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

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**MORPHO DETECTION, INC.,**

**Appellant,**

**v.**

**STATE OF WASHINGTON, DEPARTMENT OF REVENUE,**

**Respondent.**

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**BRIEF FOR APPELLANT**

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## INTRODUCTION

Appellant Morpho Detection, Inc. (MDI) is a manufacturer of explosive-detection systems used in airports across the country, including in Washington. This is the second appeal in a dispute over Respondent Department of Revenue's assessment of a use tax on MDI.

For the use tax to apply, MDI must be a "consumer" under RCW 82.12.020(1). As relevant here, a "consumer" is a person "engaged in the business of constructing, repairing, decorating, or improving new or existing buildings or other structures *under, upon, or above real property of or for the United States*" (the "real-property" component of the definition), including by "*installing or attaching . . . any article of tangible personal property therein or thereto*" (the "installation" component of the definition). RCW 82.04.190(6) (emphases added).

The first appeal was from a summary judgment granted in favor of MDI on the ground that MDI's activities did not satisfy the real-property component of the definition. Both MDI and the Department represented to the Superior Court and to the Court of Appeals that the parties disputed whether MDI installed the systems, and that MDI conceded installation only for purposes of the issue raised on summary judgment. Indeed, the Department told the Court of Appeals that the question whether MDI had "install[ed]" the systems was "likely the primary issue that will be

litigated if the case is remanded.” The Court of Appeals reversed the grant of summary judgment to MDI and remanded “for entry of order granting partial summary judgment” on the real-property issue. CP 766-767.

The Court’s opinion, however, contained a sentence suggesting a broader holding: “We conclude that as a matter of law, Morpho is a ‘consumer’ and therefore subject to the use tax under RCW 82.12.020.” CP 754. On remand, the Department seized upon that sentence and argued to the Superior Court that the Court of Appeals had somehow resolved the installation issue *sub silentio*—even though the Department had not raised that issue in front of the Superior Court on summary judgment, had not identified it as an issue on appeal or cited any legal authority relating to it, and had expressly informed the Court of Appeals that the issue would be open to further litigation on remand. Believing itself bound by the language of the Court of Appeals’ opinion, the Superior Court granted summary judgment to the Department.

This Court should now reverse. The Court should presume that the Court of Appeals resolved only the issues that were properly before it. Any language suggesting a resolution of the installation issue falls outside the scope of the issue presented and is not reasonably interpreted as part of the Court’s holding. The Superior Court therefore erred in concluding it was bound by that language under the law-of-the-case doctrine.

In any event, even if the Court of Appeals had resolved MDI's status as a "consumer" in the first appeal, such a holding would have been clearly erroneous and would work a manifest injustice upon MDI. All parties understood that MDI had made a limited concession of the installation issue for the purpose of its motion for summary judgment. Justice would be best served by restricting application of the law-of-the-case doctrine and allowing the Superior Court to reach the merits of the installation issue in the first instance.

#### **ASSIGNMENT OF ERROR**

The Superior Court erred as a matter of law in granting summary judgment to the Department on the ground that MDI is a "consumer" under RCW 82.04.190(6).

#### **ISSUES PERTAINING TO ASSIGNMENT OF ERROR**

1. Whether the Superior Court erred in concluding that it was bound under the law-of-the-case doctrine to hold that MDI installed the explosive-detection systems and was a "consumer" under RCW 82.04.190(6), when that issue was not raised by either party in the first appeal.

2. If the Superior Court was bound to conclude that MDI was a "consumer" under the law-of-the-case doctrine, whether justice would be

best served by restricting application of the law-of-the-case doctrine and remanding for consideration of the installation issue on the merits.

## **STATEMENT OF THE CASE**

### **A. Statutory background**

RCW 82.12.020(1) imposes “a tax or excise for the privilege of using” various goods “within this state as a consumer.” The term “consumer” is defined to include “[a]ny person engaged in the business of constructing, repairing, decorating, or improving new or existing buildings or other structures under, upon, or above real property of or for the United States, any instrumentality thereof . . . including the installing or attaching of any article of tangible personal property therein or thereto.” RCW 82.04.190(6); *see* RCW 82.12.010(1).

### **B. Facts**

Appellant MDI manufactures explosive-detection systems that are used to detect explosives at airports in the United States. CP 89.\* MDI contracts with the federal Transportation Security Administration to deploy these systems across the country. CP 89-90.

This dispute concerns tax assessed by the Department on 46 explosive-detection systems deployed by the TSA in Washington State. CP 90. MDI manufactured and sold the systems to the TSA in California.

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\* MDI now operates under the name of Smiths Detection, LLC.

*Id.* The TSA then shipped all of the systems to Texas. *Id.* Between 2002 and 2006, the TSA deployed 41 at the Seattle-Tacoma International Airport and deployed five at the Spokane International Airport. *Id.*

The Department assessed tax of approximately \$5.4 million against MDI as a “consumer” of the systems deployed at the Washington airports. CP 90. An informal administrative review upheld the assessment. CP 927-938.

**C. Initial Thurston County proceedings**

MDI paid the tax and brought this action for a refund. CP 27-32.

**1. MDI’s motion for summary judgment**

MDI moved for summary judgment, arguing that it was not a “consumer” under RCW 82.04.190(6). To support that argument, it relied on two theories. First, MDI argued that it “is not in the business of constructing, repairing, decorating, or improving new or existing buildings or other structures” but instead “is in the business of manufacturing and selling” explosive-detection systems. CP 104. Second, it argued “that the airports at which the [systems] are deployed and the real property on which the [systems] are located is not ‘real property of or for the United States.’” CP 107.

MDI’s motion for summary judgment did not raise the issue of whether the systems were “install[ed]” within the meaning of RCW

82.04.190(6). CP 100. In the complaint, MDI had alleged that while its contract with the TSA referred to certain “installation” activities, those activities actually meant the “assembling, inspecting, and testing” of the systems, not any actual installation by MDI. CP 29. But MDI acknowledged that the installation issue raised legal and factual issues outside the scope of the summary-judgment motion: “[a]dditional issues includ[e] the meaning of ‘installing’ [and] whether MDI’s activities amount to ‘installing.’” CP 100 n.4. Recognizing that “all disputed facts must be assumed in the Department’s favor,” MDI explained that, for purposes of summary judgment, “the Court must assume that MDI installed the [systems] even though MDI and the Department dispute both the meaning of the term ‘installation’ and, no matter how it is defined, whether MDI performed the installation.” CP 105 n.6.

**2. Department’s opposition and request for partial summary judgment as the non-moving party**

The Department asked the Court to “deny Morpho’s motion and grant partial summary judgment to the Department, as the nonmoving party, on the legal issues that Morpho raises.” CP 142. Alternatively, the Department asked the Court to deny Morpho’s motion because “there exist genuine issues of material fact.” CP 142-143; *see* CP 162-163 (discussing

fact issues relevant to real-property component of “consumer” under RCW 82.04.190(6)).

At no point in its briefing did the Department request that the Court reach the installation issue. Nor did the Department define “installing” or provide any analysis of how that term should be construed. Only in discussing a separate issue—whether MDI was “engaged in the business of constructing, repairing, decorating, or improving” buildings—did the Department say anything about installation: “Morpho installed and/or attached EDSs at the airports, making it a ‘consumer.’” CP 154 & n.15. The Department never requested summary judgment on the installation issue, nor did it advance any legal analysis to support summary judgment on that issue.

### **3. MDI’s reply in support of summary judgment**

In its reply brief, MDI again clarified that the installation issue was not before the Superior Court on summary judgment. CP 714. After describing the activities that the Department alleged MDI conducted in Washington, MDI explained that “[t]he parties dispute whether these three activities constitute installation as that term is used in RCW 82.04.190(6) but that issue is not now before the Court.” CP 716.

**4. The Superior Court’s initial grant of summary judgment to MDI**

The Superior Court granted summary judgment in favor of MDI on the ground that MDI’s work did not occur “under, upon, or above real property of or for the United States,” and therefore MDI did not satisfy the definition of a “consumer” under RCW 82.04.190(6). CP 731.

**D. The first appeal**

The Department appealed the Superior Court’s summary judgment order to this Court. CP 733-739. The appeal was docketed in Division II as No. 46689-9-II, but it was ultimately transferred to Division I, where it acquired the case number listed on the published decision, No. 73663-9-I. CP 754.

**1. The Department’s opening brief**

The Department’s brief raised only the issue reached by the Superior Court—whether MDI’s work was done on real property of the United States. The Department phrased its “Issue Pertaining to Assignment of Error” as follows:

Morpho Detection installed explosive detection systems under contract with the United States and was paid for that work by the United States. Did the trial court err when it ruled that Morpho improved buildings neither “of” nor “for” the United States under RCW 82.04.190(6) and thus did not owe use tax on the value of the personal property it installed?

Brief of Appellant at 2-3, *Morpho Detection, Inc. v. Department of Revenue*, 194 Wn. App. 17, 371 P.3d 101 (2016) (No. 46689-9-II) (attached as Appendix A; hereinafter, Dep't Opening Br.). The Department represented that "for purposes of summary judgment, Morpho has conceded that it installed the systems and the issue is therefore not presently in dispute." *Id.* at 11 n.5. It explained that, in the Superior Court, "[m]ost of the discovery surrounded the factual issue of whether Morpho installed the explosive detection systems, as opposed to some other contractor. However[,] that question was not the one upon which the trial court granted summary judgment." *Id.* at 14. It acknowledged that "whether Morpho in fact 'installed' the systems" was "likely the primary issue that will be litigated if the case is remanded." *Id.* at 11 n.5.

The argument section of the Department's opening brief was entirely devoted to analyzing the real-property issue. Dep't Opening Br. 15-37. The Department presented no legal argument or analysis of the installation issue. Instead, consistent with its representations throughout its briefing, the Department presupposed that MDI installed the systems at Washington airports, based on MDI's limited concession in the Superior Court. *Id.* at 19 ("As noted above, Morpho has conceded for purposes of summary judgment that it installed the explosive detection systems in Washington."). The Department requested that the Court "reverse the

order granting summary judgment to Morpho, rule that partial summary judgment should be granted to the Department on this issue, and remand for trial on the remaining issues.” *Id.* at 37-38.

## **2. MDI’s brief**

In opposition, MDI provided a counterstatement of the issue pertaining to the assignment of error. Like the Department’s statement of the issue, MDI’s statement did not include installation but instead focused on the real-property issue. Brief of Respondent at 2, *Morpho Detection, Inc. v. Department of Revenue*, 194 Wn. App. 17, 371 P.3d 101 (2016) (No. 46689-9-II) (attached as Appendix B; hereinafter, MDI Resp. Br.). MDI made clear that it had made a limited concession of the installation issue “for purposes of its motion for summary judgment,” even though “MDI disputes that it performed such installation and/or that such installation improved any building.” *Id.* at 3 n.1. MDI also explained that the installation issue was one of several questions that had “not been ruled on by the Superior Court” and was “not ripe for review.” *Id.* at 4 n.4.

MDI responded to the Department’s discussion of MDI’s activities, explaining that “[t]he issue is not whether MDI performed the specified activity. The sole issue is whether the activity was performed ‘under, upon, or above real property of or for the United States.’” MDI Resp. Br. 9.

### **3. The Department's reply brief**

In its reply, the Department again assumed that MDI installed the systems and argued that MDI met the real-property requirement of RCW 82.04.190(6). *See* Reply Brief of Appellant at 1, *Morpho Detection, Inc. v. Department of Revenue*, 194 Wn. App. 17, 371 P.3d 101 (2016) (No. 46689-9-II) (attached as Appendix C; hereinafter, Dep't Reply Br.). And the Department again recognized that "Morpho concedes for purposes of the summary judgment motions on review that it installed the explosive detection systems." *Id.* at 5.

### **4. Division I's opinion**

Division I reversed the Superior Court's grant of summary judgment to MDI and directed entry of partial summary judgment to the Department. CP 753-767. The court stated:

The trial court granted summary judgment and held that the contractor was not subject to the tax because it performed no work 'under, upon, or above real property of or for the United States.' RCW 82.04.1[9]0(6). [The Department] appeals. We conclude that as a matter of law, Morpho is a 'consumer' and therefore subject to the use tax under RCW 82.12.020. Accordingly, we reverse and remand for entry of partial summary judgment in favor of [the Department].

CP 754.

The Division I opinion described the issue in MDI's motion for summary judgment as follows: "whether [MDI] fell under the definition of a 'consumer' in RCW 82.04.190(6) and was therefore subject to the use tax." CP 757. The Court noted that the Department "cross-moved for partial summary judgment on the same issues." *Id.* The Court then discussed the definition of "consumer" under RCW 82.04.190(6), including the real-property component of the statute. *Id.*

The Court did not mention the installation component of the statute. CP 757. It did not construe the statutory term "improving," discuss how "installing" should be interpreted in the context of "improving," explain how a definition of "installing" could be derived from the statutory scheme as a whole, or analyze legislative intent on the issue of installation. *Id.* at 759-766. Nor did the Court determine that there was no genuine issue of material fact in dispute regarding installation, as the parties did not present any facts on that issue. *Id.*

Instead, the Court stated that "Morpho conceded *at trial* that it installed the detection systems in Washington." CP 759 (emphasis added). (No trial had taken place.) Notwithstanding that statement, the Court directed only entry of "partial summary judgment" to the Department. CP 766-767.

**5. MDI’s petition for Supreme Court review**

MDI filed a petition for review in the Washington Supreme Court, but the petition was denied. CP 873.

**E. Thurston County proceedings on remand**

**1. Second round of summary-judgment briefing**

On remand, the Department moved for summary judgment on all of MDI’s claims. CP 835-905. The Department argued that “[u]nder the law of the case doctrine, *all* issues related to whether Washington’s use tax statute applies to Morpho’s assembly of explosive detection systems in this state during the tax period are . . . resolved” by Division I’s opinion in the first appeal. CP 835-836 (emphasis added).

MDI opposed the motion, arguing that the Department “is only entitled to a narrow partial summary judgment on the sole legal issue that was before the Court of Appeals.” CP 1073. It explained that “MDI did not raise the issue of whether it installed the [systems] in its motion, [and] the Department did not seek partial summary judgment on that issue,” and that “[t]he Court of Appeals did not grant partial summary judgment on issues not even sought by the Department.” CP 1078 (footnote and citations omitted).

In reply, the Department argued that “the decision of the Court of Appeals is unambiguous” and that the Court had “held that [MDI] was a consumer as a matter of law.” CP 1212 (capitalization omitted).

**2. The Superior Court’s hearing and summary-judgment decision**

At a hearing on the summary-judgment motion, the Superior Court stated:

So I’m going to start before I hear argument with what appears to be the major issue here which is a Court of Appeals decision that explicitly says something, finding as a matter of law that Morpho Detection is a consumer apparently based on a misunderstanding of what happened below because there was a concession for the purposes of summary judgment. The Court of Appeals has this statement that they [MDI] have conceded this when it really wasn’t a true concession.

RP 3:12-21. The Court asked the Department whether the installation issue “was actually conceded below” by MDI. RP 4:4-5. The Department answered, “No, I believe that the Court’s explanation is correct.” RP 4:6-7. The Court then asked the Department whether the Court of Appeals meant to “silently” reach the installation issue based on the record before it. RP 9:9-11. The Department responded: “[T]hat’s not our pitch about what happened. . . . I think the likeliest explanation is as the Court said at the beginning of this.” RP 9:12-19.

The Superior Court concluded that it was “bound by the language of the Court of Appeals,” and that it was “bound by that statement that consumer is a matter of law.” RP 11:15-19. The Superior Court stated that “I am not going to overturn the Court of Appeals because I am not allowed to do that.” RP 11:20-21.

### **3. MDI’s notice of appeal**

The Superior Court entered summary judgment in favor of the Department on November 17, 2017. CP 1224-1225. MDI timely filed its notice of appeal on December 14, 2017. *See* RAP 5.2(a).

### **STANDARD OF REVIEW**

This Court reviews a Superior Court’s grant of summary judgment de novo. *Weden v. San Juan County*, 135 Wn.2d 678, 689, 958 P.2d 273 (1998).

