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FILED  
COURT OF APPEALS  
DIVISION II

08 DEC -8 PM 12:08

No. 37409-9-II

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

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**TRACFONE WIRELESS, INC.,**

**Appellant,**

**v.**

**WASHINGTON DEPARTMENT OF REVENUE,**

**Respondent.**

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**TRACFONE'S REPLY BRIEF**

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## SUMMARY OF ARGUMENT

The Department effectively concedes that the stated basis for the trial court's ruling was erroneous and asks this Court to decide the case instead on alternative grounds. However, the Department's arguments disregard the plain language of the statute in order to reach its desired result.

Although the Department does not dispute that the plain meaning of a statute is determined by consideration of the statute as a whole, giving effect to all of the words used and harmonizing its provisions, the Department fails to do so. Instead, the Department looks to the word "all" in isolation to try to force the statute to support its desired result. Similarly, the Department's efforts to disregard the language actually used in numerous provisions of the statute because it conflicts with the Department's desired outcome does not change the plain meaning of the statute or cause it to obtain the unstated meaning the Department would like to inject into it.

The Department dismisses the legislature's express reference the entirety of the Mobile Telecommunications Sourcing Act ("MTSA"), P.L. 106-252, in order to avoid that Act's express statement that it does not apply to prepaid wireless. The Department also attempts to deny that the *only* collection method provided in the statute (a method inherently

inapplicable to prepaid) is mandatory; this notwithstanding the undisputedly mandatory nature of the directives “must” and “shall” used by the Legislature. The Department then disavows its statutory responsibility to provide taxpayers with “clear instructions” because it cannot explain how to calculate a tax measured by months of use on sales of prepaid minutes that are not correlated with monthly use.

Finally, the Department ignores the statute’s express provision that sellers have no liability to collect E-911 tax when they obtain resale certificates establishing that their “buyer” is “not a subscriber.” Instead the Department reasons backwards: since the Department contends the tax is owed by retail purchasers of prepaid wireless and the Department believes that the retail sellers are not required to collect the tax, it postulates that TracFone must be required to collect the tax. Contrary to the Department’s myopic focus on making someone liable, harmonizing all of these provisions as a whole establishes that the statute does not impose tax on prepaid wireless subscribers. Any of the extension of the tax to prepaid will require legislative action.

## ARGUMENT

- A. The Department's isolated focus on the word "all" fails to construe the statute as a whole, disregarding numerous provisions establishing that the statute does *not* impose tax on prepaid wireless subscribers.**

The Department makes no attempt to defend the erroneous reasoning of the trial court. Instead, the Department begins its argument by emphasizing that, because the standard of review in this statutory construction case is *de novo*, the Court can decide the case "on a basis not decided by the trial court." Resp. Br. at 8.

The Department does not dispute that Courts determine the plain meaning of a statute by looking at all of the language used in the statute. App. Br. at 8-9. It is axiomatic that a "statute must be read as a whole giving effect to all of the language used, and each provision must be harmonized with other provisions." *State v. Young*, 125 Wn.2d 688, 696, 888 P.2d 142 (1995). Ignoring these fundamental principles of statutory construction, the Department now argues that the presence of the word "all" in the statute, considered in isolation, causes the E-911 tax to be imposed on "all subscribers of telephone service whether from a telephone or a cell phone." Resp. Br. at 13.

This new argument violates the prescription that a single word in a statute "not be read in isolation but rather within the context of the ... statutory scheme as a whole; statutory provisions must be read in their

entirety and construed together, not piecemeal.” *Dep’t of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002), citing *ITT Rayonier, Inc. v Dalman*, 122 Wn.2d 801, 807, 863 P.2d 64 (1993).

The Department’s contention regarding the scope of the statute is also inconsistent with its own recent (September 2007) report to the Legislature, which concluded that the statute does not apply to subscribers of Voice over Internet Protocol (“VoIP”) telephone service. CP 456.

In 2002, the Legislature (at a time when prepaid wireless was still in its infancy), extended the E-911 tax to subscribers of traditional billed wireless service. Ch. 341, Laws of 2002. This scope of the 2002 amendment is reflected in a number of different provisions adopted by the legislature: requiring that the retail seller “must” collect the tax as a separate line item on the subscriber’s “billing statement” when prepaid does not have billing statements; utilizing the MTSA (which is expressly inapplicable to prepaid wireless) to determine which subscribers the tax is imposed on; and measuring the tax based on months of use when prepaid is sold in blocks of minutes that are not correlated with months of use.

