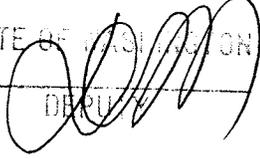


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DIVISION II

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STATE OF WASHINGTON  
BY 

No. 37329-7-II

DIVISION II, COURT OF APPEALS  
OF THE STATE OF WASHINGTON

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ACTIVATE, INC.,

Plaintiff/Appellant

v.

STATE OF WASHINGTON,  
DEPARTMENT OF REVENUE,

Defendant/Respondent

---

ON APPEAL FROM THURSTON COUNTY SUPERIOR COURT  
(Hon. Christine Pomeroy)

---

**REPLY BRIEF OF APPELLANT**

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## I.

### INTRODUCTION

The Department is generally able to recite the facts of this case, but is wholly unable to grasp the true economic substance of the “free” transactions or apply its own legal guidelines.<sup>1</sup> Specifically, the Department fails to acknowledge what causes a cellular telephone to be provided or transferred by Activate to its customer. Activate did not *really* “give away” anything for “free.” The only way a customer received a “free” cellular telephone (considered a “premium” by the Department) was to contractually commit to the purchase of an AT&T wireless plan and to keep this plan in service for a minimum period of time, typically two years. The “free” telephone, together with the “bucket of minutes” the wireless plan represented, were sufficiently measurable to the three affected parties—the customer, AT&T and Activate—to constitute valuable consideration as to each. Whereas, the telephone was hardly “free” under these circumstances, the Department repeatedly casts the transaction as if an outright, no-strings-attached, gift had been made. This

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<sup>1</sup> Activate’s use of quotation marks throughout this reply brief, as well as in its opening brief (“Activate’s Brief”), is akin to a print advertiser’s use of an asterisk (\*) strategically placed behind the word “free”, thus intending to warn the reader that there are conditions relative to the offer. The point was also made previously:

The word “free” (as well as related words, “no charge,” “given away”) are in quotations throughout this brief to draw the Court’s attention to the fact that, in these promotions the customer is required to agree to a two-year cellular service plan commitment in exchange for the “free” cellular telephone.

Activate’s Brief at 2.

is a mischaracterization of the undisputed facts and an elevation of form over substance contrary to Supreme Court rulings that “[s]ubstance rather than form should be used to assess tax classifications.” First American Title Insurance Company v. Department of Revenue, 144 Wn.2d 300, 303, 27 P.3d 604 (2001) (citing Time Oil Co. v. State, 79 Wn.2d 143, 146, 483 P.2d 628 (1971)). Accordingly, the Court should decide this case based on the economic substance of the “free” telephone transaction, not its form or the words used to describe it.

## II.

### **ARGUMENT ON REPLY**

#### **A. Activate Conforms To The Rules On “Free” Promotions.**

##### **1. The Attorney General’s Guidelines.**

The Attorney General of Washington (“AG”) acknowledges that marketing the sale of products or services with offers of “free” gifts is not only legal but an acceptable business practice in this state. For example, the AG’s website cautions consumers on the marketing of “free” products by camping clubs:

Many camping clubs attract potential customers to their sites by offering travel vouchers or other gifts, such as audio/video equipment, for visiting the campground and attending a sales presentation. Offering such gifts is perfectly legal as long as:

- ◆ The gift is actually free. This means that you don’t have to buy anything or commit to anything in order to receive the gift[.]

See [www.atg.wa.gov/ConsumerIssues/CampingClubs.aspx](http://www.atg.wa.gov/ConsumerIssues/CampingClubs.aspx). The AG’s

website is instructive. Activate does not advertise that its cellular telephones are “free” for the asking; instead, customers are told that the telephones are “free” only with the purchase of a qualified AT&T wireless plan of sufficient value. See CP 191. Clearly, the phones are not “gifts” under the AG guidelines, notwithstanding the use of the word “free.”

