

FILED
NOV 15 2007
COURT OF APPEALS
DIVISION II
TACOMA, WA
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NO. 46315-6-II

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

AFFORDABLE STORAGE CONTAINERS, INC.,

Appellant/Plaintiff

v.

STATE OF WASHINGTON DEPARTMENT
OF EMPLOYMENT SECURITY,

Respondent/ Defendant

BRIEF OF APPELLANT

MARK E. BARDWIL, WSBA# 24776
615 Commerce Street, Suite 102
Tacoma, WA 98402
(253) 383-7123
Attorney for Appellant Affordable Storage Containers, Inc.

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I. ASSIGNMENT OF ERROR

A. Assignment of Error. The trial court erred by:

1. Entering an Order Affirming the Commissioner's of the Employment Security Department Determining that two owner officers of a Corporation formed in 2001 were responsible for taxes and penalties related to their 2010 Exempt Status because they failed to file a form that originally was not required by law by the department when their company was formed in 2001.

2. Denying Appellant's Motion for Reconsideration

B. Issues Relating to Assignment of Error.

Petitioner is entitled to relief pursuant to 34.05.570(3) because:

- a) *The order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law;*
- b) *The agency has erroneously interpreted or applied the law;*
- c) *The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for the judicial review, supplemented by any additional evidence received by the court under this chapter;*
- d) *The order is inconsistent with a rule of the agency unless the agency explains the inconsistency by stating facts and reasons to demonstrate a rational basis for inconsistency;*

Additionally, the petitioner has standing, has exhausted all available administrative remedies and has timely filed this Petition for Review.

The following specific matters are at issue:

- 1. Petitioner complied with the law in effect at the time it elected to exempt its officers.*
- 2. Petitioner substantially complied with the (then current) requirements of RCW 50.040.165.*
- 3. The Department cannot have it both ways when it says that the Amended RCW 50.04.165 does not have retroactive effect.*
- 4. The Department is enforcing an action which missuses the intent of the statute.*
- 5. The Administrative Law Judge and Commissioner had the authority to waive the contributions, penalties and interest charged to the Petitioner, pursuant to RCW 50.24.020 and unreasonably refused or failed to do so.*
- 6. The Court has legal authority to overturn or remand the decision of the agency in this case.*
- 7. The Court should attorney fees and costs to the Appellant.*

II. STATEMENT OF THE CASE

A. Procedural History.

The underlying matter in this case is an action judicial review following a finding by the Commissioner of the Employment Security Department that two owner officers of a Corporation formed in 2001 were responsible for taxes and penalties related to their 2010 Exempt Status because they failed to file a form that originally was not required by law

by the department when their company was formed in 2001, pursuant to the provisions of **RCW 50.04.165**. (CP 1-7). On March 28, 2014, following briefing and oral argument, the trial court entered an Order, with Findings of Fact and Conclusions of Law affirming the Commissioner's Decision. (CP 170-172). Appellants filed a Motion for Reconsideration on April 1, 2014. (CP 173-180). Following a response and reply briefing, the court authorized oral argument on the issue, but then denied Appellant's motion in its order entered April 25, 2014, in a document labeled in the Designation of Clerk's Papers as "Order Granting Petitioner's Motion for Reconsideration" (CP 192-193). Thereafter, on May 23, 2014, the Appellant filed this timely notice of Appeal with Division II of the Court of Appeals.

B. Underlying Facts.

Petitioner, Affordable Storage Containers Inc. was incorporated in 2001. (CP 115-143). The company was formed by two individual principals, Jeff Macaulso and David McKay¹, who are the two officers of the company. (CP 115-143). At the time the company was formed, Mr. Macaluso and Mr. McKay elected to be exempt from unemployment insurance coverage on their Master Business Application. (CP 115-143). Both Mr. Macaluso and McKay submitted their quarterly unemployment

¹ As a point of accuracy, David McKay has passed away since the filing of this appeal.

forms for approximately (11) years (now 13), never listing themselves as covered employees. (CP 115-143).

RCW 50.04.165 was amended in 2007, effective 2009, to require officers claiming an exemption to affirmatively claim their exemption either when the corporation registers, or at sometime following registration, although the exemption if not claimed when the company registers, is only effective as of the first day of a calendar year if claimed by January 15 of a covered year. **RCW 50.04.165**.