Moreover, the Legislature adopted all of these provisions that are directed toward billed wireless service without making any provision for imposition of tax on or collection of tax from purchasers of prepaid wireless airtime. The language used by the Legislature, taken as a whole

with the above referenced provisions construed in harmony, establishes that the statute does not impose tax on prepaid wireless subscribers. As the Department concedes is true of VoIP telephone service, legislative action would be required for any such extension of the tax.<sup>1</sup> CP 358.

**1. The Legislature specifically referenced the entirety of P.L. 106-252, which Act expressly excludes prepaid wireless.**

As the Department concedes (Resp. Br. at 30) prepaid wireless “is not subject to” the MTSA, including the MTSA’s creation of the concept of a “place of primary use” for purposes of taxing billed wireless service. MTSA § 116(c)(1), copy at CP 361. Nevertheless, applying its result-driven approach, the Department contends that the Legislature’s reference to the entire MTSA should be re-written to incorporate *only* specific words from §124(8) of the MTSA. Resp. Br. at 29-30. Doing so, the Department contends, would support an inference that the Legislature consciously intended to expand the meaning of place of primary use to apply to prepaid wireless without actually saying so. *Id.* This argument improperly ignores the language actually used by the legislature. *Agrilink*

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<sup>1</sup> Ironically, TracFone has repeatedly offered to work with the Department on legislation to extend the E-911 tax to cover prepaid wireless – something it has done in numerous other states that had first generation E-911 tax provisions similar to Washington’s. CP 343, App. Br. at 16. Several Department officials are on record stating that a legislative fix is the best solution (CP 347-50, 353) even suggesting that an E-911 tax on prepaid could be modeled on recent legislation addressing “sales and use tax on prepaid wireless charges” which are collected by the retailer at the point of sale. CP 347.

*Foods, Inc. v. Dep't of Revenue*, 153 Wn.2d 392, 396, 103 P.3d 1228 (2005).

If the legislature had intended to look solely to a single, specific section of the federal statutes, it would have done so expressly, just like it did in RCW 82.14B.020(6) (incorporating definition from 47 U.S.C. § 332(d)(1)). *Agrilink*, 153 Wn.2d at 396 (rejecting Department's argument that broad language used in tax statute at issue should be given a limited meaning different from the language actually used and noting that the Legislature had expressly used limiting language in related tax statutes when it intended to provide for such limitation).

The Department's argument that giving effect to the Legislature's reference to the entire MTSA to establish the meaning of "place of primary use" would "render it meaningless" is also without merit. Resp. Br. at 30. As in the MTSA, the term place of primary use has meaning establishing the tax situs of the traditional billed wireless telephone service it was created to address; a meaning confirmed by the millions of dollars of E-911 tax paid by subscribers of billed wireless service.<sup>2</sup>

Finally, despite acknowledging that the term "place of primary use" is expressly defined as a "street address," the Department contends

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<sup>2</sup> In contrast, one Department witness testified that no wireless carriers collect E-911 tax from prepaid wireless subscribers (CP 288), while another testified that TracFone is the only prepaid seller to date on whom it has attempted to impose liability for tax allegedly owed by prepaid subscribers. CP 298.

that the area code a purchaser asks to have assigned to a prepaid handset should be deemed the equivalent of the “street address” required by the statute, because sellers of prepaid service “choose not to collect” street address information. Resp. Br. at 31.<sup>3</sup>

This is yet another example of the Department disregarding statutory language that contradicts its desired outcome rather than construing the language of the statute as a whole to harmonize all of its provisions.<sup>4</sup> Federal law under the MTSA requires providers of billed wireless service to collect and maintain street address information necessary to establish a subscriber’s place of primary use. MTSA §122, CP 365. No such requirement is imposed on sellers of prepaid wireless airtime, either under the MTSA or any Washington statute. Moreover, the Department’s own witness identified several reasons why a retail purchaser of prepaid wireless might want a phone number with an area code that would not match the buyer’s primary residential or business street address required by the statutory definition. CP 293.

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<sup>3</sup> The Department makes this argument to disregard the actual language of the statutory definition without disputing that it is directly contrary to the well settled principal that “Legislative definitions included in the statute are controlling.” *State v. Watson*, 146 Wn.2d 947, 954, 51 P.3d 66 (2002) discussed by TracFone in App. Br. at 25.

<sup>4</sup> The Department’s brief also sidesteps TracFone’s argument (App. Br. at 22-23) that the trial court’s resolution of a factual issue in favor of the Department should have precluded it from granting summary judgment for the Department.

