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No. 35733-0-II

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

DOT FOODS, INC.,

Appellant,

vs.

DEPARTMENT OF REVENUE, STATE OF WASHINGTON,

Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COUNTY
THE HONORABLE RICHARD HICKS

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REPLY BRIEF OF APPELLANT

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 Appellant

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I. REPLY IN SUPPORT OF STATEMENT OF CASE

The Department does not dispute the key material facts at issue in this case – that Dot Foods sells its products exclusively through Dot Transportation, Inc. (“DTI”), and that none of its sales are made to permanent retail establishments.

Without challenging these material facts, however, the Department misstates a number of factual matters in an effort to cast Dot Foods in an unfavorable light or to establish alternative grounds to support the trial court’s judgment. The Department’s distortions turn the established standard of review on its head. As this matter was decided in the Department’s favor below on summary judgment, all facts must be viewed in the light most favorable to Dot Foods, and any conflict in the record must be resolved in Dot Foods’ favor. See *U.S. Tobacco Sales and Marketing Co., Inc. v. Dept. of Revenue*, 96 Wn. App. 932, 936, 982 P.2d 652 (1999); *Senate Republican Campaign Comm. v. Public Disclosure Comm’n*, 133 Wn.2d 229, 236-37, 943 P.2d 1358 (1997).

As one example, while acknowledging that “most of the food produce Dot sells are consumer products,” (Dept. Br. at 4), the Department claims that “other products sold by Dot are non-

consumer products.” (Dept. Br. at 5) However, it is undisputed that Dot Foods’ non-consumer products comprise only 0.5% of its total revenue. (CP 306-07)

Similarly, the Department admits that all of Dot Foods’ sales in Washington State are through DTI pursuant to a written contract, that DTI does not sell Dot Foods’ products for resale, and that DTI does not solicit the sale of Dot Foods’ products in “permanent retail establishments.” (CP 61-62, 71) See RCW 82.04.423(1)(d), (2). Focusing on the fact that Dot Foods’ products are “eventually resold” in permanent retail establishments by third parties or that they may be incorporated by dairies or food processors into products that are eventually sold in grocery stores or other permanent retail establishments, the Department inaccurately asserts that “Dot sells through wholesalers.” (Dept. Br. at 20) The Department’s mischaracterization ignores its stipulation to the undisputed fact that DTI is not a wholesaler: “Dot Foods does not sell any products to DTI for resale in the State of Washington.” (CP 62)

Moreover, the Department does not dispute the fact that for 16 years it interpreted RCW 82.04.423 as authorizing taxpayers such as Dot Foods to take the exemption because they sold their

products exclusively through a direct seller's representative and not in a permanent retail establishment. In 1997, consistent with its established interpretation of RCW 82.04.423, the Department specifically authorized Dot Foods to take the direct seller's exemption in a private letter ruling. (CP 61, 68-69)

The Legislature has not changed this statute since its enactment in 1983. Only the Department's interpretation of RCW 82.04.423 changed when in 1999 it purported to prohibit the direct seller's representative exemption if a product was ultimately sold in a permanent retail establishment by anyone at any point downstream from the taxpayer in the stream of commerce. WAC 458-20-246(4)(b)(i)(B)

Although the Department claims that it notified Dot Foods and similarly situated taxpayers of its intent to change course in its interpretation of the direct seller's representative exemption, its notice did no such thing. The Department's "Special Notice for Direct Sellers," quoted in the Department's Brief at 7, stated that its revisions to WAC 458-20-246 were intended "to provide guidance to taxpayers" and to "reiterate[] the express requirements of the statute." (CP 96)

Moreover, the special notice did not distinguish between the two distinct clauses of RCW 82.04.423(2) in stating that if a consumer product is sold by **anyone** in a permanent retail establishment, the exemption is not available to the direct seller. (CP 96) The first clause of RCW 82.04.423(2) has always said that, just as the second clause has always stated that the exemption is available where a direct seller's representative "solicits the sale of, consumer products in the home or otherwise than in a permanent retail establishment," regardless of how the products are subsequently used or re-sold. RCW 82.04.423(2).

