

NO. 42050-3

COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
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DEPUTY

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

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STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Plaintiff,

v.

BI-MOR, INC., d/b/a STUPID PRICES, FURNITURE OUTLET, LLC  
and WASHINGTON STATE BOARD OF TAX APPEALS,

Defendant.

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**APPELLANT DEPARTMENT OF REVENUE'S BRIEF**

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**ORIGINAL**

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## I. INTRODUCTION

This case presents an issue of statutory interpretation of the tax statutes governing the sales tax collection obligations of retailers that advertise goods as “tax-included.”

Before 1985, it was unlawful in Washington for a seller to advertise that a price included sales tax or that the seller would pay the tax for the buyer. Laws of 1975, 1<sup>st</sup> Ex. Sess., ch. 278, § 51. Sellers that violated the prohibition were subject to criminal sanction and the loss of their business license. Sellers were required to state the tax separately from the selling price, and for purposes of determining the applicable sales tax it was “conclusively presumed” that the selling price quoted to the buyer did not include tax. RCW 82.08.050.

In 1985, the Legislature authorized sellers to advertise a tax-included price, subject to certain conditions on the form and content of such advertising. RCW 82.08.055. The Legislature simultaneously required that the tax be stated separately from the selling price “in any sales invoice or other instrument of sale.” *Id.* The Legislature also created an exception to the conclusive presumption by adding the clause, “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.” Laws of 1985, ch. 38, § 1.

The dispute in this case centers on the scope of the exception for “the advertised price” under the former and current versions of RCW 82.08.050 and RCW 82.08.010(1) (defining “selling price”).

The Department’s long-standing and contemporaneous interpretation of the 1985 act is that it allowed sellers to advertise prices as including the tax or that the seller is paying the tax, but it did not alter the requirement that the applicable sales tax be stated separately from the selling price on any sales invoice or similar document given to the buyer. WAC 458-20-107. Consequently, sellers that fail to state the tax separately from the selling price on the actual sales invoice given to the buyer must remit tax on the gross amount charged, regardless of the seller’s advertising practices.

Respondents Bi-Mor, Inc., d/b/a Stupid Prices, and Furniture Outlet, L.L.C. argued, and the Board of Tax Appeals (the Board) agreed, that the advertising exception to the conclusive presumption unambiguously prohibits the Department from treating the price stated on the sales invoice as the “selling price” if the seller fails to separately state the tax. In so holding, the Board failed to properly read RCW 82.08.050 in the relevant statutory context under the standards enunciated by the Washington Supreme Court.

Applying the correct standards, the only reasonable interpretation of RCW 82.08.050 is that the tax must be separately stated on the sales invoice or other form of receipt given to the buyer as a precondition for excluding the tax from the seller's gross receipts in determining the taxable "selling price." This separate statement requirement applies regardless of the seller's advertising practices.

The Board's contrary interpretation conflicts with the statutory definition of "selling price" that has been in effect since July 1, 2004. Under that definition, sales taxes may be excluded from the total amount of consideration received from the buyer only if they are "separately stated on the invoice, bill of sale, or similar document given to the purchaser." RCW 82.08.010(1). The Legislature enacted this definition to conform Washington's sales tax laws with the Streamlined Sales and Use Tax Agreement (the Streamlined Agreement). The Board's interpretation of RCW 82.08.050 effectively creates an exception to the measure of the retail sales tax that is not permitted under the Streamlined Agreement. This jeopardizes Washington's continued membership in the Streamlined Agreement, contrary to the express intent of the Legislature.

Even before the Legislature adopted the statutory definition of "selling price" mandated by the Streamlined Agreement, the Department's contemporaneous interpretation of the 1985 act was the only reasonable

interpretation when RCW 82.08.050 is read as a whole and in the context of related statutory provisions. The legislative history confirms that the Department's contemporaneous interpretation of the 1985 act is consistent with the Legislature's intent. The Board's contrary interpretation of the 1985 act upsets the balance struck by the Legislature, and its decision should be reversed.

## **II. ASSIGNMENTS OF ERROR**

1. The Board erroneously held that RCW 82.08.050 excuses a seller that advertises a price as tax-included from the requirement to state the tax separately from the selling price on the sales invoice or other form of receipt given to the buyer.

2. The Board erroneously held that if the seller advertises the price as tax-included, RCW 82.08.050 prohibits the Department from calculating the sales tax based on the gross amount charged when the seller fails to state the tax separately from the selling price on the sales invoice issued to the buyer.

## **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. As amended in 1985, RCW 82.08.050 requires that the retail sales tax must be stated separately from the selling price "in any sales invoice or other instrument of sale." The "selling price" is the measure of the retail sales tax. Under the statutory definition in effect

since July 1, 2004, the “selling price” is “the total amount of consideration” owed by the buyer, except for certain “separately stated” charges, including sales taxes that are “separately stated on the invoice, bill of sale, or similar document given to the purchaser.” Is the requirement to state the tax separately from the selling price “in any sales invoice or other instrument of sale” a statutory precondition for excluding an amount for tax in determining the “selling price,” regardless of whether the seller advertised a tax-included price?

2. In 1985, the Legislature created an exception to the conclusive presumption that the selling price quoted to the buyer excludes tax for “the advertised price” if the seller advertises that the price includes sales tax or that the seller will pay the tax for the buyer. Laws of 1985, ch. 38, § 1. In the same act, the Legislature required that the tax be stated separately from the selling price “in any sales invoice or other instrument of sale.” As amended in 1985, did chapter 82.08 RCW require that sales tax be stated separately from the selling price in any sales receipt given to the buyer as a statutory precondition for excluding the tax in reporting the selling price, regardless of whether the price was advertised as tax-included?

#### IV. STATEMENT OF THE CASE

The Department audited Bi-Mor, Inc., formerly known as Shane Baisch, Inc., d/b/a Stupid Prices (Bi-Mor), for the period January 1, 2003 through June 30, 2006. AR 22, 592.<sup>1</sup> At the same time, the Department audited an affiliated entity, Furniture Outlet, L.L.C. (Furniture Outlet), for the period June 1, 2004 through June 30, 2006. AR 635. Bi-Mor operated eight retail stores in Washington. AR 281-82, 679. Furniture Outlet operated a single retail furniture store in Woodinville. AR 637.

In evaluating whether a retailer correctly reported its gross sales revenues and remitted the applicable retail sales tax, the Department's auditors trace the flow of recorded information from the taxpayer's excise tax returns back to the original sales invoices or similar business records that document the sales transactions. AR 722 (Audit Manual).<sup>2</sup> When the Department's auditors reviewed Bi-Mor's and Furniture Outlet's business records, they found discrepancies between the gross sales revenues reported on their excise tax returns and the selling prices stated on the

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<sup>1</sup> The agency record certified by the Board is Bates numbered 1 through 1144. For purposes of citation, the agency record will be referred to as "AR." References to the Clerk's Papers will be referred to as "CP."

<sup>2</sup> A taxpayer must preserve and make available for the Department's review "the normal records maintained by an ordinary prudent business person," including "general ledgers, sales journals, cash receipts journals, bank statements, check registers, and purchase journals, together with all bills, invoices, cash register tapes, and other records or documents of original entry supporting the books of account entries." WAC 458-20-254(3)(c). *See* RCW 82.32.070 (taxpayers are barred from challenging the correctness of any tax assessment for any period for which they have failed to preserve suitable "books, records and invoices").

corresponding cash register tapes and sales receipts. The cash register tapes and sales receipts indicated that Bi-Mor and Furniture Outlet did not add any amount of tax to the “subtotal” they charged and collected from customers. AR 234, 573. Instead, Bi-Mor and Furniture Outlet deducted an amount for tax from their gross sales receipts when reporting sales revenues to the Department. AR 595, 679.

Most cash register receipts made no mention of sales tax. AR 227. Even when a receipt stated a separate amount of tax, the tax was not added to the selling price charged. Rather, the “total” charge equaled the “subtotal.” *Id.* In some cases, the amount of “tax” shown was calculated at a rate far exceeding the applicable tax rate. AR 233. For example, Bi-Mor’s Kent store issued the following receipt to one of the Department’s auditors who purchased an item there:

STUPID PRICES  
AFTER 7 DAYS  
ALL SALES FINAL  
11/22/2006 3:27PM 35  
050001#3006 KATHLEEN  
GENERAL: 68.99  
-64.50  
SUBTOTAL 4.49  
SUBTOTAL 4.49  
TOTAL 4.49  
ITEMS 10  
\*\*TOTAL \$4.49  
CASH 5.00  
CHANGE 0.51  
THANK YOU!  
MR. STUPID  
KENT

AR 556. *See also* AR 288-548 (cash register z-tapes).

Bi-Mor's and Furniture Outlet's exterior storefronts featured the slogan "Always No Tax." AR 226, 281-83. In-store signs stated "We Pay the Tax," and "Tax Included in the Final Total." AR 284-85. Bi-Mor's website advertised to potential purchasers, "Who pays the taxes?? WE DO!" AR 284. Its sales policy brochure stated, "Do I pay sales tax? No! All prices and discounts include tax." AR 286.

Shane Baisch, Bi-Mor's president, explained:

Wal-Mart's prices were so close to liquidation prices that we found it necessary to come up with a better model to stay in business. We were selling "scratch and dent," compromised products, customer returns, and past model electronics (much of which was within 20% of Wal-Mart's prices). We decided to offer to cut the usual price in half, and further indicate that we would absorb the sales tax in that discount, by marketing and offering to the customers our trademarked "Always No Tax."

AR 680.

According to Mr. Baisch, Bi-Mor and Furniture Outlet had no policy to state the tax separately from the selling price on cash register receipts issued to customers at any time during the audit period. AR 563, 573-74. Mr. Baisch believed that separately stating the tax on the sales receipt given to customers was neither needed nor required, and "makes no sense at all" in view of Bi-Mor's and Furniture Outlet's tax-included business model. AR 583, 573.

The Department assessed Bi-Mor and Furniture Outlet retailing B&O tax and retail sales tax based on the gross amounts their customers were charged. AR 596. Bi-Mor and Furniture Outlet filed administrative appeals to contest the tax assessments. AR 679. The Department's Appeals Division affirmed the assessments. AR 644. Bi-Mor and Furniture Outlet then appealed to the Board, which reversed the Department's assessment on cross-motions for summary judgment. CP 10 (Board's Summary Judgment Order) (copy attached as Appendix A). The Department filed a petition for judicial review in the Thurston County Superior Court. CP 4-9. The superior court affirmed the Board's summary judgment order. CP 193-94.

## **V. ARGUMENT**

The intent of the Legislature is apparent from the face of the 1985 session law that authorized the use of "tax included" advertising. At the same time the Legislature allowed retailers to advertise that a price included sales tax or that the seller would pay the tax for the buyer, it mandated that the tax be separately stated on "the sales invoice or other instrument of sale." Laws of 1985, ch. 38, § 1 (copy attached as Appendix B). Retailers that advertise tax-included prices must state the tax separately from the selling price on sales receipts given to the buyer, and must remit tax on the gross amount charged if they fail to do so.

The Department's contemporaneous interpretation of the 1985 act in WAC 458-20-107 is consistent with RCW 82.08.050 and related statutory provisions. The Board's contrary interpretation conflicts with related statutory provisions, upsets the careful balance struck by the Legislature, and thwarts the important policies served by the separate statement requirement. Therefore, this Court should reverse the Board's summary judgment order and remand for further proceedings.<sup>3</sup>

**A. This Court Applies The Error Of Law Standard Of Review To The Board's Summary Judgment Order, Giving Substantial Weight To The Department's Interpretation Of The Law It Administers.**

The Administrative Procedure Act (APA), chapter 34.05 RCW, governs judicial review of a formal Board decision. RCW 82.03.180. As the party challenging the Board's decision, the Department has the burden of establishing that the Board erred. RCW 34.05.370(1)(a); RCW 34.05.510. Agency action may be reversed where the agency has erroneously interpreted or applied the law. RCW 34.05.570(3); *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 77, 11 P.3d 726 (2000).

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<sup>3</sup> In their consolidated notice of appeal to the Board, Bi-Mor and Furniture Outlet stated eleven assignments of error, three issues of fact, and thirty issues of law. AR 823-28. The Board granted summary judgment to Bi-Mor and Furniture Outlet based on its interpretation of RCW 82.08.050, which it characterized as a "threshold question." CP 12. If this Court concludes that the Board erroneously interpreted RCW 82.08.050, the proper remedy would be to remand for the Board's resolution of the remaining issues raised by Bi-Mor and Furniture Outlet and not decided by the Board. *See* RCW 34.05.574(1) (reviewing court should remand for modification of agency action rather than "itself undertake to exercise the discretion that the legislature has placed in the agency").

This Court sits in the same position as the superior court and applies the standards of review in RCW 34.05.570 directly to the agency record. *Id.* In reviewing a summary judgment order issued by an administrative agency, the court applies the de novo standard of review ordinarily applicable to a summary judgment. *Verizon Northwest, Inc. v. Employment Sec. Dep't*, 164 Wn.2d 909, 915, 194 P.3d 255 (2008). Thus, the court reviews the facts in the administrative record in the light most favorable to the non-moving party, and the law in light of the “error of law” standard. *Id.* at 916. Under the error of law standard, this Court may substitute its interpretation of the law for that of the Board. *Id.*

A court accords substantial weight to an agency’s interpretation of the law it administers—especially when the issue falls within the agency’s expertise. *Ames v. Dep’t of Health, Med. Quality Health Assurance Comm’n*, 166 Wn.2d 255, 261, 208 P.3d 549 (2009). Here, the Department’s interpretation, not the Board’s, is entitled to such deference because the Department is the administrative agency authorized to adopt interpretive rules relating to the state’s tax laws. RCW 82.01.060; RCW 82.32.300. *See Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 593-94, 90 P.3d 659 (2004) (court defers to the agency charged with administration of a particular statute rather than a quasi-judicial agency’s interpretation of the statute).

**B. Under The Statutory Definition Of “Selling Price” In Effect Since July 1, 2004, Only Sales Taxes That Are Separately Stated On The Sales Invoice Given To The Buyer May Be Excluded From A Seller’s Gross Receipts.**

A retail seller is required to collect retail sales tax from the buyer and remit it to the state. RCW 82.08.050. The measure of the retail sales tax is the “selling price.” RCW 82.08.020(1). Under the statutory definition in effect since July 1, 2004, “selling price” means “the total amount of consideration” for which tangible personal property is sold, except for certain “separately stated” charges. RCW 82.08.010(1).<sup>4</sup> Among the separately stated charges excluded from the measure of the tax are “taxes legally imposed directly on the consumer that are *separately stated on the invoice, bill of sale, or similar document given to the purchaser.*” RCW 82.08.010(1) (emphasis added).<sup>5</sup>

A seller may advertise the price as including the tax or that the seller is paying the tax, subject to certain conditions on the form and content of such advertising. RCW 82.08.055. However, the sales tax

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<sup>4</sup> The statutory definition of “selling price” was amended during the tax periods at issue. Laws of 2003, ch. 168, § 101; Laws of 2004, ch. 153, § 406. The version in effect since July 1, 2004, and applicable during most of the tax periods at issue, was enacted to conform Washington’s sales and use tax laws to the uniform definitions of terms required by the Streamlined Agreement. *See* Laws of 2003, ch. 168, §§ 1, 101.

Because the proper application of the statutory definition of “selling price” in effect since July 1, 2004 is an important issue in this case with ongoing significance, the Department will address that version first. The Department will then address the proper interpretation of RCW 82.08.050 in the context of the statutory scheme in effect during the contested tax periods from January 2003 through June 2004.

<sup>5</sup> Separately stated interest, financing and carrying charges also are excluded from the definition of “selling price.” RCW 82.08.010(1).

“shall be stated separately from the selling price in any sales invoice or other instrument of sale.” RCW 82.08.050. *See also* WAC 458-20-107(2)(b) (same).

Former RCW 82.08.050 (1986) provided:

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.

Former WAC 458-20-107 (1986), the Department’s interpretive rule that was revised shortly after the 1985 amendment to RCW 82.08.050 explained, in relevant part:

Even when prices are advertised as including the sales tax, the actual sales invoices, receipts, contracts, or billing documents must list the retail sales tax as a separate charge. Failure to comply with this requirement may result in the retail sales tax due and payable to the state being computed on the gross amount charged even if it is claimed to already include all taxes due.

(Copy attached as Appendix C.)<sup>6</sup>

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<sup>6</sup> This Court has found WAC 458-20-107 “[c]onsistent with the plain language of RCW 82.08.050.” *Aaro Med. Supplies, Inc. v. Dep’t of Revenue*, 132 Wn. App. 709, 723 n.10, 132 P.3d 1143 (2006). *Aaro Medical* did not address the precise issue here, but

The question of statutory interpretation presented here is whether the requirement in RCW 82.08.050 that the seller must separately state the tax “in any sales invoice or other instrument of sale” applies when the seller advertises the price as tax-included, and, if so, whether the failure to do so will result in the tax being calculated on the gross amount charged.

