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No. 53266-2-II

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

FPR II, LLC,

Appellant,

v.

STATE OF WASHINGTON DEPARTMENT OF REVENUE,

Respondent.

APPELLANT'S REPLY BRIEF

Robert B. Mitchell, WSBA #10874
Gabrielle E. Thompson, WSBA #47275
Ashley E.M. Gammell, WSBA #50123

Attorneys for Appellant FPR II,
LLC

K&L GATES LLP
925 Fourth Avenue, Suite 2900
Seattle, WA 98104-1158
(206) 623-7580

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I. INTRODUCTION

The trial court’s ruling—that the catchall “Service and Other Activities” B&O tax classification applies to FPR—was erroneous for two reasons. First, FPR’s employees engage in “manufacturing” as that term is defined by the statute, and therefore the Department should have taxed FPR as a processor for hire. Second, even if FPR is not taxable as a processor for hire, the application of the catchall “Service and Other Activities” tax classification was still wrong as a matter of law because the type of services FPR renders can be taxed only as wholesale sales or retail sales, not under the catchall classification.

The Department cannot escape these conclusions. The Department’s argument that FPR’s employees do not engage in manufacturing depends on the Department’s extremely narrow and selective characterization of the work performed by FPR’s employees, and it ignores the effect of that work on the material processed at the recycling facilities. The Department’s characterization not only is unsubstantiated by the evidence but also runs counter to the standard of review. *See Keck v. Collins*, 184 Wn.2d 358, 370, 357 P.3d 1080 (2015) (“When we review a summary judgment order, we must consider all evidence in favor of the nonmoving party.”). And the Department’s argument that the catchall B&O tax classification is appropriate here is directly contradicted by statutes that prohibit the

application of that classification to the services involved in this case. The Department's application of the catchall "Service and Other Activities" tax classification is wrong as a matter of law. This Court should reverse.

II. ARGUMENT

A. **FPR should be taxed as a processor for hire because its employees engage in manufacturing.**

Under Washington law, a taxpayer is engaged in manufacturing if the taxpayer applies a process to a material that causes a significant change in the material. *Bornstein Sea Foods, Inc. v. State*, 60 Wn.2d 169, 175, 373 P.2d 483 (1962). In its opening brief, FPR demonstrated that Material Recovery Facilities ("MRFs") cause significant changes to the original material. The process transforms a nearly valueless material into useful and salable products. The process also causes changes in the form, quality, and properties of the original material: glass containers are crushed into small pieces, and cardboard, paper, plastic, metal, and aluminum are compressed into densified bales. There is also a different demand for the original material and the distinct commodities that FPR's employees produce at the facilities. Under Washington law, each of these evidences a "significant change" sufficient to qualify as manufacturing. *See McDonnell & McDonnell v. State*, 62 Wn.2d 553, 556-57, 383 P.2d 905 (1963) (factors indicating a "significant change" has occurred include "changes in form,

quality, properties (such changes may be chemical, physical, and/or functional in nature), enhancement in value, the extent and the kind of processing involved, differences in demand, et cetera . . .”).

The Department, in response, focuses on some of the tasks performed by individual FPR employees (while ignoring others) rather than on the transformation caused by the overall process at the facilities. Only by doing this can the Department get to its preferred result, which ignores the critical question and arrives at the incorrect answer.

The Department’s response suffers from another fatal flaw: it relies on an incomplete and misleading recounting of the facts, one that ignores critical evidence contradicting its arguments. The Department, for instance, argues that there “was no change in the form [of the material]—physical, chemical, functional, or otherwise—when FPR’s employees sorted the commingled recyclables into separated bundles of materials by type.” Resp. Br. 29. That statement is wholly unsupported by the facts in the record, which demonstrate changes in the physical form of the glass through crushing and in the other products through densifying the cardboard, paper, plastic, metal, and aluminum into compressed bales. As this example demonstrates, the Department has ignored the foundational rule that, on summary judgment, all evidence and reasonable inferences must be viewed in favor of the nonmoving party. *See Keck*, 184 Wn.2d at 370.