### **ARGUMENT**

#### **A. The Superior Court erred in concluding that the prior appellate decision resolved the installation issue**

The Superior Court believed that Division I’s opinion resolved the question of installation and conclusively established, as a matter of law, that MDI is a “consumer” under the statute. Although isolated language in Division I’s opinion could be read to support the Superior Court’s interpretation, the most reasonable reading of the opinion as a whole compels the conclusion that the Court of Appeals did not reach the

installation issue, an issue that was not litigated by the parties at any stage of the proceedings. The issue therefore remained open for the Superior Court to resolve, and the Superior Court erred in granting summary judgment to the Department.

**1. Division I's decision did not resolve the installation issue**

Both parties agree that the prior appellate decision determined that MDI's activities satisfied the real-property component of the definition of "consumer" under RCW 82.04.190(6). CP 766-767. But the Superior Court believed that the prior decision did more than that. Emphasizing the statement in Division I's opinion to the effect that "as a matter of law, Morpho is a 'consumer' and therefore subject to the use tax under RCW 82.12.020," CP 754, the Superior Court concluded that Division I must have resolved the installation issue as well. The Superior Court's interpretation disregarded the maxim that "general expressions in every opinion are to be confined to the facts then before the court and are to be limited in their relation to the case then decided and to the points actually involved." *Peterson v. Hagan*, 56 Wn.2d 48, 53, 351 P.2d 127 (1960); *see Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399, 5 L. Ed. 257 (1821).

In the first appeal, the entirety of definition of "consumer" was not before the Court of Appeals. When briefing the initial summary-judgment

issues, MDI and the Department advised the Superior Court and Court of Appeals that the parties disputed the installation issue, and that MDI had conceded it only for purposes of the other issues presented for summary judgment. *See, e.g.*, CP 100 n.4, 105 n.6, 714-715, 716 (MDI representations to the Superior Court); CP 731 (Superior Court order granting summary judgment to MDI, listing issues); Dep't Opening Br. 11 n.5, 14, 19, 37-38, Dep't Reply Br. 3, 21 (Department representations to the Court of Appeals regarding scope of issues); MDI Resp. Br. 3 n.1, 4 n.4 (MDI representations to the Court of Appeals regarding scope of issues). The record makes clear that both parties understood that the issue of installation was not raised on summary judgment before the Superior Court or the Court of Appeals. That is why neither party substantively briefed the installation issue in the first appeal: it simply was not in play. To the contrary, all of the briefing confirms that the installation issue would need to be resolved on remand if the Department ultimately prevailed on the real-property issue in the first appeal.

Read as a whole, the opinion of the Court of Appeals does not suggest that the Court believed it was resolving the installation issue. The Court did not, for example, articulate a definition of "installation," nor did it identify any facts that would support a finding of installation under that definition. Notwithstanding the stray language cited by the Superior Court,

the Court of Appeals’ opinion cannot be construed so broadly as to reach an issue that was never presented or argued—and to resolve that issue without any substantive explanation.

The correct understanding of Division I’s decision is reinforced by the opinion’s conclusion, which remanded for entry of *partial* summary judgment. CP 766. In the Superior Court, MDI had moved for summary judgment because if any component of the definition of “consumer” under RCW 82.04.190(6) was not satisfied, the use tax would not apply to MDI. The Department was able to request only partial summary judgment because even if the Department prevailed on the “engaged in the business of” and real-property issues, it still would need to demonstrate that MDI met the other requirements of the statute, including installation. In remanding for entry of partial summary judgment, Division I demonstrated its understanding—shared by both parties—that the installation issue would still need to be considered on remand.

**2. The Rules of Appellate Procedure would have prohibited Division I from resolving the installation issue**

Courts ordinarily presume that other courts have correctly followed the law. *See, e.g., In re Det. of H.N.*, 188 Wn. App. 744, 766, 355 P.3d 294 (2015). The Superior Court’s reading of Division I’s opinion overlooks

that principle and implicitly suggests that Division I disregarded several of the Rules of Appellate Procedure.

*First*, while appellate courts in Washington conduct a de novo review in an appeal from a summary judgment, Washington’s appellate rules contain a special rule restricting the scope of appellate review: “On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court.” RAP 9.12. “The purpose of this limitation is to effectuate the rule that the appellate court engages in the same inquiry as the trial court.” *Wash. Fed’n of State Emps., Council 28 v. Office of Fin. Mgmt.*, 121 Wn.2d 152, 157, 849 P.2d 1201 (1993). The rule combines principles of forfeiture and exhaustion: if a party fails to bring an issue to the Superior Court’s attention, it will not be considered on appeal. *See, e.g., Vernon v. Acres Allvest, LLC*, 183 Wn. App. 422, 436, 333 P.3d 534 (2014). As explained above, the installation issue was never called to the attention of the Superior Court. Division I therefore could not properly have considered it on appeal of the Superior Court’s summary-judgment order.

*Second*, Rule 10.3(a)(4) requires that an appellant’s brief include “[a] separate concise statement of each error a party contends was made by the trial court, together with the issues pertaining to the assignments of

error.” Under Rule 10.3(g), “[t]he appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto.” An appellant’s brief should also include “argument in support of the issues presented for review, together with citations to legal authority.” RAP 10.3(a)(6). “Without adequate, cogent argument and briefing, this court should not consider an issue on appeal.” *Satomi Owners Ass’n v. Satomi, LLC*, 167 Wn.2d 781, 808, 225 P.3d 213 (2009) (citation omitted).

Washington courts have repeatedly held that “an appellate court will not consider the merits of [an] issue” when the appellant “fails to raise an issue in the assignments of error” and “fails to present any argument on the issue or provide any legal citation.” *State v. Olson*, 126 Wn.2d 315, 321, 893 P.2d 629 (1995); *see Ang v. Martin*, 154 Wn.2d 477, 487, 114 P.3d 637 (2005). There is a sound policy underpinning Rule 10.3, namely, that when an issue is not properly raised, the court “is given no information on which to decide the issue,” and “the other party is unable to present argument on the issue or otherwise respond and thereby potentially suffers great prejudice.” *Olson*, 126 Wn.2d at 321.

Here, installation was not included in the assignments of error, and the Department presented no argument on it. Division I therefore could not have resolved that issue without disregarding Rule 10.3. The Superior

Court erred in interpreting the opinion in such a way as to implicitly accuse Division I of doing so.

**3. Judicial estoppel prevents the Department from arguing that the first appeal resolved the installation issue**

The doctrine of judicial estoppel prohibits a party to litigation “from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position.” *Bartley-Williams v. Kendall*, 134 Wn. App. 95, 98, 138 P.3d 1103 (2006). In applying judicial estoppel, courts consider three factors: “(1) whether a party’s later position is clearly inconsistent with its earlier position; (2) whether judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled; and (3) whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.” *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538-539, 160 P.3d 13 (2007) (quoting *New Hampshire v. Maine*, 532 U.S. 742, 750-751, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001)) (internal quotation marks omitted). Here, all three factors suggest that the Department should not be permitted to argue that the first appeal resolved the installation issue.

In the first appeal, the Department expressly advised the Court of Appeals that “whether Morpho in fact ‘installed’ the systems” was “likely

the primary issue that will be litigated if the case is remanded.” Dep’t Opening Br. 11 n.5. Having prevailed in that appeal and obtained a remand, it then told the Superior Court that the installation issue had been “resolved” by Division I’s opinion. CP 836. That position is “clearly inconsistent” with the position the Department took in the first appeal; it “create[s] the perception” that Division I “was misled” about the scope of the issues on appeal; and accepting it would “impose an unfair detriment” on MDI by depriving MDI of any opportunity to litigate the installation issue. *Arkison*, 160 Wn.2d at 538-539. Judicial estoppel bars the Department from asserting it.

**B. Even if the prior appellate decision resolved the installation issue, justice would be best served by remanding for a trial on the merits**

Even assuming that the prior appellate decision held that MDI is a consumer, thus resolving the installation issue *sub silentio*, this Court should not apply the law-of-the-case doctrine and should permit the Superior Court to consider the installation issue on remand.

**1. This Court may overrule an erroneous prior decision**

“In its most common form, the law of the case doctrine stands for the proposition that once there is an appellate holding enunciating a principle of law, that holding will be followed in subsequent stages of the same litigation.” *Roberson v. Perez*, 156 Wn.2d 33, 41, 123 P.3d 844

(2005). The doctrine “seeks to promote finality and efficiency in the judicial process.” *Id.* It also functions “(1) to protect settled expectations of the parties; (2) to insure uniformity of decisions; (3) to maintain consistency during the course of a single case; (4) to effectuate the proper and streamlined administration of justice; and (5) to bring litigation to an end.” *Lodis v. Corbis Holdings, Inc.*, 192 Wn. App. 30, 55, 366 P.3d 1246 (2015) (citation omitted).

Rule 2.5(c) codifies the law-of-the-case doctrine in Washington by setting out a rule to govern proceedings when “the same case is again before the appellate court following a remand.” Consistent with the justifications underlying the doctrine, Rule 2.5(c) provides an important exception to its application: when a prior appellate decision is at issue, “[t]he appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the case on the basis of the appellate court’s opinion of the law at the time of the later review.” RAP 2.5(c)(2).

Under Rule 2.5(c), “the law of the case doctrine does not prevent the court from overruling a previous erroneous decision.” *First Small Bus. Inv. Co. of Cal. v. Intercapital Corp. of Or.*, 108 Wn.2d 324, 333, 738 P.2d 263 (1987); *Roberson*, 156 Wn.2d at 42 (“[A]n appellate court is not obliged to perpetuate its own error,” and “application of [law of the case]

may be avoided where the prior decision is clearly erroneous, and the erroneous decision would work a manifest injustice to one party.”); *accord* RAP 1.2(a) (providing that the appellate rules “will be liberally interpreted to promote justice and facilitate the decision of cases on the merits”).

**2. If the prior appellate opinion resolved the question of installation as a matter of law, it erred in doing so**

MDI readily satisfies Rule 2.5(c)(2)’s standard for applying an exception to the law-of-the-case doctrine. If indeed Division I held, as a matter of law, that MDI is a “consumer” under RCW 82.04.190(6) because it installed the systems, then that holding was clearly erroneous.

The record shows that the installation issue was not presented as an issue on summary judgment below, raised as an issue to the Court of Appeals, or briefed to the Court of Appeals. The Court of Appeals did not engage in any analysis of the text, structure, history, or purpose of RCW 82.04.190(6) in order to construe the term “installing.” It did not identify any facts that would indicate whether installation had or had not occurred. If the Court of Appeals nevertheless did consider the issue, it plainly erred in doing so.

**3. Justice requires a remand for consideration of the installation issue on the merits**

MDI would be prejudiced by application of the law-of-the-case doctrine. It repeatedly represented that it had conceded installation only

for purposes of the issues raised on summary judgment. When the Department recognized MDI's concession verbatim in its briefing on appeal, MDI took the Department at its word. When the Department did not raise or brief the installation issue on appeal, MDI naturally did not respond. Applying the law-of-the-case doctrine here would mean foreclosing consideration of an issue that was never presented or briefed, and which MDI never had the opportunity to contest. That would defy Rule 10.3(g) and would "great[ly] prejudice" MDI. *See Olson*, 126 Wn.2d at 321.

In the Superior Court, the Department argued that MDI was deficient in failing to seek reconsideration of the prior appellate opinion. CP 1212. That argument lacks merit. As an initial matter, MDI petitioned for Supreme Court review, so it can hardly be suggested that MDI simply accepted the first appellate decision. CP 873. But even if it had, given the parties' representations and the procedural posture of the case, MDI had no reason to believe the installation issued had been decided. Requiring MDI to file a motion for reconsideration on an issue that was not even presented or briefed would be a harsh and illogical result, and it would create incentives for parties to file needless reconsideration motions, unnecessarily burdening the courts.

The more reasonable policy is to enforce and apply the appellate rules already in place. Rule 1.2(a) requires that the Court interpret the Rules of Appellate Procedure to facilitate resolution of issues on the merits. Here, all of the appellate rules can be interpreted harmoniously to facilitate that end. The Court should therefore reverse and remand to the Superior Court for a trial on the merits of the installation issue.

### CONCLUSION

The judgment of the Superior Court should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted.

June 6, 2018

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**CERTIFICATE OF SERVICE**

On June 6, 2018, I caused to be served upon the below named counsel of record, at the address stated below, via the method of service indicated, a true and correct copy of the foregoing document:

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

DATED: June 6, 2018, at Seattle, Washington.

s/ Vicki Lynn Babani  
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Legal Practice Assistant

# APPENDIX A

NO. 46689-9

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

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DEPARTMENT OF REVENUE, STATE OF WASHINGTON,

Appellant,

v.

MORPHO DETECTION, INC.,

Respondent.

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**BRIEF OF APPELLANT**

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## I. INTRODUCTION

States cannot tax the federal government directly. But they can and do tax contractors that work for the federal government. *Washington v. U.S.*, 460 U.S. 536, 546, 103 S. Ct. 1344, 75 L. Ed. 2d 264 (1983). One such tax is Washington's use tax on contractors that construct, repair, decorate, or improve buildings for the United States.

As part of a federal overhaul of airport security operations after 9/11, the United States paid Morpho Detection over \$48 million to manufacture and install explosive detection systems at two Washington airports. Therefore, the Department of Revenue imposed use tax on Morpho as the contractor that improved the airports for the United States. This outcome was required by Washington's statutory scheme, which imposes use tax on contractors in situations where Washington cannot tax the United States directly.

In a ruling that is flatly inconsistent with both the language of RCW 82.04.190(6) and the purpose of that statute to tax contractors doing business with the United States, the trial court granted Morpho's request for a tax refund of more than \$5 million. Based on an application of the plain meaning rule that our Supreme Court has repeatedly rejected, the court interpreted the words "of or for" as they appear in RCW 82.04.190(6) to limit the use tax to construction work only on land in

which the United States has a property interest. As a result, the court carved out a tax exemption for the broad category into which Morpho's work fell—work paid for by the United States on land the United States does not own. Creating a single type of building improvement work that entirely escapes taxation cannot possibly be the legislative intent behind the statute. This Court should reverse the order granting summary judgment to Morpho, direct the trial court to grant partial summary judgment to the Department, and remand for resolution of the remaining issues.

## **II. ASSIGNMENTS OF ERROR**

1. The trial court erred in granting Morpho Detection's motion for summary judgment.
2. The trial court erred in denying the Department's request for partial summary judgment.
3. The trial court erred in ruling that the United States must have a beneficial interest in the real property where buildings are improved for the use tax to apply.

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

"Consumers" of personal property owe use tax on the value of that property if they have not paid retail sales tax. RCW 82.12.020. The definition of "consumer" includes persons "engaged in the business . . . of improving . . . buildings . . . upon, or above real property of or for the United States . . . ." RCW 82.04.190(6). Morpho Detection installed

explosive detection systems under contract with the United States and was paid for that work by the United States. Did the trial court err when it ruled that Morpho improved buildings neither “of” nor “for” the United States under RCW 82.04.190(6) and thus did not owe use tax on the value of the personal property it installed? (Assignment of Errors 1-3)

#### **IV. STATEMENT OF THE CASE**

##### **A. Overview**

In the wake of September 11, 2001, Morpho Detection<sup>1</sup> won two national contracts to manufacture and install explosive detection systems at airports for the Transportation Security Administration (TSA). CP 176-367. TSA determined that the 46 systems at issue in this case would be installed at Washington airports, specifically the Seattle-Tacoma and Spokane International Airports. *See* CP 36-54. At these airports Morpho performed various tasks assigned by TSA, including assembly and assuring the systems functioned properly. *E.g.*, CP 450-70 (various invoices); CP 511; 544-45. Sea-Tac received 41 units, with the five remaining units installed in Spokane. CP 36-54.

For its manufacture and installation of the Washington systems, Morpho received over \$48 million from the federal government. Because

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<sup>1</sup> During periods relevant to this case Morpho went through various name changes, including names associated with General Electric. The company is now called Morpho Detection, LLC, owned by the French corporation Safran. For ease of reference, the brief will refer to the Respondent’s various iterations as “Morpho.”

Morpho had installed the systems in Washington and its work was for the United States, the Department assessed Morpho use tax totaling \$4,191,799, in addition to other tax, interest, and penalties. CP 562.

**B. Morpho's Bid And Contracts**

After 9/11, Congress determined that it was necessary to overhaul security operations at our nation's airports in order to protect the citizenry. Part of the reform was the Aviation Transportation Security Act, which placed responsibility for airport security within the newly-created Transportation Security Administration. *See* 49 U.S.C. § 114.

