

FILED
Court of Appeals
Division II
State of Washington
8/3/2018 3:23 PM

NO. 51293-9-II

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

MORPHO DETECTION, INC.,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

In a published decision, Division One of this Court held that because Morpho installed explosive detection systems for the United States at Washington airports, it was a “consumer . . . as a matter of law” subject to Washington use tax. *Morpho Detection, Inc. v. Dep’t of Revenue*, 194 Wn. App. 17, 28, 371 P.3d 101 (2016) (*Morpho I*). The Court remanded, and the trial court ruled in the Department’s favor on several constitutional challenges. Morpho does not challenge the rulings on its constitutional claims, but rather asks the Court to revisit its prior holding. Ample evidence in the record—including contracts requiring Morpho to install the systems and installation checklists completed by Morpho technicians—support the conclusion that Morpho was a “consumer” as a matter of Washington tax law. Morpho bears the heavy burden of demonstrating both that the prior decision was a clear error and that it has suffered a manifest injustice, such that a departure from the law of the case is warranted. It cannot do so.

Morpho did not move for reconsideration of what it now considers an overly broad appellate decision, nor did it address the issue in its petition for Supreme Court review. In addition, there is ample evidence in the appellate record supporting the conclusion that Morpho is a “consumer” subject to use tax, even if Morpho has not yet presented some

of its arguments to the trial court in the first instance. At this late stage in the litigation, this Court should conclude that Morpho has waived any additional arguments. The Court should apply the law of the case doctrine, rather than find that one of the narrow exceptions to its application exist. Morpho is a sophisticated party that has made various tactical decisions in this litigation, and no manifest injustice would result from affirming the trial court. At some point, litigation must end.

II. ISSUES

1. Division One twice stated its holding that Morpho was a “consumer” “as a matter of law,” and explained its rationale for that holding. Did the trial court err in concluding that it was bound by the decision’s mandate that Morpho was a “consumer”?

2. The prior summary judgment and appellate record contained extensive evidence, including contracts and installation checklists completed by Morpho technicians, that Morpho installed explosive detection systems. Was it clear error to conclude that Morpho was a consumer as a matter of law, such that this Court should find an exception to the law of the case doctrine and remand for further litigation about whether Morpho installed the systems?

3. Morpho did not move for reconsideration or petition for Supreme Court review on the ground that Division One’s holding in

Morpho I was overly broad. Would a manifest injustice result from following that prior decision?

III. FACTS

A. **Manufacture and Installation of the Explosive Detection Systems**

Morpho contracted with the Transportation Security Administration (TSA) to manufacture and install explosive detection systems at airports nationwide in the wake of 9/11. *Morpho I*, 194 Wn. App. at 19. The explosive detection systems at issue use computer tomography to scan checked baggage for explosives. CP 122. They examine the density of objects in luggage, comparing that density to known explosives. CP 122.

Morpho manufactured the systems in California. CP 121. The systems at issue were eventually transported and installed in Washington. Morpho installed 41 systems at SeaTac International Airport and five at Spokane International Airport. *Morpho I*, 194 Wn. App. at 20.

Preparing airports for the arrival of large explosive detection systems is a large task that requires infrastructure changes within the airports, as well as the movement and setup of the systems upon their arrival. Multiple parties were involved. The following is a summary of the activities that Morpho undertook in Washington:

Rigging. The pieces of an explosive detection system are transported to an airport in a truck. Once the truck arrives, “riggers” move the system into place using forklifts. CP 124, 592. For much of the tax period, Morpho contracted to perform “installation and rigging” for TSA. CP 126, 451-54 (contract amendment), 532, 536-37, 539-41, 622 (deposition testimony describing TSA’s request that Morpho take over the contract for this work), 878. Morpho subcontracted the rigging work. Morpho employees inspected systems for shipping damage and monitored riggers. *See, e.g.*, CP 556, 567 (items one and two under checklist for “pre-installation”), 601.

Assembly. Morpho, as the manufacturer of the equipment with superior knowledge about how the systems functioned, performed the technical assembly of the internal components of each system. CP 123, 126-28 (audit report description), CP 555-587 (installation checklists completed by Morpho technicians); 593 (summary of process in deposition testimony); 608 (same); 638 (Morpho performs the internal wiring or “cabling”). Under Morpho’s contracts with TSA, this work was termed “site installation support.” CP 288 (Section 3.9.1); CP 381-82 (same). This “site installation support” was included in the contract price for each system. CP 619-20. Because the need for parts or infrastructure

within an airport could delay assembly, assembly of a system could take as long as a year from start to finish. CP 626-27.

Baggage Handling Integration. Many explosive detection systems were integrated into baggage handling systems so that luggage passes from conveyor belts into the explosives scanner and back to the conveyor. Morpho handled the explosive detection system side of the integration, while another contractor in charge of the baggage handling system handled that side of the integration. *See* CP 594-96 (deposition testimony), 456-57 (statements of work).

Integrated Site Acceptance Test. Morpho assisted another contractor in making sure that the integrated baggage handling and explosive detection systems functioned correctly. CP 611-13; 638-39.

Multiplexing. Morpho designed and implemented a multiplex network that allowed TSA employees to monitor bag images from a remote room, physically separated from the systems themselves. CP 596-97 (deposition testimony), 465-69 (statements of work).

B. The Department of Revenue's Assessment and Review

In 2008, the Department of Revenue conducted an audit of Morpho's activities within Washington for the period of January 1, 2002 through March 31, 2006. This resulted in an audit report and tax assessment of over \$5 million, including interest and penalties. CP 121-36

(audit report). The tax assessment was based on the Department's conclusion that Morpho was a "consumer" within the definition of RCW 82.04.190(6) and therefore owed use tax for each explosive detection system Morpho installed in Washington (and other tax not at issue in this litigation). Morpho appealed the assessment through the Department's internal review process. A Department of Revenue Administrative Law Judge upheld the assessment. CP 641-52.

C. Federal Litigation

Morpho requested that TSA adjust its contract to compensate Morpho for the taxes it owed to Washington. TSA refused. Litigation over the matter reached the D.C. Circuit of the United States Court of Appeals. That court concluded that Morpho, not TSA, would be liable for any taxes owed to Washington. *Morpho Detection, Inc. v. Transportation Sec. Admin.*, 717 F.3d 975, 976 (D.C. Cir. 2013). In reaching its conclusion, the court reasoned in part that Morpho "should have known it might reasonably be determined to be a 'consumer' whose business activities in Washington were subject" to Washington use tax. *Id.* at 982.

D. Litigation in State Court

1. Trial court—Round 1

Morpho filed a tax refund lawsuit in Thurston County Superior Court in 2012. Morpho made relatively minor changes to its original

complaint in 2013. CP 27-32. Morpho asserted essentially two categories of claims. The first set of arguments related to Morpho's assertion that it does not meet the definition of a "consumer" in RCW 82.04.190(6). If a person or entity meets the definition of a "consumer" under this statute, it owes the use tax imposed under RCW 82.12.020.

In relevant part, a "consumer" is defined as follows:

(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 a part of the realty by virtue of installation; . . .

RCW 82.04.190(6). In the first set of claims, Morpho asserted that it was not a "consumer" because:

18. The airports and the locations within such airports at which the EDMs are used by TSA in Washington are not real property of or for the United States.

19. The EDMs used by TSA were not installed, attached or incorporated to real property by MDI.

20. MDI did not construct, repair, decorate or improve any new or existing buildings or other structure in Washington. MDI did not incorporate, install or attach the EDMs to any building or other structure in Washington.

CP 30.

In a second category of claims, Morpho asserted that even if it was a “consumer” under Washington law, application of the statute to Morpho would violate the Supremacy Clause, Due Process Clause, and Commerce Clause of the United States Constitution. CP 30-31.

