NO. 93121-6

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WASHINGTON STATE
SUPREME COURT

Court of Appeals No. 73663-9-1

SUPREME COURT OF THE STATE OF WASHINGTON

Morpho Detection, Inc.,

Petitioner,

v.

State of Washington, Department of Revenue

Respondent.

PETITION FOR REVIEW

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I. Introduction

The Division I Court of Appeals opinion sought to be reviewed, holds that RCW 82.04.190(6)'s plain language[1] (defining the word "consumer" to include companies working on "structures under, upon, or above real property of or for the United States") is unambiguous and means that either the work must be under, upon, or above real property of the United States or the work must be for the United States. The Court of Appeals reversed the trial court's interpretation of the same language rejecting arguments in support of the trial court's interpretation alleging they were not supported by authority. But, legal authority is not required to interpret unambiguous plain language. The decision to be reviewed conflicts with decisions of this Court regarding statutory construction, and the issues raised by this petition are matters of substantial public interest that should be determined by the Supreme Court.

II. Identity of Petitioner

The Petitioner is Morpho Detection, Inc., ("Morpho") the Respondent below and the Plaintiff in the Superior Court.

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[1] RCW 82.04.190(6) provides: Any person engaged in the business of constructing, repairing, decorating, or improving new or existing buildings or other structures under, upon, or above real property of or for the United States, any instrumentality thereof, ... including the installing or attaching of any article of tangible personal property therein or thereto, whether or not such personal property becomes part of the realty by virtue of installation; ... . Any such person shall be a consumer within the meaning of this subsection in respect to tangible personal property incorporated into, installed in, or attached to such building or other structure by such person;

III. Citation to Court of Appeals Decision

Morpho seeks review of the decision of the Court of Appeals, Division One, in *Morpho Detection, Inc. v. State of Washington, Department of Revenue,* Cause No. 73663-9-1. The decision was filed March 28, 2016. (Slip op. attached at Appendix A-1 to 14).

IV. Issues Presented

1. Is legal authority required to interpret unambiguous plain language?

2. Is language susceptible to two fundamentally different interpretations unambiguous?

3. Must an ambiguous tax statute be given the interpretation most favorable to the putative taxpayer?

4. Must a person engaged in the business of constructing, repairing, decorating, or improving new or existing buildings or other structures do such work under, upon, or above real property of or for the United States to be a consumer pursuant to RCW 82.04.190(6)?

5. If the company performing work on structures for the federal government is a consumer even when such work is not on land in which the federal government has an interest, does the tax violate the Supremacy Clause of the United States Constitution?

V. Statement of the Case

Statement of Facts

Morpho is a leading manufacturer of explosive detection machines (EDMs). The Transportation Security Administration ("TSA") contracted with Morpho for the purchase of hundreds of EDMs which were to be deployed by TSA throughout the country. TSA is part of the United States Department of Homeland Security, a Department of the United States federal government. CP 32 (Decl. of Piper).

The EDMs material to this litigation have all been deployed and operated at airports in Washington State. There are 46 such machines. 41 of the machines were deployed at SeaTac Airport and five machines were deployed at Spokane Airport. CP 32 – 33 (Decl. of Piper).[2]

The Department alleges that Morpho installed the machines at the airports and thereby improved the airport buildings.[3] *See e.g.,* Br. of App. at 11. The locations at which the 46 machines are deployed, the locations at which the Department alleges Morpho performed the business of improving a building, are not real property of or for the United States.

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[2] The Court of Appeals denominated the machines as systems following the terminology of the Department of Revenue, the Department. *See, e.g.,* Slip op. at 1 and 2 *and see,* Reply Br. of App. at 1. Morpho sold machines, and the alleged use of the machines is what is at issue.

[3] Morpho disputes that it performed such installation and/or that such installation improved any building. For purposes of its motion for summary judgment, such allegations were assumed true.

The real property on which the machines sit is under the exclusive control and belongs to the airports at which the machines are deployed. CP 28 - 31 (Declarations of Anderson and McDevitt). The United States has no lease or other real property right to or interest in such real property. *Id.*[4]

For the period January 1, 2002, through March 31, 2006, the Department assessed Morpho sales and/or use tax plus interest and penalties measured by what it understood to be the value (with minor adjustments) of the 46 EDMs manufactured and sold by Morpho to TSA that were subsequently deployed by TSA in Washington.[5] CP 33 (Decl. of Piper). The DOR assessment contended that such tax was due on the theory that Morpho was a consumer of the EDMs deployed by TSA in Washington under RCW 82.04.190(6). *Id.* To satisfy the assessment, Morpho paid DOR $5,413,642.38. *Id.*

Statement of Proceedings

Morpho sought refund under RCW 82.32.180 which provides for a *de novo* proceeding before the Thurston County Superior Court.[6] CP 10 -

[4] TSA does have a lease in other airport property.
[5] The adjustment related to a deduction for the value of the assembly work performed on site in Washington.
[6] The Court of Appeals incorrectly stated that Morpho "challenged the assessment before the Federal Aviation Administration's Office of Dispute Resolution for Acquisition." Slip op. at 3. Morpho in fact sought an adjustment to its contract for an after imposed tax. It did not challenge the assessment through the federal dispute resolution process. CP 593.

15 (Amended Complaint). The Department never filed an Answer to Morpho's Amended Complaint.[7]

Morpho brought a motion for summary judgment raising two issues:

1. Is Morpho the type of person to which RCW 82.04.190(6) applies?
2. Does the statute apply when the work is not being performed under, upon, or above real property of or for the United States?

CP 19 (Mot. For Summary Judgment). The Department brought a cross motion on both issues, and both parties filed various declarations in support of their motions. *See*, CP 60 (Dep't. Opp. to Morpho Motion for Summary Judgment), CP 28 – 35 (Declarations of Piper, McDevitt and Anderson); and CP 36 – 54 and 111 – 620 (Declarations of Huffman and Weissman).

As to the first issue, the Superior Court ruled that there was a genuine issue of material fact and denied the motion. RP 29. CP 646 (Order Granting Plaintiff's Motion for Summary Judgment).

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[7] RCW 82.32.180 does not require an Answer to be filed, and an examination of the Clerk Papers demonstrates that none was filed. The Amended Complaint raises additional grounds for granting Morpho the relief it seeks that have not been ruled on by the Superior Court and are not ripe for review. Morpho contends, *inter alia*, that it did not install the EDMs, did not improve any building, that the tax unconstitutionally discriminates against interstate commerce and that the tax violates the Art. VII, CL. 2 of the U.S. Const., the Supremacy Clause. Thus, if the Court of Appeals is sustained, the matter will proceed to trial in the trial court. If the Court of Appeals is reversed, the matter will be concluded.

