

NO. 50641-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

Aventis Pharmaceutical, Inc. and Sanofi-Aventis US, LLC,

Appellant,

v.

Washington State, Department of Revenue,

Respondent.

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APPELLANTS' BRIEF

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I. INTRODUCTION

Can a state agency add words to a tax-imposing statute to exclude an entire class of wholesalers from claiming a preferential B&O tax rate? The trial court's action allowed this to happen. The appellants,¹ Aventis Pharmaceuticals, Inc. (a.k.a. Aventisub LLC) and Sanofi-Aventis US, LLC, (hereafter collectively referred to "Sanofi") appeal the trial court's grant of summary judgment to the respondent, Department of Revenue (hereafter, "Department"), and its denial of summary judgment to Sanofi.

At issue is RCW 82.04.272, originally enacted in 1998. This statute permits a wholesale prescription drug distributor to report its Business and Occupations (B&O) tax at a lower rate than other types of wholesalers. Sanofi qualifies for the lower rate, because it meets the statute's requirements for a seller. The parties do not dispute that Sanofi qualifies as a seller under the statute. Sanofi's qualification is confirmed in the Department's Special Notice, dated October 21, 2008.

The disagreement is purely statutory, whether most of Sanofi's sales may be disqualified from RCW 82.04.272, based on the characteristics of Sanofi's buyers.

¹ Following a recent restructuring, Aventisub, LLC is the successor in interest to Aventis Pharmaceuticals, Inc.

Almost fifteen years after the legislature adopted RCW 82.04.272 the Department adopted the position that this statute only applies to wholesaler transactions if the buyer has a certain pharmacy license. This administrative position was published in an excise tax advisory dated September 25, 2013; notably this publication date fell nine months after Sanofi had already filed a refund petition. The Department denied Sanofi's refund petition, relying on its newly published position, which was not known to the public, either on the date of Sanofi's original filing or on the date of its refund claim.

The Department contends that the statute applies, on a transaction by transaction basis, only when a wholesaler sells directly to a customer that possesses either a pharmacy facility license or a non-residential pharmacy license (hereinafter a "Pharmacy License"). This requirement is not featured anywhere in the language of the statute. There is no mention anywhere in the statute of a Pharmacy License. Rather, RCW 82.04.272 makes reference to the "pharmacy quality assurance commission." This commission is authorized to issue not only such a Pharmacy License, but also to issue licenses to wholesalers. Pursuant to WAC 246-879-020 (6) the commission issues licenses wholesalers.² Thus, it is conceivable that a retailer may hold either a Pharmacy License OR a wholesaler license

² See footnote 8 for more explanation.

issued by the commission. Consequently, a wholesaler's sale to another wholesaler is within the scope of the statute. The Department, however, contends that the wholesaler's customer must hold a Pharmacy License. The Department's assertion is not supported by the plain language of the statute.

The Department (1) mistakenly assumes that the statute's reference to the "pharmacy quality assurance commission" is synonymous with a Pharmacy License; (2) that the mention of the pharmacy quality assurance commission, which appears only once in the statute and qualifies the *seller*, should be deemed to appear a second time to also modify the *buyer*; (3) that the only sales eligible for the favorable rate in the statute are those made directly to retailers holding such a Pharmacy License; and (4) that the lower rate available under the statute applies on a transaction by transaction basis, rather than attaching to the taxpayer.

RCW 82.04.272 provides as follows with emphasis added to the critical wording to be discussed:

Tax on warehousing and reselling prescription drugs.

(1) *Upon every person* engaging within this state in the business of warehousing and reselling drugs for human use pursuant to a prescription; *as to such persons*, the amount of the tax shall be equal to the gross income of the business multiplied by the rate of 0.138 percent.

(2) For the purposes of this section:

(a) "Prescription" and "drug" have the same meaning as in RCW 82.08.0281; and

(b) "Warehousing and reselling drugs for human use pursuant to a prescription" means *the buying* of drugs for human use pursuant to a prescription from a manufacturer or another wholesaler, *and reselling* of the drugs to persons selling at retail or to hospitals, clinics, health care providers, or other providers of health care services, *by a wholesaler or retailer* who is registered with the federal drug enforcement administration and licensed by the pharmacy quality assurance commission.

RCW 82.04.272(1) applies to the person, not the transaction. The statute identifies "who" will benefit, namely specific categories of sellers (*i.e.*, both "a wholesaler and a retailer"). The statute states expressly that the beneficial rate attaches to "*every person* engaging within this state in the business of warehousing and reselling drugs for human use pursuant to a prescription; *as to such persons*, the amount of the tax shall be equal to the gross income of the business multiplied by the rate of 0.138 percent" (emphasis added). The Department, however, seeks to apply the statute to individual transactions. This is contrary to the statute's express language. The "person" either qualifies or not. It is the nature of the wholesaler's "business" of transacting in prescription drugs that establishes eligibility.

The legislature did not draft the statute to provide selective relief on specific transactions.

The statutory protection contemplates both the “buying” and “reselling” of pharmaceuticals pursuant to a prescription, indicating that there will be a series of covered transactions all linked by the end goal of filling a prescription. Thus, when a drug is properly dispensed to a patient with a prescription, all the participants in the distribution channel should be covered by the statute. In the Department’s view, however, only the sales made directly to a retail pharmacy should qualify. Specifically, the Department seeks to exclude wholesaler to wholesaler transactions as well as sales to persons selling “at retail” but do not hold a Pharmacy License from the benefit of RCW 82.04.272.

The statute, however, includes wholesaler to wholesaler transactions, where the ultimate customers are those identified (retailers, hospitals, clinics, health care providers and other providers of healthcare services). It suffices if these are indirect customers of the first wholesaler. The statute contemplates that wholesalers will be covered if they engage in the activity of “buying” and “reselling” prescription drugs through legal channels. The word “buying” in the statute is superfluous under the Department’s reading. Rather, its import is to extend the protection to the general activity of wholesaling. The joinder of the word “buying” with

the term “reselling” implies that there could be multiple transfers necessary to bring drugs to patients. Thus, wholesaler to wholesaler transactions are within the statute’s scope.

RCW 82.04.272 is clearly intended to apply to all the actors in the chain of distribution, starting with the manufacturer all the way through to the customer. This is evident from the language in the beginning of the statute, which defines the covered activity as “the buying of drugs for human use *pursuant to a prescription* from a manufacturer or another wholesaler, and reselling of the drugs to persons selling at retail or to hospitals, clinics, health care providers, or other providers of health care services...” It is self-evident that no wholesaler would present the manufacturer with an actual prescription. Rather, the placement of the word “prescription” early in this sentence signals the broad intent of the statute to cover all the actors involved in the distribution, ending with the fulfillment of a prescription.