1. The Court must consider the overall processing that occurs at the facilities.

The Department argues that “the primary activity performed by FPR employees is sorting and bundling” and that this did not “create[] substantially different products when compared with the material entering the facilities.” Resp. Br. 27–28. Contrary to the Department’s argument, this Court must consider the overall processing that occurs at the MRFs—not just the individual activities performed by FPR’s employees—to determine whether FPR’s employees are engaged in manufacturing. *See Bornstein*, 60 Wn.2d at 175 (manufacturing occurs if the end product, when compared to the material at the beginning of the process, has undergone a significant change). The question in this case is whether the end products demonstrate that the original material has undergone a significant change. That change can be the result of mechanical processes, hand labor, or a combination of both. RCW 82.04.120(1) (defining “manufacturing” to include the application of labor “by hand *or* machinery” (emphasis added)). The answer to that question is plainly “yes.”

The Department seeks to bolster its selective reading of the facts by referring to FPR as a “staffing company” and citing an Excise Tax Advisory pertinent to such companies. Apart from the fact that an ETA is a policy statement and “advisory only,” RCW 34.05.230, FPR does not fit the

definition of a staffing company because it does not provide mere “staffing services.”¹ FPR is, rather, a “processor for hire” under RCW 82.04.280(c) and WAC 458-20-136(3)(e). *See* Op. Brief 22–23.

It is wholly irrelevant that approximately 75 percent of FPR’s employees are termed “sorters.” The record shows that FPR employees also operate machinery, including the disks that crush glass containers and the baling machines that use hydraulic compression to crush and densify the separated materials into compacted bales. CP 121, 127, 179-82.

2. FPR’s employees do more than merely “sort and bundle” recyclable materials.

The Department’s argument that FPR’s employees merely engage in “sorting and bundling” is also contradicted by the facts, which show that FPR’s employees do much more. The facts show that the material delivered to the recycling facilities for processing is a hodgepodge of different items that people have placed into commingled recycling bins, 20 percent of which is garbage. CP 123, 140. FPR’s employees transfer the loose,

¹ The definition of “staffing services” requires assigning the staffing business’s employees “on a temporary basis to perform work at or services for” another organization “to support or supplement” that organization’s work force, or “to provide assistance in special work situations,” or “to perform special assignments or projects,” and “[c]ustomarily attempting to reassign the employees to other organizations when they finish each assignment.” WAC 458-20-274(3). FPR, by contrast, provides complete workforces to MRF owners for terms of 12–36 months, and those terms are automatically renewable. *See* CP 399–431; *see also* WAC 458-20-274(8) (when it receives a reseller permit, “the staffing business must report such charges for the worker under the wholesaling B&O tax classification”); WAC 458-20-274(15) (“If the staffing business does not separate its charge to the client[,] the charge is reported under the classification of the predominant activity.”).

commingled material into specialized equipment that conveys the material through a series of mechanical screens, which sort the recyclable materials by product type. CP 125–32. FPR’s employees are staged at various points on the conveyor lines to further sort the material and remove garbage and prohibitives. CP 125, 126, 128–29, 132, 186. The equipment crushes the glass containers into small pieces and removes contaminants; all other types of recyclables are sorted, cleaned, and then conveyed into storage bunkers. CP 126–27, 132. Once a storage bunker is full, an FPR employee empties the bunker onto a conveyor belt that feeds the material into a baling machine. CP 132. The baling machine, which is operated by an FPR employee, compresses the loose material with hydraulic force into densified bales or cubes, and secures them with baling wire. CP 132–33. These facts, and all reasonable inferences, must be viewed in FPR’s favor. They flatly contradict the Department’s description of the processing at the facility as mere “sorting and bundling.”

The processing described above and in FPR’s opening brief is not, as the Department claims, similar to the processing of whole peas described in *McDonnell*. Resp. Br. 28. Unlike the processing of whole peas, which involved the removal of foreign materials from whole peas that were then placed into bags for sale, FPR’s employees apply a process that changes the form, quality, and properties of the material being processed. Far from

merely “bagging” or “packaging” a pre-existing commodity like whole peas, FPR’s employees clean and sort numerous discrete products from a single commodity. They also crush the glass containers and compress and bale the loose paper, cardboard, plastic, metal, and aluminum into cubes for sale to end users. FPR’s processing of the material is driven by consumer demands for cleaned, sorted, and baled recyclable materials, along with crushed glass. Thus, the processing at the MRFs is far more like the processing of the split peas described in *McDonnell*. As with split peas, FPR’s employees change the form, quality, and properties of the material they start with, creating products that—unlike the commingled material—can be marketed to end users.

