

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

2009 JAN -9 P 4:08

BY RONALD R. CARPENTER

CLERK

No. 81022-2

SUPREME COURT
OF THE STATE OF WASHINGTON

DOT FOODS, INC.,

Petitioner,

vs.

DEPARTMENT OF REVENUE, STATE OF WASHINGTON,

Respondent.

DOT FOODS' ANSWER TO AMICUS CURIAE BRIEFS OF
MELALEUCA, INC. AND DIRECT SELLING ASSOCIATION

EDWARDS, SIEH, SMITH
& GOODFRIEND, P.S.

KARR TUTTLE CAMPBELL

By: Howard M. Goodfriend
WSBA No. 14355

By: Jacquelyn A. Beatty
WSBA No. 17567

1109 First Avenue, Suite 500
Seattle, WA 98101
(206) 624-0974

1201 Third Avenue, Suite 2900
Seattle, WA 98101
(206) 223-1313

Attorneys for Petitioner

FILED AS
ATTACHMENT TO EMAIL

TABLE OF CONTENTS

I. INTRODUCTION..... 1

II. ARGUMENT IN RESPONSE TO AMICI CURIAE 1

 A. Dot Foods Is Entitled To The Direct Seller's Exemption Because Its Sales To Customers, Through Its Representative DTI, Occur Outside Of A Permanent Retail Establishment. 1

 B. Dot Foods Qualifies For The Exemption Under RCW 82.04.423 Because It Sells Consumer Goods Exclusively Through DTI, A Direct Seller's Representative. 6

 1. RCW 82.04.423's Only Exclusivity Requirement Is That The Direct Seller's Sale Of Consumer Products Must Be Exclusively Through A Direct Seller's Representative..... 6

 2. Sales Placed With An Out-Of State Seller Through The Solicitation Efforts Of A Direct Seller's Representative Are Exempt Under RCW 82.04.423 9

III. CONCLUSION 11

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Tyler Pipe Industries, Inc. v. Dept. of Revenue</i> , 483 U.S. 232, 107 S. Ct. 2810, 97 L.Ed.2d 199 (1987)	4
<i>Vehicles Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.</i> , 463 U.S. 29, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983)	10

STATE CASES

<i>Aviation West Corp. v. Dept. of Labor and Industries</i> , 138 Wn.2d 413, 980 P.2d 701 (1999)	10
<i>Dot Foods, Inc. v. Department of Revenue</i> , 141 Wn. App. 874, 173 P.3d 309 (2007), <i>rev. granted</i> , 163 Wn.2d 1052 (2008)	10
<i>Stroh Brewery Co. v. Dept. of Revenue</i> , 104 Wn. App. 235, 15 P.3d 692, <i>rev. denied</i> , 144 Wn.2d 1002 (2001)	3

STATUTES

RCW 82.04.423	<i>passim</i>
---------------------	---------------

RULES AND REGULATIONS

RAP 10.1	1
RAP 10.2	1
WAC 458-10-246	9

OTHER AUTHORITIES

House Bill 566 (1983 Reg. Sess.)	5
Senate Journal, 48 th Legis., 1 st Ex. Sess. 2212 (1983)	5
Wash. Dept. of Revenue, <i>Excise Tax Advisory Statement</i> (July 1, 2008)	9
Wash. Dept. of Revenue, <i>Tax Exemptions 2004 96</i> (2004)	6

I. INTRODUCTION

Petitioner Dot Foods, Inc., submits this Answer to the Amicus Curiae Briefs of Melaleuca, Inc. ("Melaleuca"), and the Direct Selling Association ("DSA"), pursuant to RAP 10.1(e) and RAP 10.2(g).

II. ARGUMENT IN RESPONSE TO AMICI CURIAE

A. **Dot Foods Is Entitled To The Direct Seller's Exemption Because Its Sales To Customers, Through Its Representative DTI, Occur Outside Of A Permanent Retail Establishment.**

Amicus Melaleuca offers a reasoned response, which is consistent with the statutory language, to the Department of Revenue's unsuccessful attempt to distinguish between the two alternative definitions of "direct seller's representative" under RCW 82.04.423(2). Melaleuca correctly notes that the Department and the courts below have espoused an interpretation of RCW 82.04.423(2) that would rewrite the statute to add language that was intentionally omitted by the Legislature. (Melaleuca Br. at 4-5)