**2. The Department’s Guidelines On The Tax Implications Of “Free” Promotions.**

The Department has addressed—in three separate publications—the sales and use tax implications of “giving away” goods “free.” First, WAC 458-20-116 (“Rule 116”) defines “premiums” as items offered free of charge to prospective customers as an inducement to buy something else. WAC 458-20-116(2)(b). Under Rule 116, sales of “premiums” are purchases for resale whenever there is a sale of another item. See WAC 458-20-116(3). The Department argues a “premium” is restricted only to sales of articles of tangible personal property and points to WAC 458-20-116(3)(b) (“Rule 116(3)(b)”), which states “‘sales for resale’ include sales of premiums ‘to persons who pass title to the premium along with other articles which are sold by them.’” Brief of Respondent (“DOR Brief”) at 33 (emphasis added). Based on this statement the Department concludes that when “Activate offers a cellular telephone for free if customers purchase a sufficient amount of wireless telephone service from AT&T, Activate is not passing title to the cellular

telephone ‘with other articles.’” DOR Brief at 33-34. But, this is an incomplete reading of the regulation; Rule 116 goes on to define “premiums” subject to sales tax as those sold to:

... persons who offer them as an inducement to potential customers at no charge and with no requirement that the customer purchase any other article or service as a condition to receive the premium.

WAC 458-20-116(4)(d) (emphasis added). Stated conversely, a sale to a person who offers the premium “free” as an inducement to customers with the requirement that the customer purchase an article or service as a condition to receive the “gift,” is a purchase for resale. Thus, while Rule 116(3)(b) does use the word “article” alone, subsection (4)(d) clarifies that the sale may also involve a “service.”

That the sale of a “service”—like a wireless plan—still qualifies the “premium” for the resale exemption is made clear by a second publication of the Department, Determination No. 91-177, 11 WTD 219 (1991) (“Det. 91-177”).<sup>2</sup> This was a ruling issued to a camping club that was promoting memberships by offering gifts to potential customers who attended a sales presentation. 11 WTD at 221; see CP 176. No purchase was necessary to receive the free gift from the camping club—just

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<sup>2</sup> Under RCW 82.32.410(1) the Department “may designate certain written determinations as precedents” and these “determinations designated as precedents . . . shall be published by the department.” RCW 82.32.410(1)(b). As precedents, the published determinations are binding upon the Department and taxpayers (such as Activate) have a right to rely on them. See RCW 82.32A.020(2).

attendance at the sales presentation. *Id.* A Department auditor assessed the camping club for use tax on all gift items “given away for promotional purposes.” *Id.* Det. 91-177 held that the use tax was due only in respect to gifts given to customers who did not purchase a camping membership. 11 WTD at 226; CP 181. Conversely, any “gift” item “given” to a customer who did make a purchase of a camping membership, was treated as a resale:

In those cases where the taxpayer does sell something such as a membership to a prospective customer to whom a [“gift”] has been given, a resale has occurred and . . . no sales/use tax would be owed.

11 WTD at 226, n.3; see CP 181 (emphasis added).

Det. 91-177 thus held that if the customer does buy something—in this case a camping membership—the “free” gift is in fact resold as a nontaxable premium. Det. 91-177 refutes the argument that a resale “article” must be tangible personal property, since a camping membership is clearly intangible property. The undisputed facts here show that Activate’s customers were always required to buy a qualified wireless service plan in order to be entitled to receive the premium (a “free” cellular telephone) offered by Activate. CP 190-91. Under the holding in Det. 91-177 a “resale has occurred” and “no sales/use tax would be owed.” This published decision of the Department is directly on point, dispositive and a “precedent” that has been designated and published by the

Department in accordance with RCW 82.32.410. This Court should enforce this “precedent” even if the Department itself will not.<sup>3</sup>

If Rule 116 and Det. 91-177 are not enough to demonstrate that “free” items used in promoting sales can be purchases for resale, the Department’s Audit Division offers its own interpretation in the form of “canned” or “boilerplate” audit instructions. The “Audit Instructions” describe premiums in the context of Rule 116 as follows:

Sales of premiums are sales for resale and not subject to retail sales tax when:

- Sold to persons who pass title to the premium along with the other articles sold by them.
- Sold to persons who, in turn, sell the premiums to customers at a reduced price.