Since Macaluso and McKay had always been exempt since the formation of the company, it was not necessary for them to submit an exemption claim. (CP 127-143). However, in order to be clear in light of the amendment to the statute, their accountant did prepare forms for them and mailed them to Macaluso and McKay. (CP 127-143). Testimony from their accountant indicates that the forms were sent to his clients. (CP 127-135). Testimony from Mr. Macaluso was that the forms were signed and forwarded to the department. (CP 127-135). The department apparently never received the “new” exemption forms. (CP 127-135).

It is undisputed, however, that the department did receive “forms” from the company, admitted as Exhibits A and B, which were accepted by the department with payment of premiums, which indicated that the company was exempting Macaluso and McKay. (CP 127-143). The

Department acknowledges that the forms were received, but indicates that because the forms are “computer” read, they were unaware that the exemptions were being claimed. (CP 127-143). The fact that the Department has elected to have their return forms read electronically, without any method of discerning that the Petitioners had elected to be exempt is obviously not the fault of the Petitioners.

Of note, effective December 29, 2013, **RCW 50.04.165** has been amended again, to return the statute essentially to its former default state by make the claiming of an exemption to be elective, rather than mandatory, as the 2009 modifications to the statute appear were in conflict with Federal Law. Thus, Petitioners were been caught in the midst of a temporary ‘poor’ redraft of the original pre 2007 statute. While the Commissioner had the authority to exercise discretion and waive the tax and penalty in this case, under **RCW 50.24.020** he failed or refused to do so and even failed to consider the same.

III. ARGUMENT

A. **Standard of Review**

“An appellate court reviews an agency's interpretation of the law de novo. Affordable Cabs, Inc. v. Employment Sec. Dep't, 124 Wash.App. 361, 367, 101 P.3d 440 (2004). While the court accords substantial weight to the agency's interpretation if the agency has specialized expertise in the

area, the court is not bound by the agency's interpretation. Id.; Bauer v. Employment Sec. Dep't, 126 Wash.App. 468, 481, 108 P.3d 1240 (2005). The Language Connection, LLC v. Employment Sec. Dept. of State 149 Wash.App. 575, 580-581, 205 P.3d 924, 927 (Wash.App. Div. 1,2009)”

B. Substantive Legal Authority

1. Petitioner complied with the law in effect at the time they elected to exempt their officers.

In 2009, the Legislature amended **RCW 50.04.165** (now revised again), which provided as follows with respect to election to exempt coverage for officers from coverage:

(b) The election to exempt one or more corporate officers from coverage under this title may be made when the corporation registers as required under RCW 50.12.070. The corporation may also elect exemption at any time following registration; however, an exemption will be effective only as of the first day of a calendar year. A written notice from the corporation must be sent to the department by January 15th following the end of the last calendar year of coverage. Exemption from coverage will not be retroactive, and the corporation is not eligible for a refund or credit for contributions paid for corporate officers for periods before the effective date of the exemption.

Affordable Storage Containers Inc. (“Affordable”) is a small two owner company, with its two owners as its only officers, and three employees. It is undisputed that Affordable was in existence since 2001, eight years prior to the 2009 amendment to **RCW 50.04.165** which

required (no longer) corporations to “affirmatively” exempt their officers. It is also undisputed that Affordable Storage was registered with the department and has had an employment security account number throughout its existence. At the time they formed their corporation (and registered), the “election to exempt one or more officers” was made by essentially not checking a “box” on their Master Business Application whereby they could have “opted in” to unemployment coverage for their officers.

It is undisputed that Affordable Storage Containers Inc. elected to not cover its corporate officers when it submitted its original Master Business Application form in 2001. Accordingly, pursuant to the now expiring 2007 amendment to the statute, no further action was necessary by the Petitioners.

Following the election to exempt corporate officers in 2001, the company submitted quarterly returns and made premium payments based on this election for now (13) years. Since the corporation elected to exempt the corporate officers **50.04.165(2)(b)** when the company was formed, no further action was necessary.