One of TSA's duties was to acquire explosive detection systems and assure their installation at airports. Explosive detection systems use computer tomography to scan objects such as luggage and compare their density to known explosives. CP 40. Federal law required explosive detection systems be deployed as soon as possible, but no later than December 31, 2002. 49 U.S.C. § 44901(b).

TSA<sup>2</sup> issued a solicitation on November 23, 2001, for contractors capable of both manufacturing and installing explosive detection systems. The solicitation indicated the breadth of work to be performed by the contractor in addition to the actual manufacturing requirements. For example, the solicitation stated that "Contractor shall provide program

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<sup>2</sup> The Federal Aviation Administration originally issued the solicitation, but shortly thereafter TSA took over the bidding process.

management, systems engineering, integrated logistics support, quality assurance, configuration management, training, materials and support to test, deliver, install and maintain [stand-alone] EDS [explosive detection systems] and supporting equipment/deliverables in accordance with this [Statement of Work].” CP 146.

Morpho, a relatively small company at the time, was in a prime position to expand its position in the market. *See* CP 509. Morpho was one of only two companies with an explosive detection product already certified by the federal government. *Id.* Morpho’s systems contained several parts, generally including a computer tomography unit that scanned for explosives, an entrance conveyor, an exit slide, and a console. CP 40.

Morpho responded to the government’s solicitation, touting not only its ability to manufacture explosive detection systems, but also the installation and other work it would perform at the destination airports:

We have addressed needs beyond the device itself. Today, [Morpho] not only manufactures CTX scanners, but also offers site planning, integration services, installation services, maintenance services and a range of training courses for operators, instructors and maintenance personnel.

CP 158.<sup>3</sup>

Morpho was quickly awarded a “letter contract” to manufacture and set up explosive detection systems across the United States. CP 162-75. This began a flurry of manufacturing and site installation activity as Morpho sought to keep up with the exponentially increasing demand for its explosive detection systems leading up to the December 31, 2002, deadline. At the same time, Morpho continued to negotiate specific contract terms with the federal government. Eventually the parties entered into two complete contracts for the manufacture and “site installation support” of systems at airports across the country. CP 177-367 (site installation support provisions at CP 206, 299-300). The parties agreed to a price-per-system that included assembly at an airport of TSA’s choosing. *See* CP 537-38 (assembly work included in contract price for machine). In addition, the government had the ability to order additional services and often did so. CP 450-70 (invoices to TSA for additional airport work).

### **C. The Explosive Detection Systems And Their Installation**

The detection systems at issue in this case are used to screen checked baggage for explosives. The various installation processes Morpho used are detailed in “installation checklists” that Morpho

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<sup>3</sup> “CTX” is one of Morpho’s trademarked product lines. *See* <http://www.morpho.com/detection/see-all-products/ctx-explosives-detection/> (last visited January 25, 2015).

technicians completed. CP 473-505. The basic steps to deploying an explosive detection system are as follows:

- a. *Manufacture.* Morpho manufactured the systems at its California facility. CP 33.
- b. *Factory Acceptance Test.* Once a machine was manufactured, it was tested at Morpho's California factory. TSA could witness the test. *See* CP 519-20.
- c. *Transportation.* After the factory acceptance tests, TSA-contracted trucks picked up the machines (at which point title to the machines passed to TSA) and moved them to other locations. The systems at issue in this case were taken to Texas before transport to Washington. *Id.*
- d. *Airport Infrastructure Work.* Various contractors performed structural work at the airports to accommodate the explosive detection systems, some of which are the size of minivans. *E.g.*, CP 43.
- e. *Transport to Washington.* For those systems that TSA determined would come to Seattle or Spokane, TSA arranged transportation to the Washington airport. CP 17, 33.
- f. *Rigging and Seismic Anchoring.* When an explosive detection system arrived at an airport, "riggers" met the truck carrying the system. CP 518. The systems could be in more than one piece. CP 525-

26. The riggers unloaded and uncrated the systems, then moved them using a large forklift to a marked place inside the airport. CP 510-11, 522. In some cases, riggers “seismically anchored” systems to the floor, bolting them down with custom brackets. CP 45.

Around mid-2003, Morpho assumed responsibility for rigging and subcontracted that work to other companies. CP 88, 516. Morpho’s contracts with TSA were modified to create a new billing category for “installation and rigging.” CP 369-72. Morpho employees inspected systems for shipping damage and monitored the riggers. CP 518-19, 524.

g. *Assembly.* Once the systems were in place, Morpho assembled the internal components for each system. CP 34, 44-46, 206, 511. Because of delays such as requiring a replacement part or an infrastructure delay, the time between the beginning and end of assembling a system could be as much as a year. CP 544-45.

h. *Site Acceptance Test.* Once a system was assembled and installed, Morpho assisted Battelle in conducting a site acceptance test. This test assessed whether a system could adequately identify threats after assembly by scanning test bags. CP 530-31, 543.

i. *Baggage Handling Systems and Integration.* Some of the systems were “integrated” into baggage handling systems so that luggage moved directly through the explosive detection system on the baggage

handling conveyor belt. Proper integration ensured that the two systems could “communicate” with each other and that baggage would move smoothly through the CT scanner. Morpho handled the explosive detection system side of integration, and the baggage handling system contractor handled its side. *See* CP 548-57.

j. *Integrated Site Acceptance Test.* The integrated site acceptance test determined whether the completed system functioned correctly. Morpho assisted another contractor in performing these tests. CP 529-30.

k. *Multiplexing.* Morpho also designed and implemented a multiplex network, which allows TSA employees to monitor bag images from computer viewing stations in a “remote” room, separate from the explosive detection systems themselves. *See* CP 514-15, 527-28; 553.

#### **D. Procedural Facts**

The subject of Morpho’s liability for use tax in Washington has been addressed in both state and federal venues.

##### **1. The Department’s audit**

The Department audited Morpho’s activities at the Sea-Tac and Spokane airports for the period January 1, 2002, through March 31, 2006. CP 39. The Department performed a meticulous audit, reviewing thousands of records Morpho provided to the auditor. The audit resulted

in a 16-page report entitled “Auditor’s Detail of Differences and Instructions to the Taxpayer.” CP 39-54.

Morpho received more than \$48 million from the United States for manufacturing and installing these 46 systems. CP 36. Based on the information Morpho made available during the audit, the Department assessed Morpho a total of \$5,423,645, including \$4,191,799 in use tax, \$237,293 in business and occupation tax,<sup>4</sup> a 5% assessment penalty of \$221,455, and \$773,098 in interest. CP 562. The Department imposed use tax because Morpho installed 41 explosive detection systems at Sea-Tac airport and five explosive detection systems at the Spokane airport, all for the United States. The Department calculated use tax based on the value of the personal property that Morpho installed. *See* CP 563.

## **2. Morpho’s administrative appeal**

Morpho appealed the assessment to the Department’s Appeals Division. *See* WAC 458-20-100 (explaining Department’s internal appeals process). In some of these appeals, members of the Department’s executive leadership are involved in determining the outcome of an internal appeal, as was the case here. *See* WAC 458-20-100(6)(b).

Morpho submitted extensive evidence and legal argument to the Appeals Division. After considering that material, the Department issued

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<sup>4</sup> Morpho does not dispute the business and occupation tax portion of the assessment. *See* CP 12.

its “Final Executive Level Determination,” affirming that Morpho owed use tax for installing the explosive detection systems at Washington airports. CP 559-70. Most of the Determination is devoted to the issue of whether Morpho in fact “installed” the systems.<sup>5</sup> However, the Determination does address the issue of whether the property improved must be “of” the United States, or whether such improvement can be “for” the United States while located on non-federal land. The Department reasoned:

The Department concludes that RCW 82.04.190(6) does not mandate that the real property at issue be of the United States. Rather, for purposes of RCW 82.04.190(6), business conducted can be for the United States on real property not of the United States, and those conducting such business can still be a “consumer.” Since taxpayer assembled EDS machines in Washington on behalf of TSA, an instrumentality of the United States, on real property owned by the Port of Seattle, the Department concludes that Taxpayer’s argument on this point is erroneous.

CP 564 (footnote 6).

### **3. Morpho’s federal court litigation**

While it was fighting its use tax assessment in Washington, Morpho also challenged its responsibility for the assessment through the

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<sup>5</sup> This is likely the primary issue that will be litigated if the case is remanded. Despite contracts, statements of work, invoices, and testimony by Morpho employees stating that it installed the systems, Morpho makes the surprising contention that its work was not “installation” and therefore, that it is not a “consumer” under RCW 82.04.190(6). CP 13. However, for purposes of summary judgment, Morpho has conceded that it installed the systems and the issue is therefore not presently in dispute. CP 24 (footnote 6).

federal courts. Specifically, Morpho requested that TSA adjust its contract price to include the assessment, thereby effectively reimbursing Morpho for the use tax it would pay to Washington. Morpho argued that at the time it entered its contract, it did not know at which airports it would be installing its systems, and therefore it could not have known that it would owe use tax in Washington. *See* CP 592-93. It also argued that it could not have known that Washington would impose any tax at all in this situation. TSA refused to adjust the contract price. Morpho then litigated the issue in the Federal Aviation Administration's Office of Dispute Resolution for Acquisition (ODRA), which issued detailed findings and conclusions. CP 573-602.

One of Morpho's arguments to ODRA was that Washington's use tax was an "after-imposed tax"<sup>6</sup> under standard language that applies to federal contracts. Specifically, Morpho argued that the Department's use tax assessment was an after-imposed tax because the real property where the systems were installed is not owned by the federal government, similar to its argument here. CP 592-93.

ODRA disagreed with Morpho and instead agreed with the Department's interpretation of RCW 82.04.190(6). Citing the Department's Determination explaining that work can be "for" the United

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<sup>6</sup> An "after-imposed tax" is a new or increased tax excluded on the contract date but whose exclusion was later revoked. *See* CP 92.

States in addition to being on or above real property “of” the United States, ODRA concluded that “[Morpho’s] position is not supported by the canons of statutory interpretation or by demonstrating that contrary interpretations prevailed prior to the ALJ’s Determination.” CP 598. Rather, the Department “relied on the plain, simple, and singular interpretation that gives meaning to the complete language of the statutory definition of ‘consumer.’” *Id.* ODRA also explained that Morpho would read the phrase “‘or for’ . . . out of the statute entirely.” *Id.*

Morpho appealed the issue to the United States Court of Appeals for the District of Columbia Circuit. The U.S. Court of Appeals agreed with ODRA and denied the petition. *Morpho Detection, Inc. v. Transportation Sec. Admin.*, 717 F.3d 975, 976 (D.C. Cir. 2013). It held that Washington had not created an after-imposed tax because the law defining a “consumer” had not changed since 1975, and that “Morpho should have known it might reasonably be determined to be a ‘consumer’ whose business activities in Washington were subject to the use and B&O taxes.” *Id.* at 982.

#### **4. The state court litigation**

After the Department issued its Determination in Morpho’s administrative appeal, Morpho brought a tax refund claim in Thurston County Superior Court under RCW 82.32.180. The parties conducted

extensive discovery. Most of the discovery surrounded the factual issue of whether Morpho installed the explosive detection systems, as opposed to some other contractor. However that question was not the one upon which the trial court granted summary judgment.

Morpho moved for summary judgment, raising two issues related to whether or not it met the definition of a “consumer” under RCW 82.04.190(6) and was therefore subject to the use tax. In its response to Morpho’s motion, the Department asked that partial summary judgment be granted in its favor on the two issues Morpho raised. *See* CP 60, 81. The first of these was Morpho’s argument that, even assuming it installed the explosive detection systems at Washington airports, Morpho was not “engaged in the business” of improving buildings, and therefore was not a consumer. CP 23-25. The trial court found that there was an issue of fact on this issue. CP 646; RP 29.

The second issue resulted in summary judgment being granted to Morpho. Morpho argued that the definition of “consumer” in RCW 82.04.190(6) requires that the buildings being improved must be under, upon or above real property that is either owned by the United States or in which the United States has a beneficial interest such as a lease, an easement, or a license. CP 25-26; 630-32. The Department countered that no such property interest is required as long as the buildings are improved

for the United States, and that regardless, the United States had at least a license to inspect and operate security measures at the airports. CP 75-81.

The trial court agreed with Morpho that RCW 82.04.190(6) requires a property interest, and ruled that, as a matter of law, the United States had no such interest in Sea-Tac and Spokane airports. RP 30-31; CP 653. Accordingly, the trial court ruled that Morpho was not a “consumer” of the systems and, therefore, not subject to Washington’s use tax. The Department timely filed a notice of appeal to this Court. CP 648-49.

## V. ARGUMENT

Morpho meets RCW 82.04.190(6)’s definition of a “consumer” and the Department properly assessed use tax against Morpho based on the value of the systems it installed at Washington airports. The use tax is imposed on contractors that improve buildings above or upon real property “of or for” the United States. RCW 82.04.190(6) covers two situations: (1) contractors that improve buildings on real property “of” the United States, and (2) contractors that improve buildings “for” the United States. Because Morpho received \$48 million for manufacturing and installing systems at Washington airports, it improved buildings “for” the United States, despite the fact that the United States does not own the Sea-Tac or Spokane airports.

The Department's construction of RCW 82.04.190(6) is the only reasonable one, particularly in light of the statutory scheme. Federal contractors are defined as "consumers" under the use tax because Washington cannot tax the United States directly. Therefore, the incidence of the tax is shifted to the contractor in federal contracting, unlike construction projects generally, where sales tax is imposed on the entity that purchases the work. Because Washington could not tax the United States for purchasing or installing explosive detection systems, Morpho is defined as a "consumer" and owes use tax.

Federal case law supports this result. The D.C. Circuit Court of Appeals held that Morpho should have known it might reasonably be determined to be a "consumer" and subject to Washington's use tax. *Morpho Detection*, 717 F.3d at 982. And the FAA's Office of Dispute Resolution for Acquisition found that Morpho's interpretation to the contrary was unsupported by the canons of statutory construction and read the words "or for" out of the statute entirely. CP 598.

**A. Standard of Review and Legal Standards**

The Court reviews orders granting summary judgment de novo. *In re Estate of Hambleton*, \_\_ Wn.2d \_\_, 335 P.3d 398, 406 (2014). A trial court properly grants summary judgment if there is no genuine issue of material fact and the party requesting summary judgment is entitled to

judgment as a matter of law. *Skagit Cnty. Pub. Hosp. Dist. Bd. 1 v. Dep't of Revenue*, 158 Wn. App. 426, 435, 242 P.3d 909 (2010).

The fundamental objective in construing a statute is to ascertain and carry out the Legislature's intent. *Dep't of Ecology v. Campbell & Gwinn*, 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). Courts also consider the subject, nature, and purpose of the statute, 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). Statutory interpretation is a question of law subject to de novo review. *Cashmere Valley Bank*, 181 Wn.2d at 631.

The Department is charged with enforcing the tax code and has the authority to interpret it. *Id.* at 635. "While the ultimate authority for determining a statute's meaning remains with the court, considerable deference will be given to the interpretation made by the agency charged with enforcing the statute." *Impecoven v. Dep't of Revenue*, 120 Wn.2d

357, 363, 841 P.2d 752 (1992). Taxes are presumed valid, and the burden is on the taxpayer to show that the Department's assessment is incorrect. *Space Age Fuels, Inc. v. Dep't of Revenue*, 178 Wn. App. 756, 762, 315 P.3d 604 (2013).

**B. The Department Properly Assessed Use Tax On The Value Of The Explosive Detection Systems Morpho Installed At Washington Airports.**

The use tax is imposed on “every person in this state . . . for the privilege of using within this state as a consumer any: (a) Article of tangible personal property acquired by the user in any manner . . . .” RCW 82.12.020(1). Use tax is a companion tax to the retail sales tax and is imposed when a seller has not collected the retail sales tax. *See* RCW 82.08.020(1) (retail sales tax); RCW 82.12.020(1) (use tax); WAC 458-20-178(2); *Glen Park Assocs., LLC v. Dep't of Revenue*, 119 Wn. App. 481, 484 n.1, 82 P.3d 664 (2003). The intent of use tax is “to tax the privilege of using all tangible property within the state on which sales tax has not been paid.” *Activate, Inc. v. Dep't of Revenue*, 150 Wn. App. 807, 814, 209 P.3d 524 (2009) (quoting *Sacred Heart Med. Ctr. v. Dep't of Revenue*, 88 Wn. App. 632, 638, 946 P.2d 409 (1997)). The use tax rate is determined by the applicable retail sales tax rate. RCW 82.12.020(4). The measure of the tax is the “value of the article used,” which generally is its purchase price. RCW 82.12.010(7)(a); RCW 82.12.020(4).