The Department argues that only those sales made by a wholesaler to a retailer with a Pharmacy License enjoy the favorable rate. Thus, the Department’s view, those sales made by a wholesaler to another wholesaler or to a person “selling at retail” without a Pharmacy License are not. This conclusion is illogical. The Department reads the statute in a manner that replaces the words “licensed by the pharmacy quality

assurance commission” with holds a “Pharmacy License.” This is not appropriate, as discussed above, because the pharmacy quality assurance commission also licenses wholesalers. Accordingly, retailers holding a wholesaler license from the commission would also meet the statute’s requirement. The Department applies its Pharmacy License requirement to the earlier mention of the word “retailer,” although it does not appear there. In that instance, the word “retailer” is included in the list of customers who may ultimately purchase the product.

The taxpayer disputes that (1) the Pharmacy License requirement can be substituted for the words pharmacy assurance commission (the commission also licenses wholesalers); (2) the Pharmacy License requirement applies to a prior mention of the word “retailer” (applying it to customers in addition to sellers); (3) these customer “retailers” must be direct customers of the wholesaler. Rather they may be indirect customers, who purchased from a second wholesaler (i.e., the wholesaler that purchased from the manufacturer should enjoy the beneficial rate on its resale to the next wholesaler, which is the one with the customer identified in the statute).

The natural understanding of this statute is that wholesaler to wholesaler transactions should enjoy the lower rate as an integral part of the chain of sales that bring prescription drugs to patients. This rate is not

based on the transaction, but rather to the person who is in the business of distributing prescription drugs.

In fact, the statute itself specifically contemplates sales between two wholesalers. This is why it states that an eligible wholesaler may buy from either a manufacturer or “from *another* wholesaler.” The Department’s contention that wholesaler to wholesaler transactions are excluded cannot be reconciled with this express language. The legislature specifically contemplated the possibility that a wholesaler may transact with another wholesaler. The statute cannot be interpreted in a manner that ignores the phrase “another wholesaler.” As explained by our Supreme Court, every word in a statute must be given meaning.

After argument, the trial court agreed with the Department and concluded that the statute applies to the exclusion of wholesalers selling to other wholesalers (or selling to retailers without a Pharmacy License). The court determined that the beneficial rate only applies to wholesalers selling *directly* to retailers with a Pharmacy License. Specifically, the trial court held that Sanofi’s sales to three wholesale distributors failed “to meet all of the requirements of RCW 82.04.272” and do not qualify for the reduced rate.

The statute contains no language to support the limitation advanced by the Department, and thus, the trial court erred when it granted

summary judgment to the Department and denied summary judgment for Sanofi.

II. ASSIGNMENT OF ERROR

Assignment of Error

On April 14, 2017, the trial court erred by granting summary judgment to the Department and denying summary judgment for Sanofi.

Issues Pertaining to Assignment of Error

- a. Did the trial court err when it determined that the statute was unambiguous but appeared to have allowed the Department to add the words “pharmacy facility license or non-residential pharmacy license” to the statute?
- b. Did the trial court err when it determined that the statute was unambiguous?
- c. Does the trial court’s interpretation violate the due process clause, disregard legislative intent and violate the equal protection clause, because it treats members of the same class of wholesalers differently?

III. STATEMENT OF THE CASE

- a. What the trial court considered and its decision.

On April 14, 2017, the parties moved for cross-motions for summary judgment. CP 32 and 34. The facts of the case were submitted based upon the following: Fact Stipulation (CP 36-43), Stipulated Exhibits (CP 44-78), and the Declaration of Gilbert Brewer (CP 162-181). Each party filed supporting memorandums of their respective motions for summary judgment (CP 79-95 and 96-119) as well as responses (CP 120-138 and CP 139-181) and replies (CP 182-192 and CP193-201). The trial court considered the entire record and the arguments presented on April 14, 2017 and issued its order at the conclusion of the hearing. (CP 202-203).

b. Sanofi's business activity

Sanofi engages in the pharmaceutical business, specifically purchasing, warehousing, and selling prescription drugs for human use and is registered with the United States Federal Drug Enforcement Agency and the Washington State Pharmacy Quality Assurance Commission (formerly known as the State Board of Pharmacy, see footnote 8). CP 39, ¶¶ 16, 17, 18, 22, and 23. The drugs that Sanofi sells are "prescription" that means that they can only be dispensed pursuant to licensed practitioner's written or oral order. CP 39, ¶ 20. Sanofi stores its products in a warehouse pending distribution to other wholesalers and to retailers. CP 39, ¶ 21.

Sanofi's three key buyers are Amerisource Bergen Corporation ("AmerisourceBergen") (CP 39, ¶ 24), McKesson Corporation ("McKesson") (CP 41, ¶28), and Cardinal Health Corporation ("Cardinal") (CP 42, ¶¶ 32). Like Sanofi, they are properly registered with the appropriate federal and the pharmacy quality assurance commission. CP 40, ¶¶ 25 and 27; CP 42, ¶¶ 29 and 31; and CP 42, ¶¶ 34 and 36. However, none of the three buyers held either a pharmacy facility or a non-resident pharmacy license. CP 41, ¶ 26; CP 42, ¶ 30; and CP 42, ¶ 35.

Although the three key purchasers did not hold a pharmacy facility license or non-residential pharmacy license, they did make retail sales as explained in each company's 10-K annual filings with the United States Securities and Exchange Commission. CP 39, ¶ 24.a.; CP 41, ¶ 28.a. and b.; and CP 42, ¶ 33.

AmerisourceBergen's 10-K states that it sells to "acute care hospital and healthcare systems," physicians' offices and clinics, skilled nursing facilities, assisted living centers and patients with chronic illnesses and to long-term care and workers' compensation patients. CP 39-40, ¶ 24.a. Similarly, McKesson states that it sells to "institutional providers (including hospitals, integrated delivery networks and long-term care providers)." CP 41, ¶ 28.b. Additionally, both AmerisourceBergen and

McKesson stated in declarations filed in another lawsuit³ that they reported as retailers to the Washington State Department of Revenue. CP 40, ¶ 24.b. and CP 41, ¶ 28.c.

Cardinal similarly stated that it sells to “hospitals and alternate care providers”. CP 42, ¶ 33.

The statute, however, does not limit the protection to those wholesalers selling directly to retailers. It requires only that the chain of sales, starting with the manufacturer ultimately culminate in a sale to a retailer (e.g., pharmacy), hospital, or other proper dispensing agent with the ability to fulfill prescription for a patient. Thus, it is the general activity of buying and reselling that is covered. It is “...the buying of drugs from a manufacturer *or another wholesaler*, and *reselling* of the drugs...” that is protected. Although a retailer, hospital or other dispensing agent must be the final link in the chain, there is no requirement in the statute that these be the direct customer of the wholesaler. In fact, the statute specifically contemplates that instead the wholesaler’s customer could be “another wholesaler.” In Sanofi’s case, each of its key customers, McKesson, AmerisourceBergen and Cardinal are wholesalers. As to some transactions, they are also retailers.