The Department's "special notice" similarly failed to make any reference to "wholesale vs. retail" sales, did not state that the exemption under the second clause of RCW 82.04.423(2) was limited to in-home party sales and door to door sales, or that only a "natural person" can serve as a direct seller's representative, as the Department now claims. (CP 96) Nor did the Department rely on the fact that DTI is a corporation or that a miniscule portion of Dot Foods' sales consist of non-consumer products when it disallowed the exemption in its 2004 audit of Dot Foods. (CP 79-80)

The Department concedes that the trial court rejected the Department's contention that only natural persons may qualify as a

direct seller's representative. (RP 7-8) (See Argument at § B.2, *infra*) Further, the Department also concedes that the trial court considered Dot Foods' argument that the Department's notice of its rule change was ineffective to defeat Dot Foods' reliance on the Department's prior interpretation of RCW 82.04.423 as set forth in the Department's 1997 private letter ruling to Dot Foods. (RP 12; Dept. Br. at 10-11) (Argument at § C.1, *infra*)

II. REPLY ARGUMENT

A. The Trial Court's Summary Judgment On An Issue Of Statutory Interpretation Is Reviewed De Novo.

The Department concedes that the interpretation of the direct seller's exemption is an issue of law, reviewed de novo, "from the statutory language alone." (Dept. Br. at 12, *citing Agrilink Foods, Inc. v. Dept. of Revenue*, 153 Wn.2d 392, 396, 103 P.3d 1226 (2005). See also Dept. Br. at 17: the "act must be construed as a whole, and effect should be given to all the language used," *quoting City of Seattle v. Fontanilla*, 128 Wn.2d 492, 498, 909 P.2d 1294 (1996)) As more fully set out in Dot Foods' opening brief, the Department's revised interpretation of RCW 82.04.423 is entitled to no deference. (App. Br. at 15)

B. Dot Foods Qualifies For The Direct Seller's Representative Exemption Under The Second Clause Of RCW 82.04.423(2) Because It Sells Through A Direct Seller's Representative Who Does Not Sell Dot Foods' Consumer Products In A Permanent Retail Establishment.

1. Dot Foods Qualifies For The B&O Tax Exemption Under The Plain Language Of The Second Clause Of RCW 82.04.423(2).

The Department ignores the statutory language of the second clause of RCW 82.04.423(2) in arguing that the direct seller's representative exemption is limited to direct sellers whose consumer products are never sold at retail in a permanent retail establishment. Even if this court accepts the Department's invitation to ignore the plain language of the statute in favor of legislative "intent," the Department's interpretation is refuted by the available legislative history and is not supported by the this court's decision in *Stroh Brewery Co. v. Department of Revenue*, 104 Wn. App. 235, 15 P.3d 692, *rev. denied*, 144 Wn.2d 1002 (2001).

While the Department pays lip service to principles of statutory construction, the Department's contention that the term "direct seller's representative" is limited to individual, independent door-to-door sellers of such products as Mary Kay and Avon cosmetics is not based on the statutory language of RCW 82.04.423, but on its bald assertion that the definition is co-

extensive with that used in federal tax law. (Dept. Br. at 14-16)

The Department cites to IRS publications but not to any Washington legislative history to support its current position that RCW 82.04.423, as originally enacted, was designed to incorporate a definition of “direct seller’s representative” employed under federal tax law. To support its new interpretation of this 24 year-old law, the Department can cite only to its own recent version of its own regulation, WAC 458-20-246(2). But the Department fails to explain how it determined in 1999 that what the Legislature had said in 1983 meant exactly the opposite of what the Department had believed the Legislature had been saying for more than 16 years.

Ignoring differences in the language between the first two clauses of RCW 82.04.423(2), the Department argues that the two clauses implement a statutory distinction between wholesale sales and retail sales contained in RCW 82.04.423(1) (“This chapter shall not apply to any person in respect to gross income derived from the business of making sales at wholesale or retail . . .”). To the contrary, the language of RCW 82.04.423(1) establishes that the Legislature knew how to distinguish between wholesale and retail sales using those plain, commonly understood terms in this statute

as it did elsewhere in the tax code. See RCW 82.04.050 (defining “retail sale”).