As to the second issue, the Superior Court entered a finding that "no genuine issue of material fact exists" as to "whether any such work occurred 'under, upon, or above real property of or for the United States'" and concluded that Morpho "is not a "consumer" under RCW 82.04.190(6) and RCW 82.12 in regards to the deployment of explosive detection machines at Washington airports during the tax period at issue in this matter." *Id.* The Court therefore entered summary judgment in favor of Morpho. *Id.*

The Superior Court reasoned that the term "of or for" as used in RCW 82.04.190(6) modified the term "real property." Thus, for Morpho to be a "consumer," Morpho would have to have done work either under, upon, or above real property of the United States (property which the United States owns) or under, upon, or above real property for the United States (real property in which the United States holds a lesser property interest such as a lease, an easement, or a license). RP 31.

Prior to consideration of the motion for summary judgment, the Superior Court ruled on various motions regarding the declarations filed in support of the parties' motions. RP 8 and 10.

Recognizing the import of the fact that the real property was not of or for the United States, the Department moved to disqualify Morpho's witnesses from stating such fact even though they have personal knowledge of the fact. CP 55 – 58 (Dep't. Motion to Strike).

The Superior Court granted the Department's motion and struck from the Declaration of Anderson and the Declaration of McDevitt the precise sentence in which both declarants testified that the real property at which the EDMs were and are deployed is not real property of or for the United States. RP 8.

The Court explained that "the facts that ... the court ultimately relies on as it relates to the real property status – who owns it, who doesn't own it, who has an interest, who doesn't have an interest – separate and apart from my interpretation of the meaning, are separately set out in both of the declarations by Mr. Anderson and Mr. McDevitt." RP 9. Those separately set out additional facts were not stricken from the Declarations[8] and are the only evidence in the Record regarding who has and does not have a real property interest in the property at which the EDMs are deployed. Those Declarations establish as a matter of undisputed fact that the United States has no ownership interest, leasehold interest, or other real property right to or interest in the property at which the EDMs are deployed. *See,* RP 30 – 31.

The Superior Court reviewed the references the Department contended gave the United States some real property interest in the locations at which the machines were deployed.[9] The Court did not find

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[8] We do not mean to imply that the Department even moved to strike those additional statements of fact. It did not.

[9] The references were to an administrative office and/or a break room, not to the locations where the EDMs were deployed. RP 31.

those references sufficient to create a genuine issue of material fact as to whether or not where the EDMs were installed was under, upon, or above real property of or for the United States.[10] RP 31. Therefore, the Court granted Morpho's motion for summary judgment on the second issue.

The Department filed an appeal with Division II. Division II transferred the matter to Division I. See, Appendix B.

At the Court of Appeals, both parties argued that RCW 82.04.190(6) was unambiguous. But, the Department argued that the antecedent for the word "of" was "real property" and the antecedent of the word "for" was "constructing, repairing, decorating, or improving new or existing buildings or other structures under, upon, or above real property" while Morpho argued that the words "of" and "for" had the same antecedent, "real property." *Contrast,* Br. of App. at 20-21 with Br. of Resp. at 16-17.

The Court of Appeals undertook *de novo* review. Slip op. at 4.

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[10] The Superior Court also expressly rejected "the defendant's argument that real property is for the United States just means for the benefit of the United States. It clearly relates back to real property; so if there is some sort of real property interest that the government has, which would be a lease, a license, an easement, or something of that issue. And the defendant has presented no evidence and has not created a genuine issue of material fact on that issue." RP 30 – 31. Despite this express ruling, the Department's third assignment of error reads, "the Superior Court erred in ruling that the United States must have a beneficial interest in the real property where buildings are improved for the use tax to apply." Br. of App. at 2. This phrasing of the issue might make it appear that the Superior Court agreed with the Department's argument that real property is for the United States just means for the benefit of the United States. Later in its Brief, the Department recognizes that the Court ruled that RCW 82.04.190(6) "applies only when the federal government owns, or has some other property interest in the real property on which the work is performed." Br. of App. at 21.

The Court of Appeals began its analysis by reciting several rules of statutory construction[11] such as:

(i) Statutory interpretation begins with the statute's plain meaning;

(ii) Plain meaning is discerned "from the ordinary meaning of the language at issue, the statute's context, related provisions, and the statutory scheme as a whole.'"

(iii) "While we look to the broader statutory context for guidance, we must not add words where the legislature has chosen not to place them."

(iv) "[W]e must construe statutes such that all of the language is given effect.'"

(v) If a "statute is unambiguous after a review of the plain meaning, the court's inquiry is at an end."

(vi) When a statute is ambiguous, we will "'resort to principles of statutory construction, legislative history, and relevant case law to assist in [its interpretation].'"

(vii) A statute is ambiguous if it can be reasonably interpreted in more than one way.

(viii) A statute is not ambiguous simply because different interpretations are possible.

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[11] Oddly, the Court ended its opinion with the following footnote: "Because we agree with the parties that the statute is unambiguous, we do not address the arguments on various rules of statutory construction." Slip op. at p. 14, n. 6. One argument not addressed was Morpho's argument that an ambiguous tax statute must be construed in favor of the putative taxpayer and against the government.

(ix) We are not obliged to discern any ambiguity by imagining a variety of alternative interpretations.

Slip op. at 5.

The Court then quoted the statute imposing a tax on using tangible personal property and defining "use." RCW 82.12.010. Before addressing the issues and arguments in this case, even though RCW 82.04.190(6) is a statute defining the party subject to tax and not a tax exemption statute, the Court next stated, "[e[xemptions to this tax are narrowly construed and the taxpayer claiming an exemption has the burden of proving that he or she qualifies." Slip op. at 6.

The Court of Appeals next characterized "the sole point of contention" as "the plain meaning of the phrase 'for the United States', Slip op., at 7,[12] and stated the parties differing interpretations. *Id.*

The Court found Morpho's arguments that the rules of grammar require the antecedents for the words 'of or for' to be identical unpersuasive "because Morpho cites no authority" in support of the arguments. Slip op. at 8.[13] Similarly, the Court was unpersuaded by

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[12]The issue is more correctly stated as: What are the antecedents of the words "of or for".

[13] Parenthetically, the Court wrote that it need not consider arguments unsupported by authority. Morpho did cite *City of Spokane v. Dep't of Revenue*, 104 Wn.2d 253, 258, 587 P. 3d 1206 (2001) for the proposition that absent ambiguity, courts rely on the plain language of the statute, *Vita Foods Products v. State*, 91 Wn.2d 132, 587 P.2d 535 (1978) for the proposition that Courts should and do not construe an unambiguous statute and *Group Health v. Department of Revneue*,106 Wn.2d 391, 722 P.2d 787 (1986) for the proposition that if a tax statute is ambiguous, the statute must be construed most strongly against the taxing authority, before Morpho offered its defense of the trial court's reading of the statute consistent with its plain language.