³ *Abbott Laboratories, Inc. v. State of Washington, Department of Revenue*, Thurston County Superior Court, No. 13-2-01643-2. CP 72-74 and 76-78. Sanofi understands that the case was settled.

Regardless of their status, whether they are predominately a wholesaler or retailer or both, the point is they have the authority to distribute prescription drugs. The statute affords wholesalers, legally transacting in prescription drugs a lower B&O tax rate when their customers and their customers' customers hold the proper registrations and licenses to deal in prescription drugs, which McKesson, AmerisourceBergen and Cardinal clearly do.

c. Sanofi's analysis of its activities

RCW 82.04.272(2)(b) provides that Sanofi's products must be bought and resold in such a manner that the ultimate customers will be either "persons selling at retail" or "hospitals, clinics, health care providers, or other providers of health care services." In other words, the drug must end up in the custody and possession of a buyer who can fill the prescription contemplated in the beginning of the statute. Nothing in the statute says that Sanofi's direct customer must be a retailer. It is, however, necessary that the indirect customer be a retailer (e.g., pharmacy), hospital, clinic, health care provider or other provider of health care services.

Nonetheless, Sanofi has demonstrated that its key customers do make retail sales as established in the preceding section. There has been no contention by the Department that the buyers do not make sales at

retail. Even under the Department's narrow reading, Sanofi contends that the statute needs nothing more than proof that the distributors sell at retail. The statute applies and Sanofi is entitled to the lower rate.

d. The Department's analysis of Sanofi's activities

The Department does not dispute what Sanofi does or what the buyers do. The dispute is whether the three distributors must have a Pharmacy License. In 2008, 10 years after the legislature adopted RCW 82.04.272, the Department issued a Special Notice, explaining how to claim a refund when a seller qualified for the rate under RCW 82.04.272, stating:

Who may report under the lower B&O tax rate?

Businesses engaged in warehousing and reselling drugs for human use requiring a prescription may be eligible for the lower B&O tax rate (0.138%). In order to qualify for the lower B&O tax rate, the business must meet all of the following conditions:

- buy prescription drugs for human use from a manufacturer or another wholesaler and warehouse these prescription drugs
- to resell these drugs to persons selling at retail or to hospitals, clinics, health care providers, or other health care service providers
- be a wholesaler or retailer registered with the federal Drug Enforcement Administration and licensed by the State Board of Pharmacy

CP 66-67. It said nothing about what qualifications their buyers must meet.

Sanofi requested its refunds on December 26, 2012. CP 49, 55, and 61 (see second full paragraph). Conveniently for the Department, it

issued Excise Tax Advisory 3180.2013 (ETA 3180)⁴ (CP 69-70) on September 25, 2013⁵ while the Sanofi refund was pending. The refunds were substantially denied nine months later on July 17 and 18 of 2014. CP 48, 54, and 60. In this advisory, the Department reiterated the requirements in the 2008 Special Notice, but added requirements that a buyer must possess, stating:

Buyer Requirements

A seller qualifies for the preferential B&O tax rate if the seller satisfies all the requirements above and resells the prescription drugs directly to a buyer who is:

- A retailer with a pharmacy facility license or non-residential pharmacy license issued by the Department of Health under RCW 18.64.043 or RCW 18.64.370, respectively; or
- A hospital, clinic, health care provider, or other provider of health care services.

CP 70. The Department admits that the licensing requirement is not found in the statute. Instead, after consulting with Department of Health, it apparently polled the Department's divisions to determine what "persons selling at retail" meant:

⁴ Excise Tax Advisories (ETA) are not adopted pursuant to the Administrative Procedure Act with respect rule adoption under Chapter 34.05 RCW. Consequently, ETAs do and cannot have the binding the force of law under RCW 82.32.300.

⁵ According to the Department, the meaning of "persons selling at retail" arose with one taxpayer and the Department determined that it was necessary to issue ETA 3180. CP 167, lines 1-5. It is curious that in 15 years since the statute was first enacted, 2013 was first prescription drug wholesale distributor to raise the issue.

In December 2012, ITA's Assistant Director, Alan Lynn, and Tax Policy Specialist, Joseph Vidal, consulted with the Washington State Department of Health regarding licensing requirements needed by retailers of prescription drugs. They learned that one of two licenses is required, a pharmacy facility license or a nonresidential pharmacy license under Chapter 18.64 RCW. ITA took the information to the Department of Revenue's other divisions, and there was a consensus that having one of these two licenses met the buyer requirement in RCW 82.04.272 for "persons selling at retail."

CP 166, lines 18-25. There doesn't appear to have been much legal analysis to arrive at the licensing requirement; instead, it appears to have been the convenient and most popular way within the Department to define the words.

In 2014, the Department relied on the 2013 ETA 3180 to reject a majority of the refund, stating:

Guided by RCW 82.04.272 and ETA 3180.2013, we reviewed the pertinent records and found Sanofi met the seller requirements as discussed above. ... The majority of the denied refund request is based on sales to wholesale distributors, and not directly to retailers, hospitals, clinics, health care providers, or other providers of health care services.

CP 51, 57, and 63.

The Department contends that Sanofi is not selling to retailers, but rather to other distributors or wholesalers. CP 103, lines 13-15. To be clear, the Department defines "selling at retail" as *only* sales by retailers that hold Pharmacy Licenses based on ETA 3180. It also contends that Sanofi's interpretation expands the coverage of RCW 82.04.272, because

Sanofi contends that it need only demonstrate that the buyers sell at retail.
CP 104-106.

IV. SUMMARY OF ARGUMENT

The issue is whether RCW 82.04.272 excludes Sanofi from a qualified prescription drug wholesale distributor if it distributes prescription drugs to buyers that do not meet the Department's definition of "selling at retail." Sanofi contends that the statute is unambiguous and it does not limit under what licenses or permits the retailer must hold to be a retailer; there is no basis to add the limitation in ETA 3180 that the retailer must hold "a pharmacy facility license or non-residential pharmacy license."

Sanofi meets every requirement under RCW 82.04.272; it belongs to a single class of wholesale prescription drug distributors (the statute itself makes no distinctions among wholesalers, based on the customers served. The Department agrees that Sanofi meets the seller's requirements. Contrary to the Department's position, Sanofi contends that it only needs to demonstrate that its buyers (whether direct or indirect) are selling at retail. Again, the record supports that they are. The dispute is whether a member of the class of wholesale prescription drug distributors determines its tax classification by whether the buyers hold a Pharmacy License. There are no words in the statute that creates two classes of

wholesaler or imposes such a requirement to hold a Pharmacy License. The Department's interpretation (and the one adopted by the trial court) means that after they acquire the drugs, two buyers can lawfully make sales at retail, but only the buyer that holds Pharmacy License is a qualified buyer. Thus, the wholesaler's tax classification is uncertain and depends entirely upon contingencies outside its control.