For the following reasons, the Department properly assessed Morpho for use tax on the explosive detection systems that it installed or prepared for subsequent use by TSA.

**1. Morpho “used” the explosive detection systems under RCW 82.12.010(6).**

Whether use tax applies is governed in part by the statutory definition of “use.” “Use” is given its ordinary meaning and includes in pertinent part, “the first act within this state by which the taxpayer takes or assumes dominion or control over the article of tangible personal property (as a consumer), and include[s] *installation*, storage, withdrawal from storage, distribution, or any other act preparatory to subsequent actual use or consumption within this state; . . .” RCW 82.12.010(6)(a) (emphasis added).

As noted above, Morpho has conceded for purposes of summary judgment that it installed the explosive detection systems in Washington. CP 24 (footnote 6). Because installation constitutes “use” under RCW 82.12.010(6)(a), this Court need only address whether Morpho’s use of the systems was as a “consumer” under RCW 82.04.190(6).

**2. Morpho used the explosive detection system “as a consumer” under RCW 82.04.190(6).**

To have use tax liability, a taxpayer must “use” the item in question “as a consumer.” In RCW 82.04.190, the Legislature has defined

“consumer” in numerous ways, giving the term a meaning much broader than what might commonly be understood as an individual household purchaser of goods. One subsection of that statute applies to the specific circumstances of this case, designating as “consumers” persons who construct, repair, decorate, or improve buildings upon or above real property “of or for” the United States.

‘Consumer’ means . . . [a]ny person engaged in the business of constructing, repairing, decorating, or improving new or existing buildings or other structures under, upon, or above real property *of or for* the United States. . . .

RCW 82.04.190(6) (emphasis added).

“Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.” *Davis v. Dep’t of Licensing*, 137 Wn.2d 957, 963, 977 P.2d 554 (1999) (citation omitted). To give all the words in this statute meaning, it must cover two situations:

1. Any person engaged in the business of constructing, repairing, decorating, or improving new or existing buildings or other structures under, upon, or above real property *of* the United States; and

2. Any person engaged in the business of constructing, repairing, decorating, or improving new or existing buildings or other structures *for* the United States.

This is the only logical construction of the statute that gives all the words their plain meaning. Morpho's work falls into the second situation as a matter of law because Morpho worked under contract with TSA, and TSA paid for installation of the explosive detection systems at the Washington airports. This holds true even though the federal government does not own the airports. In other words, regardless of whether Morpho installed the explosive detection systems in buildings on land "of" the United States, it certainly installed them in buildings on land "for" the United States.

The trial court reached a contrary conclusion, ruling that the definition of "consumer" in RCW 82.04.190(6) applies only when the federal government owns, or has some other property interest in, the real property on which the work is performed. RP 30-31. In doing so, the trial court failed to discern and give effect to the Legislature's intent. This intent is evident not only in the plain meaning of the words in RCW 82.04.190(6), but also in the statutory scheme, which deliberately shifts the incidence of the tax on construction-related activities to the contractor when the customer for those services is the United States.

**C. Because Washington Cannot Impose Sales Taxes On The United States For Construction-Related Costs, The Legislature Imposes Use Tax On Federal Contractors For Those Materials.**

The Supremacy Clause of the United States Constitution prohibits states from taxing the federal government directly. *U.S. v. New Mexico*, 455 U.S. 720, 733, 102 S. Ct. 1373, 71 L. Ed. 2d 580 (1982). This means that Washington’s usual tax system imposing a retail sales tax on a person or business that hires a contractor to construct, repair, decorate, or improve buildings cannot be applied if it is the federal government that pays the contractor. As a result of this limitation, Washington enacted legislation that taxes a contractor who works for the federal government as the “consumer,” rather than the actual purchaser of that work, the federal government. Even though the contractor will often pass the tax on to the federal government by including the costs in its bid price, the United States Supreme Court upheld this alternative tax system for government contracting against a Supremacy Clause challenge. *Washington v. U.S.*, 460 U.S. 536, 546, 103 S. Ct. 1344, 75 L. Ed. 2d 264 (1983).

The statutes accomplish this dual system for taxing construction through an interplay of the sales and use tax statutes and the definitions contained in those statutes. The analysis starts with the sales tax and the definitions of what is included and excluded from a “retail sale” subject to that tax. *See* RCW 82.04.050. A taxable “retail sale” generally includes

construction work. *E.g.*, RCW 82.04.050(2). Specifically, the term includes the “charge made for tangible personal property consumed and/or for labor and services” associated with:

The constructing, repairing, decorating, or improving of new or existing buildings or other structures under, upon, or above real property of or for consumers, including the installing or attaching of any article of tangible personal property therein or thereto, whether or not such personal property becomes a part of the realty by virtue of installation...

RCW 82.04.050(2)(b).

Despite the broad language of RCW 82.04.050(2)(b), work performed for the federal government is carved out of the sales tax by excluding it from the definition of “retail sale”:

The term [retail sale] does not include the sale of or charge made for labor and services rendered in respect to the constructing, repairing, decorating, or improving of new or existing buildings or other structures under, upon, or above real property of or for the United States. . .

RCW 82.04.050(12). This means that construction work “under, upon, or above real property of or for the United States” is not subject to retail sales tax on the labor and services like other construction work.

Because of the Supremacy Clause limitation on state taxation of the federal government, Washington imposed no sales or use tax on federally-funded construction projects from 1941 through 1975. *See Washington*, 460 U.S. at 538. But in 1975, the Legislature decided to

bring this work back into the tax system. And because the Legislature could not tax the federal government as a purchaser of the work, it chose to impose tax on the federal contractor. *Id.* at 538-540.

This federal contracting work is brought back into the tax scheme by defining a federal *contractor* as a “consumer” who owes use tax. RCW 82.12.020 imposes a use tax on “consumers” of personal property. In 1975, the Legislature added the definition of “consumer” in RCW 82.04.190(6), creating use tax liability for persons “engaged in the business of constructing, repairing, decorating, or improving new or existing buildings or other structures under, upon, or above real property *of or for* the United States . . . .” (Emphasis added.) Under the use tax, the federal contractor’s use of materials in this work is subject to tax based on the value of the article used. RCW 82.12.020(4)(a).

This history regarding state taxation of federal construction projects demonstrates that starting in 1975, the Legislature intended to tax federal construction projects to the full extent allowed under federal constitutional limitations.

**D. When The United States Pays A Contractor To Improve Buildings, That Work Is “For” The United States And The Contractor Is A “Consumer.”**

The trial court ruled that Morpho’s work was not subject to use tax because Morpho performed it on land in which, the trial court assumed,

the federal government had no interest. RP 29-31; CP 653. In other words, the trial court ruled that Morpho was not working on land “of” the United States. This interpretation, however, reads the words “or for” out of RCW 82.04.190(6)’s “consumer” definition. *See* CP 598 (ODRA decision). The trial court erred by failing to take into account all the language of the statute, related statutes, and the context and purpose of the statute, as our Supreme Court requires. *See Campbell & Gwinn*, 146 Wn.2d at 9-10.

**1. Morpho’s interpretation of “for” in RCW 82.04.190(6) leads to an awkward and implausible result, contrary to the unambiguous language and statutory scheme.**

Neither the trial court nor Morpho has ever offered a plausible meaning for the words “or for” that could support the result the court reached. Indeed, in its opening summary judgment brief arguing that its work was tax-exempt because it was not on federal land, Morpho made no effort whatsoever to explain this phrase. *See* CP 25-26. After the Department pointed out that shortcoming, Morpho suggested that perhaps the words “or for” mean some “beneficial interest” less than ownership. CP 631. Morpho did not identify precisely what this lesser interest might be, nor did it attempt to draw a line between what was and what was not a sufficient interest to trigger the use tax.

Morpho’s reading of the statute is strained to say the least. It is difficult to imagine that the Legislature, immediately after using the phrase “real property of,” which refers to ownership, would have used the phrase “real property . . . for” to describe some lesser property interest. It makes far more sense for real property to be “of” the federal government than for real property to be “for” the federal government.<sup>7</sup> The only plausible interpretation is that the word “for” links the earlier actions of “constructing, repairing, decorating, or improving new or existing buildings” with whom those actions are being done for—the federal government. In simple terms, contracting work is performed “for” the federal government; real property is not “for” the federal government.

If the Legislature intended that real property “for” the federal government mean property owned by someone else, but in which the United States has a lease, easement, or a license, it could easily have said so.<sup>8</sup> It did not, and Morpho’s efforts to twist the statute into something

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<sup>7</sup> Compare, for example, these sentences: “The contractor performed work on real property of the United States,” and “The contractor performed work on real property for the United States.” The first sentence plainly describes who owned the jobsite; the second sentence cannot coherently be interpreted to refer to a lease by the United States of the jobsite.

<sup>8</sup> In fact, the Legislature used such precision in another definition of activities constituting a retail sale. RCW 82.04.050(2)(c) imposes sales tax for “The constructing, repairing, or improving of any structure upon, above, or under *any real property owned by an owner who conveys the property by title, possession, or any other means* to the person performing such construction, repair, or improvement for the purpose of performing such construction, repair, or improvement and the property is then

else should be rejected. The Legislature intended “for” to address the constitutional problem of taxing the federal government directly if work is performed “for” the federal government, regardless of who owns the land where that work is performed.

Morpho’s interpretation of the statutory language also causes an absurd result with respect to RCW 82.04.050(12), the portion of the “retail sale” definition that excludes government contracting from the retail sales tax. The language in RCW 82.04.050(12) mirrors the language in RCW 82.04.190(6)—one excludes work from the retail sales tax and the other defines the contractor performing the same work as a “consumer” under RCW 82.04.190(6), making the contractor subject to use tax. The two statutes should be read consistently, as they are related. *See Campbell & Gwinn*, 146 Wn.2d at 9-10.

Under Morpho’s interpretation, because Morpho did not improve buildings “upon, or above real property of or for the United States,” it is not a “consumer” under RCW 82.04.190(6) and, accordingly, is not subject to use tax. If “upon, or above real property of or for the United States” in RCW 82.04.050(12) is read the same way, the statute would not exclude from the retail sales tax construction work performed for the United States on non-federal land. But imposing sales tax on the United

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reconveyed by title, possession, or any other means to the original owner” (emphasis added).

States would have violated the Supremacy Clause, and the Legislature did not intend such a result.

**2. Morpho's interpretation of "for" the United States is inconsistent with the rationale behind taxing federal contractors.**

The policies that underlie imposing a use tax on government contractors apply squarely to Morpho's Washington installation of explosive detection systems for TSA. Because of the Supremacy Clause, Washington could not have imposed a sales or use tax on TSA for purchasing or using the explosive detection systems.

Imposing use tax when buildings are improved "for" the United States makes much more sense in constitutional terms than limiting the use tax to situations where contractors improve buildings on real property owned by the United States. It is clear that when the United States purchases work, Washington cannot impose sales or use tax on the United States. Therefore, to tax the improvement of buildings "for" the United States at all, a tax must be imposed on the contractor. Under Morpho's construction, Washington would essentially be taxing contractors only when buildings are improved on real property "of" the United States. But the constitutional problem of taxing the federal government has nothing to do with who owns the land. Washington could constitutionally impose retail sales tax on a private buyer of construction services on federal land.

*U.S. v. New Mexico*, 455 U.S. 720, 733, 102 S. Ct. 1373, 71 L. Ed. 2d 580 (1982) (Supremacy clause only prohibits tax directly on the United States). There would be no constitutional reason to shift the incidence of tax in these situations to the contractor.<sup>9</sup> Rather, the purpose of the use tax on federal contractors is to address the constitutional prohibition on taxing work *for* the United States.

**3. The Legislature did not mean “and” when it used the word “or” in RCW 82.04.190(6).**

The Department’s interpretation of RCW 82.04.190(6) is the only reasonable interpretation that considers all the statute’s language. In a sense, Morpho and the trial court have changed the Legislature’s phrase “of or for” to “of *and* for.” If the statute did say “and,” then Morpho’s work would be tax-free because it was not both on property “of” the United States *and* performed “for” the United States. But the word “or” does not mean “and” unless legislative intent clearly indicates that such a

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<sup>9</sup> The Legislature may have included the phrase “real property of” into the use tax scheme because of some older cases suggesting that states could not tax work on federal property. *U.S. v. Livingston*, 179 F. Supp. 9 (E.D.S.C. 1959) (sales or use tax on materials procured by Dupont for Savannah River Project, a U.S. facility, was invalid), *sum. aff’d* 364 U.S. 281 (1960); *U.S. v. Allegheny Cnty.*, 322 U.S. 174, 64 S. Ct. 908, 88 L. Ed. 1209 (1944) (state property tax imposed on value of federal machinery held by private party was invalid).

The more likely explanation of the language, however, is that the Legislature merely borrowed the “of or for” phrase from the statute imposing sales tax for construction generally, which taxes work “of or for” consumers. RCW 82.04.050(2)(b). The Court in this case need not determine the meaning of improving buildings above real property “of” the United States that do not involve payment from the federal government. Rather the Court needs only to determine whether Morpho’s work was “for” the United States.

construction was intended. *Tesoro Ref. & Mktg. Co. v. Dep't of Revenue*, 164 Wn.2d 310, 319, 190 P.3d 28 (2008).

*Tesoro* is analogous. In *Tesoro*, Washington's hazardous substance tax was imposed on the first person or entity that had "the power to sell or use a hazardous substance or to authorize the sale or use by another." RCW 82.21.020(3). *Tesoro* argued that because the word "or" can be used interchangeably with the word "and," the statute was ambiguous. From this premise *Tesoro* argued that the tax did not apply to its operations because it had the power to sell, but not use, refinery gas.<sup>10</sup> *Tesoro*, 164 Wn.2d at 319.

The Court rejected *Tesoro's* argument. It explained that as a default rule, "or" does not mean "and." *Id.* The Court elaborated that the true test is legislative intent, to be understood by the statute's context, related statutory provisions, and the statutory scheme as a whole. *Id.* The Court proceeded to review the purposes of the hazardous substance tax, which were to (1) tax the first possession of all products designated

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<sup>10</sup> There is a rule of construction that an ambiguous tax-imposing statute is construed in the taxpayer's favor. However, this rule of construction should only be used as a "tie-breaker" after considering not only the text, context, and purpose of a statute, but also legislative history and any other information we have about the statute. *See In re Estate of Hitchman*, 100 Wn.2d 464, 466, 670 P.2d 655 (1983) (rule that an ambiguous tax statute is construed in favor of taxpayer "has been generally overemphasized and exaggerated in scope . . . [T]ax laws ought to be given a reasonable construction, without bias or prejudice against either the taxpayer or the state, in order to carry out the intention of the legislature and further the important public interests which such statutes subserve."). Here, there is no "tie." The trial court erred and its decision should be reversed.

hazardous substances by the Department of Ecology, and (2) to tax the possession only once. *Id.* Neither purpose indicated that the Legislature “desired to narrow the scope of taxable possessions to persons with the power to both sell *and* use the hazardous substance.” *Id.* at 320 (emphasis in original).

As in *Tesoro*, the Legislature here did not express a clear intent (or any intent) to mean “and” when it said “or” in RCW 84.02.190(6). The Legislature easily could have limited the tax to contractors performing work on real property owned by the United States. To do so it would simply have needed to eliminate the words “or for.”

As in *Tesoro*, the taxpayer’s statutory construction here is contrary to the purposes of the very statute it is construing. The use tax’s purpose in general is to impose a tax on the use of all personal property for which sales tax has not been paid. *Activate, Inc.*, 150 Wn. App. at 814. And the use tax’s purpose in government contracting specifically is to impose a use tax on a contractor where imposing sales tax on the federal government would violate the Supremacy Clause. *See Washington v. U.S.*, 460 U.S. at 537-40. Exempting federal contracting work from this tax simply because the work occurs on non-federal land is inconsistent with both these purposes. It would also make no sense. The Legislature would not enact a statute to capture tax on private contractor work on government contracts,

but exclude from that tax a host of situations—such as the federally-funded installation of explosive detection systems at Sea-Tac and Spokane airports—that did not involve a particular real property interest by the United States.