Sales of premiums are for consumption and subject to retail sales tax when:

- The purchaser does not pass title with other articles which are sold by them.
- Offered as an inducement to customers at no charge and with no requirement that the customers purchase any other article or service.

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<sup>3</sup> The Department attempts to distinguish Det. 91-177 on the basis that the “premium” here (cellular telephone) “is given in return for a promise from the customer to purchase a service from a third party [AT&T].” DOR Brief at 35, n. 17 (emphasis added). This is a distinction without a difference. Both transactions (i.e., Activate’s and the taxpayer in Det. 91-177) met the definition of “sale” (RCW 82.04.040) and, therefore, they qualified as resales regardless of whether it was a two- or three-party transaction. In addition, the Department’s argument that a three-party transaction does not qualify as a “sale” is inconsistent with Determination No. 87-44, 2 WTD 211, 216 (1986), which specifically recognized that a three-party transaction can constitute a “sale” (“[A]nything of value intended to move directly from the promisee to a third party designated by the promisor as a result of a contract is consideration, regardless that it does not move to the promisor” (quoting Williston on Contracts §113)). See Appendix 1, attached.

See Appendix 2, attached (emphasis added).<sup>4</sup> Thus, under the “canned” Audit Instructions the cellular telephones purchased by Activate and sold at “no charge” would qualify as premiums for resale, because: (1) title to the telephones passed to the customers, (2) the telephones were offered “as an inducement to customers” and (3) the customer was required to buy a service (wireless plan).

In summary, when a promotional item will be provided free of charge and not in connection with the transfer of another item for which the customer pays valuable consideration, the purchase of the promotional item is not for resale. But, when the promotional item is provided in connection with the sale of another item or service, the purchase is for resale. Activate’s purchases of cellular telephones it provided “free” to customers fall into this latter category, and three publications of the Department itself support Activate’s position that the “free” telephones are premiums purchased for resale.

**B. The Department Offers No Legal Basis For Imposing Use Tax.**

The Department’s argument relative to the use tax assessed in the audit (see CP 14-15, 20) on the “free” telephones is based on the statutory definitions of “use” (RCW 82.12.010(5))<sup>5</sup> and “consumer”

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<sup>4</sup>The audit issued by the Department to Activate (see CP 13-16) did not contain these particular Audit Instructions.

<sup>5</sup> RCW 82.12.010(5) defines “use” to mean:

*(Footnote continued on next page)*

(RCW 82.04.190 and 82.12.010(9)). The Department states:

The evidence in the record demonstrates that Activate:

- Stored the cellular phones in a warehouse or distribution center in Beaverton, Oregon (which is not taxable because not in the state). CP 188 at ¶14; CP 189 at ¶20.
- Transferred the telephones to kiosks in Washington. CP 188 at ¶14; CP 189 at ¶20.
- Used the offer of a free cellular telephone as a “promotional device” or “marketing tool.” CP 189 at ¶16 (“This offer was a promotional device used to attract customers. We have found that this type of offer—the provision of a telephone with the purchase of a plan—is a useful and valuable marketing tool for Activate.”).<sup>6</sup>
- Offered customers a “free” telephone if the customers agreed to the Activate Agreement and the AT&T/Cingular Personal Service Agreement, with service commitment and monthly recurring charge sufficient to justify the discount Activate offered (in this case 100%). CP 191 at ¶23.<sup>7</sup>

DOR Brief at 10-11. These facts do not demonstrate Activate’s liability for use tax.

First, while it may be true that the cellular telephones were stored in an Oregon warehouse by Activate (CP 188), storage alone, even if in Washington, is not an act that results in the imposition of use tax. Instead,

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(a) With respect to tangible personal property, 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 installation, storage, withdrawal from storage, distribution, or any other act preparatory to subsequent actual use or consumption within the state; . . .

<sup>6</sup> This quotation is taken out of context. The two sentences quoted above were actually preceded by the following statement: “Activate offered a ‘free’ cellular telephone to the customer if the customer purchased a certain [wireless] Plan.” CP 189, ¶16, lines 4-6.