After the parties engaged in discovery, Morpho moved for summary judgment in 2014. CP 97-108. It did not argue any of its constitutional theories.

Rather, Morpho sought summary judgment on the ground that it was not a “consumer.” Morpho argued that it was entitled to judgment as a matter of law under two theories, while also asserting in footnotes that certain facts were disputed. In simplest terms, Morpho argued that because the United States did not own the airports where the work occurred, the “consumer” definition did not apply. CP 106-07. Morpho also argued that it was not “in the business” of “constructing, repairing, decorating, or improving new or existing buildings or other structures.” CP 104-06. In footnotes, Morpho alluded to various potential legal or factual disputes, including whether explosive detection systems improved buildings, the definition of installation, and whether Morpho performed the installation. But Morpho stated that because it was moving for summary judgment, such issues should be construed in favor of the Department. *See* CP 105 n.6, CP 106 n.8.

The Department of Revenue opposed Morpho's motion for summary judgment. Although the Department's brief focused its legal analysis on the issues raised by Morpho, and requested partial summary judgment in its favor on those issues, the Department also introduced evidence to support the broader conclusion that Morpho improved the airports by installing the systems. This included hundreds of pages of documents, including installation contracts requiring Morpho to install the systems and installation checklists completed by Morpho technicians. *See, e.g.*, CP 244-454 (contracts and contract amendments); CP 513-530 (delivery orders for various work); CP 532-552 (invoices for various work at SeaTac and Spokane airports, including "installation and rigging"); CP 555-588 (installation checklists completed by Morpho technicians).

The trial court ruled that a genuine issue of material fact precluded summary judgment on the issue of whether Morpho was engaged in the business of "constructing, repairing, decorating, or improving new or existing buildings or other structures." CP 738. The trial court, however, granted summary judgment to Morpho on the ground that the "consumer" statute only applied to land owned by the United States. CP 738. Accordingly, the trial court denied the Department's request for partial summary judgment as the non-moving party. CP 738.

2. Court of Appeals—Round 1

The Department of Revenue appealed. The Department's issue statements and legal analysis focused on the legal issue upon which the trial court granted summary judgment to Morpho: whether, for the definition of "consumer" to apply, land must be owned by the United States, or whether only the work need be performed for the United States. However, there were portions of the Department's brief that related to other elements of the "consumer" definition. The Department's brief cited facts in the record supporting the broad conclusion that Morpho was a "consumer" because it was under contract to install and did in fact install explosive detection systems at Washington airports. Brief of Appellant (Br. of Appellant), App. A at 4-9. The Department asserted without qualification in several instances that Morpho met the definition of a "consumer." *E.g.*, Br. of Appellant, App. A at 15 (stating that Morpho meets the statutory definition of a "consumer"); 16, 19 (stating that Morpho used the explosive detection systems "as a consumer"). The Department also suggested that if the matter were remanded to address Morpho's installation argument, Morpho would not prevail because its own contracts, invoices, and installation checklists stated that it did in fact engage in such installation. Br. of Appellant, App. A at 11 n.5.

Despite the Department's prediction that remand to resolve the installation issue was likely, Division One of this Court apparently concluded that remand to address installation or other issues related to the "consumer" definition in RCW 82.04.190(6) was unnecessary. It not only ruled that the Department was correct that the statute could apply regardless of who owned real property beneath a project, but also held that Morpho is a "consumer" "as a matter of law." *Morpho I*, 194 Wn. App. at 19, 28. The Court stated that Morpho conceded that it installed the systems in Washington. *Id.* at 23 ("Morpho conceded at trial that it installed the detection systems in Washington."). Similarly, the Opinion stated that it was "undisputed" that Morpho installed the systems. *Id.* at 23, 28. In addition, the Opinion identified facts in the record supporting the proposition that Morpho installed the systems. *Id.* at 19-20 (explaining that Morpho had two contracts to manufacture and install systems, that Morpho began installing systems across the country, and that Morpho assembled and installed 46 systems in Washington).

Morpho did not move for reconsideration on the ground that the decision was broader than the issues before the Court of Appeals. Nor did it move for reconsideration on the ground that the Court had erred by saying that Morpho conceded it had installed the systems. The Department moved for publication of the decision, Morpho concurred, and the Court

granted that motion. Morpho sought Supreme Court review based on the Court's interpretation of the real property issue, but mentioned nothing about the Court of Appeals decision being overly broad or misstating the procedural history. *See* Appendix A. The Supreme Court denied review. *Morpho Detection Inc. v. Dep't of Revenue*, 186 Wn.2d 1010, 380 P.3d 502 (2016) (review denied).

3. Trial Court—Round 2

The case was remanded to Thurston County Superior Court. The Department argued that under the law of the case doctrine, the Thurston County Superior Court was bound to apply the Court of Appeals' ruling that Morpho was a "consumer," "as a matter of law." CP 843-47. The Superior Court agreed that Morpho could not pursue other theories about why it was not a consumer, as those theories were subsumed by the Court of Appeals ruling. CP 1231-32 (written order granting Department summary judgment); VRP (November 17, 2017) at 39 (oral ruling). Morpho challenges this ruling in the instant appeal.

The Department also moved for summary judgment on all other claims in the case, including Morpho's constitutional arguments. CP 847-54. The Thurston County Superior Court ruled on the merits that the Department should be awarded summary judgment on these constitutional theories. CP 1231-32; VRP (November 17, 2017) at 38-39 ("With respect

to the constitutional issues, I will simply note that I agree with the State's arguments.""). Morpho has not challenged these rulings in its opening brief on appeal.¹

IV. ARGUMENT

A. **The Trial Court Correctly Concluded It Was Bound by the Court of Appeals Holding That Morpho Was a Consumer as a Matter of Law.**

RAP 12.2 provides broad authority to an appellate court to determine what action to take in a case on appeal: "The appellate court may reverse, affirm, or modify the decision being reviewed and take any other action as the merits of the case and the interest of justice may require." Once the mandate issues, all issues resolved by the appellate courts are generally final. "An appellate court's mandate is binding on the lower court and must be strictly followed." *Bank of America, N.A. v. Owens*, 177 Wn. App. 181, 189, 311 P.3d 594 (2013); *see also* RAP 12.2 (upon issuance of the mandate, appellate court's decision "is effective and binding on the parties to the review and governs all subsequent proceedings in the action in any court [unless modified]." Under the law

¹ The Department also received summary judgment on a valuation claim that Morpho did not assert in its complaint, but raised for the first time in the course of the summary judgment briefing on remand. VRP (November 17, 2017) at 40-41. Morpho attempted to argue, for the first time in response to the Department's motion for summary judgment, that the Department assessed tax based on the incorrect value of the explosive detection systems. Morpho has not challenged this summary judgment ruling in its opening brief on appeal.

of the case doctrine, “once there is an appellate holding enunciating a principle of law, that holding will be followed in later stages of the same litigation.” *Id.* at 189-90 (citing *State v. Schwab*, 134 Wn. App. 635, 644, 141 P.3d 658 (2006)). The doctrine binds the parties, the trial court, and subsequent appellate courts to the holdings in a prior appeal unless such holdings are authoritatively overruled. *Id.* at 190 (citing *Humphrey Indus. Ltd. v. Clay St. Assocs., LLC*, 176 Wn.2d 662, 669, 295 P.3d 231 (2013)). It “seeks to promote finality and efficiency in the judicial process.” *Roberson v. Perez*, 156 Wn.2d 33, 41, 123 P.3d 844 (2005).

1. The Court of Appeals decision was unambiguous.

The Court unambiguously held that as a matter of law, Morpho was a “consumer.” The Court of Appeals enunciated this holding twice in its opinion. First, it did so in the introduction, stating that:

We conclude that as a matter of law, Morpho is a ‘consumer’ and therefore subject to the use tax in RCW 82.12.020.

