No. 92080-0

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Respondent,

v.

AVNET, INC.,

Petitioner.

BRIEF OF *AMICUS CURIAE*
THE ASSOCIATION OF WASHINGTON BUSINESS
SUPPORTING THE PETITION FOR REVIEW

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I. INTRODUCTION

The Association of Washington Business "AWB" supports the review of the Court of Appeals' published opinion in this matter. The Court of Appeals has failed to follow legal precedent and failed to require the Department of Revenue (DOR) to follow its duly adopted regulation.

Statutes and regulations are enacted to provide certainty for all parties subject to them. The legislative and rule making processes are designed to allow citizens to participate and comment on proposed laws. Once they are enacted, businesses rely on them to be applied and enforced in a consistent matter. In addition, businesses rely on how the law is interpreted by the courts.

It is a basic legal tenet that a lower court must follow the precedent of the higher court. In this case, the Court of Appeals failed to follow the legal precedent set by this Court and the United States Supreme Court.

Allowing the Court of Appeals decision to stand could result in a chilling effect on business in Washington State. Persons doing business in Washington State would not know which law may apply at any given time. A state agency, like DOR, will be able to pick and choose which law or rule it wants to apply regardless of legal precedent. The Court of

Appeals decision allows DOR to its own rules and regulations when they do not favor it, only enforcing them when they benefit the agency.

The Court may accept review of a decision of the Court of Appeals where "the petition involves an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b)(4). The Court may also grant review when an opinion is in conflict with precedent, supporting review under RAP 13.4(b)(1)-(2). AWB contends that the failure of the Court of Appeals to follow legal precedent and the failure of DOR to follow its own rules are issues of substantial public interest.

The AWB respectfully request the Court grant review of the Court of Appeals decision.

II. IDENTITY AND INTEREST OF AMICI CURIAE

AWB is Washington State's Chamber of Commerce and principal representative of the state's business community. AWB is the state's oldest and largest general business membership federation, representing the interests of approximately 8,000 Washington companies who, in turn, employ over 700,000 employees, approximately one-quarter of the state's workforce. AWB members are located in all areas of Washington, represent a broad array of industries, and range from sole proprietors and very small employers to the large, recognizable, Washington-based

corporations which do business in all parts of the state and world. AWB members include all types of employers that conduct business both in at out of state. Our members rely on the consistent application of laws in every jurisdiction. AWB members have a vested interest in the outcome of this matter.

III. ISSUES OF CONCERN TO *AMICUS CURIAE*

Among the issues presented in the Petition for Review, this memorandum seeks to address:

1. Did the Court of Appeals err when it refused to apply controlling United State Supreme Court precedent on an issue of federal constitutional law based on speculation that the case had been "overruled by implication"?

2. Did the Court of Appeals err when it permitted DOP to abandon its long-standing interpretation of rule193, and to retroactively apply a new interpretation of the rule without notice or amendment, on the grounds that it was merely "interpretive" and, therefore, not binding?

IV. STATEMENT OF THE CASE

AWB adopts and joins in the Statement of the Case in the Brief of Petitioner, Avnet, Inc.

V. ARGUMENT

A The Court of Appeals Failed to Follow Controlling Precedent of the Washington Supreme Court and the United State Supreme Court

As was pointed out in the Petition for Review, the Court of Appeals failed to follow the United States Supreme Court's decision in *Norton Co v. Dep't of Revenue of Ill.*, 340 U.S. 534 (1951) and this Court's decision in *B.F. Goodrich Co. v. State*, 38 Wn.2d 663, 231 P.2d 325 (1951). The DOR argued to the Court of Appeals and in its Answer that *Norton* is no longer good law and simply ignored *Goodrich*. However DOR fails to cite a single case, from any federal or state court, let alone the United States Supreme Court that directly or implicitly repeals *Norton*. DOR relies on three cases for the proposition that *Norton* has been implicitly overruled. *Tyler Pipe Industries, Inc. v. Dep't of Revenue*, 483 U.S. 232 (1987); *Standard Pressed Steel Co. v. Dep't of Revenue*, 419 U.S. 560 (1975); and *General Motors Corp. v. Washington*, 377 U.S. 436 (1964). Contrary to DOR's suggestion, *General Motors* explicitly applied *Norton* in holding that GM's sales of its Pontiac and Oldsmobile brands were not dissociated from the company's Washington activities. 377 U.S. at 448. GM employed resident district managers for those brands who regularly met with Washington dealers "an average of at least once a