<sup>7</sup> This last assertion—customers receive a “free” telephone if they agree to a minimum wireless commitment—underscores Activate’s argument that the “premium” (phone) is resold in exchange for the customer’s contractual promise to buy the wireless plan.

under the clear requirements of RCW 82.12.010(5), storage must be “preparatory to subsequent actual use or consumption” in Washington. If mere storage triggered the use tax, all inventory in storage would be subject to use tax and the sales tax resale exemption (RCW 82.04.050(1)(a)) would be obliterated. Moreover, storage “preparatory to subsequent actual use or consumption” in this state means that the retailer must withdraw the articles from inventory for business or personal use before sale. There is no evidence in the record that any telephone was withdrawn from inventory, used or put to an intervening use by Activate.

Second, Activate acknowledges that the phones were transferred from Activate’s warehouse to its kiosks, including those in Washington (CP 188), but this fact likewise did not trigger the use tax. Goods held for sale by retailers are regularly moved from warehouses to retail stores, and even between stores, to satisfy customer demand and to keep a full stock of inventory on hand at all retail locations. The Department cannot point to any authority for the proposition that the mere transfer of inventory held for resale results in the imposition of use tax.

Third, the Department says Activate “used” the cellular telephones since they were promoted as “free.” In support of this so-called act of “use” the Department relies on two decisions of this Court: Mayflower Park Hotel, Inc. v. Dep’t of Revenue, 123 Wn.App. 628, 98 P.3d 534

(2004), review denied, 154 Wn.2d 1022 (2005); Seattle FilmWorks, Inc. v. Dep't of Revenue, 106 Wn.App. 448, 24 P.2d 460, review denied, 145 Wn.2d 1009 (2001).<sup>8</sup> But these decisions are distinguishable from Activate's facts. In Mayflower, the issue before the Court was whether a hotel made intervening use as a consumer of furnishings and amenities placed in guest rooms. This Court ruled that a hotel makes intervening use of these items when it puts the articles in the hotel's rooms "for the comfort of its guests." Mayflower, 123 Wn.2d at 632. Here, the telephones were, at all times, in Activate's inventory of goods in the warehouse or at its retail stores, and the phones were only removed from inventory after a sale had been made to a customer. CP 190. This situation is unlike the hotel when the goods were placed in the guest room "for the comfort of . . . guests." The Mayflower case is clearly distinguishable.

In FilmWorks the Court found that imprinting customer information on pre-printed order forms was "an act that benefited FilmWorks by making the forms useful to it if the customers returned the forms with . . . orders." 106 Wn.App. at 459. This "act" of preprinting the order forms subjected them to sales/use tax. However, in Activate's case there was no act (like imprinting) upon the cellular telephones, or

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<sup>8</sup> The Mayflower and FilmWorks cases were also addressed in Activate's opening brief. See Activate's Brief at 28-30.

which benefited Activate. Activate promoted the sale of wireless service with offers of phones at “no charge” or a reduced charge with a wireless service commitment but, in and of itself, advertising is not an “act” of “use” that otherwise triggers the use tax, as Det 91-177, Rule 116 and the Audit Instructions so clearly state. If advertising is an act of use, every item that appears in a retailer’s radio, television, newspaper or internet advertisements would be subject to use tax. The FilmWorks decision is equally distinguishable.

The Department further argues Activate is a “consumer” of the cellular telephones under several different statutory definitions of that word. DOR Brief at 15-22 (citing RCW 82.04.190 and RCW 82.12.010(9)). The first definition includes any “person engaged in any business activity taxable under RCW 82.04.290.”<sup>9</sup> DOR Brief at 15 (quoting RCW 82.04.190(2)(a)). The Department says that, because “Activate is taxed under RCW 82.04.290 on its activity of selling wireless telephone service contracts for AT&T,” this provision applies. *Id.* But, the undisputed facts here show that Activate is engaged in two business activities: (1) the sale of wireless telephone plans, a “service” business, and (2) the sale of cellular telephones, related accessories and equipment, a “retail” business. CP 188. Sales of “free” telephones (premiums) are

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<sup>9</sup> RCW 82.04.290 imposes the “Service” business and occupation (B&O) tax.

only made in conjunction with sales of qualified wireless plans. Thus, these sales fell under this latter category of business activity—retailing—making this definition of “consumer” inapplicable here.