When RCW 82.04.190(6)'s language is read in context of the statutory scheme as a whole, and the statute's purpose is taken into account, legislative intent is clear. A "consumer" includes not only those who perform the specified types of work on real property owned by the United States or in which the United States has an ownership interest, but also those who perform such work "for" the United States, regardless who owns the real property that is improved.<sup>11</sup>

**4. The legislative history further supports the interpretation that the Legislature sought to tax contractors for all personal property incorporated into building improvements for the United States.**

Because the Legislature's intent is evidenced by RCW 82.04.190(6)'s language, the statutory scheme surrounding government

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<sup>11</sup> There is additional historical support for reading "of or for" in the disjunctive rather than the conjunctive. As noted above at pg. 28 n. 9, the language in RCW 82.04.190(6) was likely drawn from the definition of "retail sale" that includes work above real property "of or for consumers." The retail sale definition statute previously had different language. A retail sale was defined in 1941 as the improvement of buildings above "real property of consumers or for consumers." *Klickitat Cnty. v. Jenner*, 15 Wn.2d 373, 379, 130 P.2d 880 (1942). The Legislature then simplified the statute by deleting the first reference to "consumers" in 1943. This change expressed the Legislature's apparent approval of the Court's interpretation in *Klickitat County*, rather than a change in the law. See *Earley v. State*, 48 Wn.2d 667, 671, 296 P.2d 530 (1956). This supports a reading of the use tax definition as applying to work above real property of the United States or work for the United States.

contracting, and the purpose behind that scheme, this Court need not review the legislative history. But even if this Court were to find RCW 82.04.190(6) ambiguous, the legislative history supports the Department's interpretation.

The legislative history of the statute provides further evidence that the Legislature did not intend RCW 82.04.190(6) to apply only to property in which the United States government has a property interest. For instance, the fiscal note emphasizes work performed "for" the federal government:

This measure broadens the sales and use tax base to include construction activity performed *for* the U.S. Government . . . . Consumer has been redefined to include persons engaged in constructing, repairing, or improving buildings *for* these same government entities.

CP 134 (emphasis added); *see also* CP 130 (Senate Committee report states statute "provides for the collection of the Sales and Use Tax upon the construction and maintenance of buildings *for* the United States . . .") (emphasis added). In contrast, there is no evidence in this history of any intention to limit the use tax to buildings improved *on* federal land. To the contrary, the history shows an intention to reach all work performed for the federal government that would otherwise be tax exempt under the Supremacy Clause. Therefore, even if this Court were to find the language of the statute ambiguous, the legislative history affirms the

legislative intent and purpose to reach all contracting for the federal government.

**5. The federal courts agree that the Department's construction of RCW 82.04.190(6) is reasonable.**

Washington courts have not construed RCW 82.04.190(6) with respect to this particular issue. But in Morpho's litigation with TSA, the Office of Dispute Resolution for Acquisition provided a logical and coherent analysis of the issue that is entirely consistent with the Department's construction of the statute.

In its federal litigation, Morpho raised a number of arguments as to why TSA should adjust its contract price to cover Washington's use tax assessment. Relevant here, Morpho asserted that Washington assessed an "after-imposed tax" that Morpho could not have anticipated.

ODRA flatly rejected Morpho's argument, observing that

[Morpho's] position is not supported by the canons of statutory interpretation or by demonstrating that contrary interpretations prevailed prior to the ALJ's determination. The ALJ's footnote shows that he relied on the plain, simple, and singular interpretation that gives meaning to the complete language of the statutory definition of 'consumer.'

CP 598.<sup>12</sup>

ODRA continued by explaining that Morpho's reading of Washington's definition of "consumer" reads the phrase "or for" out of the

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<sup>12</sup> The reference to "the ALJ's footnote" is to the Department's Executive Level Determination. See CP 564. That footnote is quoted above at p.11.

statute: “The ALJ gave meaning to the phrase ‘or for’ while [Morpho] would read it out of the statute entirely.” CP 598. ODRA also found significant that neither Morpho nor its own research found any contrary interpretation in case law, tax guides, or even the press. *Id.* ODRA concluded its statutory analysis emphatically: “The plain meaning of the long standing statutory definition of ‘consumer’ spoke for itself for nearly three decades.” CP 599.

Morpho appealed ODRA’s decision to the United States Court of Appeals for the D.C. Circuit. Morpho again argued that Washington’s assessment constituted an “after-imposed tax” because it involved a “novel interpretation” of Washington law. *Morpho*, 717 F.3d at 976, 980. The D.C. Circuit likewise rejected Morpho’s argument.

The court expressed the view that the statute was ambiguous,<sup>13</sup> noting that sometimes statutes mistakenly use the word “or” when they really mean to use the word “and.” *See, e.g., Morpho*, 717 F.3d at 980. However, the context of the court’s statements about the statute being ambiguous is significant. The court was rejecting Morpho’s argument that Washington’s interpretation was not foreseeable: “[W]e find unpersuasive Morpho’s claim of unfair surprise.” *Id.* at 981.

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<sup>13</sup> Even if the language were ambiguous, the surrounding use and sales tax statutes and purpose behind the statute indicate that the Department’s construction is correct.

The court concluded that “Morpho should have known it might reasonably be determined to be a ‘consumer’ whose business activities were subject to the use and B&O taxes.” *Id.* at 982. In a footnote, the court pointed out that the statute’s construction was ultimately a matter for the Washington courts, but that the Department’s construction was “a permissible interpretation. . . .” *Id.* at 982 n.10. Even if the Department’s interpretation were merely “permissible,” it would still be entitled to considerable deference. *Impehoven v. Dep’t of Revenue*, 120 Wn.2d 357, 363, 841 P.2d 752 (1992) (“considerable deference will be given to the interpretation made by the agency charged with enforcing the statute”).

**E. Even If Morpho Is Correct That “For” Relates To Real Property Rather Than The Party Purchasing The Work, Morpho Remains A “Consumer” Subject To Use Tax.**

Even under Morpho’s interpretation of the term “or for,” the trial court’s decision should be reversed. Morpho made an effort to explain the phrase in its summary judgment reply brief:

“Real property is for” the United States if the United States has a beneficial interest, easement, lease, license to use or other interest in the real property.

CP 631.

If the Legislature intended the phrase “or for” to mean a beneficial interest, easement, lease, or license in real property, TSA, as a matter of law possessed such a license in the airport properties. A license is merely

“an authority to do a particular act, or series of acts, upon another’s land, without possessing any estate therein.” *Black’s Law Dictionary* 1060 (10<sup>th</sup> ed. 2009). Federal law required TSA to maintain security at the airports and therefore gave it a license to use real property at the airport to conduct such security operations. 49 U.S.C. § 44901 (providing, for example, that TSA shall supervise passenger screening at airports and has the power to order the dismissal of any individual performing such screening); 49 U.S.C. § 44916(b) (TSA “shall conduct periodic and unannounced inspections of security systems of airports . . . .”); *see generally* 49 U.S.C. § 114 (listing TSA responsibilities). Accordingly, even if the term “for” means a beneficial interest such as a license, as Morpho contends, the real property was improved for the United States.

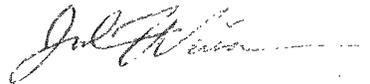
## VI. CONCLUSION

The Legislature intends to impose a use tax on contractors who improve buildings for the federal government on any real property, whether owned by the federal government or not. Accordingly, the trial court erred by granting summary judgment to Morpho on the ground that the federal government does not own or have a property interest in the Sea-Tac and Spokane airports. This Court should reverse the order granting summary judgment to Morpho, rule that partial summary

judgment should be granted to the Department on this issue, and remand  
for trial on the remaining issues.

RESPECTFULLY SUBMITTED this 4th day of February, 2015.

ROBERT W. FERGUSON  
Attorney General

A handwritten signature in cursive script, appearing to read "Joshua Weissman", written in black ink.

Joshua Weissman, WSBA No. 42648  
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**PROOF OF SERVICE**

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

DATED this 4<sup>th</sup> day of February, 2015, at Tumwater, WA.



Susan Barton  
Legal Assistant

# WASHINGTON STATE ATTORNEY GENERAL

**February 04, 2015 - 1:25 PM**

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# APPENDIX B

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No. 46689-9

STATE OF WASHINGTON

BY \_\_\_\_\_

DEPUTY

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COURT OF APPEALS  
DIVISION II  
OF THE STATE OF WASHINGTON

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Morpho Detection, Inc.

Respondent,

v.

State of Washington, Department of Revenue

Appellant.

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Brief of Respondent

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## I. Introduction

Finding as a matter of undisputed fact, that Respondent, Morpho Detection Inc., (hereinafter referred to as “MDI”) performed no work “under, upon, or above real property of or for the United States,” the Thurston County Superior Court, Judge Schaller presiding, concluded that MDI is not a “consumer” under RCW 82.04.190(6) which reads:

(6) Any person engaged in the business of constructing, repairing, decorating, or improving new or existing buildings or other structures under, upon, or above real property of or for the United States, any instrumentality thereof, ... including the installing or attaching of any article of tangible personal property therein or thereto, whether or not such personal property becomes part of the realty by virtue of installation; ... . Any such person shall be a consumer within the meaning of this subsection in respect to tangible personal property incorporated into, installed in, or attached to such building or other structure by such person;

Therefore, summary judgment in favor of MDI was entered. CP 646 (Order Granting Plaintiff’s Motion for Summary Judgment); *See also*, RP 30-31.

On appeal, the Appellant, State of Washington, Department of Revenue, (hereinafter referred to as “the Department”) principally argues that MDI could be a consumer under RCW 82.04.190(6) even though it did not work under, upon, or above real property of or for the United States. Br. of App. 1 – 36. The Department’s Brief also contains a one

page argument, without citation to the Record, that as a matter of law the United States, through TSA, has a real property interest in the airport properties. *Id.* at 36 -37.

The plain, unambiguous language of RCW 82.04.190(6) demonstrates that the Superior Court, and not the Department, is correct as to the meaning of the term “consumer”. The undisputed evidence in the Record establishes that TSA had no real property interest of any kind or nature in the real property on which the work allegedly occurred.

## **II. Counterstatement of Issues Pertaining to Assignments of Error**

Must a person engaged in the business of constructing, repairing, decorating, or improving new or existing buildings or other structures do such work under, upon, or above real property of or for the United States to be a consumer pursuant to RCW 82.04.190(6)?

## **III. Counterstatement of the Case**

### *Statement of Facts*

MDI is a leading manufacturer of explosive detection machines (EDMs). As a result of the terrorist attacks on September 11, 2001, the Transportation Security Administration (“TSA”) contracted with MDI for the purchase of hundreds of EDMs which were to be deployed by TSA throughout the country. TSA is part of the United States Department of

Homeland Security, a Department of the United States federal government. CP 32 (Decl. of Piper).

The EDMs material to this litigation have all been deployed and operated at airports in Washington State. There are 46 such machines. 41 of the machines were deployed at SeaTac Airport and the remaining five machines were deployed at Spokane Airport. CP 32 – 33 (Decl. of Piper).

The Department alleges that MDI installed the machines at the airports and thereby improved the airport buildings.<sup>1</sup> *See e.g.*, Br. of App. at 11. The locations at which the 46 machines are deployed, the locations at which the Department alleges MDI performed the business of improving a building, is not real property of or for the United States. The real property on which the machines sit is under the exclusive control and belongs to the airports at which the machines are deployed. CP 28 - 31 (Declarations of Anderson and McDevitt). The United States has no lease or other real property right to or interest in such real property. *Id.*<sup>2</sup>

For the period January 1, 2002, through March 31, 2006, the Department assessed MDI sales and/or use tax plus interest and penalties measured by what it understood to be the value (with minor adjustments)

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<sup>1</sup> While MDI disputes that it performed such installation and/or that such installation improved any building, for purposes of its motion for summary judgment such allegations were assumed true.

<sup>2</sup> TSA does have a lease in other airport property.

of the 46 EDMs manufactured and sold by MDI to TSA that were subsequently deployed by TSA in Washington.<sup>3</sup> CP 33 (Decl. of Piper).

To satisfy the assessment, between July 18, 2012 and July 20, 2013, MDI paid DOR \$5,413,642.38. *Id.* The DOR assessment contended that such tax was due on the theory that MDI is a consumer of the EDMs deployed by TSA in Washington under RCW 82.04.190(6). *Id.*

*Statement of Proceedings*

MDI paid the assessment and sought refund under RCW 82.32.180 which provides for a *de novo* proceeding before the Thurston County Superior Court. CP 10 -15 (Amended Complaint). The Department never filed an Answer to MDI's Amended Complaint.<sup>4</sup>

MDI brought a motion for summary judgment raising two issues:

1. Is MDI the type of person to which RCW 82.04.190(6) applies?
2. Does the statute apply when the work is not being performed under, upon, or above real property of or for the United States?

CP 19 (Mot. For Summary Judgment). The Department brought a cross motion on both issues, and both parties filed various declarations in

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<sup>3</sup> The adjustment related to a deduction for the value of the assembly work performed on site in Washington.

<sup>4</sup> RCW 82.32.180 does not require an Answer to be filed and an examination of the Clerk Papers demonstrates that none was filed. The Amended Complaint raises additional grounds for granting MDI the relief it seeks that have not been ruled on by the Superior Court and are not ripe for review. MDI contends, *inter alia*, that it did not install the EDMs, did not improve any building, that the tax unconstitutionally discriminates against interstate commerce and that the tax violates the Supremacy Clause.

support of their motions. *See*, CP 60 (Dep't. Opp. to Morpho Motion for Summary Judgment). CP 28 – 35 (Declarations of Piper, McDevitt and Anderson); and CP 36 – 54 and 111 – 620 (Declarations of Huffman and Weissman).

As to the first issue, the Superior Court ruled that there was a genuine issue of material fact and denied the motion. RP 29. CP 646 (Order Granting Plaintiff's Motion for Summary Judgment).

As to the second issue, the Superior Court entered a finding that “no genuine issue of material fact exists” as to “whether any such work occurred ‘under, upon, or above real property of or for the United States’” and concluded that MDI “is not a “consumer” under RCW 82.04.190(6) and RCW 82.12 in regards to the deployment of explosive detection machines at Washington airports during the tax period at issue in this matter.” *Id.* The Court therefore entered summary judgment in favor of MDI. *Id.*

Prior to consideration of the motion for summary judgment, the Superior Court ruled on various motions regarding the declarations filed in support of the parties' motions. RP 8 and 10.

Recognizing the import of the fact that the real property was not of or for the United States, the Department moved to disqualify MDI's witnesses from stating such fact even though they have personal knowledge of the fact. CP 55 – 58 (Dep't. Motion to Strike).

The Superior Court granted the Department's motion and struck from the Declaration of Anderson and the Declaration of McDevitt the precise sentence in which both declarants testified that the real property at which the EDMs were and are deployed is not real property of or for the United States. RP 8.

The Court explained that “the facts that ... the court ultimately relies on as it relates to the real property status – who owns it, who doesn't own it, who has an interest, who doesn't have an interest – separate and apart from my interpretation of the meaning, are separately set out in both of the declarations by Mr. Anderson and Mr. McDevitt.” RP 9. Those separately set out additional facts were not stricken from the Declarations<sup>5</sup> and are the only evidence in the Record regarding who has and does not have a real property interest in the property at which the EDMs are deployed. Those Declarations established as a matter of undisputed fact that the United States has no ownership interest, leasehold interest, or other real property right to or interest in the property at which the EDMs are deployed. *See*, RP 30 – 31.

The Court also granted MDI's motion to strike hearsay from the Declaration of Huffman. This motion was unopposed at the hearing. RP 10.

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<sup>5</sup> We do not mean to imply that the Department even moved to strike those statements of fact. It did not.