Morpho's arguments that the words "under, upon, or above real property" must be tied to the phrase "of or for the United States" for the words to have substantial meaning as everything is under, upon or above real property because Morpho cited no authority for the proposition. Id. at 8.[14]

The Court also disagreed with Morpho's argument that "real property for the United States" means "the United States has an easement, lease, right to possess or other such interest in the real property" again because Morpho cited no authority for its claim that the ordinary meaning for the language at issue refers to a property interest held by the United States.[15] Additionally, the Court found Morpho's arguments strained because the phrase "real property for the United States" allegedly does not easily convey a reference to real property in which the United States has an interest but does not own. Id. at 9.[16]

The Court of Appeals also reasoned that Morpho's interpretation leads to absurd results because the same language (real property of or for) appears elsewhere imposing tax and elsewhere in an exemption from the

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[14] The Court also rejected this argument on the basis that the words "under, upon, or above real property" are the antecedent for the phrase "of the United States" even though according to the Court they are not the antecedent for the phrase "for the United States." The actual statutory phrase, however, is "of or for the United States."

[15] Morpho did cite RCW 82.04.190(4) and RCW 82.04.050(2)(b) for support.

[16] The statutory phrase is "real property of or for the United States" not the just the phrase "real property for the United States." Reading the whole phrase as it appears in the statute clearly means "real property which the United States owns or in which the United States has a lesser interest." Morpho's arguments regarding the meaning of the phrase "real property for the United States" were in response to the Department's argument that the trial court gave no meaning to the phrase "for the United States" and that such phrase was meaningless. *See,* Br. of Resp. at 17 n. 3. The Court of Appeals appears to have focused on the half phrase "for the United States" rather than the full statutory phrase "real property of or for the United States" in determining what the plain language means.

tax for the United States. The Court believed that if the same language was given the same meaning Morpho contends is correct in all the statutes,

> we would necessarily have to conclude that RCW 82.04.050(12) does not exclude from the sales tax work done for the federal government on land which the federal government holds no interest. This result is absurd for at least two reasons. First, it is contrary to the legislative scheme which clearly seeks to avoid imposing a sales tax on the federal government and instead relies on the use tax. And second, imposing such a tax on the United States is likely unconstitutional and the legislature surely did not intend such a result.

Slip op. 12-13.[17]

Based on the above, the Court of Appeals reversed and remanded for entry of partial summary judgment in favor of the Department holding that the "use tax applies to a contractor who either installs tangible personal property on real property owned by the federal government or for the federal government. In the latter circumstance, it is irrelevant whether the United States also has some interest in the real property upon which the work is done." Slip op. at 13.[18]

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[17] The Court of Appeals did not understand that (i) RCW 82.04.050(12) does not generally exclude the federal government from sales and use tax. It only excludes sales to the federal government from sales and use tax when certain work is done on real property of or for the United States; (ii) The United States generally falls within the definition of "consumer" when it buys tangible personal property. *See generally*, RCW 82.04.190 and (iii) The general exemption from sales tax the United States enjoys stems from the Supremacy Clause of the United States Constitution and is reflected in RCW 82.08.0254 and RCW 82.12.0255 exempting from tax any sale or use which the State is prohibited from taxing under the U.S. Constitution.

[18] Such a holding results in the tax being unconstitutional under the Supremacy Clause for the reasons explained at p. 19-20, *infra*.

VI. Summary of Argument

The Superior Court read RCW 82.04.190(6) and applied its unambiguous plain language in concluding that the words "of or for" modified real property. The Court of Appeals reversed apparently finding the Superior Court's reading unreasonable and Morpho's arguments in support thereof "unsupported by authority or other persuasive argument." But, no such authority is necessary if the statutory language is plain and unambiguous as the Court of Appeals held.

If the statute is ambiguous, it must be construed in favor of Morpho because the statute is a taxing statute, not an exemption statute. But, the Court of Appeals cited the rule of construction regarding exemptions before rejecting Morpho's arguments and the trial court's interpretation.

RCW 82.04.190(6) is clear. The statutory words "of or for" modify "real property". In context, the word "for" must relate to some real property interest less than fee title because in the phrase "real property of or for the United States," "for" follows the word "of" and "of" relates to a fee interest in the real property. The Court of Appeals interprets "for" as relating to work done on real property. Not only is this interpretation wrong and out of context, but it causes the statute to be unconstitutional.

VII. Argument

A. Standard of Review

The interpretation of a statute is a question of law reviewed *de novo*. *Dep't of Ecology v. Campbell & Gwinn*, 146 Wn.2d 1, 43 P.3d 4 (2002)

B. Where Statutory Language Is Unambiguous, Its Meaning Is Derived From Its Language Alone.

> When interpreting a statute, we first look to its plain language. If the plain language is subject to only one interpretation, our inquiry ends because plain language does not require construction. Where statutory language is plain and unambiguous, a statute's meaning must be derived from the wording of the statute itself. Absent ambiguity or a statutory definition, we give the words in a statute their common and ordinary meaning.

Homestreet, Inc. v. State, Dep't. of Revenue, 166 Wn.2d 444, 451, 210 P. 3d 297 (2009) (citations omitted).

While this Court has indicated that it is correct to take into account the statutory context, basic rules of grammar, any special usage stated by the legislature on the face of the statute, and even background facts of which judicial notice could be taken and which the legislature would have been aware when it passed the statute, the plain meaning of an unambiguous statute is still derived from what the Legislature has said in its enactments. *Dep't of Ecology v. Campbell & Gwinn*, 146 Wn.2d 1, 43 P.3d 4 (2002). Therefore, it is reversible error for a Court of Appeals to

employ an agency interpretation to construe a statute without first determining that the statute is ambiguous. *Cerrillo v. Esparza*, 158 Wn.2d 194, 142 P.3d 155 (2006).

Here, the Court of Appeals rejected the trial court's reading of the plain language because it was not supported by specific authority. Instead, the Court of Appeals construed the statute as did the Department. As a result, the Court of Appeals erred. The Court should have simply read the statute and derived its meaning from the words in the statute. No additional authority was necessary or proper as the statute is unambiguous.[19]

C. A Statute is Ambiguous if Susceptible to Two or More Interpretations.

If a statute remains subject to multiple interpretations after analyzing the plain language, it is ambiguous. *Burton v. Lehman*, 153 Wn.2d 416, 423, 103 P.3rd 1230 (2005). *Agrilink Foods, Inc. v. State, Dep't of Revenue,* 153 Wn.2d 392, 103 P.3d 1226 (2003) (A statute is ambiguous if it is susceptible to two or more reasonable interpretations,

[19] The Court of Appeals opinion could be read as presuming the agency's interpretation as correct, placing the burden of persuasion on Morpho and subjecting Morpho's arguments to scrutiny. Such an approach errs in not recognizing that Morpho's arguments were supporting the trial court's reading of the statute, that if more than one interpretation is possible the statute should have been held ambiguous and for the reasons discussed at p. 17, *infra*, ambiguous statutes are construed in favor of the taxpayer.

but it is not ambiguous merely because different interpretations are conceivable.)