Bi-Mor and Furniture Outlet argued, and the Board agreed, that the statutory language “the advertised price shall not be deemed the selling price” in RCW 82.08.050 “clearly and unambiguously” prohibits the Department from assessing retail sales tax on the gross amount Bi-Mor and Furniture Outlet charged their customers when the tax was not separately stated on the sales receipts given to customers. CP at 15. The Board failed to properly analyze the plain language of RCW 82.08.050.

The fundamental objective of statutory interpretation is to ascertain and give effect to the Legislature’s intent. *Lake v. Woodcreek*

*Homeowners Ass’n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010).

Statutory language cannot be read in isolation. *See G-P Gypsum Corp. v.*

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it recognized as a general matter that the rule properly interprets RCW 82.08.050. *Id.* In *Aaro Medical*, a seller of durable medical equipment sought a sales-tax refund on assigned reimbursements received from the federal government on sales to Medicare beneficiaries. The seller relied on Rule 107 for the proposition that the reimbursements did not include tax because the tax was not separately stated on the Medicare reimbursement schedules. 132 Wn. App. at 721. This Court deemed the issue irrelevant because the seller is liable for properly collecting and remitting the sales tax from the buyer. *Id.* This Court held that the Department correctly determined the applicable sales tax notwithstanding that the federal government’s reimbursement schedules did not state a specific amount of tax. *Id.* at 722, *citing* RCW 82.08.050.

*Dep't of Revenue*, 169 Wn.2d 304, 309, 237 P.3d 256 (2010). Rather, the “plain meaning” of statutory language is discerned “from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question.” *TracFone Wireless, Inc. v. Dep't of Revenue*, 170 Wn.2d 273, 281, 242 P.3d 810 (2010). A court looks to “the ordinary meaning of the language at issue, the context of the statute in which the provision is found, related provisions, and the statutory scheme as a whole. *Id.* (internal quotation marks omitted).

The clause the Board concluded was determinative of this case, “the advertised price shall not be considered the selling price,” must be read in context. This language modifies the conclusive presumption that “the selling price quoted in any *price list*, sales document, contract or other agreement between the parties does not include” sales tax. RCW 82.08.050 (emphasis added). Because the conclusive presumption in RCW 82.08.050 addresses the determination of the selling price, it should be read together with related statutory provisions, including the requirement stated earlier in the same statute that the tax must be stated separately from the selling price in “any sales invoice or other instrument of sale,” and RCW 82.08.010(1), which defines “selling price.”

RCW 82.08.050 provides, “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.” The only exception in RCW 82.08.050 to this requirement is that the tax need not be separately stated on retail sales through vending machines. *Id.*<sup>7</sup>

Under the statutory definition in effect since July 1, 2004, “selling price” means “the total amount of consideration” for which tangible personal property is sold, except for certain “separately stated” charges, including “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.*” RCW 82.08.010(1) (emphasis added).

Thus, the statutory definition of “selling price” expressly incorporates the separate statement requirement of RCW 82.08.050 as a statutory precondition for deducting an amount for tax from the total consideration received by the seller.

The Board ignored this *express* statutory requirement and erroneously inferred from the last clause in RCW 82.08.050 an *implied*

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<sup>7</sup> The Department may allow a seller to pay the retail sales tax itself if, after a hearing, the Department finds that the circumstances of the sale make it “impracticable” to separately charge and collect the tax from the buyer. RCW 82.08.080 (“vending machine and other sales”). Bi-Mor and Furniture Outlet made no attempt to avail themselves of this provision although Bi-Mor’s president, Mr. Baisch, expressed the view that separately charging and collecting tax “makes no sense at all” in the context of Bi-Mor’s tax-included business model. AR 573. Even if Bi-Mor’s business model rendered the separate collection of tax “impracticable” within the meaning of RCW 82.08.080, the result would be only that Bi-Mor could be permitted to pay the tax itself rather than collect it from the buyer. In other words, the sales tax would be assessed on the same gross amount charged, which is the same result that Bi-Mor and Furniture Outlet challenge in this case.

exception to the separate statement requirement from the Legislature's decision to permit tax-included advertising. CP 16.

Viewed in the context of the statutory requirement to separately state the tax in "any sales invoice or other instrument of sale," and of the statutory definition of "selling price," which permits a seller to exclude only taxes legally imposed on the buyer if they are "separately stated" on the sales receipt given to the buyer, the last clause of RCW 82.08.050 should not be read broadly as excusing sellers that advertise tax-included prices from assessment for uncollected sales tax on the total amount charged when they fail to separately state the tax on sales receipts.

**C. The Board's Overly Broad Interpretation Of The Advertising Exception In RCW 82.08.050 Is Inconsistent With The Streamlined Agreement.**

The Streamlined Agreement requires member states to adopt uniform definitions in its Library of Definitions.<sup>8</sup> The Board's interpretation essentially creates an unauthorized exception to the Streamlined Agreement's definition of "selling price" for sellers that advertise tax-included prices. This is inconsistent with the Legislature's expressed intent that Washington's sales and use tax laws shall be interpreted and applied consistently with the Streamlined Agreement,

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<sup>8</sup> The entire Streamlined Agreement (as amended through May 19, 2011) is available at: <http://www.streamlinedsalestax.org/uploads/downloads/Archive/SSUTA/SSUTA%20As%20Amended%2005-19-11.pdf>.

which “provides for a simpler, more uniform sales and use tax structure among states that have sales and use taxes.” RCW 82.02.210(1), (3). Laws of 2003, ch. 168, §§ 1, 101 (copy provided as Appendix D).

If this Court were to adopt the Board’s interpretation of RCW 82.08.050, Washington would become substantially out of compliance with the Streamlined Agreement, defeating the Legislature’s basic purpose in passing the 2003, 2004 and 2007 acts designed to bring Washington into compliance with that Agreement. One of the fundamental purposes of the Streamlined Agreement is to bring about uniformity in the measure of the retail sales and use taxes by requiring all member states to adopt a common definition of “sales price.” *See* Streamlined Agreement, §§ 102, 327 (copy of the Streamlined Agreement’s “sales price” definition is attached as Appendix E). The Streamlined Agreement requires member states to both enact and *apply* uniform definitions consistently with the Streamlined Agreement. *See* Streamlined Agreement, § 327. (“A member state shall not use a Library definition in its sales or use tax statutes or administrative rules or regulations that is contrary to the meaning of the Library definition.”) States must enact the definitions in the Library of Definitions without qualifications except for those variations allowed by the Streamlined Agreement. The Streamlined Agreement accommodates variations among state tax laws by allowing states to include or exclude

from the tax base certain specified charges.

The separate statement of charges is the means by which the Streamlined Agreement differentiates amounts that are excluded from the measure of the sales tax from non-deductible costs of doing business and taxable receipts. The Streamlined Agreement gives member states the option to exclude incidental charges or services needed to complete a sale, delivery and installation charges, and credit for any trade-in, but only “if they are separately stated on the invoice, billing, or similar document given to the purchaser.” Streamlined Agreement, Appendix C, Library of Definitions, at 136; Rule 327.4 (copy attached as Appendix F). The Streamlined Agreement requires states to exclude amounts received for interest, financing or carrying charges, and taxes legally imposed on the consumer, but only if the amount is “separately stated on the invoice, bill of sale or similar document given to the purchaser.”

The Governing Board of the Streamlined Agreement issues interpretive rules to clarify required definitions in its Library of Definitions. Streamlined Agreement, § 902. The interpretive rules are part of the Agreement. *Id.* The Governing Board has not yet adopted an interpretive rule relating to the exclusion of separately stated taxes from the “sales price.” However, it has adopted an interpretive rule addressing parallel language relating to the exclusion of “delivery charges” from the

definition of “sales price.”

Rule 327.4 provides: “Where the seller does not separately state on an invoice or similar billing document given to the purchaser the ‘delivery charges’ for ‘direct mail’ for [components of direct mail delivery charges], such charges shall not be excluded from “delivery charges,” and shall be included in or excluded from the sales/purchase price in the same manner as “delivery charges.” Rule 327.4(G) (seller’s billing practices). Delivery charges that are not separately stated on the invoice given to the buyer must be included in the measure of the sales tax, even if they otherwise would be exempt under the state’s sales-tax laws.

RCW 82.08.050 can and should be read consistently with the Streamlined Agreement as requiring that the sales tax must be stated separately from the selling price on any sales invoices given to the buyer as a condition for excluding the tax from the total consideration received.

**D. The 1985 Session Law That Authorized Tax-Included Advertising Did Not Excuse Sellers From The Requirement To Separately State The Tax On The Sales Receipts Given To Customers, Or From Liability For Uncollected Sales Tax When They Failed To Do So.**

Even before the Legislature enacted the Streamlined Agreement’s definition of “sales price,” all sellers were required to state the tax separately from the selling price on the sales invoice given to the buyer as a statutory precondition for excluding the tax in reporting the selling price.

This is the only reasonable interpretation of the 1985 session law that authorized sellers to advertise tax-included prices.

In the 1985 session law, the Legislature simultaneously amended RCW 82.08.050 (statutory obligation to collect and remit sales tax), RCW 82.08.010 (defining “selling price”) and RCW 82.08.120 (prohibition on tax-included advertising, refunding, or rebating taxes), and enacted RCW 82.08.055, a new section imposing restrictions on the form and content of tax-included advertising. Laws of 1985, ch. 38. These changes occurred in the same act and should be read together. *In re Arbitration of Mooberry v. Magnum Mfg., Inc.*, 108 Wn. App. 654, 658, 32 P.3d 302 (2001) (statutes enacted as part of the same legislative act should be construed together, *in pari materia*, to determine their meaning).

The Legislature enacted an exception to the conclusive presumption for “the advertised price” in conjunction with eliminating a long-standing criminal prohibition in RCW 82.08.120 on tax-included advertising. Laws of 1985, ch. 38, §§ 2, 4. The Legislature modified the conclusive presumption that the selling price quoted “in any price list, sales document, contract or other agreement between the parties” excludes sales tax by adding the clause, “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.” *Id.* at § 1. In addition, the

Legislature modified the definition of “selling price” by carving out an exception to the rule that taxes are non-deductible business expenses with the phrase, “other than taxes imposed under this chapter if the seller advertises the price as including the tax or that the seller is paying the tax.” Laws of 1985, ch. 38, § 3.

At the same time, the Legislature required that the tax must be stated separately from the selling price “in *any* sales invoice or other instrument of sale”:

The tax required by this chapter to be collected by the seller shall be stated separately from the selling price (~~and~~) in any sales invoice or other instrument of sale. 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.

Laws of 1985, ch. 38, § 1.

Thus, the Legislature reaffirmed the separate statement requirement at the same time that it carved out an exception to the conclusive presumption and amended the definition of “selling price.”

Laws of 1985, ch. 38, § 1. When viewed in context, the exception for “the advertised price” allows the seller to deduct the tax from the gross amount charged only if the seller complies with the requirement to state the tax

separately from the selling price “in any sales invoice or other instrument of sale.” RCW 82.08.050. When the seller separately states the tax on the sales invoice, the tax may be deducted from the seller’s gross receipts (rather than deemed a non-deductible business expense) even if the seller has advertised that it will pay the tax itself. However, the advertising exception to the conclusive presumption does not relieve the seller from the requirement to separately state the tax, or from possible liability for uncollected sales tax as a consequence of its failure to do so.

Only this interpretation gives effect to the statute as a whole. The Board gave no effect to the language in RCW 82.08.050 requiring that sales tax “shall be stated separately from the selling price in any sales invoice or other instrument of sale.” RCW 82.08.050. “Any” means “every” and “all.” *State v. Westling*, 145 Wn.2d 607, 611, 40 P.3d 669 (2002). Thus, the plain language of RCW 82.08.050 shows legislative intent that the tax shall be separately stated on the sales invoice for each and every retail sale, without implied exceptions for transactions in which a seller advertises that the price includes the tax or that the seller is paying the tax.<sup>9</sup>

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<sup>9</sup> *Cf. TracFone Wireless*, 170 Wn.2d at 281 (rejecting proposition that the marketing practices or business model of a prepaid wireless service provider could alter clear statutory imposition of E-911 tax on “all” cell phone radio access lines).

The Board erred by extending the advertising exception by implication. Exceptions to statutory provisions are read narrowly to give effect to the legislative intent underlying the general provisions. *R.D. Merrill Co. v. Pollution Control Hearings Bd.*, 137 Wn.2d 118, 140, 969 P.2d 458 (1999); *State v. Wright*, 84 Wn.2d 645, 652, 529 P.2d 453 (1974); *City of Spokane v. State*, 198 Wash. 682, 693-64, 89 P.2d 826 (1939) (statutory exceptions should not be extended by implication). Here, the general rule of law is that the retail sales tax must be stated separately from the selling price in “any sales invoice or other instrument of sale,” and “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 sales tax. RCW 82.08.050.<sup>10</sup>

The statutory language “sales invoice or other instrument of sale,” refers to a document that memorializes an actual sales transaction. A “sales invoice” is “[a] document showing details of a purchase or sale, including price and quantity of merchandise.” Black’s Law Dictionary

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<sup>10</sup> The Legislature adopted the conclusive presumption in 1971. Laws of 1971, 1st Ex. Sess., ch. 299, § 7. AR 257. Before then, a taxpayer could rebut the presumption with contrary evidence. Laws of 1965, ch. 173, § 15. AR 255. The Legislature enacted the conclusive presumption in the wake of disputes about sales-tax liability arising from the sale of construction services when the contract was ambiguous as to whether the quoted price included tax. See *Pomeroy v. Anderson*, 32 Wn. App. 781, 783, 649 P.2d 855 (1982) (purpose of conclusive presumption is to clarify liability for sales tax when the parties’ agreement is ambiguous). The Legislature intended to prevent such disputes by creating a bright-line rule that the selling price quoted to the buyer in any written sales document (“any price list, sales document, contract or other agreement between the parties”) excludes the applicable sales tax.

846-47 (8th ed. 2004). A cash register receipt is an example of an instrument of sale. *See Commonwealth v. Sneddon*, 738 A.2d 1026 (Pa. Super. 1999) (cash register receipt represents contract for sale of goods between buyer and seller).

In contrast, a price advertisement is a mere invitation to bargain. *Lefkowitz v. Great Minneapolis Surplus Store, Inc.*, 251 Minn. 188, 86 N.W.2d 689, 690-91 (1957); *Georgian Co. v. Bloom*, 27 Ga. App. 468, 108 S.E. 813, 814 (1921). A contract of sale is not made until the buyer offers to pay, and the seller agrees to accept, a specified price. *Steinberg v. Chicago Med. Sch.*, 69 Ill.2d 320, 371 N.E.2d 634, 639 (1977). Before that moment, a seller may modify or revoke the advertised terms or prices. *Id.* Only when the merchant takes the money is there an acceptance of the offer to purchase. *Id.* Thus, a price advertisement cannot be equated with an actual sales invoice or other document that evidences the parties' agreement, as the Board did here when it held that computing sales tax on the selling price stated on the *sales invoice* violated the statutory prohibition on treating "*the advertised price*" as the selling price.

The BTA failed to give effect to the manifest intent of the Legislature to treat "the advertised price" differently from the price stated on "any sales invoice or other instrument of sale." The only reasonable interpretation of RCW 82.08.050 is that the seller must state the tax

separately from the selling price when giving a sales receipt to the buyer as a precondition for backing out the sales tax from the total amount received from the buyer. A seller that fails to separately state the tax on the sales receipt may not deduct an amount for tax from its gross sales receipts, regardless of whether the price was advertised as tax included.

**E. The Board's Overly Broad Interpretation Of The Advertising Exception Would Result In Unlikely, Absurd And Strained Consequences.**

Statutes should not be read in a manner that produces unlikely, absurd or strained consequences. *Tingey v. Haisch*, 159 Wn.2d 652, 663-664, 152 P.3d 1020 (2007). A reading that produces absurd results must be avoided because it is presumed the Legislature did not intend absurd results. *Id.* at 664. To appreciate the absurd consequences that would result from the Board's interpretation of the advertising exception in RCW 82.08.050, it is important to understand the multiple policies and purposes served by the separate statement requirement.

The requirement to state the tax separately from the selling price on the sales invoice given to a customer is not a mere technicality. It is a central component of the retail sales tax scheme that serves several important functions relating to the administration of the sales tax,

consumer protection, and the prevention of anti-competitive practices.<sup>11</sup>

The Board's overly broad interpretation of the advertising exception undermines these important policies.

**1. The Board's interpretation renders the measure of the tax inherently ambiguous.**

Reading RCW 82.08.050 as excusing sellers that advertise tax-included prices from the separate statement requirement renders the "selling price" inherently ambiguous. A price that is properly advertised "as including the tax or that the seller is paying the tax" is ambiguous as to both the amount of tax and whether the seller or the buyer agreed to pay the tax. *See, e.g., Pomeroy v. Anderson*, 32 Wn. App. 781, 783, 649 P.2d 855 (1982) (deeming ambiguous a contractual promise to pay "all sales...taxes required by law"). In this case, for instance, Bi-Mor and Furniture Outlet advertised "sales tax included," "we pay the tax," and "Always No Tax." AR 281, 284-86, 1095. Each of these slogans standing alone is ambiguous. Their simultaneous use sends contradictory messages about the applicability of the tax, the amount of tax, and who will pay the tax. Assuming an advertised price of \$10 and a sales-tax rate of 8 per cent, the selling price could be either \$10 (if the seller pays the tax) or

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<sup>11</sup> The requirement to separately state the tax applies in a variety of contexts in chapter 82 RCW. In a case addressing the E-911 tax, the Washington Supreme Court recently observed: "The chief importance of the requirement that the tax be stated separately appears to be notice to the subscriber of the amount of the tax included in the billed amount." *See TracFone Wireless*, 170 Wn.2d at 281.