2. **The Department disregards the express statutory requirement that the tax “must” be collected as a separate line item on the subscriber’s “billing statement,” a collection method inherently inapplicable to prepaid service.**

The Department does not dispute that the *only* collection method provided for in the statute is to collect the tax as a separate line item on the subscriber’s “billing statement.” RCW 82.14B.040, 042. The Department also does not dispute that the words used in the statute’s collection sections, “must” and “shall” are mandatory words. App. Br. at 9-10. Nevertheless, the Department relies on the unsupported contention that “The statute does not mandate that the exclusive method of collecting the tax is through a billing statement” to try to convert the statute to its desired outcome. Resp. Br. at 17.

The Department also mis-characterizes TracFone’s argument as being that TracFone “is not required to collect the tax” because it “does not send out billing statements.” Resp. Br. at 17. TracFone’s argument is that the statute’s requirement that the tax “must” and “shall” be collected as a line item on the subscriber’s “billing statement” is plain language establishing that the tax does not apply to prepaid wireless subscribers App. Br. at 14-15. With respect to this point, the Department does not dispute that prepaid wireless, by its very nature, does not involve billing statements because airtime is paid for in advance of the purchasers’ use.

The Department's attempt to distinguish a recent Michigan case because the E-911 tax statute in that case used the phrase "billing address" rather than "billing statement" (Resp. Br. at 24), is off the mark as well; each requires the other. The key word is "billing." As the Court recognized, billing "entails actually sending bills on an account to a customer" yet with prepaid "there is no billing." *TracFone Wireless, Inc. v. Dep't of Treasury*, 2008 WL 2468462 (Mich. Ct. App. June 19, 2008).

In the absence of statutory language to support its desired outcome, the Department is relegated to speculating that a variety of hypothetical alternatives by which tax might be collected from prepaid subscribers are theoretically feasible, including among others, requiring purchasers of prepaid airtime to provide the carrier a credit card number on which to charge the monthly tax. Resp. Br. at 18. None of the alternative collection methods suggested by the Department are supported by any language in the statute.<sup>5</sup> While alternatives to the current statute may have a role in discussions of possible legislative options for how to extend the tax to prepaid wireless, it does not cause the current statute – whose only

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<sup>5</sup> The Department's speculation (Resp. Br. at 21-22) that there is only a "remote" risk the state would actually enforce the criminal penalties in RCW 82.14B.042(2) if a seller were to follow the Department's "suggestion" to raise the price of prepaid airtime instead of collecting the tax from does not alter the suggestions violation of the statutory mandate. Moreover, sellers who fail to follow the statute's collection provision may become the subject of consumer class action claims. See *Nelson v. Appleway Chevrolet, Inc.*, 160 Wn.2d 173, 157 P.3d 847 (2007).

stated collection method specifically requires that the tax “must” and “shall” be collected on the subscriber’s “billing statement” – to apply to prepaid, which undisputedly does not involve any billing statements.

**3. The Department cannot reconcile the statute’s imposition of tax measured by months of use with the sale of prepaid service in blocks of minutes because the two bear no correlation to each other.**

The Department issued a Special Notice asserting that the statute requires that “sellers of prepaid service ... *must* collect the tax at the time of sale.” CP 309 (emphasis added). Yet the Department does not dispute that the number of months over which each purchase of prepaid airtime minutes will be used cannot be known at the time of sale because the actual months of use are not correlated with the number of minutes on the prepaid airtime card – a person may purchase and use multiple prepaid airtime cards in a single month or may use a single prepaid airtime card over the course of many months. Resp. Br. at 26.

Moreover, the Department has acknowledged that collection of one month of tax on each purchase of prepaid airtime would systematically under-collect tax from purchasers who use their prepaid airtime over many months and over-collect tax from purchasers who use multiple airtime cards in a month. CP 317. Nevertheless, the Department now asserts (Resp. Br. at 28) that it is possible to “calculate” the amount of tax

allegedly owed by prepaid subscribers by “assessing” retail buyers three months of tax on every 60 minute airtime card (because a 60 minute prepaid card extends the handset’s expiration date by three months).

Whether one month of tax or three months of tax is “assessed,” collecting a fixed amount of tax on each airtime card will still result in systematically over-collecting from some purchasers and under-collecting from others.

Because a 60 minute prepaid card might be fully used in one hour or not for many months, the statute’s imposition of tax at a rate based on months of use is simply incompatible with prepaid service, which is sold in block of minutes whose use has no correlation to the tax rate. The incompatibility between the language of the statute and the Department’s litigating position forces it to disclaim responsibility for informing taxpayers how to comply with the Department’s proposed interpretation of the statute. Resp. Br. at 26. In so doing, the Department ignores its statutory duty under the Taxpayer’s Bill of Rights, which specifically provides that taxpayers are entitled to “clear instructions” from the Department on their tax reporting obligations. RCW 82.32A.020(5).

