

No. 81022-2

SUPREME COURT
OF THE STATE OF WASHINGTON

DOT FOODS, INC.,

Petitioner,

vs.

DEPARTMENT OF REVENUE, STATE OF WASHINGTON,

Respondent.

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SUPPLEMENTAL BRIEF OF PETITIONER

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I. INTRODUCTION

Dot Foods, Inc., petitioner, submits this supplemental brief pursuant to RAP 13.7(g).

II. ISSUES ACCEPTED FOR REVIEW

RCW 82.04.423 provides an exemption from B&O tax to an out-of-state seller who makes sales in Washington state “exclusively to or through a direct seller’s representative,” defined as one who “sells, or solicits the sale of, consumer products in the home or otherwise than in a permanent retail establishment.” (App. A)

A. Does the exclusivity requirement of RCW 82.04.423 refer to the manner in which a direct seller’s products are sold, rather than to the type of products sold, so that an out-of-state seller is not disqualified from claiming the exemption from B&O tax where all of its products are sold exclusively through a Washington representative and more than 99% of those sales consist of consumer products.

B. Does the plain language of the statute authorize the exemption to Dot Foods where all of Dot Foods’ Washington sales are made through a representative that solicits the sale of Dot

Foods' consumer products outside of permanent retail establishments?

III. STATEMENT OF THE CASE

The undisputed facts, more fully set out in the Brief of Appellant and Petition for Review, are summarized below, for the Court's convenience:

Dot Foods, Inc. is an Illinois corporation that sells food products to dairies, meat packers, food processors, and other food companies. Dot Food's products are used as ingredients in other food products, or are sold to wholesalers for resale to restaurants or to other food service operators or institutions, such as nursing homes, schools or hospitals. (CP 61-62) Over 99% of the products sold by Dot Foods in the state of Washington are "consumer products" as defined by WAC 458-20-246(4)(b)(ii). (CP 119-34, 169, 306-07)

Dot Foods sells its products in Washington State exclusively through its wholly owned subsidiary, Dot Transportation Inc. ("DTI"). (CP 61, 71) DTI's Washington sales representatives solicit the sale of Dot Foods products to food service distributors, meat packers, and dairies in Washington. (CP 62) Those orders are then transmitted to Dot Foods in its home state of Illinois, and shipped to

Washington customers from outside of the state. (CP 62-63) DTI receives a commission of 0.7% of all sales of Dot Foods products to Washington customers. DTI conducts no other sales activities in Washington. (CP 63)

DTI paid B&O tax on all commissions earned through the sale of Dot Foods products. (CP 231-67) Dot Foods claimed the direct seller's exemption from B&O tax pursuant to RCW 82.04.423 and former WAC 458-20-246 because Dot Foods was a foreign corporation selling exclusively through DTI, and DTI did not solicit any sales of Dot Foods' consumer products in a permanent retail establishment. Consistent with its administrative interpretation adopted in 1984 shortly after the statute was enacted, the Department of Revenue approved Dot Foods' exemption from B&O tax under a private letter ruling dated October 23, 1997. (CP 68-69)

On January 1, 2000, the Department reversed its long-standing interpretation of RCW 82.04.423, adopting a new "interpretive rule". WAC 458-20-246. See WSR 99-17-029 (proposed rule). While RCW 82.04.423(2) defines a direct seller's representative as one who "sells, or solicits the sale of, consumer products in the home or otherwise than in a permanent retail

establishment,” the Department’s new rule, for the first time, purported to disallow the direct seller’s exemption “if a consumer product is [subsequently] sold by anyone in a permanent retail establishment.” (CP 73)

Because some of Dot Foods’ products were ultimately sold by others in permanent retail establishments, the Department disallowed the exemption, and in an audit, determined that Dot Foods owed the department back B&O taxes for the years 2000-2003, plus statutory interest and penalties. (CP 76-80, 98-101) The Department did not rely on the fact that less than 1% of Dot Foods’ sales consisted of non-consumer products. (CP 78-80, 99-101)

Dot Foods filed this action in 2005 and sought a refund of \$1,101,070 in disputed B&O taxes, interest and penalties. (CP 22-31, 65) The Court of Appeals affirmed the dismissal of Dot Foods’ tax refund action. The Court of Appeals held that the statutory exemption applies only to those direct sellers that “exclusively sell consumer products in Washington,” (Opinion at 7), and that Dot Foods was ineligible for the exemption because Dot Foods’ products are ultimately sold by others in permanent retail establishments. (Opinion at 11-13).