\$9.26 (if the buyer pays the tax), with differing amounts of sales tax due. The Legislature would not have intended to interject such uncertainty into the measure of the sales tax. Rather, it intended to prevent such uncertainty by requiring the tax be separately stated on “any sales invoice or other instrument of sale.”

**2. The Board’s interpretation deprives consumers of the ability to obtain a refund of erroneously paid taxes.**

Requiring the seller to separately state the tax on sales invoices protects the buyer’s ability to obtain a refund of erroneously collected taxes by providing conclusive evidence the buyer paid the tax at the point of sale. The Legislature has created numerous exemptions from the retail sales tax for specific products and persons. *See, e.g.*, RCW 82.08.0273 (exempting sales to nonresidents); RCW 82.08.02573 (exempting sales by non-profit organizations for fundraising); RCW 82.08.0283 (exempting certain medical products). In addition, RCW 82.08.0254 provides a catchall exemption for “sales which the state is prohibited from taxing” under the state or federal constitution. In order to claim a tax refund for erroneously collected taxes, a taxpayer must prove it paid the tax. RCW 82.32.180.

Reading RCW 82.08.050 as relieving sellers that advertise a tax-included price from the requirement to separately state the tax on sales

invoices would hinder, if not preclude, a tax-exempt purchaser from obtaining a sales-tax refund for erroneously collected taxes. If the tax is not separately stated on the sales invoice, the buyer may not even be aware that it paid the tax. *See, e.g., Trump Plaza Assoc.'s. v. Director, Div. of Taxation*, 25 N.J. Tax 56 (2009) (tax-exempt customer erroneously paid sales taxes on the purchase of electricity where the tax was included in the amount billed). Moreover, a buyer may not have access to advertising or marketing materials to attempt to prove that tax was truly “included” where the sales receipt bears no indication that tax was paid.

Here, for example, Bi-Mor’s and Furniture Outlet’s representations concerning sales tax (“Always No Tax,” “Tax Included,” and “We Pay the Tax”) were made in the form of store signage, websites, wall banners, counter displays, and radio and newspaper advertisements. AR 281, 286. Most of the documents actually given to the buyer made no mention of tax. AR 232. Cash register receipts that actually stated an amount of tax indicated that the tax was *not* collected from the buyer. AR 232-34. Bi-Mor and Furniture Outlet’s failure to correctly state the tax on the sales receipts given to customers thus deprived customers of the opportunity to establish that they had in fact paid the tax. The Legislature would not have intended this absurd result.

**3. The Board's interpretation exposes buyers to liability for use tax or deferred sales tax.**

If the sales invoice does not separately state the sales tax, the buyer potentially remains liable for use tax or deferred sales tax if its records are subsequently audited. *See, e.g., Noar Trucking Co., Inc. v. State Tax Comm'n*, 139 A.D.2d 869, 527 N.Y.S.2d 597 (App. Div. 1988) (rejecting buyer's argument that sales tax was included in the contract price where the sales tax was not separately stated on the purchase invoices); *Giant Tiger Drugs, Inc. v. Kosydar*, 43 Ohio St.2d 103, 330 N.E.2d 917 (Ohio 1975) (affirming deferred sales tax assessment on purchaser of advertising materials where invoices did not separately state tax).

It is likely that some of Bi-Mor's and Furniture Outlet's customers included businesses that were themselves subsequently audited by the Department. The receipts Bi-Mor and Furniture Outlet issued indicate that the sales tax was not charged or collected. *See, e.g.* AR 540 (cash register tape dated 10/09/2004 showing \$1,843.50 charge for "furniture"- no mention of tax); AR 548 (cash register tape dated 12/10/2005 showing \$3,150 charge for "electronics" - tax stated as \$254.78 but not added to "subtotal"). Thus, these customers would be unable to rely on the sales receipts as proof that they had paid the correct amount of tax if their books and records were reviewed by the Department's auditors. The Legislature

would not have intended to leave buyers vulnerable to use tax assessments when they authorized sellers to advertise tax-included prices.

**4. The Board’s interpretation eliminates a reliable documentary basis for determining tax liability.**

The requirement to separately state the tax on sales invoices aids the efficient administration of the sales tax by providing a readily verifiable objective source of information on sale transactions. Taxpayers are required to preserve and make available for the Department’s review “suitable business records” needed to determine tax liability.

RCW 82.32.070. Any taxpayer that fails to do so is “forever barred” from challenging a tax assessment. *Id.* The strict document retention requirements of RCW 82.32.070 show legislative intent to ensure an adequate documentary basis for determining tax liability. A seller’s advertising and marketing materials are a patently inadequate substitute for the documentation of tax on the sales invoices or similar form of receipt.

Unlike advertising materials, which are ephemeral, sales invoices are among the documents the Legislature expressly requires sellers to preserve and make available for the Department’s review. *See* RCW 82.32.070 (“All [the taxpayer’s] books, records, and *invoices* shall be open for examination at any time by the department of revenue.”) (Emphasis

added.) While a posted price list, menu or advertising bill merely evidences an offering price, a sales invoice memorializes the actual completed sale transaction.<sup>12</sup>

In advising the 1985 Legislature that it had no objection to the bill that authorized tax-included advertising, the Department's Deputy Director was careful to emphasize that the separate statement requirement would provide an adequate "paper trail" for the Department's auditors:

The bill merely permits sellers to include the sales tax in the advertised price. Because there is still a requirement that the sales tax be stated separately in the invoice or other document of sale, it provides an adequate paper trail for the Department.

CP 144. The Legislature would not have intended to undermine the Department's ability to reconcile the information reported on excise-tax returns with the original source documents that memorialize the corresponding sales transactions.

**5. The Board's interpretation allows sellers to deceive consumers about the applicability and the amount of the sales tax.**

Separately stating the tax helps to prevent consumers from being misled as to the applicability and the amount of the tax. It ensures buyers

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<sup>12</sup> The Department considers sales invoices, and in particular cash-register receipts, the best evidence of a sales transaction. Det. No. 95-138, 16 WTD 33 (1995); (AR 261).

will know the specific amount they are paying to the government that is not part of the item's purchase price.<sup>13</sup>

The Board's interpretation of RCW 82.08.050 leads to the absurd result that a seller may engage in deceptive practices with impunity. For example, the record shows that Bi-Mor provided cash-register receipts showing an amount of "tax" at a rate far exceeding the applicable tax rate, while the "total" charge equaled the stated "subtotal." AR 555-56. This creates the misleading impression that the seller is paying the buyer's sales tax obligation. It also misleads the buyer as to the amount of sales tax the seller ostensibly is paying for the buyer. In allowing sellers to advertise a tax-included price, the Legislature would not have intended to authorize such deceptive practices.

Although "tax included" advertising is no longer subject to criminal sanction, sales-tax refunds or rebates are deemed unfair competitive practices under Washington law. *Stoen v. French Slough Flood Control Dist.*, 67 Wn.2d 440, 445, 407 P.2d 963 (1965);

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<sup>13</sup> Historically, the requirement to state the tax separately from the selling price and the ban on tax-included advertising were nearly universal features of the state sales tax schemes nationwide. See *John F. Due and John L. Mikesell, Sales Taxation: State and Local Structure and Administration*, at 30-31 (2nd ed. 1995) (observing that each of the seventeen states that impose sales tax on the buyer rather than the seller, including Washington, "require the vendor to collect the tax from the consumer and remit it to the state, and to keep the tax separate from the price."). These requirements were introduced at the behest of retailers who wanted it clear to the public that they were required to collect the tax. *Id.*

RCW 82.08.120. Stating a separate charge for “tax” and then not adding the stated amount to the price of the goods sold deceptively suggests to the buyer that the seller is waiving or refunding the sales tax, which is prohibited by RCW 82.08.120.

In retaining the requirement to separately state the tax “in any sales invoice or other instrument of sale,” the Legislature intended to prevent retailers from gaining an unfair competitive advantage over other retailers by misleading consumers about the applicability or amount of tax. The balance struck by the Legislature was to relax restrictions on a seller’s advertising and marketing practices, while requiring that the actual sales receipt accurately state the applicable sales tax.

Bi-Mor’s president, Mr. Baisch, was candid in explaining that he decided to operate under the slogan “Always No Tax” as a means to compete more effectively with Wal-Mart, stating:

We decided to offer to cut the usual price in half, and further indicate that we would absorb the sales tax in that discount, by marketing and offering to the customers our trademarked ‘Always No Tax.’

AR 680.

By suggesting that they would “absorb the sales tax,” Bi-Mor and Furniture Outlet indicated to consumers that they would pay the tax itself. This was a permissible marketing strategy. *See* RCW 82.08.055.

However, having failed to separately state the tax on the sales receipts issued to their customers, Bi-Mor and Furniture Outlet were required to remit sales tax on the gross amount they charged their customers, consistent with the message they conveyed to their customers.

A seller may not increase its sales revenues under the guise of waiving or absorbing the tax, and then claim a deduction from its sales revenues for an amount that was not separately stated as “tax.” The requirement to separately state the tax prevents such unfair competitive practices and is a much more important condition imposed on “tax included” advertising than the conditions imposed on such advertising under RCW 82.08.055.

**F. The Statutory Background Of The 1985 Amendments Of RCW 82.08 Suggests The Legislature Merely Intended To Remove Restrictions On A Seller’s Advertising And Marketing Practices.**

The legislative intent underlying the 1985 amendments of RCW 82.08 is illuminated by its statutory background, including the long-standing prohibition on tax-included advertising, sharp increases in the sales-tax rate in the years just preceding its enactment, and the Washington Supreme Court’s invalidation of the Legislature’s attempt to ease the sales-tax obligations of retailers in border counties that compete with retailers in Oregon. *See Dep’t of Ecology v. Campbell & Gwinn*,

*LLC*, 146 Wn.2d 1, 43 P.3d 4 (2002) (“[B]ackground facts of which judicial notice can be taken are properly considered as part of the statute’s context because presumably the legislature also was familiar with them when it passed the statute.”) (Quoting 2A Norman J. Singer, *Statutes and Statutory Construction* § 48A:16, at 809-10 (6th ed. 2000)).

Before 1985, it was unlawful in Washington to engage in tax-included advertising. Laws of 1975, 1st Ex. Sess., ch. 278, § 51. The prohibition on tax-included advertising had been a component of Washington’s sales-tax regime since 1935. Laws of 1935, ch. 180, § 27; AR 251. Advertising that tax was included in the price, or that the seller would pay the tax was viewed as an anti-competitive practice. *Stoen*, 67 Wn.2d at 445. Sellers that violated the ban were subject to criminal penalties and the revocation of their business licenses. AR 254 (final bill report for H.B. 601). Viewed against this background and the severe consequences for sellers that violated the prohibition on tax-included advertising, it is clear that the Legislature’s decision to permit the use of tax-included advertising was, in itself, a significant change in the law.

The Board failed to appreciate this, reasoning that the Legislature must have intended to accomplish more than merely ease restrictions on advertising:

Having made the policy decision to permit tax-included advertised prices (and seller tax-absorption prices), the legislature would want to assure that the sellers who complied with those strict requirements would not lose the benefit of making such sales by having to make the complex point-of-sale calculations that factor out the sales price.

AR 27 (Board's Summary Judgment Order).

Nothing in the language of RCW 82.08.050 or related statutes suggests that the Legislature intended to relieve sellers from the obligation to make complex "point-of-sale calculations" when it enacted the 1985 amendments to RCW 82.08.050.<sup>14</sup> The only benefit the Legislature intended was the freedom to engage in previously prohibited advertising practices, a benefit viewed as particularly important for retailers in border counties competing with retailers in Oregon, which does not have a sales tax.

Between 1981 and 1983, the rate of the state retail sales tax increased 44 percent, from 4.5 percent to 6.5 percent. Laws of 1981, 2nd Ex. Sess., ch. 8, § 1; Laws of 1982, 1st Ex. Sess., ch. 34, § 1; Laws of 1983, ch. 7, § 6. AR 797. In addition, the 1982 Legislature temporarily repealed the sales-tax exemption for food products as an emergency

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<sup>14</sup> The Board seems to have misunderstood the complexity of calculating the sales tax. AR 22. The calculation is made simply by dividing the tax-included price by the sum of one plus the sales-tax rate. For example, if the tax-included price is \$100 and the tax rate is 8 percent, the seller would divide \$100 by 1.08 to calculate the selling price. This is no more complicated than multiplying the selling price by the tax rate to determine the sales tax when the seller does not advertise a tax-included price.

revenue-raising measure. Laws of 1982, 1st Ex. Sess., ch. 35; AR 795.

The Legislature recognized that sales tax increases have a disparate impact on retailers in border counties. Consequently, the 1983 Legislature exempted four border counties from an increase in the state sales-tax rate in view of the competitive disadvantage faced by such retailers. Laws of 1983, ch. 7, § 6. *See Bond v. Burrows*, 103 Wn.2d 153, 155, 690 P.2d 1168 (1984) (discussing legislative intent of 1983 sales tax exemption for border counties). However, the Washington Supreme Court invalidated the tax exemption as contrary to article 2, section 28 and article 7, section 1 of the Washington Constitution, which require that state taxes apply uniformly throughout the state. *Id.*

The Legislature's decision to permit tax-included advertising occurred in the first legislative session that followed the Supreme Court's *Bond* decision. The legislation was devised as an alternative remedy for retailers that competed for business with retailers in Oregon. The 1985 amendment had the specific and limited purpose of relaxing restrictions on tax-included advertising. There is no indication the Legislature intended to otherwise alter a seller's duties to collect and remit the sales tax.

**G. The Legislature Has Acquiesced In The Department's Interpretation For 25 Years.**

The Legislature enacted House Bill 601 in April, 1985. AR 253.

That November, the Department instituted the rule-making process to revise WAC 458-20-107. CP 53-59. The new rule was adopted on January 7, 1986. Washington State Register 86-03-016 (1986). CP 57. The Legislature has amended RCW 82.08.050 eleven times since the Department revised WAC 458-20-107, yet it has never repudiated the Department's interpretation.<sup>15</sup>

That the Legislature left the Department's contemporaneous interpretation of the 1985 amendment undisturbed for a quarter century reflects the Legislature's view that the Department's rule is consistent with

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<sup>15</sup> In 2003, RCW 82.08.050 was separated into subsections without change to the language enacted in 1985, which was codified as RCW 82.08.050(5). Laws of 2003, ch. 76, § 3. In 2007, RCW 82.08.050(5) was again recodified without change as RCW 82.08.050(9). Laws of 2007, ch. 6, § 1202.

In 2010, the Legislature made technical changes to RCW 82.08.050 as part of a 112-page omnibus bill that enacted numerous amendments to the state and local sales tax laws. A general purpose of the bill was to "improve clarity and consistency, eliminate obsolete provisions, and simplify administration." Laws of 2010, ch. 106. The bill amended RCW 82.08.050(9) by adding the phrase, "Except as otherwise provided in this subsection," to the beginning of the first and third sentences of former RCW 82.08.050(9). *Id.* at 237. The Legislature also separated the advertising exception to the conclusive presumption into a separate sentence. The legislative history does not reveal why these specific changes were made. However, the changes are consistent with the Legislature's general intent to enact technical changes to clarify the laws.

The 2010 amendments to RCW 82.08.050(9) are consistent with WAC 458-20-107. The changes to RCW 82.08.050(9) clarified that subsection by creating parallelism between two general rules and their exceptions. The first sentence of RCW 82.08.050(9) states the requirement that the tax must be "stated separately from the selling price" in any sales invoice or other instrument of sale. The second sentence provides that the tax "need not be stated separately from the selling price" on vending machine sales. Thus, the phrase, "except as otherwise provided in this subsection" in the first sentence refers to the exception to the separate statement requirement for vending machine sales. The third sentence of RCW 82.08.050(9) states the conclusive presumption that the selling price quoted in any "price list, sales document, contract or other agreement between the parties" does not include tax. The final sentence creates an exception from the conclusive presumption for "the advertised price." Thus, the phrase, "except as otherwise provided in this subsection" in the third sentence refers to the advertising exception to the conclusive presumption.

the statute. *In re Sehome Park Care Ctr., Inc.*, 127 Wn.2d 774, 780, 903 P.2d 443 (1995); *Green River Cmty. Coll., Dist. No. 10 v. Higher Ed. Personnel Bd.*, 95 Wn.2d 108, 118, 622 P.2d 826 (1980) (“a contemporaneous construction by the department charged with administering an ambiguous statute is even more persuasive if the legislature not only fails to repudiate the construction, but also amends the statute in some other particular without disturbing the administrative interpretation”).