At the hearing on the motions below, the Department did attempt to argue that MDI's witnesses were wrong because the TSA leases other real property at the airport. RP 19 - 20. In response, MDI argued that the declarants were specific. *See generally*, RP 24 and CP 19 (Mot. For Summary Judgment). Both declarants first declared they knew the location of the machines and then declared that the real property at which the EDMs were and are deployed by TSA "is real property owned (and exclusively controlled by others than the United States). The United States has no lease or other real property right to or interest in *such* real property." Declarations of Anderson and McDevitt. (Emphasis added). The witnesses did not declare that the federal government had no interest in *other* real property at the airport. Thus, the Department's evidence regarding other property did not create a dispute over the property at issue.

The Superior Court reviewed the references the Department contended gave the United States some real property interest in the locations at which the machines were deployed.<sup>6</sup> The Court did not find those references sufficient to create a genuine issue of material fact as to whether or not where the EDMs were installed was under, upon, or above real property of or for the United States.<sup>7</sup> RP 31. Therefore, the Court granted MDI's motion for summary judgment on the second issue.

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<sup>6</sup> The references were to an administrative office and/or a break room, not to the locations where the EDMs were deployed. RP 31.

<sup>7</sup> The Superior Court also expressly rejected "the defendant's argument that real property is for the United States just means for the benefit of the United States. It clearly relates back to real property; so if there is some sort of real property interest that the government

#### IV. Summary of Argument

RCW 82.04.190(6) provides:

(6) Any person engaged in the business of constructing, repairing, decorating, or improving new or existing buildings or other structures under, upon, or above real property of or for the United States, any instrumentality thereof, ... including the installing or attaching of any article of tangible personal property therein or thereto, whether or not such personal property becomes part of the realty by virtue of installation; ... . Any such person shall be a consumer within the meaning of this subsection in respect to tangible personal property incorporated into, installed in, or attached to such building or other structure by such person;

The plain, unambiguous language of the statute requires that the specified activity (the business of constructing, repairing, decorating, or improving new or existing buildings or other structures) must occur “under, upon, or above real property of or for the United States.”

The undisputed facts are that the locations at the airports at which the EDMs are deployed are owned and exclusively controlled by the airports. The United States has no lease or other real property right to or

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has, which would be a lease, a license, an easement, or something of that issue. And the defendant has presented no evidence and has not created a genuine issue of material fact on that issue.” RP 30 – 31.

Despite this express ruling, the Department’s third assignment of error reads, “the Superior Court erred in ruling that the United States must have a beneficial interest in the real property where buildings are improved for the use tax to apply.” Br. of App. at 2. This phrasing of the issue might make it appear that the Superior Court agreed with the Department’s argument that real property is for the United States just means for the benefit of the United States. Later in its Brief, the Department recognizes that the Court ruled that RCW 82.04.190(6) “applies only when the federal government owns, or has some other property interest in the real property on which the work is performed.” Br. of App. at 21.

interest in such real property and the EDMs are used at the airport for the benefit of the airport, the airlines and the flying public. Declarations of Goodwin and McDevitt. CP 28 - 31. Thus, the real property at which the EDMs are deployed is not of or for the United States, and MDI cannot be a “consumer” under RCW 82.04.190(6).

This conclusion is supported by the plain, unambiguous language of the statute, rules of statutory construction, and rules of English grammar.

Unable to refute the plain, unambiguous meaning of the statute, the Department spends many pages detailing the work MDI allegedly performed at the airports. Br. of App. at 4 - 9. To this, no response is necessary. The issue is not whether MDI performed the specified activity. The sole issue is whether the activity was performed “under, upon, or above real property of or for the United States.” It was not.

Unable to refute the plain, unambiguous meaning of the statute, the Department also mischaracterizes prior litigation, offers an interpretation of the statute that requires additional words and/or makes portions of the statute superfluous, argues that the intent of the legislature was to pass a tax other than it did, creates a straw man argument and ends with an attempt to create an interest in Washington real property as a matter of law out of federal statutory language.

After quickly providing the plain meaning of RCW 82.04.190(6) by reference to its unambiguous language, we address the rules of

statutory construction and the rules of grammar which control the interpretation of the statute. We then identify and/or correct the Department's errors regarding its several separate arguments.

## **V. Argument**

### **A. Standard of Review**

The standard of review of a Superior Court's order granting summary judgment is *de novo*. *Clean v. City of Spokane*, 133 Wn.2d 455, 462, 947 P.2d 1169 (1997).

### **B. RCW 82.04.190(6) Only Applies if the Constructing, Repairing, Decorating, or Improving Is Under, Upon or Above Real Property of or for the United States.**

*1. The Unambiguous, Plain Language of the Statute Requires the Specified Activity to Occur Under, Upon or Above Real Property of or for the United States*

RCW 82.04.190(6) provides:

(6) Any person engaged in the business of constructing, repairing, decorating, or improving new or existing buildings or other structures under, upon, or above real property of or for the United States, any instrumentality thereof, ... Any such person shall be a consumer within the meaning of this subsection in respect to tangible personal property incorporated into, installed in, or attached to such building or other structure by such person;

The unambiguous language of the statute is that the specified activity -- the business of constructing, repairing, decorating, or improving

new or existing buildings or other structures --must occur "under, upon, or above real property of or for the United States."

The undisputed fact is that the real property on which the EDMs are located is not "real property of or for the United States." Declarations of Anderson and McDevitt.<sup>8</sup> Therefore, RCW 82.04.190(6) does not apply to MDI and the Superior Court's judgment should be affirmed.

*2. RCW 82.04.190(6)'s Plain Language Must Be Given Effect and Any Ambiguity Must Be Construed in Favor of the Taxpayer According to Rules of Statutory Construction.*

While the statutory interpretation issue raised by this case concerning RCW 82.04.190(6) has not been previously addressed by Washington Courts, the appellate courts of this state have repeatedly stated the rules courts should follow in interpreting tax statutes.

Absent ambiguity, courts rely on the plain language of the statute. *City of Spokane v. Dep't of Revenue*, 104 Wn. App. 253, 258, 17 P. 3d 1206 (2001). Courts should not and do not construe an unambiguous statute. *Vita Food Products v. State*, 91 Wn.2d 132, 587 P.2d 535 (1978). If a tax statute is ambiguous, the statute must be construed most strongly

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<sup>8</sup> In the Superior Court, the Department tried to claim that the witnesses were wrong because the TSA leases other real property at the airport. The witnesses were specific. Both witnesses first declared they knew the location of the machines and then declared that "[t]he real property at which the EDMs were and are deployed by TSA is real property owned (and exclusively controlled by others then the United States). The United States has no lease or other real property right to or interest in *such* real property." Declarations of Anderson and McDevitt (emphasis added). The witnesses did not declare that the federal government has no interest in *other* real property at the airport.

against the taxing authority.<sup>9</sup> *Group Health v. Department of Revenue*, 106 Wn.2d 391, 722 P.2d 787 (1986). That is, if there is doubt as to the meaning of a taxing statute, it is to be construed in favor of the taxpayer and against the taxing body. *Vita Food Products v. State*, 91 Wn.2d 132, 587 P.2d 535 (1978).<sup>10</sup>

For example, in *Vita Foods*, our Supreme Court was interpreting a tax statute that levied a privilege tax upon the “original receiver” of fish. “Original receiver” was statutorily defined as the person first receiving, handling, dealing in or dealing with the fish within the State of Washington. *Id.*

The Department argued that the statute was intended to apply to the first person receiving the fish which is subject to the taxing jurisdiction of the State. Therefore, when an Indian Tribe was the first person physically receiving and dealing with the fish within the State but the Tribe was not taxable because while within the State it was still beyond the taxing jurisdiction of the State, the Department argued that *Vita Foods*, the second person dealing with the fish, was taxable.

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<sup>9</sup> As RCW 82.04.190(6) is unambiguous, the Department’s arguments concerning statutory intent and legislative history should not be considered. Moreover, if the statute was ambiguous, then the statute must be construed most strongly against the Department. *See*, authorities cited and discussed in text.

<sup>10</sup> If doubt or ambiguity exists in regards to a tax exemption or deduction, rather than a statute defining who is taxable such as RCW 82.04.190(6), the statute would be construed strictly, though fairly, and in keeping with the ordinary meaning of the statute’s language against the taxpayer. *Group Health v. Department of Revenue*, 106 Wn.2d 391, 727 P.2d 787 (1986).

The Court rejected the Department's argument because the statute was clear on its face. The original receiver was defined as the first person actually, physically receiving the fish. The Department's argument would have the Court add words to the statute to fit what it claimed was the legislative intent (that the legislature meant the first receiving person to mean the first person over whom taxing authority may be asserted). Even if the Court believed the legislature intended something other than what it expressed, the Court lacked the power to add words to the statute. The Court buttressed its conclusion by reasoning that if there is doubt as to the meaning of a taxing statute, it is to be construed in favor of the taxpayer and against the taxing body. *Id.*

Below, the Thurston County Superior Court held that the statute was unambiguous and applied the plain meaning of the statute. Finding no genuine issue of material fact concerning whether or not the EDMs were installed under, upon, or above real property of or for the United States, the Superior Court concluded MDI is not a consumer. RP 31.

*3. Rules of Grammar and Rules of Construction Require the Specified Activity to Occur Under, Upon or Above Real Property of or for the United States.*

The Department claims that it is not a requirement that the real property be of or for the United States. It claims it is enough if the specified activity is done for the United States. Br. of App. at 15, 20 – 21. The specified activity is constructing, repairing, decorating, or improving

new or existing buildings or other structures. The Department fails to understand that the specified activity has to occur under, upon, or above real property of or for the United States.

The Department's construction would have the specified activity be constructing, repairing, decorating, or improving new or existing buildings or other structures under, upon, or above real property. Thus, it claims it is sufficient if the real property is of the United States or if the specified activity is for the United States. *Id.*

Such a construction is incorrect because:

(a) The Department's construction violates normal grammar rules;

(i) There is no comma or other punctuation after real property, and there would be if the Department's construction were correct;

(ii) The antecedents for the words "of or for" need to be identical. The Department's construction changes antecedents from real property for the word "of" to the specified activity for the word "for". Such a construction does violence to the English language.

(b) The Department's construction violates the rules of construction;

(i) "[A]ll the language used (in a statute) is given effect with no portion rendered meaningless or superfluous." *New West*

*Fisheries, Inc. v. Department of Revenue*, 106 Wn. App. 370, 376, 22 P.3d 1274 (2001).<sup>11</sup>

The Department's construction makes the words "under, upon, or above real property" superfluous. Everything is under, upon, or above real property. To have meaning, those words need to be tied to the phrase "of or for the United States."

The Department's construction also apparently makes the word "of" in the phrase "real property of or for" superfluous. The Department expressly argues that:

the constitutional problem of taxing the federal government has nothing to do with who owns the land. Washington could constitutionally impose retail sales tax on a private buyer of construction services on federal land. (Citation omitted) There would be no constitutional reason to shift the incidence of tax in these situations to the contractor. (footnote omitted) Rather, the purpose of the use tax on federal contractors is to address the constitutional prohibition on taxing work for the United States.

Br. of App at 28 – 29.<sup>12</sup>

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<sup>11</sup> The *New West Fisheries, Inc. v. Department of Revenue* case involved the enhanced food fish tax. The tax was subject to a credit for any tax previously paid on the same fish. New West contended that the language "any tax" permitted it a credit for an unemployment insurance tax and a worker's compensation tax. The Department countered that the tax had to be on the same fish. The Court ruled in favor of the Department because focusing on the word "any" made the language "on the same fish" superfluous. See also, *United Parcel Service, Inc. v. Department of Revenue*, 102 Wn. 2d 355, 687 P.2d 186 (1984) (Statutory deduction for vehicles used for transporting therein persons or property for hire across the boundaries of the state held to require the vehicles to cross the state boundaries and not just the persons or property because if just the persons or property had to cross state lines the language regarding vehicles would be superfluous.)

<sup>12</sup>The Department's omitted footnote argues that the "Legislature may have included the phrase "real property of" into the use tax scheme because of some older cases suggesting that states could not tax work on federal property" Br. of App. at 29 n. 9. The

But, the statute has the words “real property of or for”. A construction that makes the word “of” superfluous must be rejected.

(ii) Even if a Court believes the Legislature intended something other than what it expressed, the Courts lack the power to add words to the statute. *See, Vita Foods*, discussed at 11 – 12, *supra*.

The Department’s construction requires an additional word to be added to the statute. Rather, than reading “real property of or for the United States,” the Department has the statute reading “real property of the United States or *work* for the United States.” (Emphasized word “work” is added by Department construction while the word “of” and the phrase “under, upon or above real property” become superfluous). Therefore, the Department’s construction must be rejected.

The Superior Court’s reading that the real property must be of or for the United States is the only reading that gives meaning to each word of the statute. “Real property is of” the United States if the United States owns the real property. “Real property is for” the United States if the United States has an easement, lease, right to possess or other such interest

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Department then tells this Court that it need not determine the meaning of improving buildings under, upon or above real property “of” the United States that do not involve payment from the federal government. The Department gives that instruction apparently because its construction leads to “of” being superfluous.

in the real property. Thus, if the federal government leased the land, it would be real property for the United States.<sup>13</sup>

Persuasively, the Superior Court's reading of the phrase "of or for" is also consistent with what the Department described on page 11 and again on page 22 of the Department's Opposition to Morpho's Motion for Summary Judgment. CP 69 and 80. On those pages, the Department twice inadvertently demonstrated by reference to RCW 82.04.050(2)(b)<sup>14</sup> and RCW 82.04.190(4)<sup>15</sup> that "real property for" means, real property of a lessee, easement holder, or holder of a right of possession. There is no reason to think "real property for" means anything different in RCW 82.04.190(6).<sup>16</sup>

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<sup>13</sup> The paragraph in text is a complete response to the Department's argument that the Superior Court's reading "reads the words 'or for' out of RCW 82.04.190(6)'s consumer definition" and the Department's argument that neither "the trial court nor Morpho has ever offered a plausible meaning for the words 'or for' that could support the result the court reached." *See*, Br. of App. at 25. This paragraph is also a complete response to the straw man argument that "or" does not mean "and". *See*, Br. of App. at 29 - 32. The Department made the same argument below even though MDI has never argued that "or" meant "and". *Cf.* Brief of Appellant at 29 - 32 with Department's Opposition to Morpho's Motion for Summary Judgment at 18 - 20, CP 76 - 78. The Superior Court's reading gives every word of RCW 82.04.190(6) meaning without changing any words. The Department's construction based on its overstated understanding of statutory intent does not.

<sup>14</sup> According to the Department, "real property of or for" means in the context of RCW 82.04.050(2)(b) owning, leasing having the right to possess or having an easement. *See*, CP 69 (Department's Opposition to Morpho's Motion for Summary Judgment at 11). The Superior Court adopted that meaning of the terms.

<sup>15</sup> According to the Department, citing RCW 82.04.190(4), "real property of or for" refers to owning, leasing or having the right of possession to or an easement in real property. *See*, CP 80 (Department's Opposition to Morpho's Motion for Summary Judgment at 22). Again, the Superior Court adopted that meaning of the terms.

<sup>16</sup> Tellingly, the Brief of Appellant makes no reference to RCW 82.04.050(2)(b) and RCW 82.04.190(4) and instead argues that RCW 82.04.050(2)(c) shows how the Legislature would write a statute if it intended "for" to mean some lesser property right interest. Br. of App. at 26 n. 8. The Department is wrong on multiple counts. First, the statutes referred to in text show - as the Department argued below - what "real property

As whatever work MDI performed in regards to the EDMs did not occur on real property of the United States or on real property for the United States, MDI is entitled to summary judgment.

*4. Prior Litigation Does Not Support The Department.*

The Department discusses MDI's administrative appeal, even though the Superior Court's proceeding is *de novo* because it wants to create the illusion that prior tribunals agree with the Department. Not only is MDI's administrative appeal irrelevant to the Superior Court's proceeding, all such a proceeding results in is a Determination by the Department. Obviously, the Department's Determination agrees with the Department. That is always the case. It is a tautology.

The Department also discusses the federal administrative appeal MDI brought in its unsuccessful attempt to recover the amounts assessed as an after imposed tax. Not only is the "ODRA" decision described by the Department nothing more than a recommendation to the TSA Administrator that it reject MDI's claim that Washington's use tax is an after-imposed tax, but the TSA Administrator's decision was appealed. *See, Morpho Detection, Inc. v. Transportation Sec. Admin.*, 717 F.3d 975 (D.C. Cir. 2013).

On appeal, the issue before this Court was expressly not decided.