IV. SUPPLEMENTAL ARGUMENT

A. RCW 82.04.423 Must Be Given Its Plain And Unambiguous Meaning, In Accordance With Settled Principles Of Statutory Construction.

In its most recent cases, this Court has developed a consistent framework of statutory interpretation, “discerning legislative intent from the ordinary meaning of the words” of the statute itself. *Tesoro Refining and Marketing Co. v. Department of Revenue*, ___ Wn.2d ___, 190 P.3d 28, ¶10 (2008) (plurality); *Spain v. Employment Sec. Dept.*, ___ Wn.2d ___, 185 P.3d 1188, ¶12 (2008) (“Time and time again, we are compelled to return to the words of the statute itself.”). “[I]f the statute’s meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent.” *Dept. of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002).

The Court may not rewrite an unambiguous statute “to suit our notions of what is good public policy.” *Sedlacek v. Hillis*, 145 Wn.2d 379, 390, 36 P.3d 1014 (2001), quoting *State v. Jackson*, 137 Wn.2d 712, 725, 976 P.2d 1229 (1998). Similarly, the Court will not allow an administrative agency to rewrite an unambiguous statute through regulatory interpretation, because the determination of the meaning of statutory language is first and foremost, a judicial

function. See *Densely v. Department of Retirement Systems*, 162 Wn.2d 210, 221, 173 P.3d 885 (2007); *Bostain v. Food Exp., Inc.*, 159 Wn.2d 700, 716, 153 P.3d 846 (2007); *Association of Washington Business v. State of Washington, Dept. of Revenue*, 155 Wn.2d 430, 446-47, 120 P.3d 46 (2005). Accordingly, the Department's interpretation of an unambiguous statute that violates the statute's plain meaning is void. *Department of Labor and Industries v. Granger*, 159 Wn.2d 752, 764, 153 P.3d 839 (2007). See *Tesoro Refining*, 190 P.3d at 28, ¶ 25.

This Court resorts to tools of statutory construction, such as the statute's legislative history, administrative interpretations, or the rule that exemptions are narrowly construed against the taxpayer, only where it determines that the statute is ambiguous:

This court does not subject an unambiguous statute to statutory construction and has declined to add language to an unambiguous statute even if it believes the Legislature intended something else but did not adequately express it.

Cerrillo v Esparza, 158 Wn.2d 194, 202, 142 P.3d 155 (2006) (citations and internal quotation omitted). This Court has repeatedly held that a statute is not ambiguous merely because "different interpretations are conceivable." *Cerrillo*, 158 Wn.2d at 201; *Agrilink Foods, Inc. v. Dept. of Revenue*, 153 Wn.2d 392,

396, 103 P.3d 1226 (2005). Ambiguity occurs only when a statute is susceptible to more than one reasonable interpretation, “without the importation of additional language” that the Legislature did not employ. *Cerillo*, 158 Wn.2d at 203.

This Court should adhere to these well-established principles in the instant case. First, RCW 82.04.423(2) unambiguously defines a direct seller’s representative as “one who . . . solicits the sale[] of consumer products.” The Legislature required a direct seller to “make[] sales in this state exclusively to or through a direct seller’s representative,” RCW 82.04.423(1)(d), but did not require a direct seller’s representative to “exclusively” solicit the sale of consumer products as a condition to the statutory direct seller’s exemption from the B&O tax. Second, a direct seller’s representative is one who, on behalf of an out-of-state seller, solicits the sale of consumer products “in the home or otherwise than in a permanent retail establishment.” RCW 82.04.423(2). The exemption under this second clause of RCW 82.04.423(2) is not lost if those consumer products are ultimately sold “by any other person” in retail establishments.

Here, the Department's interpretation cannot be sustained and cannot be considered reasonable "without the importation of additional language" that the Legislature did not employ. **Cerillo**, 158 Wn.2d at 203. As Dot Foods qualifies for the direct seller's exemption from B&O tax, this Court should reverse and direct entry of judgment in favor of Dot Foods in its refund action.

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, Even If It Also Sells A De Minimis Quantity Of Non-Consumer Goods Through DTI.