Morpho I, 194 Wn. App. at 19. After reciting the facts, the Court set forth its analysis of this statutory term in the context of the use tax statute. 194 Wn. App. at 22. As the Court explained, “The State imposes a use tax 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.’” *Id.* (citing RCW 82.12.020(1)(a)). The Court first

discussed that the term “use” had its ordinary meaning, and then stated, “Morpho conceded at trial that it installed the detection systems in Washington.” *Id.* at 22-23.

The Court framed the issue broadly as whether Morpho’s “use” of the systems was “as a consumer” under RCW 82.12.020. The Court then turned to the definition of “consumer” in RCW 82.04.190(6). *Id.* at 23. The Opinion italicized not only the portion of the statute pertaining to real property, but also portions of the statute regarding what business the consumer was engaged in and whether that person or business was improving buildings. *Id.*

The Court repeated its conclusion, “there is no dispute that Morpho’s activity of *installing* systems for TSA in the state’s airports was done for the United States,” and then turned to an analysis of the real property issue. *Id.* at 23-28 (emphasis added). Once the Court resolved the real property issue by concluding that work could be performed for the United States regardless of who owned the underlying property, it again explained its broad holding and the rationale for it:

Here, because it is undisputed that Morpho installed security systems for the United States at Sea-Tac and the Spokane Airport, it is a consumer, as a matter of law, under RCW 82.04.190(6).

Id. at 28.

Under the law of the case doctrine and RAP 12.2, the Court of Appeals' ruling was effective and binding on the trial court. The Court stated twice that Morpho was a "consumer" "as a matter of law." In addition, the Court explained the rationale for resolving more than just the real property issue: Morpho conceded that it installed the systems and that fact was undisputed. The Court repeated this reasoning three separate times. *Id.* at 23, 28. Even if Morpho were correct that the Court of Appeals misunderstood its concession, the trial court was bound to follow the dictates of a higher court. As the trial judge correctly explained in his oral ruling, even if the Court of Appeals had erred in its analysis, he had no authority to correct such an error. VRP (November 17, 2017) at 40 ("I am also not one to sit here and in essence reverse or in the very least edit a Court of Appeals opinion in this case. The Court of Appeals said what it said. I am bound by that.").

Morpho's argument that the Court of Appeals "did not resolve the installation issue" is simply incorrect. Br. of Appellant at 16. Three times the Court explained that in its view, the installation issue was undisputed and had been resolved. Morpho cites *Peterson v. Hogan*, 56 Wn.2d 48, 53, 351 P.2d 127 (1960), for the proposition that general expressions in an opinion are confined to the facts and points actually involved. Perhaps this argument would have some force if the Court of Appeals had simply

stated once that Morpho was a “consumer” and said nothing more. But Division One went far beyond this. The Court of Appeals explained—twice—that Morpho was a consumer “as a matter of law,” and explained that Morpho conceded the installation issue. *Morpho I*, 194 Wn. App. at 19, 23, 28. The Court also cited Morpho’s contract stating that it installed the systems. *Id.* at 19. Not only did the trial court not err by following Division One’s holding, it would have erred if it did the opposite.

A recent decision from our Supreme Court is analogous. *See Humphrey Industries, Ltd. v. Clay Street Associates, LLC*, 176 Wn.2d 662, P.3d 231 (2013). The case involved a dispute between members of an LLC. Part of the dispute involved a real property sale. The trial court awarded attorney fees against Humphrey for acting arbitrarily, vexatiously, and in bad faith in part for rejecting a settlement and CR 68 offer of judgment. *Id.* at 667. The Supreme Court reversed the attorney fee award because the record did not establish bad faith conduct. *Id.* at 668.

On remand, the trial court again awarded attorney fees against Humphrey, basing its findings on separate bad faith conduct than that discussed by the Supreme Court in rejecting the initial fee award. *Id.* at 668-69. The other parties acknowledged that the law of the case doctrine precluded the trial court from considering issues that were decided on appeal, but asserted that the Supreme Court did not reach the findings of

fact underlying the trial court's decision to impose fees against Humphrey.

Id. at 670.

The Supreme Court disagreed. The Court explained that while it does not generally review findings that have not been challenged, it has inherent authority to consider issues not raised if necessary to reach a proper decision. *Id.* at 671. The Court had implicitly found that it was necessary to determine whether the record established bad faith. This became the law of the case. *Id.*

This case is similar. The Court of Appeals did not analyze every conceivable argument related to the definition of a "consumer" in RCW 82.04.190(6). But the Court, based on an extensive factual record, determined that it was able to conclude that Morpho was a consumer as a matter of law. *See In re Dependency of A.S.*, 101 Wn. App. 60, 72, 6 P.3d 11 (2000) ("Under RAP 12.2, appellate courts are authorized to affirm, modify or reverse a trial court order without further proceedings, when doing so would be a useless act or a waste of judicial resources."). The trial court properly declined to revisit that holding.

2. The Court of Appeals followed the Rules of Appellate Procedure.

Morpho also cites two rules of appellate procedure in support of its argument that the trial court somehow had the analytical space to avoid

Division One's unambiguous decision. These rules are RAP 9.12, which limits appellate review to the issues and record before the trial court, and RAP 10.3(a)(4), which requires the parties to set forth the issues on appeal. Neither of these rules affects the trial court's authority on remand of the decision from the Court of Appeals. Faced with a clear and unambiguous holding from the Court of Appeals, the trial court was required to follow that holding.

In any event, the Court of Appeals did not misconstrue the Rules of Appellate Procedure. The Court considered only the evidence before the trial court. The Court also considered the same statute, RCW 82.04.190(6), analyzed by the trial court. And RAP 12.2 permitted the Court to address any issue necessary to interpret that statute based on the record before it.

RAP 10.3 merely sets forth the contents of an appellant's brief. The Department's issue statement referred to the definition of "consumer" in RCW 82.04.190(6). And again, RAP 12.2 permitted the Court to address any issue it needed to in resolving the statutory interpretation issues presented.

3. The Department has taken consistent positions.

Lastly, Morpho argues that judicial estoppel prohibits the Department from taking inconsistent positions. Br. of Appellant at 21-22.

The Department did not do so. On the first appeal, the Department stated in a footnote that the installation issue would likely be an issue for remand. Br. of Appellant, App. A at 11 n.5. That was before the Court of Appeals held that the installation issue was undisputed. On remand to the trial court and in this appeal, the Department argues that the law of the case has resolved this issue. There is nothing inconsistent about these positions. The Department's prior statement was made before the Court of Appeals issued its opinion. The Department anticipated what the future procedural posture of the case might be. But once the Court of Appeals case was decided, that procedural posture was different than the Department predicted. The law of the case bound not only the trial court but also both parties to the litigation. RAP 12.2.

B. This Court Should Follow the Law of the Case Because There Has Been No Clear Error or Manifest Injustice.

Division One's opinion did not make a clear error, nor has any manifest injustice resulted. This case is a prime example of where the law of the case doctrine should apply, rather than one of its narrow exceptions.

1. The law of the case doctrine ordinarily precludes revisiting a prior ruling of this Court.

“Where there has been a determination of the applicable law in a prior appeal, the law of the case doctrine ordinarily precludes re-deciding the same legal issues in a subsequent appeal.” *Folsom v. County of*

Spokane, 111 Wn.2d 256, 263-64, 759 P.2d 1196 (1988); *see also* RAP 12.2. The exceptions to application of the law of the case doctrine are codified in RAP 2.5(c).