If the trial court effectively found, with its rulings, that RCW 82.04.272 was ambiguous and needed additional words (e.g., the licensing language) to determine the legislative intent, then a tax-imposing statute must be construed in favor of the taxpayer. Sanofi also contends that the construction that the Department and the trial court give to the statute may violate the due process clause (determining Sanofi's tax status based upon actions of others over whom Sanofi has no control).

For these reasons, Sanofi appeals the trial court's grant of the Department's motion for summary judgment and the court's denial of Sanofi's motion for summary judgment.

V. ARGUMENT

- a. RCW 82.04.272 is unambiguous and Sanofi meets every requirement for the statute to apply to it.

As a preliminary matter, when reviewing a statute, the courts have followed certain interpretive principles and they apply here as well. As briefly stated by the Washington Supreme Court:

We review questions of statutory interpretation de novo. *State v. J.P.*, 149 Wash.2d 444, 449, 69 P.3d 318 (2003). In reviewing a statute, we give effect to the legislature's intent, primarily derived from statutory language. Where statutory language is plain and unambiguous, we ascertain the meaning of the statute solely from its language. We read an unambiguous statute as a whole and must give effect to all of its language.

Dot Foods, Inc. v. Washington Dep't of Revenue, 166 Wn.2d 912, 919, 215 P.3d 185, 188 (2009).

The statute imposes a selling gross receipts tax at the rate of .0138% on the business on “warehousing and reselling drugs for human use pursuant to a prescription.” RCW 82.04.272(1). That term is statutorily defined as:

... the buying of drugs for human use pursuant to a prescription from a manufacturer or another wholesaler, and reselling of the drugs to persons selling at retail ... by a wholesaler or retailer who is registered with the federal drug enforcement administration and licensed by the pharmacy quality assurance commission.

RCW 82.04.272(2)(b). Parsing this statute, the taxpayer (seller) claiming the reduced rate must be a “wholesaler or retailer” that is registered by both the federal and state government’s pharmacy quality assurance commission. Here, Sanofi is the seller. Sanofi is registered with the

United States Federal Drug Enforcement Agency. CP 39, ¶¶ 17 and 18. It is also registered with the Washington State Pharmacy Quality Assurance Commission. CP 39, ¶¶ 22 and 23. The Department does not dispute that Sanofi qualifies as a qualified seller. CP 51, 57, and 63 (see first sentence of first full paragraph). These licensing and registration requirements are specific to the *seller*, although the Department affirmatively adds the same requirements for retail customers purchasing from the wholesaler.

Next, the statute contemplates that the drug should be resold. The resale may be either from wholesaler to wholesaler, as specifically contemplated by the words “from another wholesaler” or by a wholesaler to a retailer, hospital, clinic, health care provider, or other provider of health care services.” Contrary to the Department’s contention, these buyers do not have to be the direct purchaser. Again, a wholesale to wholesale transaction may precede these transfers and should be covered too. The statute simply contemplates that the chain of sales must culminate in a sale “to persons selling at retail” or to a hospital, clinic, health care provider or other provider of health care services. Sanofi’s buyer does not have to be a retailer. It is sufficient if Sanofi’s indirect customer is a retailer, hospital, clinic, health care provider or other provider of health care services. Since McKesson, AmerisourceBergen and Cardinal each in turn sold to customers of this type (retailers,

hospitals, clinics, health care providers or other providers of health care services), the prior sales in the chain, starting with the manufacturer should all be eligible for the lower rate of tax.

Although Sanofi contends that its buyers do not necessarily need to be selling at retail, even under the Department's strict reading of the statute, there is uncontroverted evidence that AmerisourceBergen, McKesson, and Cardinal themselves sold at retail. First, with respect to AmerisourceBergen (January 2005 through December 2012) and McKesson (January 2005 through December 2012), there are two declarations from company representatives who have stated under the penalty of perjury that each of these companies filed Washington State Combined Excise Tax Returns, reporting income as a retailer. CP 72-73 and 76-77.

Second, with respect to all three, they have filed annual forms 10-K with the United States Security and Exchange Commission that they sell at retail. In the case of AmerisourceBergen, the company's 10-K states that it sells to "alternate site customers (physicians' offices and clinics, skilled nursing facilities ... assisted living centers and patients with chronic illnesses)," "acute care hospitals," and "long-term care and worker's compensation patients." CP 39, ¶24. In the case of McKesson, its 10-K states that it sells to "institutional providers (including hospitals,

integrated delivery networks and long-term care providers).” CP 41, ¶28.b. Finally, in the case of Cardinal, its 10-K states that it sells to “hospitals and alternate care providers.” CP 42, ¶ 33.

Why are identifying AmerisourceBergen, McKesson and Cardinal’s purchasers important with respect to the Department’s analysis? Because the facts demonstrate that these three distributors were selling at retail. In fact, the Department’s rule mandates that conclusion.

WAC 458-20-168 provides:

(7) Sales of tangible personal property.

Retailing B&O tax applies to sales of tangible personal property sold and billed separately from the performance of personal or professional services by hospitals, nursing homes, assisted living facilities, adult family homes, and similar health care facilities. This includes charges for making copies of medical records. The seller must collect retail sales tax from the buyer and remit the tax to the department unless the sale is specifically exempt by law.

- (a) Retailing B&O and retail sales taxes do not apply to charges to a patient for tangible personal property used in providing medical services to the patient, even if separately billed. Tangible personal property used in providing medical services is not considered to have been sold separately from the medical services simply because those items are separately invoiced. These charges, even if separately itemized, are for providing medical services.

- (b) For example, when a hospital charges a patient for drugs physically administered by the hospital staff, the charges to the patient are subject to B&O tax under the appropriate tax classification as shown in the table in subsection (2)(a) of this rule based on the hospital making the charge [none of those classifications is retailing]....

This rule states two legal results. First, if hospitals, nursing homes, assisted living facilities, adult family homes, and similar health care facilities (collectively referred to “Medical Facilities”) make sales of tangible personal property separately from professional services, then they are not consumers and responsible for collection sales tax from the patients.⁶ They are reselling at retail to the patients.

More importantly, the second legal result is that if the tangible personal property (e.g., prescription drugs) is used by the facilities in providing the medical service, then the Medical Facilities are not reselling the prescription drugs to the patients. Instead, they made retail purchases of prescription drugs from AmerisourceBergen, McKesson and Cardinal and used the prescription drugs as part of the medical service.⁷ *And it*

⁶ "Consumer" means the following: (1) Except as provided otherwise in this section, any person who purchases, acquires, owns, holds, or uses any article of tangible personal property ... RCW 82.04.190.