The Superior Court read RCW 82.04.190(6) and applied its plain language in concluding that the words "of or for" modified real property. The Superior Court's reading was certainly reasonable. The Court of Appeals accepted the Department's interpretation which has the word "of" modifying "real property" and the word "for" modifying "constructing, repairing, decorating, or improving new or existing buildings or other structures under, upon, or above real property" For the reasons expressed below, we do not find such a reading reasonable, but even if it is, the statute is ambiguous.

D. Ambiguous Tax Statutes Are Construed Against the Taxing Authority and in Favor of the Taxpayer.

"If any doubt exists as to the meaning of a taxation statute, the statute must be construed most strongly against the taxing power and in favor of the taxpayer." *Ski Acres, Inc. v. Kittitas County*, 118 Wn.2d 852, 827 P.2d 1000 (1992) (*citing Puyallup v. Pac. Northwest Bell*, 98 Wn.2d 443, 448, 656 P.2d 1035 (1982) and *Vita Food Products v. State*, 91 Wn.2d 132, 587 P.2d 535 (1978)).

The reason for this rule of construction against the taxing authority is Wash. Const. Art. VII, Section 5 which provides: "No tax shall be

levied except in pursuance of law; and every law imposing a tax shall state distinctly the object of the same to which only it shall be applied." *See, Clemency v. State*, 175 Wn.2d 549, 290 P.3d 99 (2012) (tax on estate rejected).

RCW 82.04.190(6) is a statute that seeks to define the person liable for the use tax, a consumer. It must do so distinctly. If there is a doubt as to its meaning, the statute must be construed in favor of Morpho and against the Department.[20]

E. A Person Working on Structures Must Perform Such Work Under, Upon, or Above Real Property of or for the United States to be a Consumer Pursuant to RCW 82.04.190(6).

RCW 82.04.190(6) provides:

> (6) Any person engaged in the business of constructing, repairing, decorating, or improving new or existing buildings or other structures under, upon, or above real property of or for the United States, any instrumentality thereof, ... Any such person shall be a consumer within the meaning of this subsection in respect to tangible personal property incorporated into, installed in, or attached to such building or other structure by such person;

The unambiguous language of RCW 82.04.190(6) is that the specified activity -- constructing, repairing, decorating, or improving new

[20] The Court of Appeals may have thought that Morpho was seeking a tax deduction or exemption. See, Slip op. at 6 where it states that "Exemptions to this tax are narrowly construed and the taxpayer claiming an exemption has the burden of proving that he or she qualifies." Applying that burden to Morpho would be reversible error.

or existing buildings or other structures -- must occur "under, upon, or above real property of or for the United States." The trial court held, the words "of or for" modify "real property. RP 31. The trial court's reading is reasonable in context. The word "for" must relate to some real property interest less than fee title because in the phrase "real property of or for the United States," "for" follows the word "of" and the word "of" relates to a fee interest in the real property. Thus, for Morpho to be a "consumer," Morpho would have to have performed work under, upon, or above real property of the United States (property which the United States owns) or under, upon, or above real property for the United States (real property in which the United States holds a lesser property interest such as a lease, an easement, or a license). RP 31. Morpho did no work on such property. Therefore, it was entitled to summary judgment.

F. If Use Tax Applies Because a Contractor Works for the Federal Government and Installs Personal Property on Real Property in which the Federal Government Has No Interest, The Tax Would Violate the Supremacy Clause.

The Court of Appeals interprets "for" as relating to work on structures. Not only is this interpretation wrong and out of context, but it is facially unconstitutional. Property installed by a federal contractor on land on which the federal government has no interest will be subject to

two taxes while the general rule is that personal property installed on nonfederal property is subject to only one tax. *See,* RCW 82.04.190.

The definition of consumer includes any person who holds or uses any article of tangible personal property. RCW 82.04.190(1). It is a certainty that those with interests in the real property will hold or use the personal property. Therefore, those with interests in the real property on which the personal property is being installed will be subject to tax. The federal contractor who installs the personal property will be subject to a second use tax under the Court of Appeals interpretation of RCW 82.04.190(6).

The record before this Court confirms this facial discrimination. The EDMs at issue are used by the Port of Seattle and the airlines at the Spokane Airport. CP 28 – 31. Such use is not exempt under any statute. If Morpho is subject to a second use tax because it installed the EDMs for the United States, the EDMs would be subject to two taxes. That second tax arises because -- according to the Court of Appeals -- a person installing the machines for the United States on land in which the United States has no interest is a consumer subject to tax.

RCW 82.04.190(6) targets federal contractors for a special use tax and was challenged as facially discriminatory in *Washington v. United States*, 460 U.S. 536, 103 S. Ct. 1344, 75. L.Ed.2d 264 (1983). The tax

was sustained only because RCW 82.04.190(6) as interpreted by the Supreme Court left the Federal Government and federal contractors *better off* than other taxpayers under the tax system as a whole. 460 U.S. 541-42. *(emphasis in original).* But if federal contractors are subject to tax just because they work for the federal government and the owners of the real property interests are also subject to a second tax because they own, hold or use the personal property, the property contracted to be installed by the federal government is subject to two taxes while the general rule is that property installed on nonfederal property is subject to only one tax.

VIII. Conclusion

For the reasons expressed above, as well as the reasons discussed in the Brief of Respondent, Morpho Detection, Inc., the Petitioner, is entitled to have the Court of Appeals decision reviewed and reversed.

Respectfully submitted, this 14th day of April, 2016.

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Appendix A

Morpho Detection, Inc. v. *State of Washington, Department of Revenue*,

Cause No. 73663-9-1 (March 28, 2016)

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2016 MAR 28 AM 9:40

MORPHO DETECTION, INC.,	)	
	)	
	)	No. 73663-9-I
Respondent,	)	
	)	
v.	)	DIVISION ONE
	)	
STATE OF WASHINGTON, DEPARTMENT OF REVENUE,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: March 28, 2016

SPEARMAN, C.J. — The Washington State Department of Revenue (DOR) assessed use tax on Morpho Detection Inc.'s (Morpho) installation of security systems for the Transportation Security Administration (TSA) in the Seattle-Tacoma (Sea-Tac) and Spokane airports. Morpho paid the assessment and sought a refund under RCW 82.32.180, claiming that it was not a "consumer" and therefore not subject to the use tax. The trial court granted summary judgment and held that the contractor was not subject to the tax because it performed no work "under, upon, or above real property of or for the United States." RCW 82.04.180(6). DOR appeals.