While an appellate court has discretion to revisit a prior ruling, it should do so only when a prior decision was clearly erroneous and a manifest injustice would result. *See Folsom*, 111 Wn.2d at 264. “The discretion of a court to review earlier decisions should be exercised sparingly so as not to undermine the salutary policy of finality that underlies the rule.” *Moore v. James H. Matthews & Co.*, 682 F.2d 830, 833-34 (9th Cir. 1982).² In this case, nothing in Division One’s opinion rises to the level of a clear error. And certainly, no manifest injustice would result from following the prior appellate decision’s conclusion that Morpho is a “consumer” as defined by RCW 82.04.190(6). Morpho failed to complain of the alleged error at a time when the Court of Appeals could have corrected it.

2. Division One did not clearly err.

Courts do not reach the conclusion that clear error has occurred lightly. *See Cox Enterprises, Inc. v. News-Journal Corp.*, 794 F.3d 1259, 1272 (11th Cir. 2015) (explaining that “the ‘clear error’ exception must be

² Federal courts apply similar legal tests as Washington courts under the law of the case doctrine and its exceptions.

rarely invoked” and the standard is “a high bar”). The Court of Appeals concluded that Morpho was a consumer as a matter of law. Based on a review of the entire record, this conclusion was not clear error.

In challenging this holding, Morpho focuses primarily on procedure rather than substance. But in substance, there is more than ample evidence in the record to support Division One’s ultimate conclusion. When deciding whether the Court of Appeals made a clear error, it is appropriate to look at the substance of the legal conclusion and the evidence supporting it, rather than merely the procedure that led to the result. *See Weidner v. Thieret*, 932 F.2d 626, 631-32 (7th Cir. 1991) (in determining whether clear error occurred, the court should examine entire evidence rather than whether a particular procedure was error).

The “consumer” definition about which Morpho intends to assert additional arguments upon remand is as follows:

(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 a part of the realty by virtue of installation; . . .

RCW 82.04.190(6). Not all of Morpho’s potential arguments are clear from the face of its amended complaint, but it appears Morpho wants to raise several arguments based on this definition. One argument is that

Morpho did not improve buildings by installing explosive detection systems. This is either because the systems are not sufficiently attached to improve the real property itself, or because it will assert that some other contractor was the actual installer. Another possible argument that Morpho would assert is that even if it did improve buildings in this manner, it is not “in the business” of doing so, because its primary business is manufacturing systems, not installing them. These arguments have no merit, and there is sufficient evidence in the current record to reject them.

a. Morpho improved the airports by installing explosive detection systems.

RCW 82.04.190(6) applies if a person improves buildings or other structures for the United States. One way this can occur is through installing or attaching personal property to the building. The Department of Revenue concluded that Morpho installed the explosive detection systems. CP 123-29 (audit report explanation); CP 645-50 (explanation by Department of Revenue Administrative Law Judge). The Court of Appeals stated once that the issue of installation was conceded and twice that the issue was undisputed. *Morpho I*, 194 Wn. App. at 23, 28. The Court did not precisely explain how it reached this conclusion. Morpho did not argue the absence of installation in its summary judgment motion, choosing to focus on other aspects of the “consumer” definition. Morpho did state in

footnotes in its summary judgment brief that there were disputes surrounding the meaning of “improvement,” “installation,” and whether Morpho performed these activities. *See* CP 100 (note 4), CP 105 (note 6). It appears, therefore, that Morpho did not intend to concede issues related to installation or improvement of buildings, but rather sought to preserve these issues in case its first legal theory regarding the meaning of the statutory term “consumer” failed.

It is unclear exactly why the Court of Appeals believed that the installation issue was undisputed, and therefore reached the conclusion that it should resolve the “consumer” issue as a matter of law. Morpho asserts that the Court of Appeals simply misconstrued its trial court position. This is possible. It would not be surprising given that Morpho never clarified its position on appeal about what should happen if the case were remanded. Rather, Morpho merely alluded to a factual dispute in footnotes in its appellate and summary judgment briefs. *See, e.g.*, Br. of Appellant, App. B (Morpho’s brief in the prior appeal) at 3 n.1, 4 n.4.

While the Department must acknowledge the possibility the Court of Appeals misunderstood Morpho’s concession, other possible explanations are also plausible. For example, the Court could have concluded the evidence that Morpho installed the systems—which was in the summary judgment and appellate record—was so overwhelming (and

based on Morpho's own documents) that it could be said to be undisputed. Or the Court of Appeals could have concluded that because Morpho did not address the merits of the installation issue, it should find that issue to be resolved for purposes of construing the definition of "consumer." Under RAP 12.2, the Court of Appeals had the authority to resolve whether Morpho was a "consumer."

Even if Division One misconstrued Morpho's trial court position, there is ample evidence in the record to support the conclusion that Morpho improved the airports by installing explosive detection systems, and therefore was a "consumer." In other words, while it is possible (but not clear) that the Court misapprehended a fact in reaching its conclusion, the conclusion itself is correct and is supported by extensive evidence in the record.

The Court summarized the procurement and contract documents, in which Morpho agreed to install explosive detection systems at airports across the country as directed by TSA. *Morpho I*, 194 Wn. App. at 19. The contracts deemed these activities "site installation support," which referred to the technical assembly of each system. CP 288, 381-82. It does not appear to be disputed that Morpho indeed engaged in this technical assembly. *See infra* at 4 (citing various evidence in the record). The record also contains "installation checklists," which are checklists for the

installation of each system completed by Morpho engineers in their own handwriting. CP 555-587. It would be remarkable if a trial court would ignore Morpho's own documents to conclude that it did not in fact install the systems. Yet this is precisely the argument Morpho seeks to advance should this Court decline to follow the law of the case.

Morpho was also responsible for other activities that could be deemed "installation." Early in the tax period, Morpho contracted with TSA to perform "installation and rigging." CP 451-54. At that point, Morpho took over supervision of rigging (moving and setting the systems in place), and subcontracted with a company to perform these activities.³ *See infra* at 3-4 (explaining evidence related to "rigging"). Accordingly, the conclusion that Morpho is a "consumer" is plainly not clear error.

Morpho may also wish to argue that the systems did not improve the airports because they are movable. The statutory definition of "consumer" applies to those who improve buildings. And the definition expressly applies even if the personal property does not become a fixture: one is a consumer "whether or not such personal property becomes a part of the realty by virtue of installation." RCW 82.04.190(6). The addition of

³ Regardless of how one defines "installation," Morpho certainly improved the airports through its activities. RCW 82.04.190(6) makes a consumer the one who improves buildings for the United States, and installation is just one way that can be accomplished.

millions of dollars of explosive detection systems certainly improved the airports. So this argument too is without merit.

b. Morpho engaged in the business of improving buildings.

The record equally supports the conclusion that Morpho *engaged in the business* of improving buildings for the United States when it installed the systems. This phrase is defined extremely broadly in Washington tax statutes. RCW 82.04.150 defines “engaging in business” as “commencing, conducting, or continuing in business. . .” RCW 82.04.140 defines “business” as “all activities engaged in with the object of gain, benefit, or advantage to the taxpayer or to another person or class, directly or indirectly.” While Morpho earned more compensation for manufacturing explosive detection systems than for installing them, it still received compensation for the latter activity. RCW 82.04.140 includes *all* activities engaged in for gain or benefit, not just the primary activity in which a taxpayer engages in. A taxpayer cannot define its activities narrowly so as to escape the conclusion that other compensation it receives is not taxed. *See, e.g., Steven Klein, Inc. v. Dep’t of Revenue*, 183 Wn.2d 889, 357 P.3d 59 (2015) (rejecting car dealer’s argument that because it was in the business of selling cars, “dealer cash” incentive received from manufacturer was not subject to tax). The record plainly

supports the conclusion that Morpho engaged in the business of improving the airports when it installed explosive detection systems there.

c. Viewing the record as a whole, there is no clear error.