3. FPR’s employees are engaged in manufacturing because they cause a “significant change” in the material they process at the facilities.

Similarly, the Department’s contention that FPR’s employees did not create substantially different products through their processing is supported by neither the law nor the facts. Resp. Br. 28.

The Department argues that the materials must become something else for FPR’s processing to qualify as manufacturing, Resp. Br. 30, but that contention has been squarely rejected. As FPR explained in its opening brief at 31–32, the Supreme Court has held that the underlying substance of an article does not need to change for manufacturing to have occurred. *See*

Bornstein, 60 Wn.2d at 177 (“The fact that the end product is still fish does not mean that the end product is not new and different after the process of filleting is accomplished.”); *McDonnell*, 62 Wn.2d at 556. Thus, it is immaterial that at the end of the process you are left with an identical substance, so long a “significant change” has occurred when one compares the original article with the end product. *Bornstein*, 60 Wn.2d at 177.²

The 2012 Department of Revenue Appeals Division determination, CP 35–40, upon which the Department relies, is based on the same faulty logic rejected by the Supreme Court in *Bornstein* and *McDonnell* and, in any case, is not binding on this Court. There, the Appeals Division determined that a recycling facility was not engaged in “manufacturing” because the taxpayer “essentially sorts the materials without changing the underlying character of those materials.” CP 40. Although the Appeals Division acknowledged that the taxpayer’s actions increased the value of the material, it nonetheless determined that the taxpayer was not “manufacturing” because the “form of those materials does not become something other than recyclable materials.” *Id.* That analysis ignores the admonition in *Bornstein* and *McDonnell* that it is immaterial whether the end product consists of the same underlying material as the article that was

² This is also confirmed by the plain language of the statute, which defines “manufacturing” to include not just activities that result in a new article but also activities that result in a “different” or “useful” article. RCW 82.04.120(1).

being processed.³

Here, the evidence demonstrates that the material that enters the MRFs for processing *is different* from the materials at the end of the process. The material delivered to the MRFs for processing is a single commodity made up of a mixture of trash, paper, cardboard, glass containers, plastics, metals, and aluminum. Without processing, the commingled material is effectively trash. End users will not buy it; no one can use it to make post-consumer products; and if FPR's employees did not process it, it would have to be dumped in a landfill. Though the commingled recyclable material contains a variety of containers and other materials that *could be recycled* into new products *if they were cleaned, separated, and baled*, the commingled material is also made up of 20 percent garbage. That garbage and other prohibitives must be removed for the sorted and baled commodities to be sold to end users. The materials that leave the facility are different, individual commodities, each with its own market, specifications, and utility. These commodities are indisputably distinct from the commingled material that was initially delivered to the facility. Thus, the

³ That decision also misapplied Department precedent from the 1995 Metal Cube Case discussed in FPR's opening brief at 37–40. The Metal Cube Case is on all fours with this one. The Department's suggestion (at 32) that the materials differ is not just factually wrong—the ferrous metals in the commingled recyclables are no different from scrap metal—but also irrelevant. The legal analysis is not governed by the type of material involved but rather by the *process* that was applied to the material and the *effect* that process had on the material.

Department's assertion that the "recyclable materials do not become something other than sorted and bundled recyclable materials," Resp. Br. 29, is false.

The Department's argument that "[t]here was no change in form—physical, chemical, functional, or otherwise—when FPR's employees sorted the commingled recyclables into separated bundles of materials by type," Resp. Br. 30, is also contradicted by the evidence.⁴ When the loose, commingled mixture of garbage and recyclables is compared to the crushed glass and compressed, densified bales that are sold from the facilities, it is clear that FPR's employees are changing the form, quality, and properties of the original material that is delivered for processing at the facility.