Affordable paid unemployment premiums for its employees, but not for its two owner officers, and lawfully operated this manner for

approximately (8) years prior to the statutory amendment in 2009. The Department does not argue that the Petitioners were NOT registered with the Department; had an employment security account number; chose not to elect coverage for its officers prior to 2009; and further does not argue that Petitioner didn't pay premiums for their other employees. The Department merely argues that the 2009 statutory amendment required Affordable to affirmatively "reaffirm" on some "undefined form" that it did not want to cover its officers with unemployment insurance. This action is not only redundant; it is not required by statute, since Affordable already made this election under existing law, "at the time that it registered with the department".

The lack of the Master Business Application demonstrating an "opt in" box checked is proof positive that Petitioner made its election for no coverage "at the time it registered" as required by the 2009 amended statute. The other method of electing to "opt out" of coverage by sending in a form, as indicated above in **RCW 50.04.165(2)**, was not necessary, because the corporation was already in compliance with the statute at the time it was amended in 2009. Nonetheless, testimony was presented at the hearing that Affordable mailed in a form, but the Department indicates it did not receive it. Affordable continued to operate the way it had from its inception, paying premiums for its employees only, while indicating on

every return that it was exempting its (2) officers. (CP 127-143). The Department accepted the requisite quarterly returns and payments and made no issue of this until an audit occurred in 2012.

Still, the Department argues that **RCW 50.04.165** requires a corporation who has already effectively “chosen to exempt its officers under pre-existing law, to now affirmatively “**re-exempt**” pursuant 2009 Amendment. The Department cites no specific legal authority for this argument, and the statute simply does not say that a corporation, who already made this election previously, must do it again.

2. Petitioner Substantially Complied with the requirements of RCW 50.040.165.

Where a statute so indicates that it should be liberally construed, substantial compliance should suffice when interpreting a parties actions in the context of compliance with a statute. Myles v. Clark County , 170 Wash.App. 521, 532-533, 289 P.3d 650. Furthermore, a vested right has protection from new legislation where “a party’s right has become title, legal or equitable, to present or future property, a demand, or a legal exemption from a demand by another” Id. at 532-533. Where a statute is to be read liberally, and construed in the context of substantial compliance, a person dealing with a governmental agency should be able to substantially comply where he reasonably puts the government on

notice related to the issue at hand. Renner v. City of Marysville, 168 Wash.2d 540, 546 230 P.3d 569 (2010).

RCW 50.01.010 provides, with respect to its interpretation, as follows:

*“The legislature, therefore, declares that in its considered judgment the public good, and the general welfare of the citizens of this state require the enactment of this measure, under the police powers of the state, for the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own, **and that this title shall be liberally construed** for the purpose of reducing involuntary unemployment and the suffering caused thereby to the minimum.”*

This statute is intended to prevent and/or reduce involuntary unemployment and the suffering caused thereby. To that end, compliance with the statute should be liberally construed.

The Department argues that notice to the State of a claimed officer exemption should be on a “form prescribed by the Department”. There is no actual specific form contained or outlined in the statute or WAC, and it is not otherwise defined. At the time that Affordable was founded in 2001, there was no “form prescribed by the department” because in order to cover officers, one would simply “check the box” on the Master Business Application, which Affordable elected not to do. At this time, until Affordable would decide to change its exemption status, its right to exempt its officers from unemployment insurance *vested*. The 2009 legislation should not be able to disturb that vested right.

Furthermore, after filing its Master Business Application and *not* electing coverage for its officers, the Petitioners have been submitting other “forms prescribed by the department”, in the form of their Department created quarterly returns/reports since 2001 (CP 127-143, for the two tax years in question), which clearly demonstrate their intent NOT to cover the officers with unemployment insurance. On each tax report filed on a form “prescribed by the department”, the reports, which it is not disputed were received, indicate as follows with respect to exemptions for corporate officers:

“Number of Exempt Corporate officers: 2”

Id. (Emphasis added)

None of their employees have been in jeopardy of not having coverage, nor have such claims that they were have ever been made. It is absurd that the Department now is attempting to use a “form over substance” argument to say that Affordable did not comply with the requirement to notify the state of its intention to exempt its officers. Affordable has made clear to the department in every document submitted to it for (13) years that it was not covering its officers. It was abundantly clear that Affordable, from the beginning, and throughout its history, intended to exempt its corporate officers, and there is nothing to contradict that. The subsequent quarterly forms filed by Affordable, in addition to

the procedure undertaken in 2001, substantially comply with the now deposited “temporary” notice requirement of the 2009 amended **RCW 50.46.165**. The Department’s answer to this notice that “computers read the forms” is no excuse to their constructive notice of the Petitioner’s intentions², and in so filing these “prescribed forms”, the Petitioners have substantially complied with **RCW 50.04.165**, even if they were required to file something beyond the initial Master Business Application (which at the time was the only required “form recognized by the Department”).