**H. Every Available Source Of Legislative History Supports The Conclusion That WAC 458-20-107 Is Consistent With Legislative Intent And Serves The Policies And Goals The Legislature Sought To Achieve When It Amended RCW 82.08 In 1985.**

Because the language of RCW 82.08.050 is at least as susceptible to the Department’s interpretation as to that of the Board’s interpretation, this Court may consider the legislative history and circumstances surrounding its enactment as evidence of legislative intent. *Lake*, 169 Wn.2d at 527; *In re Sehome Park*, 127 Wn.2d at 781 (examining legislative history to determine scope of amended tax exemption). As discussed below, the legislative history shows that E.H.B. 601 was drafted to address concerns about preventing deceptive trade practices, ensuring transparency in the collection of the sales tax, and providing an adequate “paper trail” for the Department’s auditors. The Legislature chose to serve

these goals by requiring that the tax be stated separately from the selling price on the sales invoice or similar document given to the buyer.

- 1. The bill reports and bill analysis uniformly explain that retailers that advertise tax-included prices still must state the tax separately from the selling price on any sales invoice that documents a sale transaction.**

During the 1984 legislative session, the Legislature considered three bills relating to the elimination of the ban on tax-included advertising, House Bill 497, Senate Bill 3275, and House Bill 601. 1 House Journal, 49th Leg., Reg. Sess., at 136, 164 (Wash. 1985); 1 Senate Journal, 49<sup>th</sup> Reg. Sess., at 1039 (Wash. 1985). CP 95, 100, 104. House Bill 497 and Senate Bill 3275 would have eliminated the ban on tax-included advertising and also would have repealed the requirement to state the tax separately from the selling price. H.B. 497, 49th Leg., Reg. Sess. (Wash. 1985). CP 95. Legislative Digest and History of Bills, 49th Leg., at 244 (Wash. 1985); H.B. 601, 49th Leg., Reg. Sess. (Wash. 1985); S.B. 3275, 49th Leg., Reg. Sess. (Wash. 1985).

The bill the Legislature ultimately enacted, Engrossed House Bill 601, repealed the advertising ban but required sellers to state the sales tax separately “on any sales invoice or other instrument of sale.” Laws of 1985, ch. 38, §§ 2-5; CP 118.

The House and Senate bill reports and the House bill analysis all include the following summary of House Bill 601:

Retailers are allowed to advertise and display sales prices which include the sales tax or infer [sic] that they are absorbing the sales tax. However, the sales invoice or other instrument of sale must state the tax separately.

Final Bill Report H.B. 601, 49th Leg., Reg. Sess. (Wash. 1985) (copy attached as Appendix G); House Comm. on Ways and Means, H.B. Rep. on H.B. 601 at 1, 49th Leg. Reg. Sess. (Wash. 1985); Senate Comm. on Commerce and Labor, S.B. Rep. on E.H.B. 601, 49th Leg. Reg. Sess. (Wash. 1985); House Comm. on Ways and Means, H.B. Analysis on H.B. 601, 49th Leg. Reg. Sess. (Wash. 1985). CP 127-34.

**2. The transcripts of the House committee hearings show that House Bill 601 had the specific, limited purpose of relaxing restrictions on tax-included advertising.**

On February 20, 1985, the House Ways and Means Committee held a public hearing on House Bill 601.<sup>16</sup> CP 24. The bill's sponsor, Representative Bussee Nutley of Vancouver explained that House Bill 601, unlike the other bills that had been introduced, ensured there would be a "paper record" on sales advertised as tax-included by requiring the

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<sup>16</sup> Digitized audio recordings of the House of Representatives Committee meetings for the period 1973-2002 were recently made available online by the Washington Secretary of State. The audio recordings may be accessed by clicking on the "Detailed Search" tab at <http://www.digitalarchives.wa.gov>, and selecting "audio recordings" from the "Record Series" search option and "statewide" from the "County" search option.

amount of tax paid by the consumer to be shown on the invoice:

What we're asking for is the opportunity for our local merchants to get around the existing advertising ban on including the sales tax in the advertised—advertised price of their products. And the reason that we're doing this is because we have a psychological barrier of the consumers and that is that they just prefer not to pay the sales tax and they can go across the river to Oregon and not pay the sales tax.

It's very difficult in our area, we have a 7.3% sales tax at this point, but it's difficult for people to take a \$95 item and figure out how much sales tax is going on top of that and figure out exactly how much money will be out of their wallet to pay for that particular good.

What this bill will affect is the ability for the consumer to know that an item, if it's advertised in the State of Washington, tax included, \$100, the same amount of money will be written on the check or cash out of the pocketbook as if they went to Oregon for an advertised product for \$100. It's a psychological bottom line kind of money.

What my bill has in it is the --kind of the paper record to show on the invoice that the person paid \$92 for the item and \$8 for the tax. So we are not trying to hide the tax. We're not trying to do anything but to allow as an option to the merchants the opportunity to advertise the total price of the product.

CP 25-26.

In response to concerns that the bill would deceive consumers about the applicability and amount of the sales tax, Representative Nutley stated:

It is simply a marketing technique that we would be allowing back to the merchants...All we are doing is removing a current prohibition for advertising.

CP 33.

Representative Nutley invited Clyde Ahl, a retailer from her district, to testify. Mr. Ahl explained that House Bill 601 would allow Washington retailers to avoid losing business to Oregon by offering “to pay the sales tax for the customer” when a customer objected that an item that could be purchased for “\$100” in Oregon would cost “\$107.3” in Washington. CP 29.

Committee members speaking in favor of the bill said it would facilitate comparison shopping by consumers who live near the border.

Representative Gary Locke explained:

The clear example would be you have an item in Portland that’s selling and advertised at \$355 and you have an item in Vancouver advertised at \$325. The psychological barrier to the people in Vancouver is that they just don’t want to compute that – that sales tax, so they assume that Portland, even at \$355, might be cheaper. Yet if they were to sit down and make that calculation, it turns out that it’s actually cheaper in Vancouver. By allowing the advertised price to say includes sales tax, it would be listed at \$351. And so especially when you have advertisements in the same newspaper, it really makes for easy comparison shopping.

CP 34.

Representative Nutley explained that in requiring the separate statement of tax on the sales invoice, House Bill 601 would ensure consumers are aware of the amount they are paying to the government, which she characterized as the “problem” the Legislature had intended to address by adopting the separate statement requirement in the first

instance.<sup>17</sup> CP 35.

On February 21, 1985, the House Ways and Means Committee approved a “do pass” recommendation for House Bill 601. CP 40, 50.

Before the committee voted, a staff member gave the following “recap”:

This measure would allow sellers to advertise a price, including the sales tax. Currently such advertisement would subject the sellers to or retailers to a penalty and possible loss of business license.

The bill does require that the instrument of sale separately state the —the price and the—sales tax, so there would be a separate accounting of the sales tax.

CP 41.

In response to a committee member’s expression of concern that the bill would deceive customers, Representative King stated:

What this bill says is they can advertise the price that said the price is \$325, includes sales tax. Subsequently, the document, the transaction, cash register receipt, voucher whatever, separately lists the sales tax on there so the customer is well aware of what is happening.

CP 44.

On March 4, 1985, the House passed the bill as recommended by the Ways and Means Committee. Legislative Digest and History of Bills, 49th Leg., at 244 (Wash. 1985). CP 93.

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<sup>17</sup> The express requirement to separately state the tax was adopted in 1965. Laws of 1965, ch. 173, § 15; AR 256. However, the ban on tax-included advertising had been in effect since 1935. Laws of 1935, ch. 180, § 27; AR 251.

3. **The Senate amendment to House Bill 601 shows that the specific conditions on tax included advertising codified at RCW 82.08.055 were intended to supplement, not substitute for, the requirement to separately state the tax on sales invoices.**

On March 15, 1985, the Senate Committee on Commerce and Labor held a public hearing on House Bill 601. CP 132. The Legislative Digest indicates that the Senate Committee recommended passage of House Bill 601 after amending it to include additional conditions on tax-included advertising. CP 93.<sup>18</sup> The Senate Bill Report includes the following summary of the bill as amended by the Senate:

Retailers are allowed to advertise and display sales prices which include the sales tax or state that they are paying the sales tax, subject to the following conditions: (a) that the sales invoice or other instrument of sale state the tax separately; (b) that the words "tax included" following the advertised price, be stated in the same medium and in half the print size; and (c) that the advertised price be shown on all price tags.

Senate Comm. on Commerce and Labor, S.B. Rep. on E.H.B. 601, as of March 20, 1985, 49th Leg. Reg. Sess., at 2 (Wash. 1985). CP 137.

On April 3, 1985, the Senate passed the bill as amended. CP 93. On April 5, the House passed the bill as amended by the Senate. E.H.B. 601, 49th Leg., Reg. Sess. (Wash. 1985), CP 117; Laws of 1985, ch. 38.

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<sup>18</sup> The Department has been unable to access the audio recording of the committee hearing.

CP 124. The restrictions on tax-included advertising that the Senate added to the bill were codified as RCW 82.08.055.

In its summary judgment order, the Board speculated that the “strict requirements” of RCW 82.08.055 show legislative intent to relieve sellers from the requirement of separately stating the tax at the point of sale. CP 16. On the contrary, the legislative history shows conclusively that the Legislature adopted the advertising restrictions as *additional* conditions for tax-included advertising.<sup>19</sup>

**4. The zero fiscal notes for HB 601 were predicated on the assumption that retailers must separately state the tax on sales invoices even if they advertise tax-included prices.**

The fiscal note for House Bill 601 also demonstrates that the Legislature intended to retain the requirement that the tax be separately stated on the actual sales invoice, regardless of the seller’s advertising practices. The “description” of the bill states:

This measure would permit sellers at retail to advertise prices, including the retail sales tax, or state that the seller will absorb the tax. Currently, such practice is prohibited by RCW 82.08.120 (pertinent language stricken by HB 601) and is considered a misdemeanor.

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<sup>19</sup> The Board stated: “Neither party provided the legislative history on the prohibition proviso in the third sentence of RCW 82.080.050(5), and its connection to RCW 82.08.055.” AR 27. On the contrary, the Department provided the Board with the Final Bill Report and the Senate Journal, both of which refer to RCW 82.08.055 in conjunction with RCW 82.08.050 and support the Department’s argument that the requirement to separately state the tax when giving a sales receipt to the buyer applies to sellers that use tax-included advertising. AR 253, 254.

The sales invoice for such products must still separately state the amount of retail sales tax, and the advertised price, if it includes the sales tax, is not considered the selling price for purposes of collection of the sales tax.

Fiscal Note to H.B. 601, 49th Leg., Reg. Sess., at 2 (Wash. 1985)

(prepared by Department of Revenue) (on file with the Washington State Archives). CP 139-40. The fiscal note further states:

Because the sales tax must still be separately stated on the invoice, there should be no loss of state or local sales tax as a result of HB 601.

*Id.*

5. **In advising the Legislature that it had no objection to House Bill 601, the Department emphasized that the bill required retailers to separately state the tax on sales invoices.**

The legislative bill file for House Bill 601 includes a letter dated March 17, 1985, from the Department's Deputy Director Matthew Coyle to Senator Al Bauer. The letter states:

This will confirm your understanding that the Department of Revenue has no objection to the above entitled bill as presently worded. The bill merely permits sellers to include the sales tax in the advertised selling price. Because there is still a requirement that the sales tax be stated separately in the invoice or other document of sale, it provides an adequate trail for the Department.

Letter from Mathew J. Coyle to The Honorable Al Bauer (on file with Washington State Archives). CP 144.

**6. The floor synopsis is consistent with the bill reports and bill analysis.**

The legislative bill file also includes a “floor synopsis” for Engrossed House Bill 601. Under the heading “what the bill does,” the document states:

Allows retailers to add sales tax to the selling price in the advertised price, as long as the selling price and sales tax are separately stated on all invoices and other instruments of sale. The advertised price must be shown on all price tags, followed by the words: “tax included,” in the same medium and print size.

CP 146.

**7. The bill’s sponsor relied on the separate statement requirement in responding to opponents of the bill during the Senate floor debate.**

During the Senate floor debate, a bill sponsor used the separate statement requirement to rebut arguments made in opposition to the bill. CP 154 (transcript of 4/3/1985 Senate floor debate). Senator Rasmussen argued the bill would cause “friction” among merchants and “lead to a lot of confusion” among consumers. CP 159, 163. Senator Cantu argued the Legislature should not be “playing around with definitions of sales taxes.” CP 163. Speaking in support of E.H.B. 601, Senator Warnke replied:

This bill only deals with advertising the prices of commodities. It has absolutely nothing to do with the definition of sales tax. It has absolutely nothing to do with the confusion involved that I’ve heard in the remarks here today. ...All this bill does is allow retailers in the State of

Washington to put on their tags the full price as long as in the store there is a sign that says our prices include sales tax. It also requires that the receipt given to the person must split out the sales tax.

CP 164-65.

Thus, all available sources of legislative history support the conclusion that WAC 458-20-107 is not merely a reasonable interpretation of the 1985 statute, but the correct interpretation. In contrast, the Board's conclusion that RCW 82.08.050 excuses sellers that advertise tax-included prices from the requirement to separately state the tax is plainly inconsistent with the Legislature's intent, as revealed with such remarkable clarity by the legislative history.

## VI. CONCLUSION

This Court should reverse the summary judgment order of the Board and remand the matter for further proceedings.

RESPECTFULLY SUBMITTED this 19<sup>th</sup> day of August, 2011.

ROBERT M. MCKENNA  
Attorney General



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**PROOF OF SERVICE**

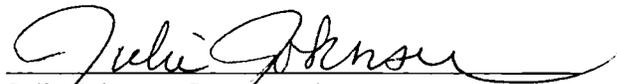
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I certify that I served a copy of this document, via email and U.S. Mail, postage prepaid, through Consolidated Mail Services, upon the following:

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

DATED this 19<sup>th</sup> day of August, 2011, at Tumwater, WA.

  
Julie Johnson, Legal Assistant

# **APPENDIX A**

RECEIVED  
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BEFORE THE BOARD OF TAX APPEALS  
STATE OF WASHINGTON

ATTORNEY GENERAL'S OFFICE  
REVENUE DIVISION

1  
2  
3 FURNITURE OUTLET, LLC, )  
4 Appellant, )  
5 v. )  
6 STATE OF WASHINGTON )  
7 DEPARTMENT OF REVENUE, )  
8 Respondent. )

Docket No. 09-108  
RE: Excise Tax Appeal  
SUMMARY JUDGMENT ORDER

9 BI-MOR, INC., D/B/A STUPID PRICES, )  
10 Appellant, )  
11 v. )  
12 STATE OF WASHINGTON )  
13 DEPARTMENT OF REVENUE, )  
14 Respondent. )

Docket No. 09-109  
RE: Excise Tax Appeal  
SUMMARY JUDGMENT ORDER

15 This matter came before the Board of Tax Appeals (Board) at a telephonic hearing  
16 conference on March 23, 2010. Peter P. Perron, Attorney, represented the Appellants, Furniture  
17 Outlet, LLC, and Bi-Mor Incorporated d/b/a Stupid Prices (Appellants); Frank Dollar, Tax  
18 Representative for Appellants, observed. Rosann Fitzpatrick, Assistant Attorney General,  
19 represented Respondent, State of Washington Department of Revenue (Department).

20 This Board now grants Appellant's motion for summary judgment as argued and briefed.

21 ISSUE

22 Sebring.

23 The Appellants advertise all their prices, in accordance with RCW 82.08.055, as always  
24 including the sales tax ("Always No Tax"), but do not separately state the amount of sales tax on  
25 receipts and invoices provided to customers. Does RCW 82.08.050 authorize the Department to

1 assess additional sales tax based on the advertised tax-included prices that appear on the  
2 customers' cash register receipts?

3 Answer: No.

4  
5 FACTS AND CONTENTIONS

6 The case comes before the Board upon agreement that there are no material issues of  
7 disputed facts as to the Appellant's sales practices. The Appellants agree that most<sup>1</sup> of their  
8 customer receipts or invoices reviewed during the audit period, 2003 to 2006, did not state the  
9 amount of sales tax. The receipts or invoices provide only the total selling price. The  
10 Department argues there are no disputes as to the material facts in this appeal, and it too moves  
11 for summary judgment.

12 Bi-Mor, Inc., and Furniture Outlet, LLC, are businesses located in Washington State that  
13 engage exclusively in retail sales. Their stores have signs and advertising that reflect their slogan  
14 "Always No Tax." The Department does not contest that the Appellant's advertising practices  
15 comply with RCW 82.08.055 requirements for advertising prices that include sales tax. The  
16 Appellants reported and paid sales taxes for all the transactions. In accordance with established  
17 practice, however, the Appellants "factored out" the sales tax from the total advertised price.<sup>2</sup>

18 There is no dispute that the Appellants paid sales taxes to the state calculated on the total  
19 selling price of an item minus the sales tax. The Department, however, re-calculates the amount  
20 of tax due based on the advertised tax-included price and assessed additional sales tax to the  
21 Appellants. The Department relies on its interpretation of RCW 82.08.050(5) in WAC 458-20-

22  
23 <sup>1</sup> Receipts from three of the Appellant's nine stores during the later years audited stated the amount of the sales tax  
24 separately, but they did not add the lower item price to the sales tax for a higher total amount. For example, Exhibit  
25 R6-001 shows the following invoice: "SUBTOTAL: \$15.23; tax: 1.24; TOTAL \$15.23." The Appellant's argues  
these invoices are in compliance with the Department's regulation, even if the Board rules in the Department's  
favor. It is not the Appellants' practice or intent, however, to separately state the selling price and tax.

