using within this state as a consumer: (a) Any article of tangible personal property purchased at retail” See WAC 458-20-178(1) (use tax applies to the use as a consumer of articles

the statutes, unless otherwise indicated. Copies of the key statutes are appended to this brief.

⁶ One common circumstance under which use tax liability arises is when an item is purchased outside the taxing state, but is brought into the state for use. This is the circumstance here. Activate purchased the cellular phones it later sold or provided to customers in Washington without charge from AT&T in Oregon. Oregon has no sales tax, so Activate paid no retail sales tax when it purchased the cellular phones. CP 188-89. A second common circumstance in which use tax liability can arise is when a taxpayer purchases goods or services from a seller that should charge retail sales tax on the sale, but for some reason does not. Department employees often refer to this as “deferred retail sales tax.” See CP 65 (Determination stating the taxpayer “owes deferred retail sales tax or use tax”). Either the retail sales tax or the use tax applies in this circumstance, but not both.

⁷ See also 1B K. Kunsch, Washington Practice: Methods of Practice § 72.65 (4th ed. 1997). The use tax “imposes an exaction equal in amount to the sales tax that would have been imposed on the sale of the property in question if the sale had occurred within the state’s taxing jurisdiction.” II J. Hellerstein & W. Hellerstein, State Taxation ¶ 16.01[2] at 16-4 (3rd ed. 2000).

of tangible personal property purchased at retail where the user has not paid retail sales tax on such property); Seattle Filmworks, Inc. v. Dep't of Revenue, 106 Wn. App. 448, 454, 24 P.3d 460, review denied, 145 Wn.2d 1009 (2001).

The use tax statute incorporates by reference “insofar as applicable” the definitions in RCW 82.04 (business & occupation tax) and RCW 82.08 (retail sales tax), including the definition of “retail sale” in RCW 82.04.050. RCW 82.12.010(9); Seattle Filmworks, 106 Wn. App. at 454 n.3. By doing so, the use tax statute incorporates many of the same exemptions that apply to the retail sales tax because those exemptions are embedded within the definition of “retail sale” in RCW 82.04.050. The “retail sale” definition in RCW 82.04.050 is the source of both exemptions for which Activate argues it qualifies. See discussion in Parts IV.B. & IV.C., infra.

For all the following reasons, the Department properly assessed Activate for use tax on the cellular telephones Activate provided without charge to customers, and the trial court properly granted summary judgment to the Department.

1. Activate “used” the cellular telephones under RCW 82.12.010(5).

Whether use tax applies is governed in large part by the statutory definition of “use.” The statutory definition has multiple components and provides in pertinent part:

(5) “Use,” “used,” “using,” or “put to use” shall have their ordinary meaning, and shall mean:

(a) With respect to tangible personal property, the first act within this state by which the taxpayer takes or assumes dominion or control over the article of tangible personal property (as a consumer), and include installation, storage, withdrawal from storage, distribution, or any other act preparatory to subsequent actual use or consumption within the state; . . .

RCW 82.12.010.⁸ Activate falls within this definition in several respects, any one of which is sufficient to impose the use tax.⁹

The evidence in the record demonstrates that Activate:

- Stored the cellular phones in a warehouse or distribution center in Beaverton, Oregon (which is not taxable because not in the state). CP 188 at ¶ 14; CP 189 at ¶ 20.
- Transferred the telephones to kiosks in Washington. CP 188 at ¶ 14; CP 189 at ¶ 20.
- Used the offer of a free cellular telephone as a “promotional device” or “marketing tool.” CP 189 at ¶ 16 (“This offer was a

⁸Curiously, Activate fails to cite or discuss the statutory definition of “use.” In a case seeking the refund of use tax, the definition of “use” is the logical starting point in the analysis. See CP 14-15 (audit report). The Department agrees with Activate that when a statute contains a defined term, the Court is required to apply that definition. Appellant’s Brief at 19; see *State v. Watson*, 146 Wn.2d 947, 954, 53 P.3d 66 (2002).

⁹The meaning of use “as a consumer” is discussed in the next section.

promotional device used to attract customers. We have found that this type of offer – the provision of a telephone with the purchase of a plan – is a useful and valuable marketing tool for Activate.”).

- Offered customers a “free” telephone if the customer agreed to the Activate Agreement and the AT&T/Cingular Personal Service Agreement, with service commitment and monthly recurring charge sufficient to justify the discount Activate offered (in this case 100%). CP 191 at ¶ 23.

“Ordinary meaning.” Activate uses the cellular telephones it provides to customers for free under the ordinary meaning of the word “use.” The Court may determine the ordinary meaning by resort to a general dictionary. “Use” is “the act or practice of using something.” Webster’s Third New International Dictionary of the English Language 2523 (2002). It is a synonym for “employ,” “utilize,” “apply,” and “avail.” Id. “USE is general and indicates any putting to service of a thing, usu. for an intended or fit purpose or person” Id. (emphasis added). Activate uses the cellular telephones as a “promotional device” or “marketing tool” to induce customers to purchase wireless telephone service.

Exercise of “dominion and control.” Activate exercises dominion and control over the cellular telephones by withdrawing them from storage in Oregon and placing them in kiosks in Washington, using them as a promotional device, and distributing them free of charge to

customers who purchase sufficient wireless telephone service to suit Activate's requirements.

Activate argues that it did not "use" the cellular telephones because they remained in their original packaging and were not activated until the customers owned them. CP 189-91. Activate seems to argue that "use" requires "actual" use of a product, such as alteration of the product or, in this case, use of the cellular phone to make telephone calls. Appellants' Brief at 26-31. Two prior decisions of this Court hold otherwise.

Mayflower Park Hotel, Inc. v. Dep't of Revenue, 123 Wn. App. 628, 98 P.3d 534 (2004), review denied, 154 Wn.2d 1022 (2005); Seattle Filmworks, Inc. v. Dep't of Revenue, 106 Wn. App. 448, 24 P.3d 460, review denied, 145 Wn.2d 1009 (2001).

In Mayflower Park Hotel, the hotel sought to avoid paying retail sales tax on its purchases of furnishings and other items (including soap, shampoo, and other one-time use items). This Court rejected the same narrow interpretation of "use" Activate is advocating here:

Mayflower argues that it does not "use or consume" the furnishings or amenities that it places in its guest rooms; rather, it says, its guests do that. Like the courts elsewhere, however, we think that a hotel "uses or consumes" such items, in the course of furnishing lodging, when it puts them in its rooms for the comfort of its guests. That its guests may also use or consume such items is not material here.

Mayflower Park Hotel, 123 Wn. App. at 632-33.

In Seattle Filmworks, this Court expressly rejected the argument that intervening use required “actual” use of the goods. 106 Wn. App. at 459. Nor did it indicate that any “physical use” was required.

The case concerned a film processing company that conducted a significant portion of its business by mail. The company purchased order forms in bulk and printed customer information on the forms, then included the new order forms in packets to customers of processed film and other materials. Some of these imprinted forms were returned with new orders, and some were not. The company challenged the application of use tax to the forms it purchased that were not returned by customers. Id. at 450-51.

Applying the statutory definition of “use,” RCW 82.12.010(5)(a), this Court rejected the film processing company’s argument that the statute required actual use by the taxpayer before an intervening use occurred. This Court held in part:

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; Further, printing the customer information on the forms was an intervening act because it was the *first* act of dominion and control over the forms before FilmWorks sent the forms to its customers.

106 Wn. App. at 459 (emphasis in original).

In both Mayflower Park Hotel and Seattle Filmworks, this Court recognized that “use” for tax purposes means something beyond merely putting a product to its ultimate, intended use (such as shampoo being used to wash a hotel guest’s hair, or using pre-printed order form to obtain film processing, or using a cellular telephone to make a wireless telephone call).¹⁰ This Court correctly interpreted the definition of “use” in RCW 82.12.010(5) previously, and the Department is confident it will do so again. We now turn to the concept of use “as a consumer” to see how Activate’s use is taxable.

2. Activate used “as a consumer” the cellular telephones it gave to customers free of charge.

To have use tax liability, a taxpayer must not only “use” the item in question, but also must use it “as a consumer.” Giving this topic only a footnote, Activate argues that it does not use the cellular telephones it provides to customers without charge as a “consumer.” Appellant’s Brief at 34 n.10. However, the Legislature defined “consumer” to mean something much broader than what might commonly be understood as an individual household purchaser of goods. Activate is a “consumer” under three different statutory provisions defining “consumer.” See RCW 82.04.190(1)(a); RCW 82.04.190(2)(a); RCW 82.12.010(9). Under any

¹⁰ These two cases also dispose of an argument Activate made in the trial court, that to be a “consumer” one must make the “subsequent actual use or consumption.” CP 138. See also the discussion of use “as a consumer” in the next section.

one of the three provisions, Activate's use of the cellular telephones it provided to customers without charge was "as a consumer" and subject to use tax.

- a. **RCW 82.04.190(2)(a): Activate is a "consumer" because it is taxable for business and occupation tax purposes under RCW 82.04.290.**

Over the years, the Legislature has enacted what is currently a very lengthy definition of "consumer" in RCW 82.04.190. One subsection of that statute defines "consumer" as "[a]ny person engaged in any business activity taxable under RCW 82.04.290." RCW 82.04.190(2)(a). Activate is taxed under RCW 82.04.290 on its activity of selling wireless telephone service contracts for AT&T. Accordingly, Activate is a "consumer."

Businesses taxable under RCW 82.04.290 for business and occupation tax purposes include those taxed under what the Department calls the "service and other activities" tax classification in RCW 82.04.290(2). That provision is a statutory "catchall" and applies to persons engaged in any business activities "other than or in addition to an activity taxed explicitly under another section of this chapter." RCW 82.04.290(2). Examples of business activities with explicit tax statutes include retailing (RCW 82.04.250), wholesaling (RCW 82.04.270), and manufacturing (RCW 82.04.240), among others.

When Activate earns commissions from AT&T for sales of wireless telephone service to customers in Washington, it is taxable under the service and other classification under RCW 82.04.290(2) (paying 1.5% on that gross income). See CP 13-14 (audit report discussing commission income). When Activate sells cellular telephones or cellular telephone equipment to customers (with a charge), Activate is taxable on those gross receipts under the retailing classification under RCW 82.04.250 (paying 0.471%). When Activate acts as a retailer, it also collects state and local retail sales tax, the total of which varies by location. See CP 17-25 (audit schedule showing varying rates by store location); CP 198, 202 (exhibits showing sales tax charged).