If the Legislature had intended to limit the clause one exemption to “wholesale” sales and the clause two exemption to “retail” sales, it would have done so in plain and unambiguous language. Instead, it used the “to or through” language in RCW 82.04.423(1)(d) to distinguish between sales made “to” a direct seller’s representative in **clause one**, and “through” a direct seller’s representative in **clause two** of RCW 82.04.423(2) – the latter being a type of sale that entails even less conduct with the state than sales “to” a direct seller’s representative. DTI is a direct seller’s representative under **clause two** because, on behalf of Dot Foods, it “solicits the sale of, consumer products . . . otherwise than in a permanent retail establishment.” RCW 82.04.423(2) Because Dot Foods’ sales of consumer products in the State of Washington are made exclusively through a direct seller’s representative, it falls within the plain language of the exemption from B&O tax under RCW 82.04.423(2).

Even if the Department were able to muster some indicia of legislative intent to support its argument, this court will not rely on legislative history to interpret an unambiguous statute. **State v.**

Liden, ___ Wn. App. ___, 156 P.3d 259, 263 ¶ 24 (2007) (“when a statute is unambiguous, we determine legislative intent from the statutory language alone.”). See also *Agrilink*, 153 Wn.2d at 396-97. Even if this court were to conclude that RCW 82.04.423 is ambiguous, the contemporaneous interpretations from the statute’s enactment in 1983 support Dot Foods’ and the Department’s prior reading of the statute. For instance, the Department urged the governor to veto the exemption in 1983, characterizing the law as providing an exemption “for out-of-state manufacturers who make sales in Washington exclusively through the ‘direct selling scheme.’” (CP 229-30)¹

The Department’s failure to provide any explanation for its about face amply illustrates why this court should refuse to give any deference to its new interpretation of RCW 82.04.423. See *Edelman v. State ex. rel. Public Disclosure Comm’n*, 152 Wn.2d 584, 590, 99 P.3d 386 (2004) (refusing to defer to agency; Legislature, had it intended to adopt agency’s interpretation, “would have done so in the language of the statute.”) The Department has not claimed that its prior interpretation of the law was wrong, or that

¹ The Department continued to characterize RCW 82.04.423’s statutory purpose as “encourag[ing] out-of-state manufacturers to use Washington based agents” as recently as 2004. (CP 268-69)

it misinterpreted the statutory purpose of the direct seller's exemption for over a decade and a half, characterizing its change of policy as a "revised rule" that "reiterate[d] the express requirements of the statute." (CP 96) Because the Department here has failed to provide any justification for interpreting the direct seller's exemption in a manner different than the statute's plain language and its original administrative interpretation, this court should reject its current contention that the second clause of RCW 82.04.423(2) exempts only retail, door-to-door sales to the end user of a product.

The Department's reliance on judicial interpretation of the statute is equally unavailing because, as discussed in Dot Foods' opening brief, this court analyzed only the first clause of RCW 82.04.423(2) in ***Stroh Brewery Co. v. Department of Revenue***, 104 Wn. App. 235, 15 P.3d 692, *rev. denied*, 144 Wn.2d 1002 (2001): "We hold that, in order for a direct seller who sells to wholesalers to qualify for the exemption, neither the 'buyer' which is the direct seller's representation, *nor 'any other person,'* may resell the direct seller's product in a permanent retail establishment." 104 Wn. App. at 241 (emphasis added). The ***Stroh Brewery*** court limited its holding to those cases where the sales by a taxpayer are

to buyer-wholesalers who are also purporting to act as direct seller's representatives because Stroh conceded that it could only qualify for the exemption as a wholesaler under the first clause of RCW 82.04.423(2). 104 Wn. App. at 240.

Here, however, Dot Foods' direct seller's representative, DTI, is neither a buyer nor a wholesaler. (CP 62) The issue is not whether the consumer products sold "through" DTI are ever sold in a permanent retail establishment by "any other person," as was the case in *Stroh Brewery*. The second clause of RCW 82.04.423(2) does not contain the "any other person" language repeatedly relied upon the court in holding that Stroh's wholesaler-buyers were not direct seller's representatives. *Stroh Brewery*. 104 Wn. App. at 240-41.