⁷ This is the same principle found generally for service businesses. WAC 458-20-224(6). This is why lawyers pay sales tax on the paper and ink they buy and use in providing legal services and why they are not required

logically follows that when these Medical Facilities bought the prescription drugs from AmerisourceBergen, McKesson and Cardinal, these three distributors were making “sales at retail.”

Further, under WAC 458-20-168(7)(a), there is no mention that the seller must hold any Pharmacy License to qualify the purchase as a retail sale.

There is nothing in RCW 82.04.272 that describes what kind of retailer is a qualified buyer. There is nothing in the statute that requires the retailer to hold a Pharmacy License. To add those words now would imply that the legislature does not know how to place limits in a statute. Indeed, the legislature demonstrated that it knows exactly how to limit words in the statute. Here, the legislature provided that the qualified seller is required to hold a license issued by the pharmacy quality assurance commission. It is telling that the legislature did not modify the phrase “persons selling at retail” by adding the ETA 3180 requirements (that such retailer must hold a “pharmacy facility license or non-residential pharmacy license”).

The reference in RCW 82.04.272(b) to the “pharmacy quality assurance commission” does not equate to holding a “Pharmacy License.”

to collect sales tax from their clients on for the wills or pleadings are drafted.

It would be incorrect to draw this conclusion, because the pharmacy quality assurance commission has the power to license wholesalers as well. WAC 246-879-070(6).⁸

Thus, there is no dispute of the facts. Sanofi met the “seller’s requirements.” The dispute is whether Sanofi only qualifies for the reduced rate of tax on those sales made directly to retail customers that hold a Pharmacy License, or whether the statute is broader and covers sales to those selling at retail. Sanofi argues for broad inclusion because it is in the “business” of “buying” and “reselling” prescription drugs through legal channels as a properly licensed and registered wholesaler. Sanofi should be eligible if its customers are other wholesalers that are either (1) themselves registered as retailers; or (2) selling to retailers, hospitals, clinics, health care providers and other health care service providers. In this latter instance, Sanofi counts these buyers as indirect customers in satisfaction of the statute.

With respect to Issues Pertaining to Assignment of Error II. a. and b., Sanofi contends that the trial court erred when it declared the statute to

⁸ The commission draws this power from RCW 18.64.005, according to the rules statement citing its statutory authority. The rules’ various references to Board are likely because they have not been updated. According to the Code Reviser’s note: “Chapter 19, Laws of 2013 changed ‘state board of pharmacy’ to ‘pharmacy quality assurance commission.’” *See* Code Reviser’s Note following RCW 82.64.350.

be unambiguous but allowed the Department to add words to what it meant to be “making sales at retail.” The trial court further erred when it granted the Department’s motion for summary judgment and denied Sanofi’s motion for summary judgment.

1. RCW 82.04.272 appears to have a redundancy, but that is not enough to adopt the Department’s vision of the statute.

At the hearing, the trial court asked Sanofi what it should make of the statutory language “reselling of the drugs to persons selling at retail or to hospitals, clinics, health care providers, or other providers of health care services.” VR 13, lines 13-20. Sanofi infers that the court wondered why the statute would say “selling at retail” and then juxtaposed a list of sales that WAC 458-20-168(7)(a) defines as retail sales to hospitals, clinics, healthcare providers or other providers of health care services.

Does that mean that the statute is redundant and additional words limiting the meaning of “persons selling at retail” are necessary to eliminate the redundancy? The answer is no; it is not necessarily redundant, because “selling at retail” is broader concept than the latter phrase describing sales to certain types of purchasers, such as hospitals. When asked by the trial court, Sanofi explained that there can be retail sales that may not be to the Medical Facilities listed in the statute. For example, sales to the federal government such as to the Department of

Defense or the Bureau of Prisons are examples. VR 13, lines 24-25 through VR 16, lines 1-7. Additionally, although not specifically mentioned at the hearing with respect to federal government agencies, the retail sales tax does not apply to retail sales to the United States government.⁹ Similarly, the retail sales tax does not apply to retail sales to certain instrumentalities of the federal government.¹⁰ For example, the American Red Cross is such an instrumentality. 36 U.S.C. § 300101. Also, not mentioned at the hearing, but the retail sales tax does not apply to retail sales to Indian tribes. WAC 458-20-192(5)(a)(1). Thus, there are many examples when a retail sale can occur but not to one of the Medical Facilities.

Under these statutes and rules, the Department of Defense, Bureau of Prisons, the American Red Cross and Indian tribes are not “hospitals, clinics, health care providers, or other providers of health care services.” However, they can make retail purchases for their internal uses. If this

⁹ “The tax levied by RCW 82.08.020 shall not apply to sales which the state is prohibited from taxing under the Constitution of this state or the Constitution or laws of the United States.” RCW 82.08.0254.

¹⁰ “The tax levied by RCW 82.08.020 shall not apply to sales to corporations which have been incorporated under any act of the congress of the United States and whose principal purposes are to furnish volunteer aid to members of armed forces of the United States and also to carry on a system of national and international relief and to apply the same in mitigating the sufferings caused by pestilence, famine, fire, floods, and other national calamities and to devise and carry on measures for preventing the same.” RCW 82.08.0258.

court equates the universe of retail sales with sales to only certain purchaser types (e.g., the Medical Facilities), then it will leave out other retail purchasers that are not one of the specifically identified purchasers. Consequently, the statute is not redundant.

Adopting the trial court's interpretation means that a person selling at retail to individual consumers that buy from a pharmacy would be qualified buyer for Sanofi but a person selling at retail to the federal government, instrumentalities of the federal government or Indian tribes would not be a qualified buyer. There is nothing in RCW 82.04.272 that suggests that should be the result or that the legislature intended to create two classes of distributors within the single class of wholesale prescription drug distributors. It was error for the trial court to do so.

- b. If RCW 82.04.272 is ambiguous, then the court should have considered legislative history and should avoid an interpretation that would raise constitutional issues.

Both parties contend that the statute is plain on its face and is unambiguous. Only Sanofi's interpretation applies the words that appear in the statute, and thus, Sanofi took the position that the statute was unambiguous. Because the lower court found that the statute was unambiguous, it allowed the Department to add qualifying words to what it meant to be a "person selling at retail," it did not address Sanofi's additional arguments with respect to ambiguous statutes.

Sanofi argued in the alternative that if the trial court found an ambiguity, then certain principles should be followed in construing RCW 82.04.272. CP 86-91. It explained that tax-imposing sections should be construed against the state; the statute should not be construed to reverse the legislature's intended benefit; and the statute should not be construed in a fashion that could be constitutionally infirm. For the reasons that follow, with respect to Issues Pertaining to Assignment of Error II.c., Sanofi contends the trial court erred when it adopted two classes of wholesale prescription drug distributors.