We conclude that as a matter of law, Morpho is a "consumer" and therefore subject to the use tax under RCW 82.12.020. Accordingly, we reverse and remand for entry of partial summary judgment in favor of DOR.

FACTS

Morpho Detection Systems (Morpho) had two national contracts with the Transportation Security Administration (TSA) to manufacture and install explosive detection systems in airports, including the Sea-Tac and Spokane International Airports. The TSA issued a solicitation on November 3, 2001, for contractors capable of manufacturing and installing such systems. At that time, Morpho was one of two companies with explosive detection products already certified by the federal government. Morpho responded to TSA's request for proposals, describing the products as well as the planning, installation, maintenance, and training services it had to offer.

Morpho was awarded the contract and began manufacturing and installing explosive detection systems across the country, seeking to meet TSA's deadline of December 31, 2001. Morpho continued to negotiate terms with the federal government and the parties entered into two contracts for the manufacture and "site installation support" that set up a price-per-system that included system assembly and provided the government with the ability to order additional services. Clerk's Papers (CP) at 206.

Morpho assembled and installed 41 systems at Sea-Tac and 5 at the Spokane airport, receiving over $48 million from the federal government for its work. DOR performed an audit on Morpho's activities at the airports for the period of January 1, 2002 to March 31, 2006. Based on this audit, DOR

assessed a total tax of $5,423,645, including $4,191,799 in use tax. The amount of the tax was calculated based on the value of the personal property that Morpho had installed at the airports.

Morpho appealed the assessment to DOR's internal appeals division. The appeals division affirmed that Morpho owed use tax for installing the systems at the two airports. The decision was based primarily upon finding that Morpho "installed" the systems. CP at 659-70. The appeals division also interpreted RCW 82.12.020 and RCW 82.04.190(6) as requiring the tax to be collected when the business conducted is for the United States, even if not conducted on United States' property.

Morpho challenged the assessment before the Federal Aviation Administration's Office of Dispute Resolution for Acquisition (ODRA). Morpho argued that Washington's use tax was an "after-imposed tax" that should have been TSA's responsibility, not the contactor's. CP at 593. The ODRA disagreed, and found that it was not an after-imposed tax and affirmed DOR's interpretation of RCW 82.04.190(6). Morpho appealed the issue to the D.C. Circuit Court of Appeals. The Circuit Court denied the petition, holding that because Washington had not changed its definition of "consumer" since 1975, it was reasonable that Morpho should have known that it might be subject to use tax for its activities in Washington. Morpho Detection, Inc. v. Transp. Sec. Admin., 717 F.3d 975, 982 (D.C.Cir.2013).

Morpho then brought a tax refund claim in Thurston County Superior Court under RCW 82.32.180. Morpho moved for summary judgment on the issue of whether it fell under the definition of a "consumer" in RCW 82.04.190(6) and was therefore subject to the use tax. DOR cross-moved for partial summary judgment on the same issues. The trial court agreed with Morpho that the term "of or for" as used in RCW 82.04.190(6) modifies the term "real property." Verbatim Report of Proceedings (VRP) at 30. Thus, in order to meet the statutory definition of a "consumer," the work done by Morpho had to have been done either on real property "of the United States," i.e., owned by the United States or real property "for the United States," i.e., property in which the United States held a lesser property interest, such as "a lease, a license, an easement or something of that issue." VRP at 31. Because it was undisputed that the United States neither owned nor held a lesser property interest in Sea-Tac or the Spokane airport, the trial court ruled that Morpho was not a consumer and not subject to the use tax. DOR appeals the trial court's order granting summary judgment in Morpho's favor and the denial of its motion for partial summary judgment.

DISCUSSION

Because this case involves questions of statutory interpretation and review of a summary judgment order, our review is de novo. Flight Options, LLC v. Dep't. of Revenue, 172 Wn.2d 487, 495, 259 P.3d 234 (2011) (citing Lamtec Corp. v. Dep't of Revenue, 170 Wn.2d 838, 842, 246 P.3d 788 (2011)). Statutory

interpretation begins with the statute's plain meaning. Lake v. Woodcreek Homeowners Ass'n, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010). We discern plain meaning from the ordinary meaning of the language at issue, the statute's context, related provisions, and the statutory scheme as a whole. Id. (citing State v. Engel, 166 Wn.2d 572, 578, 210 P.3d 1007 (2009)). While we look to the broader statutory context for guidance, we must not add words where the legislature has chosen not to place them and we must construe statutes such that all of the language is given effect. Id. If the statute is unambiguous after a review of the plain meaning, the court's inquiry is at an end. Id.

When a statute is ambiguous, however, we will "resort to principles of statutory construction, legislative history, and relevant case law to assist in [its interpretation]." Yousoufian v. Office of King County Exec., 152 Wn.2d 421, 434, 98 P.3d 463 (2004) (quoting State v. Watson, 146 Wn.2d 947, 955, 51 P.3d 66 (2002)). "[A] statute is ambiguous if it can be reasonably interpreted in more than one way." Id. at 433-34, (quoting Vashon Island Comm. for Self-Gov't v. Wash. State Boundary Review Bd., 127 Wn.2d 759, 771, 903 P.2d 953 (1995)). However, a statute is not ambiguous simply because different interpretations are possible and we are not obliged to discern any ambiguity by imagining a variety of alternative interpretations. American Continental Ins. Co. v. Steen, 151 Wn.2d 512, 518, 91 P.3d 864 (2004).

The state imposes a use tax on "every person in this state ... for the privilege of using within this state as a consumer any: (a) Article of tangible personal property acquired by the user in any manner...." RCW 82.12.020(1)(a). In this context, "use" has its ordinary meaning, and "[w]ith respect to tangible personal property," means "the first act within this state by which the taxpayer takes or assumes dominion or control over the article of tangible personal property (as a consumer), and include[s] installation, storage, withdrawal from storage, distribution, or any other act preparatory to subsequent actual use or consumption within this state; . . . " RCW 82.12.010(6)(a). Exemptions to this tax are narrowly construed and the taxpayer claiming an exemption has the burden of proving that he or she qualifies. Glen Park Associates, LLC v. Dep't. of Revenue, 119 Wn. App. 481, 486, 82 P.3d 664 (2003).