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for" means. Second, RCW 82.04.050(2)(c)'s language "any real property owned by an owner who conveys the property by title, possession, or any other means" does not show what "real property for" means. The quoted language shows how someone could convey title, that is, ownership. "Real property for" is something less than "real property of". The latter refers to ownership, the former refers to a lesser real property right or interest.

The Federal Court of Appeals wrote:

Whether the Revenue Department's statutory construction is correct as a matter of public policy or legislative intent is a question left to the Washington state courts where Morpho is currently challenging the tax assessment, 'on a variety of state-law grounds.' (Citation omitted). We conclude only that it is a permissible interpretation of the ambiguous language.

*Morpho Detection, Inc. v. Transportation Sec. Admin.*, 717 F.3d 975 at n. 10 (D.C. Cir. 2013).<sup>17</sup>

*5. The Department's Arguments Based On Statutory Intent Are Incorrect.*

The Department argues at length and repeatedly that the statute's intent is to tax persons selling to the federal government because the state cannot impose its sales or use taxes directly on the federal government.

*See, e.g.*, Br. of App. at 22 – 24, 27.<sup>18</sup>

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<sup>17</sup> The Department ultimately attempts to take comfort from the Court of Appeals statement that its interpretation was "permissible." The Department argues that its interpretation should be afforded considerable deference. Br. of App. at 36. While deference to an agency interpretation of an ambiguous statute within its area of special expertise might ordinarily be appropriate, here the statute is plain and unambiguous. "If a statute's meaning or a rule's meaning is plain and unambiguous on its face, then we give effect to that plain meaning. ... Only ambiguous statutes require judicial construction; statutes are not ambiguous simply because different interpretations are conceivable." *Department of Revenue v. Bi-Mor, Inc.*, 171 Wn. App. 197, 286 P.3d 417 (2012). Moreover, this statute is a taxing statute. Any ambiguity in such a statute is construed in favor of the taxpayer, not the Department. *See*, discussion of relevant cases at pgs. 10 -12 *supra*.

<sup>18</sup> *See also*, Br. of App. at 1 and 16 (the Department states that the State taxes contractors working for the federal government without limiting it to contractors working on real property of or for the United States).

The problem with the Department's argument is it only focuses on a portion of the legislative intent.<sup>19</sup> Clearly, the Legislature could have easily drafted a statute that defined persons selling tangible personal property to the federal government as consumers. That would have accomplished the legislative goal the Department repeatedly claims exists. But, the Legislature passed a statute that did something different.

The Legislative intent can best be understood by reference to the statutory language. The Legislature limited the definition of consumer to persons attaching tangible personal property to buildings or other structures under, upon, or above real property of or for the United States. Not only does the statute's first sentence require the work to be under, upon or above real property of or for the United States, but the statute's final sentence is: "Any such person shall be a consumer within the meaning of this subsection in respect to tangible personal property incorporated into, installed in, or attached to such building or other

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<sup>19</sup> The Department's legislative intent argument, like its other arguments concerning federal case law and statutory construction are also inappropriate because the statute is not ambiguous. "If a statute's meaning or a rule's meaning is plain and unambiguous on its face, then we give effect to that plain meaning. .... Only ambiguous statutes require judicial construction: statutes are not ambiguous simply because different interpretations are conceivable." *Department of Revenue, v. Bi-Mor, Inc.*, 171 Wn. App. 197, 286 P.3d 417 (2012). Moreover, this statute is a taxing statute. Any ambiguity in such a statute is construed in favor of the taxpayer, not the Department. *See*, discussion of relevant cases at pgs. 10 -12 *supra*. Thus, none of these separate Department arguments need be considered

structure by such person;” Such building or structure must be “under, upon, or above real property of or for the United States.”

The intent is not to tax all persons selling tangible property to the United States. By including the language regarding real property of or for the United States and the language regarding the person attaching, installing or otherwise incorporating the property to such building or other structure, the Legislature made clear that its intent was to tax a much smaller class of persons, only those attaching, installing or otherwise incorporating tangible personal property to a building or other structure under, upon, or above real property of or for the United States. That class of persons is much smaller than the Department argues were intended to be taxed. But, the Legislature specifically did not tax those persons only selling tangible personal property, those persons only working on real property but not attaching, installing or otherwise incorporating tangible personal property to a building or other structure, or those persons working on buildings or other structures that are not on real property of or for the United States.<sup>20</sup>

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<sup>20</sup> The Department claims the Superior Court’s reading of the statute is “strained” or “absurd” because by excluding MDI from the definition of consumer, it results in the United States being a consumer and sales and use taxes cannot be imposed on the United States because of the Supremacy Clause of the U. S. Constitution. *See*, Br. of App. at 27 – 28. The Department is wrong because (i) RCW 82.08.0254 and RCW 82.12.0255 specifically exclude from the sales and use tax sales and uses which the State is prohibited from taxing under the U.S. Constitution and (ii) the United States is clearly a consumer whenever it buys tangible personal property that is not installed, attached or

6. *No Genuine Issue of Material Fact Exists As To Whether Any MDI Work Occurred Under, Upon, or Above Real Property of or for the United States.*

Unable to create a genuine issue of material fact, the Department falsely claims that the Superior Court *assumed* that the real property on which the EDMs are located is not real property of or for the United States. Br. of App. at 24.

The Department is simply wrong. Declarants with personal knowledge declared that the real property at which EDMs are and were deployed is real property owned by the airports. They further declared that the United States has no lease or other real property right to or interest in such real property. Finally, both Declarants testified that the EDMs were used at the airport for “the benefit of the airport, the airlines and the flying public.” Declarations of Anderson and McDevitt. After reviewing the evidence, the Superior Court found as a matter of fact that where the EDMs were installed is not real property of or for the United States. On that basis, summary judgment was granted to MDI. RP 31.

Unable to create a genuine issue of material fact, the Department also boldly proclaims, without any evidence to substantiate its claim, that as a matter of law, TSA possessed a license to the airport properties. Br.

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otherwise incorporated into real property. Thus, the “problem” the State feared was anticipated and specifically addressed by the Legislature. The Department is just wrong.

of App. at 36. Rather than rely on evidence, the Department attempts to create a TSA real property interest by arguing that the federal government has a statutory duty to maintain security at the airports.

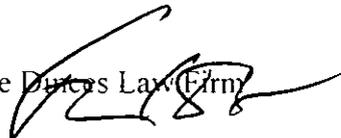
Again, the Department is simply wrong. Its bald claim must fail in the face of the direct testimony by witnesses with personal knowledge. Moreover, TSA's statutory authority to maintain security does not require it to have any real property interest in any real property on which the EDMs are located. The witnesses declared such interest does not exist, no evidence exists to the contrary, and the TSA can maintain security through other locations at the airports (checkpoints), electronic means (viewing images from the EDMs and/or other devices from a remote location) and random patrols or inspections. Nothing mandates that the TSA must have a real property interest to perform its function.

## VI. Conclusion

For the reasons stated above, the Superior Court's Order Granting Plaintiff's Motion for Summary Judgment is correct and should be affirmed.

Respectfully submitted, this 20<sup>th</sup> day of February, 2015

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DIVISION II

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STATE OF WASHINGTON

Certificate of Service

BY Franklin G. Dinces, I, Franklin G. Dinces, do hereby certify that on this the 20<sup>th</sup> day of February ~~2015~~ served a copy of this Brief of Respondent via email, pursuant to an electronic service agreement, on the following:

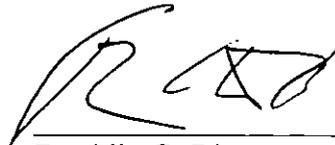
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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.



Franklin G. Dinces

# APPENDIX C

NO. 46689-9

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

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STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Appellant,

v.

MORPHO DETECTION, INC.

Respondent.

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**REPLY BRIEF OF APPELLANT**

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## I. INTRODUCTION

Morpho Detection installed complex explosive detection systems at two Washington airports for the United States, under contracts with the Transportation Security Administration. Contractors that improve buildings on real property “of or for” the United States are liable for use tax on the value of materials or items installed under the statutory definition of “consumer” in RCW 82.04.190(6). The statute covers two situations: (1) contractors that improve buildings on real property “of” the United States, and (2) contractors that improve buildings “for” the United States. RCW 82.04.190(6). Because Morpho installed the systems “for” the Transportation Security Administration, the trial court should have ruled that Morpho was a “consumer” subject to use tax on those systems, and its order granting summary judgment to Morpho should be reversed.

Morpho’s reading of RCW 82.04.190(6), which the trial court adopted, thwarts the Legislature’s intent to ensure that sales or use tax is imposed on materials installed into all of the construction projects in this state. Morpho seeks a loophole to fit its particular fact pattern involving construction paid for by the United States, but not on United States real property. But Morpho does not and cannot explain why the Legislature would have sought to exclude such projects from the tax it imposed on all other projects.

This case involves a fundamental dispute about the basics of statutory interpretation. To the Department, “[t]he fundamental objective in construing a statute is to ascertain and carry out the Legislature’s intent.” *Dep’t of Ecology v. Campbell & Gwinn*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). The plain meaning rule and the tools of statutory construction are a means toward this end.

Morpho disagrees and believes that the Court should only consider legislative intent if a statute is ambiguous. To do otherwise, according to Morpho, is “inappropriate.” Resp’s Br. at 20 n.19. But by relying on only a dictionary and simple rules of grammar to establish the meanings of statutory words and phrases, and disregarding other reliable indicators of legislative intent, Morpho flips statutory interpretation on its head.

There is no support in the language of the sales and use tax statutes, the purpose behind those statutes, or the legislative history, for Morpho’s strained interpretation. Morpho relies on a discredited and rejected version of the plain meaning rule that, even if applied, does not result in the outcome Morpho advocates. Rather, the statutory scheme as a whole demonstrates that a contractor that improves buildings for the United States owes use tax based on the value of the materials installed, regardless of who owns the land. In this case, Morpho is that contractor.

## II. ARGUMENT

### A. **The Legislature's Broad Intent To Tax Federal Contractors Encompasses Morpho's Activities.**

To determine the Legislature's intent in enacting RCW 82.04.190(6) and whether Morpho's activities are subject to use tax, the Court should consider the statute's plain meaning. That meaning cannot be discerned merely from individual words or a short phrase in the statute. Instead, the plain meaning should be discerned from all the words of the statute, related statutes, the context in the statutory scheme, and the purpose underlying the statute. Applying this rule, the statutory language demonstrates that the Legislature intended to tax both the improvement of buildings above real property *of* the United States and improvement of buildings *for* the United States. Further, the Legislature's purpose in enacting this statute was to expand the tax base to reach federal projects paid for by the United States—projects like the improvement of Washington airports under the Homeland Security Act.

#### 1. **The Washington Supreme Court rejected Morpho's narrow reading of the plain meaning rule.**

In *Campbell & Gwinn*, the Washington Supreme Court resolved a diverging line of cases applying the plain meaning rule. The Court explained that in some of its cases, "the court has said that in an unambiguous statute, a word is given its plain and obvious meaning."

*Campbell & Gwinn*, 146 Wn.2d at 10 (citations and internal quotations omitted). In those cases, only if that language was ambiguous or unclear, should the statute or statutory scheme be reviewed as a whole. *Id.* Otherwise the statute was to be read in isolation. It is this rule upon which Morpho bases its argument. Resp's Br. at 20 n.19. However, the Court in *Campbell & Gwinn* explicitly rejected this line of cases. *Id.* at 11.

Instead, the Court held that "the plain meaning rule requires courts to consider legislative purposes or policies appearing on the face of the statute as part of the statute's context." *Id.* at 11 (citing 2A Norman J. Singer, *Statutes and Statutory Construction* § 48A:16, at 809-10 (6th ed. 2000)). The Court further explained that the plain meaning is "still derived from what the Legislature has said," but that the analysis includes "all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question." *Id.* Washington appellate courts have consistently applied the *Campbell & Gwinn* version of the plain meaning rule since and should apply it here.

For example, in another use tax case, the Supreme Court held that it was error for the Court of Appeals not to consider a statement of legislative purpose in interpreting whether Tacoma's use tax applied to G-P Gypsum's consumption of natural gas within Tacoma city limits. *G-P Gypsum Corp. v. Dep't of Revenue*, 169 Wn.2d 304, 309, 237 P.3d

256 (2010). The Court explained that it had “previously criticized such a crabbed notion of statutory interpretation,” and repeated *Campbell & Gwinn*’s instruction that plain meaning should be discerned from all that the Legislature has said in the statute and related statutes that disclose legislative intent. *Id.* Based on this broader understanding of the plain language rule, the *G-P Gypsum* Court held that under the ordinary meaning of “use,” *G-P Gypsum* used natural gas in Tacoma when it consumed the gas there. *Id.* at 313-14. As in *G-P Gypsum*, the Court here should consider the entire statutory scheme and the Legislature’s intent to tax federal contractors in interpreting RCW 82.04.190(6).

**2. The plain meaning of RCW 82.04.190(6) makes Morpho a “consumer” subject to use tax.**

Properly applying the plain meaning rule results in the inescapable conclusion that Morpho is a “consumer” and subject to use tax for its work in Washington’s airports. The use tax is imposed for the privilege of using within this state as a consumer any article of tangible personal property. RCW 82.12.020(1). “Use” includes “installation.” *See* RCW 82.12.010(6)(a). Morpho concedes for purposes of the summary judgment motions on review that it installed the explosive detection systems. *See, e.g.,* Resp’s. Br. at 3 n.1.

Morpho also used the explosive detection systems as a “consumer.” In pertinent part, RCW 82.04.190(6) defines “consumer” to include both work on federal property and work for the United States:

Any person engaged in the business of constructing, repairing, decorating, or improving new or existing buildings or other structures under, upon, or above real property of or for the United States . . . including the installing or attaching of any article of tangible personal property therein or thereto, whether or not such personal property becomes a part of the realty by virtue of installation . . .

This statute covers two scenarios: (i) work done under, upon, or above real property “of” the United States and (ii) work done under, upon, or above real property “for” the United States. Because Morpho did work under, upon, or above real property “for” the United States, it fits scenario (ii) and is subject to the use tax.

Under the *Campbell & Gwinn* plain meaning rule, determining whether Morpho is a consumer requires examination of the entire “consumer” definition, as well as the retail sales tax definitions related to government contracting – rather than just the small excerpt from the “consumer” definition that Morpho takes out of context throughout its brief. *See* Resp’s Br. at 1, 3, 7, 8, 9, 11, 13, 14, 16, 20, and 21.<sup>1</sup>

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<sup>1</sup> For example, see page 21 of Respondent’s Brief, arguing that the building or structure must be “under, upon, or above real property of or for the United States” without referring to the rest of the statute.

The statute undoubtedly focuses on those who perform the specified work for the United States. While work on United States real property is included within the definition, the definition is not limited to taxpayers engaged in such work. The constructing, repairing, decorating or improving buildings may be on real property “of” the United States, *or* it may be “for” the United States, on any real property.

The definition of “consumer” in the use tax context can only be understood as a whole and in relation to other statutes within the statutory scheme. *See* RCW 82.04.050(12) (excluding the charge for labor and services for government contracting from the definition of “retail sale”). Throughout its brief, Morpho separates the first portion of RCW 82.04.190(6) that describes “any person engaged in the business of constructing, repairing, decorating, or improving new or existing buildings” from the portion of the statute that Morpho isolates in order to support its position, “under, upon, or above real property of or for the United States.” *See, e.g.,* Resp’s Br. at 11 (“The undisputed fact is that the real property on which the EDMs are located is not real property of or for the United States.”). By doing so, Morpho implies that the intent of the Legislature was to tax based on real property ownership. But RCW 82.04.190(6) does not use the word “own,” nor does it make any reference to a lease, easement, or license. *Cf* Resp’s Br. at 17 (“[t]hus, if the federal

government leased the land, it would be real property for the United States”) (footnote omitted).

Morpho offers no explanation why the Legislature would have intended to limit the tax in such an unprincipled way. Rather, Morpho simply seizes on two words, “real property,” as definitive proof of the Legislature’s intent. This incomplete reading of the statute is unsupported. See *Jongeward v. BNSF R. Co.*, 174 Wn.2d 586, 595, 278 P.3d 157 (2012) (“a statute’s plain meaning must be discerned from all that the Legislature has said in the statute, not just two words”) (citations omitted); see also *Maracich v. Spears*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 2191, 2203, 186 L. Ed. 2d 275 (2013) (quoting *United States v. Boisdore’s Heirs*, 49 U.S. 113, 122, 8 How. 113, 12 L. Ed. 1009 (1850)) (“In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.”).