As Activate repeatedly has emphasized, when it offers to provide cellular telephones to customers without charge, it does so to induce the customer to purchase a two-year wireless telephone service contract with AT&T, on which Activate earns a commission. CP 189 at ¶ 16, 191 at ¶ 23; Appellant's Brief at 2. Activate's representative in the administrative proceedings before the Department referred to Activate's receipt of commission income as the "core" of Activate's business. CP 74. In transactions for which Activate receives no "gross income" other than commission income, which includes all transactions in which Activate provides cellular telephones without charge to customers, Activate is

taxable only under the “service and other” classification under RCW 82.04.290(2) for B&O tax purposes. Thus, as a matter of law, Activate is the “consumer” of those cellular telephones under RCW 82.04.190(2)(a).

b. Because Activate did not “resell” the cellular telephones it gave away, Activate also is a “consumer” under RCW 82.04.190(1).

Under the same lengthy statutory definition of “consumer” discussed above, RCW 82.04.190, Activate also is a “consumer” under a different subsection. “Consumer” includes:

Any person who purchases, acquires, owns, holds or uses any article of tangible personal property irrespective of the nature of the person’s business . . . other than for the purpose (a) of resale as tangible personal property in the regular course of business

RCW 82.04.190(1)(a). Activate “purchased” the cellular telephones it gave to customers without charge. It “owned” and “held” the cellular telephones until it gave them to customers. Activate “used” the cellular telephones for a purpose other than reselling as tangible personal property, which purpose was a “promotional device” or “marketing tool” to induce customers to purchase at least two years of wireless telephone service from AT&T. See CP 189 at ¶ 16.

Activate will argue that this definition of “consumer” does not apply because it purchased or held these cellular telephones for the purpose of resale as tangible personal property in the regular course of

business. The Department agrees that when Activate sold cellular telephones to customers for \$49.99 or \$99.99, Activate was not the “consumer” of those telephones because Activate purchased or held them for the purpose of resale. See CP (invoices).¹¹ The Department vigorously disagrees, however, that Activate purchased for “resale” the cellular telephones it provided to customers without charge.

The inquiry into what constitutes a purchase for “resale” is the same in the definition of “consumer” in RCW 82.04.190(1)(a) as it is in determining whether an otherwise taxable sale is exempt from sales or use tax under the resale exemption, RCW 82.04.050(1)(a). The Department has briefed that issue in detail in Part IV.B.1, infra, and to avoid duplicative briefing, will rely on that discussion to demonstrate why the resale exception to this definition of “consumer” does not apply in this instance.¹² If the Court agrees with the Department that Activate does not “resell” the cellular telephones it provides to customers without charge,

¹¹ See the discussion in footnote 17, infra, regarding sales with partially discounted cellular telephones.

¹² The standards for qualifying for the resale exemption include no “intervening use” of the tangible personal property being resold. RCW 82.04.050(1)(a). Through the definition of “use” in RCW 82.12.010(5), which contains the phrase “as a consumer,” and the definition of “consumer” in RCW 82.04.190(1)(a), which uses the word “resale,” the analysis of what qualifies for the resale exemption becomes somewhat circular. Although this can be confusing, it merely demonstrates the Legislature’s intent to distinguish between purchases for use as a consumer and purchases for the purpose of resale. If the purchaser is a “consumer” of the items under any of the definitions the Legislature provided, then that purchase is taxable, rather than a tax-exempt purchase for resale.

then as a matter of law Activate is a “consumer” under RCW 82.04.190(1) for use tax purposes (in addition to not qualifying for the resale exemption under RCW 82.04.050(1)(a)).

c. Activate also is a “consumer” under RCW 82.12.010(9).

A third statutory basis on which to consider Activate the “consumer” of cellular telephones it provides to customers without charge is a provision in the use tax chapter that expands the definition of “consumer.” Under RCW 82.12.010(9), “consumer” includes “any person who distributes or displays, or causes to be distributed or displayed, any article of tangible personal property, except newspapers, the primary purpose of which is to promote the sale of products or services.” (Emphasis added). Under the plain language of this statute and the evidence in the record, Activate is a “consumer” of these cellular telephones.

Activate distributes cellular telephones to selected customers who agree to purchase wireless telephone service from AT&T for at least two-year terms. Activate distributes these cellular telephones as a “promotional device” and “marketing tool” to induce sales of wireless telephone service. CP 189. The ordinary meaning of “distribute” as found in dictionaries encompasses Activate’s activities in relation to the cellular telephones it provides without charge to customers. See Webster’s Third New International Dictionary of the English Language at 660 (2002) (“**1a**: to divide among several or many: deal out: apportion esp. to members of

a group or over a period of time”); Black’s Law Dictionary at 508 (8th ed. 2004) (“1. To apportion; to divide among several. 2. To arrange by class or order. 3. To deliver. 4. To spread out; to disperse.”). Activate deals out and delivers cellular telephones to customers without charge, on terms different than those for customers to whom it sells the telephones for an actual charge. Accordingly, Activate also “apportions” those cellular telephones.

Activate distributed items of tangible personal property, cellular telephones, “the primary purpose of which [was] to promote the sale of products or services,” specifically the sale of wireless telephone service. As a matter of law, under RCW 82.12.010(9), Activate is a “consumer” of these cellular telephones.

The Department anticipates Activate may argue that this definition of “consumer” is inapplicable under a Department rule interpreting the statute, WAC 458-20-17803 (“Rule 17803”). Rule 17803 describes tangible personal property used to promote the sale of products or services as “promotional material.” Rule 17803(1). The rule also includes a definition of “promotional material”:

Promotional material is any article of tangible personal property, except newspapers, displayed or distributed in the state of Washington for the primary purpose of promoting the sale of products or services. Examples of promotional materials include, but are not limited to, advertising literature, circulars, catalogs, brochures, inserts (but not newspaper inserts), flyers, applications, order forms,

envelopes, folders, posters, coupons, displays, signs, free gifts, or samples (such as carpet or textile samples).

Rule 17803(4) (emphasis added).

Rule 17803 was intended for a different purpose than the circumstances here, relating to statutory amendment in 2002. The provision defining “consumer” as a person who distributes tangible personal property in the state for the purpose of promoting the sale of products or services has been on the books for decades. Effective June 2002, the Legislature added an additional sentence to RCW 82.12.010(9), stating that with respect to property distributed in this state by a consumer as defined in this section, “use of the property shall be deemed to be by such consumer.” Laws of 2002, ch. 367, § 3. In 2005, the Department promulgated Rule 17803 and indicated that the new rule “explains the use tax reporting responsibilities of consumers when such property is delivered directly to persons other than the consumer from outside Washington.” Rule 17803(1).

This case does not concern tangible personal property distributed from outside Washington to residents in Washington, so on its face, Rule 17803 does not apply. Even if it does apply, Rule 17803 does not create an escape hatch from use tax for Activate. First, the definition of “promotional material” contains a list of examples that includes “free

gifts.” Second, the list of examples is “not limited to” the listed examples. Third, the definition in Rule 17803 recognizes that the statutory definition includes “any article of tangible personal property, except newspapers,” used for the indicated purpose. Rule 17803(4) (emphasis added); RCW 82.12.010(9). If the definition in Rule 17803(4) were interpreted to limit RCW 82.12.010(9) to the listed examples of “promotional materials” in Rule 17803(4), it would be inconsistent with the statute. In that case, the rule would have to give way to the statute. See Mayflower Park Hotel, 123 Wn. App. at 633 (statutes trump conflicting agency rules).

In summary, because Activate distributed items of tangible personal property, “the primary purpose of which [was] to promote the sale of products or services,” Activate was a “consumer” under the plain language of RCW 82.12.010(9). Activate “used” the cellular telephones it gave to customers free of charge “as a consumer.” In the absence of an applicable exemption, Activate was liable for use tax on those cellular telephones. For the reasons discussed below, no such exemption applies, and the trial court properly granted summary judgment to the Department.

B. The “Resale” Exemption Does Not Apply To Cellular Telephones Activate Gave To Customers Free Of Charge.

As noted earlier, embedded within some statutory definitions applicable to retail sales tax, use tax, and the business and occupation tax

are exceptions that create tax exemptions. The two exemptions at issue in this case fall within the definition of “retail sale.” Under RCW 82.04.050(1), a “retail sale” is “every sale of tangible personal property . . . to all persons irrespective of the nature of their business” The definition applies generally to all sales of tangible personal property,

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, . . . 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. . . .

RCW 82.04.050(1)(a), (e) (emphasis added).¹³ Each of these two exemptions has several required elements, and Activate’s purchases of the

¹³ The language quoted from RCW 82.04.050(1)(e) relates solely to the competitive telephone service exemption, which is discussed below in Part IV.C. Subpart (e) also goes on to list additional types of sales of tangible personal property that are included within the definition of “retail sale,” as opposed to being excluded from the definition. These additional sentences are not industry specific, and they include the following: “The term also means every sale of tangible personal property to persons engaged in any business taxable under . . . RCW 82.04.290” This provision is a complement to RCW 82.04.190(2)(a), which defines “consumer” to include any person engaged in business activities taxable (for business and occupation tax purposes) under RCW 82.04.290. Activate is a business taxable under RCW 82.04.290 in its role as a sales agent for AT&T of wireless telephone service. See discussion in Part IV.A.2.a, supra. Because Activate purchases the cellular telephones at issue in order to use them as “promotional devices” or “marketing tools” to induce the sale of wireless telephone service, Activate is the “consumer” of these cellular telephones under RCW 82.04.190(2)(a). Thus, when Activate purchases these telephones, it is purchasing them “at retail” under RCW 82.04.050(1)(e). This provision in RCW 82.04.050(1)(e), though oddly placed in the same paragraph with the competitive telephone exemption, provides an additional statutory basis for affirming summary judgment for the Department.

cellular telephones in question fail as a matter of law to meet the requirements of either of the exemptions.

Before addressing the specific requirements of each division, the Department would like to clarify a requirement common to these two exemptions in RCW 82.04.050(1). They both require that the purchaser “present a resale certificate” under a statute that describes the circumstances in which sellers may sell goods without charging retail sales tax and the required components of a valid resale certificate. See RCW 82.04.470. The definitions in RCW 82.04 apply to words used in the use tax statute, RCW 82.12, “insofar as applicable.” RCW 82.12.010(9). The resale certificate requirement is not applicable to the facts of this case because Activate purchased the cellular telephones from AT&T in Oregon. See CP 188-89. For purposes of this case, presentation at purchase of a resale certificate is not one of the elements Activate must establish.¹⁴

Even without the resale certificate requirement, Activate fails to qualify for the resale exemption in RCW 82.04.050(1)(a), with respect to cellular telephones it provides to customers free of charge. The only tax

¹⁴In its administrative Determination, the Department indicated that Activate had used a resale certificate to purchase the cellular telephones. CP 65. That assumption was picked up in the Department’s briefing before the trial court. CP 98. Activate does not discuss the issue, except to point out that the Department “does not dispute” that a resale certificate was presented at the time of purchase. Appellant’s Brief at 37.

exempt purchases under this exemption are (a) for the purpose of resale, (b) as tangible personal property, (c) in the regular course of business, and (d) without intervening use. Activate fails to qualify for the exemptions under (a) and (d). It failed to “resell” the cellular telephones it gave customers at no charge. Even if there was a “resale” as contemplated in RCW 82.04.050(1)(a), Activate made “intervening use” of the cellular telephones, for the reasons stated above in Part IV.A., which discusses statutory “use.” The Department will not repeat the “use” discussion here, but incorporates that discussion by reference. Here, the Department will focus on Activate’s resale argument.