Morpho conceded at trial that it installed the detection systems in Washington. It is undisputed that the federal government does not own or have any other interest in the real property upon which the airports are located. The question before us is whether Morpho's "use" of the systems falls within the privilege of using "as a consumer" under RCW 82.12.020. "Consumer" under RCW 82.04.190(6) means, in relevant part, the following:

> (6) Any person engaged in the business of constructing, repairing, decorating, or improving new or existing buildings or other structures under, upon, or above real property of or for the United States, any instrumentality thereof, or a county or city housing authority created pursuant to chapter 35.82 RCW, including the installing or attaching of any article of tangible personal property

> therein or thereto, whether or not such personal property becomes a part of the realty by virtue of installation....

(Emphasis added). Neither party argues that the statute is ambiguous, thus the sole point of contention is the plain meaning of the phrase "for the United States" as it is used in the statutory definition of "consumer."

DOR argues that under the statute, a contractor doing work for the federal government is a consumer and subject to the use tax in two circumstances. If the work is done on existing structures or buildings on real property "of," i.e., owned by the United States or if the work is done "for," i.e., on behalf of the United States. Br. of Appellant at 20-21. Thus, it argues that the antecedent to the word "of" is the term "real property," while the antecedent to the word "for" is the activity of "constructing, repairing, decorating or improving new or existing buildings or other structures. . . ." And because there is no dispute that Morpho's activity of installing systems for TSA in the state's airports was done for the United States, DOR contends Morpho clearly falls within the statutory definition of a "consumer." Id.

Morpho, on the other hand, contends that "of" and "for" must have the identical antecedent, which it argues is the term "real property." Thus, it argues that "real property of...the United States" refers to property owned by the United States and "real property ... for the United States" necessarily means real property in which the United States has a lesser property interest, such as a lease or an easement. Br. of Respondent at 16-17.

According to Morpho, DOR's reading of the statute fails because it violates normal rules of grammar. It contends that for DOR's reading to be correct, the rules of grammar require a comma or other punctuation after "real property."[1] It also argues that because "[t]he antecedents for the words 'of or for' need to be identical ... [DOR's] construction does violence to the English language." Id. at 14. These arguments are unpersuasive, however, because Morpho cites no authority in support of them. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (we need not consider arguments unsupported by authority.)

Morpho also contends that DOR's reading fails because it renders portions of the statute meaningless or superfluous. Br. of Respondent at 14-15. It argues that because everything is "under, upon, or above real property" in order to have meaning, "those words need to be tied to the phrase 'of or for the United States.'" Id. We disagree. First, Morpho cites no authority for this proposition.

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[1] Morpho never refers to the "last antecedent" rule, but its argument that "for the United States" refers back to "real property," appears to rely on the rule's application. The "last antecedent" rule is a rule of grammar employed to aid in discerning the plain meaning of statutory language. State v. Bunker, 169 Wn.2d 571, 578, 238 P.3d 487 (2010). The rule provides that qualifying or modifying words and phrases refer to the last antecedent. A corollary principle is that "'the presence of a comma before the qualifying phrase is evidence the qualifier is intended to apply to all antecedents instead of only the immediately preceding one.'" Id. (Quoting City of Spokane v. Spokane County, 158 Wn.2d 661, 673, 146 P.3d 893 (2006). But we do not apply the rule if other factors, such as context and language in related statutes, indicate contrary legislative intent or if applying the rule would result in absurd or nonsensical interpretation. Id. And while "the presence of a comma before the qualifying phrase is evidence the qualifier is intended to apply to all antecedents instead of only the immediately preceding one," (Sehome Park, 127 Wn.2d 774, 781-82, 903 P.2d 443 (1995)) the absence of a comma does not automatically indicate that the rule applies, nor does it require two qualifiers to have the same antecedent.

Second, the argument assumes the question. The words only have no meaning if one assumes, as Morpho argues, that the legislature intended the antecedent to both the words "of" and "for" to be identical and further assumes that antecedent to be the activity of "constructing, repairing, decorating or improving new or existing buildings or other structures." But this is not DOR's argument. DOR contends that under a plain reading of the statute, the antecedents are not identical. Indeed, the parties agree that the antecedent to word "of" are the words "under, upon, or above real property." Thus, under either party's reading of the statute the words retain their meaning.

Morpho's contention that "'[r]eal property is for' the United States" means "the United States has an easement, lease, right to possess or other such interest in the real property" also fails. Br. of Respondent at 16-17. First, Morpho cites no authority for its claim that the ordinary meaning of the language at issue refers to a property interest held by the United States. Morpho appears to rely solely on its contention that DOR propounded this meaning of "for the United States" in its opposition to Morpho's motion for summary judgment. Br. of Respondent at 17, n.14-15. Morpho appears to contend that because the trial court relied upon DOR's own definition, it should not now be heard to take a contrary position. Id. The argument is without merit. In its opposition brief, DOR made two points: First, that in the retail sales context the definition of consumer includes "work performed on real property *of or for* an owner, lessee, easement

holder, etc." CP at 69. And second, that the definition of "consumer" set out in RCW 82.04.190(4) includes "[a]ny person who is an owner, lessee, or has the right of possession to or an easement in real property," as an example of language that the legislature could have included in RCW 82.04.190(6) if that was its intention. CP 80. Neither argument suggests that "for the United States" should be read as meaning a less than fee simple ownership interest. Moreover, a dictionary definition of the word "for" is its use "as a function word to indicate the person or thing that something is to be delivered to . . . ."[2] Thus, ordinarily the phrase "for the United States" would be construed to refer to the United States as the recipient of an activity or tangible property, not the owner of an interest in real property.

Additionally, Morpho's interpretation is strained and leads to absurd results. It is strained because while "real property of the United States" is easily understood to refer to property owned by the United States, the phrase "real property for the United States" does not easily or naturally convey a reference to real property in which the United States has an interest but does not own. And, if the legislature had meant to convey such meaning, it easily could have done so

[2] "'For' used as a function word to indicate the person or thing that something is to be delivered to <to any letters ~ me> or assigned to <a slot ~ out of town mail> or used by or in connection with <are those the tires ~this car>." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 886 (2002).

as it has elsewhere in 82.04 RCW.[3] (See In re Marriage of McLean, 132 Wn.2d 301, 307, 937 P.2d 602 (1997), "If the Legislature had intended to require evidence of actual delivery, it could have said so expressly, as former RCW 46.64.040 and RCW 12.40.040 demonstrate.")

Morpho's interpretation leads to absurd results when it is viewed in the context of the entire statute. RCW 82.04.050 defines what is included and excluded from a "retail sale" for purposes of imposition of the state's sales tax. Subsection (2)(b) includes within that definition "the sale of or charge made ... for labor and services rendered in respect to ... constructing, repairing, decorating, or improving of new or existing buildings or other structures under, upon, or above real property of or for consumers ...." But because the Supremacy Clause of the United States Constitution limits the ability of the state to tax the federal government,[4] the statute excludes from imposition of a sales tax "the sale of or charge made for labor and services rendered in respect to constructing,

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[3] See e.g., RCW 82.04.050(2)(c) imposing sales tax on the constructing of a structure upon real property "owned by an owner" who conveys the property to the contractor who then reconveys the property to the original owner; RCW 82.04.050(10) excluding from the retail sales tax the charge for labor and services rendered in respect to the building of a road "owned by ... the United States"); RCW 82.04.190(5) (defining as a "consumer" any person who is an "owner, lessee, or has the right of possession to personal property which is being constructed, repaired, improved, cleaned, imprinted, or otherwise altered by a person engaged in business.")