**3. The Legislature’s intent to tax federal contractors is critical in discerning RCW 82.04.190(6)’s plain meaning.**

The Legislature enacts a statute with a purpose in mind, and this purpose provides a significant backdrop to determining a statute’s plain meaning. See *G-P Gypsum Corp.*, 169 Wn.2d at 310 (“an enacted statement of legislative purpose is included in a plain reading of a

statute”); *see also* Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 538-39 (1947) (“Legislation has an aim; it seeks to obviate some mischief, to supply an inadequacy, to effect a change in policy, to formulate a plan of government.”).

When it created the definition of “consumer” in RCW 82.04.190(6), the Legislature brought federal contracting back into the tax base. *See Washington v. U.S.*, 460 U.S. 536, 538, 130 S. Ct. 1344, 75 L. Ed. 2d 264 (1983) (“In 1975, the Washington Legislature acted to eliminate the complete tax exemption for construction purchased by the United States.”); *see also id.* at 545 (“the tax on federal contractors is part of the same structure, and imposed at the same rate, as the tax on the transactions of private landowners and contractors”).

It is not “inappropriate,” as Morpho argues, to consider the statutory scheme for taxing construction-related work or the Legislature’s expansion of tax liability to federal contracting in 1975 in interpreting RCW 82.04.190(6). To the contrary, the Legislature’s intent to include personal property installed in *all* federal construction projects in the sales and use tax base is obviously significant in understanding RCW 82.04.190(6). Morpho’s self-serving interpretation negates not only this intent but most of the statute itself. As such, this Court should reject it.

Nothing in RCW 82.04.190(6)'s language indicates that the Legislature intended to limit the application of use tax to projects where federal contractors provide services on real property owned by the United States. Such a reading does not further any identifiable legislative policy.

Morpho appears to argue that the improvement of buildings under, upon, or above real property for the United States means only the improvement of buildings in which the United States has a right or interest in the real property where the activities are taking place. *See* Resp's Br. at 22-23.<sup>2</sup> But there is no indication that the Legislature cryptically desired the phrase "for the United States" to mean a United States real property interest less than ownership. To the contrary, surrounding statutes indicate that when the Legislature intended to specify a particular type of property interest required, it knew how to so say so. *E.g.*, RCW 82.04.050(2)(c) (imposing sales tax on the constructing of a structure upon real property "owned by an owner" who conveys the property to the contractor who then reconveys the property to the original owner); RCW 82.04.050(10) (excluding from the retail sales tax the charge for labor and services rendered in respect to the building of a road "owned by . . . the United States"); RCW 82.04.190(5) (defining as a "consumer" any person who is

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<sup>2</sup> At the trial court, Morpho indicated that the use tax would apply if the United States had "a beneficial interest, easement, lease, license to use or other interest in the real property." CP 631. On appeal, Morpho does not specifically state what property right or interest for the United States would satisfy RCW 82.04.190(6).

an “owner, lessee, or has the right of possession to personal property which is being constructed, repaired, improved, cleaned, imprinted, or otherwise altered by a person engaged in business”). In contrast, the words “own,” “lease,” and “easement” appear nowhere in RCW 82.04.190(6). The Legislature did not intend “or for the United States” to mean work on real property in which the United States has a right or interest.

Morpho imagines various holes in the statutory scheme that simply do not exist when the statute is viewed as a whole with the legislative intent in mind. For example, Morpho asserts that “the Legislature made clear that its intent was to tax a much smaller class of persons” than the Department argues the Legislature intended to tax. Resp’s Br. at 21.

Morpho has it backwards. The 1975 Legislature intended to bring federal construction projects, including installations, back into the tax base. *See Washington v. U.S.*, 460 U.S. at 550 (the Legislative change was “purposefully made to catch the burgeoning federal construction in the State.”); *see also* RCW 82.04.190(6) (definition of “consumer” subject to use tax includes those who install or attach tangible personal property to real property). Morpho reads the phrase “or for” out of RCW 82.04.190(6) by suggesting a requirement for a specific United States property interest, thereby continuing to exclude contractors paid by the

federal government who happen to work on privately-owned land. There is no plausible reason why the Legislature would have used such limited and obscure criteria to describe which construction projects were subject to sales and use tax and which were not, when its intent was to tax all federal construction projects.

**B. Even If The Court Looks Beyond The Plain Meaning, The Department's Interpretation Of RCW 82.04.190(6) Effectuates Legislative Intent.**

Properly applying the plain meaning rule, including reviewing the entire statute and related statutes, as well as the statutory scheme for taxing construction projects, resolves this case in the Department's favor. But even if the Court were to turn to other tools to help construe RCW 82.04.190(6), the Department's construction best effectuates the Legislature's intent and should be adopted. *Burns v. City of Seattle*, 161 Wn.2d 129, 140, 164 P.3d 475 (2007) ("Our goal in statutory interpretation is to effectuate the legislature's intent.").

**1. Legislative history confirms the Department's construction that "for the United States" includes work paid for by the United States.**

The legislative history surrounding RCW 82.04.190(6) is consistent with, and further supports, the Department's interpretation that "for the United States" means work paid for by the United States. *See Filmore LLLP v. Unit Owners Ass'n of Centre Pointe Condominium*, 183

Wn. App. 328, 333 P.3d 498 (2014) (“Legislative history may be of some interest even where the court concludes that the statute’s plain language is unambiguous”). This history demonstrates that the Legislature’s focus was construction activity funded by the United States that was previously exempt from taxation, not construction tied to a particular property interest. For example, the fiscal note stated that the measure would broaden the tax base “to include construction activity performed for the U.S. Government.” CP 134. And the Senate Committee report stated that the new legislation imposed “sales and use tax upon the construction and maintenance of buildings for the United States.” CP 130. The fiscal note and the Committee report also show that the Legislature understood what the word “for” meant, and that it did not mean “having a lesser property interest.” This history further supports the Department’s interpretation.

**2. The Department’s interpretation of RCW 82.04.190(6) is entitled to deference.**

Courts routinely defer to agency interpretations of statutes they administer as long as an interpretation is reasonable and consistent with the statutory scheme and language. *See, e.g., Cashmere Valley Bank v. Dep’t of Revenue*, 181 Wn.2d 622, 635, 334 P.3d 1100 (2014) (deferring to Department of Revenue determination concluding that certain investments qualify for a specific tax deduction while others do not);

*Dep't of Revenue v. Nord Northwest Corp.*, 164 Wn. App. 215, 223, 264 P.3d 259 (2011) (“we accord substantial weight to an agency’s interpretation of a statute within its expertise”).

Such deference is appropriate in this case. The Department’s construction of RCW 82.04.190(6) as set forth in its determination of Morpho’s tax liability in administrative proceedings is consistent with the statutory scheme and legislative intent. CP 564 (footnote 6). In addition, the D.C. Circuit Court of Appeals held that Morpho should have known it could “reasonably” be determined to be a “consumer” that owed Washington use tax and that the Department’s interpretation was “permissible.” *Morpho Detection, Inc. v. Transportation Sec. Admin.*, 717 F.3d 975, 982 & n.10 (D.C. Cir. 2013). And the Federal Aviation Administration’s Office of Dispute Resolution for Acquisition ruled that the Department “relied on the plain, simple, and singular interpretation that gives meaning to the complete language of the statutory definition of ‘consumer.’”<sup>3</sup> CP 598. Even if this Court goes beyond the plain meaning rule to interpret RCW 82.04.190(6), the Department’s construction is reasonable and entitled to deference.

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<sup>3</sup> Morpho states that the ODRA decision was “nothing more than a recommendation” to the TSA Administrator. Resp’s Br. at 18. However, the TSA Administrator adopted the ODRA’s findings and denied Morpho’s contract dispute in its entirety. *Morpho Detection, Inc.*, 717 F.3d at 978.

**3. The Court should not rigidly apply the last antecedent rule in the face of contrary legislative intent.**

Morpho never mentions the last antecedent rule, but it appears to argue the principle underlying the rule applies. *See* Resp’s Br. at 14. The trial court’s oral ruling also suggests that the last antecedent rule influenced the court’s reasoning. *See* RP 30. Specifically, Morpho’s argument seems to be that the phrase “or for” primarily modifies the last antecedent “real property.” Resp’s Br. at 14.

If Morpho is arguing the last antecedent rule, this is the sort of rigid application of the rule that courts caution against. *State v. McGee*, 122 Wn.2d 783, 788-89, 864 P.2d 912 (1993) (the last antecedent rule is an aid to discovering intent and is not inflexible or uniformly binding); *see also Buscaglia v. Bowie*, 139 F.2d 294, 296 (1st Cir. 1943) (the last antecedent principle “is of no great force” and should not be applied if a “very slight indication of legislative purpose or a parity of reason, or the natural and common sense reading of the statute, may overturn it and give it a more comprehensive application.”).

The last antecedent rule states that qualifying or modifying words and phrases generally refer to the last antecedent in the absence of a comma before the qualifying phrase at issue. *State v. Bunker*, 169 Wn.2d 571, 578, 238 P.3d 487 (2010). However, the rule does not apply if other

factors counsel against its application: *Id.* Context, related statutes, and avoiding absurd results are all reasons to avoid applying the rule: “We do not apply the rule if other factors, such as context and language in related statutes, indicate contrary legislative intent or if applying the rule would result in an absurd or nonsensical interpretation.” *Id.*

The last antecedent rule also does not apply if such an application impairs a sentence’s meaning. The last antecedent refers to “the last word, phrase or clause that can be made an antecedent *without impairing the meaning of the sentence.*” *In re Smith*, 139 Wn.2d 199, 205, 986 P.2d 131 (1999) (quoting *In re Kurtzman’s Estate*, 65 Wn.2d 260, 264, 396 P.2d 786 (1964)) (emphasis added).

Applying the last antecedent rule here as Morpho advocates would violate these principles. It would impair the statute’s meaning: while the qualifying word “of” can pertain to real property, the qualifying word “for” naturally refers not to the real property, but to the entity for whom the work is being performed. Reading the word “for” in connection with only the last antecedent “real property” impairs the meaning of the sentence—in fact, it destroys it.

Applying the last antecedent rule in this manner also impairs the functioning of the statutory scheme. The statute imposes use tax on contractors in those situations where tax on the federal government cannot

be imposed. To read the “consumer” definition as including only those projects on federal property means that one category of construction projects, work on private land that the federal government funds, escapes tax altogether. The Legislature did not intend this result.

Applying the last antecedent rule also leads to an absurd result. The use tax is imposed on government contractors to collect tax in situations where the Supremacy Clause prohibits Washington from taxing the United States. But Morpho’s construction rewrites the statute in a way that prevents the law from doing just that. If work performed “for” the federal government is not subject to use tax, but work performed on real property owned by the federal government is, then the statute is tailored to the wrong issue. This is because the problem, in constitutional terms, occurs when the federal government is the purchaser, not when it owns the underlying property. The State must tax the contractor on work done “for” the federal government or no one will be taxed.

Under Morpho’s construction, the very transactions at which the statute is aimed—contracts with the federal government—will not be subject to tax if they happen to concern work performed on non-federal land. In other words, Morpho proposes a construction basing taxation on *where* the work is, while the statute was written to impose a tax based on

*who pays* for the work. This application of the last antecedent rule turns the statute around and does not fulfill the purpose behind the statute.

**4. The Court should not construe RCW 82.04.190(6) against the Department.**

Both sides assert that the plain meaning rule resolves this dispute, although the Supreme Court has rejected Morpho's outdated version of the plain meaning rule. Apparently in the alternative, Morpho suggests several times, mostly in footnotes, that if the Court finds the tax statute ambiguous, it should be construed against the Department. Resp's Br. at 11, 12 n.9, 19 n.17, 20 n.19. This is a canon of construction, but it is not the only one.

The Court's overall goal is to ascertain and carry out the Legislature's intent. *See Getty Images, Inc. v. City of Seattle*, 163 Wn. App. 590, 600, 260 P.3d 926 (2011) ("When interpreting statutory language, our goal is to carry out the intent of the legislative body."). There is more than enough here in the statutory language, scheme, purpose, and legislative history to reverse the trial court's ruling. This Court need not resort to a tie-breaker such as the canon of construction construing ambiguous tax statutes against the Department. Our Supreme Court has cautioned that this canon should not be over-used:

Initially, the estate argues that any doubt in the meaning of a taxing statute must be resolved in favor of the taxpayer.

*See Vita Food Prods., Inc. v. State*, 91 Wn.2d 132, 134, 587 P.2d 535 (1978). This rule has been generally overemphasized and exaggerated in scope, however.

“The better rule . . . is that statutes imposing taxes and providing means for the collection of the same should be construed strictly in so far as they may operate to deprive the citizen of his property by summary proceedings or to impose penalties or forfeitures upon him; but otherwise tax laws ought to be given a reasonable construction, without bias or prejudice against either the taxpayer or the state, in order to carry out the intention of the legislature and further the important public interests which such statutes subserve.”

*In re Estate of Hitchman*, 100 Wn.2d 464, 466, 670 P.2d 655 (1983)

(quoting 3 C. Sands, *Statutory Construction* § 66.02 (4th ed. 1974)). The Court should not resort to this canon of construction in the face of contrary legislative intent.

**C. Even If Morpho’s Construction Of RCW 82.04.190(6) Is Correct, The United States Has At Least A License To Access Explosive Detection Systems In The Airports.**

Unable to give meaning to the phrase “or for” in RCW 82.04.190(6), Morpho tentatively proposed in the court below that the phrase meant that the United States would have to have “a beneficial interest, easement, lease, license to use or other interest in the real property.” CP 631. Morpho appears to argue the same in its brief on appeal. *See* Resp’s Br. at 22-23. Even if Morpho is correct, the United States possesses at least a license over the relevant areas in the airports. A

license is merely the right to use another's land. *Lacey Nursing Center, Inc. v. Dep't of Revenue*, 103 Wn. App. 169, 183-84, 11 P.3d 839 (2000); *see also Teel v. Stading*, 155 Wn. App. 390, 395, 228 P.3d 1293 (2010) (citations omitted) ("A licensee is a person who is privileged to enter or remain on land only by virtue of the possessor's consent.").

There can be no doubt that the federal statutes requiring the TSA to oversee security operations at the airports, in combination with the evidence in the record, demonstrate the United States has a right to enter and use the relevant real property at the airports. *See, e.g.*, 49 U.S.C. § 44901 (requiring TSA to supervise passenger screening at airports); CP 511-12 (Morpho deponent states that TSA or its contractors operate the explosive detection systems). As a matter of law, this constitutes at least a license. *See, e.g., Showalter v. City of Cheney*, 118 Wn. App. 543, 547-51, 76 P.3d 782 (2003) (tavern owner's right to place canopy over sidewalk was a license, even though right was revocable). The fact that it arises through the operation of federal law does not change the conclusion. Thus, even if Morpho's unusual interpretation of RCW 82.04.190(6) were correct, the Department still properly imposed use tax on Morpho.

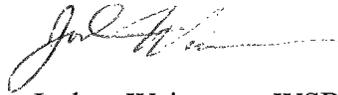
### III. CONCLUSION

Legislative intent is not an after-thought to be considered only if the rules of grammar result in statutory mystery. Legislative intent is the

whole point. Applying the statutory interpretation standards in *Campbell & Gwinn* demonstrates that the Department's interpretation of RCW 82.04.190(6) is correct, and Morpho was properly subject to use tax as a "consumer" on the value of the systems it installed in Washington airports "for" the TSA. The legislative history further supports this conclusion. This Court should reverse the order granting Morpho summary judgment and direct the trial court to enter partial summary judgment in favor of the Department.

RESPECTFULLY SUBMITTED this 23rd day of March, 2015.

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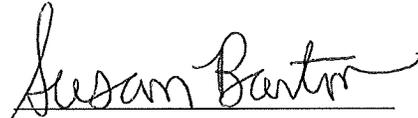
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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 23<sup>rd</sup> day of March, 2015, at Tumwater, WA.

  
\_\_\_\_\_  
Susan Barton  
Legal Assistant

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