1. Activate did not “re-sell” the cellular telephones it provided to customers free of charge.

The resale exemption does not apply to Activate’s purchases of the cellular telephones it provided to customers without charge because Activate did not “resell” those cellular telephones to its customers. A “resale” is, by definition, an “act of selling again usu. to the next link in a chain of distribution.” Webster’s Third New International Dictionary of the English Language 1929 (2002). For a variety of reasons, Activate’s resale arguments are legally flawed.

Activate has acknowledged twice that it did not resell the cellular telephones at issue. Activate’s Complaint states that it provided the

telephones to customers “without an additional or separate charge.” CP 5 at ¶ 6. Activate’s Controller, Clinton Keller, declared that the telephones were provided “at no charge,” “‘free’ of charge,” “at . . . no cost,” and “at . . . zero price.” CP 188-190 at ¶¶ 12, 18, 17, 21. These undisputed facts preclude application of the resale exemption.

a. Activate’s position is contrary to tax policy.

Activate’s argument that its purchases of these cellular telephones are exempt under the resale exemption is inconsistent with the policy behind the exemption. States exclude from sales and use tax sales to wholesalers, retailers and others who resell the goods “[t]o accomplish the objective of limiting retail sales taxes to purchases by the consumer.” II J. Hellerstein & W. Hellerstein, State Taxation ¶ 12.04[3] at 12-62 (3d ed. 2000) (“Hellerstein”). Because Activate paid no retail sales tax on the telephones and is seeking a refund of the use taxes it paid, and because it transferred the telephones to customers at no charge, no retail sales or use tax would ever be paid on these telephones under Activate’s interpretation of the resale exemption. This defeats the very purpose of the resale exemption: instead of shifting the retail sales tax obligation to the downstream consumer, the tax would be eliminated entirely.

b. Commentators and courts reject treating “free” items as “resales.”

A leading state tax commentator has recognized the problem in treating items given to customers without charge as “resales”:

When property is purchased for distribution without charge – for example, when an advertiser purchases advertising brochures or when a retailer purchases “free samples” for its customers – the inapplicability of the resale exemption would seem to follow naturally from the fact that there simply is not “resale” of the items in question. The final *sale* of such items is to the advertiser or retailer, even though the final transfer is to the advertiser’s or retailer’s customers.

Hellerstein, ¶ 14.02[7] at 14-37 (emphasis in original; also noting that “many cases” conclude there is no resale in this situation). The issue can arise in a variety of circumstances. In New Jersey, for instance, the tax court rejected a casino’s argument that providing complimentary beverages to casino patrons was a “resale” of those beverages:

We are in total agreement with the Tax Court judge . . . that the complimentary providing of non-alcoholic beverages to casino patrons and employees “is a transfer for no consideration, or at least for legally insufficient consideration, and does not constitute a ‘resale’ of the beverages.” . . . Accordingly, we also agree that “[w]ith this provision to the patrons, the sale-for-resale exemption disappeared, and [the casino] became, for tax purposes, the consumer or ‘end-user’ of the nonalcoholic beverages” and, thus, that “a use tax became due on the beverages [the casino] purchased under the sale-for-resale certificates.”

Boardwalk Regency Corp. v. Div. of Taxation, 18 N.J. Tax 328, 330 (1999) (quoting 17 N.J. Tax 331, 342-43 (1998)). Similarly, although Activate later transferred the cellular telephones to its customers, the final “sale” was to Activate.

c. Activate proposes an awkward interpretation of the definition of “sale” in RCW 82.04.040.

Activate argues that its transfers of the cellular telephones to customers falls within the definition of “sale” in RCW 82.04.040, and therefore qualifies as a “resale.” Appellant’s Brief at 19-26. The definition of “sale” includes “any transfer of the ownership of, title to, or possession of property for a valuable consideration.” RCW 82.04.040. There is no dispute that Activate “transferred” ownership of the cellular telephones from itself to customers. The sticking point is whether there is any “valuable consideration” giving rise to a “sale” by Activate.

In a case from Louisiana with facts very similar to the facts in this case, the appellate court rejected some of the same arguments Activate makes here. Mercury Cellular Tel. Co. v. Calcasieu Parish of Louisiana, 773 So.2d 914 (La. Ct. App. 2000). In that case, Mercury Cellular regularly offered to sell cellular telephones at a discounted price, for a nominal price, or free if the customer contracted to purchase telecommunications service from Mercury Cellular for a specific period of

time. 773 So.2d at 916. First, the court applied the definition of “sale” in the governing ordinance, which included “any transfer of title or possession or both . . . of tangible personal property for consideration.” 773 So.2d at 917-18. The court concluded that when Mercury provided cellular telephones gratuitously to customers who entered into a cellular service contract, the transaction was not a “sale.” Id. at 918. The court noted: “Clearly, free is the antithesis of sale: one cannot ‘sell’ an item that is provided free of charge.” Id.

The court in Mercury Cellular also found significant the fact that Mercury charged all of its cellular service customers the same amount for the service, regardless of whether they acquired a cellular telephone from Mercury. Id. at 916. Because Mercury charged the same rates for cellular service regardless of whether the customers also received a telephone, the court held the customers had not paid any consideration for the cellular telephones as required by the applicable ordinances defining “sale.” Id. at 918.¹⁵

¹⁵ The decision in Mercury Cellular was superseded in Louisiana by statute in 2002. See Unwired Telecom Corp. v. Parish of Calcasieu, 838 So.2d 854, 858-59 (La. Ct. App. 2003) (holding 2000 act, which redefined “sales” and “use,” was a substantive change in the law and that the legislature acted unconstitutionally in declaring it retroactive); Unwired Telecom Corp. v. Parish of Calcasieu, 903 So.2d 392, 406 (La. 2005) (affirming that legislation changing the law had prospective application only, despite legislature’s indication to the contrary).

Similar facts exist here. Activate has admitted that calling-plan customers who declined a free telephone from Activate received no reduction in the cost of the calling plan. CP 84. Moreover, Activate had no authority to make changes in the price of cellular telephone service customers purchased from AT&T. Id.

Activate argues that legal consideration exists here under contract law because, in return for the free cellular telephones, customers made a legally binding promise to purchase wireless service from AT&T, from which Activate benefited by commissions AT&T paid Activate.¹⁶ Appellant's Brief at 22-25. In this three-way transaction, Activate argues, there was valuable consideration flowing in each direction, and as to each party. Id. at 23. Activate faults the trial court for overlooking the inherent value of the customers' service agreements with AT&T and asserts that the consideration received from the customers for the cellular telephones was the commission AT&T paid Activate. Id. at 25.

The Department does not disagree that in the transaction described by Activate, the promise by a customer to enter into a two-year wireless telephone service agreement with AT&T in return for a free cellular telephone constitutes consideration for purposes of creating an enforceable

¹⁶ Presumably AT&T paid commissions to Activate under a sales agency agreement. The record does not include a copy of the contract between AT&T and Activate.

contract. See Restatement (Second) of Contracts § 71(4) (1981). But Activate has failed to demonstrate that when the Legislature used the words “valuable consideration” in the definition of “sale” in RCW 82.04.040, it intended to include every contract where tangible personal property changes hands as a “sale.”

One problem with Activate’s interpretation of RCW 82.04.040 is that it would lead to excessive burdens on the administration of the retail sales tax. The measure of that tax is the “selling price” or “sales price.” RCW 82.08.020(1). The “selling price” or “sales price” is defined in RCW 82.08.010(1), which provides that the term means “the total amount of consideration, . . . including cash, credit, property, and services, . . . valued in money, whether received in money or otherwise.”

In an ordinary retail sale, the “selling price” is documented in a receipt provided to the buyer and in the seller’s sales account ledgers. If a “sale” includes consideration flowing to the seller from a third party, rather than from the customer, the “selling price” will be difficult to determine. The seller would have to collect retail sales tax from the customer based on the “value in money” of the consideration received from the third party. It would need to keep additional records documenting the source and amount of the third-party consideration for each sale. When the Department conducted a routine audit of such a

seller, it would need to review all that documentation establishing the “value in money” to the seller of the consideration flowing from the third party for each individual sale. Without this information, the Department could not determine whether the seller collected the appropriate amount of retail sales tax, or whether a credit was due or an assessment for underpayment was required.

The same problems that would arise with application of the retail sales tax also would also impact application of the use tax. Use tax is imposed on “the value of the article used,” which the Legislature defined as the “purchase price.” RCW 82.12.010(2)(a); RCW 82.12.020(5). The “purchase price” generally means the same as “sales price” under RCW 82.12.010(1).

Activate’s interpretation of what constitutes a “sale” for tax purposes could create numerous other problems in the collection, administration, and enforcement of excise taxes. The foregoing examples suffice to cast serious doubt on whether the Legislature actually intended a transfer of tangible personal property without charge, in the three-way transaction described here, to be considered a “sale.” The contract law principles on which Activate relies fail to address the issues that arise in this statutory context. In order to avoid the strained and unlikely results that would follow from Activate’s interpretation, this Court should hold

that Activate's transfer of cellular telephones to customers without charge is not a "sale," and thus cannot be a "resale."

d. The Department's position in this case is consistent with its rule regarding sales "premiums."

Contrary to Activate's arguments, the Department's position in this case is entirely consistent with the Department's rule concerning sales "premiums." See WAC 458-20-116 ("Rule 116"); Appellant's Brief at 31-33. In Rule 116, the Department explains the application of retail sales taxes to the sale of labels, name plates, tags, advertising material, and "premiums" offered at reduced or no cost to consumers. Rule 116(1). A "premium" is "an item offered free of charge or at a reduced price to prospective customers as an inducement to buy." Rule 116(2).

Activate notes what the Department freely agrees: that the Department does not impose use tax and treats as a purchase for resale, items designated as "free" in promotions such as "two-for-one," "buy two, get one free," "free printer with purchase of computer," or "free software kit with purchase of two ink cartridges." Rule 116(3)(b) provides that "sales for resale" include sales of premiums "to persons who pass title to the premium along with other articles which are sold by them" When Activate offers a cellular telephone for free if customers purchase a

sufficient amount of wireless telephone service from AT&T, Activate is not passing title to the cellular telephone “with other articles.”

