

NO. 50057-4-II

---

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

---

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Appellant,

v.

WAREHOUSE DEMO SERVICES, INC.,

Respondent.

---

**BRIEF OF APPELLANT**

---

ROBERT W. FERGUSON  
Attorney General

Charles Zalesky, WSBA No. 37777  
Assistant Attorney General  
Revenue Division, OID No. 91027  
P.O. Box 40123  
Olympia, WA 98504-0123  
(360) 753-5528

**TABLE OF CONTENTS**

I. INTRODUCTION.....1

II. ASSIGNMENTS OF ERROR AND ISSUE PRESENTED .....2

III. STATEMENT OF THE CASE.....4

    A. Warehouse Demo’s Product Demonstration Services. ....4

    B. Warehouse Demo’s Refund Claims. ....6

    C. The Board Of Tax Appeals Decision And Subsequent Superior Court Review. ....9

IV. ARGUMENT .....11

    A. Standard Of Review.....11

    B. RCW 82.04.290(2)(b) Is Not Ambiguous, And Its Meaning Can Be Derived From Its Plain Language.....12

    C. The Board Erred When It Concluded That Warehouse Demo Met The Statutory Requirements Of The B&O Tax Exemption For Promotional Materials Furnished To An Agent.....14

        1. The exemption for supplies and materials furnished to an agent does not apply to cash payments received at the conclusion of the service activity. ....15

            a. The tax exemption is narrowly tailored and applies only to the value of qualifying supplies and materials. .....15

            b. The Board misconstrued the term “the value of” when it concluded that the exemption applies to cash payments. .....18

2.	The products that Warehouse Demo purchased and gave away to Costco members were not “furnished” to it by anyone. ....	20
3.	Warehouse Demo was not an agent of the Costco vendors who paid Warehouse Demo for its services.....	25
a.	<u>Warehouse Demo admitted it was not an agent, and no evidence contradicts that admission.</u> .....	26
b.	<u>If conclusion of law 14.3 is treated as a mislabeled finding of fact, the finding that Warehouse Demo acted as an agent is not supported by substantial evidence.</u> .....	30
V.	CONCLUSION .....	33

## TABLE OF AUTHORITIES

### Cases

<i>Blodgett v. Olympic Savings &amp; Loan Ass'n</i> , 32 Wn. App. 116, 646 P.2d 139 (1982).....	26, 29
<i>Budget Rent-A-Car of Washington-Oregon, Inc. v. Dep't of Revenue</i> , 81 Wn.2d 171, 500 P.2d 764 (1972) .....	20
<i>Burns v. City of Seattle</i> , 161 Wn.2d 129, 164 P.3d 475 (2007).....	14
<i>Burton v. Lehman</i> , 153 Wn.2d 416, 103 P.3d 1230 (2005).....	22, 24
<i>Cashmere Valley Bank v. Dep't of Revenue</i> , 181 Wn.2d 622, 334 P.3d 1100 (2014).....	13
<i>Darkenwald v. Emp't Sec. Dep't</i> , 183 Wn.2d 237, 350 P.3d 647 (2015).....	22
<i>Department of Ecology v. Campbell &amp; Gwinn, LLC</i> , 146 Wn.2d 1, 43 P.3d 4 (2002).....	13, 14
<i>Department of Revenue v. Nord Nw. Corp.</i> , 164 Wn. App. 215, 264 P.3d 259 (2011).....	11, 30, 33
<i>Dot Foods, Inc. v. Dep't of Revenue</i> , 185 Wn.2d 239, 372 P.3d 747 (2016) .....	19
<i>Engine Rebuilders, Inc. v. State</i> , 66 Wn.2d 147, 401 P.2d 628 (1965).....	15, 19, 23
<i>Heath v. Uraga</i> , 106 Wn. App. 506, 24 P.3d 413 (2001).....	27
<i>Hewson Const., Inc. v. Reintree Corp.</i> , 101 Wn.2d 819, 685 P.2d 1062 (1984).....	26

<i>In re Forfeiture of One 1970 Chevrolet Chevelle,</i> 166 Wn.2d 834, 215 P.3d 166 (2009).....	22
<i>Matsumura v. Eilert,</i> 74 Wn.2d 362, 444 P.2d 806 (1968).....	27
<i>Millay v. Cam,</i> 135 Wn.2d 193, 955 P.2d 791 (1998) .....	17
<i>Moss v. Vadman,</i> 77 Wn.2d 396, 463 P.2d 159 (1969).....	27
<i>O'Brien v. Hafer,</i> 122 Wn. App. 279, 93 P.3d 930 (2004).....	27
<i>Pullman Co. v. State,</i> 65 Wn.2d 860, 400 P.2d 91 (1965) .....	19, 24
<i>State ex rel. Citizens Against Tolls v. Murphy,</i> 151 Wn.2d 226, 88 P.3d 375 (2004) .....	13
<i>State v. Kintz,</i> 169 Wn.2d 537, 238 P.3d 470 (2010).....	24
<i>Steven Klein, Inc. v. Dep't of Revenue,</i> 183 Wn.2d 889, 357 P.3d 59 (2015) .....	13
<i>Texaco Ref. &amp; Mktg., Inc. v. Dep't of Revenue,</i> 131 Wn. App. 385, 127 P.3d 771 (2006).....	16
<i>Thurston County v. Cooper Point Ass'n,</i> 148 Wn.2d 1, 57 P.3d 1156 (2002).....	32
<i>Time Oil Co. v. State,</i> 79 Wn.2d 143, 483 P.2d 628 (1971).....	16, 23
<i>Uni-Com Northwest, Ltd. v. Argus Publishing Co.,</i> 47 Wn. App. 787, 737 P.2d 304 (1987).....	27
<i>Verizon Nw., Inc. v. Employment Sec. Dep't,</i> 164 Wn.2d 909, 194 P.3d 255 (2008).....	12

<i>Washington Trucking Ass'ns v. Emp't Sec. Dep't</i> , No. 93079-1, 2017 WL 1533246 (Wash. April 27, 2017).....	22
<i>Wilson v. Employment Sec. Dep't</i> , 87 Wn. App. 197, 940 P.2d 269 (1997).....	12

**Statutes**

Laws of 1935, ch. 180, § 5(f) .....	19
Laws of 1935, ch. 180, § 5(g).....	19
Laws of 1935, ch. 180, § 5(h).....	19
Laws of 1963, Ex. Sess., ch. 28, § 2 .....	12
RCW 34.05.570(1)(a) .....	11
RCW 34.05.570(3).....	12
RCW 34.05.570(3)(e) .....	32
RCW 82.03.180 .....	11
RCW 82.04.090 .....	19, 20
RCW 82.04.250(1).....	7
RCW 82.04.290 .....	24
RCW 82.04.290(2)(a) .....	7
RCW 82.04.290(2)(b) .....	passim
RCW 82.04.317 .....	17
RCW 82.04.323 .....	17
RCW 82.04.324 .....	17
RCW 82.04.326 .....	16, 17