<sup>2</sup> The Board notes that the calculation of the sales tax in the "factoring out" process apparently requires  
the application of an algebraic equation to calculate both the selling price and the sales tax for reporting  
and remitting the sales tax to the Department of Revenue.

1 107 (Rule 107).<sup>3</sup> Rule 107 adds to the general requirement in the first sentence of RCW  
2 82.08.050(5) a specific requirement that that retailers advertising and selling items for a “price  
3 including sales tax” (i.e., “tax-included prices”) must separately state the selling price and sales  
4 tax separately on each invoice or other instrument of sale. The Department also argues that the  
5 general requirement for a separate statement of tax and selling price in RCW 84.08.050(5) is  
6 “unconditional.”

7 RCW 82.08.050(5) includes a provision for determining the selling price on which to  
8 compute the sales tax due if a seller does not separately state the sales tax and selling price. The  
9 third sentence of RCW 82.08.050(5), provides that it shall be conclusively presumed that the  
10 selling price quoted in a price list or other agreement between the parties does not include the tax  
11 imposed, *except* when the *advertised* price is “*tax-included*.” Notwithstanding the exception to  
12 calculating sales tax based on the advertised price, the Department argues that if a seller  
13 advertising tax-include prices fails to separately state the sales tax, the Department is entitled to  
14 conclusively presume that the total on such a seller’s cash register receipt becomes the amount  
15 upon which the sales tax is calculated, rather than the selling price calculated by “factoring out”  
16 the sales tax from the advertised tax-included price.

17 The Appellants contend, and the Board agrees, that the threshold question is whether the  
18 specific exception to the conclusive presumption provision in the third sentence in RCW  
19 82.08.050(5) prohibits the Department outright from considering the advertised tax-included sale  
20 price to be the selling price for the purpose of determining the amount of sales tax due. The  
21 Appellants correctly argue that the language of the statute is clear and unambiguous, and that  
22 WAC 458-20-107 (Rule 107) and the Department’s assessment conflicts with the express  
23 exception in the second clause of the third sentence in RCW 82.08.050(5) prohibiting the  
24

25 <sup>3</sup> See, Department’s Determination No. 08-0334R.

1 Department from calculating sales tax on the advertised tax-included price when sales tax is not  
2 separately stated on the cash register receipt.

#### 4 ANALYSIS AND CONCLUSIONS

5 The controlling statute is:

#### 6 **RCW 82.08.050<sup>4</sup>**

7 **Buyer to pay, seller to collect tax – Statement of tax – Exception – Penalties –**

8 **Contingent expiration of subsection.**

9  
10 (1) The tax hereby imposed shall be paid by the buyer to the seller, and each seller shall  
11 collect from the buyer the full amount of the tax payable in respect to each taxable sale in  
12 accordance with the schedule of collections adopted by the department pursuant to the  
13 provisions of RCW 82.08.060.

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

#### 23 **RCW 82.08.055**

24 **Advertisement of price.**

25 A seller may advertise the price as including the tax or that the seller is paying the tax,  
subject to the following conditions:

(1) Unless the advertised price is one in a listed series, the words "tax included" are  
stated immediately following the advertised price and in print size at least half as large as  
the advertised price;

(2) If the advertised prices are listed in a series, the words "tax included in all prices"  
are placed conspicuously at the head of the list and in the same print size as the

<sup>4</sup> The statute was later amended; the version above was in effect during the audit period 2003 to 2006. Subsection (5) is now (9) of the later statute.

1 advertised prices;

2 (3) If a price is advertised as "tax included," the price listed on any price tag shall be  
3 shown in the same manner; and

4 (4) All advertised prices and the words "tax included" are stated in the same medium,  
5 be it oral or visual, and if oral, in substantially the same inflection and volume.

6 Rule 107 provides as follows:

7 **WAC 458-20-107 Requirement to separately state sales tax -- Advertised prices**  
8 **including sales tax.** (1) **Introduction.** Under the provisions of RCW 82.08.020 the retail  
9 sales tax is to be collected and paid upon retail sales, measured by the selling price.

10 (2) **Retail sales tax separately stated.** RCW 82.08.050 specifically requires that the  
11 retail sales tax must be stated separately from the selling price on any sales invoice or  
12 other instrument of sale, i.e., contracts, sales slips, and/or customer billing receipts. (For  
13 an exception covering restaurant receipts of Class H liquor licensees, see WAC 458-20-  
14 124.) This is required even though the seller and buyer may know and agree that the price  
15 quoted is to include state and local taxes, including the retail sales tax.

16 (a) The law creates a "conclusive presumption" that, for purposes of collecting the tax  
17 and remitting it to the state, the selling price quoted does not include the retail sales tax.  
18 This presumption is not overcome or rebutted by any written or oral agreement between  
19 seller and buyer.

20 (b) Selling prices may be advertised as including the tax or that the seller is paying the  
21 tax and, in such cases, the advertised price must not be considered to be the taxable  
22 selling price under certain prescribed conditions explained in this section. Even when  
23 prices are advertised as including the sales tax, the actual sales invoices, receipts,  
24 contracts, or billing documents must list the retail sales tax as a separate charge. Failure  
25 to comply with this requirement may result in the retail sales tax due and payable to the  
state being computed on the gross amount charged even if it is claimed to already include  
all taxes due.

(3) **Advertising prices including tax.**

(a) The law provides that a seller may advertise prices as including the sales tax or that  
the seller is paying the sales tax under the following conditions:

(i) The words "tax included" are stated immediately following the advertised price in  
print size at least half as large as the advertised price print size, unless the advertised price  
is one in a listed series;

(ii) When advertised prices are listed in series, the words "tax included in all prices"

1 are placed conspicuously at the head of the list in the same print size as the list;

2 (iii) If the price is advertised as including tax, the price listed on any price tag must be  
3 shown in the same way; and

4 (iv) All advertised prices and the words "tax included" are stated in the same medium,  
5 whether oral or visual, and if oral, in substantially the same inflection and volume.

6 (b) If these conditions are satisfied, as applicable, then price lists, reader boards,  
7 menus, and other price information mediums need not reflect the item price and  
8 separately show the actual amount of sales tax being collected on any or all items.

9 (c) The scope and intent of the foregoing is that buyers have the right to know whether  
10 retail sales tax is being included in advertised prices or not and that the tax is not to be  
11 used for the competitive advantage or disadvantage of retail sellers.

12 (Emphasis added to provisions not already set forth in RCW 82.08.050(5)).

13 The Appellants focus on the third sentence of RCW 82.08.050(5):

14 For purposes of determining the tax due from the buyer to the seller and from the  
15 seller to the department it shall be conclusively presumed that the *selling price*  
16 *quoted* in any price list, sales document, contract or other agreement between the  
17 parties does not include the tax imposed by this chapter, *but if the seller*  
18 *advertises the price as including the tax* or that the seller is paying the tax, the  
19 advertised price shall not be considered the selling price. (Emphasis added.)

20 The Board agrees with the Appellant's argument that the third sentence of RCW  
21 82.08.050(5) clearly and unambiguously prohibits the Department from ever considering the  
22 advertised tax-included price to be the selling price, even if that statute generally requires the  
23 sales tax to be stated separately. That is, when the item is advertised as "the price as including  
24 the tax or that the seller is paying the tax" the statute expressly provides that "the advertised  
25 price shall not be considered the selling price." That language thus creates an exception to the  
requirement earlier in the same paragraph that the sales tax must always be stated for retail sales.  
Notwithstanding the first sentence requiring a separate statement, the legislature clearly foresaw  
that sellers might fail to comply and therefore included the provision that, *unless the seller is*

1 advertising the tax is included or absorbing the tax, then the selling price quoted prior to the  
2 actual sale is conclusively deemed to be the selling price and the tax computed thereon.<sup>5</sup>

3 Rule 107 conflicts with RCW 82.08.050(5) when it provides that: "Failure to comply  
4 with this requirement may result in the retail sales tax due and payable to the state being  
5 computed on the gross amount charged even if it is claimed to already include all taxes due."

6 A regulation that conflicts with the statute it purports to implement is invalid.<sup>6</sup>

7  
8 The Board notes that this decision applies to the fact situation where a seller (1) complies  
9 with RCW 82.08.055 and (2) fulfills the sales tax collection and remittance provisions of RCW  
10 82.08.050, which includes correctly calculating (with the proper mathematical "factoring out"  
11 formula), reporting and timely paying the sales tax due on those sales.

12 DECISION

13 The Board sets aside Department's Determination No. 08-0334R, and dismisses any  
14 assessment against Appellants related to this appeal. The hearing date of April 22, 2010, is  
15 cancelled.

16 DATED this 1st day of April, 2010.

17  
18  
19 <sup>5</sup> The exception to the separate statement mandate makes sense from a practical perspective. It is easy for sellers to  
20 program cash registers and calculators to compute the sales tax for their location. RCW 82.08.050 was amended in  
21 1985 by Laws 1985, ch. 38, § 1, and that RCW 82.08.055 was enacted by Laws 1985, ch. 38, § 2. Neither party  
22 provided the legislative history on the prohibition proviso in the third sentence in RCW 82.080.050(5), and its  
23 connection to RCW 82.08.055. The Board observes, however, that there is most likely a connection between the  
24 amendment to the former statute in the Laws of 1985, ch. 38, and the creation of the specific rules allowing tax-  
25 included advertised prices and seller tax-absorption sales under strict conditions in that same statute. Having made  
the policy decision to permit tax-included advertised prices (and seller tax-absorption prices), the legislature would  
want to assure that the sellers who complied with those strict requirements would not lose the benefit of making  
such sales by having to make the complex point-of-sale calculations that factor out the sale price. Thus, the  
Legislature appears to have carved out an express exception to the general separate statement requirement when it  
enacted Laws of 1985, ch. 38, § 1.

<sup>6</sup> *Coast Pacific Trading, Inc. v. Department of Revenue*, 105 Wn.2d 912, 719 P.2d 541 (1986) (The Department  
cannot contradict a substantive legislative enactment); *Duncan Crane Service, Inc. v. State Dept. of Revenue*, 44  
Wn. App. 684, 723 P.2d 480 (1986) (Regulation adopted by the Department of Revenue cannot be inconsistent with  
the applicable statute; regulation that taxes more broadly than the statute it purports to implement is invalid.)

BOARD OF TAX APPEALS

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TERRY SEBRING, Chair

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KAY S. SLONIM, Vice Chair

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STEPHEN L. JOHNSON, Member

Right of Reconsideration of a Final Decision

Pursuant to WAC 456-09-955, you may file a petition for reconsideration of this Summary Judgment Order. You must file the petition for reconsideration with the Board of Tax Appeals within 10 business days of the date of mailing of the Order. The petition must state the specific grounds upon which relief is requested. You must also serve a copy on all other parties and their representatives of record. The Board may deny the petition, modify its decision, or reopen the hearing.

Please be advised that a party petitioning for judicial review is responsible for the reasonable costs incurred by this agency in preparing the necessary copies of the record for transmittal to the superior court. Charges for the transcript are payable separately to the court reporter selected by the Board to create a transcript from the electronic recording.

# **APPENDIX B**

- (8) Section 8, chapter 323, Laws of 1959 and RCW 18.08.170;  
 (9) Section 9, chapter 323, Laws of 1959 and RCW 18.08.180;  
 (10) Section 10, chapter 323, Laws of 1959, section 1, chapter 266, Laws of 1971 ex. sess., section 2, chapter 30, Laws of 1975 1st ex. sess. and RCW 18.08.190;  
 (11) Section 11, chapter 323, Laws of 1959 and RCW 18.08.200;  
 (12) Section 12, chapter 323, Laws of 1959, section 58, chapter 81, Laws of 1971 and RCW 18.08.210;  
 (13) Section 13, chapter 323, Laws of 1959, section 3, chapter 30, Laws of 1975 1st ex. sess. and RCW 18.08.220;  
 (14) Section 14, chapter 323, Laws of 1959 and RCW 18.08.230;  
 (15) Section 16, chapter 323, Laws of 1959 and RCW 18.08.250;  
 (16) Section 17, chapter 323, Laws of 1959 and RCW 18.08.260; and  
 (17) Section 18, chapter 323, Laws of 1959 and RCW 18.08.270.

NEW SECTION. Sec. 19. Sections 2 through 17 of this act are each added to chapter 18.08 RCW.

NEW SECTION. Sec. 20. If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

Passed the House April 5, 1985.

Passed the Senate March 29, 1985.

Approved by the Governor April 15, 1985.

Filed in Office of Secretary of State April 15, 1985.

## CHAPTER 38

[Engrossed House Bill No. 601]

### SELLING PRICE—ADVERTISED PRICE—CONDITIONS ON INCLUDING SALES TAX IN ADVERTISED PRICE

AN ACT Relating to excise taxes; amending RCW 82.08.050, 82.08.010, and 82.08.120; adding a new section to chapter 82.08 RCW; and declaring an emergency.

Be it enacted by the Legislature of the State of Washington:

Sec. 1. Section 82.08.050, chapter 15, Laws of 1961 as last amended by section 7, chapter 299, Laws of 1971 ex. sess. and RCW 82.08.050 are each amended to read as follows:

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. 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 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 shall be guilty of a gross misdemeanor.

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 own acts or the result of acts or conditions beyond his control, he shall, nevertheless, be personally liable to the state for the amount of the tax.

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 shall be guilty of a misdemeanor. The tax required by this chapter to be collected by the seller shall be stated separately from the selling price (and) in any sales invoice or other instrument of sale. 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.

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 fifteenth day of the month following the tax period in which the purchase was made shall be considered as the due date of the tax.

NEW SECTION. Sec. 2. A new section is added to chapter 82.08 RCW to read as follows:

A seller may advertise the price as including the tax or that the seller is paying the tax, subject to the following conditions:

(1) Unless the advertised price is one in a listed series, the words "tax included" are stated immediately following the advertised price and in print size at least half as large as the advertised price;

(2) If the advertised prices are listed in a series, the words "tax included in all prices" are placed conspicuously at the head of the list and in the same print size as the advertised prices;

(3) If a price is advertised as "tax included," the price listed on any price tag shall be shown in the same manner; and

(4) All advertised prices and the words "tax included" are stated in the same medium, be it oral or visual, and if oral, in substantially the same inflection and volume.

Sec. 3. Section 82.08.010, chapter 15, Laws of 1961 as last amended by section 2, chapter 2, Laws of 1985 and RCW 82.08.010 are each amended to read as follows:

For the purposes of this chapter:

(1) "Selling price" means the consideration, whether money, credits, rights, or other property except trade-in property of like kind, expressed in the terms of money paid or delivered by a buyer to a seller without any deduction on account of the cost of tangible property sold, the cost of materials used, labor costs, interest, discount, delivery costs, taxes other than taxes imposed under this chapter if the seller advertises the price as including the tax or that the seller is paying the tax, or any other expenses whatsoever paid or accrued and without any deduction on account of losses; but shall not include the amount of cash discount actually taken by a buyer; and shall be subject to modification to the extent modification is provided for in RCW 82.08.080.

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 of revenue may prescribe;

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

(3) "Buyer" 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) 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.

Sec. 4. Section 82.08.120, chapter 15, Laws of 1961 as amended by section 51, chapter 278, Laws of 1975 1st ex. sess. and RCW 82.08.120 are each amended to read as follows:

Whoever, excepting as expressly authorized by this chapter, refunds, remits, or rebates to a buyer, either directly or indirectly and by whatever means, all or any part of the tax levied by this chapter (~~(, or makes in any form of advertising, verbal or otherwise, any statements which might infer that he is absorbing the tax or paying the tax for the buyer by an adjustment of prices, or at a price including the tax, or in any other manner whatsoever))~~) shall be guilty of a misdemeanor. The violation of this section by any person holding a license granted by the state or any political subdivision thereof shall be sufficient grounds for the cancellation of the license of such person upon written notification by the department of revenue to the proper officer of the department granting the license that such person has violated the provisions of this section. Before any license shall be canceled hereunder, the licensee shall be entitled to a hearing before the department granting the license under such regulations as the department may prescribe.

NEW SECTION. Sec. 5. This act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect immediately.

Passed the House April 5, 1985.

Passed the Senate April 3, 1985.

Approved by the Governor April 15, 1985.

Filed in Office of Secretary of State April 15, 1985.

## CHAPTER 39

[Substitute House Bill No. 1063]

### IMPACT CENTER—RESPONSIBILITIES MODIFIED—SUNSET PROCEDURE PROVIDED

AN ACT Relating to agricultural marketing; amending section 1, chapter 57, Laws of 1984 (uncodified); amending section 2, chapter 57, Laws of 1984 (uncodified); amending section 3, chapter 57, Laws of 1984 (uncodified); amending section 6, chapter 57, Laws of 1984 (uncodified); amending section 7, chapter 57, Laws of 1984 (uncodified); adding new sections to chapter 28B.30 RCW; adding new sections to chapter 43.131 RCW; repealing section 4, chapter 57, Laws of 1984 (uncodified); repealing section 5, chapter 57, Laws of 1984 (uncodified); repealing section 8, chapter 57, Laws of 1984 (uncodified); providing an expiration date; providing an effective date; and declaring an emergency.