In Rule 116(4)(c) and (d), the Department lists two categories of premium sales it considers taxable retail sales, rather than sales for resale. One is sales of premiums to persons who give them as an inducement to perform a service. Rule 116(4)(c). Although this is somewhat similar to the situation here, it is not a perfect fit. Activate is not trying to induce customers to perform a service for it, but to enter into a wireless service contract with AT&T under which AT&T performs the service for the customers. The other “retail sale” category listed is sales of premiums to those who offer them as an inducement to potential customers at no charge and with no requirement that the customer purchase any other article or service as a condition to receive the premium. Rule 116(4)(d). Here, Activate gives telephones to customers conditioned upon their agreement to purchase AT&T wireless service from AT&T. This requirement takes the present situation out of Rule 116(4)(d).

Although the listed categories of taxable taxes to retailers in Rule 116(4) do not cover the circumstances of this case, it would be improper to conclude that Activate’s purchases of its “premiums” are tax exempt. First, the listed categories of tax exempt sales of premium in Rule 116(3) also fail to cover the circumstances of this case. Second, the rule contains

an example that clearly indicates the Department's position on a similar transaction:

BC Bank offers a choice of various premiums to customers opening new savings accounts. In some cases, a charge may be made to the customer for the premium, with the amount of the charge based on the amount of deposit the customer makes in the new savings account. BC Bank may give a resale certificate to its suppliers for those premiums which will be resold to its new customers. For those premiums which will be given to customers without charge, BC Bank must pay either the retail sales tax to its suppliers or use tax to the department on the cost of the premiums.

Rule 116(7)(d). This rule has been in effect in its current form since 1993.

Under the plain language of the applicable statutes and under Rule 116,

Activate should not have been surprised that the Department assessed it for unpaid use tax.¹⁷

¹⁷ Activate argues that the Department's position in this case is inconsistent with a published determination the Department issued in 1991, Determination No. 91-177, 11 WTD 219 (1991). See CP 174-84; Appellant's Brief at 34-35 n.12. The holding in the Determination, which considered an earlier version of Rule 116, is reflected in what is now an example in Rule 116(7)(c): When a camping club offers premiums to potential customers free of charge on the condition that the customer attend a sales presentation, but without requiring any purchase by the customer, the camping club must remit sales or use tax on its purchase of the premiums. This example does not reflect the circumstances of this case, so it is inapplicable. What Activate seizes upon is a footnote in the Determination indicating that 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 no sales tax would be due. However, the footnote demonstrates no inconsistency with the Department's position in this case. In the camping club matter, the Department was not dealing with and did not address the situation we have here, where a premium is given in return for a promise from the customer to purchase a service from a third party. Activate's customers do not purchase wireless service from Activate; they purchase wireless service from AT&T. Activate "sells" that wireless service only as an agent for AT&T under a commission arrangement.

Because Activate does not “sell” the cellular telephones it provides to customers without charge, its purchases of those cellular telephones from AT&T (or any other supplier) do not qualify as purchases for “resale.” Accordingly, Activate does not qualify for the resale exemption in RCW 82.04.050(1)(a).

2. If giving a cellular telephone to customers without charge is a “resale,” then Activate owes retail sales tax to the Department instead of use tax.

Activate’s theory under the resale exemption is that its customers’ promise to purchase at least two years of wireless telephone service from AT&T is “valuable consideration” for Activate providing a free cellular phone to the customer, such that the transfer of that telephone is a “sale,” and Activate’s purchase of that telephone is a purchase for “resale” under RCW 82.04.050(1)(a). The Department disagrees with that conclusion for the reasons stated above (including the earlier discussion of “use”). If the Court agrees with Activate, it would be appropriate for the Court to reverse the trial court’s order granting summary judgment to the Department. It would not be appropriate, however, for the Court to direct the trial court to enter summary judgment for Activate, because Activate would be liable for the retail sales tax it failed to collect from its customers, rather than liable for use tax.

In addition to imposing upon buyers the obligation to pay retail sales tax, Washington imposes upon sellers the obligation to collect the retail sales tax from the buyer and remit the tax to the Department. RCW 82.08.050. When a seller fails for any reason to collect retail sales taxes or, having collected the tax, fails to pay it to the Department, the seller is “personally liable” to the State for the amount of the tax (subject to certain exceptions). RCW 82.08.050(3); see Aaro Med. Supplies, Inc. v. Dep’t of Revenue, 132 Wn. App. 709, 716, 132 P.3d 1143 (2006), review denied, 159 Wn.2d 1013 (2007) (seller liability exists regardless of whether the seller was at fault in failing to collect the tax).

If Activate is exempt from use tax for its purchases of cellular telephones it gave to customers without charge under the resale exemption in RCW 82.04.050(1)(a) because providing those telephones to customers was a “retail sale,” as Activate argues, then Activate should have collected retail sales tax from the customers on the “selling price” of those cellular telephones. See RCW 82.08.020(1). Because Activate did not collect any retail sales tax for the cellular telephones it provided without charge to those customers, Activate is now “personally liable” for those taxes. RCW 82.08.050(3).

To determine what Activate owes as uncollected retail sales tax, we return to the definition of “selling price”: “the total amount of

consideration, . . . including cash, credit, property, and services, . . . valued in money, whether received in money or otherwise.” RCW 82.08.010(1). Activate argues that the consideration it received from its customers in return for providing the customers cellular telephones free of charge was the value of the commissions it received from AT&T when the customers entered into wireless service agreements with AT&T. Appellant’s Brief at 22-25. In Activate’s words: “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, . . .” Id. at 25.

The record does not reveal precisely what amount of commissions Activate receives from AT&T when it provides customers a cellular telephone in return for the customer entering into a wireless telephone contract with AT&T. The only evidence in the record suggesting what amount Activate may receive in commissions from AT&T for each two-year wireless service agreement Activate induces customers to purchase is the customer contracts Activate designates Exhibits 1 and 3. CP 194, 198.

Each of these documents reflects, according to Activate, the customer’s commitment to enter into a two-year wireless service agreement with AT&T, along with the amount Activate charged for the cellular telephones (\$0.00 or \$49.99). The customer in each instance

agreed to terms related to maintaining the corresponding wireless telephone service with AT&T. The agreement imposes penalties on the customer if it cancels the wireless service prior to 180 days, including the following: “I agree to pay Activate \$200 plus applicable taxes as compensation for the commission that Activate would be required to repay the cellular provider.” *Id.* Thus, Activate apparently earns at least \$200 in commissions from AT&T for each two-year wireless plan it sells to customers (regardless of whether Activate sells the telephone at a discount or gives it away for free). Under Activate’s theory of the case, Activate is liable for retail sales tax on \$200 for each cellular telephone Activate provided to customers without charge.¹⁸

¹⁸ For cellular telephones Activate sold to customers at a discounted price, such as \$49.99, Activate already collected and paid to the Department the retail sales tax owed on each such sale, based on the sale price to the customer. Washington is a state that does not impose additional tax on retailers for the difference between their wholesale cost and a below-cost discounted sales price to customers. *See* B. Madison & P. Zinn, “Cellular Phone ‘Deals’ Create New Sales And Use Tax,” 1 St. & Loc. Tax Law 41, 42 (1996). Washington’s approach results in the situation where a retailer who charges customers \$1 for cellular telephones that cost the retailer \$100 at wholesale owes no use tax and is considered to make a “resale,” while a retailer who gives the same \$100 telephone to customers for no charge owes use tax on the \$100 value of the item. Apparently 21 other states follow a similar approach. *See* J. Sedon, “Sales and Use Tax Consequences of Cellular Phone Transactions,” 45 State Tax Notes No. 5, 287, 289-90, 295 (July 30, 2007). In part this is dictated by the definition of “selling price” in the retail sales tax statute, RCW 82.08.010, which does not give the Department the same authority in determining the true value of an item sold as the use tax definition of “value of the article used.” RCW 82.12.010(2)(a) (allowing the Department to prescribe rules under which the true retail value of an item used may be determined). Because the statutes require the Department to draw lines, the resulting tax liability between a \$1.00 sale and a \$0.00 may seem incongruous, but a taxing system that imposed relative parity between these two scenarios also would place additional recordkeeping and tax reporting burdens on taxpayers (because of the additional taxes that would be owed in the \$1.00 sale) and administrative burdens on the Department.

This approach to taxation is not without precedent. One commentator noted in 1996 that several states charged retailers a tax on commissions earned by retailers from cellular telephone providers in the precise circumstances at issue here, or when the telephone equipment was sold below the retailer's cost. B. Madison & P. Zinn, "*Cellular Phone 'Deals' Create New Sales And Use Tax*," 1 St. & Loc. Tax Law 41, 42 (1996).

If the Court agrees with Activate that Activate "resold" the cellular telephones it gave to customers in return for "valuable consideration" represented by the commissions Activate earned from AT&T, then neither Activate nor the Department is entitled to summary judgment. Instead, a remand would be necessary to determine the amount of Activate's retail sales tax liability. That amount would be offset against the amount of use tax Activate paid under the assessment. See PACCAR, Inc. v. Dep't of Revenue, 135 Wn.2d 301, 320-21, 957 P.2d 669 (1998) (total tax liability for a tax period considers different types of taxes and credits). If Activate paid more in use tax than it owes in retail sales tax, it will be entitled to a refund. If the retail sales tax liability is more than what Activate paid in use tax, Activate will owe additional tax.

As an alternative to using Activate's commissions for the "selling price" to determine retail sales tax, Activate may argue the more

appropriate measure would be the undiscounted retail value of the cellular phones. The record does not disclose exactly what that amount is, but one piece of evidence is the \$99.99 Activate charged a customer who purchased a cellular telephone without also purchasing wireless telephone service from AT&T. CP 191, 202. Activate's Controller indicated in his declaration that this was a phone sold without any discount. CP 191. If the Court determines that actual retail value is the appropriate measure of the retail sales tax, a remand would be necessary to determine the correct amount of the tax.

A third option for fixing a "selling price" for retail sales tax purposes could be the cost to Activate to acquire the phones it gave to customers without charge. The record does not disclose the amount Activate paid AT&T for each cellular telephone. We know, however, that the Department's auditor assessed use tax on Activate for the "purchase price" Activate paid for the phones. CP 14. The total, with interest and penalties, is the total amount Activate seeks in a refund in this case, \$131,794.29. CP 7. Of the three alternatives, this is the easiest measure to document, from the taxpayer's standpoint, and the easiest measure to administer, from the Department's standpoint. If Activate's cost in acquiring the cellular telephones is determined to provide the appropriate "selling price," Activate would not be entitled to any refund, and it would

not owe any additional tax. No refund would be necessary. The Court could affirm summary judgment for the Department on the basis of sales tax liability instead of use tax liability.