RCW 82.04.327 .....	16
RCW 82.04.331 .....	17
RCW 82.04.332 .....	17
RCW 82.04.337 .....	17
RCW 82.04.339 .....	17
RCW 82.04.355 .....	17
RCW 82.04.363 .....	17
RCW 82.04.3651 .....	17
RCW 82.04.367 .....	17
RCW 82.04.368 .....	18
RCW 82.04.385 .....	18
RCW 82.04.390 .....	18
RCW 82.04.392 .....	18
RCW 82.04.399 .....	18
RCW 82.04.408 .....	18
RCW 82.04.416 .....	18
RCW 82.04.4201 .....	18
RCW 82.04.422 .....	18
RCW 82.04.4251 .....	18
RCW 82.04.4261 .....	18
RCW 82.04.4262 .....	18

RCW 82.04.4263 .....	18
RCW 82.04.4264 .....	18
RCW 82.04.4265 .....	18
RCW 82.04.4266 .....	16
RCW 82.04.4266(1).....	17
RCW 82.04.4267 .....	18
RCW 82.04.4268 .....	16
RCW 82.04.4268(1).....	17
RCW 82.04.4269 .....	16
RCW 82.04.4269(1).....	17

**Regulations**

WAC 458-20-159.....	26
---------------------	----

**Dictionaries**

<i>Roget's International Thesaurus</i> § 385.7, at 282 (5th ed. 1992).....	25
<i>Webster's Third New Int'l Dictionary</i> 924 (unabridged ed. 2002).....	22

## I. INTRODUCTION

This case involves a little known tax exemption enacted when it was common for a salesperson, carrying a sample case of demonstration products and supplies, to solicit sales through face-to-face contact. The exemption, codified at RCW 82.04.290(2)(b), was added in 1963 and, until now, has never been the subject of any controversy. On its face, the exemption provides that the value of promotional supplies and materials furnished to an agent by his or her principal to be used for informational, educational, or promotional purposes is not to be included as part of the agent's remuneration or commission for purposes of the state's business and occupation (B&O) tax.

The Board of Tax Appeals broadly construed the exemption statute, allowing Warehouse Demo Services, Inc. (Warehouse Demo) to claim the exemption with respect to *cash payments* the company received from product manufacturers as reimbursement for demonstration products that Warehouse Demo *purchased from Costco* and used in its product demonstration business. Moreover, the Board concluded as a matter of law that Warehouse Demo was acting as an agent as required by the statute, even though (1) the company admitted that it was not an agent, (2) its "Agreement for Demonstration Services" with Costco specified that it was not an agent, and (3) no evidence was presented to the Board contradicting

Warehouse Demo's admission that it was not an agent or the terms of its Demonstration Services agreement.

The Board misapplied the "promotional materials furnished to an agent" tax exemption by construing it in a manner that is inconsistent with the plain language used by the Legislature. The Board is not empowered to enlarge tax exemptions beyond their plain meaning. Its decision to do so here is contrary to law and should be set aside.

## **II. ASSIGNMENTS OF ERROR AND ISSUE PRESENTED**

1. The Board of Tax Appeals erred when it concluded that demonstration products Warehouse Demo purchased from Costco were "furnished to" Warehouse Demo under the plain meaning of RCW 82.04.290(2)(b). AR 019-20, Conclusion of Law 13, including subparagraphs 13.1 through 13.3.

2. The Board of Tax Appeals erred when it concluded that Warehouse Demo and its customers (Costco vendors) had an agency relationship as required by RCW 82.04.290(2)(b). AR 020, Conclusion of Law 14, including subparagraphs 14.1 through 14.3. Moreover, to the extent the Board's conclusion of law 14.3 is treated as a mislabeled finding of fact, the Board of Tax Appeals erred in finding that Warehouse Demo "was acting as the 'agent'" for its customers. The implied or

mislabeled finding is not supported by evidence that is substantial when viewed in light of the record as a whole.

3. The Board of Tax Appeals erred when it concluded that “[b]ecause RCW 82.04.290(2)(b) provides that the ‘value of . . . demonstration . . . materials . . . is not subject to taxation,’” the amounts Warehouse Demo received from its customers as reimbursement for its purchase of demonstration products are likewise “not subject to B&O tax.” AR 021, Conclusions of Law 15.

4. The Board of Tax Appeals erred when it concluded that the Legislature intended to exempt cash payments from tax under RCW 82.04.290(2)(b) when it specified that the exemption applies to “the value of” demonstration materials to be used in a qualifying activity. AR 021, Conclusions of Law 16.

5. The Board of Tax Appeals erred when it concluded that the amounts Warehouse Demo received from its customers are exempt from B&O tax under the plain language of RCW 82.04.290(2)(b). AR 021, Conclusion of Law 17.

6. The Board of Tax Appeals erred when it concluded that Warehouse Demo met the statutory requirements of the tax exemption for promotional materials furnished to an agent to be used for a qualified

informational, educational, or promotional purpose. AR 022, Conclusion of Law 19.

ISSUE PRESENTED (as to all assignments of error): Did the Board of Tax Appeals err in concluding that amounts Warehouse Demo received as reimbursement for the cost of demonstration products that it purchased from Costco were exempt from the B&O tax under RCW 82.04.290(2)(b), which exempts the value of promotional supplies and materials furnished to an agent to be used for a qualified informational, educational, or promotional purpose?

### **III. STATEMENT OF THE CASE**

#### **A. Warehouse Demo's Product Demonstration Services.**

During its existence, Warehouse Demo provided product demonstration service at Costco Wholesale Corporation (Costco) stores in the Pacific Northwest and parts of California. AR 623.<sup>1</sup> Warehouse Demo marketed its services to companies that sell products at Costco stores such as General Mills, Heinz, Foster Farms, and Nestlé. AR 629. These Costco vendors would employ Warehouse Demo to offer free trial samples of food products and to demonstrate and promote the benefits of other consumer products to Costco members. AR 623. According to Warehouse

---

<sup>1</sup> Warehouse Demo was acquired by Club Demonstration Services in 2013. BTA Hearing Transcript ("Tr.") at 60. This appeal involves the December 2006 through September 2011 tax periods when Warehouse Demo was still in existence.

