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STATE OF WASHINGTON
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Case No. 810222

SUPREME COURT OF THE STATE OF WASHINGTON

BY RONALD R. CARPENTER

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bjh DOT FOODS, INC.,

Appellant,

vs.

DEPARTMENT OF REVENUE, STATE OF WASHINGTON

Respondent,

APPEAL FROM THE COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

AMICUS CURIAE BRIEF OF THE
DIRECT SELLING ASSOCIATION

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I. TABLE OF STATUTES & AUTHORITIES

Revised Code of Washington, 82.04.423 (1983 1st ex.s.c 66 §5).

Ass'n of Washington Business v. Department of Revenue, 155 Wn.2d 430 – 447 (2005).

Agrilink Foods, Inc. v. Department of Revenue, 153 Wn.2d 392, 396, P.3d 1226 (2005).

Dep't of Ecology v. Campbell & Gwinn, L.L.C.; 146 Wn.2d 1,9, 43 P.3d 4 (2002).

Troxell v. Ranier Pub. Sch. Dist. No. 307, 154 Wn.2d 345, 350, 111 P.3d 1173 (2005).

John H. Snellen Co. v. Department of Revenue, 558 P. 2d 1342 (Wash. Sup. Ct. 1977).

II. STATEMENT OF INTEREST OF AMICUS CURIAE

The Direct Selling Association (DSA) is the national trade association of leading firms that manufacture and distribute goods and services sold directly to consumers. More than 200 companies are members of the association, including many recognizable brand names. As of 2006, more than 15 million individuals participated in direct selling activities in the U.S and helped generate over \$30 billion in sales.

Over the past twenty years, DSA has closely monitored Washington's Business and Occupation (B&O) tax with a particular interest in the statutory tax exemption under RCW 82.04.423 granted to direct sellers (companies that manufacture and distribute products out-of-state for direct sales by independent direct seller representatives in Washington). This exemption is commonly referred to as the "direct seller" exemption.

In order to qualify as a "direct seller" under RCW 82.04.423 a business must satisfy four elements:

- (a) Does not own or lease real property within this state; and
- (b) Does not regularly maintain a stock of tangible personal property in this state for sale in the ordinary course of business; and
- (c) Is not a corporation incorporated under the laws of this state; and

(d) Makes sales in this state exclusively to or through a direct seller's representative.

DSA member companies have a keen legal interest regarding this Court's interpretation of RCW 82.04.423 in light of the original legislative intent to exempt direct sellers and the potentially significant effect that its decision could have on the ability of DSA member companies to conduct business in Washington.

III. ARGUMENT

A) THE DEPARTMENT OF REVENUE CONTINUES TO MISINTERPRET THE MEANING OF RCW 82.04.423 SECTION (d) "TO OR THROUGH A DIRECT SELLING REPRESENTATIVE" REQUIREMENT

Of particular interest to DSA and the primary impetus of its amicus curiae brief is RCW 82.04.423 section (d), regarding the "to or through a direct seller's representative" language. Although Dot Foods' direct selling representative was the only "person" who solicited orders from customers in Washington (and earned sales commissions from every order received), those customers sent their orders directly to Dot Foods at its out-of-state headquarters, where they were accepted and filled.

DSA disagrees with the Department of Revenue's (DOR) interpretation and contention that in order for sales to be made "to or through" a direct selling representative (DSR), the DSR must directly receive the order and then relay it to the out-of-state company. The DOR provides an overly narrow and legally invalid interpretation of the word "through" (in the statutory requirement that all sales be made "to or

through" DSRs). This court is not bound by an administrative agency's statutory interpretations, Ass'n of Washington Business v. Department of Revenue, 155 Wn.2d 430 – 447 (2005), *see also* Agrilink Foods, Inc. v. Department of Revenue, 153 Wn.2d 392, 396 103 P.3d 1226 (2005) ("Statutory interpretation is a question of law that is reviewed *de novo*."). Rather, the fundamental object of the court in construing a statute is to ascertain and carry out the Legislature's intent. Dep't of Ecology v. Campbell & Gwinn, L.L.C.; 146 Wn.2d 1,9, 43 P.3d 4 (2002). [The ordinary meaning of the word "through" includes "by means of" or "through the agency of"¹ the sales agent.] DSA contends that the DOR's definition of "to or through" is counter to the Legislature's intent to provide the exemption to qualified direct sellers who make sales outside of retail establishments in the home or office setting, notwithstanding the precise medium or manner of the sale.

1) Legislative History of RCW 82.02.423

The statutory language of RCW 82.04.423 is derived from the Tax Equity & Fiscal Responsibility Act of 1982 (Pub. Law 97-248 and 26 U.S.C. §3508) designating certain persons performing services as direct sellers as statutory non employees for purposes of federal employment taxes. The independent representatives contracting with DSA member companies continue to operate under this classification. Ironically, the DOR concedes that RCW 82.04.423 is modeled on 26 U.S.C. §3508 and

¹ "through." Merriam-Webster Online Dictionary. 2008. Merriam-Webster Online. December 9, 2008 <http://www.merriam-webster.com/dictionary/through>

applies “to persons who market consumer products through activities like in-home parties and door to door (home) solicitations and not in permanent retail establishments.” (See Respondent’s Brief to Court of Appeals, Division II at 15). Moreover, the DOR stated that “the Legislature presumably enacted the direct seller’s exemption to benefit sellers that use representatives to sell their consumer products through in home parties and door to door sales solicitations.” Id. At 15-16.