As explained in Dot Foods' prior briefing, the statutory language of RCW 82.04.423 creates two alternatives by which an out-of-state direct seller of consumer products may qualify for the exemption from Washington's business and occupation tax, only one of which precludes the exemption if consumer products are

eventually sold downstream “*by any other person, in the home or otherwise than in a permanent retail establishment:*”

For purposes of this section, the term “direct seller’s representative” means a person who buys consumer products on a buy-sell basis or a deposit-commission basis for resale, by the buyer or any other person, in the home or otherwise than in a permanent retail establishment, or who sells, or solicits the sale of, consumer products in the home or otherwise than in a permanent retail establishment.

RCW 82.04.423(2) (emphasis added). (See Dot Foods Supp. Br. at 13-14)

The Department maintains that this statutory language necessarily differentiates between wholesale direct sellers in the first alternative, and retail direct sellers in the second alternative. But as Melaluca demonstrates, the statutory language in the first alternative, which defines a direct seller’s representative as one “who buys consumer products on a buy-sell basis,” is significantly narrower than generic wholesale sales because the terms “buy-sell basis or deposit-commission basis” are peculiar to

the direct sales business. (Melaleuca Br. at 6-7)¹ The second alternative, which does not prohibit the downstream sale “*by any other person* in the home or otherwise than in a permanent retail establishment,” allows the exemption for direct sales made either at wholesale or retail provided the representative “solicits the sale of, consumer products in the home or otherwise than in a permanent retail establishment.” RCW 82.04.432(2).

Dot Foods has consistently maintained that the two alternative definitions refer to the distinct types of commercial relationships that are unique to the economics of direct sales, and that had the Legislature intended to distinguish between wholesale and retail direct sellers, it would have made that distinction plain. (Supp. Br. at 13-17) Melaleuca’s analysis of the legislative history of RCW 82.04.423 provides further support for Dot Foods’ interpretation, and is consistent with the interpretation offered by Amicus URM Stores, Inc., which filed an amicus brief in the Court of Appeals. That history shows that the Legislature intended to

¹ The Court of Appeals may have felt constrained by its prior decision in ***Stroh Brewery Co. v. Dept. of Revenue***, 104 Wn. App. 235, 15 P.3d 692, *rev. denied*, 144 Wn.2d 1002 (2001), in accepting the Department’s position that the first alternative of RCW 82.04.423(2) was limited to wholesale sales. This Court can overrule ***Stroh Brewery*** to the extent its interpretation of the first clause of the statute is erroneous.

provide "nexus" relief to a small class of out-of-state sellers that solicit direct sales without maintaining a physical presence within the state. (Supp. Br. at 17-19; URM Amicus Br. at 3-7)

Melaleuca correctly reviews the legislative history to demonstrate that RCW 82.04.423 was enacted in 1983, before the Supreme Court definitively extended state taxing jurisdiction on out-of-state companies in *Tyler Pipe Industries, Inc. v. Dept. of Revenue*, 483 U.S. 232, 107 S. Ct. 2810, 97 L.Ed.2d 199 (1987). The 1983 Legislature was responding to concerns raised by the Department's aggressive attempt to tax out-of-state companies whose only presence in Washington was based on sales through independent contractors. The legislative history confirms that while companies such as Shaklee objected to being subjected to B&O tax based upon the activities of independent direct seller's representatives, they were not alone. Independent representatives of garment manufacturers operating in the Seattle Trade Center also lobbied for the bill, as their livelihoods were tied to the ability of out-of-state garment manufacturers to market their products in a cost-effective manner. (CP 230) As a result, the initial House Bill included a broad exclusion for anyone who did not own or lease

real property, or maintain a stock of tangible personal property in Washington. HB 566 (1983 Reg. Sess.) (App. F to Melaleuca Br.) As Melaleuca points out, the Legislature rejected that sweeping proposal as too costly. (Melaleuca Br. at 9-10 & App. F-6; Dot Foods Supp. Br. at 17)

The resulting compromise legislation, which was signed into law by Governor Spellman over the Department's objection, exempts "out-of-state firms which merely ship into the state their products (w/no inventory, property or employees in the state)." (Governor's Staff - Enrolled Bill Analysis - SB 3244, App. G-5 to Melaleuca Br.) In this manner, the legislation "take[s] care of the particular problem faced by some of the occupants of the Seattle Trade Center." Senate Journal, 48th Legis., 1st Ex. Sess. 2212 (1983) (comments of Senators Moore and Lee).