The foregoing discussion demonstrates the problems created by Activate's theory that the commissions it receives from AT&T constitute "valuable consideration." First, Activate's theory creates retail sales tax liability in place of use tax liability. Second, it creates confusion and uncertainty about what should be used as the "selling price" to measure retail sales tax. Third, it creates extra burdens on taxpayers and the Department in terms of reporting, compliance, and administration of the tax. All of these problems are avoided if the Court agrees with the Department that when Activate provides cellular telephones to customers without charge, it does not receive "valuable consideration" under RCW 82.04.040 from the customers through the commissions it receives from AT&T for selling wireless telephone services.

C. Activate Fails To Qualify For The Competitive Telephone Service Exemption Under RCW 82.04.050(1)(e).

In addition to claiming tax-exempt status under the resale exemption, Activate argues it also is exempt from the use tax under an exemption for a taxpayer who "[p]urchases for the purpose of providing the property to consumers as part of competitive telephone service, as

defined in RCW 82.04.065.” RCW 82.04.050(1)(e). Under the plain language of the referenced statutory definition, Activate’s purchases of the cellular telephones it provided to customers without charge do not qualify for the competitive telephone service tax exemption. The trial court properly granted summary judgment to the Department.

1. Activate did not make a “separate charge” to customers for the cellular telephones it gave to customers as an inducement to purchase wireless telephone service.

The competitive telephone service exemption in RCW 82.04.050(1)(e) incorporates the definition of “competitive telephone service” in RCW 82.04.065. Under RCW 82.04.065(1),

“Competitive telephone service” means the providing by any person of telecommunications equipment or apparatus, or service related to that equipment or apparatus such as repair or maintenance service, 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.

(Emphasis added). Additional definitions in RCW 82.04.065 include, among others, “network telephone service,” which broadly covers access to a telephone network and other communication or transmission systems, and “telephone service,” which encompasses either “competitive telephone services” or “network telephone services,” or both. See RCW 82.04.065(2), (3). Reading these three subsections together, the “separate

charge” in subsection (1) apparently means a charge separate from the charge for access to the telephone or communications network.

The Department does not dispute that cellular telephones Activate sells or provides to customers are the type of equipment that qualify as “competitive telephone service” under RCW 82.04.065. But more is required under this statute – a “separate charge” must be made for the telephones. When Activate sold cellular telephones to customers at full price or at a discounted price, Activate memorialized those sales with a “separate charge.” See CP 198 (\$49.99); CP 202 (\$99.99). In the circumstances at issue here, when Activate gave the cellular telephones to customers, what the invoice shows is not a “separate charge” for the free phones, but a separate notation of the absence of any charge. See CP 194 (\$0.00).

The Department is not “splitting hairs over semantics,” as Activate asserts, but applying common sense. Appellant’s Brief at 38. Activate’s interpretation of “charge,” on the other hand, is “strained, unlikely, or unrealistic,” contrary to guidelines for discerning legislative intent. See Bour v. Johnson, 122 Wn.2d 829, 835, 864 P.2d 380 (1993).

The word “charge,” which is not defined in the statute, must be given its plain, ordinary meaning. To charge someone is “to impose a pecuniary burden” on him or her or to “ask payment of” him or her;

likewise, a charge is an “expenditure or incurred expense,” “a pecuniary liability,” or “the price demanded for a thing or service.” Webster’s Third New International Dictionary of the English Language 377 (2002) (emphasis added). The invoice shows that, far from “imposing a pecuniary burden” or “demanding a price,” Activate provided the free phones for “\$0.0000”—at “zero price.” Mastrodonato Decl., Ex. 1; Keller Decl. ¶ 17. The invoice in fact memorializes what Activate has repeatedly acknowledged—that it provided the basic phones, not “with a charge,” but “without charge,” “at no charge,” “free of charge.” See CP 5; CP 189-90 at ¶¶ 18, 21. Because Activate has proven that it made no separate charge for the free phones, its claimed entitlement to the exemption in RCW 82.04.050(1)(e) must fail.

2. The competitive telephone service and resale exemptions are perfectly harmonious without reading the words “separate charge” to mean “no charge.”

Although Activate initially states in its brief that the only rule of statutory construction in this case is the plain meaning rule, it cites several other rules in justification of its interpretation of the words “separate charge” in RCW 82.04.065 to mean no charge at all. See Appellant’s Brief at 15, 35, 40-41. These arguments are without merit.

First, Activate argues that the resale exemption in RCW 82.04.050(1)(a) is a “regular” or “general” statute, and that the

competitive telephone service exemption in RCW 82.04.050(1)(e) is a “special” or “specific” statute. Activate states that the competitive telephone service exemption should apply “first and foremost” under the rule that a specific statute prevails over a general statute. Appellant’s Brief at 35 & n. 13. However, this guideline applies only if there is an “inescapable conflict” between general and specific provisions. State v. Austin, 59 Wn. App. 186, 199, 796 P.2d 746 (1990).

Here, no conflict exists. If a taxpayer qualifies for one exemption, the purchase is tax exempt regardless of whether the taxpayer also qualifies for another tax exemption. Once a transaction falls outside the definition of “retail sale” under one of the listed exceptions no retail sales tax (or use tax) is owed. Other unrelated exceptions to the definition do not change that result, so no conflict can result. In this instance, characterizing one exemption as “regular” and the other as “special” does nothing to advance the analysis.

Second, Activate argues that to read “separate charge” to require an amount greater than \$0.00 would mean the purchase would qualify for the resale exemption under RCW 82.04.050(1)(a), which would render the competitive telephone service exemption “mere surplusage.” Appellant’s Brief at 40. The only way to harmonize the two exemptions and to give all the language of the statute meaning, according to Activate, is to assume

that “separate charge” includes \$0.00, or no charge at all. Appellant’s Brief at 40-42.

Activate’s arguments are flawed. Activate bases its conclusion in part on a false premise, which is that a “separate charge” of any amount greater than \$0.00 would mean the transaction necessarily qualifies as a “resale” under RCW 82.04.050(1)(a). Recall, however, that the resale exemption has four required elements, only one of which is that the item be “resold.”¹⁹ If one of the other requirements were missing, the resale exemption would not apply, and the competitive telephone service exemption would in no way be “redundant and unnecessary.” See Appellant’s Brief at 42.

Even if all the requirements of the resale exemption were met, which they are not here, it would still be inappropriate to jump to the conclusion that the competitive telephone service exemption is “surplusage” or “redundant.” While arguing that all relevant language should be given meaning, Activate omits any discussion of other relevant language in the definition of “retail sale” that bears on legislative intent. Specifically, RCW 82.04.050(5) defines “retail sale” to include “the providing of telephone service, as defined in RCW 82.04.065, to

¹⁹ To qualify for the resale exemption, the purchase must be made (a) for the purpose of resale, (b) as tangible personal property, (c) in the regular course of business, and (d) without intervening use. RCW 82.04.050(1)(a).

consumers.”²⁰ This is one of several examples of “services” the tax code defines as “retail sales,” in addition to sales of tangible personal property. Because the provision of telephone service is not treated as a sale of tangible personal property, the Legislature probably added the competitive telephone service exemption to the other resale-related exemptions under RCW 82.04.050(1), all of which concern the sale of tangible personal property, for a far different purpose than Activate advocates. It may well have intended the exemption to clarify that it intended “property” provided to consumers “as part of competitive telephone service” to qualify as a sale of tangible personal property, when that conclusion otherwise would have been questionable.

The foregoing is a more plausible reason why the Legislature added RCW 82.04.050(1)(e) to the list of resale exemptions in 1981²¹ than the explanation offered by Activate, which is that the Legislature used the words “separate charge” to mean a “charge” of \$0.00. It also eliminates any issue of “mere surplusage” because the competitive telephone service exemption would have meaning independent of the resale exemption.

Even if the competitive telephone service exemption can conceivably apply to some transactions also covered by the resale

²⁰ Recall that RCW 82.04.065 defines “telephone service” to include both “competitive telephone service” and “network telephone service.” RCW 82.04.065(3).

²¹ See Laws of 1981, ch. 144, § 1.

exemption, this is not a basis for rejecting a reasonable interpretation of the exemption in favor of the unlikely interpretation Activate advances. Some degree of redundancy does not render statutes meaningless. Although every word in a statute counts, “a statute that is the product of compromise may contain redundant language as a byproduct of the strains of the negotiating process.” Richard Posner, “*Statutory Interpretation – In the Classroom and in the Courtroom*”, 50 U. Chi. L. Rev. 800, 812 (1983) (criticizing the presumption that legislatures do not use surplus words as based on unrealistic assumptions about the legislative process).

There is no need for this Court to conclude that “separate charge” means \$0.00 in order to apply the statutory scheme reasonably. If the Court is unclear about the Legislature’s intent and finds the statute ambiguous, it should review the legislative history, which the Department summarized in its briefing below. CP 114-116.²² The Court will find that the primary beneficiaries of the 1981 legislation were regulated telephone companies, not companies like Activate.

As a matter of law, when Activate provides cellular telephones to customer for \$0.00, Activate is providing those telephones at no charge,

²² See Laws of 1981, ch. 144, § 1; R. Geppert, “*Specific Industries and Issues: Taxation of Telecommunications Service*,” Washington State and Local Tax Deskbook at 13E-7-8 (1996); Western Telepage, Inc. v. City of Tacoma, 95 Wn. App. 140, 146 n.6, 974 P.2d 1270 (1999); Western Telepage, Inc. v. City of Tacoma, 140 Wn.2d 599, 602-03 & nn.2-3, 998 P.2d 884 (2000).

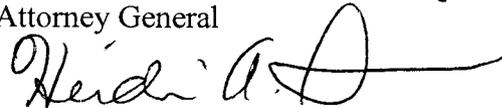
rather than under a “separate charge.” The trial court properly granted summary judgment to the Department on this exemption claim as well as the resale exemption claim.

V. CONCLUSION

For all of the foregoing reasons, this Court should affirm the trial court’s order granting summary judgment to the Department of Revenue.

RESPECTFULLY SUBMITTED this 17th day of September, 2008.

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APPENDIX

RCW 82.04.050

RCW 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), 82.04.290, and 82.04.2908 ; or

(f) Purchases for the purpose of satisfying the person's obligations under an extended warranty as defined in subsection (7) of this section, if such tangible personal property replaces or becomes an ingredient or component of property covered by the extended warranty without intervening use by such person.

(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 self-service laundry facilities, and also excluding sales of laundry service to nonprofit 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 constructing, repairing, or improving of 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 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) 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 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) 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)(a) The term shall also include:

(i) The renting or leasing of tangible personal property to consumers; and

(ii) Providing tangible personal property along with an operator for a fixed or indeterminate period of time. A consideration of this is that the operator is necessary for the tangible personal property to perform as designed. For the purpose of this subsection (4)(a)(ii), an operator must do more than maintain, inspect, or set up the tangible personal property.

(b) The term shall not include the renting or leasing of tangible personal property where the lease or rental is for the purpose of sublease or subrent.