FPR's employees are not just "bundling" or "packaging" the cleaned and separated paper, cardboard, plastics, metals, and aluminum. Rather, they are subjecting these products to hydraulic pressure, which compresses the loose pieces of paper, cardboard, plastic, metal, and aluminum into densified cubes or bales. CP 132–33. This process certainly changes the physical form of the materials, for it transforms otherwise loose, low-

⁴ Contrary to the Department's argument, Resp. Br. 30, this case is similar to *J & J Dunbar & Co. v. State*, 40 Wn.2d 763, 245 P.2d 1164 (1952). As with the raw whisky in that case, the process at the MRFs changes the physical properties of the original material and transforms something that cannot be consumed into a usable product—or, here, multiple products.

density pieces of paper, cardboard, plastic, metal, and aluminum into densified bales. CP 471–72.

Moreover, in addition to compressing paper, cardboard, plastics, metals, and aluminum into bales, FPR’s employees crush glass containers as part of their processing of the commingled material. CP 471. Surely the act of crushing glass containers constitutes a change in form, quality, and properties of the glass containers. *Id.* Indeed, the legislature has expressly recognized that the act of “[c]rushing . . . rock, sand, stone, gravel, or ore” constitutes “manufacturing” under RCW 82.04.120. FPR’s employees are engaged in activities akin to crushing rock: They crush glass, and they also crush and compact cardboard, paper, plastic, metal, and aluminum into densified bales. These activities undoubtedly change the physical form of the original material received at the facility and go far beyond mere “packaging” or “bundling,” as the Department alleges.

The evidence also demonstrates that, contrary to the Department’s argument, the compressed bales of separated materials perform a function that is different (and more useful) than the commingled material. As FPR’s expert witness explained, the material that comes into the recycling facility is a commodity that is “recognized as a specific product, commingled recyclables.” CP 471. That commodity is not usable by secondary processors, such as aluminum smelters or paper mills, because it is too

contaminated and because it contains too many different types of materials. CP 471. As a result, secondary processors require the commingled material to be cleaned, sorted, and baled before they will purchase it. CP 133, 471. Additionally, sorting and compressing the different types of materials makes them easier to transport and store. CP 472. Absent processing by FPR's employees, the commingled material serves no function; it is trash.

Expert evidence also shows that the compression of ferrous and non-ferrous cans is essential for secondary processors to use those materials. Without compression, the cans cannot reach the right combustion point and melt properly. CP 458. Although the trial court excluded a portion of this evidence, the court also stated that "clearly I considered it and read it." RP 28. The trial court also noted that the excluded testimony was "simply a more detailed explanation about that one aspect of the tin cans and the density," and that "[t]he arguments of density were made in his earlier deposition testimony" *Id.*

The Department's characterization of the materials and processes at issue in this case ignores key facts in an attempt to escape the conclusion that the process at the facilities qualifies as "manufacturing." Those key facts are that (1) a single commodity is delivered to the facilities; (2) that commodity is nearly valueless and cannot be marketed to end users; (3) FPR's employees, through mechanical and manual labor, process that single

commodity into new, discrete products (crushed glass and compacted bales of paper, cardboard, aluminum, plastic, and metal) that can be sold to end users; and (4) through that process, the form, quality, properties, value, usability, and demand of the original commodity are significantly changed. Those undisputed facts, which must be viewed in the light most favorable to FPR, compel the conclusion that this is a manufacturing activity.

4. FPR's employees are not engaged in "refurbishing" under WAC 458-20-136(6).

The Department's assertion that the work FPR's employees perform at the recycling facilities is "more akin to refurbishing the recyclable materials" under WAC 458-20-136(6), Resp. Br. 23, is untenable and ignores critical facts about the processing that takes place at the MRFs. Repairing and/or refurbishing is defined as an "activity [that] merely restores an existing article of tangible personal property to its original utility." WAC 458-20-136(6). An example of refurbishing is disassembling an engine core, cleaning the components, and reassembling them. *Id.* Here, unlike a company restoring engine cores, FPR's employees are creating new and different products from a single commodity. Nothing about the process that takes place at MRFs indicates that FPR's employees are restoring or prolonging the life of the commingled recyclable material. Resp. Br. 23. On

the contrary, that material ceases to exist at the end of the process.⁵

5. The legislative history upon which the Department relies is inapplicable.

The legislative history upon which the Department relies does not affect this case. Resp. Br. 33–34. Although the legislature has amended the definition of “manufacturing,” those amendments did not change the basis for the Supreme Court’s “manufacturing” analysis. Instead, the legislature created special exemptions for agricultural activities in response to the courts’ application of the general definition to factual scenarios that are irrelevant here. *See* RCW 82.04.120(2)(a), (2)(c) (excluding certain agricultural activities from the definition of “manufacturing”). The legislature did not change the standard that this Court must apply in determining whether FPR’s employees are engaged in manufacturing.