Demo's marketing materials, these product demonstrations allowed Costco members to experience the Costco vendors' products before purchase and "learn their most compelling benefits first hand." *Id.* The free trial samples and product demonstrations "are part of the Costco shopping experience and a key to attracting the interest and keeping the loyalty of Costco members for their featured brands." AR 626.

Warehouse Demo would provide demonstration services for a particular Costco vendor at several Costco stores on the same date. *See* AR 684 (invoice listing demonstration services provided to Tyson Foods at five Costco stores on December 12, 2008). It billed the Costco vendor shortly after the demonstration services were completed. *Id.* (invoice dated December 15, 2008). The Costco vendors typically remitted payment by wire transfer. Tr. at 48.

Although Warehouse Demo provided services to Costco vendors, and was paid by the Costco vendors, there was no written contract entered into between Warehouse Demo and the vendors it served. AR 701; AR 014 (FOF 4). Instead, the terms governing Warehouse Demo's service activities were set out in the "Agreement For Demonstration Services" entered into between Warehouse Demo and Costco. AR 673-83. As relevant in this appeal, the agreement specified that Warehouse Demo was

an independent contractor and was “solely responsible for the direction of persons conducting Demos under [the] Agreement.” AR 675.

The products Warehouse Demo gave away to Costco members as free samples were not provided to Warehouse Demo by Costco or by the Costco vendors who paid for the service. Instead, Warehouse Demo purchased the products at the Costco store where the demonstration was scheduled to take place. AR 647; AR 015 (FOF 7). There were sound business reasons for this practice, including logistical issues involving the transportation and possible spoilage of the sample products, and to ensure that Costco members were sampling the same products that they could purchase from that particular Costco store. *Id.*

Warehouse Demo periodically billed its Costco vendor customers for its services. AR 684. The amount charged included a demonstration fee “plus supplies and product costs.” AR 633. All of the amounts Warehouse Demo charged and received from its customers—including the reimbursement for products purchased from Costco—were recorded as gross income on its accounting records. AR 016 (FOF 10.1 and 10.2).

**B. Warehouse Demo’s Refund Claims.**

During the tax periods at issue, Warehouse Demo timely reported and paid Washington B&O tax on the full amount of gross income it received from its Washington business activities, including the amounts it

received as reimbursement for the cost of the products it purchased and gave away to Costco members. AR 486-544. In December 2011 the company submitted a tax refund claim to the Department, seeking a refund of over \$700,000 plus interest for the December 2006 through September 2011 tax periods. AR 645-46. The refund claim asserted that amounts Warehouse Demo received from Costco vendors as reimbursement for the products it demonstrated should not have been included as “gross income of the business” as that term is defined in RCW 82.04.080. AR 647-48. Roughly one year later Warehouse Demo filed an alternative refund claim, arguing that if B&O tax was owed on the amounts at issue, it should be computed under the retailing B&O tax rate, not the higher service rate. AR 657.<sup>2</sup> Neither refund claim mentioned RCW 82.04.290(2)(b), and neither refund claim asserted that the amounts at issue were exempt from tax as demonstration materials furnished to an agent.

The Department’s Audit Division reviewed the initial and alternative refund claims, and it rejected both arguments Warehouse Demo advanced. AR 667. Shortly thereafter Warehouse Demo filed an appeal with the Department’s Appeals Division. AR 575. The Appeals Division also rejected both arguments. AR 692. Warehouse Demo then sought de

---

<sup>2</sup> Gross income from retail sales is taxed at the rate of 0.471 percent, while the gross income from service activities is taxed at the rate of 1.5 percent. *See* RCW 82.04.250(1) (imposing B&O tax on retailers); .290(2)(a) (imposing B&O tax on service and other business activities).

novo review by the Washington Board of Tax Appeals. AR 723. Its appeal to the Board raised the same two issues that had been decided by the Department. *See id.* (listing “Issues(s) to be Resolved”).

The matter was set for a formal APA hearing. AR 711. Roughly three weeks before the hearing, Warehouse Demo raised a new argument in support of its refund claim, asserting that the amounts it billed its Costco vendor customers for the cost of the products that were given away as free samples were exempt from B&O tax under RCW 82.04.290(2)(b). *See* AR 132 (page 11 of Warehouse Demo’s hearing brief).

RCW 82.04.290(2)(b) provides that the value of “advertising, demonstration, and promotional supplies and materials furnished to an agent by his or her principal or supplier to be used for informational, educational, or promotional purposes is not considered a part of the agent’s remuneration or commission and is not subject to taxation under this section.” Without citing any evidence, Warehouse Demo asserted in its BTA hearing brief that it “acted as the agent of the vendors” when promoting the vendors’ products at the in-store demonstrations. AR 132. The assertion that Warehouse Demo was acting as the agent of its Costco vendor customers was a reversal from its earlier admission to the Department of Revenue that “WDS is not an agent of, nor do they have a contract with, the products vendors” they represent. AR 579.

**C. The Board Of Tax Appeals Decision And Subsequent Superior Court Review.**

The Board held an evidentiary hearing in November 2015. The only witness that testified at the hearing was the company's part-owner and Chief Financial Officer, Brent Ellis. Mr. Ellis explained that Costco had contracted with Warehouse Demo "to run [Costco's] demo business" by "promoting products to Costco's members." Tr. at 20, 19. Warehouse Demo "supplied the labor and the marketing know-how to execute those product demonstrations." Tr. at 19. To help manage the business, Warehouse Demo hired "full-time salaried demo managers" who would oversee the product demonstrations at each Costco location. Tr. at 29. Demo managers would hire and train demonstrators and would purchase from Costco the specific products necessary to "execute a demo." *Id.*

Mr. Ellis also confirmed that Warehouse Demo had almost no direct contact with any of the Costco vendors it served. Tr. at 23. Rather, the terms and conditions of its demonstration service activities were dictated by Costco. Tr. 19-21. Consistent with that testimony, Mr. Ellis never asserted that Warehouse Demo acted as the agent for any of the Costco vendors. Nor did he offer any testimony contradicting Warehouse Demo's earlier admission that it was "not an agent of . . . the products vendors." AR 579.

After the hearing was concluded, Warehouse Demo voluntarily withdrew its alternative refund claim it had filed with the Department in which the company had argued that the proper B&O tax rate was the retail rate, not the service rate. AR 037. Consequently, that issue was not addressed by the Board and is not part of this appeal.

Several months later, the Board of Tax Appeals issued its written decision. AR 012. The Board rejected Warehouse Demo's argument that the reimbursement payments it received from the Costco vendors should be excluded from its gross income. AR 013 ("Brief Answer" to issue # 1); AR 018 (COL # 6). Warehouse Demo has not appealed that ruling, and it is not at issue in this appeal.