The Department received, processed and accepted quarterly returns and payments for the two years in question from Affordable Storage, without raising any issue. Now the department claims that it was not responsible for accepting this information and payments because the Department uses “computers not humans” to process the forms. The Department should be estopped from claiming they had no notice of Appellant’s intentions with respect to these exemptions.

The Department cites no legal authority to support the proposition that it somehow can relieve itself of being placed on notice of the exemption during the period in question. The payments were made and returns were submitted in a “format prescribed by the department” for two

² It is ironic that the Department argues that citizens have to be responsible for their actions in ensuring that the government is aware of the exemption, but the government is not accountable for the form in which they accept and receive communication. The Department should be estopped from making this excuse.

years. The statute does not give a specific “form” that must be sent. The Department was on notice. The Department cannot now claim that it was oblivious to the company’s claims of exemption, to the detriment of the Petitioners, seeking payments of premiums and penalties.

The Petitioners had a right to rely on the receipt of the “notice” form sent by the Petitioners, particularly in light of the subsequent payments and returns which were accepted without issue.

3. The statute was amended because it was in conflict with Federal law, and the Department cannot have it both ways when it says that the Amended RCW 50.04.165 does not have retroactive effect.

RCW 50.04.165 has, effective December 29, 2013, been amended again, to its original posture whereby an officer of a corporation must affirmatively “opt in”, rather than “opt out”, if officers are to be covered. The Department argues that the 2013 Amendment cannot be considered because the statute reflected no intent to have ‘retroactive effect’. In essence, the department continues to seek to penalize the Petitioners for alleged non-compliance with a statute that has since been found to be in violation of Federal law, and impracticable at best. The court should determine that in light of the modifications to the statute, the issue of compliance with the now defunct 2007 amendments is moot, and

determine that the Petitioners are entitled to a dismissal of the charges sought by the department. To strictly enforce this now defunct law's terms under these facts would result in a miscarriage of justice and an assault on a small local company who were merely exercising their pre-existing and vested rights to exempt their owner officers from the expense of Unemployment Coverage. These officers (Macaluso and McKay), are in fact, the "Petitioner".

The Department cites Macey v. State, Dept. of Employment Sec. 110 Wash.2d 308, 313 752 P.2d 372 (1988) for the proposition that "substantial weight should be given to the agency's construction of statutory language. The Department fails to mention, however that Macey first indicates that issues of law are reviewed under the error of law standard of **RCW 34.04.130(6)(d)** which allows the reviewing court to substitute its judgment for that of the administrative body (emphasis added).

Assuming that the Department's position is correct, then its argument that the 2009 Amendment requiring an "opt out" for corporate officer exemptions to corporations who already had made their election when they registered with the department under previous law also fails. The Department can't have it both ways. If the 2013 amendment does not have retroactive effect, certainly the 2009 does not.

Interpretation of a statutory amendment presents only a question of law, and therefore review is de novo. Dep't of Ecology v. Campbell & Gwinn, LLC, 146 Wash.2d 1, 9, 43 P.3d 4 (2002). Statutory Amendments are presumed to be prospective unless there is a legislative intent to apply the statute retroactively or the amendment is clearly curative or remedial. Johnson v. Cont'l W., Inc., 99 Wash.2d 555, 559, 663 P.2d 482 (1983). The amendment must be “clearly curative” for it to be retroactively applied. Howell v. Spokane & Inland Empire Blood Bank, 114 Wash.2d 42, 47, 785 P.2d 815 (1990). A court will not apply a curative amendment retroactively if it contravenes a judicial construction of the statute that is clarified or technically corrected because of separation of powers considerations. State v. Ramirez, 140 Wash.App. 278, 289, 165 P.3d 61 (2007) (capitalization omitted) (quoting 1000 Va. Ltd. P'ship v. Vertecs Corp., 158 Wash.2d 566, 584, 146 P.3d 423 (2006)), review denied, 163 Wash.2d 1036, 187 P.3d 269 (2007).