1. If RCW 82.04.272 is ambiguous, then the court should have construed the statute against the state.

RCW 82.04.272(2)(b) is tax-imposing section; it defines and imposes the B&O tax on wholesale prescription drug distributor activities. Tax exemptions, exclusions and deductions are construed against the taxpayer. *Lacey Nursing Ctr., Inc. v. Dep't of Revenue*, 128 Wn.2d 40, 49, 905 P.2d 338, 343 (1995). However, a corollary statutory rule of construction is that tax-imposing sections are construed in favor of the taxpayer. The Washington Supreme Court held:

What the department wishes to do in this case is to impute contract interest to Weyerhaeuser, and then impose a higher tax rate on that interest. The controlling statutory language as it now exists simply provides no authority for such imposition. We are guided in this instance by ordinary rules of statutory construction. Any doubts

as to the meaning of a statute under which a tax is sought to be imposed will be “construed against the taxing power.” *Duwamish Warehouse Co. v. Hoppe*, 102 Wash.2d 249, 254, 684 P.2d 703 (1984); *Mac Amusement Co. v. Department of Rev.*, 95 Wash.2d 963, 966, 633 P.2d 68 (1981).

Weyerhaeuser Co. v. State Dep't of Revenue, 106 Wn.2d 557, 565–66, 723 P.2d 1141, 1146 (1986). In that case, the Department enlarged the definition of “interest” in a WAC 458-20-109 to allow wholesaling and service tax-imposing sections of RCW 82.04.270 and RCW 82.04.290 to tax “imputed” interest. The court found that the statute at issue was a tax-imposing section and it construed the tax-imposing section against the state. It found nothing in the statute that allowed the term “interest” to be modified by “imputed”.

In this case, the issue is not different from *Weyerhaeuser*. Here, the Department is adding the words “pharmacy facility license or non-residential pharmacy license” --- that do not appear in the statute --- to modify the “persons selling at retail.” The Department thereby seeks to restrict the type of sales eligible for the reduced tax rate. Like the *Weyerhaeuser* court, that said it was impermissible “to impute contract interest to *Weyerhaeuser*” and then impose a higher tax rate on that interest” (the trial court should not be allowed to add words to the statute) “and then impose a higher tax rate on that interest.” The trial court here should not have construed the statute to create two classifications of wholesale prescription drug distributors that allowed the state to impose a

higher rate of tax on an administratively made class of wholesale prescription drugs distribution.

Sanofi anticipates that the Department will dispute this principle, arguing that this statute is a tax preference and should be construed like an exemption, exclusion, or deduction that is narrowly construed against the taxpayer. CP 108, lines 4-5. However, that argument has been rejected by our Supreme Court. In *Agrilink* the Supreme Court rejected that a tax-preferred tax-imposing section should be treated like an exemption, exclusion or deduction¹¹ in footnote 1:

Although not essential to our holding, we note that, were we to conclude that RCW 82.04.260(4) is ambiguous, *Agrilink* would be entitled to the general presumption that ambiguous tax statutes must be construed in favor of the taxpayer. *Ski Acres*, 118 Wash.2d at 857, 827 P.2d 1000.

Agrilink Foods, Inc. v. State, Dep't of Revenue, 153 Wn.2d 392, 399, 103 P.3d 1226, 1230 (2005).

2. If RCW 82.04.272 is ambiguous, then the court should look at the legislative history to determine legislative intent.

RCW 82.04.272 contemplates that sales by a pharmaceutical wholesaler should be subject to a reduced rate of B&O tax, likely with the expectation that the cost savings associated with the reduced rate would be

¹¹ The Department made this argument at the Court of Appeals when it heard the *Agrilink* case.

passed along to consumers. If, however, the statute is interpreted in a manner that denies the lower rate to transactions between wholesalers, then that objective would be defeated. This result is contrary to public policy which would favor a reduced overall B&O tax cost associated with bringing drugs to consumers.

If read holistically, the statute would accomplish this objective. It contemplates that the chain of sales that originates with the manufacturer and ends with the dispensing agent's sale to the consumer should be eligible for the beneficial rate. Thus, the starting point of the statute is the purchase "from a manufacturer or another wholesaler" and the ending point is the sale to a dispensing agent that sells or administers the drugs to patients. The initial reference to the manufacturer and to other wholesalers would be superfluous unless intended to demarcate the scope of the benefit, namely to extend it to the entire chain of actors who bring the manufacturer's product to the patient. The statute contemplates in subsection (1) that the protected classes are those who "are in the business of warehousing and reselling drugs." To exclude from this protected class those wholesalers who sell to other wholesalers (*i.e.*, Sanofi selling to Amerisource, McKesson, and Cardinal) in the chain, seems contrary to the intent of the statute which covers the entire sales cycle from manufacturer to consumer.

Further, the statute itself contemplates that there may be one or more sales between wholesalers before a product reaches the consumer. It states that the taxpayer (*i.e.*, a pharmaceutical wholesaler) may acquire the product either from a manufacturer, or “*from another wholesaler.*” If the legislature had wished to exclude sales that take place between two intermediary wholesalers, then why would it expressly point to this permutation of the facts when describing the chain of transactions eligible for the benefit?

Manufacturers, when they resell, they leave the B&O tax classification of manufacturing and enter the tax classification of wholesaler. A manufacturer does not sell; it manufactures and is taxed on that activity, not selling activity. RCW 82.04.110, RCW 82.04.120 and RCW 82.04.240. When it sells its manufactured product, it becomes a wholesaler or retailer, depending upon the buyer.¹² Thus, it makes no sense to have included a manufacturer in RCW 82.04.272 unless the intention was to capture the entire distribution chain from manufacturing to selling at retail. The legislature’s use of these words and understanding that wholesaling activity can have multiple layers, is indicative of a broad protection. If the legislature did not intend to capture the entire chain of distribution that includes transactions by a manufacturer to and among wholesalers and to the retailers, then it should have drafted an entirely

¹² WAC 458-20-136(4)(a).

different statute. The beneficial rate should have applied only to qualified sales that would be specifically defined. But that is not what the legislature did. The statute applies to “persons” that engage within this state in the business of warehousing and reselling drugs for human use pursuant to a prescription. RCW 82.04.272(1). And “as to such *persons*, the amount of the tax shall be equal to the gross income of the business multiplied by the rate of 0.138 percent.” *Id.* (Italics supplied.) Rather than apply the tax to “persons”, the Department’s interpretation applies the tax to transactions. Applying the statute on a sale by sale basis is contrary to the approach of the statute, which is to attach the benefit to the person.

The legislative history does not draw the Department’s distinctions. In fact, the legislative history supports the opposite. When the legislature adopted RCW 82.04.272 in 1998 (ESHB 293, Wash. Laws 1998, C. 343), the purpose of the law was not to single out the last wholesaler in the supply chain (the one that sells to the dispensing agent) and give that last wholesaler a preferential rate over any preceding wholesaler. Rather, the purpose was to “level the playing field” for in-state wholesale prescription drug distributors that paid Washington a wholesaling B&O tax, allowing them to compete with out-of-state wholesale prescription drug distributors who paid no wholesaling B&O tax. The out-of-state distributors paid no tax, because they either lacked

nexus, or they had a direct seller exemption. The House Bill Analysis for HB 2933 provides:

Washington based wholesalers sometimes face competition from out-of-state sellers who may not have sufficient nexus for the B&O tax to apply to their wholesale sales. These wholesalers may use direct seller's representatives or take orders by telephone or mail.