B. If it is not a processor for hire, FPR must be classified either as a wholesaler or as a retailer.

If this Court determines that, despite the significant changes in commingled recyclables that take place at MRFs and the transformation of something that is worthless into valuable commodities, FPR was not a processor for hire engaged in manufacturing, the trial court’s grant of

⁵ Like the Department’s other arguments, this argument presumes that the materials produced by a MRF are not distinct from the commingled material that it processes. The evidence shows, however, that the commingled recyclable material delivered to the MRFs is its own commodity, one that is distinct from the discrete products produced through the processing carried on at the MRFs. *See* CP 471.

summary judgment must still be reversed. If not manufacturing, the activity of cleaning, altering, or improving tangible personal property is taxable only as a wholesale or a retail sale; it cannot be taxed under the “Service and Other Activities” classification. RCW 82.04.290(2)(b).

The Department cannot contest this legal proposition. The “Service and Other Activities” classification applies to “persons engaged in the business of rendering any type of service which *does not constitute* a ‘sale at retail’ or a ‘sale at wholesale.’” RCW 82.04.290(2)(b) (emphasis added).⁶ And both “wholesale sales” and “retail sales” include the sale of services to clean, alter, or improve tangible personal property. RCW 82.04.050(2)(a); RCW 82.04.060(1)(b). Accordingly, a person that sells services to clean, alter, or improve tangible personal property may not be classified as owing “Service and Other Activities” tax: Cleaning, altering, or improving tangible personal property is taxed as either a wholesale or a retail sale.

1. The Department conceded, and the facts demonstrate, that FPR cleans, alters, and improves tangible personal property.

The Department seeks to avoid this clear legal principle by raising a

⁶ The Department’s rules confirm that it may not apply the “Service and Other Activities” classification to services rendered to clean or improve the personal property of others. *See* WAC 458-20-224(3) (catchall classification “does not include persons engaged in the business of cleaning, repairing, improving, etc., the personal property of others”). Instead, the catchall classification is intended for services rendered *to persons*, not to *personal property* of persons; such as services rendered by accountants, engineers, and attorneys. *See* WAC 458-20-224(2).

semantic argument about whether it conceded, or merely “assumed” for purposes of its motion, that FPR employees engage in cleaning, altering, or improving personal property. That argument fails for at least three reasons.

First, there is no question that the Department conceded this factual point at its deposition. The Department testified that the dictionary definitions of the terms “cleaning, altering, or improving,” if read honestly,⁷ encompass what FPR’s employees do. CP 654–56.

Second, the evidence, which must be viewed in the light most favorable to FPR, shows that FPR was cleaning, altering, *and* improving the commingled recyclable material. The commingled material that is delivered to the MRFs contains approximately 20 percent garbage, and FPR’s processing of the material removes that garbage. This qualifies as “cleaning” under the statute. *See Am. Legion Post 32 v. Walla Walla*, 116 Wn.2d 1, 8, 802 P.2d 784 (1991) (where no statutory definition is given, courts resort to the dictionary to determine the ordinary meaning of a term); *Webster’s Third New Int’l Dictionary* 419 (1986) (to “clean” means “to free of dirt, refuse, or litter and set in order”).⁸ FPR also crushes the glass

⁷ The Department testified that the tax official who authored the determination in this case “took out at least part of the entire part of the definition” of the term “cleaning.” CP 653–55. The Department further testified that, under the excluded portion of the definition (“To free of dirt, refuse or litter and set in order”), “an argument could be made” that FPR is “cleaning.” CP 654–55.