Be it enacted by the Legislature of the State of Washington:

Sec. 1. Section 1, chapter 57, Laws of 1984 (uncodified) is amended to read as follows:

# **APPENDIX C**

The burden is upon the taxpayer to establish the facts concerning the adjustment of the beneficial interest in the business when exemption is claimed.

#### USE TAX

The use tax applies upon the use of any property purchased at a casual retail sale without payment of the retail sales tax, unless exempt by law. Uses which are exempt from the use tax are set out in RCW 82.12.030.

Where there has been a transfer of the capital assets to or by a business, the use of such property is not deemed taxable to the extent the transfer was accomplished through an adjustment of the beneficial interest in the business, provided, the transferor previously paid sales or use tax on the property transferred. (See the exempt situations listed under the retail sales tax subdivision of this rule.)

[Statutory Authority: RCW 82.32.300, 83-07-034 (Order ET 83-17), § 458-20-106, filed 3/15/83; Order ET 75-1, § 458-20-106, filed 5/2/75; Order ET 74-1, § 458-20-106, filed 5/7/74; Order ET 70-3, § 458-20-106 (Rule 106), filed 5/29/70, effective 7/1/70.]

**WAC 458-20-107 Advertised prices including sales tax—Warranties, maintenance agreements, service contracts.** Under the provisions of RCW 82.08.020 the retail sales tax is to be collected and paid upon retail sales, measured by the "selling price."

The term "Selling price" means the consideration, whether money, credits, rights, or other property except trade-in property of like kind, expressed in the terms of money paid or delivered by a buyer to a seller without any deduction on account of the cost of tangible property sold, the cost of materials used, labor costs, interest, discount, delivery costs, taxes other than taxes imposed under this chapter if the seller advertises the price as including the tax or that the seller is paying the tax, or any other expenses whatsoever paid or accrued and without any deduction on account of losses; . . ." (See RCW 82.08.010(1)).

Concerning the tax liabilities and benefits in connection with "trade-in" transactions, see WAC 458-20-247.

RCW 82.08.050 specifically requires that the retail sales tax must be stated separately from the selling price on any sales invoice or other instrument of sale, i.e., contracts, sales slips, and customer billing receipts. (For an exception covering restaurant receipts of Class H liquor licensees, see WAC 458-20-119.) This is required even though the seller and buyer may know and agree that the price quoted is to include state and local taxes, including the retail sales tax. The law creates a "conclusive presumption" that, for purposes of collecting the tax and remitting it to the state, the selling price quoted does not include the retail sales tax. This presumption is not overcome or rebutted by any written or oral agreement between seller and buyer. However, selling prices may be advertised as including the tax or that the seller is paying the tax and, in such cases, the advertised price shall not be considered to be the taxable selling price under certain prescribed conditions explained in this rule. Even when prices are advertised as including the sales tax, the actual sales invoices, receipts, contracts, or

billing documents must list the retail sales tax as a separate charge. Failure to comply with this requirement may result in the retail sales tax due and payable to the state being computed on the gross amount charged even if it is claimed to already include all taxes due.

#### ADVERTISING PRICES INCLUDING TAX

The law provides that a seller may advertise prices as including the sales tax or that the seller is paying the sales tax under the following conditions:

(1) The words "tax included" are stated immediately following the advertised price in print size at least half as large as the advertised price print size, unless the advertised price is one in a listed series;

(2) When advertised prices are listed in series, the words "tax included in all prices" are placed conspicuously at the head of the list in the same print size as the list;

(3) If the price is advertised as including tax, the price listed on any price tag shall be shown in the same way; and

(4) All advertised prices and the words "tax included" are stated in the same medium, whether oral or visual, and if oral, in substantially the same inflection and volume.

If these conditions are satisfied, as applicable, then price lists, reader boards, menus, and other price information mediums need not reflect the item price and separately show the actual amount of sales tax being collected on any or all items.

The scope and intent of the foregoing is that buyers have the right to know whether retail sales tax is being included in advertised prices or not and that the tax is not to be used for the competitive advantage or disadvantage of retail sellers.

#### WARRANTIES, MAINTENANCE AGREEMENTS, AND SERVICE CONTRACTS

For purposes of this rule, the following definitions apply:

Warranties, sometimes referred to as guarantees, are agreements which call for the replacement or repair of tangible personal property with no additional charge for parts or labor, or both, based upon the happening of some unforeseen occurrence, e.g., the property breaks down.

Maintenance agreements, sometimes referred to as service contracts, are agreements which require the specific performance of repairing, cleaning, altering, or improving of tangible personal property on a regular or periodic basis to ensure its continued satisfactory operation.

Manufacturer's warranties are generally included within the retail selling price of the property and no additional charge is made. However, when any additional charge is made for any warranty protecting tangible personal property sold, additional tax liability is incurred depending on how the warranty is sold. If it is sold by the retail seller of the property protected by the warranty and concomitant with the sale of that property, the entire charge, including the charge for the warranty, is

subject to retailing business tax and retail sales tax. This is so even though the warranty charge may be separately billed or separately itemized on any billing. Such warranty sales are deemed to be "for labor and services rendered in respect to . . . installing, repairing, cleaning, altering, imprinting, or improving tangible personal property of or for consumers . . ." and therefore they are "retail sales" under RCW 82.04.050.

Warranties which are sold by any person who was not the seller of the property protected by the warranty or which are purchased subsequent to and distinct from the original warranty purchased concomitant with the property, are deemed to be services rather than retail sales. Charges for such warranties are subject to the service business tax and are not subject to retail sales tax.

#### MAINTENANCE AGREEMENTS

Maintenance agreements and service contracts require the periodic specific performance of inspecting, cleaning, physical servicing, altering, and/or improving of tangible personal property. Therefore, charges for contracts or agreements of this nature are retail sales, subject to retailing business tax and retail sales tax under all circumstances.

In the cases of both warranties and maintenance agreements, any actual additional charge made to the consumer because of the providing of materials or the performance of actual labor pursuant to such agreements is separately taxable under the retailing business tax and retail sales tax. This includes so-called "deductible" amounts not covered by the warranty or service agreement.

Moreover, if an agreement contains warranty provisions but also requires the actual specific performance of inspection, cleaning, servicing, altering, or improving the property on a regular or periodic basis, without regard to the operating condition of the property, such agreements are fully taxed as service agreements, not warranties.

[Statutory Authority: RCW 82.32.300, 86-03-016 (Order ET 86-1), § 458-20-107, filed 1/7/86; 83-07-034 (Order ET 83-17), § 458-20-107, filed 3/15/83; Order ET 70-3, § 458-20-107 (Rule 107), filed 5/29/70, effective 7/1/70.]

**WAC 458-20-108 Returned goods, allowances, cash discounts.** When a contract of sale is made subject to cancellation at the option of one of the parties or to revision in the event the goods sold are defective or if the sale is made subject to cash or trade discount, the gross proceeds actually derived from the contract and the selling price are determined by the transaction as finally completed.

**RETURNED GOODS.** When sales are made either upon approval or upon a sale or return basis, and the purchaser returns the property purchased and the entire selling price is refunded or credited to the purchaser, the seller may deduct an amount equal to the selling price from gross proceeds of sales in computing tax liability, if the amount of sales tax previously collected from the buyer has been refunded by the seller to the buyer. If the property purchased is not returned within the guaranty period as established by contract or by customs of the trade, or if the full selling price is not refunded or

credited to the purchaser, a presumption is raised that the property returned is not returned goods but is an exchange or a repurchase by the vendor.

To illustrate: S sells an article for \$60.00 and credits his sales account therewith. The purchaser returns the article purchased within the guaranty period and the purchase price and the sales tax theretofore paid by the buyer is refunded or credited to him. S may deduct \$60.00 from the gross amount reported on his tax return.

**DEFECTIVE GOODS.** When bona fide refunds, credits or allowances are given within the guarantee period by a seller to a purchaser on account of defects in goods sold, the amount of such refunds, credits or allowances may be deducted by the seller in computing tax liability, if the proportionate amount of the sales tax previously collected from the buyer has been refunded by the seller.

S sells an article to B for \$60.00 and credits his sales account therewith. The article is later found to be defective.

(a) S gives B credit of \$50.00 on account of the defect, and also a credit of sales tax collectible on that amount. S may deduct \$50.00 from the gross amount reported in his tax returns. This is true whether or not B retains the defective article.

(b) B returns the article to S who gives B an allowance of \$50.00 on a second article of the same kind which B purchases for an additional payment of \$10.00, plus sales tax thereon. S may deduct \$50.00 from the gross amount reported in his tax returns. The sale of the second article, however, must be reported for tax purposes as a \$60.00 sale and included in the gross amount in his tax return.

(c) B returns the article to S who replaces it with a new article of the same kind free of charge, and without sales tax. S may deduct \$60.00 from the gross amount reported in his tax returns, but the \$60.00 selling price of the substituted article must be reported in the gross amount.

No deduction is allowed from the gross amount reported for tax if S in "b" and "c" above, does not credit his sales account with the selling price of the new article furnished to replace the defective one, but instead merely credits the sales account with an amount equal to the additional payment received, if any. In such case, the allowance for the defect is already shown in the sales account by the reduced sales price of the new article.

**DISCOUNTS.** The selling price of a service or of an article of tangible personal property does not include the amount of bona fide discounts actually taken by the buyer and the amount of such discount may be deducted from gross proceeds of sales providing such amount has been included in the gross amount reported. Discounts are not deductible under the retail sales tax when such tax is collected upon the selling price before the discount is taken and no portion of the tax is refunded to the buyer. Discount deductions will be allowed under the extracting or manufacturing classifications only when the value of the products is determined from the gross proceeds of sales. Patronage dividends which are granted in the form of discounts in the selling price of specific articles (for example, a rebate of one cent per gallon on

(1) Transfers of capital assets between a corporation and a wholly-owned subsidiary, or between wholly-owned subsidiaries of the same corporation.

(2) Transfers of capital assets by an individual or by a partnership to a corporation, or by a corporation to another corporation in exchange for capital stock therein.

(3) Transfers of capital assets by a corporation to its stockholders in exchange for surrender of capital stock.

(4) Transfers of capital assets pursuant to a reorganization under 26 USC Section 368 of the Internal Revenue Code, when capital gain or ordinary income is not realized.

(5) Transfers of capital assets to a partnership or joint venture in exchange for an interest in the partnership or joint venture; or by a partnership or joint venture to its members in exchange for a proportional reduction of the transferee's interest in the partnership or joint venture.

(6) Transfer of an interest in a partnership by one partner to another; and transfers of interests in a partnership to third parties, when one or more of the original partners continues as a partner, or owner.

The burden is upon the taxpayer to establish the facts concerning the adjustment of the beneficial interest in the business when exemption is claimed.

#### Use Tax

The use tax applies upon the use of any property purchased at a casual retail sale without payment of the retail sales tax, unless exempt by law. Uses which are exempt from the use tax are set out in RCW 82.12.030.

Where there has been a transfer of the capital assets to or by a business, the use of such property is not deemed taxable to the extent the transfer was accomplished through an adjustment of the beneficial interest in the business, provided, the transferor previously paid sales or use tax on the property transferred. (See the exempt situations listed under the retail sales tax subdivision of this rule.)

[Statutory Authority: RCW 82.32.300, 83-07-034 (Order ET 83-17), § 458-20-106, filed 3/15/83; Order ET 75-1, § 458-20-106, filed 5/2/75; Order ET 74-1, § 458-20-106, filed 5/7/74; Order ET 70-3, § 458-20-106 (Rule 106), filed 5/29/70, effective 7/1/70.]

**WAC 458-20-107 Selling price—Advertised prices including sales tax.** (1) **Selling price.** Under the provisions of RCW 82.08.020 the retail sales tax is to be collected and paid upon retail sales, measured by the "selling price."

(a) The term "'Selling price' means the consideration, whether money, credits, rights, or other property except trade-in property of like kind, expressed in the terms of money paid or delivered by a buyer to a seller without any deduction on account of the cost of tangible personal property sold, the cost of materials used, labor costs, interest, discount, delivery costs, taxes other than taxes imposed under this chapter if the seller advertises the price as including the tax or that the seller is paying the tax, or any other expenses whatsoever paid or accrued and without any deduction on account of losses; . . ." (See RCW 82.08.010(1).)

(b) Concerning the tax liabilities and benefits in connection with "trade-in" transactions, see WAC 458-20-247.

(c) RCW 82.08.050 specifically requires that the retail sales tax must be stated separately from the selling price on any sales invoice or other instrument of sale, i.e., contracts,

[Title 458 WAC—p. 136]

sales slips, and/or customer billing receipts. (For an exception covering restaurant receipts of Class H liquor licensees, see WAC 458-20-119.) This is required even though the seller and buyer may know and agree that the price quoted is to include state and local taxes, including the retail sales tax. The law creates a "conclusive presumption" that, for purposes of collecting the tax, and remitting it to the state, the selling price quoted does not include the retail sales tax. This presumption is not overcome or rebutted by any written or oral agreement between seller and buyer. However, selling prices may be advertised as including the tax or that the seller is paying the tax and, in such cases, the advertised price shall not be considered to be the taxable selling price under certain prescribed conditions explained in this section. Even when prices are advertised as including the sales tax, the actual sales invoices, receipts, contracts, or billing documents must list the retail sales tax as a separate charge. Failure to comply with this requirement may result in the retail sales tax due and payable to the state being computed on the gross amount charged even if it is claimed to already include all taxes due.

#### (2) Advertising prices including tax.

(a) The law provides that a seller may advertise prices as including the sales tax or that the seller is paying the sales tax under the following conditions:

(i) The words "tax included" are stated immediately following the advertised price in print size at least half as large as the advertised price print size, unless the advertised price is one in a listed series;

(ii) When advertised prices are listed in series, the words "tax included in all prices" are placed conspicuously at the head of the list in the same print size as the list;

(iii) If the price is advertised as including tax, the price listed on any price tag shall be shown in the same way; and

(iv) All advertised prices and the words "tax included" are stated in the same medium, whether oral or visual, and if oral, in substantially the same inflection and volume.

(b) If these conditions are satisfied, as applicable, then price lists, reader boards, menus, and other price information mediums need not reflect the item price and separately show the actual amount of sales tax being collected on any or all items.

(c) The scope and intent of the foregoing is that buyers have the right to know whether retail sales tax is being included in advertised prices or not and that the tax is not to be used for the competitive advantage or disadvantage of retail sellers.

(3) See: WAC 458-20-257 for warranties (guarantees) and maintenance agreements (service contracts).

[Statutory Authority: RCW 82.32.300, 90-10-080, § 458-20-107, filed 5/2/90, effective 6/2/90; 86-03-016 (Order ET 86-1), § 458-20-107, filed 1/7/86; 83-07-034 (Order ET 83-17), § 458-20-107, filed 3/15/83; Order ET 70-3, § 458-20-107 (Rule 107), filed 5/29/70, effective 7/1/70.]

**WAC 458-20-108 Returned goods, allowances, cash discounts.** (1) When a contract of sale is made subject to cancellation at the option of one of the parties or to revision in the event the goods sold are defective or if the sale is made subject to cash or trade discount, the gross proceeds actually derived from the contract and the selling price are determined by the transaction as finally completed.

(2005 Ed.)

# **APPENDIX D**

(1) There shall be a beer and wine license to be issued to a private club for sale of beer, ~~strong beer~~, and wine for on-premises consumption.

(2) Beer, ~~strong beer~~, and wine sold by the licensee may be on tap or by open bottles or cans.

(3) The fee for the private club beer and wine license is one hundred eighty dollars per year.

(4) The board may issue an endorsement to the private club beer and wine license that allows the holder of a private club beer and wine license to sell for off-premises consumption wine vinted and bottled in the state of Washington and carrying a label exclusive to the license holder selling the wine. Spirits, ~~strong beer~~, and beer may not be sold for off-premises consumption under this section. The annual fee for the endorsement under this ~~(chapter [section])~~ section is one hundred twenty dollars.

**Sec. 11.** RCW 82.08.130 and 1998 c 126 s 16 are each amended to read as follows:

(1) There is levied and shall be collected a tax upon each retail sale of spirits (~~(or strong beer)~~) in the original package at the rate of fifteen percent of the selling price. The tax imposed in this subsection shall apply to all such sales including sales by the Washington state liquor stores and agencies, but excluding sales to spirits, beer, and wine restaurant licensees.

(2) There is levied and shall be collected a tax upon each sale of spirits (~~(or strong beer)~~) in the original package at the rate of ten percent of the selling price on sales by Washington state liquor stores and agencies to spirits, beer, and wine restaurant licensees.