CP 131.

Testimony before the House Finance Committee on substitute bill

HB 2933, stated:

Testimony For: Competition from out-of-state firms and mail order companies is hurting Washington distributors of pharmaceutical products. These competitors use their out-of-state location to avoid the B&O tax. The B&O tax averages roughly 25 percent of the profit of Washington firms. The proposed tax treatment applies only to pharmaceutical drugs that are regulated by the Federal Drug Enforcement Administration and Washington State Board of Pharmacy. It would make Washington companies competitive with out-of-state sellers.

CP 119.

The legislature did not limit the application of RCW 82.04.272 to only the last wholesale prescription drug distributor in the supply chain. Rather, it intended that the law apply to all wholesalers that previously paid the higher wholesaling B&O tax that applied to general wholesalers,

making them competitive with out-of-state wholesale prescription drug wholesalers.

Why would the legislature only intend to help the last distributor? There is no logic that it would if the problem the legislature addressed was the competitive disadvantage that out-of-state distributors had over in-state distributors. Without limitation, the record appears that the legislature intended to help all in-state wholesaler distributors that faced the competition of out-of-state wholesalers that paid no B&O tax whatsoever. This is consistent with Sanofi's earlier discussion with respect to why Sanofi need not sell to a retailer.¹³

As a matter of public policy, applying the reduced rate of B&O tax to all wholesale prescription drug distributors is desirable because it reduces the amount of tax passed on to consumers and insurance companies, thereby making drugs more affordable and increasing public access. Applying the B&O tax at a higher rate with respect to "wholesaler to wholesaler" transactions would inflate the cost of bringing drugs to consumers, thereby making them less accessible. While the legislative history does not speak directly to this issue, it seems unlikely that the legislature would have intended such a result as increasing costs. Given that the general objective was to reduce the applicable B&O tax, the Department's interpretation, which drives up the total B&O tax cost, seems anathema to the intent of the legislature.

¹³ See discussion in Section V.a, beginning at 17, *supra*.

Nowhere in the committee reports does it state that only wholesalers directly serving retailers are eligible for the reduced rate. Instead, the class of taxpayers that is mentioned in the committee reports is: “Washington based wholesalers”. CP 131. The intention appears that the legislature sought to benefit the distribution of prescription drugs from manufacture to the final lawful distribution to the end consumer as opposed to benefitting only the last distributor to a licensed pharmaceutical seller. The Department ignores the words “persons”, “manufacturer,” “another wholesaler,” and “buying” from RCW 82.04.272. Further, its interpretation makes the Pharmacy License requirement a stand in for the licensing by the pharmacy quality assurance commission, which is too narrow because it ignores the commission’s wholesaler licensing activity. Finally, it applies this Pharmacy License requirement, which only exists as to seller (i.e., taxpayers claiming the reduced rate who are either wholesalers or retailers under the statute) and equally applies this narrow reading to buyers identified as “retailers.”

Rather, a holistic view of the statute is that in order to claim the reduced rate, a wholesaler (regardless of position in the supply chain) must demonstrate that its products will ultimately fulfill orders placed by licensed and registered retailers, hospitals, or other medical care providers that can legally dispense the drugs. A wholesale prescription drug distributor that sells into improper distribution channels, fulfilling the demand for illegal drugs, would not qualify for the beneficial rate.

Because the legislative history is silent on the last distributor and actually mentions the single class of Washington-based wholesalers, the court should construe the statute, if ambiguous, as Sanofi has interpreted the statute.

3. If RCW 82.04.272 is ambiguous, then the court should avoid an unconstitutional construction.

We begin this discussion with the court's obligation to avoid adopting an interpretation that may render RCW 82.04.272 unconstitutional. In a 1991 case, the Court of Appeals refused to adopt an unconstitutional interpretation, stating:

If RCW 76.04.495(1) is interpreted as barring Littlejohn from questioning DNR's expenditures, then Littlejohn is subjected to the risk of having its property, in the form of a money judgment, taken without due process. It could then be required to pay for more than the loss it occasioned by its negligence. "[W]here a statute is susceptible of several interpretations, some of which may render it unconstitutional, the court, without doing violence to the legislative purpose, will adopt a construction which will sustain its constitutionality if at all possible to do so." *State ex rel. Morgan v. Kinnear*, 80 Wash.2d 400, 402, 494 P.2d 1362 (1972).

Dep't of Nat. Res. State of Wash. v. Littlejohn Logging, Inc., 60 Wn. App. 671, 677, 806 P.2d 779, 782 (1991).

In this case, the Department argues that Sanofi's interpretation inappropriately expands this limited B&O tax classification for prescription drug wholesale distributors. CP 104-107 and 194. It contends that the legislature did not intend to allow sales between wholesalers to be covered. CP 16-17. But this begs the question, whether the three buyers

were eligible because they made “sales at retail.” As explained above in Section V.a. above, the three buyers did indeed make sales at retail. The Department counters that Sanofi did not produce evidence of “what portion of each of the Distributors’ overall sales constitute sales to hospitals and other healthcare providers.” CP 153.

However, this tracing requirement of subsequent transfers --- by others over whom the seller has no control --- is precisely what creates the constitutional infirmity. The Washington Supreme Court said:

Melaleuca, Inc., in its amicus brief, presents an argument that reinforces Dot's reading of the statute's language:

“[A] proper interpretation of all of the words in the statute makes it understandable that the Legislature only imposed restrictions on sales activities to the extent that the direct sales company could have some control over them. This is not only logical, it is undoubtedly required by the Due Process Clauses of both the United States and the Washington Constitutions. U.S. Const., Amend. XIV, § 1; Wash. Const., Art. I, § 3. A state cannot impose taxes on someone based upon the actions of another person, who is not the seller's agent, and whose actions are beyond the tax payer's control.”

Amicus Curiae Br. of Melaleuca, Inc., at 11. We agree with this analysis.

Dot Foods, supra, 166 Wn.2d at 923, 215 P.3d at 190 (underlining supplied). In this case, the Department argued that the taxpayers tax status depended upon its products were never sold from a permanent retail establishment. This was information that the taxpayer could not know at

the time it sold its products because it did not know what its buyers would do with its products.