⁸ Contrary to the position that the Department took in its determination, the ordinary meaning of “clean” does not require the application of an “aqueous medium.” *See* CP 575

containers and compresses the sorted paper, cardboard, metal, aluminum, and plastics into bales. That constitutes “altering” under the statute. *See Webster’s* at 63 (to “alter” means “to cause to become different in some particular characteristic (as measure, dimension, course, arrangement, or inclination) without changing into something else”). FPR’s processing also constitutes “improving” because it enhances the value of the material by transforming a single commodity that has no commercial market into multiple commodities that can be sold to end users. *See id.* at 1138 (“improving” means “to enhance in value or quality: make more profitable, excellent, or desirable”). These facts demonstrate that FPR, at a minimum, cleans, alters, or improves the commingled recyclable material.

Third, the Department fails to cite any authority for the proposition that it may “assume” facts without conceding them. If the Department’s “assumption” means that it reserves the right to dispute the application of “cleaning, altering or improving” to FPR’s activities—which is a factual question—then summary judgment for the Department is precluded. *See Morpho Detection, Inc. v. Dep’t of Revenue*, 8 Wn. App. 2d 672, 685, 440 P.3d 1009 (2019). Regardless of how one treats the Department’s assumption or concession, it requires the conclusion that FPR’s activities

(“[FPR] does not submit the single stream of recyclable products to any aqueous medium including water. [FPR]’s activity does not meet the definition of clean.”). Cleaning does not require water, as anyone who has ever swept or vacuumed a floor well knows.

constitute either wholesaling or retailing for purposes of B&O tax.⁹ Those activities do not, as a matter of law, fit within the “Service & Other Activities” classification.

2. FPR properly raised its argument that, if not a processor for hire, it must be taxed under either the wholesale or the retail classification.

The Department also argues that FPR failed to raise the “retailing” classification before the trial court and may not be heard to do so on appeal. It contends that, in suggesting that FPR must be taxed as a retailer if not as a wholesaler or a processor for hire, FPR has impermissibly raised a new legal issue on appeal. Resp. Br. 47. That contention is wholly belied by the record. FPR raised this issue before the trial court in its summary judgment opposition, where it stated: “The alternative classification for cleaning, altering, or improving tangible personal property is not ‘Service and Other,’ the Department’s preferred classification, but rather retailing.” CP 456 n.5. FPR raised the same issue multiple times in oral argument. *See, e.g.*, RP 14 (“[I]f FPR is not a processor for hire . . . , then the fact that FPR’s cleaning, altering or improving personal property means that [it] is taxed either as a

⁹ Even if the Department only “assumed” for the purposes of its motion that FPR was engaged in cleaning, altering, or improving personal property, that assumption has the same practical effect as a concession. Those services must be taxed as either wholesale sales or retail sales and cannot be taxed under the “Service and Other Activities” classification. RCW 82.04.290(2)(b). Thus, by assuming for the sake of argument that FPR is engaged in cleaning, altering, or improving, the Department cannot prevail on its argument that the “Service and Other Activities” classification is correct.

retailer or as a wholesaler.”); RP 23 (“At bottom, if FPR is not a processor for hire, it is either a wholesaler or a retailer.”).

FPR further developed its argument before the trial court by pointing to the language of Rule 173 (WAC 458-20-173):

[I]f the cleaning, altering and improving of tangible personal property by a MRF does not constitute manufacturing, then it is either retailing or wholesaling under rule 173. . . . Applying rule 173 requires this court to resolve two key issues of material fact; namely, whether FPR sells its services, A, to resellers, or B, to manufacturers. If so, it must be taxed as a wholesaler. If not, it must be taxed as a retailer. There is no third option. The ‘service and other’ classification that the department is arguing for is not even allowed under the rule it’s citing.

RP 18. Even before FPR made these points, the Department had raised the retailing argument at the summary judgment hearing. *See* RP 7 (“So here FPR, if we’re assuming for this motion that they are altering or improving tangible personal property, that activity is defined as a retail sale under RCW 82.04.050(2)(a) when it’s rendered for consumers.”). The Department returned to the point in its rebuttal argument before the trial court:

[T]he department has not assessed retailing business and occupation tax or retail sales tax on FPR’s services, but that doesn’t mean that it’s not wholesaling. The department’s conclusion in its determination was that FPR’s services did not meet the—the—sort of like cleaning or altering or improving the tangible personal property, and that was the basis for the conclusion that wholesaling was inapplicable. In order for retailing to be applicable, it would be those same services; it would just be provided to a consumer.

RP 24–25.¹⁰ Because this legal issue was raised and argued before the trial court, it is properly before this Court.