The 2013 amendment that essentially restored the state of the law prior to the 2009 Amendment to **RCW 50.04.165** was indeed “curative”, as the legislature clearly found that forcing corporations to “opt out” their officers from coverage, as had been in effect for a few short years, was a “bad idea”, and led to confusion and absurd results just like this case. More importantly, it conflicted with Federal law, and the provisions

therefore were preempted. Therefore the court should apply the 2013 amendment retroactively.

The Department on the other hand, cannot in good faith argue that the 2009 Amendment was curative, as it merely amended a procedure, which was later amended back to its previous status. Therefore, the 2009 Amendment to the statute should not have been given retroactive effect to require pre-existing corporations (who had exercised a vested right not to elect officer coverage) to “opt out” their officers.

If the court finds the 2009 Amendment to have retroactive effect, it must find both to have such effect, meaning the Department’s charges, penalties and interest to Affordable should be reversed. If it finds the 2013 amendment not to be retroactively effective, then both must not so be. In either case, the result would be the same. Petitioner should have been treated by the Department to be in compliance with Pre-existing **RCW 50.04.165**, by having not “opted in” to coverage for its officers when Affordable registered with the Department.

4. The Department is enforcing an action which missuses the intent of the statute.

The Preamble of the Employment Compensation Statute, **RCW 50.01.010**, provides,

in pertinent part, as follows:

Whereas, economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of this state; involuntary unemployment is, therefore, a subject of general interest and concern which requires appropriate action by the legislature to prevent its spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker and his or her family. Social security requires protection against this greatest hazard of our economic life. This can be provided only by application of the insurance principle of sharing the risks, and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment, thus maintaining purchasing powers and limiting the serious social consequences of relief assistance. The state of Washington, therefore, exercising herein its police and sovereign power endeavors by this title to remedy any widespread unemployment situation which may occur and to set up safeguards to prevent its recurrence in the years to come. The legislature, therefore, declares that in its considered judgment the public good, and the general welfare of the citizens of this state require the enactment of this measure, under the police powers of the state, for the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own, and that this title shall be liberally construed for the purpose of reducing involuntary unemployment and the suffering caused thereby to the minimum.

Affordable Storage Containers Inc. is a small closely held company owned by two persons, the company's only officers, Jeff Macaluso and David McKay. Macaluso and McKay formed the company in 2001 and submitted a Master Business application at that time indicating that they wished to be exempt from coverage from unemployment insurance, as they were the company's owners and had the right to do so. The action of the department here does not protect Mr. Macaluso or Mr. McKay as they are, in fact, the company's sole owners and officers, one in the same.

The Department's position, even if correct, is a form over substance argument, and it flies in the face of the stated goal of the statute.

5. The Administrative Law Judge and Commissioner had the authority to waive the contributions, penalties and interest charged to the Petitioner, pursuant to RCW 50.24.020 and unreasonably refused or failed to do so.

As the court recalls, Petitioner Corporation was formed in 2001 and has NEVER covered, nor intended to cover its two corporate officers (owners), with unemployment insurance during its entire existence. During an audit, however, the Employment Security Department determined that an "opt-out form" had not been received, which under the 2009 amended statute was required for Petitioner to maintain its [lack of] coverage. The administrative law judge determined that she was without authority to do "equity" apparently recognizing from her remark in Paragraph 8 of her decision that the result was unfair, and assessed the Petitioner with responsibility for two years of contributions, penalties and interest, for coverage for the two officers which could never even be used in any way. This is punitive and completely flies in the fact of fairness.

Petitioner had represented itself at the hearing before the Administrative Law Judge, and therefore was not fully aware of all of the remedies allowed for by statute. But it is clear from the language of the

ALJ's ruling itself, that a request was made to the administrative law judge to do equity, and waive the contributions, penalties and interest charged to Petitioner in this case. In the Administrative Law Judge's decision, Paragraph 8, the ALJ stated as follows:

"8. As an Administrative Law Judge, I have no equitable authority to grant exemption from the effect of law. I can only apply the laws as they are written. Therefore, without some more convincing evidence of the filing of forms, and/or the reply form the Department to approve or deny the requested action, I have no authority to hold that appellant's officers are exempt. "

However, the administrative law judge was incorrect in this statement, as the ALJ and the Commissioner do have the authority to waive such charges where, as described in **RCW 50.24.020**, collection of the same "*would be against equity and good conscience*". **RCW 50.24.020**; Delagrave v. Employment Sec. Dept. of State of Wash. 127 Wash.App. 596, 609, 111 P.3d 879, 886 (2005).