While reducing the revenue that could constitutionally be collected from out-of-state sellers, RCW 82.04.423 limits the exemption to those out-of-state direct sellers who contract with Washington taxpayers to solicit sales of their consumer products. As the Department previously recognized, the legislation was designed to "to stimulate trade and encourage out-of-state

manufacturers to use Washington-based agents.” Wash. Dept. of Revenue, *Tax Exemptions 2004 96* (2004) (reprinted at CP 269).

Because Dot Foods’ direct seller’s representative, Dot Transportation, Inc. (“DTI”) solicits the sale of Dot Foods’ consumer products “otherwise than in a permanent retail establishment,” DTI meets the second definition of a direct seller’s representative under RCW 82.04.423(2).

B. Dot Foods Qualifies For The Exemption Under RCW 82.04.423 Because It Sells Consumer Goods Exclusively Through DTI, A Direct Seller’s Representative.

1. RCW 82.04.423’s Only Exclusivity Requirement Is That The Direct Seller’s Sale Of Consumer Products Must Be Exclusively Through A Direct Seller’s Representative.

Melaleuca and DSA correctly note that Dot Foods satisfied the requirement that its sales in the state of Washington were made “exclusively . . . through a direct seller’s representative,” RCW 82.04.423(1)(d), because all of its sales were made through the solicitations of an independent contractor, Dot Transportation, Inc., (“DTI”). As Dot Foods has previously argued, the plain language of RCW 82.04.423(2) does not support the Department’s position, that the exemption is limited to sellers who “exclusively sell consumer products in Washington.” (Opinion at 7) This is because the term “exclusive” is not contained in the definition of “direct seller’s

representative” – “one who buys consumer products . . . or solicits the sale of consumer products . . .” RCW 82.04.423(2). The only “exclusivity” mentioned in the statute is the requirement that the out-of-state direct seller “[m]akes sales in this state exclusively to or through a direct seller’s representative.” RCW 82.04.423(1)(d).

Melaleuca asks this court to hold that the Department may not disallow the exemption to an out-of-state direct seller that sells marketing materials to its Washington-based direct seller’s representative. While that is not what occurred in the instant case, the Department’s current attempt to disallow the exemption based upon the sale of marketing materials parallels the Department’s contention here that the sale by Dot Foods of any quantity of non-consumer goods, however *de minimus*, deprives Dot Foods of the direct seller’s exemption for all consumer products sold through its direct seller’s representative. The Department disallowed the exemption to Dot Foods despite the fact that 99.5% of Dot Foods’ sales through DTI consist of consumer products. (CP 306-07)

The Department contends that its interpretation of the statute is reasonable because it would allow home-based direct seller’s representatives of companies such as Avon or Amway to solicit door to door sales without subjecting the out-of-state sellers to

Washington B&O tax. However, Melaleuca convincingly demonstrates how the Department's improper rewriting of the statute to include an exclusivity requirement in RCW 82.04.423(2) entirely eliminates the exemption for out-of-state direct sellers from Washington's tax code. If the sale of marketing materials to direct seller's representatives comprises the sale of non-consumer products and disqualifies a direct seller from claiming the exemption, no direct seller would ever be eligible for it.

This Court should hold that the *de minimus* sale of non-consumer products by a direct seller precludes the direct seller from claiming the exemption as to those non-consumer products, but does not disqualify a direct seller from claiming the benefit of RCW 82.04.423 with respect to the sale of consumer products through a direct seller's representative. Dot Foods qualifies for the exemption because all of Dot Foods' sales of consumer products are through DTI, which "solicits the sale of consumer products in the home or otherwise than in a permanent retail establishment." RCW 82.04.432(2).