Clearly, the court observes that restrictions on the taxpayer's activities are reasonable to the extent that the taxpayer has some control over the activities. However, determining the tax based upon what others' activities is impermissible if the taxpayer has no control over those activities. That is precisely the case here; Sanofi has no control over whether the three buyers make retail or wholesale sales. It only knows that they make both kinds of sales. To impose tax on Sanofi based upon what the three buyers --- that Sanofi does not control --- did with its products is inconsistent with *Dot Foods*. Consequently, the Department's construction raises due process issues.

Second, Sanofi explained that if the trial court was to choose a clarifying interpretation if the statute is found to be ambiguous, then the equal protection clause should be considered to measure the viability of the Department's interpretation. CP 89-91. It explained how the Department's interpretation would fail to pass the questions that the court uses to determine if the equal protection clause has been violated. *Id.* Sanofi explained that in this case the Department's interpretation takes a single class of prescription drug wholesale distributors and creates two classes. One class is distributors selling to persons selling at retail and

also holding a Pharmacy License and the other class are distributors selling to other wholesalers and/or to retailers without such a license.

Again, the Washington Supreme Court had the chance to explain how the equal protection clause could be affected by creating two classes from a single class. The general rule is that a wholesaler must pay wholesale B&O tax on its sales. However, the general rule would not apply to vertically integrated operations like Safeway, Albertsons or other such large retail chains. This was because such vertically integrated businesses bought and warehoused product in large quantities and then redistributed the products to the various retail outlets. In order to put internal distributors on the same economic tax base as the general wholesaler, the legislature imposed a “wholesale function” tax on the vertically integrated business equal to burden of the general wholesaling tax. Now, in theory, both would bear approximately the same tax burden. However, the legislature also allowed special treatment for the vertically integrated taxpayers under certain circumstances that were not available to the general wholesalers.

Associated Grocers, a general wholesaler, challenged the statute, claiming that because both Associated Grocers and the internal distributors were engaging in equivalent wholesale functions and it too should get the special treatment under the same circumstances as the

vertically integrated businesses. The Washington Supreme Court agreed with Associated Grocers, explaining the equal protection provisions:

The parties agree that the constitutional question presented by this statutory scheme should be analyzed under the “minimal scrutiny” or “rational basis” test announced in *Yakima Cy. Deputy Sheriff's Ass'n v. Board of Comm'rs*, 92 Wash.2d 831, 601 P.2d 936 (1979), *appeal dismissed*, 446 U.S. 979, 100 S.Ct. 2958, 64 L.Ed.2d 835 (1980). Using this test, the court makes three inquiries: (1) whether the classification applies alike to all members within the designated class; (2) whether some basis in reality exists for reasonably distinguishing between those within and without the class; and, (3) whether the challenged classification bears any rational relation to the purposes of the challenged statute. *Yakima Cy. Deputy Sheriff's Ass'n v. Board of Comm'rs*, 92 Wash.2d 831, 835–36, 601 P.2d 936 (1979), *appeal dismissed*, 446 U.S. 979, 100 S.Ct. 2958, 64 L.Ed.2d 835 (1980). If each inquiry is answered “yes,” then the statutory classification would be constitutional.

In this case, the trial court considered the statute as a whole and its legislative purpose and concluded that the Legislature created a single class of taxpayers under RCW 82.04.270 and that the Legislature included distributors, as well as wholesalers, within that class.

Associated Grocers, Inc. v. State, 114 Wn.2d 182, 187, 787 P.2d 22, 25 (1990). The court found that denying the special treatment to Associated Grocers violated the first prong of the test, holding:

The exemption in RCW 82.04.270(2) is applied only to distributors, and not to wholesalers. The members of the class are thus treated differently. The first inquiry under the *Yakima County* test, then, is answered “no.” The exemption, which applies only to distributors, violates Associated's rights under the equal protection clause of the fourteenth amendment to the United States Constitution and the privileges and immunities clause of the state constitution (Const. art. 1, § 12).

Associated Grocers, Inc. v. State, 114 Wn.2d 182, 188, 787 P.2d 22, 25 (1990).

RCW 82.04.272(1) presents the same situation as the wholesale function tax in *Associated Grocers*. Here, the statute creates the single class of taxpayers in the “business of warehousing and reselling drugs for human use pursuant to a prescription.” The trial court asserts that there is but one class but not as broad as Sanofi contends. VR 38, lines 17-25. While Sanofi respects the court’s opinion, it disagrees. The trial court created two classes within that single class of taxpayers that are engaged in the “business of warehousing and reselling drugs for human use pursuant to a prescription.”

Like the case in *Associated Grocers*, there is an attempt to create two separate groups, one that sells to persons selling at retail that holds a Pharmacy License and one that sells to persons selling at retail that do not have a Pharmacy License. If the court has found that the legislature itself could not create two classes, then it is most difficult to understand how the Department can do so lawfully with an excise tax advisory.

Thus, the trial court’s adoption of the interpretation that RCW 82.04.272 applies only to the class of business of warehousing and reselling drugs for human use pursuant to a prescription that sells to a retailer that holds a Pharmacy License raises the risk that the interpretation

violates the equal protection clause to the detriment of persons selling to buyers selling at retail that do not have a Pharmacy License.

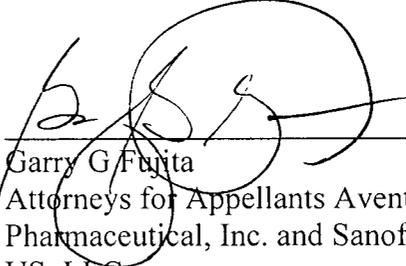
As the court is bound to interpret statutes so that they are constitutional and avoid interpretations that would render the statute unconstitutional, this court should reverse the trial courts action to grant the Department's motion for summary judgment and failure to grant Sanofi's motion for summary judgment.

VI. CONCLUSION

The trial court erred when it granted the Department's motion for summary judgment and denied Sanofi's motion for summary judgment. The statute is clear on its face and is in no need of the Department's desire to limit RCW 82.04.272. Further, if the statute is in need of further interpretation to determine the meaning of "persons selling at retail", then the trial court erred when it adopted an interpretation that trigger's due process clause and equal protection clause infirmity as well as frustrates the legislature's intent and purpose. The trial court's order should be reversed; this court should deny the Department's motion for summary judgment and grant Sanofi's motion for summary judgment.

RESPECTFULLY SUBMITTED this 18th day of September,
2017.

EISENHOWER CARLSON PLLC

By: 

Garry G. Fujita
Attorneys for Appellants Aventis
Pharmaceutical, Inc. and Sanofi-Aventis
US, LLC

CERTIFICATE 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 herein mentioned a resident of the State of Washington, over the age of eighteen 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 foregoing document on the following persons and in the manner listed below:

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- E-SERVICE
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I hereby declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED at Tacoma, Washington this 18th day of September, 2017.

Cindy Rockelle
Cindy Rockelle
DEPUTY
STATE OF WASHINGTON
2017 SEP 18 PM 3:57
FILED APPEALS
COURT OF APPEALS
DIVISION II