(5) The term shall also include the providing of "competitive telephone service," "telecommunications service," or "ancillary services," as those terms are defined in RCW 82.04.065, to consumers.

(6) The term shall also include the sale of prewritten computer 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 prewritten computer software.

(7) The term shall also include the sale of or charge made for an extended warranty to a consumer. For purposes of this subsection, "extended warranty" means an agreement for a specified duration to perform the replacement or repair of tangible personal property at no additional charge or a reduced charge for tangible personal property, labor, or both, or to provide indemnification for the replacement or repair of tangible personal property, based on the occurrence of specified events. The term "extended warranty" does not include an agreement, otherwise meeting the definition of extended warranty in this subsection, if no separate charge is made for the agreement and the value of the agreement is included in the sales price of the tangible personal property covered by the agreement. For purposes of this subsection, "sales price" has the same meaning as in RCW 82.08.010.

(8) 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.

(9) 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 department 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.

(10) 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.

(11) The term shall not include the sale of or charge made for labor, services, or tangible personal property pursuant to agreements providing maintenance services for bus, rail, or rail fixed guideway equipment when a regional transit authority is the recipient of the labor, services, or tangible personal property, and a transit agency, as defined in RCW 81.104.015, performs the labor or services.

[2007 c 54 § 4; 2007 c 6 § 1004. Prior: 2005 c 515 § 2; 2005 c 514 § 101; prior: 2004 c 174 § 3; 2004 c 153 § 407; 2003 c 168 § 104; 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.]

RCW 82.04.190

RCW 82.04.190
"Consumer."

"Consumer" means the following:

(1) Any person who purchases, acquires, owns, holds, or uses any article of tangible personal property irrespective of the nature of the person's 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 for the purpose (a) of resale as tangible personal property in the regular course of business or (b) of incorporating such property as an ingredient or component of real or personal property when installing, repairing, cleaning, altering, imprinting, improving, constructing, or decorating such real or personal property of or for consumers or (c) of consuming such property in producing for sale a new article of tangible personal property or a new substance, of which such property becomes an ingredient or component or as 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) 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) of satisfying the person's obligations under an extended warranty as defined in RCW 82.04.050(7), if such tangible personal property replaces or becomes an ingredient or component of property covered by the extended warranty without intervening use by such person;

(2)(a) Any person engaged in any business activity taxable under RCW 82.04.290 or 82.04.2908; (b) any person who purchases, acquires, or uses any competitive telephone service, ancillary services, or telecommunications service as those terms are defined in RCW 82.04.065, other than for resale in the regular course of business; (c) any person who purchases, acquires, or uses any service defined in RCW 82.04.050(2)(a), other than for resale in the regular course of business or for the purpose of satisfying the person's obligations under an extended warranty as defined in RCW 82.04.050(7); (d) any person who purchases, acquires, or uses any amusement and recreation service defined in RCW 82.04.050(3)(a), other than for resale in the regular course of business; (e) any person who is an end user of software; and (f) any person who purchases or acquires an extended warranty as defined in RCW 82.04.050(7) other than for resale in the regular course of business;

(3) Any person engaged in the business of contracting for 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 of Washington 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 as defined in RCW 82.04.280, in respect to tangible personal property when such person incorporates such property as an ingredient or component of such publicly owned street, place, road, highway, easement, right-of-way, mass public transportation terminal or parking facility, bridge, tunnel, or trestle by installing, placing or spreading the property in or upon the right-of-way of such street, place, road, highway, easement, bridge, tunnel, or trestle or in or upon the site of such mass public transportation terminal or parking facility;

(4) Any person who is an owner, lessee or has the right of possession to or an easement in real property which is being constructed, repaired, decorated, improved, or otherwise altered by a person engaged in business, excluding only (a) municipal

corporations or political subdivisions of the state in respect to labor and services rendered to their real property which is used or held for public road purposes, and (b) the United States, instrumentalities thereof, and county and city housing authorities created pursuant to chapter 35.82 RCW in respect to labor and services rendered to their real property. Nothing contained in this or any other subsection of this definition shall be construed to modify any other definition of "consumer";

(5) Any person who is an owner, lessee, or has the right of possession to personal property which is being constructed, repaired, improved, cleaned, imprinted, or otherwise altered by a person engaged in business;

(6) Any person engaged in the business of constructing, repairing, decorating, or improving 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; also, any person engaged in the business of clearing land and moving earth of or for the United States, any instrumentality thereof, or a county or city housing authority created pursuant to chapter 35.82 RCW. Any such person shall be a consumer within the meaning of this subsection in respect to tangible personal property incorporated into, installed in, or attached to such building or other structure by such person, except that consumer does not include any person engaged in the business of constructing, repairing, decorating, or improving new or existing buildings or other structures under, upon, or above real property of or for the United States, or any instrumentality thereof, if the investment project would qualify for sales and use tax deferral under chapter 82.63 RCW if undertaken by a private entity;

(7) Any person who is a lessor of machinery and equipment, the rental of which is exempt from the tax imposed by RCW 82.08.020 under RCW 82.08.02565, with respect to the sale of or charge made for tangible personal property consumed in respect to repairing the machinery and equipment, if the tangible personal property has a useful life of less than one year. Nothing contained in this or any other subsection of this section shall be construed to modify any other definition of "consumer";

(8) Any person engaged in the business of cleaning up for the United States, or its instrumentalities, radioactive waste and other byproducts of weapons production and nuclear research and development; and

(9) Any person who is an owner, lessee, or has the right of possession of tangible personal property that, under the terms of an extended warranty as defined in RCW 82.04.050(7), has been repaired or is replacement property, but only with respect to the sale of or charge made for the repairing of the tangible personal property or the replacement property.

[2007 c 6 § 1008; 2005 c 514 § 103. Prior: 2004 c 174 § 4; 2004 c 2 § 8; 2002 c 367 § 2; prior: 1998 c 332 § 6; 1998 c 308 § 2; prior: 1996 c 173 § 2; 1996 c 148 § 4; 1996 c 112 § 2; 1995 1st sp.s. c 3 § 4; 1986 c 231 § 2; 1985 c 134 § 1; 1983 2nd ex.s. c 3 § 27; 1975 1st ex.s. c 90 § 2; 1971 ex.s. c 299 § 4; 1969 ex.s. c 255 § 4; 1967 ex.s. c 149 § 6; 1965 ex.s. c 173 § 4; 1961 c 15 § 82.04.190; prior: 1959 ex.s. c 3 § 3; 1957 c 279 § 2; 1955 c 389 § 20; prior: 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.]

RCW 82.04.290

RCW 82.04.290

Tax on international investment management services or other business or service activities.

(1) Upon every person engaging within this state in the business of providing international investment management services, as to such persons, the amount of tax with respect to such business shall be equal to the gross income or gross proceeds of sales of the business multiplied by a rate of 0.275 percent.

(2)(a) Upon every person engaging within this state in any business activity other than or in addition to an activity taxed explicitly under another section in this chapter or subsection (3) of this section; as to such persons the amount of tax on account of such activities shall be equal to the gross income of the business multiplied by the rate of 1.5 percent.

(b) This subsection (2) includes, among others, and without limiting the scope hereof (whether or not title to materials used in the performance of such business passes to another by accession, confusion or other than by outright sale), persons engaged in the business of rendering any type of service which does not constitute a "sale at retail" or a "sale at wholesale." The value of advertising, demonstration, and promotional supplies and materials furnished to an agent by his principal or supplier to be used for informational, educational and promotional purposes shall not be considered a part of the agent's remuneration or commission and shall not be subject to taxation under this section.

(3)(a) Until July 1, 2024, upon every person engaging within this state in the business of performing aerospace product development for others, as to such persons, the amount of tax with respect to such business shall be equal to the gross income of the business multiplied by a rate of 0.9 percent.

(b) "Aerospace product development" has the meaning as provided in RCW 82.04.4461.

[2008 c 81 § 6; 2005 c 369 § 8; 2004 c 174 § 2; 2003 c 343 § 2; 2001 1st sp.s. c 9 § 6; (2001 1st sp.s. c 9 § 4 expired July 1, 2001). Prior: 1998 c 343 § 4; 1998 c 331 § 2; 1998 c 312 § 8; 1998 c 308 § 5; 1998 c 308 § 4; 1997 c 7 § 2; 1996 c 1 § 2; 1995 c 229 § 3; 1993 sp.s. c 25 § 203; 1985 c 32 § 3; 1983 2nd ex.s. c 3 § 2; 1983 c 9 § 2; 1983 c 3 § 212; 1971 ex.s. c 281 § 8; 1970 ex.s. c 65 § 4; 1969 ex.s. c 262 § 39; 1967 ex.s. c 149 § 14; 1963 ex.s. c 28 § 2; 1961 c 15 § 82.04.290 ; prior: 1959 ex.s. c 5 § 5; 1955 c 389 § 49; prior: 1953 c 195 § 2; 1950 ex.s. c 5 § 1, part; 1949 c 228 § 1, part; 1943 c 156 § 1, part; 1941 c 178 § 1, part; 1939 c 225 § 1, part; 1937 c 227 § 1, part; 1935 c 180 § 4, part; Rem. Supp. 1949 § 8370-4, part.]

RCW 82.08.010

RCW 82.08.010
Definitions.

For the purposes of this chapter:

(1)(a) "Selling price" includes "sales price." "Sales price" means the total amount of consideration, except separately stated trade-in property of like kind, including cash, credit, property, and services, for which tangible personal property, extended warranties, or services defined as a "retail sale" under RCW 82.04.050 are sold, leased, or rented, valued in money, whether received in money or otherwise. No deduction from the total amount of consideration is allowed for the following: (i) The seller's cost of the property sold; (ii) the cost of materials used, labor or service cost, interest, losses, all costs of transportation to the seller, all taxes imposed on the seller, and any other expense of the seller; (iii) charges by the seller for any services necessary to complete the sale, other than delivery and installation charges; (iv) delivery charges; and (v) installation charges.