The next definition of “consumer” argued by the Department is RCW 82.04.190(1)(a):

Any person who purchases, acquires, owns, holds or uses any article of tangible personal property irrespective of the nature of the person’s business . . . other than for the purpose (a) of resale as tangible personal property in the regular course of business . . .

DOR Brief at 17 (emphasis added).

The Department argues “Activate ‘used’ the cellular telephones for a purpose other than reselling as tangible personal property, which purpose was a ‘promotional device’ or ‘marketing tool’ to induce customers to purchase at least two years of wireless telephone service from AT&T.” *Id.* (emphasis added). There are two things wrong with this argument. First, the Department cites no evidence in the record that any individual telephone was withdrawn from inventory and “used” as a “promotional device” or “marketing tool.”<sup>10</sup> The cellular telephones here were merely generically advertised as “free” with the purchase of a wireless plan, but the actual telephones were in inventory at all times.<sup>11</sup>

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<sup>10</sup> If any individual telephone was actually withdrawn and used to promote the wireless service, Activate would concede the use tax on that particular phone.

<sup>11</sup> The telephones “given away” in the “free” promotions were part of the same inventory of phones that could be sold to customers without a wireless plan. See CP 149, 157.

As argued above, if the mere act of advertising a product or service triggers use tax, retailers would incur the tax on every item of inventory that appears in their advertisements.

Second, Det. 91-177 expresses the only situation where a “promotional” article given away “free” is subjected to use tax—i.e., when the customer does not make a purchase. See CP 174-184. This fact is further buttressed by the Department’s own “canned” Audit Instructions, which state that goods (premiums) “[o]ffered as an inducement to customers at no charge” are not subject to tax when title passes to the customers and there is a purchase requirement. See Appendix 2. As the Department readily admits, a wireless plan must be purchased in order for the customer to receive a “free” telephone, thereby falling under the resale provisions set forth in Rule 116, Det. 91-177, and the “canned” Audit Instructions.

The final definition of “consumer” relied upon by the Department is “any person who distributes or displays, or causes to be distributed or displayed, any article of tangible personal property, except newspapers, the primary purpose of which is to promote the sale of products or services.” DOR Brief at 19 (quoting RCW 82.12.010(9)) (emphasis in original). This is an argument the Department’s Audit Division understood did not apply and its Appeals Division expressly conceded: “We agree that the cellular phones are not promotional materials.” CP 65-

66. The Court should ignore this aspect of the Department's argument, since it was waived and is inconsistent with the Department's prior concession. See also, Activate's Brief at 34, n.12.

C. **The Resale Exemption Applies Even When The Goods Are "Free" Or Sold At "No Charge" Or For No Additional Consideration.**

Activate addressed the resale exemption (RCW 82.04.050(1)(a)) in its opening brief. See Activate's Brief at 17-34. The Department says Activate "failed to 'resell' the cellular telephones it gave to customers at no charge" and that Activate's "resale arguments are legally flawed." DOR Brief at 25. The Department disregards its own published guidelines to reach this conclusion. Det. 91-177, Rule 116 and the "canned" Audit Instructions are directly on point, and conclusively show a resale has occurred despite the Department's litigation position to the contrary.

The Department states that Activate "acknowledged twice that it did not resell the cellular telephones at issue." *Id.* To support this claim, the Department points to Activate's complaint, which stated the telephones were provided "to customers without an additional or separate charge" (CP 5 at ¶6)<sup>12</sup> and to Mr. Keller's declaration, which stated "that the telephones were provided 'at no charge,' "'free' of charge,' 'at . . . no

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<sup>12</sup> The Department's reliance on a statement made in the complaint that initiated the litigation is misplaced. The complaint is not evidence, but merely notice of what the case is generally about. Simpson v. State, 26 Wn.App. 687, 691, 615 P.2d 1297 (1980).