Morpho cites several rules of appellate procedure in support of the argument that the Court erred by reaching issues not before it. Ultimately it was for the Court to determine which issues were so intertwined with the parties' arguments that it could resolve. *See Humphrey*, 176 Wn.2d at 671 (court has inherent authority to consider issues not raised by the parties if necessary to reach a proper decision). The additional arguments Morpho seeks to make are related to the same definition of "consumer" that the Court resolved. It is difficult to sever portions of one particular tax statute, address those, and ignore other portions. In fact, the rules of statutory construction require review of an entire statute. *ITT Rayonier, Inc. v. Dalman*, 122 Wn.2d 801, 807, 863 P.2d 64 (1993) ("Statutory provisions must be read in their entirety and construed together, not piecemeal"). It is therefore unsurprising that the Court addressed RCW 82.04.190(6) in its entirety.

The Court of Appeals reviewed the summary judgment record *de novo*, and there was significant evidence supporting the conclusion that Morpho was a consumer as a matter of law, even if the parties did not

argue every part of the statute. Even if the Court misunderstood Morpho's summary judgment position, the substance of the Opinion's conclusion was not clear error.

3. No manifest injustice would result from following Division One's ruling.

In addition, application of the law of the case doctrine would not result in manifest injustice. Assuming for the sake of argument that the prior opinion contains an error, Morpho must share in the blame for failing to prevent or respond to that error until over a year after that opinion was rendered. The policy of finality must at some point weigh more heavily than the ability to endlessly litigate claims in a piecemeal fashion.

a. Morpho did not move for reconsideration of the prior decision or identify an over breadth argument in its Supreme Court petition.

If Morpho believed that the prior appellate holding that Morpho was a consumer as a matter of law was the product of a mistake, it should have sought reconsideration. *See* RAP 12.4 (permitting motion for reconsideration within 20 days of decision); VRP (November 17, 2017) at 39 (trial court stating that “[t]he appropriate way to address [possible error] would have been through a motion for reconsideration with the Court of Appeals.”). Morpho could have asked the Court to narrow the Opinion's conclusion if it was based on a misapprehended fact. *See* RAP

12.4(c) (stating motion should state the points of law or fact which the moving party contends the court has overlooked or misapprehended). It would have presented the Court an opportunity to correct its decision if it believed an error had been made and may have avoided two years of additional litigation over the scope and correctness of the decision.

Morpho did not pursue such a course.

Indeed, at least one appellate court has held that “unless good cause is shown for a litigant’s failure to comply with [an appellate rule permitting a motion for reconsideration within 10 days] neither the trial judge nor another part of that same appellate court should undertake to again consider determinations made in the matter.” *Polidori v. Kordys, Puzio & Di Tomasso*, AIA, 589 A.2d 1254, 1258 (N.J. Super. 1988). It is a sensible rule that should be applied in this case based on Washington’s Rules of Appellate Procedure both permitting motions for reconsideration and applying the law of the case in most circumstances. RAP 12.4; 2.5(c).

And while Morpho did petition the Washington Supreme Court for review, it did not raise an over breadth issue in its petition either. *See* Appendix A. “A legal decision made at one stage of litigation, unchallenged in a subsequent appeal when the opportunity to do so existed, [generally] becomes the law of the case.” *Concrete Works of Colo., Inc. v. City & Cty. of Denver*, 321 F.3d 950, 992 (10th Cir. 2003).

The points that Morpho now raises were not latent in the Court of Appeals' opinion. Morpho argues that it "had no reason to believe the installation had been decided." Br. of Appellant at 25. But this point was obvious on the face of the opinion. The opinion stated no fewer than three times that installation was not at issue, and twice that Morpho was a consumer as a matter of law. Yet Morpho sat on its rights to correct any defects in the Court of Appeals opinion until opposing the Department's summary judgment motion on remand. And the trial court, as it correctly explained, was bound by the Court of Appeals decision. VRP (November 17, 2017) at 40. The fact that Morpho did not promptly act to protect its own rights counsels both against a conclusion that any error was "clear," or that a manifest injustice would result from following the prior decision.

b. Morpho is responsible for not sufficiently preserving any additional arguments.

Morpho made other tactical decisions that have guided the course of this litigation. It is not at all clear that it was appropriate to move for summary judgment based on a phrase within a statutory definition, while attempting to preserve other factual and legal arguments related to the same statute. Morpho's summary judgment motion was certainly less than clear with respect to what issues it believed were legal and which issues

were factual. It is not particularly surprising that some confusion has arisen among the parties and perhaps even the Court.

A 2013 law of the case decision in another matter bears certain similarities. *Bank of America, N.A. v. Owens*, 177 Wn. App. 181, 190, 311 P.3d 594 (2013). In that case, Treiger and Owens filed for dissolution of their marriage, and each also filed separate bankruptcy actions. *Id.* at 184. In yet another action, Bank of America filed suit against Owens seeking repayment of a debt and a claim in rem against any separate property owned by Owens and later awarded to Treiger. The Bank obtained a writ of attachment as to Owens' portion of a property and a money judgment. *Id.* at 185. After resolution of each bankruptcy proceeding, the superior court in the dissolution proceeding sought to distribute the parties' property. By agreement, the Bank became a part of the case involving the distribution of the parties' property. On summary judgment motions by Treiger, Owens, and the Bank, the court ordered distribution of the parties' property, including the real property that the Bank had attached, but "preserved and tolled" the Bank's separate in rem claim pending appeal of its summary judgment distribution order as to lien priority. *Id.* at 187. The summary judgment order was favorable to the Bank, and Treiger appealed. *Id.* The Court of Appeals and Supreme Court disagreed with the trial court on the question of lien priority, and held that the trial court should have

granted priority to Treiger's lien. *Id.* Neither party addressed the in rem claim at the Court of Appeals or Supreme Court. *Id.*

When the case returned to the trial court, the trial court granted the Bank summary judgment on its in rem claim, and denied Treiger's request for judgment on the mandate. *Id.* at 188. On a second appeal, the Court of Appeals held that the trial court was bound by the Supreme Court's decision on the lien priority dispute. The trial court's granting of the Bank's summary judgment motion on remand "thwarted the Supreme Court's direction that Treiger's lien be given priority." *Id.* at 191.

Furthermore, the Court of Appeals disapproved of the trial court's decision to preserve and toll one of the Bank's claims. The trial court should not have allowed:

the Bank to sit on its in rem theory and raise it upon not prevailing on its initial theory. Doing so flies squarely in the face of the indisputable policy against allowing piecemeal appeals.

Id. at 193.

Morpho's attempt to take another swing at the "consumer" issue is similar to the Bank's effort to revisit lien priority. Morpho originally won summary judgment on one of the reasons it asserted it was not a "consumer" under RCW 82.04.190(6), and sought to preserve its other arguments for a later day in case they became necessary. After this Court rejected the first theory, Morpho sought to fall back on a different theory

involving the same statute. In addition to asking for a result that would contradict the express language of the Court of Appeals decision, Morpho engaged in a piecemeal litigation strategy contrary to the dictates of *Bank of America*.

All of Morpho's statutory claims involved reasons why it alleged it is was a not "consumer" as defined by Washington's tax statutes. If Morpho believed that some of its arguments related to this statute were discrete and presented disputed factual issues, it would have been safer to proceed to trial and offer evidence on those points. Instead, Morpho sought multiple bites at the same apple. The Department introduced summary judgment evidence of installation and improvement of buildings, and also addressed these facts in its appellate brief. Morpho should have, at a minimum, clarified that a factual dispute existed on these points to be resolved upon remand if it did not prevail on the primary issue in dispute.⁴ Morpho did not protect its position that it could re-litigate these issues.