month" to "discuss and work out with the dealer the 30-, 60-, and 90-day projection of orders" – Washington activities clearly associated with sales to those dealers. 377 U.S. at 444.

While DOR relies on the fact that the taxpayers in *Tyler Pipe* and *Standard Pressed Steel* cited *Norton* in their briefs, DOR Answer at 7-8, it fails to inform the Court that DOR's own briefs in those cases did ***not*** argue that *Norton* was impliedly overruled, only that the facts in those cases were distinguishable from *Norton*. *See* 1986 WL 7282567 (Tyler Pipe) and 1974 WL 186396 (Standard Pressed Steel).

As DOR acknowledges, the U.S. Supreme Court's Commerce Clause jurisprudence requires "that a state must have a connection or 'nexus' with the taxpayer ***and*** with the transaction or activity it seeks to tax." CP 356 (emphasis added). Under *Norton* and *Goodrich*, dissociation occurs when there is a nexus with the taxpayer (i.e. the taxpayer has an office in the state) but there is no nexus with the particular category of sales transactions the state seeks to tax.

None of the cases DOR alleges implicitly overruled *Norton* assert that there has been any change to the constitutional requirement of nexus with the transaction. To the contrary, after *Tyler Pipe*, the Court expressly reaffirmed that "there must be a connection to the activity itself, rather

than a connection only to the actor the State seeks to tax." *Allied-Signal, Inc. v. Director of Tax'n, 504 U.S. 7768(1992).* In light of the Court of Appeals' recognition that the facts in this case are indistinguishable from *Norton* and *Goodrich,* it was error not to follow those controlling precedents. To allow the Court of Appeals to ignore the legal precedent of *Norton* and *Goodrich* creates a confusing landscape, where businesses cannot trust any court decision when deciding whether a tax applies or not. AWB requests that this Court grant the Petition for Review based on the Court of Appeals failure to follow legal precedent.

B. DOR Cannot Choose to Ignore Its Duly Adopted Rules when it Benefits the Agency.

Businesses and individuals rely on continuity in the law; it creates a level playing field for all parties involved. If a business or individual does not like the law, they can seek to have it changed or decide to not do business in the particular jurisdiction. To do what the Court of Appeals did in this matter would break such continuity and have a negative impact on business in Washington.

DOR has decided to reinterpret its own rule mid-stream. In *Ass'n of Wash. Bus. v. Dep't of Revenue,* 155 Wn.2d 430, 120 P.3d 46 (2005) this Court found that many of DOR rules are "interpretive rules". The AWB decision has been misinterpreted by DOR to say that the agency can

ignore its own rules. If this is the case, then tax payers cannot rely on those interpretations when determining if an activity is taxable or not. What *AWB* says is that an interpretive rule is not binding on the courts when determining the law. Duly adopted agency rules are binding on the agency until properly prospectively changed through formal rule making process under the Administrative Procedures Act. *See Deffenbaugh v. DSHS,* 53 Wn.App. 868, 871, 770 P.2d 1084 (1989) ("Administrative agencies are bound by their own rules."); *Silverstreak, Inc. v. Dep't of Labor and Indus.*, 159 Wn.2d 868, 902, 154 P.2d 891 (2007) ("It is self-evidently unfair to permit the Department to adopt and publicly distribute an interpretive policy memorandum and later deny the memorandum's plain reading."). In this case, not only was WAC 458-20-193 duly adopted under the APA, but DOR has published numerous determinations since shortly after its adoption expressly applying dissociation. See Opening Brief of Respondent/Cross-Appellant, Avnet, Inc. at 25 (listing representative published determinations applying dissociation under Norton and Rule 193). DOR's published determinations are statutorily identified as "precedential." RCW 82.32.410.