cost,' and 'at . . . zero price.'" DOR Brief at 26 (citing CP 188-190 at ¶¶ 12, 18, 17, 21).<sup>13</sup> This shows the Department's reliance on semantics (form) over economic substance. It further demonstrates the Department's desire to twist words into an argument supporting its legal position. In truth, the words used here merely describe the transaction in a convenient, easy-to-understand manner. As First American (144 Wn.2d at 303) and Time Oil (79 Wn.2d at 146) explain, the Court's duty is to look beyond mere labels to the underlying substance. In other words, the form of the transaction may have been the "giving away" of a "free" cellular telephone, but the substance was a telephone provided only in conjunction with the actual purchase of qualified wireless service.<sup>14</sup>

The Department also argues "Activate's position is contrary to tax policy" because "no retail sales or use tax would ever be paid on these telephones under Activate's interpretation of the resale exemption." DOR Brief at 26. This is so, according to the Department, since the "purpose of the resale exemption" is to shift "the retail sales tax obligation to the downstream consumer," otherwise "the tax would be eliminated entirely."

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<sup>13</sup> As noted (see fn. 6, supra), the Department quotes Mr. Keller out of context.

<sup>14</sup> A decision of the Tennessee Supreme Court stated it even more succinctly:

Regardless of what anything may be called it remains what it is. It is indisputable that regardless of the ads, "Gifts for you" and "Free of Extra Charge," they were not gifts nor were they free. The merchandise was bought and paid for by the doctors and the sales tax was paid on the entire sale even though it (the sales tax) was charged to the medicine. So it can be rightly said that the form of these transactions is a "gift" but the real substance is a sale.

Morton Pharms. v. MacFarland, 212 Tenn. 168, 368 S.W.2d 756, 757 (1963).

*Id.* The flaw in this argument is that the sales tax is paid by the “downstream consumer,” i.e., when the customer pays AT&T for the wireless service, that charge is subject to sales tax. See RCW 82.04.050(5). What the Department is really arguing is that there is no apparent charge for the telephone when it is transferred to the customer. But, this is merely a repackaging of the Department’s form over substance argument. As the Tennessee court reasoned, the cellular telephones were “bought and paid for” by Activate “and the sales tax was paid on the entire sale even though it (the sales tax) was charged to” the wireless service.

The Department’s regulations are also replete with situations where the resale exemption applies even when the retailer makes no specific charge for the item, in recognition that the sales tax is paid on the goods sold along with the “free” item.<sup>15</sup> For example, when a customer buys merchandise from a retailer (like Nordstrom) does the store separately list on the sales receipt the shopping bag and tissue paper “given” to the customer? The answer is no. Is the shopping bag thus “free”? Under the Department’s reasoning, yes. Does Nordstrom pay sales or use tax on these items when it purchases them from suppliers? The answer is, no. Why? Because the Department says the

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<sup>15</sup> See also, the discussion of “Buy-One-Get-One-Free” and “Buy-X-Get-Y” promotions addressed in Activate’s Brief at 31-33.

bag and tissue paper are packing materials and “[s]ales of packing materials to persons who sell tangible personal property contained therein or protected thereby are sales for resale.” See WAC 458-20-115(3)(a) (emphasis added). Thus, while no sales tax is ever paid directly on the bags and tissue pursuant to a resale exemption, sales tax is nevertheless collected and remitted by the retailer upon the sale of the shirt, dress, coat, etc. What about when Nordstrom offers “free” gift wrapping as an “inducement” to shop at the store during the holiday season, are the gift boxes, holiday wrapping, ribbons and bows subject to use tax? Again, the answer is no, per the above. In short, there is no fundamental difference between these examples and Activate’s purchase of telephones eventually resold as one bundled transaction upon which sales tax will ultimately be paid by the customer.<sup>16</sup>

The Department argues that “[c]ommentators and courts reject treating ‘free’ items as ‘resales.’” DOR Brief at 27-28. The commentator cited is J. Hellerstein & W. Hellerstein, State Taxation § 12.04[3] at 12-62 (3d ed. 2000). Department’s Brief at 26. Here, Hellerstein addressed advertising brochures distributed by a retailer. But, in the example cited by Hellerstein, there was no sale of another product or service along with