Although the Board rejected Warehouse Demo's primary argument concerning the definition of "gross income," it did accept the company's claim that the amounts it received as reimbursement for the cost of the products given away to Costco members were exempt from the B&O tax under RCW 82.04.290(2)(b). AR 013 ("Brief Answer" to issue # 2). In reaching its decision, the Board concluded that the products Warehouse Demo purchased from Costco and gave away to Costco members had been "furnished" to Warehouse Demo by the Costco vendors who paid Warehouse Demo for its services. AR 019 (COL # 13). The Board also concluded that Warehouse Demo was the agent of the Costco vendors who

it served, and concluded that the exemption applied to payments received as reimbursement from the Costco vendors after the demonstration service activity took place. AR 020-21 (COL #s 14-16 ).

The Department timely appealed to the Thurston County Superior Court. CP 4. The Superior Court affirmed the Board of Tax Appeals. CP 208. The Court explained that there was no need to consult a dictionary to help determine the meaning of the term “furnished.” VRP at 32. Instead, the Court concluded that the common sense meaning of the term was broad enough to include “purchase or provide.” *Id.* The Court also held that there was evidence in the record to support the Board’s conclusion that “there was an agency relationship” between Warehouse Demo and its Costco vendor customers. VRP 35. This appeal followed. CP 213.

#### **IV. ARGUMENT**

##### **A. Standard Of Review.**

The Administrative Procedure Act (APA) governs judicial review of a formal Board of Tax Appeals decision. RCW 82.03.180; *Department of Revenue v. Nord Nw. Corp.*, 164 Wn. App. 215, 223, 264 P.3d 259 (2011). In this APA appeal, the burden of demonstrating the invalidity of the Board’s order is on the Department of Revenue because it asserts that the Board erred. RCW 34.05.570(1)(a). This Court may reverse the Board’s order if, among other reasons, the Board erroneously interpreted

or applied the law, the Board made a finding of fact that is not supported by substantial evidence, or the Board's order is arbitrary and capricious. RCW 34.05.570(3).

An appellate court reviews the decision of the administrative agency and "applies the APA standards directly to the administrative record." *Verizon Nw., Inc. v. Employment Sec. Dep't*, 164 Wn.2d 909, 915, 194 P.3d 255 (2008). The court reviews an agency's legal conclusions under the error of law standard. *Nord Nw.*, 164 Wn. App. at 223. Findings of fact, on the other hand, are reviewed under the "substantial evidence" standard. *Wilson v. Employment Sec. Dep't*, 87 Wn. App. 197, 200-01, 940 P.2d 269 (1997).

**B. RCW 82.04.290(2)(b) Is Not Ambiguous, And Its Meaning Can Be Derived From Its Plain Language.**

This appeal turns on the meaning of RCW 82.04.290(2)(b), which was added to the B&O tax code in 1963. *See* Laws of 1963, Ex. Sess., ch. 28, § 2. The statute provides:

(2)(a) Upon every person engaging within this state in any business activity other than or in addition to an activity taxed explicitly under another section in this chapter or subsection (1) or (3) of this section; as to such persons the amount of tax on account of such activities is equal to the gross income of the business multiplied by the rate of 1.5 percent.

(b) This subsection (2) includes, among others, and without limiting the scope hereof (whether or not title to materials used in the performance of such business passes to

another by accession, confusion or other than by outright sale), persons engaged in the business of rendering any type of service which does not constitute a “sale at retail” or a “sale at wholesale.” *The value of advertising, demonstration, and promotional supplies and materials furnished to an agent by his or her principal or supplier to be used for informational, educational, and promotional purposes is not considered a part of the agent's remuneration or commission and is not subject to taxation under this section.*

(Emphasis added).

RCW 82.04.290(2)(a) imposes B&O tax on business activities that are not explicitly taxed under another section of the B&O tax code. *Steven Klein, Inc. v. Dep't of Revenue*, 183 Wn.2d 889, 898, 357 P.3d 59 (2015). RCW 82.04.290(2)(b) sets out a narrow exception to the section. The statute is not ambiguous. Consequently, its plain language controls.

Statutory construction is a question of law. *State ex rel. Citizens Against Tolls v. Murphy*, 151 Wn.2d 226, 242, 88 P.3d 375 (2004). The fundamental objective in construing a statute is to ascertain and carry out the Legislature's intent. *Department of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). “When possible, the court derives legislative intent solely from the plain language enacted by the legislature, considering the text of the provision in question, the context of the statute in which the provision is found, related provisions, amendments to the provision, and the statutory scheme as a whole.” *Cashmere Valley Bank v. Dep't of Revenue*, 181 Wn.2d 622, 631, 334 P.3d 1100 (2014)

(citing *Campbell & Gwinn*, 146 Wn.2d at 9-10). In determining a statute's plain meaning, courts may consider its subject, nature, and purpose, along with the consequences of adopting one interpretation over another. *Burns v. City of Seattle*, 161 Wn.2d 129, 140, 164 P.3d 475 (2007).

**C. The Board Erred When It Concluded That Warehouse Demo Met The Statutory Requirements Of The B&O Tax Exemption For Promotional Materials Furnished To An Agent.**

The tax exemption set out in RCW 82.04.290(2)(b) applies to the value of advertising, demonstration, and promotional supplies and materials that are furnished to an agent by his or her principal or supplier to be used by the agent for informational, educational, and promotional purposes. Read as a whole, the exemption plainly does not apply to the payments Warehouse Demo received as reimbursement for demonstration products it purchased from Costco and gave away to Costco members. Instead, the language used shows the intent to provide a narrow tax exemption that may be claimed by sales agents who are furnished with product samples or similar supplies and materials to be used to demonstrate, promote, or advertise a client's products or services. In the event the value of the samples would have been included as part of the agent's "remuneration or commission," the statute makes clear that B&O tax is not owed.

The language used by the Legislature in RCW 82.04.290(2)(b) is not susceptible to a reasonable interpretation supporting Warehouse Demo's

refund claim. When the statute is parsed into its various requirements, it is evident that Warehouse Demo does not qualify for three distinct reasons. First, the statute applies to *the value* of certain supplies and materials “*to be used*” in a qualifying promotional activity, not to cash payments received after the qualifying activity has been completed. Second, the statute applies only to qualifying supplies and materials that are “*furnished to*” the service provider, not supplies and materials that are purchased by the service provider. Third, the statute applies only if there is a principal-agent relationship. Warehouse Demo was not acting as an agent when it purchased and gave away food samples and other consumer goods to Costco members, and any implied or mislabeled finding of fact to the contrary is not supported by the evidence.