The Department's final argument is that construing the two clauses of RCW 82.04.423(2) to distinguish between direct seller's representatives who "buy consumer products . . . for resale" versus those who "sell or solicit the sale of consumer products on behalf of an out-of-state seller" is nonsensical as a matter of public policy. However, it is perfectly logical for the Legislature to determine that an in-state wholesaler who purchases and then resells an out-of-state manufacturer's consumer products provides a stronger nexus

to Washington state than does an independent contractor who solicits the sale of consumer products on behalf of the out-of-state manufacturer. The Legislature could have determined, as a matter of policy, that providing an exemption to out-of-state manufacturers who sell through independent direct seller's representatives would encourage the growth of independent Washington businesses to serve as representatives for out-of-state businesses, such as DTI does here. See Wash Dept. of Revenue, *Tax Exemptions 2004* 96 (2004) (CP 269).

Because DTI "solicits the sale of, . . . consumer products in the home or otherwise than in a permanent retail establishment," this court should hold that Dot Foods is entitled to the direct seller's exemption under the plain language of RCW 82.04.423(2).

2. The Taxation Statute Defines "Person" To Include A Corporation. Nothing In RCW 82.04.423 Limits A Direct Seller's Representative To A Natural Person.

The Department's argument that a direct seller's representative is limited to a natural person and cannot be a corporation finds no support in the statutory language and, like its "wholesale/retail" interpretation of RCW 82.04.423, conflicts with its previous interpretation of the statute. The trial court rejected the Department's position. This court should as well.

RCW 82.04.423(2) defines direct seller's representative as a "a person, " and not a "natural person." The definition section of the chapter defines "person" to include a "corporation." RCW 82.04.030. Under RCW 82.04.010, this definition "appl[ies] throughout this chapter." Moreover, both as a matter of general statutory construction and common law, the term "person" is defined to include "any public or private corporation." RCW 1.16.080(1); *In Re Brazier Forest Products, Inc.*, 106 Wn.2d 588, 595, 724 P.2d 970 (1986) (under common law, term "person" includes corporations).

The Department agrees that the "context" of RCW 82.04.423(2) "implies" that only a natural person can comply with the requirements of a "direct seller's representative," citing the requirement that the DSR may not be paid based on "the number of hours worked" and "will not be treated as an employee. . ." (Dept. Br. at 29, *citing* RCW 82.04.423(2)(b)). These provisions only "imply" that a direct seller's representative may *include* a natural person. This statutory language does not preclude a corporation from also meeting that definition. Organizations, as well as individuals, can bill for services on other than an hourly basis and may serve as independent contractors.

The Department also ignores its own previous interpretation of RCW 82.04.423, which was not addressed in its 1999 rewriting of WAC 458-20-246.² In 1987, the Department ruled that an “Oregon corporation soliciting sales on behalf of the taxpayer is a direct seller’s representative.” 3 WTD 357, No. 87-233 (reprinted at CP 272-76).

Finally, the Department did not disallow Dot Foods’ exemption because DTI was not a “natural person.” (CP 78-80) It is now precluded from attempting to justify its decision based on a ground that differs from the basis of its administrative decision. See ***Aviation West Corp v. Washington State Dept. of Labor and Indust.***, 138 Wn.2d 413, 435-36, 980 P.2d 701 (1999), quoting ***Neah Bay Chamber of Commerce v. Department of Fisheries***, 119 Wn.2d 464, 474, 832 P.2d 1310 (1992) (Court will “review the administrative record to determine the factors employed by the agency and the quality of its reasoning”); ***Federal Power Commission v. Texaco Inc.***, 417 U.S. 380, 397, 94 S. Ct. 2315, 41 L.Ed.2d 141 (1974) (“we cannot ‘accept appellate counsel’s post

² Although the Department initially proposed amending the regulation to provide that “entities that are not natural persons (e.g., corporations and partnerships) do not qualify as direct seller’s representatives,” (CP 282-83), this provision is not contained in the final rule adopted by the Department.

hoc rationalizations for agency action'; for an agency's order must be upheld, if at all, 'on the same basis articulated in the order by the agency itself,' quoting *Burlington Truck Lines, Inc. v. U.S.*, 371 U.S. 156, 168-169, 83 S. Ct. 239, 246, 9 L.Ed.2d 207 (1962); *SEC v. Chenery Corp.*, 332 U.S. 194, 196, 67 S. Ct. 1575, 1577, 91 L.Ed. 1995 (1947). This court should reject the Department's attempt to limit direct seller's representatives to natural persons.