RCW 50.24.020 provides as follows:

"The commissioner may compromise any claim for contributions, interest, or penalties due and owing from an employer, and any amount owed by an individual because of benefit overpayments existing or arising under this title in any case where collection of the full amount due and owing, whether reduced to judgment or otherwise, would be against equity and good conscience".

In Delagrave, the court examined this very issue, but in the context of repayment of unemployment benefits following an overpayment. Even though the record in that case was scant of evidence of the Petitioner's request for the waiver at hearing, the Court of Appeals overruled the Superior Court Judge who denied the appeal, and remanded the matter back to the Department for determination by the Commissioner, consistent with the statute. Delagrave v. Employment Sec. Dept. of State of Wash at 613.

This court has the authority to fashion different remedies with respect to Administrative appeals. **RCW 34.05.570** provides, in pertinent part, as follows:

“(1) In a review under RCW 34.05.570, the court may (a) affirm the agency action or (b) order an agency to take action required by law, order an agency to exercise discretion required by law, set aside agency action, enjoin or stay the agency action, remand the matter for further proceedings, or enter a declaratory judgment order. The court shall set out in its findings and conclusions, as appropriate, each violation or error by the agency under the standards for review set out in this chapter on which the court bases its decision and order. In reviewing matters within agency discretion, the court shall limit its function to assuring that the agency has exercised its discretion in accordance with law, and shall not itself undertake to exercise the discretion that the legislature has placed in the agency. The court shall remand to the agency for modification of agency action, unless remand is impracticable or would cause unnecessary delay.”

Emphasis Added.

The trial court was fairly clear to the parties that it did not like the result of the ruling on March 28, 2014, and that in light of the equities, it would have considered waiving the charges, despite its finding that the Corporation bears (or with the now amended statute used to bear) the responsibility to make sure that the exemption form was received by the department. The court has that authority to fashion such a remedy and should do so. Furthermore, the statute contemplates that the Commissioner will exercise fair discretion when it comes to applying **RCW 50.24.020** to promote fairness, when the situation arises. In this case, however, the Department simply failed to work with a pro se tax payer to consider this fair option. Like in Delgrave, the Commissioner simply adopted the findings of the ALJ, and therefore, adopted the ALJ's flawed ruling that she had no power to apply equity to the situation. This court should reverse that decision.

6. The Court has the legal authority to overturn or remand the decision of the agency in this case.

The Administrative Law Judge simply misstated (and misapplied) the law with respect to the authority (and responsibility) the department has to consider a waiver of the charges being sought in this case when the judge said:

“8. As an Administrative Law Judge, I have no equitable authority to grant exemption from the effect of law. I can only apply the laws as they are written. Therefore, without some more convincing evidence of the filing of forms, and/or the reply form the Department to approve or deny the requested action, I have no authority to hold that appellants officers are exempt. “

This is a clear misstatement of the law, as **RCW 50.24.020** provides as follows:

“The commissioner may compromise any claim for contributions, interest, or penalties due and owing from an employer, and any amount owed by an individual because of benefit overpayments existing or arising under this title in any case where collection of the full amount due and owing, whether reduced to judgment or otherwise, would be against equity and good conscience”.

Because the Commissioner acknowledges that it failed (or refused) to even consider or exercise any scintilla of discretion in its handling of the matter, this court may remedy a failure of the department to follow established policies and/or exercise discretion, pursuant to **RCW 34.05.574(1)** , which provides in pertinent part, as follows:

“(1) In a review under RCW 34.05.570, the court may (a) affirm the agency action or (b) order an agency to take action required by law, order an agency to exercise discretion required by law, set aside agency action, enjoin or stay the agency action, remand the matter for further proceedings, or enter a declaratory judgment order.

Emphasis Added.

Petitioners are entitled to relief under multiple subsections of **RCW 34.05.570(3)** as follows:

“ ... (c) The agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure;

(d) The agency has erroneously interpreted or applied the law;

(e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter;

(f) The agency has not decided all issues requiring resolution by the agency;

(h) The order is inconsistent with a rule of the agency unless the agency explains the inconsistency by stating facts and reasons to demonstrate a rational basis for inconsistency; or

(i) The order is arbitrary or capricious.