2) Department of Revenue’s Inconsistent and Incorrect Statutory Analysis

DSA’s concerns regarding the DOR’s interpretation of RCW 82.04.423 are longstanding. For example, in 1999, DSA commented on the DOR’s Rule 246(4)(a)(iv) regarding Internet sales made by direct sellers. DSA stressed that use of catalogs and placement of orders by customers via the Internet was entirely consistent with the exemption definition set forth in Washington statutes so long as the transaction was related to the efforts and involvement of a DSR. Notwithstanding its more recent statements to the Court of Appeals regarding the exemption, the DOR published a draft Excise Tax Advisory on June 26, 2007, later issued in its final form as Number 2041.04.246 on July 1, 2008 (July 2008 ETA) and determined the following activities would cause a direct seller to be ineligible for the RCW 82.04.423’s B&O tax exemption:

1. Allowing any interested persons to order or purchase directly from the direct seller. The exemption is not available even if only persons outside the sales area or a direct seller’s

representative are allowed to order and purchase directly from the direct seller; or

2. Having a direct seller's representatives enroll customers via the Internet, that allows those customers to place orders with or make purchases directly from the direct seller.²

DSA strongly objected to the June 26, 2007 draft Excise Tax Advisory (ETA) that contrasts with the intent of the Legislature in granting the B&O tax exemption to direct sellers.³ Simply stated, the Internet is only one of numerous mechanisms used by direct sellers' representatives to make direct sales in Washington. There is no valid statutory basis to disqualify direct sellers from the Legislature-authorized exemption simply because some of a direct seller's representative's direct sales are made using the Internet or any other of a range of modern mechanisms of commerce.

DSA remains very concerned about the deleterious consequences of the DOR's analysis. According to the July 2008 ETA "direct sellers, who would otherwise clearly qualify for an exemption from the B&O tax, lose the exemption on all sales because some customers of direct seller representatives make purchases through a direct seller's Internet web site." DSR-driven Internet sales are directly attributable to the efforts of a DSRs and, therefore constitute a "direct sale" irrespective of the technical means

² Washington Department of Revenue Excise Tax Advisory, Number 2041.04.246, July 1, 2008.

³ July 17, 2007 Letter from Joseph Mariano, DSA Executive Vice President and Legal to Richard Cason, Department of Revenue, Interpretations and Technical Advice Division

used to facilitate and consummate the sale. Any contrary interpretation would undoubtedly lead to time consuming and illogical scenarios, effectively forcing direct sellers to employ dated and archaic sales practices such as title transfer and in person delivery in order to qualify for the exemption. “An interpretation that produces ‘absurd consequences’ must be rejected since such results would belie legislative intent.” Troxell v. Ranier Pub. Sch. Dist. No. 307, 154 Wn.2d 345, 350, 111 P.3d 1173 (2005).

Clearly, if a direct seller makes sales through the efforts and activities of its DSRs in Washington, whether through the Internet or any other modern and recognized means of commerce, the direct seller should qualify for the exemption. To conclude otherwise, not only conflicts with the Legislature’s exemption, but would render it almost meaningless in this day and age. The DOR is clearly not authorized to administer the Legislature’s exemption in such a manner that negates legislative intent when few, if any taxpayers, would qualify for it. John H. Snellen Co. v. Department of Revenue, 558 P. 2d 1342 (Wash. Supreme Court 1977).

Notwithstanding the unambiguous holding in Snellen, the DOR sent DSA correspondence to DSA in July of 2008 stating: “sales made by the direct seller via the Internet, mail order, direct calls, or by other means directly to customers in Washington disqualify the direct seller. This is true even if the direct seller’s representative is involved in recruiting the customer or enrolling the customer into the direct seller’s program, if the

representative is not otherwise involved in soliciting the sale, placing the order or distributing the merchandise.”⁴ DSA contends that DOR’s letter innapropriately misinterprets and miscontrues the legislature’s clear intent.

3) Deleterious Consequences of DOR’s RCW 82.04.423 Interpretation

Under the DOR’s overly-narrow and incorrect interpretation of what constitutes “to or through a DSR,” many sales that would not have occurred but for a DSR contacting, educating and supporting the customer would be improperly excluded from the B&O tax exemption. For example, assume a DSR meets with a customer regarding a direct selling company’s new product. The customer wishes to have some additional time before making a decision to purchase. Later that day, the customer goes to the direct selling company’s Web site with an access code provided by the DSR. Over the course of the next few weeks, the customer makes an online purchase and the DSR receives a commission for the sale.

Under its current interpretation, the DOR would not consider these transactions exempt because the DSR did not physically participate in the final purchases. As stated above, such an interpretation would lead to the ‘absurd consequence’ of either forcing the customer to make a hasty decision or requiring the DSR to remain present at the customer’s home or to return to the premises once the customer is ready to effectuate the

⁴ July 7, 2008, Letter from Richard Cason, Department of Revenue, Interpretations and Technical Advice Division to Joseph Mariano, DSA Executive Vice President and Legal Counsel.

transactions. All three situations run counter to recognized consumer and businesses practices, allocation of scarce resources such as fuel, and, of course, common sense.

IV. CONCLUSION

For all the reasons stated herein, this Court should direct the DOR to formally recognize the fact that in modern commerce, DSRs use numerous mechanisms to make direct sales. These mechanisms may include orders placed by faxes, mail, Internet and telephone. Direct sellers utilize these mechanisms for the shopping convenience of the DSRs' customers.

Consequently, this court should hold that RCW 82.04.423 (the direct selling exemption) applies to all sales where 1.) A commission is paid to a DSR or 2.) the sale is attributable to the agency or actions by a DSR . These actions should undoubtedly include situations where a customer maintains an ongoing commercial relationship with the DSR and whose purchases and relationship with the direct selling company would not have occurred but for the relationship and efforts of the DSR.