Just as Bank of America, Treiger, and Owens asked the courts to resolve lien priority, without specifically addressing a separate claim by the bank that could affect this priority, the parties in this case asked the appellate courts to resolve whether Morpho could meet the definition of

⁴ Morpho merely alluded to this point in a footnote, without expressly stating what the procedural posture would be on remand. *See* Br. of Appellant, Appendix B at 3 n.1.

“consumer” without specifically asking the courts to address all aspects of that definition. When Division One definitively resolved whether Morpho met the definition, and the Supreme Court denied review, Morpho did not suffer a manifest injustice. Morpho never clarified throughout that entire round of appellate litigation that in fact the parties were only addressing a narrow portion of that definition.

V. CONCLUSION

The prior Court of Appeals opinion was unambiguous and left no room for interpretation by the trial court. The trial court correctly concluded that Morpho could not present arguments challenging the holding that it was a “consumer” as defined by RCW 82.04.190(6).

This Court should apply the law of the case as set forth in its prior opinion and decline to apply a narrow exception to that doctrine. Viewing the record as a whole, the Court did not clearly err in concluding that Morpho is a consumer as a matter of law. Nor did that ruling inflict manifest injustice upon Morpho. This Court should affirm.

RESPECTFULLY SUBMITTED this 3rd day of August, 2018.

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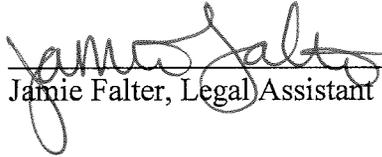
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I certify under penalty of perjury under the laws of the State of
Washington that the foregoing is true and correct.

DATED this 3rd day of August, 2018, at Tumwater, WA.



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APPENDIX A

NO. 93121-6

FILED
E MAY 13 2016
WASHINGTON STATE
SUPREME COURT

Court of Appeals No. 73663-9-1

SUPREME COURT OF THE STATE OF WASHINGTON

Morpho Detection, Inc.,

Petitioner,

v.

State of Washington, Department of Revenue

Respondent.

PETITION FOR REVIEW

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FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2016 APR 15 AM 10:59

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I. Introduction

The Division I Court of Appeals opinion sought to be reviewed, holds that RCW 82.04.190(6)'s plain language¹ (defining the word “consumer” to include companies working on “structures under, upon, or above real property of or for the United States”) is unambiguous and means that either the work must be under, upon, or above real property of the United States or the work must be for the United States. The Court of Appeals reversed the trial court’s interpretation of the same language rejecting arguments in support of the trial court’s interpretation alleging they were not supported by authority. But, legal authority is not required to interpret unambiguous plain language. The decision to be reviewed conflicts with decisions of this Court regarding statutory construction, and the issues raised by this petition are matters of substantial public interest that should be determined by the Supreme Court.

II. Identity of Petitioner

The Petitioner is Morpho Detection, Inc., (“Morpho”) the Respondent below and the Plaintiff in the Superior Court.

¹ RCW 82.04.190(6) provides: 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;

III. Citation to Court of Appeals Decision

Morpho seeks review of the decision of the Court of Appeals, Division One, in *Morpho Detection, Inc. v. State of Washington, Department of Revenue*, Cause No. 73663-9-1. The decision was filed March 28, 2016. (Slip op. attached at Appendix A-1 to 14).

IV. Issues Presented

1. Is legal authority required to interpret unambiguous plain language?
2. Is language susceptible to two fundamentally different interpretations unambiguous?
3. Must an ambiguous tax statute be given the interpretation most favorable to the putative taxpayer?
4. 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)?
5. If the company performing work on structures for the federal government is a consumer even when such work is not on land in which the federal government has an interest, does the tax violate the Supremacy Clause of the United States Constitution?

V. Statement of the Case

Statement of Facts

Morpho is a leading manufacturer of explosive detection machines (EDMs). The Transportation Security Administration (“TSA”) contracted with Morpho 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 five machines were deployed at Spokane Airport. CP 32 – 33 (Decl. of Piper).²

The Department alleges that Morpho installed the machines at the airports and thereby improved the airport buildings.³ *See e.g.*, Br. of App. at 11. The locations at which the 46 machines are deployed, the locations at which the Department alleges Morpho performed the business of improving a building, are not real property of or for the United States.

² The Court of Appeals denominated the machines as systems following the terminology of the Department of Revenue, the Department. *See, e.g.*, Slip op. at 1 and 2 *and see*, Reply Br. of App. at 1. Morpho sold machines, and the alleged use of the machines is what is at issue.

³ Morpho 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.

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.*⁴

For the period January 1, 2002, through March 31, 2006, the Department assessed Morpho sales and/or use tax plus interest and penalties measured by what it understood to be the value (with minor adjustments) of the 46 EDMs manufactured and sold by Morpho to TSA that were subsequently deployed by TSA in Washington.⁵ CP 33 (Decl. of Piper). The DOR assessment contended that such tax was due on the theory that Morpho was a consumer of the EDMs deployed by TSA in Washington under RCW 82.04.190(6). *Id.* To satisfy the assessment, Morpho paid DOR \$5,413,642.38. *Id.*

Statement of Proceedings

Morpho sought refund under RCW 82.32.180 which provides for a *de novo* proceeding before the Thurston County Superior Court.⁶ CP 10 -

⁴ TSA does have a lease in other airport property.

⁵ The adjustment related to a deduction for the value of the assembly work performed on site in Washington.

⁶ The Court of Appeals incorrectly stated that Morpho "challenged the assessment before the Federal Aviation Administration's Office of Dispute Resolution for Acquisition." Slip op. at 3. Morpho in fact sought an adjustment to its contract for an after imposed tax. It did not challenge the assessment through the federal dispute resolution process. CP 593.

15 (Amended Complaint). The Department never filed an Answer to Morpho's Amended Complaint.⁷

Morpho brought a motion for summary judgment raising two issues:

1. Is Morpho 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 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).

⁷ 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 Morpho the relief it seeks that have not been ruled on by the Superior Court and are not ripe for review. Morpho 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 Art. VII, CL. 2 of the U.S. Const., the Supremacy Clause. Thus, if the Court of Appeals is sustained, the matter will proceed to trial in the trial court. If the Court of Appeals is reversed, the matter will be concluded.

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 Morpho “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 Morpho. *Id.*

The Superior Court reasoned that the term “of or for” as used in RCW 82.04.190(6) modified the term “real property.” Thus, for Morpho to be a “consumer,” Morpho would have to have done work either under, upon, or above real property of the United States (property which the United States owns) or under, upon, or above real property for the United States (real property in which the United States holds a lesser property interest such as a lease, an easement, or a license). RP 31.

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 Morpho’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 Declarations⁸ 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 establish 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 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.⁹ The Court did not find

⁸ We do not mean to imply that the Department even moved to strike those additional statements of fact. It did not.

⁹ The references were to an administrative office and/or a break room, not to the locations where the EDMs were deployed. RP 31.

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.¹⁰ RP 31. Therefore, the Court granted Morpho's motion for summary judgment on the second issue.

The Department filed an appeal with Division II. Division II transferred the matter to Division I. See, Appendix B.

At the Court of Appeals, both parties argued that RCW 82.04.190(6) was unambiguous. But, the Department argued that the antecedent for the word "of" was "real property" and the antecedent of the word "for" was "constructing, repairing, decorating, or improving new or existing buildings or other structures under, upon, or above real property" while Morpho argued that the words "of" and "for" had the same antecedent, "real property." *Contrast*, Br. of App. at 20-21 with Br. of Resp. at 16-17.

The Court of Appeals undertook *de novo* review. Slip op. at 4.

¹⁰ 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 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.