2. Sales Placed With An Out-Of State Seller Through The Solicitation Efforts Of A Direct Seller's Representative Are Exempt Under RCW 82.04.423

DSA and Melaleuca both ask this Court to expressly hold what would appear to be self-evident from the plain statutory language – that sales that are transmitted electronically by a Washington customer to an out-of-state direct seller qualify for the exemption as “sales in this state exclusively . . . through a direct seller's representative.” RCW 82.04.423(1)(d). They cite a July 1, 2008 Excise Tax Advisory Statement in which the Department announces its intent to disallow the exemption where a direct seller makes “[i]nternet sales, mail orders, and similar sales directly to customers” even if those sales are solicited through the activities of a direct seller's representative. (See Melaleuca Br. at App. D)

In this case, however, the Department has never claimed that the method of transmission of customer orders to Dot Foods headquarters in Illinois was “one of DOR's grounds for denial of Dot Foods' claims,” as Melaleuca mistakenly asserts. (Melaleuca Br. at 12) Quite to the contrary, the Department denied Dot Foods' exemption because under its January 1, 2000 revision to WAC 458-10-246, “the retail sale of the product must take place either in the buyer's home or in a location that is not a permanent retail

establishment.” (CP 79) Accordingly, the Court of Appeals stated, as a matter of undisputed fact, that all of “Dot Foods’ Washington sales have been exclusively through . . . DTI.” ***Dot Foods, Inc. v. Department of Revenue***, 141 Wn. App. 874, 878, 173 P.3d 309 (2007), *rev. granted*, 163 Wn.2d 1052 (2008).

The Department’s attempt to further rewrite the plain statutory language of RCW 82.04.423 under its July 1, 2008 Excise Tax Advisory Statement is emblematic of its mission to void by administrative fiat a tax exemption that the Legislature has not changed since its enactment in 1983. However, because the Department did not disallow Dot Foods’ exemption based upon the manner in which Dot Foods’ received its orders from Washington customers, it could not at this late date change its rationale for denying Dot Foods’ exemption for the tax years at issue in this appeal. To do so would violate the fundamental tenet of administrative law, that an agency’s action may be upheld only “on the basis articulated by the agency itself.” ***Motor Vehicles Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.***, 463 U.S. 29, 50, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983); ***Aviation West Corp. v. Dept. of Labor and Industries***, 138 Wn.2d 413, 436, 980 P.2d 701 (1999).

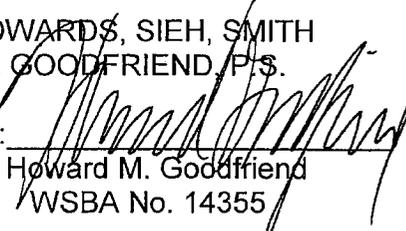
III. CONCLUSION

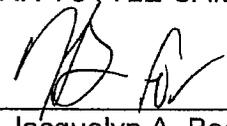
This Court should reverse the Court of Appeals and hold, consistent with the plain language and legislative intent of RCW 82.04.423, that Dot Foods direct sales of consumer products in the State of Washington, solicited by DTI, are exempt from Washington's business and occupation tax.

Dated this 9th day of January, 2009.

EDWARDS, SIEH, SMITH
& GOODFRIEND, P.S.

KARR TUTTLE CAMPELL

By: 

By: 

Howard M. Goddfriend
WSBA No. 14355

Jacquelyn A. Beatty
WSBA No. 17567

Attorneys for Petitioner

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

2009 JAN 9 P 4: 08
DECLARATION OF SERVICE

BY RONALD R. CARPENTER
CLERK

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on January 9, 2009, I arranged for service of the Dot Foods' Answer to Amicus Curiae Briefs of Melaleuca, Inc. and Direct Selling Association, to the court and the parties to this action as follows:

Office of Clerk Washington Supreme Court Temple of Justice P.O. Box 40929 Olympia, WA 98504-0929	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
Jacquelyn A. Beatty Karr Tuttle Campbell 1201 3rd Ave., Suite 2900 Seattle, WA 98101-3284	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
Cameron G. Comfort Office of the Attorney General Revenue Division 7141 Cleanwater Dr. SW PO Box 40123 Olympia, WA 98504-0123	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
Dirk Giseburt Davis Wright Termaine LLP 1201 3rd Ave., Ste 2200 Seattle, WA 98101-3045	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
Dean A. Heyl Jeremy D. Tunis Direct Selling Association 1667 K. Street, NW, Suite 1100 Washington, DC 20006	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail

G. Kim Risenmay Stoel Rives LLP 600 University Street, Suite 3600 Seattle WA 98101	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
---	---

DATED at Seattle, Washington this 9th day of January, 2009.



Tara D. Friesen