It is not FPR but rather the Department that seeks to raise a new issue before this Court by suggesting that FPR could be liable for retail sales tax. The sole question raised in this case is the proper B&O tax classification for the activities performed by FPR employees at MRFs. The Department has not asserted any other tax liability, and it may not be heard to do so here. *See* RAP 9.12; *Wash. Fed. Sav. v. Klein*, 177 Wn. App. 22, 29, 311 P.3d 53 (2013).

3. The wholesaling classification is more apt.

The Department asserts that, because FPR’s customers are “consumers,” the wholesaling classification does not fit. The Department claims that FPR is arguing “for an entirely different B&O tax classification” and “attempts to recast its business activities as qualifying for the wholesaling B&O tax classification.” Resp. Br. 37. This claim misleads. FPR is not “recasting” anything. The “manufacturing” classification applies if the changes made in commingled recyclables at a MRF are significant enough to produce a new, different, or useful article of personal property. If the changes do not rise to the level of manufacturing, the services FPR

¹⁰ Before this Court, the Department argues that “FPR’s recycling clients clearly fall within RCW 82.04.190(5)’s definition of ‘consumer.’” Resp. Br. 40.

provides still qualify as changes to tangible personal property because FPR is cleaning, altering, or improving the material.¹¹ The sale of such services is taxable under the wholesaling classification.¹²

The Department also testified under oath that, if FPR is engaged in cleaning, altering, or improving, the wholesaling classification is “most likely” the proper one. *See* Op. Br. 49. The Department seeks to denigrate its Rule 30(b)(6) designee by calling him “a Department employee,” Resp. Br. 35, but Mr. Yrjanson was testifying *for the Department*. And the Department neither offered any contrary evidence nor amended Mr. Yrjanson’s testimony when his deposition was signed.¹³ The Department also designated Mr. Yrjanson as a rebuttal witness to testify “about the Department’s practices and policies in relation to the taxation of the manufacturing industry.” CP 723.¹⁴ The Department’s practice and policy has been to tax entities in the position of FPR—taxpayers that alter tangible personal property of others—as wholesalers if not as manufacturers. *See* CP

¹¹ As the Department admits, “altering” is a synonym for “changing.” CP 650.

¹² The wholesaling and manufacturing classifications apply the very same B&O tax rates. *See* RCW 82.04.240 (manufacturing), RCW 82.04.280(c) (processor for hire), and RCW 82.04.270 (wholesaling).

¹³ The Department likens Mr. Yrjanson to an expert offering an impermissible legal opinion, but that is an inapt comparison. The topics on which he was designated to testify included the Department’s basis for concluding that FPR’s employees were not cleaning, altering, or improving tangible personal property. CP 607.

¹⁴ Concurrent with this brief, FPR has filed a supplemental designation of clerk’s papers pursuant to RAP 9.6(a) to include the Department’s Disclosure of Rebuttal Witness.

586 (“I have confirmed . . . that DOR’s longstanding administrative practice is to treat cleaning, repair, etc. of property in inventory as a wholesale transaction because the owner is not a ‘consumer’ under 190(1).”).

The Department argues that, contrary to its own practice and deposition testimony,¹⁵ the law compels a conclusion that FPR’s activities constitute retailing rather than wholesaling. The Department misconstrues the law. The Legislature has defined “wholesale sale” to include “[a]ny sale, which is not a sale at retail, of . . . [s]ervices defined as a retail sale” RCW 82.04.060(1)(b). The Department does not address the paradox in this definition (how can something not be a sale at retail if is defined as a retail sale?) or FPR’s explanation of how the paradox is resolved. *See* Op. Br. 43–47. Instead, the Department insists that the definitions of “retail sale” and “consumer” rule out the possibility of a wholesale sale unless the service of cleaning, altering, or improving personal property is itself resold. The statute does not say that; no case says that; and the Department has not applied the statute in that way.

If the Department’s reading of the statutes were correct, and only the reselling of services constitutes a wholesale sale under RCW

¹⁵ The Department contends that its deposition testimony is not binding on this court. Resp. Br. 35–37, 39 n.5. Although that may be true as to any legal conclusions stated in the testimony, it is not true with regard to the Department’s factual testimony. Moreover, even if the testimony is not binding on the Court, it is binding on the Department, which did not seek to correct that testimony or offer any evidence to contradict it.