The Court of Appeals began its analysis by reciting several rules of statutory construction¹¹ such as:

(i) Statutory interpretation begins with the statute's plain meaning;

(ii) Plain meaning is discerned "from the ordinary meaning of the language at issue, the statute's context, related provisions, and the statutory scheme as a whole."

(iii) "While we look to the broader statutory context for guidance, we must not add words where the legislature has chosen not to place them."

(iv) "[W]e must construe statutes such that all of the language is given effect."

(v) If a "statute is unambiguous after a review of the plain meaning, the court's inquiry is at an end."

(vi) When a statute is ambiguous, we will "resort to principles of statutory construction, legislative history, and relevant case law to assist in [its interpretation]."

(vii) A statute is ambiguous if it can be reasonably interpreted in more than one way.

(viii) A statute is not ambiguous simply because different interpretations are possible.

¹¹ Oddly, the Court ended its opinion with the following footnote: "Because we agree with the parties that the statute is unambiguous, we do not address the arguments on various rules of statutory construction." Slip op. at p. 14, n. 6. One argument not addressed was Morpho's argument that an ambiguous tax statute must be construed in favor of the putative taxpayer and against the government.

(ix) We are not obliged to discern any ambiguity by imagining a variety of alternative interpretations.

Slip op. at 5.

The Court then quoted the statute imposing a tax on using tangible personal property and defining “use.” RCW 82.12.010. Before addressing the issues and arguments in this case, even though RCW 82.04.190(6) is a statute defining the party subject to tax and not a tax exemption statute, the Court next stated, “[e]xemptions to this tax are narrowly construed and the taxpayer claiming an exemption has the burden of proving that he or she qualifies.” Slip op. at 6.

The Court of Appeals next characterized “the sole point of contention” as “the plain meaning of the phrase ‘for the United States’, Slip op., at 7,¹² and stated the parties differing interpretations. *Id.*

The Court found Morpho’s arguments that the rules of grammar require the antecedents for the words ‘of or for’ to be identical unpersuasive “because Morpho cites no authority” in support of the arguments. Slip op. at 8.¹³ Similarly, the Court was unpersuaded by

¹²The issue is more correctly stated as: What are the antecedents of the words “of or for”.

¹³ Parenthetically, the Court wrote that it need not consider arguments unsupported by authority. Morpho did cite *City of Spokane v. Dep’t of Revenue*, 104 Wn.2d 253, 258, 587 P. 3d 1206 (2001) for the proposition that absent ambiguity, courts rely on the plain language of the statute, *Vita Foods Products v. State*, 91 Wn.2d 132, 587 P.2d 535 (1978) for the proposition that Courts should and do not construe an unambiguous statute and *Group Health v. Department of Revenue*, 106 Wn.2d 391, 722 P.2d 787 (1986) for the proposition that if a tax statute is ambiguous, the statute must be construed most strongly against the taxing authority, before Morpho offered its defense of the trial court’s reading of the statute consistent with its plain language.

Morpho's arguments that the words "under, upon, or above real property" must be tied to the phrase "of or for the United States" for the words to have substantial meaning as everything is under, upon or above real property because Morpho cited no authority for the proposition. *Id.* at 8.¹⁴

The Court also disagreed with Morpho's argument that "real property for the United States" means "the United States has an easement, lease, right to possess or other such interest in the real property" again because Morpho cited no authority for its claim that the ordinary meaning for the language at issue refers to a property interest held by the United States.¹⁵ Additionally, the Court found Morpho's arguments strained because the phrase "real property for the United States" allegedly does not easily convey a reference to real property in which the United States has an interest but does not own. *Id.* at 9.¹⁶

The Court of Appeals also reasoned that Morpho's interpretation leads to absurd results because the same language (real property of or for) appears elsewhere imposing tax and elsewhere in an exemption from the

¹⁴ The Court also rejected this argument on the basis that the words "under, upon, or above real property" are the antecedent for the phrase "of the United States" even though according to the Court they are not the antecedent for the phrase "for the United States." The actual statutory phrase, however, is "of or for the United States."

¹⁵ Morpho did cite RCW 82.04.190(4) and RCW 82.04.050(2)(b) for support.

¹⁶ The statutory phrase is "real property of or for the United States" not just the phrase "real property for the United States." Reading the whole phrase as it appears in the statute clearly means "real property which the United States owns or in which the United States has a lesser interest." Morpho's arguments regarding the meaning of the phrase "real property for the United States" were in response to the Department's argument that the trial court gave no meaning to the phrase "for the United States" and that such phrase was meaningless. *See*, Br. of Resp. at 17 n. 3. The Court of Appeals appears to have focused on the half phrase "for the United States" rather than the full statutory phrase "real property of or for the United States" in determining what the plain language means.

tax for the United States. The Court believed that if the same language was given the same meaning Morpho contends is correct in all the statutes,

we would necessarily have to conclude that RCW 82.04.050(12) does not exclude from the sales tax work done for the federal government on land which the federal government holds no interest. This result is absurd for at least two reasons. First, it is contrary to the legislative scheme which clearly seeks to avoid imposing a sales tax on the federal government and instead relies on the use tax. And second, imposing such a tax on the United States is likely unconstitutional and the legislature surely did not intend such a result.

Slip op. 12-13.¹⁷

Based on the above, the Court of Appeals reversed and remanded for entry of partial summary judgment in favor of the Department holding that the “use tax applies to a contractor who either installs tangible personal property on real property owned by the federal government or for the federal government. In the latter circumstance, it is irrelevant whether the United States also has some interest in the real property upon which the work is done.” Slip op. at 13.¹⁸

¹⁷ The Court of Appeals did not understand that (i) RCW 82.04.050(12) does not generally exclude the federal government from sales and use tax. It only excludes sales to the federal government from sales and use tax when certain work is done on real property of or for the United States; (ii) The United States generally falls within the definition of “consumer” when it buys tangible personal property. *See generally*, RCW 82.04.190 and (iii) The general exemption from sales tax the United States enjoys stems from the Supremacy Clause of the United States Constitution and is reflected in RCW 82.08.0254 and RCW 82.12.0255 exempting from tax any sale or use which the State is prohibited from taxing under the U.S. Constitution.

¹⁸ Such a holding results in the tax being unconstitutional under the Supremacy Clause for the reasons explained at p. 19-20, *infra*.

VI. Summary of Argument

The Superior Court read RCW 82.04.190(6) and applied its unambiguous plain language in concluding that the words “of or for” modified real property. The Court of Appeals reversed apparently finding the Superior Court’s reading unreasonable and Morpho’s arguments in support thereof “unsupported by authority or other persuasive argument.” But, no such authority is necessary if the statutory language is plain and unambiguous as the Court of Appeals held.

If the statute is ambiguous, it must be construed in favor of Morpho because the statute is a taxing statute, not an exemption statute. But, the Court of Appeals cited the rule of construction regarding exemptions before rejecting Morpho’s arguments and the trial court’s interpretation.

RCW 82.04.190(6) is clear. The statutory words “of or for” modify “real property”. In context, the word “for” must relate to some real property interest less than fee title because in the phrase “real property of or for the United States,” “for” follows the word “of” and “of” relates to a fee interest in the real property. The Court of Appeals interprets “for” as relating to work done on real property. Not only is this interpretation wrong and out of context, but it causes the statute to be unconstitutional.

VII. Argument

A. Standard of Review

The interpretation of a statute is a question of law reviewed *de novo*. *Dep't of Ecology v. Campbell & Gwinn*, 146 Wn.2d 1, 43 P.3d 4 (2002)

B. Where Statutory Language Is Unambiguous, Its Meaning Is Derived From Its Language Alone.

When interpreting a statute, we first look to its plain language. If the plain language is subject to only one interpretation, our inquiry ends because plain language does not require construction. Where statutory language is plain and unambiguous, a statute's meaning must be derived from the wording of the statute itself. Absent ambiguity or a statutory definition, we give the words in a statute their common and ordinary meaning.