When tangible personal property is rented or leased under circumstances that the consideration paid does not represent a reasonable rental for the use of the articles so rented or leased, the "selling price" shall be determined as nearly as possible according to the value of such use at the places of use of similar products of like quality and character under such rules as the department may prescribe;

(b) "Selling price" or "sales price" does not include: Discounts, including cash, term, or coupons that are not reimbursed by a third party that are allowed by a seller and taken by a purchaser on a sale; interest, financing, and carrying charges from credit extended on the sale of tangible personal property, extended warranties, or services, if the amount is separately stated on the invoice, bill of sale, or similar document given to the purchaser; and any taxes legally imposed directly on the consumer that are separately stated on the invoice, bill of sale, or similar document given to the purchaser;

(c) "Selling price" or "sales price" includes consideration received by the seller from a third party if:

(i) The seller actually receives consideration from a party other than the purchaser, and the consideration is directly related to a price reduction or discount on the sale;

(ii) The seller has an obligation to pass the price reduction or discount through to the purchaser;

(iii) The amount of the consideration attributable to the sale is fixed and determinable by the seller at the time of the sale of the item to the purchaser; and

(iv) One of the criteria in this subsection (1)(c)(iv) is met:

(A) The purchaser presents a coupon, certificate, or other documentation to the seller to claim a price reduction or discount where the coupon, certificate, or documentation is authorized, distributed, or granted by a third party with the understanding that the third party will reimburse any seller to whom the coupon, certificate, or documentation is presented;

(B) The purchaser identifies himself or herself to the seller as a member of a group or organization entitled to a price reduction or discount, however a "preferred customer" card that is available to any patron does not constitute membership in such a group; or

(C) The price reduction or discount is identified as a third party price reduction or discount on the invoice received by the purchaser or on a coupon, certificate, or other documentation presented by the purchaser;

(2)(a) "Seller" means every person, including the state and its departments and institutions, making sales at retail or retail sales to a buyer, purchaser, or consumer, whether as agent, broker, or principal, except "seller" does not mean:

(i) The state and its departments and institutions when making sales to the state and its departments and institutions; or

(ii) A professional employer organization when a covered employee coemployed with the client under the terms of a professional employer agreement engages in activities that constitute a sale at retail that is subject to the tax imposed by this chapter. In such cases, the client, and not the professional employer organization, is deemed to be the seller and is responsible for collecting and remitting the tax imposed by this chapter.

(b) For the purposes of (a) of this subsection, the terms "client," "covered employee," "professional employer agreement," and "professional employer organization" have the same meanings as in RCW 82.04.540;

(3) "Buyer," "purchaser," and "consumer" include, without limiting the scope hereof, every individual, receiver, assignee, trustee in bankruptcy, trust, estate, firm, copartnership, joint venture, club, company, joint stock company, business trust, corporation, association, society, or any group of individuals acting as a unit, whether mutual, cooperative, fraternal, nonprofit, or otherwise, municipal corporation, quasi municipal corporation, and also the state, its departments and institutions and all political subdivisions thereof, irrespective of the nature of the activities engaged in or functions performed, and also the United States or any instrumentality thereof;

(4) "Delivery charges" means charges by the seller of personal property or services for preparation and delivery to a location designated by the purchaser of personal property or services including, but not limited to, transportation, shipping, postage, handling, crating, and packing;

(5) "Direct mail" means printed material delivered or distributed by United States mail or other delivery service to a mass audience or to addressees on a mailing list provided by the purchaser or at the direction of the purchaser when the cost of the items are not billed directly to the recipients. "Direct mail" includes tangible personal property supplied directly or indirectly by the purchaser to the direct mail seller for inclusion in the package containing the printed material. "Direct mail" does not include multiple items of printed material delivered to a single address;

(6) The meaning attributed in chapter 82.04 RCW to the terms "tax year," "taxable year," "person," "company," "sale," "sale at retail," "retail sale," "sale at wholesale," "wholesale," "business," "engaging in business," "cash discount," "successor," "consumer," "in this state" and "within this state" shall apply equally to the provisions of this chapter;

(7) For the purposes of the taxes imposed under this chapter and under chapter 82.12 RCW, "tangible personal property" means personal property that can be seen, weighed, measured, felt, or touched, or that is in any other manner perceptible to the senses. Tangible personal property includes electricity, water, gas, steam, and prewritten computer software;

(8) "Extended warranty" has the same meaning as in RCW 82.04.050(7).

[2007 c 6 § 1302; (2007 c 6 § 1301 expired July 1, 2008); 2006 c 301 § 2; 2005 c 514 § 110; 2004 c 153 § 406; 2003 c 168 § 101; 1985 c 38 § 3; 1985 c 2 § 2 (Initiative Measure No. 464, approved November 6, 1984); 1983 1st ex.s. c 55 § 1; 1967 ex.s. c 149 § 18; 1963 c 244 § 1; 1961 c 15 § 82.08.010. Prior: (i) 1945 c 249 § 4; 1943 c 156 § 6; 1941 c 178 § 8; 1939 c 225 § 7; 1935 c 180 § 17; Rem. Supp. 1945 § 8370-17. (ii) 1935 c 180 § 20; RRS § 8370-20.]

RCW 82.08.050

RCW 82.08.050

Buyer to pay, seller to collect tax — Statement of tax — Exception — Penalties — Contingent expiration of subsection.

(1) The tax hereby imposed shall be paid by the buyer to the seller, and each seller shall collect from the buyer the full amount of the tax payable in respect to each taxable sale in accordance with the schedule of collections adopted by the department pursuant to the provisions of RCW 82.08.060.

(2) The tax required by this chapter, to be collected by the seller, shall be deemed to be held in trust by the seller until paid to the department, and any seller who appropriates or converts the tax collected to his or her own use or to any use other than the payment of the tax to the extent that the money required to be collected is not available for payment on the due date as prescribed in this chapter is guilty of a gross misdemeanor.

(3) In case any seller fails to collect the tax herein imposed or, having collected the tax, fails to pay it to the department in the manner prescribed by this chapter, whether such failure is the result of his or her own acts or the result of acts or conditions beyond his or her control, he or she shall, nevertheless, be personally liable to the state for the amount of the tax, unless the seller has taken from the buyer a resale certificate under RCW 82.04.470, a copy of a direct pay permit issued under RCW 82.32.087, a direct mail form under RCW 82.32.730(5), or other information required under the streamlined sales and use tax agreement, or information required under rules adopted by the department.

(4) Sellers shall not be relieved from personal liability for the amount of the tax unless they maintain proper records of exempt transactions and provide them to the department when requested.

(5) Sellers are not relieved from personal liability for the amount of tax if they fraudulently fail to collect the tax or if they solicit purchasers to participate in an unlawful claim of exemption.

(6) Sellers are not relieved from personal liability for the amount of tax if they accept an exemption certificate from a purchaser claiming an entity-based exemption if:

(a) The subject of the transaction sought to be covered by the exemption certificate is actually received by the purchaser at a location operated by the seller in Washington; and

(b) Washington provides an exemption certificate that clearly and affirmatively indicates that the claimed exemption is not available in Washington. Graying out exemption reason types on a uniform form and posting it on the department's web site is a clear and affirmative indication that the grayed out exemptions are not available.

(7)(a) Sellers are relieved from personal liability for the amount of tax if they obtain a fully completed exemption certificate or capture the relevant data elements required under the streamlined sales and use tax agreement within ninety days, or a longer period as may be provided by rule by the department, subsequent to the date of sale.

(b) If the seller has not obtained an exemption certificate or all relevant data elements required under the streamlined sales and use tax agreement within the period allowed subsequent to the date of sale, the seller may, within one hundred twenty days, or a longer period as may be provided by rule by the department, subsequent to a request for substantiation by the department, either prove that the transaction was not subject to tax by other means or obtain a fully completed exemption certificate from the purchaser, taken

in good faith.

(c) Sellers are relieved from personal liability for the amount of tax if they obtain a blanket exemption certificate for a purchaser with which the seller has a recurring business relationship. The department may not request from a seller renewal of blanket certificates or updates of exemption certificate information or data elements if there is a recurring business relationship between the buyer and seller. For purposes of this subsection (7)(c), a "recurring business relationship" means at least one sale transaction within a period of twelve consecutive months.

(8) The amount of tax, until paid by the buyer to the seller or to the department, shall constitute a debt from the buyer to the seller and any seller who fails or refuses to collect the tax as required with intent to violate the provisions of this chapter or to gain some advantage or benefit, either direct or indirect, and any buyer who refuses to pay any tax due under this chapter is guilty of a misdemeanor.

(9) The tax required by this chapter to be collected by the seller shall be stated separately from the selling price in any sales invoice or other instrument of sale. On all retail sales through vending machines, the tax need not be stated separately from the selling price or collected separately from the buyer. For purposes of determining the tax due from the buyer to the seller and from the seller to the department it shall be conclusively presumed that the selling price quoted in any price list, sales document, contract or other agreement between the parties does not include the tax imposed by this chapter, but if the seller advertises the price as including the tax or that the seller is paying the tax, the advertised price shall not be considered the selling price.

(10) Where a buyer has failed to pay to the seller the tax imposed by this chapter and the seller has not paid the amount of the tax to the department, the department may, in its discretion, proceed directly against the buyer for collection of the tax, in which case a penalty of ten percent may be added to the amount of the tax for failure of the buyer to pay the same to the seller, regardless of when the tax may be collected by the department; and all of the provisions of chapter 82.32 RCW, including those relative to interest and penalties, shall apply in addition; and, for the sole purpose of applying the various provisions of chapter 82.32 RCW, the twenty-fifth day of the month following the tax period in which the purchase was made shall be considered as the due date of the tax.

(11) Notwithstanding subsections (1) through (10) of this section, any person making sales is not obligated to collect the tax imposed by this chapter if:

(a) The person's activities in this state, whether conducted directly or through another person, are limited to:

(i) The storage, dissemination, or display of advertising;

(ii) The taking of orders; or

(iii) The processing of payments; and

(b) The activities are conducted electronically via a web site on a server or other computer equipment located in Washington that is not owned or operated by the person making sales into this state nor owned or operated by an affiliated person. "Affiliated persons" has the same meaning as provided in RCW 82.04.424.

(12) Subsection (11) of this section expires when: (a) The United States congress grants individual states the authority to impose sales and use tax collection duties on

remote sellers; or (b) it is determined by a court of competent jurisdiction, in a judgment not subject to review, that a state can impose sales and use tax collection duties on remote sellers.

(13) For purposes of this section, "seller" includes a certified service provider, as defined in RCW 82.32.020, acting as agent for the seller.

[2007 c 6 § 1202. Prior: 2003 c 168 § 203; 2003 c 76 § 3; 2003 c 53 § 400; 2001 c 188 § 4; 1993 sp.s. c 25 § 704; 1992 c 206 § 2; 1986 c 36 § 1; 1985 c 38 § 1; 1971 ex.s. c 299 § 7; 1965 ex.s. c 173 § 15; 1961 c 15 § 82.08.050; prior: 1951 c 44 § 1; 1949 c 228 § 6; 1941 c 71 § 3; 1939 c 225 § 11; 1937 c 227 § 7; 1935 c 180 § 21; Rem. Supp. 1949 § 8370-21.]

RCW 82.12.010

RCW 82.12.010
Definitions.

For the purposes of this chapter:

(1) "Purchase price" means the same as sales price as defined in RCW 82.08.010.