**1. The exemption for supplies and materials furnished to an agent does not apply to cash payments received at the conclusion of the service activity.**

- a. The tax exemption is narrowly tailored and applies only to the value of qualifying supplies and materials.

Under Washington law, the value of property transferred to a seller of goods or services is part of the seller’s “gross income” if that property was transferred as consideration for the goods or services provided. *Engine Rebuilders, Inc. v. State*, 66 Wn.2d 147, 151, 401 P.2d 628 (1965). Under this rule of law, barter transactions are subject to the B&O tax. *Texaco Ref. & Mktg., Inc. v. Dep’t of Revenue*, 131 Wn. App. 385, 390, 127 P.3d 771

(2006). Consequently, furnishing a seller with valuable property as part of his or her remuneration equates to a barter transaction and is subject to B&O tax absent an express statutory exemption. *Time Oil Co. v. State*, 79 Wn.2d 143, 146-47, 483 P.2d 628 (1971). RCW 82.04.290(2)(b) was designed to provide a narrow statutory exemption to this principle of Washington tax law, excluding from the gross income of a sales agent the value of certain supplies and materials furnished by his or her principal or supplier to be used for a qualified informational, educational, or promotional purpose.

It is telling that RCW 82.04.290(2)(b) exempts “[t]he value of” qualifying advertising, demonstration and promotional supplies and materials. It does not exempt the “amounts received” with respect to qualifying advertising, demonstration and promotional supplies and materials. Only three other B&O tax exemptions use the phrase “the value of” to define or limit the scope of the exemption. *See* RCW 82.04.4266, RCW 82.04.4268, and RCW 82.04.4269. By contrast, most B&O tax exemptions apply to “amounts received” from certain business activities (or words to that effect), or to specified businesses. *E.g.*, RCW 82.04.326 (B&O tax “does not apply to amounts received by a qualified organ procurement organization . . . to the extent that the amounts are exempt from federal income tax”); RCW 82.04.327 (B&O tax “does not apply to adult family homes”). And the three statutes that use the phrase “the value of” to define

the scope of the tax exemption each make clear that the B&O tax “does not apply to the value of products *or the gross proceeds of sales derived from*” qualifying business activity. RCW 82.04.4266(1) (emphasis added); RCW 82.04.4268(1) (emphasis added); RCW 82.04.4269(1) (emphasis added). No B&O tax exemption, other than the exemption at issue in this appeal, is limited solely to “the value of” qualifying property. This distinction is important in ascertaining the meaning and purpose of RCW 82.04.290(2)(b) since “[i]t is well settled that where the Legislature uses certain language in one instance but different, dissimilar language in another, a difference in legislative intent is presumed.” *Millay v. Cam*, 135 Wn.2d 193, 202, 955 P.2d 791 (1998).

By its plain terms RCW 82.04.290(2)(b) establishes a narrow, targeted tax exemption that shields sales agents from having the value of promotional supplies and materials “to be used” for a qualified purpose from being included as part of the agents’ “remuneration or commission.” If the Legislature had intended the exemption to apply to *amounts received* with respect to qualifying supplies and materials used in a qualifying activity, it would have used plain language to express that intent.<sup>3</sup> It did not, and the

---

<sup>3</sup> The Legislature clearly understands how to exempt amounts “received” or “derived” from qualifying business activity. See RCW 82.04.317 (exempting “amounts received”); .323 (same); .324 (same); .326 (same); .331 (same); .332 (same); .337 (same); .339 (exempting “amounts derived by”); .355 (exempting “any funds received in the course of”); .363 (exempting “amounts received”); .3651 (same); .367 (exempting “gross income

Board of Tax Appeals erred as a matter of law when it expanded the exemption beyond its plain and unambiguous terms. *See TracFone Wireless, Inc. v. Dep't of Revenue*, 170 Wn.2d 273, 281, 242 P.2d 810 (2010) (“If the statute’s meaning is plain on its face, we give effect to that plain meaning as the expression of what was intended”); *Kilian v. Atkinson*, 174 Wn.2d 16, 21, 50 P.3d 638 (2002) (“Courts may not read into a statute matters that are not in it and may not create legislation under the guise of interpreting a statute”).

b. The Board misconstrued the term “the value of” when it concluded that the exemption applies to cash payments.

In reaching its decision, the Board reasoned that the statute must apply to cash payments received as reimbursement for the purchase of demonstration product because those payments constituted “value proceeding or accruing” to Warehouse Demo from its business activities. AR 021, conclusions of law 16.1-16.3. The connection the Board drew between the terms “value proceeding and accruing” and “the value of” advertising, demonstration, and promotional supplies and materials is thin and ignores the context in which these terms are used.

---

received”); .368 (exempting “amounts derived from”); .385 (exempting “income received”); .390 (exempting “gross proceeds derived from”); .392 (exempting “amounts received”); .399 (same); .408 (exempting “income received”); .416 (exempting “amounts received”); .4201 (same); .422 (same); .4251 (same); .4261 (same); .4262 (same); .4263 (exempting “income received”); .4264 (exempting “amounts received”); .4265 (same); and .4267 (same).

The Legislature defines “value proceeding or accruing” in RCW 82.04.090 as “the consideration, whether money, credits, rights, or other property express in terms of money, actually received or accrued.” The definition was part of the original 1935 act that created the B&O tax and elucidates a key term used in the statutory definitions of “gross proceeds of sales” and “gross income of the business.” *See* Laws of 1935, ch. 180, §§ 5(f) (defining “gross proceeds of sales” as “the value proceeding or accruing from the sale of tangible personal property . . .”); 5(g) (defining “gross income of the business” as “the value proceeding or accruing by reason of the transaction of the business engaged in . . .”); 5(h) (defining “value proceeding or accruing”). The purpose for these statutory definitions was to make clear that the B&O tax applies broadly “to everything that is earned, received, paid over to or acquired by the seller from the purchaser.” *Engine Rebuilders*, 66 Wn.2d at 150. Moreover, it does not matter whether the value received, paid over to, or acquired by the seller resulted in profit. *See Pullman Co. v. State*, 65 Wn.2d 860, 867, 400 P.2d 91 (1965) (holding that amounts received as reimbursement for the actual cost of work performed were gross income of the business even though the reimbursement payments “yield[ed] no profit”). Consequently, the tax applies to all gross proceeds and all gross income “unless a specific exemption exists.” *Dot Foods, Inc. v. Dep’t of Revenue*, 185 Wn.2d 239, 245, 372 P.3d 747 (2016).