Under RCW 82.04.423(1), an out of state seller that does not maintain a stock of tangible personal property for sale in Washington state is exempt from B&O tax "if such person . . . (d) Makes sales in this state exclusively to or through a direct seller's representative."³ The term "direct seller's representative" is defined in the statute as "one who buys consumer products . . . or solicits the sale of consumer products . . ." RCW 82.04.423(2). The plain language of this statutory exemption directly refutes the

³ It is undisputed that Dot Foods meets the first three criteria of RCW 82.04.423(1)(a)-(c). (Opinion at 2)

Department's position in this litigation⁴, adopted by the courts below, that RCW 82.04.423 is limited to sellers who "exclusively sell consumer products in Washington." (Opinion at 7)

Of the 60,000 products carried by Dot Foods, 99.5% are "consumer products." (CP 306-07) 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." (Argument C, *infra*). RCW 82.04.423(1)(d) uses the term "exclusively" to refer to the *manner*, but not the type, of an out of state seller's sales – the seller must make its "sales in this state exclusively to or through a direct seller's representative."

The statutory language, interpreted as a whole, is plain and unambiguous – an out-of-state direct seller is not disqualified from the exemption merely because its direct sales may include non-consumer products. Indeed, when it revised its regulation in 2000, the Department did not mention an exclusivity requirement: "The direct seller must be selling a consumer product." WAC 488-20-

⁴ As noted in the Petition, the Department first adopted this "exclusivity" requirement in the instant litigation, as its administrative interpretation has consistently required only that a "direct seller must be selling a consumer product" to qualify for the exemption. WAC 458-20-246-(4)(b)(ii). See WSR 99-24-007 (containing former language of regulation).

246(4)(b)(ii). The statute cannot be interpreted to require a direct seller to exclusively sell consumer products without adding additional language to the statute.

The Department's argument that a literal interpretation of the exemption would yield "absurd" results is without merit. It posits that a direct seller could exempt its sales of millions of dollars of non-consumer products by selling a de minimus amount of consumer products through a representative. (Resp. Br. at 24-27) First, this is not an "absurd" result, given the undisputed statutory purpose of providing "nexus" relief to out-of-state businesses "making sales at wholesale or retail." RCW 82.04.423. (Argument C, *infra*); see **Stone v. Southwest Suburban Sewer Dist.**, 116 Wn. App. 434, 440, 65 P.3d 1230 (2003) (if plain meaning interpretation comports with statutory purpose, it does not lead to absurd results; "the wisdom of the policy choices of the statute is better left to the Legislature.") Second, under the Department's interpretation, a direct seller that exclusively sells consumer products would lose the exemption if its representative, including a door-to-door salesperson, sold any non-consumer products or sold services on behalf of anyone to any other person in the state – a far more "absurd" result than allowing the exemption here. Had the

Legislature intended to impose an exclusivity requirement on the type of goods sold through a direct seller's representative, it would have stated this condition in RCW 82.04.423(1)(d), or in the definition of a direct seller's representative under RCW 82.04.423(2).

At a minimum, only Dot Foods' sales of non-consumer products through DTI are subject to the B&O tax, while its sales of consumer products, over 99% of its business in Washington, remain exempt. Even if, as the Department argues, the use of the phrase "consumer products" in the definition of a direct seller's representative, RCW 82.04.423(2), indicates an intent to limit the exemption to sales of consumer goods, the Legislature did not require a direct seller to exclusively sell consumer products. A far more reasonable interpretation of the statutory language would allow a direct seller that meets the other conditions of the statute to exempt its direct sales of consumer products through a direct seller's representative, while taxing sales of non-consumer products.

C. 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.

The courts below accepted the Department's position that RCW 82.04.423(2) distinguishes between wholesale sales (in the first clause) and retail sales (in the second clause). Whatever merit this distinction may have as a matter of policy, it is not based on the statutory language. Even if the statute is ambiguous, the Department's current interpretation is entitled to less deference than its original interpretation, which from 1984 until 2000, allowed direct sellers such as Dot Foods to claim the exemption.

The plain language of RCW 82.04.423(2), which defines a direct seller in two alternative ways, applies to Dot Foods, as an out-of-state seller that sells through its representative DTI outside of stores or other retail establishments:

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).

The first definition is based upon the commercial relationship between the out-of-state seller and its representative – the exemption is available if the representative “buys consumer products” and they are in turn resold, “by the buyer or any other person,” outside of a permanent retail establishment. The second definition focuses on the place where the representative makes the sale – it must occur “in the home or otherwise than in a permanent establishment.” The first definition precludes “any other person” from further selling the out-of-state seller’s consumer products in permanent retail stores; the second definition does not. Because 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).