Homestreet, Inc. v. State, Dep't. of Revenue, 166 Wn.2d 444, 451, 210 P.3d 297 (2009) (citations omitted).

While this Court has indicated that it is correct to take into account the statutory context, basic rules of grammar, any special usage stated by the legislature on the face of the statute, and even background facts of which judicial notice could be taken and which the legislature would have been aware when it passed the statute, the plain meaning of an unambiguous statute is still derived from what the Legislature has said in its enactments. *Dep't of Ecology v. Campbell & Gwinn*, 146 Wn.2d 1, 43 P.3d 4 (2002). Therefore, it is reversible error for a Court of Appeals to

employ an agency interpretation to construe a statute without first determining that the statute is ambiguous. *Cerrillo v. Esparza*, 158 Wn.2d 194, 142 P.3d 155 (2006).

Here, the Court of Appeals rejected the trial court's reading of the plain language because it was not supported by specific authority. Instead, the Court of Appeals construed the statute as did the Department. As a result, the Court of Appeals erred. The Court should have simply read the statute and derived its meaning from the words in the statute. No additional authority was necessary or proper as the statute is unambiguous.¹⁹

C. A Statute is Ambiguous if Susceptible to Two or More Interpretations.

If a statute remains subject to multiple interpretations after analyzing the plain language, it is ambiguous. *Burton v. Lehman*, 153 Wn.2d 416, 423, 103 P.3rd 1230 (2005). *Agrilink Foods, Inc. v. State, Dep't of Revenue*, 153 Wn.2d 392, 103 P.3d 1226 (2003) (A statute is ambiguous if it is susceptible to two or more reasonable interpretations,

¹⁹ The Court of Appeals opinion could be read as presuming the agency's interpretation as correct, placing the burden of persuasion on Morpho and subjecting Morpho's arguments to scrutiny. Such an approach errs in not recognizing that Morpho's arguments were supporting the trial court's reading of the statute, that if more than one interpretation is possible the statute should have been held ambiguous and for the reasons discussed at p. 17, *infra*, ambiguous statutes are construed in favor of the taxpayer.

but it is not ambiguous merely because different interpretations are conceivable.)

The Superior Court read RCW 82.04.190(6) and applied its plain language in concluding that the words “of or for” modified real property. The Superior Court’s reading was certainly reasonable. The Court of Appeals accepted the Department’s interpretation which has the word “of” modifying “real property” and the word “for” modifying “constructing, repairing, decorating, or improving new or existing buildings or other structures under, upon, or above real property” For the reasons expressed below, we do not find such a reading reasonable, but even if it is, the statute is ambiguous.

D. Ambiguous Tax Statutes Are Construed Against the Taxing Authority and in Favor of the Taxpayer.

“If any doubt exists as to the meaning of a taxation statute, the statute must be construed most strongly against the taxing power and in favor of the taxpayer.” *Ski Acres, Inc. v. Kittitas County*, 118 Wn.2d 852, 827 P.2d 1000 (1992) (citing *Puyallup v. Pac. Northwest Bell*, 98 Wn.2d 443, 448, 656 P.2d 1035 (1982) and *Vita Food Products v. State*, 91 Wn.2d 132, 587 P.2d 535 (1978)).

The reason for this rule of construction against the taxing authority is Wash. Const. Art. VII, Section 5 which provides: “No tax shall be

levied except in pursuance of law; and every law imposing a tax shall state distinctly the object of the same to which only it shall be applied.” See, *Clemency v. State*, 175 Wn.2d 549, 290 P.3d 99 (2012) (tax on estate rejected).

RCW 82.04.190(6) is a statute that seeks to define the person liable for the use tax, a consumer. It must do so distinctly. If there is a doubt as to its meaning, the statute must be construed in favor of Morpho and against the Department.²⁰

E. A Person Working on Structures Must Perform 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).

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 RCW 82.04.190(6) is that the specified activity -- constructing, repairing, decorating, or improving new

²⁰ The Court of Appeals may have thought that Morpho was seeking a tax deduction or exemption. See, Slip op. at 6 where it states that “Exemptions to this tax are narrowly construed and the taxpayer claiming an exemption has the burden of proving that he or she qualifies.” Applying that burden to Morpho would be reversible error.

or existing buildings or other structures -- must occur “under, upon, or above real property of or for the United States.” The trial court held, the words “of or for” modify “real property. RP 31. The trial court’s reading is reasonable in context. The word “for” must relate to some real property interest less than fee title because in the phrase “real property of or for the United States,” “for” follows the word “of” and the word “of” relates to a fee interest in the real property. Thus, for Morpho to be a “consumer,” Morpho would have to have performed work under, upon, or above real property of the United States (property which the United States owns) or under, upon, or above real property for the United States (real property in which the United States holds a lesser property interest such as a lease, an easement, or a license). RP 31. Morpho did no work on such property. Therefore, it was entitled to summary judgment.

F. If Use Tax Applies Because a Contractor Works for the Federal Government and Installs Personal Property on Real Property in which the Federal Government Has No Interest, The Tax Would Violate the Supremacy Clause.

The Court of Appeals interprets “for” as relating to work on structures. Not only is this interpretation wrong and out of context, but it is facially unconstitutional. Property installed by a federal contractor on land on which the federal government has no interest will be subject to

two taxes while the general rule is that personal property installed on nonfederal property is subject to only one tax. *See*, RCW 82.04.190.

The definition of consumer includes any person who holds or uses any article of tangible personal property. RCW 82.04.190(1). It is a certainty that those with interests in the real property will hold or use the personal property. Therefore, those with interests in the real property on which the personal property is being installed will be subject to tax. The federal contractor who installs the personal property will be subject to a second use tax under the Court of Appeals interpretation of RCW 82.04.190(6).

The record before this Court confirms this facial discrimination. The EDMs at issue are used by the Port of Seattle and the airlines at the Spokane Airport. CP 28 – 31. Such use is not exempt under any statute. If Morpho is subject to a second use tax because it installed the EDMs for the United States, the EDMs would be subject to two taxes. That second tax arises because -- according to the Court of Appeals -- a person installing the machines for the United States on land in which the United States has no interest is a consumer subject to tax.

RCW 82.04.190(6) targets federal contractors for a special use tax and was challenged as facially discriminatory in *Washington v. United States*, 460 U.S. 536, 103 S. Ct. 1344, 75 L.Ed.2d 264 (1983). The tax

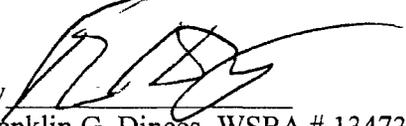
was sustained only because RCW 82.04.190(6) as interpreted by the Supreme Court left the Federal Government and federal contractors *better off* than other taxpayers under the tax system as a whole. 460 U.S. 541-42. (*emphasis in original*). But if federal contractors are subject to tax just because they work for the federal government and the owners of the real property interests are also subject to a second tax because they own, hold or use the personal property, the property contracted to be installed by the federal government is subject to two taxes while the general rule is that property installed on nonfederal property is subject to only one tax.

VIII. Conclusion

For the reasons expressed above, as well as the reasons discussed in the Brief of Respondent, Morpho Detection, Inc., the Petitioner, is entitled to have the Court of Appeals decision reviewed and reversed.

Respectfully submitted, this 14th day of April, 2016.

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August 03, 2018 - 3:23 PM

Transmittal Information

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Appellate Court Case Title: Morpho Detection, Inc., Appellant v. State of Washington, Department of Revenue, Respondent
Superior Court Case Number: 12-2-01758-9

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