In contrast, the term “the value of” as used in RCW 82.04.290(2)(b) is intentionally narrow. The statute does not exempt all “value” that happens to qualify as gross income of the business. Rather, only the value of specified supplies and materials is exempt. This narrow reading of the statute is consistent with the language used by the Legislature and with general principles of construction that apply to tax exemption statutes. *See Budget Rent-A-Car of Washington-Oregon, Inc. v. Dep’t of Revenue*, 81 Wn.2d 171, 175, 500 P.2d 764 (1972) (the B&O tax is very broad and exemptions to the tax are “correspondingly narrow”). The Board erred as a matter of law when it mechanically equated the term “the value of” in RCW 82.04.290(2)(b) with the definition of “value proceeding and accruing” in RCW 82.04.090 without considering the difference in language, context, and purpose between the two statutes. For this reason, the Board’s decision to grant Warehouse Demo’s refund claim should be set aside.

**2. The products that Warehouse Demo purchased and gave away to Costco members were not “furnished” to it by anyone.**

The statute applies only with respect to the value of supplies and materials “furnished to an agent by his or her principal or supplier” to be used in a qualifying informational, educational, or promotional activity. The demonstration products that Warehouse Demo gave away to Costco members were not furnished to Warehouse Demo. They were purchased

by Warehouse Demo. For this additional reason, the tax exemption does not apply.

For valid business reasons, Warehouse Demo purchased from the Costco store at which the demonstration was scheduled to take place the food products and other consumer goods that it planned to give away to Costco members. AR 015 (FOF 7). This fact was not in dispute. *See* AR 124 (“WDS purchased vendor products from Costco”). Yet the Board of Tax Appeals inexplicably concluded that “[t]he food products that [Warehouse Demo] demonstrated at Costco stores . . . were, under the plain meaning of RCW 82.04.290(2)(b), ‘furnished to’ [Warehouse Demo] by the vendors.” AR 019 (COL 13). The Board’s legal conclusion is completely meritless. The phrase “furnished to an agent by his or her principal or supplier” cannot be read to mean “purchased by the agent from his or her principal or supplier” without rewriting the statute. The Board of Tax Appeals is not authorized to rewrite the statute, and is not authorized to substitute its judgment for the Legislature’s judgment.

As an initial matter, the Legislature chose to use the term “furnished” to describe when the tax exemption could apply, not the term “purchased.” This choice of language is significant in ascertaining the meaning of the statute. As our Supreme Court has recently restated, “[w]hen determining a statute’s plain meaning, [courts] consider ‘the

ordinary meaning of words, basic rules of grammar, and the statutory context to conclude what the legislature has provided for in the statute and related statutes.” *Darkenwald v. Emp’t Sec. Dep’t*, 183 Wn.2d 237, 245, 350 P.3d 647 (2015) (quoting *In re Forfeiture of One 1970 Chevrolet Chevelle*, 166 Wn.2d 834, 838-39, 215 P.3d 166 (2009)).

The Legislature did not define the term “furnish” in the statute. Where, as here, an “undefined statutory term is not technical, the court may refer to the dictionary to establish the meaning of the word.” *Washington Trucking Ass’ns v. Emp’t Sec. Dep’t*, No. 93079-1, 2017 WL 1533246 at \*11 (Wash. April 27, 2017) (quoting *Burton v. Lehman*, 153 Wn.2d 416, 423, 103 P.3d 1230 (2005)). The dictionary succinctly defines “furnished” as “provided with essentials : EQUIPPED.” *Webster’s Third New Int’l Dictionary* 924 (unabridged ed. 2002). The term connotes the idea of having something provided by another without any charge. By contrast, the term “purchase” conveys a very different idea: to “obtain . . . by paying money or its equivalent.” *Id.* at 1844. The statute plainly does not apply to supplies and materials that a taxpayer has purchased. As a result, the statute plainly does not apply here.

In addition, the statute makes sense when the term “furnished” is given its usual and ordinary meaning, but makes no sense if the term “furnished” is extended to apply to the value of supplies and materials that

are “purchased” by the agent. As discussed above, under Washington law the value of property that is received by a business in a barter transaction will be included as part of the recipient’s gross income absent an express statutory exemption. *Engine Rebuilders*, 66 Wn.2d at 151; *Time Oil*, 79 Wn.2d 146-47. Consequently, there are circumstances where the B&O tax exemption set out in RCW 82.04.290(2)(b) could logically apply, namely in a transaction where the “agent” receives qualified supplies and materials as part of his or her remuneration or commission for qualified service activity. Assuming all requirements of the statute are met, the value of the supplies and materials received in the barter transaction would be excluded from the agent’s gross income. By contrast, there is no circumstance where the statute could apply to the value of supplies and materials that have been *purchased by* an agent to be used in a qualifying activity. The value of purchased goods and services are never considered “gross income” of the business that is paying for those goods and services. Rather, it is the seller (not the purchaser) who recognizes gross income. Consequently, there is no circumstance where an agent would owe B&O tax on the value of supplies and materials that the agent purchased for use in a qualifying informational, educational, or promotional activity. Because the value of purchased supplies and materials is never treated as gross income of the business that is paying for those

supplies and materials, there would have been no reason for the Legislature to enact an exemption to cover such purchases.<sup>4</sup>

It would have been absurd for the Legislature in 1963 to amend RCW 82.04.290 to exclude from B&O tax the value of supplies and materials that were “purchased by” an agent since that value would not have been subject to the tax to begin with. A statute should be construed where possible to “avoid unlikely, absurd or strained results.” *Burton*, 153 Wn.2d at 423 (internal quotation marks and citation omitted). Here, construing the statute in light of the usual and ordinary meaning of the term “furnished” avoids absurd results, while the construction advocated by Warehouse Demo and applied by the Board of Tax Appeals does not.

Finally, if there remains any doubt as to whether the usual and ordinary meaning that the term “furnished” can conceivably include the “purchase” of supplies and materials, it would be appropriate to consult the thesaurus. *See State v. Kintz*, 169 Wn.2d 537, 547, 238 P.3d 470 (2010) (“If necessary, it is also appropriate to rely on the thesaurus when interpreting statutes”). Using this tool of statutory construction, there is no

---

<sup>4</sup> In the present case, the gross income at issue was not recognized by Warehouse Demo as a result of its *purchase* of products that it demonstrated. Instead, the gross income was recognized and recorded when Warehouse Demo received cash payment from its customers for the cost of the demonstration products. AR 016 (FOF 10.1 and 10.2). Warehouse Demo was not obligated to charge its customers for these costs of doing business. But having done so, it owed B&O tax on the amounts it received. *Pullman Co.*, 65 Wn.2d at 867.

reasonable way to construe the term “furnished” to mean “purchased.” When used as a verb, the term “furnish” is synonymous with “supply,” “provide,” or “give.” *Roget’s International Thesaurus* § 385.7, at 282 (5th ed. 1992); *id.* § 478.15, at 347.<sup>5</sup> “Purchase,” on the other hand, is synonymous with “buy.” *Id.* at § 733.7, at 515. Simply put, construing the term “furnished” to include demonstration products Warehouse Demo “purchased” from Costco would be inconsistent with basic tenets of statutory construction and basic English.