[4] See, M'Culloch v. State of Maryland, 17 U.S. 316, 317, 4 L.Ed. 579 (1819) ("[S]tates have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the national government."), State v. Wiles, 116 Wash. 387, 391, 199 P. 749 (1921) ("It is doubtless true that the states may not directly tax the property of the federal government, nor the instrumentalities which it uses to discharge any of its constitutional functions, nor may a state, by taxation or otherwise, materially interfere with the due, expeditious, and orderly procedure of that government while in the exercise of its constitutional powers.").

repairing, decorating, or improving of new or existing buildings or other structures under, upon, or above real property of or for the United States ...." RCW 82.04.050(12).

The use tax, however, is a constitutional means by which the state may subject this event to taxation. Significantly, in so doing, the statutory language excluding work done for the United States from the sales tax and subjecting such work to the use tax is nearly identical. Each includes the language at issue here, "constructing, repairing, decorating, or improving of new or existing buildings or other structures under, upon, or above real property of or for the United States." Because these statutes are interrelated and relate to the same subject matter, they must be read together and harmonized, if possible, to give effect to the provisions of each. Harmon v. Department of Social and Health Services, 134 Wn.2d 523, 542, 951 P.2d 770 (1993), Wright v. Miller, 93 Wn. App. 189, 198, 963 P.2d 934 (1998).

Morpho does not contend that the language of either provision should be read differently from the other. But if the meaning of each statute is the same, under Morpho's reading of the statute, we would necessarily have to conclude that RCW 82.04.050(12) does not exclude from the sales tax work done for the federal government if it is done on land in which the federal government holds no interest. This result is absurd for at least two reasons. First, it is contrary to the legislative scheme which clearly seeks to avoid imposing a sales tax on the

federal government and instead relies on the use tax. And second, imposing such a tax on the United States is likely unconstitutional[5] and the legislature surely did not intend such a result.

We reject Morpho's reading of RCW 82.04.190(6). Its contention that the statute is only applicable if the United States has an interest of some sort in the real property upon which the work is done, is unsupported by authority or other persuasive argument. In light of the language used in the statute and the overall legislative scheme, we agree with DOR that its only reasonable reading is that the use tax applies to a contractor who either installs tangible property on real property owned by the federal government or for the federal government. In the latter circumstance, it is irrelevant whether the United States also has some interest in the real property upon which the work is done. Here, because it is undisputed that Morpho installed security systems for the United States at Sea-Tac and the Spokane airports, it is a consumer, as a matter of law, under RCW 82.04.190(6). Accordingly, we reverse and remand for entry of order granting

[5] The issue of the constitutionality of such a tax is not before us so we need not and do not address this question, but we note that neither party has asserted that such a tax on the federal government would be permissible.

partial summary judgment in favor of DOR.[6]

WE CONCUR:

Spearman C.J.

Trickey, J

Leach, J.

[6] Because we agree with the parties that the statute is unambiguous, we do not address their arguments based on various rules of statutory construction.

Appendix B

Letter from Division II transferring matter to Division I

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington

DIVISION I
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July 13, 2015

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CASE #: 73663-9-I
Morpho Detection Inc., Respondent v WA State Dept of Revenue, Appellant
Thurston County No. 12-2-01758-9
[Division II # 46689-9-II]

Counsel:

The above case has been transferred to Division I of the Court of Appeals.

All matters in connection with the above cause should be addressed to the Court Administrator/Clerk of the Court of Appeals, Division I, One Union Square Building, 600 University Street, Seattle, Washington 98101.

Counsel are requested to please note the Court of Appeals Division I number in all future references to this case.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

LAM

Appendix C

RCW 82.04.190

RCW 82.04.190

"Consumer." (*Effective until January 1, 2016.*)

"Consumer" means the following:

(1) Any person who purchases, acquires, owns, holds, or uses any article of tangible personal property irrespective of the nature of the person's business and including, among others, without limiting the scope hereof, persons who install, repair, clean, alter, improve, construct, or decorate real or personal property of or for consumers other than for the purpose of:

(a) Resale as tangible personal property in the regular course of business;

(b) Incorporating such property as an ingredient or component of real or personal property when installing, repairing, cleaning, altering, imprinting, improving, constructing, or decorating such real or personal property of or for consumers;

(c) Consuming such property in producing for sale as a new article of tangible personal property or a new substance, of which such property becomes an ingredient or component or as a chemical used in processing, when the primary purpose of such chemical is to create a chemical reaction directly through contact with an ingredient of a new article being produced for sale;

(d) Consuming the property purchased in producing ferrosilicon which is subsequently used in producing magnesium for sale, if the primary purpose of such property is to create a chemical reaction directly through contact with an ingredient of ferrosilicon; or

(e) Satisfying the person's obligations under an extended warranty as defined in RCW **82.04.050**(7), if such tangible personal property replaces or becomes an ingredient or component of property covered by the extended warranty without intervening use by such person;

(2)(a) Any person engaged in any business activity taxable under RCW **82.04.290** or **82.04.2908**; (b) any person who purchases, acquires, or uses any competitive telephone service, ancillary services, or telecommunications service as those terms are defined in RCW **82.04.065**, other than for resale in the regular course of business; (c) any person who purchases, acquires, or uses any service defined in RCW**82.04.050**(2) (a) or (g), other than for resale in the regular course of business or for the purpose of satisfying the person's obligations under an extended warranty as defined in RCW **82.04.050**(7); (d) any person who purchases, acquires, or uses any amusement and recreation service defined in RCW **82.04.050**(3)(a), other than for resale in the regular course of business; (e) any person who purchases or acquires an extended warranty as defined in RCW **82.04.050**(7) other than for resale in the regular course of business; and (f) any person who is an end user of software. For purposes of this subsection (2)(f) and RCW **82.04.050**(6), a person who purchases or otherwise acquires prewritten computer software, who provides services described in RCW **82.04.050**(6)(b) and who will charge consumers for the right to access and use

the prewritten computer software, is not an end user of the prewritten computer software;