(3) There is levied and shall be collected an additional tax upon each retail sale of spirits in the original package at the rate of one dollar and seventy-two cents per liter. The additional tax imposed in this subsection shall apply to all such sales including sales by Washington state liquor stores and agencies, and including sales to spirits, beer, and wine restaurant licensees.

(4) An additional tax is imposed equal to fourteen percent multiplied by the taxes payable under subsections (1), (2), and (3) of this section.

(5) An additional tax is imposed upon each retail sale of spirits in the original package at the rate of seven cents per liter. The additional tax imposed in this subsection shall apply to all such sales including sales by Washington state liquor stores and agencies, and including sales to spirits, beer, and wine restaurant licensees. All revenues collected during any month from this additional tax shall be deposited in the violence reduction and drug enforcement account under RCW 69.50.520 by the twenty-fifth day of the following month.

(6)(a) An additional tax is imposed upon retail sale of spirits in the original package at the rate of one and seven-tenths percent of the selling price through June 30, 1995, two and six-tenths percent of the selling price for the period July 1, 1995, through June 30, 1997, and three and four-tenths of the selling price thereafter. This additional tax applies to all such sales including sales by Washington state liquor stores and agencies, but excluding sales to spirits, beer, and wine restaurant licensees.

(b) An additional tax is imposed upon retail sale of spirits in the original package at the rate of one and one-tenth percent of the selling price through June 30, 1995, one and seven-tenths percent of the selling price for the period July 1, 1995, through June 30, 1997, and two and three-tenths of the selling price

thereafter. This additional tax applies to all such sales to spirits, beer, and wine restaurant licensees.

(c) An additional tax is imposed upon each retail sale of spirits in the original package at the rate of twenty cents per liter through June 30, 1995, thirty cents per liter for the period July 1, 1995, through June 30, 1997, and forty-one cents per liter thereafter. This additional tax applies to all such sales including sales by Washington state liquor stores and agencies, and including sales to spirits, beer, and wine restaurant licensees.

(d) All revenues collected during any month from additional taxes under this subsection shall be deposited in the health services account created under RCW 43.72.900 by the twenty-fifth day of the following month.

(7) The tax imposed in RCW 82.08.020 shall not apply to sales of spirits ~~(or strong beer)~~ in the original package.

(8) The taxes imposed in this section 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 under this section. The taxes required by this section to be collected by the seller shall be stated separately from the selling price and for purposes of determining the tax due from the buyer to the seller, it shall be conclusively presumed that the selling price quoted in any price list does not include the taxes imposed by this section.

(9) As used in this section, the terms, "spirits (~~(or strong beer)~~)" and "package" shall have the meaning ascribed to them in chapter 66.04 RCW.

**NEW SECTION. Sec. 12.** Sections 8 and 9 of this act apply to retailers who hold a restricted grocery store license or restricted beer and/or wine specialty shop license on or after the effective date of this section.

**NEW SECTION. Sec. 13.** The liquor control board shall report to the legislature by December 1, 2004, on the impacts of strong beer sales.

**NEW SECTION. Sec. 14.** This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect July 1, 2003.

Passed by the Senate April 17, 2003.

Passed by the House April 14, 2003.

Approved by the Governor May 9, 2003.

Filed in Office of Secretary of State May 9, 2003.

## CHAPTER 168

[Senate Bill 5783]

### SALES AND USE TAX

AN ACT Relating to implementing the streamlined sales and use tax agreement; amending RCW 82.08.010, 82.12.010, 82.04.040, 82.04.050, 82.14.050, 82.14.070, 82.08.050, 82.04.470, 82.08.064, 82.14.055, 82.32.430, 82.08.02566, 82.12.02566, 82.08.037, 82.12.020, 82.12.040, 82.12.060, 82.08.0293, 82.12.0293, 66.28.190, 82.04.272, 82.04.4289, 82.08.0281, 82.12.0275, 82.08.0283, 82.12.0277, 82.14.020, 82.04.215, 82.04.29001, 82.12.0284, and 82.04.120; amending 2002 c 67 s 18 (uncodified); reenacting and amending RCW 82.14.020; adding new sections to chapter 82.02 RCW; adding new sections to chapter 82.08 RCW; adding new sections to chapter 82.32 RCW; adding new sections to chapter 82.12 RCW; adding a new section to chapter 82.04 RCW; creating a new section; and providing effective dates.

Be it enacted by the Legislature of the State of Washington:

## INTENT

NEW SECTION. Sec. 1. A new section is added to chapter 82.02 RCW to read as follows:

(1) It is the intent of the legislature that Washington join as a member state in the streamlined sales and use tax agreement referred to in chapter 82.58 RCW. The agreement provides for a simpler and more uniform sales and use tax structure among states that have sales and use taxes. The intent of the legislature is to bring Washington's sales and use tax system into compliance with the agreement so that Washington may join as a member state and have a voice in the development and administration of the system, and to substantially reduce the burden of tax compliance on sellers.

(2) This act does not include changes to Washington law that may be required in the future and that are not fully developed under the agreement. These include, but are not limited to, changes relating to online registration, reporting, and remitting of payments by businesses for sales and use tax purposes, monetary allowances for sellers and their agents, sourcing, and amnesty for businesses registering under the agreement.

(3) It is the intent of the legislature that the provisions of chapters 82.08 and 82.12 RCW be interpreted and applied consistently with the agreement.

(4) The department of revenue shall report to the fiscal committees of the legislature on January 1, 2004, and each January 1st thereafter, on the development of the agreement and shall recommend changes to the sales and use tax structure and propose legislation as may be necessary to keep Washington in compliance with the agreement.

## PART I—DEFINITIONS

Sec. 101. RCW 82.08.010 and 1985 c 38 s 3 are each amended to read as follows:

For the purposes of this chapter:

(1) "Selling price" includes "sales price." "Sales price" means the total amount of consideration, ((whether money, credits, rights, or other property except trade-in property of like kind, expressed in the terms of money paid or delivered by a buyer to a seller without any deduction on account of the cost of tangible property sold, the cost of materials used, labor costs, interest, discount, delivery costs, taxes other than taxes imposed under this chapter if the seller advertises the price as including the tax or that the seller is paying the tax, or any other expenses whatsoever paid or accrued and without any deduction on account of losses; but shall not include the amount of cash discount actually taken by a buyer; and shall be subject to modification to the extent modification is provided for in RCW 82.08.080.

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 of revenue may prescribe)) except trade-in property of like kind, including cash, credit, property, and services, for which tangible personal property 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: (a) The seller's cost of the property sold; (b) 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; (c) charges by the seller for any services necessary to complete the sale, other than delivery and installation charges; (d) delivery charges; (e) installation charges; and (f) the value of exempt tangible personal property given to the purchaser where taxable and exempt tangible personal property have been bundled together and sold by the seller as a single product or piece of merchandise.

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.

"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 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;

(2) "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 the state and its departments and institutions when making sales to the state and its departments and institutions;

(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) 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;

(6) 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.

Sec. 102. RCW 82.12.010 and 2002 c 367 s 3 are each amended to read as follows:

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 ~~((mean the consideration, whether money, credit, rights, or other property except trade in property of like kind, expressed in terms of money, paid or given or contracted to be paid or given by the purchaser to the seller))~~ be the purchase price for the article of tangible personal property, the use of which is taxable under this chapter. ~~((The term includes the amount of any freight, delivery, or other like transportation charge paid or given by the purchaser to the seller with respect to the purchase of such article.))~~ The term also includes, in addition to the ~~((consideration paid or given or contracted to be paid or given))~~ 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 ~~((of revenue))~~ 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 ~~((retail selling))~~ purchase price ~~((; as defined in RCW 82.08.010,))~~ of such article if, but for the use of the direct pay permit, the transaction would have been subject to sales tax;

~~((2))~~ (3) "Value of the service used" means the ~~((consideration, whether money, credit, rights, or other property, expressed in terms of money, paid or given or contracted to be paid or given by the purchaser to the seller))~~ 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 ~~((of revenue))~~ may prescribe;

~~((3))~~ (4) "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; and

(b) With respect to a service defined in RCW 82.04.050(2)(a), the first act within this state 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 include installation, storage, withdrawal from storage, distribution, or any other act preparatory to subsequent actual use or consumption of the article within this state;

~~((4))~~ (5) "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;

~~((5))~~ (6) "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;

~~((6))~~ (7) 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

# **APPENDIX E**

1 Appendix C

2 LIBRARY OF DEFINITIONS

3  
4 **Part I** Administrative definitions including tangible personal property. Terms included  
5 in this Part are core terms that apply in imposing and administering sales and use taxes.

6  
7 **Part II** Product definitions. Terms included in this Part are used to impose sales and use  
8 taxes, exempt items from sales and use taxes or to impose tax on items by narrowing an  
9 exemption that otherwise includes these items.

10 *Compiler's note: On September 5, 2008 the description of Part II was amended to add "impose sales and use taxes"*  
11 *before the comma. The amendment became effective upon its adoption.*

12  
13 **Part III** Sales tax holiday definitions. Terms included in this Part are core terms that  
14 apply in imposing and administering sales and use taxes during sales tax holidays.

15  
16 PART I

17  
18 Administrative Definitions

19  
20 A **"bundled transaction"** is the retail sale of two or more products, except real property and  
21 services to real property, where (1) the products are otherwise distinct and identifiable, and (2)  
22 the products are sold for one non-itemized price. A "bundled transaction" does not include the  
23 sale of any products in which the "sales price" varies, or is negotiable, based on the selection by  
24 the purchaser of the products included in the transaction.

25  
26 (A) "Distinct and identifiable products" does not include:

- 27 1. Packaging – such as containers, boxes, sacks, bags, and bottles – or other  
28 materials – such as wrapping, labels, tags, and instruction guides – that  
29 accompany the "retail sale" of the products and are incidental or immaterial to

1 “purchase price” and “sales price” of the products to determine if the taxable products are de  
2 minimis.

3 (c) Sellers shall use the full term of a service contract to determine if the taxable  
4 products are de minimis; or

5 (4) The “retail sale” of exempt tangible personal property and taxable tangible personal  
6 property where:

7 (a) the transaction includes “food and food ingredients”, “drugs”, “durable medical  
8 equipment”, “mobility enhancing equipment”, “over-the-counter drugs”, “prosthetic devices” (all  
9 as defined in Appendix C) or medical supplies; and

10 (b) where the seller's “purchase price” or “sales price” of the taxable tangible personal  
11 property is fifty percent (50%) or less of the total “purchase price” or “sales price” of the  
12 bundled tangible personal property. Sellers may not use a combination of the “purchase price”  
13 and “sales price” of the tangible personal property when making the fifty percent (50%)  
14 determination for a transaction.

15 *Compiler's note: On April 16, 2005 the definition of a “bundled transaction” was added. Member States shall*  
16 *comply with this definition no later than January 1, 2008.*

17  
18 **“Delivery charges”** means charges by the seller of personal property or services for preparation  
19 and delivery to a location designated by the purchaser of personal property or services including,  
20 but not limited to, transportation, shipping, postage, handling, crating, and packing.

21 A. A member state may exclude all delivery charges from the sales price of all personal  
22 property and services, or choose to exclude from the sales price of personal property or services  
23 one or more of the following components, and may amend the definition of delivery charges  
24 accordingly:

25 1. Handling, crating, packing, preparation for mailing or delivery, and similar  
26 charges; or

27 2. Transportation, shipping, postage, and similar charges.

28 B. In addition, a member state may treat “delivery charges” for “direct mail” differently than  
29 it treats “delivery charges” for other personal property or services. A member state may exclude  
30 all “delivery charges” from the “sales price” for “direct mail” or choose to exclude from the

1 Compiler's note: On December 6, 2008 the definition of "delivery charges" was amended by adding the following  
2 to subsection C: "The exclusion of "delivery charges" for "direct mail" shall apply to any sale involving the  
3 delivery or mailing of "direct mail" or printed material that would otherwise be direct mail that results from a  
4 transaction that a state considers the sales of a service." This provision became effective upon its adoption.

5 Compiler's note: On May 12, 2009 the definition of "delivery charges" was amended as follows:

6 **"Delivery charges"** means charges by the seller of personal property or services for preparation and delivery to a  
7 location designated by the purchaser of personal property or services including, but not limited to, transportation,  
8 shipping, postage, handling, crating, and packing.

9 A. A member state may exclude from "delivery charges" any of the following, if the charges are separately  
10 stated on an invoice or similar billing document given to the purchaser all delivery charges from the sales price of  
11 all personal property and services, or choose to exclude from the sales price of personal property or services one or  
12 more of the following components, and may amend the definition of delivery charges accordingly:

13 A-1. Handling, crating, packing, preparation for mailing or delivery, and similar charges; or

14 B-2. Transportation, shipping, postage, and similar charges, or

15 C. The "delivery charges" for "direct mail." The exclusion of "delivery charges" for "direct mail"  
16 shall apply to any sale involving the delivery or mailing of "direct mail" or printed material that would  
17 otherwise be direct mail that results from a transaction that a state considers the sales of a service.

18 B. In addition, a member state may treat "delivery charges" for "direct mail" differently than it treats  
19 "delivery charges" for other personal property or services. A member state may exclude all "delivery charges"  
20 from the "sales price" for "direct mail" or choose to exclude from the "sales price" of "direct mail" one or more  
21 of the following components, and may amend the definition of "delivery charges" accordingly:

22 1. Handling, crating, packing, preparation for mailing or delivery, and similar charges;

23 2. Transportation, shipping, and similar charges; or

24 3. Postage.

25 C. Unless a seller separately states the "delivery charges" or components of "delivery charges" on the  
26 invoice or similar billing document given to the purchaser, those non-separately stated charges will not qualify for  
27 the exclusion from "sales price." No member state may require a seller to separately state any "delivery charge"  
28 or component thereof.

29 D. The exclusion of "delivery charges" for "direct mail" shall apply to any sale involving the delivery or  
30 mailing of: "direct mail;" printed material that would otherwise be "direct mail" that results from a transaction  
31 that a state considers the sale of a service; or printed material delivered or mailed to a mass audience when the  
32 costs of the printed materials are not billed directly to the recipients and is the result of a transaction that includes  
33 the development of billing information or the provision of data processing services.

34 E. If a shipment includes exempt property and taxable property, the seller should allocate the delivery charge  
35 by using:

1 subsection, an operator must do more than maintain, inspect, or set-up the  
2 tangible personal property.

3 B. Lease or rental does include agreements covering motor vehicles and trailers where the  
4 amount of consideration may be increased or decreased by reference to the amount  
5 realized upon sale or disposition of the property as defined in 26 USC 7701(h)(1).

6 C. This definition shall be used for sales and use tax purposes regardless if a transaction is  
7 characterized as a lease or rental under generally accepted accounting principles, the  
8 Internal Revenue Code, the [state commercial code], or other provisions of federal, state  
9 or local law.

10 D. This definition will be applied only prospectively from the date of adoption and will  
11 have no retroactive impact on existing leases or rentals. This definition shall neither  
12 impact any existing sale-leaseback exemption or exclusions that a state may have, nor  
13 preclude a state from adopting a sale-leaseback exemption or exclusion after the  
14 effective date of the Agreement.

15  
16 **“Purchase price”** applies to the measure subject to use tax and has the same meaning as sales  
17 price.

18  
19 **“Retail sale or Sale at retail”** means any sale, lease, or rental for any purpose other than for  
20 resale, sublease, or subrent.

21  
22 **“Sales price”** applies to the measure subject to sales tax and means the total amount of  
23 consideration, including cash, credit, property, and services, for which personal property or  
24 services are sold, leased, or rented, valued in money, whether received in money or otherwise,  
25 without any deduction for the following:

26 A. The seller's cost of the property sold;

27 B. The cost of materials used, labor or service cost, interest, losses, all costs of  
28 transportation to the seller, all taxes imposed on the seller, and any other expense  
29 of the seller;

- 1 B. *Interest, financing, and carrying charges from credit extended on the sale of personal property or*  
2 *services, if the amount is separately stated on the invoice, bill of sale or similar document given to*  
3 *the purchaser; and*
- 4 C. *Any taxes legally imposed directly on the consumer that are separately stated on the invoice, bill of*  
5 *sale or similar document given to the purchaser.*

6

7 **“Telecommunications nonrecurring charges”** means an amount billed for the installation,  
8 connection, change or initiation of “telecommunications service” received by the customer.

9

10 “Sales price” shall not include:

- 11 A. Discounts, including cash, term, or coupons that are not reimbursed by a third party  
12 that are allowed by a seller and taken by a purchaser on a sale;
- 13 B. Interest, financing, and carrying charges from credit extended on the sale of  
14 personal property or services, if the amount is separately stated on the invoice, bill  
15 of sale or similar document given to the purchaser; and
- 16 C. Any taxes legally imposed directly on the consumer that are separately stated on the  
17 invoice, bill of sale or similar document given to the purchaser.