C. Dot Foods Is Not Barred From Claiming The Exemption Where Consumer Products Comprise 99.5% Of Its Sales.

An out-of-state taxpayer qualifies for the exemption if it sells "exclusively to or through a direct seller's representative." RCW 82.04.423(1)(d). The statute does not require that a direct seller's representative "exclusively" sell consumer products, as the Department argues. It simply defines a direct seller's representative as one who "buys consumer products . . . or solicits the sale of consumer products." RCW 82.04.423(2).³

The Department posits an array of hypotheticals to argue that a plain reading of the statutory language could lead to "absurd consequences" in contravention of the "legislative intent." (Dept. Br. at 24-26). The Department bases this argument on the

³ The Department did not base its rejection of the exemption to Dot Foods upon the fact that a miniscule portion of its sales represent non-consumer products. (CP 79-80)

possibility that a taxpayer selling predominately non-consumer products through a direct seller's representative would be eligible for the full amount of the exemption if the direct seller's representative also solicits the sale of only a nominal amount of consumer products on behalf of the taxpayer. This is not such an "absurd or incongruous result" that would justify departing from the plain and ordinary language of the statute. *McFreeze Corp. v. Department of Revenue*, 102 Wn. App. 196, 200, 6 P.3d 1187 (2000) ("we are not free to disregard the plain meaning of the statute to avoid an incongruous result").

Moreover, the Department does not cite any legislative history to support its contention that the Legislature intended to limit the exemption to out-of-state seller of consumer products. To the contrary, the intent behind the statute is to promote the use of Washington-based direct seller's representatives by out-of-state sellers. (CP 268-69)

Moreover, even if the Department's opinion of legislative intent is accurate, it does not explain why the sale of a de minimus quantity of non-consumer goods would defeat the purported legislative intent to authorize the exemption for the sale of consumer products through a direct seller's representative. The

sale by a taxpayer of products that do not qualify for an exemption does not disqualify the taxpayer from claiming the exemption with respect to the sale of those products that do clearly qualify for the exemption. (Opening Br. at 28-29, *citing Lone Star Industries, Inc. v. Department of Revenue*, 97 Wn.2d 630, 647 P.2d 1013 (1982)).

Dot Foods' Washington sales consist overwhelmingly (99.5%) of consumer products. (CP 306-07). The Department fails to explain how authorizing a tax exemption on behalf of this non-Washington seller of consumer products in accordance with the plain language of RCW 82.04.423 leads to "absurd consequences."

D. The Department Failed To Provide Adequate Notice To Dot Foods And Other Affected Persons When It Purported To Make A Significant Change To Its Longstanding Interpretation Of The Direct Seller's Representative Exemption.

This court should hold that the Department failed to give sufficient notice of its significant change to its legislative interpretation of the direct seller's exemption in WAC 458-20-246 to defeat Dot Food's reasonable reliance on the Department's longstanding allowance of the exemption in accordance with a plain reading of the statute. The Department asks this court to refuse to address this argument on the merits. The Department's procedural

arguments are without merit. Dot Foods raised this issue in its petition in superior court, and its refund action is not time barred under RCW 82.32.060.

1. Dot Foods Preserved Its Argument By Challenging The Lack Of Notice In The Department's Change Of Policy.

Dot Foods argued that the Department gave insufficient notice in revising WAC 458-20-246 in the trial court, both in its petition and on summary judgment. In its petition, Dot Foods alleged that "effective February 1, 2000, the DOR changed its position on the '*permanent retail establishment*' condition." (CP 16, emphasis in original) Dot Foods sought a refund based upon "Dot Foods' justified reliance upon the Department's 1997 letter ruling." (CP 19; see also CP 15)

In its motion for summary judgment, Dot Foods argued that the Department's notice announcing that the Department "had updated . . . Rule 246," (CP 56, *quoting* CP 73), was insufficient to defeat "Dot's continued reliance upon the exemption approved in its [private letter ruling] . . ." (CP 57) because the Department failed to provide specific notice that it was changing its interpretation of a substantive provision of the tax code:

The Notice explained the "purpose of the revision is to provide guidance to taxpayers regarding the

requirements of the statute,” but Dot had already received individual guidance from DOR that DOR never revoked. Nor did DOR announce the new rule as a “change.” The Notice merely said the revised rule is “intended to implement” the 17-year old statute “in a comprehensive way, *consistent with the terms of the statute.*” Moreover, the only part of the statute to which the Notice expressly refers, “*Clause one*” is *not* part of the statute on which Dot relied for its exemption, *i.e.*, “*Clause two.*”

(CP 56-57)

Dot Foods’ argument in its opening brief was identical to those made below:

The Department’s form notice mailed to Dot Foods did not announce the new regulation as a change in policy, let alone a radical change that would defeat Dot Foods’ reasonable reliance on the Department’s longstanding interpretation of the direct seller’s exemption, not recently and clearly articulated in the Department’s 1997 private letter ruling.

(Opening Br. at 30).

Although Dot Foods did not specifically cite the requirement of RCW 34.05.328 in the trial court, it clearly apprised the trial court of the Department’s failure to provide adequate notice of its significant change in policy. “[I]t is not necessary to cite all supporting authority in the trial court in order to preserve a substantive issue for appeal. It is only necessary that the issue be raised.” *Nickerson v. City of Anacortes*, 45 Wn. App. 432, 437, 725 P.2d 1027 (1986). Moreover, the trial court addressed Dot

Foods' argument on the merits, holding that the Department's special notice "specifically signaled" to Dot Foods that its reliance on the private letter ruling was "at risk." (RP 12) Dot Foods complied both with RAP 2.5(a)'s requirement that a party must raise an issue in the trial court before raising the issue on appeal, and RCW 82.32.180's mandate that a taxpayer set forth "the reason why the tax should be reduced or abated" in its petition for a refund.

Even if this court concludes that Dot Foods' argument raises a "new issue," it may address the Department's inadequate notice under RCW 34.05.554. Under the APA, a party may raise a new issue if "[t]he agency action subject to judicial review is a rule and the person has not been a party in adjudicative proceedings that provided an adequate opportunity to raise the issue." RCW 34.05.554(1)(b). This court should address the Department's failure to provide adequate notice of its new interpretation of the direct seller's representative exemption on the merits.

2. Dot Foods' Challenge To The Department's Revised Interpretation Of The Direct Seller's Representative Exemption Is Not Time Barred Under The APA.

The Department wrongly contends that Dot Foods was required to contest the validity of its revised interpretation of the

direct seller's exemption within two years after the Department amended WAC 458-20-246. If the Department's new rule is contrary to the statute it purports to interpret, it is void and cannot be enforced. See RCW 34.05.542(1) ("petition for judicial review of a rule may be filed at any time, except as limited by RCW 34.05.375."). Dot Food's substantive challenge to the validity of the new rule is not barred by RCW 34.05.375.

Dot Food's procedural challenge is not time barred either, because this tax refund action is governed by the procedural provisions of RCW ch. 82.32, and not the APA. The two year statute of limitations for challenging an agency's failure to substantially comply with rulemaking requirements under RCW 34.05.375 does not apply because Dot Foods is not petitioning for judicial review of a rule under RCW 34.05.542(1). The two year limitation period for challenging a rule applies only to actions seeking to invalidate a rule for an agency's failure to substantially comply with the rulemaking procedures specified in the APA. See RCW 34.05.375 ("No action *based upon this section* may be maintained to contest the validity of any rule unless it is commenced within two years . . .") (emphasis added).

This was not an action to set aside a rule as procedurally invalid brought under the APA, but a statutory refund action brought after Dot Foods paid B&O taxes under protest. See RCW 82.32.180. As one of the grounds for a refund, Dot Foods claimed that the Department could not apply its newly revised regulation to defeat Dot Foods' reasonable reliance on a private letter ruling interpreting the statute according to its plain language because the Department failed to provide adequate notice of its substantive change of policy. (CP 14-15, 56-57, 226-28) Where, as here, a taxpayer brings an original action for a refund of taxes, the action is governed by the tax code and not by the APA. See *PACCAR, Inc. v. Department of Revenue*, 135 Wn.2d 301, 307, 957 P.2d 669 (1998) ("There is no final agency action to review in this case because it was filed by Petitioner PACCAR as an original action in the Thurston County Superior Court under RCW 82.32.180.").