While the Department originally interpreted this exemption according to its plain language, it adopted a completely different interpretation in 2000, when it sought to limit the first definition to “wholesale sales made by a direct seller to a representative,” and the second definition to “retail sales made by the direct seller to the consumer.” WAC 458-20-246(4)(a)(iv). Thus, the Department improperly added the “or any other person” language, which

appears in the first but not in the second clause, by stating that under either definition, “[t]he direct seller may take the exemption only if the retail sale of the consumer product takes place either in the home or otherwise than in a permanent retail establishment.” WAC 458-20-246(4)(b)(i)(B).

This Court should reject the Department’s attempt to rewrite the two statutory definitions of “direct seller’s representative” in terms of wholesale and retail sellers, respectively. While the Legislature could have adopted a “wholesale/retail” distinction, it did not do so. By contrast, the Legislature used the commonly understood terms “wholesale” and “retail” in the first section of RCW 82.04.423(1), elsewhere in RCW ch. 82.04,⁵ as well as in other portions of the 1983 legislation that adopted this direct seller’s exemption. See 1983 Wash. Laws (1st Ex. Sess.), ch. 66, § 3(7) (establishing tax rate “[u]pon every person engaging in the business of slaughtering, breaking and/or processing perishable meat products and/or selling the same at wholesale only and not at retail. . .”). The Department’s interpretation thus ignores the elementary rule of statutory construction, “that where the

⁵ The tax code separately provides for persons making “sales at retail,” RCW 82.04.250(1), and “sales at wholesale.” RCW 82.04.270. See *also* RCW 82.04.050 (defining “sale at retail”).

Legislature uses certain statutory language in one instance, and different language in another, there is a difference in legislative intent.” *Weyerhaeuser Co. v. Dept. of Revenue*, 106 Wn.2d 557, 564, 723 P.2d 1141 (1986), quoting *United Parcel Service, Inc. v. Dept. of Revenue*, 102 Wn.2d 355, 362, 687 P.2d 186 (1984).

The Department's attempt to import a “wholesale/retail” definition by citing to federal legislation also fails to take into account the distinct statutory language used by the 1983 Legislature. The term “direct seller” was used by Congress in enacting an exemption for employers from federal payroll taxes. 26 U.S.C. § 3508(b)(2). While Congress did not use the terms “wholesale” and “retail” in defining a “direct seller,” it adopted such a distinction in unambiguous language by differentiating between sellers “to any buyer . . . for resale” and sales “in the home or otherwise than in a permanent retail establishment:”

(2) Direct seller.—The term “direct seller” means any person if—

(A) such person—

(i) is engaged in the trade or business of selling (or soliciting the sale of) consumer products to any buyer on a buy-sell basis, a deposit-commission basis, or any similar basis which the Secretary prescribes by regulations, for resale (by the buyer or any other person) in the home or otherwise than in a permanent retail establishment, [or]

(ii) is engaged in the trade or business of selling (or soliciting the sale of) consumer products in the home or otherwise than in a permanent retail establishment . . .

26 U.S.C. § 3508(b)(2)(A)(i), (ii).

The Legislature could have adopted this language in order to create the alternative “wholesale” or “retail” definitions that limit the exemption to those direct sellers whose consumer products are eventually sold in the home or otherwise than in a permanent retail establishment. The fact that the Legislature chose not to use the language of the federal statute is a strong indication of its intent to adopt a definition of direct seller’s representative that is different from that adopted by Congress under Section 3508:

A provision of the federal statute cannot be engrafted onto the state statute where the Legislature saw fit not to include such a provision.

Everett Concrete Products, Inc. v. Dept. of Labor & Industries, 109 Wn.2d 819, 826, 748 P.2d 1112 (1988) (quotation omitted). See ***Bird-Johnson Corp. v. Dana Corp.***, 119 Wn.2d 423, 427-28, 833 P.2d 375 (1992) (Legislature adopted language from CERCLA but omitted language providing for express right of contribution in Model Toxics Control Act); ***In re Easton’s Estate***, 170 Wash. 280, 284, 16 P.2d 433 (1932) (“In deliberately changing the words [from

the language used in other states], the Legislature had some purpose in mind.”).

Nothing in the legislative history of the statute supports the “wholesale/retail” distinction adopted by the Department, even were the Court to resort to tools of statutory interpretation. The 1983 Legislature rejected a blanket exemption for out-of-state “wholesalers” and “retailers” who do not have a physical presence in Washington. See HB 566 (1983 Reg. Sess.) (proposing to grant nexus relief to both out-of-state retailers and wholesalers by amending RCW 82.04.250 and .270). However, while refusing to adopt proposed amendments to RCW 82.04.250 and .270, it is undisputed that the Legislature intended to grant some tax relief to out-of-state sellers engaged in direct sales solicited by Washington based agents in enacting this tax exemption.