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<sup>16</sup> As discussed above, there is no requirement that sales tax even be paid on the ultimate item sold for the “premium” to be purchased for resale, although sales tax is collected on the wireless charges here (see RCW 82.04.050(5)). Det. 91-177 is a perfect example of the resale exemption allowed for gift items even when sales tax did not apply to the underlying sale of the camping membership.

the “give away” brochure. This situation is unlike Activate, which requires that the customer purchase qualified wireless telephone service in order to obtain the desired premium (a “free” cellular telephone). Accordingly, the Department’s use of this particular Hellerstein example is misplaced. However, Hellerstein does recognize a different scenario may also exist:

. . . the tangible personal property is given as a premium to the retailer’s customer when that customer purchases another product that is subject to the sales tax. Under those circumstances, the transaction may be “deemed a sale of both the premium and the product so the retailer’s supplier may accept a resale certificate when selling such merchandise to the retailer.” Thus the Missouri Supreme Court held that the Kansas City Royals baseball club purchased baseball caps, trading cards, baseball gloves, batting gloves, T-shirts and other promotional items for resale. The court observed that “[a]lthough the promotional items are ostensibly given away, the cost of purchasing these items is factored into the price charged for each ticket of admission to a Royals game.” The court found that “[t]his is sufficient consideration to find that a resale has occurred.”

Hellerstein ¶ 14.02[7][a] (quoting Kansas City Royals Baseball Corp. v. Director of Revenue, 32 S.W.3d 560, 563 (2000)) (other footnotes and citations omitted).<sup>17</sup> The principle is the same here. Whereas, the Department emphasizes the phones are “given away,” the cost of the bundled sale is nevertheless factored into the three-party transaction: first,

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<sup>17</sup> See Ronnoco Coffee Co., Inc. v. Director of Revenue, 185 S.W.3d 676, 680 (Mo. 2006) (the court held that purchases by a coffee wholesaler of coffee-making equipment subsequently “loaned” to coffee purchasers are exempt purchases for resale; although “there is no stated extra charge for customers’ use of the equipment, . . . consideration is given insofar as the customers’ cost for the products used with the equipment reflects the cost of the use of the equipment itself”).

by the customer seeking a cellular telephone capable of operation on AT&T's proprietary cellular network for an agreed-upon period; second, by Activate measured by its commission net of the discounted phone; and third, by the value to AT&T which the customer's wireless service commitment represents net of all costs. This latter point by Hellerstein, i.e., the costs are clearly factored into the price, is more closely akin to Activate's situation than the example cited by the Department.

The Department also says "courts" reject "treating 'free' items as 'resales'" but addresses only one New Jersey case, Boardwalk Regency Corp. v. Div. of Taxation, 18 N.J. Tax 328 (1999), for this supposedly universal principle. DOR Brief at 27-28. In this NJ case the court held that complimentary, non-alcoholic beverages provided to casino patrons and employees is not a resale of the beverages. Boardwalk at 330. Activate has no disagreement with this conclusion and it even appears consistent with Washington law. The beverages were given away "with no strings attached." They were truly gifts and there was no requirement to purchase anything to receive the free beverage; thus, the casino was the consumer of the beverages. These facts are entirely different than Activate's facts, which require the customer to purchase a qualified wireless plan.

The Department concedes the three-party contract between Activate, the customer and AT&T (see Activate's Brief at 20-26)

“constitutes consideration for purposes of creating an enforceable contract” (DOR Brief at 30-31 (citing Restatement (Second) of Contracts, §71(4) (1981))), but states “Activate has failed to demonstrate that when the Legislature used the words ‘valuable consideration’ in the definition of ‘sale’ in RCW 82.04.040 it intended to include every contract where tangible personal property changes hands as a ‘sale.’” DOR Brief at 31. The Legislature defined the word “sale” to mean “any transfer of the ownership of, title to, or possession of property for a valuable consideration.” RCW 82.04.040(1) (emphasis added). That Activate makes a “sale” of the cellular telephone—even the “free” one—under this definition is beyond dispute.