RCW 34.05.570(3)

The State argued at the trial court level that the court cannot grant relief requested because the agency “decided, at its discretion, not to compromise the Affordable assessment”. However, this is quite simply false. The ALJ’s own words above, which were adopted by the Commissioner, indicate that no such discretion was exercised, because the law did not allow for it. There is no evidence whatsoever that the Commissioner considered (and denied) a waiver.

Keep in mind that this case is about the State is seeking payment from a small business for premiums and penalties for past unemployment insurance coverage that was not used, nor will it ever be used, by the

officers of this company. and clearly, the officers of Affordable have never requested coverage for the first nine years of their existence, or thereafter even following the law change in 2009. With the reinstatement of the old law in December of 2013, they still do not seek coverage for the officers. Petitioners never made a claim for coverage throughout the existence of the corporation because they never asked to be covered, and never wanted to be covered. This entire matter is a result of an audit in which the Department found what it believes is a ‘technical error’ (that the Petitioners failed to file a form that was required during a small window in time), entitling the Department to a windfall, without the risk of ever having to pay anything out. The state suffered no losses as a result of this form not being filed, and neither Affordable nor its officers derived any benefit from the state because this form was not filed. If there was ever a case for the department to exercise its lawful discretion to waive charges such as these, this is it. To completely refuse to even consider such a waiver (and actually state –wrongfully—that the agency and Commissioner cannot exercise such discretion), is (legally and morally) wrong. How could the Commissioner determine that collection of these charges is not “against equity and good conscience” entitling Affordable to a waiver under **RCW 50.24.020**? Furthermore, why did the Commissioner fail to even consider such a waiver? This is the very situation that the court found itself in Delagrave v. Employment Sec. Dept.

of State of Wash. 127 Wash.App. 596, 609, 111 P.3d 879, 886 (2005), when it granted relief to the Petitioner in that case. The court in this case also indicated that it did not like the facts supporting the state's claim. This court, like the Delgrave court, can do something to change the result. The Petitioner's respectfully request this court to do so.

7. **Attorney fees.**

To the extent Appellant prevails, it is entitled to reasonable attorney fees and costs pursuant to RCW 4.84.350, or other appropriate statute..

IV. CONCLUSION

For the above reasons, this court should reverse the trial court's order affirming the decision of the Commissioner of the Employment Security Department, and determine as a matter of law, that:

- (1) Appellant was not required to file new exemption forms following the change in the statute in 2007; or
- (2) Appellant substantially complied with the statute by claiming exemptions on forms submitted to the Department in quarterly filings, and therefore providing constructive notice of the claimed exemption; or
- (3) The Department is estopped from claiming it did not know that Appellants did not intend to claim exemptions for its officers; or

- (4) The Department should have exercised discretion in waiving any tax and penalties, as authorized by statute, but that the department abused its discretion by unreasonably refusing to do so; and
- (5) The Appellant be awarded attorney fees and costs as a result of all fees incurred in this matter.

In the alternative, this court should remand the matter back to the trial court for further proceedings consistent with its opinion.

Respectfully submitted this 11th day of August,
2014.



MARK E. BARDWIL, WSBA #24776
Attorney for Defendants/Appellants

WASHINGTON STATE COURT OF APPEALS
DIVISION II

AFFORDABLE STORAGE CONTAINERS,) NO. 46315-6-II
INC.,)
Appellant,) DECLARATION OF SERVICE
)
vs.)
)
STATE OF WASHINGTON DEPARTMENT)
OF EMPLOYMENT SECURITY,)
)
Respondent.)

DECLARATION OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times; mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen (18) years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be served the BRIEF OF APPELLANT, on the following individuals in the manner indicated below.

Elizabeth Thompson-Lagerberg, AAG
Office of Attorney General
Licensing & Administrative Law Division
PO BOX 40110
Olympia, WA 98504-0110

U.S. First Class Mail
 Via Legal Messenger
 Electronically via email
ElizabethT1@atg.wa.gov

Attorney for Respondent

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

Dated this 11 day of August 2014, at Tacoma, Washington.


Susan G. Pierce