This dispute concerns the extent of such “nexus” relief. While the Department relies on legislative history to argue that the exemption covers sales in the home by door-to-door representatives of such companies as Avon, that history does not suggest that the statutory language is *limited* to direct sales of consumer products that are never resold in retail establishments. See Senate Journal, 48th Legis., 1st Ex. Sess. 2212 (1983)

(colloquy reflects that the bill was intended to “take care of the particular problem faced by some of the occupants of the Seattle Trade Center.”)

The Department initially opposed the effort to grant any relief to out-of-state sellers who could constitutionally be subject to a Washington tax for activities conducted within this state, and sought a veto of the 1983 legislation. (CP 229-30) But when Governor Spellman rejected the Department’s advice and signed the exemption into law, the Department enacted a regulation that followed the statute’s plain language, WSR 84-24-029 (Nov. 30, 1984), and, thirteen years later, issued a private letter ruling to Dot Foods, authorizing the statutory exemption so long as its representative, DTI, “will not make sales from a permanent retail establishment.” (CP 69)

Although the Court may give deference to an agency’s interpretation of an ambiguous statute that is within its expertise, the Department has never explained why its contemporaneous interpretation of RCW 82.04.423, adopted immediately after the statute’s enactment and adhered to for almost 16 years, was incorrect. See WSR 84-24-028; 3 WTD 357 (1987), *reprinted at* CP 272-76 (Oregon corporation selling food products at wholesale

through representative entitled to exemption). This Court gives deference to an agency's interpretation of an ambiguous statute because the agency has "the responsibility of setting its machinery in motion of making the parts work efficiently and smoothly while they are yet untried and new." *Rasor v. Retail Credit Co.*, 87 Wn.2d 516, 525, 554 P.2d 1041 (1976) (quotation omitted). But where, as here, the Department has radically altered its interpretation in the absence of any intervening change of the statutory language, the policy behind judicial deference evaporates. The Legislature's "silent acquiescence" in the Department's original interpretation substantially undermines the Department's contention that it had completely misinterpreted the Legislature's statute for well over a decade. See *Newschwander v. Board of Trustees of Washington State Teachers Retirement System*, 94 Wn.2d 701, 711, 620 P.2d 88 (1980) (affording deference to administrative interpretation is particularly appropriate "where that construction has been accompanied by silent acquiescence of the legislative body over a long period of time.")

This Court should reject the Department's reversal of its longstanding interpretation of the clear and unambiguous language of RCW 82.04.423. DTI is a direct seller's representative because

it solicits sales on behalf of Dot Foods at locations that are not permanent retail establishments. Dot Foods is entitled to the exemption under RCW 82.04.423 as an out-of-state seller of consumer products that are sold exclusively through DTI, its direct seller's representative.

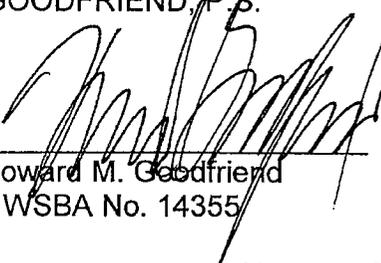
V. CONCLUSION

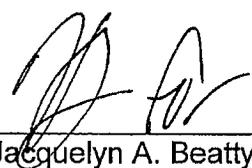
This Court should reverse the Court of Appeals and direct entry of judgment in favor of Dot Foods on its action for a refund of B&O taxes paid under protest.

Dated this 5th day of September, 2008.

EDWARDS, SIEH, SMITH
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**FILED AS
ATTACHMENT TO EMAIL**

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 if such person:

- (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.

(2) 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; and

(a) Substantially all of the remuneration paid to such person, whether or not paid in cash, for the performance of services described in this subsection is directly related to sales or other output, including the performance of services, rather than the number of hours worked; and

(b) The services performed by the person are performed pursuant to a written contract between such person and the person for whom the services are performed and such contract provides that the person will not be treated as an employee with respect to such purposes for federal tax purposes.

(3) Nothing in this section shall be construed to imply that a person exempt from tax under this section was engaged in a business activity taxable under this chapter prior to the enactment of this section.

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 September 5, 2008, I arranged for service of the Supplemental Brief of Petitioner, 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
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DATED at Seattle, Washington this 5th day of September, 2008.


Tara D. Friesen