In this case, DOR suggests that the taxpayer could and should have asked for "tax reporting instructions" under RCW 82.32A.020, meaning

that taxpayers cannot rely on the plain language of the rules and cannot rely on the agency following its rules. Requiring every taxpayer to seek "individual tax reporting instructions" in lieu of following duly adopted regulations, it not workable for either business or the agency.

The Court of Appeals decision essentially makes all "interpretive rules" meaningless. What will result? Taxpayers might as well completely ignore them, as the Court of Appeals did in its opinion – making no effort to determine what the rule says, since what it says is meaningless.

Had the Court of Appeals actually analyzed Rule 193, it would have found that the rule is a reasonable construction of the B&O tax statutes. The taxable event for wholesaling B&O tax is the seller's transfer of possession of goods to the buyer for consideration. RCW 82.04.270, 82.04.040(1). Rule 193 reasonably construes this event as occurring where the buyer "first either tak[es] physical possession of the goods or exercises dominion and control over them." WAC 458-20-193(2)(d). As DOR explained in a precedential published determination, "***the Rule covers both actual possession and constructive possession***. 'Actual possession means that the goods are in the personal custody of the person ...; whereas, constructive possession means that the goods are not

in actual, physical possession, but that the person ... has dominion and control over the goods.'" Det. No. 14-0157, 33 WTD 539, at 543 (2014) (emphasis added; internal citations omitted). As the trial court correctly held, in Avnet's third party drop shipped sales, Avnet's purchaser obtained *constructive* possession of the goods when it exercised dominion and control over them by instructing Avnet to ship the goods to a third party.[1]

Litigation will likely increase because every "interpretive rule" is suspect and should be challenged by every taxpayer. It could be argued as malpractice not to challenge every rule, since they all could be subject to change without notice. Even if the rule makes sense, DOR could change the interpretation at any time. Why would anyone pay a particular tax until they receive a specific demand from DOR?

Worse yet, the Court of Appeals' decision could be used by every state agency to ignore their own rules. Why have any rules if the agency can change its "interpretation" at any stage in the process? The Court of Appeals decision has created a system where business cannot rely on a consistent application of the law. This decision is bad for business, which

[1] As this Court has held, under RCW 82.04.040 a seller "has made a sale to the purchaser within the revenue acts of the state" when the seller tenders the goods to a common carrier "and sends it on its way to the purchaser." *St. Regis Paper Co. v. Washington Tax Comm'n*, 63 Wn.2d 564, 569, 388 P.2d 520 (1964).

results in businesses leaving for more consistent stable environments. Lost business means lost jobs.

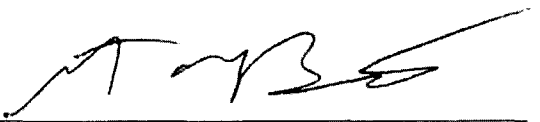
This Court should not allow DOR or any agency to pick and choose which rule they will apply and which they will ignore in any particular case. Businesses need to be able to count on a consistent interpretation and application of the agency rules. If this is undermined then a business in Washington would have to assume that any law may potentially change, regardless of the past interpretation or court ruling. If the uncertainty becomes too great, the result is loss of business and ultimately loss of jobs.

VI. CONCLUSION

For the reasons stated above, AWB urges this Court to grant the petition.

DATED this 6th day of October, 2015.

THE ASSOCIATION OF WASHINGTON BUSINESS

By 

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Dear Clerk:

Please find attached for filing in the above-referenced matter, electronic copies of the following documents:

- Motion for Leave to file Memorandum of Amicus Curiae of AWB
- Brief of Amicus Curiae of AWB
- Declaration of Service

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