The Department’s unsupported contention that the Taxpayer’s Bill of Rights only requires the Department to tell taxpayers “whether they owe tax, the amount, and at times, if there is a deficiency” (Resp. Br. at 19) flatly contradicts the statute’s express command to provide “clear

instructions.” Moreover, the Department cannot fulfill even its acknowledged duty to tell sellers of prepaid wireless “the amount” of tax owed by retail purchasers if it cannot explain how to properly calculate the amount of monthly tax due on prepaid airtime that is not sold on a monthly basis. That is why the present case involves an “estimated” assessment unrelated to any identified subscribers, determination of any subscribers’ street address/place of primary use, or anything else for that matter; it is simply a made-up number. CP 371.

**B. The Department’s discussion of whether a retail seller has a duty to collect the tax from the retail buyer is irrelevant to the statute’s express provision that sellers have no duty to collect the tax on sales to “buyers” who are “not subscribers”.**

Even if the statute were deemed to impose E-911 tax on prepaid wireless subscribers (which as discussed above it does not), the statute expressly provides that radio communications service companies are *not* required to collect the tax on any sale to a “buyer” that “was not a sale to a subscriber.” RCW 82.14B.200(1). Thus, under the plain language of the statute, even if the tax were imposed on prepaid subscribers, TracFone had no duty to collect tax on its wholesale sales of prepaid wireless airtime to third party retailers such as Wal-Mart, Safeway, Radio Shack, Target, etc, because those “buyers” are “*not* subscribers.”<sup>6</sup>

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<sup>6</sup> It is undisputed that more than 85% of TracFone’s sales are wholesale sales to third party retailers. CP 370, ¶ 9, Resp. Br. at 32.

Ignoring the plain language of the statute and reasoning backwards from its desired result, the Department contends that TracFone must have a duty to collect tax the Department presumes is owed by retail purchasers. The Department reasons that *someone* must be required to collect the tax and it contends that the required someone is not the retail store, which actually sell the prepaid airtime to the retail purchaser. Resp. Br. at 34. According to the Department, the “retail store that [re]sells TracFone[ branded] phones and airtime cards do [sic] not provide radio communications services.”). *Id.*

There are two fundamental errors with the Department’s contention. First, the retailer’s status as a radio communications service company” is simply irrelevant under the plain language of the statute, which only requires that the “buyer” is “not ... a subscriber” – it is undisputed that TracFone’s wholesale buyers are “not subscribers.” Second, the statute specifically defines the term “radio communications service company” to “include ... nonfacilities-based resellers,” RCW 82.14B.020(6). Both TracFone and the retailers are “nonfacilities-based resellers” of wireless airtime provided by unrelated facilities based carriers.<sup>7</sup>

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<sup>7</sup> As the Department concedes “TracFone does not own or operate any wireless network facilities.” Resp. Br. at 3, *citing* CP 162.

Ironically, the Department relies on an analogy to the sales tax collection statute to support its position that TracFone should be deemed to have a duty to collect E-911 tax on wholesale sales to buyers who are not subscribers. Resp. Br. at 34, *citing* RCW 82.08.050. The flaw in the Department's analogy can be seen in the fact that the retailer, not TracFone, is the person who collects the sales tax owed by buyers on their retail purchase of prepaid wireless airtime cards. RCW 82.32.520(3)(c). As has been previously noted, the sales tax collection statute, RCW 82.08.050, and the E-911 tax collection statute are structurally identical. CP 267-68. As with sales tax, there is no statutory duty to collect the tax when the seller sells to a wholesale buyer who does not owe the tax.<sup>8</sup>

The Department also contends, without explanation, that the statute's express provision that a seller has no duty to collect the tax if it establishes the wholesale nature of its sale by obtaining a resale certificate

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<sup>8</sup> The Department also says, without explanation, that "TracFone's argument is no different than the argument the Public Port Association made in *Washington Public Port Ass'n v. Dep't of Revenue*, 148 Wn.2d 637, 62 P.3d 462 (2003). CP 34. There is no relationship between that case and this one. The Leasehold Excise Tax involved in the *Port Association* case does not have a comparable provision regarding collection of tax on wholesale sales. RCW 82.29A.050(1) provides that Leasehold Excise Tax "shall be paid *by the lessee to the lessor* ... at the same time as payments are due to the lessor for use of the property from which the leasehold interest arises." Lessors who fail to collect the tax from their lessees are "fully liable" for the uncollected tax. The issue in *Port Association* was the validity of an administrative regulation that relieved a lessor of personal liability for tax it failed to collect from the lessee only if the lessor was also unsuccessful in collecting rent owed by the lessee and had so notified the Department of Revenue in writing. 148 Wn.2d at 646-47.

from its buyer “does not apply.” Resp. Br. at 35. It is undisputed that TracFone obtains resale certificates from the third party retailers to whom it make wholesale sales of prepaid wireless airtime. CP 119-125.