The Board of Tax Appeals erred as a matter of law when it construed the statutory phrase “furnished to the agent by his or her principal or supplier” to apply with respect to demonstration products Warehouse Demo purchased from Costco. This error of law resulted in a large and undeserved refund of B&O taxes the company correctly paid when it filed its Washington excise tax returns. The Board’s decision granting Warehouse Demo’s refund claim should be set aside.

**3. Warehouse Demo was not an agent of the Costco vendors who paid Warehouse Demo for its services.**

The Board also erred when it concluded that Warehouse Demo was an agent of the Costco vendors who paid Warehouse Demo for its

---

<sup>5</sup> A copy of the relevant pages of *Roget’s International Thesaurus* is provided in the Clerk’s Papers at CP 48-54.

services. AR 020 (COL # 14). The Board's conclusion has no support in the record.

- a. Warehouse Demo admitted it was not an agent, and no evidence contradicts that admission.

The Legislature, in enacting RCW 82.04.290(2)(b), made clear that a taxpayer claiming the exemption must be an agent. The term "agent" is used twice in the statute, first to identify the person who is furnished with the supplies and materials, and again to emphasize that the exemption applies to the "agent's remuneration or commission." A non-agent is not entitled to the tax preference.

The burden of establishing an agency relationship is on the party asserting its existence. *Hewson Const., Inc. v. Reintree Corp.*, 101 Wn.2d 819, 823, 685 P.2d 1062 (1984). An agency relationship is not presumed. *Blodgett v. Olympic Savings & Loan Ass'n*, 32 Wn. App. 116, 128, 646 P.2d 139 (1982); *see also* WAC 458-20-159 (under Washington's excise tax laws, the person claiming to be acting as agent or broker in promoting sales or in making purchases "will have such claim recognized only when the contract or agreement between such persons clearly establishes the relationship of principal and agent . . ."). It is true that an agency relationship may arise without an express understanding between the principal and agent that it has been created. Nevertheless, agency "does

not come into existence out of thin air.” *Matsumura v. Eilert*, 74 Wn.2d 362, 368, 444 P.2d 806 (1968). Rather, “[i]t arises from manifestations that one party consents that another shall act on his behalf and subject to his control, and corresponding manifestations of consent by another party to act on behalf of and subject to the control of another.” *Id.*

The element of control is the “essential” and “crucial factor” to establish agency. *Moss v. Vadman*, 77 Wn.2d 396, 403, 463 P.2d 159 (1969); *O’Brien v. Hafer*, 122 Wn. App. 279, 283, 93 P.3d 930 (2004); *Heath v. Uraga*, 106 Wn. App. 506, 514 n.9, 24 P.3d 413 (2001). Without control, the relationship is one of a buyer and seller, for example, not a principal and agent. *Uni-Com Northwest, Ltd. v. Argus Publishing Co.*, 47 Wn. App. 787, 797, 737 P.2d 304 (1987).

Here, the record lacks any evidence of an agency relationship between Warehouse Demo and the Costco vendors who paid Warehouse Demo for its services. Warehouse Demo was hired to do a job—to demonstrate products at Costco stores. Warehouse Demo sold its services to Costco vendors under the terms of an agreement it entered into with Costco. AR 673. Paragraph 2(E) of that agreement expressly provided that no agency relationship was being created, that Warehouse Demo was an independent contractor, and that the “mode, manner, methods and means used by [Warehouse Demo] or its Demonstrators in the performance of

Demos shall be under the control and direction of” Warehouse Demo. AR 675. That paragraph also specified that Warehouse Demo was “solely responsible for the direction of persons conducting Demos under [the] Agreement.” *Id.* Likewise, paragraph 3(A) of the agreement stipulated that Warehouse Demo “will be fully responsible” for all “acts, omissions, statements and representations made by any . . . persons or entities acting on [its] behalf.” AR 676. Consistent with the terms of its agreement with Costco, Warehouse Demo admitted that it was not an agent for any of the Costco vendors who it served. *See* AR 579 (“WDS is not an agent of, nor do they have a contract with, the product vendors”).

The testimony offered at the BTA hearing was entirely consistent with paragraphs 2(E) and 3(A) of the agreement between Costco and Warehouse Demo, and with Warehouse Demo’s admission that it was not an agent. Mr. Ellis, part owner and CFO of Warehouse Demo, explained to the Board that the terms of the agreement “fairly describe[d] WDS’s actions as it relates to vendors.” Tr. at 22. He also explained that Warehouse Demo hired full-time “demo managers” to oversee the in-store demonstrations. Tr. at 29. The demo managers, not the Costco vendors, would hire and train demonstrators and would decide how much of a vendor’s product should be purchased from Costco in order to “execute the demo.” *Id.* Just as important, Mr. Ellis offered no testimony regarding

any alleged oral agreement between Warehouse Demo and the Costco vendors, and offered no testimony suggesting that the vendors exercised some degree of control over Warehouse Demo's business activities. Instead, he consistently explained that Warehouse Demo itself exercised control over the demonstrations it performed. *See, e.g.*, Tr. at 19 (The company "supplied the labor and the marketing know-how to execute [the] product demonstrations").<sup>6</sup>

Because the element of control was lacking, the relationship between the Costco vendors and Warehouse Demo was that of buyer and seller of demonstration services. The Board of Tax Appeals erred as a matter of law when it concluded otherwise. *See Blodgett*, 32 Wn. App. at 128 (where there was no evidence that building owner exercised control over contractor doing remodeling work, trial court should have found contractor was not owner's agent as a matter of law).

---

<sup>6</sup> Mr. Ellis did testify that "there were demo instructions for every demo" that the company performed. Tr. at 58. Mr. Ellis did not specify who provided or received these "demo instructions." *Id.* Nevertheless, Warehouse Demo asserted in its brief filed with the Superior Court that the instructions were provided by the Costco vendors. *See* CP 92 (referring to the demo instructions as "the vendor's demo instructions"). No evidence supports the claim. To the contrary, Warehouse Demo holds itself out as employing "thoroughly trained" demonstrators that have "[f]ull-time, on-site demo supervision." AR 631. Any assertion that the Costco vendors "instructed" these trained demonstrators on how to prepare food samples or conduct an in-store demonstration is belied by the actual evidence in the administrative record.