The tax code specifically authorizes a taxpayer to seek a refund of taxes within four years of "the beginning of the calendar year in which the refund application is made . . ." RCW 82.32.060(1). See RCW 82.32.180 (appeal for refund of tax paid may be made "within the time limitation for a refund provided in chapter 82.32 RCW."). The more specific limitations period

established by the Legislature in the tax code controls the instant refund action. See *Johnston v. Beneficial Management Corp. of America*, 85 Wn.2d 637, 644-45, 538 P.2d 510 (1975) (specific statute of limitations governing actions under retail installment sales act and usury statute control over general limitations period under CPA “since they deal with the subject of limitations in a more minute and specific manner.”).

Applying the two year limitation period for an APA petition challenging rulemaking procedures makes no sense where a taxpayer seeks a refund because the Department failed to inform the taxpayer that it was reversing its interpretation of a statute. Dot Foods did not bring an APA action to set aside the Department’s new interpretation of RCW 82.04.423 because it had no basis for believing that the Department had completely reversed its interpretation of the exemption until Dot Foods was audited in 2004. Had the Department provided clear notice of its intention to adopt a significant legislative revision to its longstanding plain language interpretation of the statutory direct seller’s exemption, Dot Foods and other similarly situated taxpayers could have participated in the rulemaking process. Instead, the Department ignored its own action plan by failing to notify taxpayers like Dot Foods, that the

Department intended to retract “specific reporting instructions” and to “give specified corrected instructions” regarding its new interpretation of the exemption. (CP 286)

The Legislature’s policy under the Regulatory Reform Act supports Dot Foods’ consistently stated position that a state agency must give affected taxpayers clear notice of its intent to make a “significant amendment to . . . policy.” RCW 34.05.328(5)(c)(iii)(C). The purpose of this provision is to preclude an agency from doing what the Department did here – enact a substantive change of the law by executive fiat without providing clear notice of the consequences to a readily identifiable class of affected persons.

The Department argues that its revision was not a “significant legislative rule,” because it is only “interpreting” the statute. (Resp Br. at 34) However, when considering reversing its interpretation of the statute, the Department’s staff considered the revision “a change in policy.” (CP 293) See RCW 34.05.328(5)(c)(iii)(C) (significant legislative rule defined as “significant amendments” to . . . policy “). The Department’s contention that it can ignore the additional notice requirements of RCW 34.05.328 when it withdraws a tax exemption because a taxpayer that continues to claim the exemption is not subject to a

“sanction or penalty” is equally without merit. See RCW 34.05.328((5)(a)(1) (requirements apply to Department of Revenue); RCW 34.05.328(5)(c)(iii)(A) (significant legislative rule “subjects a violator . . . to a penalty or sanction”). Because Dot Foods faced penalties and interest when it continued claiming the exemption (CP 80), the Department should have done more than announce that it was “reiterat[ing] the express requirements of the statute.” (CP 64, 96)

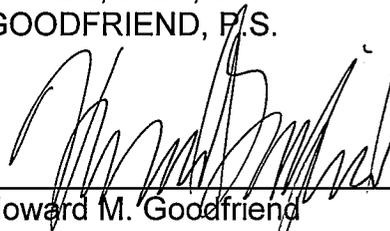
III. CONCLUSION

This court should hold that the Department’s revised interpretation of RCW 82.04.423 is both substantively and procedurally flawed, reverse the trial court and order a refund of taxes paid by Dot Foods under protest.

Dated this 17th day of May, 2007.

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

KARR TUTTLE CAMPELL

By: 

Howard M. Goodfriend
WSBA No. 14355

By: 

Jacquelyn A. Beatty
WSBA No. 17567

Attorneys for Appellant

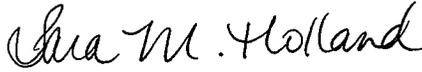
DECLARATION OF SERVICE

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

That on May 17, 2007, I arranged for service of the foregoing *Reply Brief of Appellant* to the court and the parties to this action as follows:

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DATED at Seattle, Washington this 17th day of May, 2007.



Tara M. Holland

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