The Department’s next statement is also disconnected from the actual language of the statute, contending without explanation of the perceived relevance “TracFone is not *selling* radio access lines to the retailers.” Resp. Br. at 36 (emphasis added). RCW 82.14B.200 does not address sales of “radio access lines” (defined by statute as telephone numbers). Moreover, the record reflects that telephone numbers are not “sold” at all (either by TracFone or by the underlying carrier) but are merely assigned to activated handsets. CP 49, ¶ 6.3. In other words, TracFone does not sell radio access lines to anyone. The specific language of the statute provides that there is no duty to collect the E-911 tax when a “sale of the use of ... a radio access line *was not a sale to a subscriber.*” RCW 82.14B.200(1) (emphasis added).

If the tax applied to prepaid wireless, it is the sale (to a retail buyer) of a prepaid wireless airtime card (a block of minutes of *use* of airtime on a prepaid wireless handset) that triggers the statutory duty to collect from the subscriber any taxes that are owed by the subscriber. Thus, even if the 2002 statute were deemed to impose E-911 tax on prepaid wireless subscribers, the statute does not impose a duty on

TracFone to collect the tax its wholesale sales to “buyers” who are “not subscribers” and thus TracFone cannot be held liable for having failed to collect the tax on those sales.

**C. Any ambiguity that would arise from treating the Department’s contentions as if they were reasonable constructions of the language actually used by the Legislature in this tax imposition statute must be resolved in favor of the taxpayer.**

The Department does not dispute that “ambiguities in taxing statutes are construed ‘most strongly against the government and in favor of the taxpayer.’” *Qwest Corp. v. City of Bellevue*, 161 Wn.2d 353, 364, 166 P.3d 667 (2007), (quoting *Estate of Hemphill v. Dept’ of Revenue*, 153 Wn.2d 544, 522, 105 P.3d 391 (2005)).

Instead the Department attempts to re-characterize TracFone’s arguments regarding the statute’s imposition of tax on prepaid wireless subscribers, labeling them instead as arguments for an “implied exemption” from collecting the tax. Resp. Br. at 14, 16. Then, relying on that mis-characterization, the Department attempts to invoke the notion that exemptions from tax should not be “implied.” Resp. Br. at 15-16.

However, “a tax exemption presupposes a taxable status.” *In re Sehome Park Care Center, Inc.*, 127 Wn.2d 774, 778, 903 P.2d 443 (1995). Here, the Department’s presumption that the tax should be imposed on prepaid wireless subscribers does not make it so. To the

contrary, as discussed above, the Department's argument that the statute imposes tax on prepaid wireless subscribers isolates a single word out of context and fails to construe the language of the statute as a whole, disregarding rather than harmonizing the numerous provisions of the statute, which establish that it does not impose e-911 tax on prepaid wireless subscribers as currently written.

### CONCLUSION

For the reasons set forth above and in the Brief of Appellate, Ch. 341, Laws of 2002 does not impose E-911 tax on prepaid wireless subscribers. Even if the statute were deemed to impose tax on prepaid wireless subscribers, it does not require a seller to collect the tax on wholesale sales; sales to "buyers" who are "not subscribers." Accordingly TracFone respectfully requests the Court of Appeals to reverse the dismissal of its Complaint and remand the case to the Superior Court with instructions to enter summary judgment for TracFone, refunding all amount (including interest and penalties) paid for estimated uncollected E-911 tax or in the alternative for a refund of amounts assessed on TracFone's wholesale sales of prepaid wireless airtime.

DATED: December 8, 2008

PERKINS COIE LLP

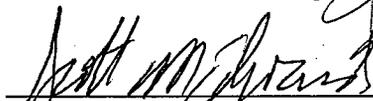
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**CERTIFICATE OF SERVICE**

The undersigned certifies that a copy of the foregoing document was served this day by hand delivery, at the following addresses:

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DATED this 8th day of December, 2008.

  
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