(3) Any person engaged in the business of contracting for the building, repairing or improving of any street, place, road, highway, easement, right-of-way, mass public transportation terminal or parking facility, bridge, tunnel, or trestle which is owned by a municipal corporation or political subdivision of the state of Washington or by the United States and which is used or to be used primarily for foot or vehicular traffic including mass transportation vehicles of any kind as defined in RCW **82.04.280**, in respect to tangible personal property when such person incorporates such property as an ingredient or component of such publicly owned street, place, road, highway, easement, right-of-way, mass public transportation terminal or parking facility, bridge, tunnel, or trestle by installing, placing or spreading the property in or upon the right-of-way of such street, place, road, highway, easement, bridge, tunnel, or trestle or in or upon the site of such mass public transportation terminal or parking facility;

(4) Any person who is an owner, lessee or has the right of possession to or an easement in real property which is being constructed, repaired, decorated, improved, or otherwise altered by a person engaged in business, excluding only (a) municipal corporations or political subdivisions of the state in respect to labor and services rendered to their real property which is used or held for public road purposes, and (b) the United States, instrumentalities thereof, and county and city housing authorities created pursuant to chapter **35.82** RCW in respect to labor and services rendered to their real property. Nothing contained in this or any other subsection of this definition shall be construed to modify any other definition of "consumer";

(5) Any person who is an owner, lessee, or has the right of possession to personal property which is being constructed, repaired, improved, cleaned, imprinted, or otherwise altered by a person engaged in business;

(6) Any person engaged in the business of constructing, repairing, decorating, or improving new or existing buildings or other structures under, upon, or above real property of or for the United States, any instrumentality thereof, or a county or city housing authority created pursuant to chapter **35.82** RCW, including the installing or attaching of any article of tangible personal property therein or thereto, whether or not such personal property becomes a part of the realty by virtue of installation; also, any person engaged in the business of clearing land and moving earth of or for the United States, any instrumentality thereof, or a county or city housing authority created pursuant to chapter**35.82** RCW. Any such person is a consumer within the meaning of this subsection in respect to tangible personal property incorporated into, installed in, or attached to such building or other structure by such person, except that consumer does not include any person engaged in the business of constructing, repairing, decorating, or improving new or existing buildings or other structures under, upon, or above real property of or for the United States, or any instrumentality thereof, if the investment

project would qualify for sales and use tax deferral under chapter **82.63** RCW if undertaken by a private entity;

(7) Any person who is a lessor of machinery and equipment, the rental of which is exempt from the tax imposed by RCW **82.08.020** under RCW **82.08.02565**, with respect to the sale of or charge made for tangible personal property consumed in respect to repairing the machinery and equipment, if the tangible personal property has a useful life of less than one year. Nothing contained in this or any other subsection of this section may be construed to modify any other definition of "consumer";

(8) Any person engaged in the business of cleaning up for the United States, or its instrumentalities, radioactive waste and other by-products of weapons production and nuclear research and development;

(9) Any person who is an owner, lessee, or has the right of possession of tangible personal property that, under the terms of an extended warranty as defined in RCW **82.04.050**(7), has been repaired or is replacement property, but only with respect to the sale of or charge made for the repairing of the tangible personal property or the replacement property;

(10) Any person who purchases, acquires, or uses services described in RCW **82.04.050**(6)(b) other than:

(a) For resale in the regular course of business; or

(b) For purposes of consuming the service described in RCW **82.04.050**(6)(b) in producing for sale a new product, but only if such service becomes a component of the new product. For purposes of this subsection (10), "product" means a digital product, an article of tangible personal property, or the service described in RCW **82.04.050**(6)(b);

(11)(a) Any end user of a digital product or digital code. "Consumer" does not include any person who is not an end user of a digital product or a digital code and purchases, acquires, owns, holds, or uses any digital product or digital code for purposes of consuming the digital product or digital code in producing for sale a new product, but only if the digital product or digital code becomes a component of the new product. A digital code becomes a component of a new product if the digital good or digital automated service acquired through the use of the digital code becomes incorporated into a new product. For purposes of this subsection, "product" has the same meaning as in subsection (10) of this section.

(b)(i) For purposes of this subsection, "end user" means any taxpayer as defined in RCW **82.12.010** other than a taxpayer who receives by contract a digital product for further commercial broadcast, rebroadcast, transmission, retransmission, licensing, relicensing, distribution, redistribution or exhibition of the product, in whole or in part, to others. A person that purchases digital products or digital codes for the purpose of giving away such products or codes will not be considered to have engaged in the distribution or redistribution of such products or codes and will be treated as an end user;

(ii) If a purchaser of a digital code does not receive the contractual right to further redistribute, after the digital code is redeemed, the underlying digital product to which the digital code relates, then the purchaser of the digital code is an end user. If the purchaser of the digital code receives the contractual right to further redistribute, after the digital code is redeemed, the underlying digital product to which the digital code relates, then the purchaser of the digital code is not an end user. A purchaser of a digital code who has the contractual right to further redistribute the digital code is an end user if that purchaser does not have the right to further redistribute, after the digital code is redeemed, the underlying digital product to which the digital code relates;

(12) Any person who provides services described in RCW **82.04.050**(9). Any such person is a consumer with respect to the purchase, acquisition, or use of the tangible personal property that the person provides along with an operator in rendering services defined as a retail sale in RCW **82.04.050**(9). Any such person may also be a consumer under other provisions of this section;

(13) Any person who purchases, acquires, owns, holds, or uses chemical sprays or washes for the purpose of postharvest treatment of fruit for the prevention of scald, fungus, mold, or decay, or who purchases feed, seed, seedlings, fertilizer, agents for enhanced pollination including insects such as bees, and spray materials, is not a consumer of such items, but only to the extent that the items:

(a) Are used in relation to the person's participation in the federal conservation reserve program, the environmental quality incentives program, the wetlands reserve program, the wildlife habitat incentives program, or their successors administered by the United States department of agriculture;

(b) Are for use by a farmer for the purpose of producing for sale any agricultural product; or

(c) Are for use by a farmer to produce or improve wildlife habitat on land the farmer owns or leases while acting under cooperative habitat development or access contracts with an organization exempt from federal income tax under 26 U.S.C. Sec. 501(c)(3) of the federal internal revenue code or the Washington state department of fish and wildlife; and

(14) A regional transit authority is not a consumer with respect to labor, services, or tangible personal property purchased pursuant to agreements providing maintenance services for bus, rail, or rail fixed guideway equipment when a transit agency, as defined in RCW**81.104.015**, performs the labor or services.

Certificate of Service

I, Franklin G. Dinces, do hereby certify that on this the 14th day of April, 2016 I served a copy of the Petition For Review via email, pursuant to an electronic service agreement, on the following:

Joshua Weissman (JoshuaW@ATG.WA.GOV)

Candy Zilinskas (candyz@arg.wa.gov)
Julie Johnson (JulieJ@ATG.WA.GOV)

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Franklin G. Dinces