(2)(a) "Value of the article used" shall be the purchase price for the article of tangible personal property, the use of which is taxable under this chapter. The term also includes, in addition to the purchase price, the amount of any tariff or duty paid with respect to the importation of the article used. In case the article used is acquired by lease or by gift or is extracted, produced, or manufactured by the person using the same or is sold under conditions wherein the purchase price does not represent the true value thereof, the value of the article used shall be determined as nearly as possible according to the retail selling price at place of use of similar products of like quality and character under such rules as the department may prescribe.

(b) In case the articles used are acquired by bailment, the value of the use of the articles so used shall be in an amount representing a reasonable rental for the use of the articles so bailed, determined as nearly as possible according to the value of such use at the places of use of similar products of like quality and character under such rules as the department of revenue may prescribe. In case any such articles of tangible personal property are used in respect to the construction, repairing, decorating, or improving of, and which become or are to become an ingredient or component 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 such articles therein or thereto, whether or not such personal property becomes a part of the realty by virtue of installation, then the value of the use of such articles so used shall be determined according to the retail selling price of such articles, or in the absence of such a selling price, as nearly as possible according to the retail selling price at place of use of similar products of like quality and character or, in the absence of either of these selling price measures, such value may be determined upon a cost basis, in any event under such rules as the department of revenue may prescribe.

(c) In the case of articles owned by a user engaged in business outside the state which are brought into the state for no more than one hundred eighty days in any period of three hundred sixty-five consecutive days and which are temporarily used for business purposes by the person in this state, the value of the article used shall be an amount representing a reasonable rental for the use of the articles, unless the person has paid tax under this chapter or chapter 82.08 RCW upon the full value of the article used, as defined in (a) of this subsection.

(d) In the case of articles manufactured or produced by the user and used in the manufacture or production of products sold or to be sold to the department of defense of the United States, the value of the articles used shall be determined according to the value of the ingredients of such articles.

(e) In the case of an article manufactured or produced for purposes of serving as a prototype for the development of a new or improved product, the value of the article used shall be determined by: (i) The retail selling price of such new or improved product when first offered for sale; or (ii) the value of materials incorporated into the prototype in cases in which the new or improved product is not offered for sale.

(f) In the case of an article purchased with a direct pay permit under RCW 82.32.087, the value of the article used shall be determined by the purchase price of such article if, but for the use of the direct pay permit, the transaction would have been subject to sales tax;

(3) "Value of the service used" means the purchase price for the service, the use of which is taxable under this chapter. If the service is received by gift or under conditions wherein the purchase price does not represent the true value thereof, the value of the service used shall be determined as nearly as possible according to the retail selling price at place of use of similar services of like quality and character under rules the department may prescribe;

(4) "Value of the extended warranty used" means the purchase price for the extended warranty, the use of which is taxable under this chapter. If the extended warranty is received by gift or under conditions wherein the purchase price does not represent the true value of the extended warranty, the value of the extended warranty used shall be determined as nearly as possible according to the retail selling price at place of use of similar extended warranties of like quality and character under rules the department may prescribe;

(5) "Use," "used," "using," or "put to use" shall have their ordinary meaning, and shall mean:

(a) With respect to tangible personal property, the first act within this state by which the taxpayer takes or assumes dominion or control over the article of tangible personal property (as a consumer), and include installation, storage, withdrawal from storage, distribution, or any other act preparatory to subsequent actual use or consumption within this state;

(b) With respect to a service defined in RCW 82.04.050(2)(a), the first act within this state after the service has been performed by which the taxpayer takes or assumes dominion or control over the article of tangible personal property upon which the service was performed (as a consumer), and includes installation, storage, withdrawal from storage, distribution, or any other act preparatory to subsequent actual use or consumption of the article within this state; and

(c) With respect to an extended warranty, the first act within this state after the extended warranty has been acquired by which the taxpayer takes or assumes dominion or control over the article of tangible personal property to which the extended warranty applies, and includes installation, storage, withdrawal from storage, distribution, or any other act preparatory to subsequent actual use or consumption of the article within this state;

(6) "Taxpayer" and "purchaser" include all persons included within the meaning of the word "buyer" and the word "consumer" as defined in chapters 82.04 and 82.08 RCW;

(7)(a)(i) Except as provided in (a)(ii) of this subsection (7), "retailer" means every seller as defined in RCW 82.08.010 and every person engaged in the business of selling tangible personal property at retail and every person required to collect from purchasers the tax imposed under this chapter.

(ii) "Retailer" does not include a professional employer organization when a covered employee coemployed with the client under the terms of a professional employer agreement engages in activities that constitute a sale of tangible personal property, extended warranty, or a sale of any service defined as a retail sale in RCW 82.04.050

(2)(a) or (3)(a) that is subject to the tax imposed by this chapter. In such cases, the client, and not the professional employer organization, is deemed to be the retailer and is responsible for collecting and remitting the tax imposed by this chapter.

(b) For the purposes of (a) of this subsection, the terms "client," "covered employee," "professional employer agreement," and "professional employer organization" have the same meanings as in RCW 82.04.540;

(8) "Extended warranty" has the same meaning as in RCW 82.04.050(7);

(9) The meaning ascribed to words and phrases in chapters 82.04 and 82.08 RCW, insofar as applicable, shall have full force and effect with respect to taxes imposed under the provisions of this chapter. "Consumer," in addition to the meaning ascribed to it in chapters 82.04 and 82.08 RCW insofar as applicable, shall also mean any person who distributes or displays, or causes to be distributed or displayed, any article of tangible personal property, except newspapers, the primary purpose of which is to promote the sale of products or services. With respect to property distributed to persons within this state by a consumer as defined in this subsection (9), the use of the property shall be deemed to be by such consumer.

[2006 c 301 § 3; 2005 c 514 § 104. Prior: 2003 c 168 § 102; 2003 c 5 § 1; 2002 c 367 § 3; 2001 c 188 § 3; 1994 c 93 § 1; prior: 1985 c 222 § 1; 1985 c 132 § 1; 1983 1st ex.s. c 55 § 2; 1975-'76 2nd ex.s. c 1 § 1; 1975 1st ex.s. c 278 § 52; 1965 ex.s. c 173 § 17; 1961 c 293 § 15; 1961 c 15 § 82.12.010; prior: 1955 c 389 § 24; 1951 1st ex.s. c 9 § 3; 1949 c 228 § 9; 1945 c 249 § 8; 1943 c 156 § 10; 1939 c 225 § 18; 1937 c 191 § 4; 1935 c 180 § 35; Rem. Supp. 1949 § 8370-35.]

RCW 82.12.020

RCW 82.12.020
Use tax imposed.

(1) There is hereby levied and there shall be collected from every person in this state a tax or excise for the privilege of using within this state as a consumer: (a) Any article of tangible personal property purchased at retail, or acquired by lease, gift, repossession, or bailment, or extracted or produced or manufactured by the person so using the same, or otherwise furnished to a person engaged in any business taxable under RCW 82.04.280 (2) or (7); (b) any prewritten computer software, regardless of the method of delivery, but excluding prewritten computer software that is either provided free of charge or is provided for temporary use in viewing information, or both; or (c) any extended warranty.

(2) This tax shall apply to the use of every extended warranty, service defined as a retail sale in RCW 82.04.050 (2)(a) or (3)(a), and the use of every article of tangible personal property, including property acquired at a casual or isolated sale, and including byproducts used by the manufacturer thereof, except as hereinafter provided, irrespective of whether the article or similar articles are manufactured or are available for purchase within this state.

(3) The provisions of this chapter do not apply in respect to the use of any article of tangible personal property, extended warranty, or service taxable under RCW 82.04.050 (2)(a) or (3)(a), purchased at retail or acquired by lease, gift, or bailment if the sale to, or the use by, the present user or his bailor or donor has already been subjected to the tax under chapter 82.08 RCW or this chapter and the tax has been paid by the present user or by his bailor or donor.

(4) Except as provided in this section, payment by one purchaser or user of tangible personal property, extended warranty, or service of the tax imposed by chapter 82.08 or 82.12 RCW shall not have the effect of exempting any other purchaser or user of the same property, extended warranty, or service from the taxes imposed by such chapters. If the sale to, or the use by, the present user or his or her bailor or donor has already been subjected to the tax under chapter 82.08 RCW or this chapter and the tax has been paid by the present user or by his or her bailor or donor; or in respect to the use of property acquired by bailment and the tax has once been paid based on reasonable rental as determined by RCW 82.12.060 measured by the value of the article at time of first use multiplied by the tax rate imposed by chapter 82.08 RCW or this chapter as of the time of first use; or in respect to the use of any article of tangible personal property acquired by bailment, if the property was acquired by a previous bailee from the same bailor for use in the same general activity and the original bailment was prior to June 9, 1961, the tax imposed by this chapter does not apply.

(5) The tax shall be levied and collected in an amount equal to the value of the article used, value of the extended warranty used, or value of the service used by the taxpayer multiplied by the rates in effect for the retail sales tax under RCW 82.08.020, except in the case of a seller required to collect use tax from the purchaser, the tax shall be collected in an amount equal to the purchase price multiplied by the rate in effect for the retail sales tax under RCW 82.08.020.

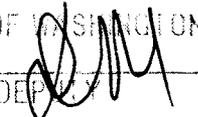
[2005 c 514 § 105. Prior: 2003 c 361 § 302; 2003 c 168 § 214; 2003 c 5 § 2; 2002 c 367 § 4; 1999 c 358 § 9; 1998 c 332 § 7; 1996 c 148 § 5; 1994 c 93 § 2; 1983 c 7 § 7; 1981 2nd ex.s. c 8 § 2; 1980 c 37 § 79; 1977 ex.s. c 324 § 3; 1975-76 2nd ex.s. c 130 § 2; 1975-76 2nd ex.s. c 1 § 2; 1971 ex.s. c 281 § 10; 1969 ex.s. c 262 § 32; 1967 ex.s. c 149 § 22; 1965 ex.s. c 173 § 18; 1961 c 293 § 9; 1961 c 15 § 82.12.020; prior: 1959 ex.s. c 3 § 10; 1955 ex.s. c 10 § 3; 1955 c 389 § 25; 1949 c 228 § 7; 1943 c 156 § 8; 1941 c 76 § 6; 1939 c 225 § 14; 1937 c 191 § 1; 1935 c 180 § 31; Rem. Supp. 1949 § 8370-31.]

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COURT OF APPEALS
DIVISION II

NO. 37329-7-II

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**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON
BY 
DEPUTY

ACTIVATE, INC.,

Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,

Respondent.

CERTIFICATE OF
SERVICE

I certify that I served a copy of the Brief of Respondent and this Certificate of Service, via U.S. Mail, postage prepaid, through Consolidated Mail Services, upon the following:

GEORGE MASTRODONATO
DORSEY & WHITNEY
U.S. BANK CENTRE
1420 FIFTH AVENUE, SUITE 3400
SEATTLE, WA 98101

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

DATED this 17th day of September, 2008, at Tumwater,

Washington.


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