- b. If conclusion of law 14.3 is treated as a mislabeled finding of fact, the finding that Warehouse Demo acted as an agent is not supported by substantial evidence.

The Board's "Findings of Fact" included no findings pertaining to Warehouse Demo's relationship with the Costco vendors. *See* AR 013-17 (setting out 15 findings of fact). As a result, the "substantial evidence" standard of review under the APA that applies to an adjudicative agency's findings of fact is not implicated. Instead, the issue here centers on the Board's conclusion of law that an agency relationship had been created even though Warehouse Demo had admitted that it was not acting as an agent. AR 020 (COL 14). The court reviews an agency's legal conclusions under the error of law standard. *Nord Nw. Corp.*, 164 Wn. App. at 223.

It is, however, conceivable that the Board's conclusion of law 14.3 could be treated as a mislabeled finding of fact. That conclusion provides:

When [Warehouse Demo] purchased at Costco the product a vendor had engaged [Warehouse Demo] to demonstrate at the store, the vendor was the "principal," and [Warehouse Demo] was acting as the "agent." The vendor . . . exercised control over [Warehouse Demo's] purchase of the products to be demonstrated: the vendor, not [Warehouse Demo], selected the product to be demonstrated, and the vendor authorized [Warehouse Demo] to purchase the products at Costco in amounts meeting the Costco shoppers' demands. [Warehouse Demo], as agent, acted as the vendor's substitute, purchasing the products on site.

AR 20.

Regardless of its labeling, the claim that Warehouse Demo “was acting as the ‘agent’” with respect to its relationship with Costco vendors is not supported by any substantial evidence. Importantly, Costco vendors did not exercise any control over Warehouse Demo’s purchases of products, as the Board contends. Rather, it is undisputed that Warehouse Demo employed “demo managers” that, among other things, determined how much of a particular product to purchase. Tr. at 28-29. As explained by Mr. Ellis, “one aspect to [a demo manager’s] job was buying demo products, and the reason I bring up the manager is because it took -- it was not a science, but there was a little bit of judgment on how much . . . demo product to buy to execute a demo.” Tr. at 29. This testimony is consistent with other public statements the company made when soliciting potential customers. For instance, Warehouse Demo informed potential customers that it would provide “thoroughly trained” demonstrators, “[f]ull-time, on-site demo supervision,” “[d]emo program design expertise,” and “[c]ustomized demo presentation[s].” AR 631. By employing trained demonstrators and full-time demo managers, Warehouse Demo is able to supply “the labor and the marketing know-how to execute [the] product demonstrations.” Tr. at 19.

The other facts discussed in conclusion of law 14.3 are consistent with a typical buyer-seller relationship and, as a result, do not support a

finding of agency. As the buyer of demonstration services, a Costco vendor “select[s] the products to be demonstrated” to Costco members. And as the seller of demonstration services, Warehouse Demo purchases the products needed to accomplish the demonstration. These actions involve the typical conduct of a business that sells its services to a buyer of those services, not the conduct of an agent towards its principal. Critically, as discussed above, no evidence undercuts Warehouse Demo’s admission that it was not an agent or its express agreement with Costco stipulating that Warehouse Demo was solely responsible for the mode, manner, methods and means used in conducting its demonstration service activities.

“[S]ubstantial evidence is a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order.” *Thurston County v. Cooper Point Ass’n*, 148 Wn.2d 1, 8, 57 P.3d 1156 (2002) (internal quotation and citation omitted). Here, no evidence in the administrative record supports a finding that Warehouse Demo was an agent of the Costco vendors. Rather, the undisputed evidence in the administrative record reflects that Warehouse Demo entered into a typical buyer-seller relationship. The Board’s conclusion of law 14.3, if viewed as a finding of fact, is not supported by substantial evidence and should be set aside. RCW 34.05.570(3)(e); *see also Nord Nw.*, 164 Wn. App. at 232-

33 (rejecting Board findings of fact that cash contributions made by LLC members to construction LLCs were merely “loans” and not capital contributions, concluding that no substantial evidence supported the findings).

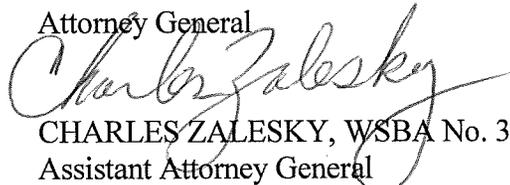
#### V. CONCLUSION

Warehouse Demo does not qualify for the “promotional materials furnished to an agent” B&O tax exemption. The Board of Tax Appeals decision to the contrary is incorrect as a matter of law and is not supported by the evidence. Accordingly, this Court should reverse the decision of the Board of Tax Appeals.

RESPECTFULLY SUBMITTED this 15th day of May, 2017.

ROBERT W. FERGUSON

Attorney General



CHARLES ZALESKY, WSBA No. 37777

Assistant Attorney General

Attorneys for Appellant

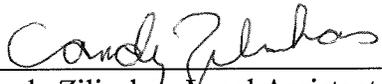
**PROOF OF SERVICE**

I certify that I served a copy of this document, via electronic mail, per agreement, on the following:

Garry G. Fujita  
Eisenhower Carlson, PLLC  
1200 Wells Fargo Plaza 1201  
Tacoma, WA 98102  
gfujita@eisenhowerlaw.com  
crochelle@eisenhowerlaw.com

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

DATED this 15<sup>th</sup> day of May, 2017, at Tumwater, WA.

  
\_\_\_\_\_  
Candy Zilinskas, Legal Assistant

**WASHINGTON STATE ATTORNEY GENERAL**  
**May 15, 2017 - 2:55 PM**  
**Transmittal Letter**

Document Uploaded: 7-500574-Appellant's Brief.pdf

Case Name: State of Washington Department of Revenue

Court of Appeals Case Number: 50057-4

**Is this a Personal Restraint Petition?**    Yes     No

**The document being Filed is:**

Designation of Clerk's Papers                      Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: \_\_\_\_\_

Answer/Reply to Motion: \_\_\_\_\_

Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_\_

Hearing Date(s): \_\_\_\_\_

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: \_\_\_\_\_

**Comments:**

No Comments were entered.

Sender Name: Candy Zilinskas - Email: [CandyZ@ATG.WA.GOV](mailto:CandyZ@ATG.WA.GOV)

A copy of this document has been emailed to the following addresses:

[chuckZ@ATG.WA.GOV](mailto:chuckZ@ATG.WA.GOV)

[gfujiita@eisenhowerlaw.com](mailto:gfujiita@eisenhowerlaw.com)

[crochelle@eisenhowerlaw.com](mailto:crochelle@eisenhowerlaw.com)