18

19 “Sales price” shall include consideration received by the seller from third parties if:

- 20 A. The seller actually receives consideration from a party other than the purchaser and the  
21 consideration is directly related to a price reduction or discount on the sale;
- 22 B. The seller has an obligation to pass the price reduction or discount through to the  
23 purchaser;
- 24 C. The amount of the consideration attributable to the sale is fixed and determinable by the  
25 seller at the time of the sale of the item to the purchaser; and
- 26 D. One of the following criteria is met:
- 27 1. The purchaser presents a coupon, certificate or other documentation to the seller to  
28 claim a price reduction or discount where the coupon, certificate or documentation is  
29 authorized, distributed or granted by a third party with the understanding that the

# **APPENDIX F**

## Rule 327. Library of Definitions

### Rule 327.4. Delivery Charges:

A. **“Delivery charges”** is defined in Part I of the Library of Definitions, conjunctively with the definitions of “sales price” and “purchase price.” “Sales price” and “purchase price” include “delivery charges” unless a member state elects to exclude all delivery charges from the computation of sales and purchase price. A member state may choose to exclude from the computation of “sales price” and “purchase price” of all personal property and services other than direct mail any of the following components of delivery charges, if the charges are separately stated on an invoice or similar billing document given to the purchaser:

1. handling, crating, packing, preparation for mailing or delivery, and similar charges for activities necessary for preparing personal property or a service for delivery to a location designated by the purchaser of the personal property or service; or
2. transportation, shipping, postage, and similar charges for movement of personal property or a service from possession by the seller to possession by the purchaser or the purchaser’s designee.

B. A member state may choose to exclude from the computation of “sales price” and “purchase price” of direct mail all or any of the following components of delivery charges, if the charges are separately stated on an invoice or similar billing document given to the purchaser.

1. handling, crating, packing, preparation for mailing or delivery, and similar charges for activities necessary for preparing direct mail for delivery to a location designated by the purchaser of direct mail; or
2. transportation, shipping, and similar charges for movement of direct mail from possession by the seller to possession by the purchaser or the purchaser’s designee; or
3. postage.

C. **Direct mail.** A state may treat the “delivery charges” for sales of personal property or services that meet the definition of “direct mail”, including both “advertising and promotional direct mail” and “other direct mail” differently than with respect to sales of other personal property or services. Thus, a state may generally require that “sales price” include all “delivery charges” (or one or more components thereof) but exclude “delivery charges” (or one or more components thereof) from the computation of “sales price” of sales of products that meet the definition of “direct mail.” In order for a seller to exclude “delivery charges for direct mail” (or component thereof) from the computation of “sales price” with respect to direct mail such charge must be separately stated on an invoice or similar billing document given to the purchaser.

The exclusion for “delivery charges for direct mail” applies only to sales of personal property and services that meet the definition of “direct mail.” In addition, the exclusion includes separately stated “delivery charges” for:

- 1) retail sales that include both the printing and delivery of “direct mail,” including sales characterized under state law as the sale of a service when that sale results in printed material that meets the definition of “direct mail;”
- 2) retail sales of services for only mailing or delivering of “direct mail” not printed or sold by the delivery or mailing service provider, and
- 3) retail sales of services for the development of billing information or data processing services that results in printed materials delivered or mailed to a mass audience where the costs of the printed materials are not directly billed to the recipients.

Prior to its adoption of the definitions of “sales price” and “purchase price,” a state may have excluded “delivery charges” (or one or more components thereof) from “sales price” with respect to sales of personal property or services that meet the definition of “direct mail” while at the same time including “delivery charges” (or one or more components thereof) with respect to sales of other personal property or services. Such a state may continue to exclude “delivery charges” (or one or more components thereof) with respect to sales of personal property or services that meet the definition of “direct mail” by (1) adopting the definitions of “delivery charges” and “direct mail” and (2) excluding from the definition of “delivery charges”, “delivery charges” (or one or more components thereof) with respect to “direct mail”.

**Example 1:** State A has adopted the definition of “direct mail” from Part I of the Library of Definition. Its definition of “delivery charges” reads as follows:

“Delivery charges” means all of the charges (including but not limited to charges for transportation, shipping, postage, handling, crating and packing) by the seller of personal property or services for preparation and delivery thereof to a location designated by the purchaser. “Delivery charges” does not include any charge by the seller with respect to direct mail delivery charges.

State A’s definition of “delivery charges” is sufficient to exclude all “delivery charges” from the computation of “sales price” with respect to sales of personal property or services that meet the definition of “direct mail” so long as such charges are separately stated on the invoice or bill given to the purchaser.

**Example 2:** State B has adopted the definition of “direct mail” found in Part I of the Library of Definition. State B’s definition of “delivery charges” reads as follows:

“Delivery charges” means all of the charges (including but not limited to charges for transportation, shipping, postage handling, crating and packing) by the seller of personal property or services for preparation and delivery thereof to a location designated by the purchaser. “Delivery charges” does not include postage for delivering personal property or a service that meets the definition of “direct mail.”

State B’s definition of “delivery charges” is sufficient to exclude from the computation of “sales price” charges for postage for delivery of personal property or a service that meets the definition of “direct mail” so long as such charges are separately stated on the invoice or other billing document given to the purchaser.

The following illustrations demonstrate the applicability of the direct mail delivery charge exclusion from sales price and purchase price in a state that has adopted that exclusion.

**Illustration 1:** *State A excludes all components of direct mail delivery charges from the computation of sales price.* A printer enters into a contract to print and mail advertising and promotional material to a mass audience. The material is printed, sorted, inserted into an envelope, addressed, and mailed via the United States Postal Service to a mass audience at the direction of the purchaser. The advertising and promotional direct mail sale qualifies for the direct mail delivery charge exclusion. Charges separately stated on the customer’s bill or invoice for preparation for delivery, transportation and postage with respect to the direct mail is excluded from the computation of “sales price.”

**Illustration 2: *State B excludes the handling and postage components of direct mail delivery charges from the computation of sales price.*** A purchaser contracts with a printer to perform data processing services, print billing invoices, prepare the invoices for mailing, and deliver them to the U. S. Postal Service for delivery to the address on each invoice. Each envelope is mailed to a residential address and contains an invoice and an advertising insert. The mailing qualifies for the direct mail delivery charge exclusion. Separately stated charge(s) on the customer's bill or invoice for preparing the mailing for delivery and postage for delivery to the residential addresses are excluded from the computation of "sales price."

**Illustration 3: *State C excludes the transportation and postage components of direct mail delivery charges from the computation of sales price.*** A mail service provider enters into a contract with a customer to perform mailing services for advertising flyers which have been printed by a third party. The flyers are to be distributed to a mass audience at the direction of the customer. The mail service provider folds and sorts the flyers according to the jurisdictions to which they will be delivered, applies the appropriate postage to each flyer and delivers the flyers to the United States Postal Service. This mailing service sale qualifies for the direct mail delivery charge exclusion. Separately stated charge(s) for transporting the mailing to the United States Postal Service and postage are excluded from the computation of "sales price."

**Illustration 4: *State W excludes only the postage component of direct mail delivery charges from the computation of sales price.*** Company B is a hair products company that just released a new shampoo product. As part of a nationwide campaign to inform the public about its new shampoo, it acquires a mailing list of potential customers and hires a company that does printing and mailing to print and mail promotional materials to all of the people on the mailing list. Included with the promotional materials is a free sample of the shampoo. The promotional materials qualify as direct mail because the recipient is not charged for the sample of the shampoo or other materials in the mailing and therefore separately stated charge(s) for the postage paid with respect to mailing the promotional materials and free sample are excluded from the computation of sales price.

**Illustration 5: *State X excludes only the postage component of direct mail delivery charges from sale price.*** A purchaser contracts with a service provider to perform data processing services, print paychecks and pay stubs, prepare the checks and stubs for mailing, and deliver them to the U. S. Postal Service or other delivery service for delivery to the address on each. Each envelope containing a check and pay stub is mailed to each of the purchaser's employees' home addresses. This sale will qualify for the exclusion of the postage component of the direct mail delivery charge depending on whether the U.S. Post Office delivers the direct mail or whether some other delivery service is used. If the mailing is sent through the U.S. Postal Service, then the exclusion for postage will apply if the postage is separately stated on the invoice given to the purchaser. If some other delivery service is used to deliver the checks and pay stubs, then the exclusion for postage will not apply.

**Illustration 6: *Same facts as in Illustration 4 [above] except that State X, in addition to postage, also excludes the transportation, shipping and similar charges components of direct mail delivery charges from sales price.*** With this broader exclusion, whether the sale will qualify for the exclusion of direct mail delivery charges will not depend on whether the U.S. Post Office delivers the direct mail or whether some other delivery service is used; the delivery charge exclusion will apply regardless of which mode of delivery is used, as long as the charges are separately stated on the invoice."

**Illustration 7: State Y excludes only the "transportation, shipping, and similar charges" component of direct mail delivery charges from the computation of sales price.** Company A sells men's clothing and markets its products through catalogs and through an Internet website. Customer orders a sweater that will be shipped using a courier service. Company A includes with the package containing the sweater one of its catalogs and other promotional materials. The catalog and other promotional materials included in the package do not qualify as direct mail since it is not being mailed to a mass audience and since Customer is being billed for the sweater. Therefore, the fees charged by the courier service for delivering the package are not excluded from the computation of sales price.

**Illustration 8: State A excludes all components of direct mail delivery charges from the computation of sales price.** A printer produces 10,000 copies of an advertising brochure. Under the contract, the printer is required to shrink-wrap the pallet containing the brochures and deliver the pallet to the custody of a mailing service provider contracted by the purchaser. The sale of the brochures is not "direct mail" and does not qualify for the direct mail delivery charge exclusion, since the seller/printer is not delivering or distributing the printed material to a mass audience or to addressees on a mailing list at the direction of the purchaser.

**Illustration 9: State A excludes all components of direct mail delivery charges from the computation of sales price.** A printer produces 100,000 advertising flyers for a purchaser. For this print job, the purchaser requires the printer to ship 1,000 copies of the flyer to 100 stores located in various states that are owned by the purchaser. The flyers will be made available to customers as they enter the store. The sale of the flyers is not "direct mail," and does not qualify for the direct mail delivery charge exclusion, because multiple items of the same printed material are delivered or shipped to a single address and because the printed materials are delivered to and billed to the recipient (store owner).

**D. Handling, crating, packing, preparation for mailing or delivery, and similar charges.**

A state may opt to exclude from "delivery charges" the component for handling, crating, packing, preparation for mailing or delivery, and similar charges for activities necessary for preparing personal property or a service for delivery to a location designated by the purchaser of the personal property or service. In order for a seller to exclude the component of delivery charges for activities necessary for preparing personal property or a service from the computation of "sales price" with respect to the sale of any product or service such charge must be separately stated on an invoice or similar billing document given to the purchaser. ***Election of this option would permit inclusion in sales/purchase price of charges for movement of personal property or a service from possession by the seller to possession by the purchaser or the purchaser's designee (including but not limited to transportation, shipping, and postage) while excluding from sales/purchase price charges for activities necessary for preparing personal property or a service for delivery to a location designated by the purchaser of personal property or a service (including but not limited to handling, crating, packing, and preparation for mailing or delivery).***

**Illustration 1: State D adopts the definition of "delivery charges," but excludes handling, crating, packing, preparation for mailing or delivery, and similar charges.** Charges for transportation, shipping, and postage are included as part of sales/purchase price. Charges for handling, packing, crating, preparation for mailing or delivery, and similar charges for activities necessary for preparing personal property or a service for delivery to a location designated by the purchaser of the personal property or service, if separately stated on an

invoice or similar billing document given to the purchaser, are not part of the sales/purchase price of a product or service. A separate charge for storage or warehousing prior to shipment is not a charge for movement of personal property or a service from possession by the seller to possession by the purchaser or the purchaser's designee.

**Illustration 2: State E adopts the definition of "delivery charges" and "direct mail," but excludes handling, crating, packing, preparation for mailing or delivery, and similar charges as well as the "delivery charges" for "direct mail."** For items other than "direct mail," "delivery charges" (which do not include handling, crating, packing, preparation for mailing or delivery, and similar charges separately stated on an invoice or similar billing document given to the purchaser) are included as part of the sales/purchase price of a product or service. "Delivery charges" separately stated on an invoice or similar billing document given to the purchaser are not part of the sales/purchase price of a product or service that meets the definition of direct mail described in subsection C of this Rule.

**E. Transportation, shipping, postage, and similar charges.**

A state may opt to exclude from "delivery charges" the component for transportation, shipping, postage, and similar charges for movement of personal property or a service from possession by the seller to possession by the purchaser or the purchaser's designee. In order for a seller to exclude this component of delivery charges from the computation of "sales price" with respect to the sale of any product or service such charge must be separately stated on an invoice or similar billing document given to the purchaser. *Election of this option would permit inclusion in sales/purchase price of charges for activities necessary for preparing personal property or a service for delivery to a location designated by the purchaser of the personal property or service (including but not limited to handling, crating, packing, and preparation for mailing or delivery), while excluding from sales/purchase price charges for movement of personal property or a service from possession by the seller to possession by the purchaser or the purchaser's designee (including but not limited to transportation, shipping, and postage).*

**Illustration 1: State F adopts the definition of "delivery charges," but excludes transportation, shipping, postage, and similar charges.** Charges for handling, crating, packing, and preparation for mailing or delivery are included as part of sales/purchase price. Charges for transportation, shipping, postage, and similar charges for movement of personal property or a service from possession by the seller to possession by the purchaser or the purchaser's designee, if separately stated on an invoice or similar billing document given to the purchaser, are not part of the sales/purchase price of a product or service.

**Illustration 2: State G adopts the definition of "delivery charges" and "direct mail," but excludes transportation, shipping, postage, and similar charges as well as the "delivery charges" for "direct mail."** For items other than "direct mail," "delivery charges" (which do not include transportation, shipping, postage, and similar charges separately stated on an invoice or similar billing document given to the purchaser) are included as part of the sales/purchase price of a product or service. "Delivery charges" separately stated on an invoice or similar billing document given to the purchaser are not part of the sales/purchase price of a product or service that meets the definition of "direct mail" described in subsection C of this Rule.

**F. Reasonable and customary mark-up.**

A state which excludes from the sales/purchase price of a product or service properly separately stated "delivery charges" for "direct mail," properly separately stated handling, crating, packing,

preparation for mailing or delivery, and similar charges, or properly separately stated transportation, shipping, postage, and similar charges, shall allow as excluded from the sales/purchase price of a product or service, in addition to the seller's actual cost for such charges, such mark-up as is reasonable and customary in the seller's industry.

**G. Seller's billing practices.**

Where the seller does not separately state on an invoice or similar billing document given to the purchaser the "delivery charges" for "direct mail," handling, crating, packing, preparation for mailing or delivery, and similar charges, or transportation, shipping, postage, and similar charges, such charges shall not be excluded from "delivery charges," and shall be included in or excluded from the sales/purchase price in the same manner as "delivery charges." A seller's decision not to separately state on an invoice or similar billing document given to a purchaser any such charge which, if so separately stated, could have been excluded from the sales/purchase price, shall be presumed to be a reasonable business practice.

# **APPENDIX G**

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**HB 593**

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EFFECTIVE: January 1, 1986  
July 1, 1985 (Sections 2 and 4)

**SHB 596**

C 115 L 85

By Committee on Local Government (originally sponsored by Representatives Hine, Barnes and Valle)

Authorizing transaction assistance as a remedial program for property in a noise abatement impacted area.

House Committee on Local Government

Senate Committee on Governmental Operations

**BACKGROUND:**

A port district that operates an airport serving 20 or more scheduled jet aircraft flights per day may undertake aircraft noise abatement programs in defined impact areas. These programs involve acquiring property and property rights, and soundproofing structures.

**SUMMARY:**

Aircraft noise abatement programs by port districts are expanded to include transaction assistance programs, including assistance with real estate fees, mortgage assistance, compensation for loss of property values due to aircraft noise or vibration, and other neighborhood remedial programs. A property owner may receive benefits under any of the separate noise abatement programs, but may not receive benefits under a separate program more than once.

**VOTES ON FINAL PASSAGE:**

House 96 0  
Senate 46 0

EFFECTIVE: July 28, 1985

**HB 601**

C 38 L 85

By Representatives Nutley, J. King, Perry, Sutherland, Tanner, Zellinsky, Walk, Lux, Appelwick, Fuhrman, L. Smith and Isaacson

Authorizing the advertisement of prices as including sales tax.

House Committee on Ways & Means

Senate Committee on Commerce & Labor

**BACKGROUND:**

The sales tax is levied on the buyer and collected by the seller. The seller then holds the sales taxes in trust until paid to the Department of Revenue. The seller has the responsibility of collecting the sales tax and the tax must be stated separately from the selling price. Thus, a retailer is prohibited from including the sales tax in a stated or advertised selling price.

If sellers include the sales tax in the selling price, they are guilty of a misdemeanor. In addition, the Department of Revenue may move to cancel the business license of such a seller.

**SUMMARY:**

Retailers are allowed to advertise and display sales prices which include the sales tax or infer that they are absorbing the sales tax. However, the sales invoice or other instrument of sale must state the tax separately. Specific conditions are established for advertising the inclusion of the tax.

Penalties for advertising that the sales tax is included in the price are removed.

An emergency clause with an immediate effective date is added.

**VOTES ON FINAL PASSAGE:**

House 90 4  
Senate 36 11 (Senate amended)  
House 96 1 (House concurred)

EFFECTIVE: April 15, 1985