82.04.060(1), that would render RCW 82.04.060(3) superfluous.¹⁶ Under subsection (3), sales of services to consumers are wholesale sales if the services are sold for resale. This Court must reject an interpretation that renders any portion of a statute meaningless or superfluous. *See State v. Keller*, 143 Wn.2d 267, 277, 19 P.3d 1030 (2001) (“Statutes must be construed so that all language is given effect with no portion rendered meaningless or superfluous.”).

RCW 82.04.270 provides that, “[u]pon every person engaging within this state in the business of making sales at wholesale,” the amount of tax equals the gross proceeds of sales times 0.484 percent. And RCW 82.04.470(1) says that a seller may meet its burden of showing that a sale is one at wholesale by taking a copy of the buyer’s reseller permit. FPR did that. What’s more, the Department testified that it treats recycling businesses as resellers of the products that they recycle, CP 622, 649, and that FPR’s customers were resellers, CP 661.

The Department now says that the purpose of the reseller-permit statute is “to protect sellers from liability for uncollected retail sales tax.” Resp. Br. 43. Certainly that is one purpose. The reseller permits that FPR

¹⁶ RCW 82.04.060(3) defines a wholesale sale to include “[t]he sale of any service for resale, if the sale is excluded from the definition of ‘sale at retail’ and ‘retail sale’ in RCW 82.04.050(14).” In turn, RCW 82.04.050(14) excludes from the definition of “retail sale” the “sale for resale of any service described in this section if the sale would otherwise constitute a ‘sale at retail’ and ‘retail sale’ under this [RCW 82.04.050].”

collected are sufficient to defeat the Department's newly raised contention that, if FPR is classified for B&O tax purposes as a retailer, it is liable for unpaid retail sales tax. *See* page 20 above. But the statute is not so limited.

RCW 82.04.470(1) states:

The burden of proving that a sale is a wholesale sale rather than a retail sale is on the seller. A seller may meet its burden of proving a sale is a wholesale sale rather than a retail sale by taking from the buyer, at the time of sale or within a reasonable time after the sale . . . , a copy of a reseller permit issued to the buyer by the department

The Department also seeks to challenge the reseller permits that are in the record, claiming that they cover some but not all of FPR's customers. Resp. Br. 43–44.¹⁷ Until the eve of summary judgment, FPR did not understand the Department to be challenging the fact that FPR's customers were resellers. After all, the Department had not raised that issue in any pleading or asked any FPR witness about it in depositions. If the Department now questions the scope of the reseller certificates that are in the record, that is a genuine question of material fact that precludes summary judgment.¹⁸

¹⁷ The Department did not make this argument to the trial court but raises it for the first time on appeal.

¹⁸ *See* RP 18 (“If the department does not concede that FPR received reseller permits and exemption certificates from the customers to which it was selling its services, then that becomes a genuine issue of material fact precluding summary judgment.”).

Under RCW 82.04.190(1)(a), the term “[c]onsumer” excludes “any person who purchases, acquires, owns, holds, or uses any article of tangible personal property” for the purpose of “resale as tangible personal property in the regular course” of that person’s business. This exclusion fits FPR’s customers to a “T.” In any case, the Department’s insistence that FPR’s customers must be viewed as “consumers” is self-defeating. If the Department is correct, the retailing B&O tax classification applies, not “Service and Other Activities,” and FPR is entitled to be refunded the difference in the tax applicable to those two classifications.

III. CONCLUSION

The Department’s imposition of the catchall “Service and Other Activities” tax classification on FPR was improper as a matter of law. The trial court erred in granting the Department summary judgment, and this Court should reverse.

DATED this 1st day of November 2019.

Respectfully submitted,

K&L GATES LLP

By /s/ Robert B. Mitchell
Robert B. Mitchell, WSBA # 10874
Gabrielle E. Thompson WSBA #47275
Ashley E.M. Gammell WSBA #50123

Attorneys for Appellant FPR II, LLC

K&L GATES LLP

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Comments:

Sender Name: Robert B. Mitchell - Email: rob.mitchell@klgates.com
Address:
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SEATTLE, WA, 98104-1158
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