The Department also fails to address Activate’s contract law authority that supports the existence of “valuable consideration” in this transaction (see Activate’s Brief at 21-26 for discussion of Labriola v. Pollard Group, Inc., 152 Wn.2d 828, 100 P.3d 791 (2004)), other than to state that the Department really doubts “the Legislature actually intended a transfer of tangible personal property without charge, in a three-way transaction . . . , to be considered a ‘sale.’” DOR Brief at 32. The clear and unambiguous language of RCW 82.04.040 is conclusive evidence of legislative intent and if the statute’s meaning is plain on its face, the Court must apply that meaning and regardless of any “doubts” the Department may have. See G-P Gypsum Corporation v. State Revenue, 144 Wn.App.

664, 183 P.3d 1109 (2008). The definition of “sale” includes “any transfer of the ownership of, title to, or possession of property for a valuable consideration.” RCW 82.04.040. There is nothing ambiguous about RCW 82.04.040, nor is there a question whether a “sale” took place here: Activate transferred ownership, title and possession of the cellular telephones to the customers in exchange for valuable consideration, specifically the purchase of the wireless agreement, which represented value in terms of a commission due Activate from AT&T. The definition of “sale” and resale were thus met.

**D. The Special Telephone Resale Exemption Applies Here, First and Foremost.**

Lastly, the Department addresses the special telephone resale exemption (RCW 82.04.050(1)(e)). DOR Brief at 42-50. Activate contended in its opening brief (see pp. 35-43), and reasserts it again here, that this is really the critical exemption that applies specifically to the facts of this case.<sup>18</sup> The question boils down to the Department’s assertion that “Activate did not make a ‘separate charge’ to customers for the cellular telephone, it gave to customers as an inducement to purchase wireless

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<sup>18</sup> The Department states that the “trial court properly granted summary judgment” in its favor on this issue. DOR Brief at 43. But this is the statute the trial court not only failed to apply, but failed to even address in its ruling. See VRP at 30-31; see also Activate’s Brief at 12-13. The trial court did not grant summary judgment on this issue, requiring reversal by this Court.

telephone service.” See DOR Brief at 43-45.<sup>19</sup> But, the undisputed evidence shows that Activate did make a “separate charge” in each and every instance in which Activate provided a cellular telephone. Here are three examples of the “separate charges” made:

	<u>Quantity</u>	<u>Item No.</u>	<u>Description</u>	<u>Price</u>	<u>Amount</u>
[a]	1	797553006879	Nokia 5165	0.00	0.00
[b]	1	797553007258	Nokia 3360	49.99	49.99
[c]	1	797553006862	Nokia 5165	99.99	99.99

CP 194, 198, 202; see Activate’s Brief, Exhibits A, C, E.

The Department concedes that in the second and third examples above ([b], [c]), “Activate memorialized those sales with a ‘separate charge.’” DOR Brief at 44. However, when it comes to the first example ([a]), the Department alleges this “is not a ‘separate charge’ for the free phones” because, according to the Department, this is but a “separate notation of the absence of any charges” *Id.* Thus, the Department admits the existence of a separate “notation” but denies a “charge” exists because the price is zero (\$0.00). Activate submits its listed price of \$0.00 is just as much a “separate charge” as its listed prices of \$49.99 or \$99.99. The only difference is, [b] and [c] reflect an amount greater than zero, whereas [a] does not.<sup>20</sup> In all other respects the separately-stated charges are

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<sup>19</sup> The “separate charge” issue was addressed extensively in Activate’s Brief at 37-40.

<sup>20</sup> The Department’s argument that \$0.00 does not represent a “separate charge” implies that zero is not a number. But zero is a number, and a real number, at that. “It is on the number line . . . between 1 and -1. [One] can add, subtract, and multiply with 0 and get  
(Footnote continued on next page)

identical on customer invoices. Moreover, Activate has shown that the word “charge” can certainly mean \$0.00.<sup>21</sup>

The Department also contends Activate argues that a conflict exists between the regular resale exemption (RCW 82.04.050(1)(a)) and the special telephone resale exemption (RCW 82.04.050(1)(e)). See DOR Brief at 45-46. There is no conflict; instead, Activate qualifies for both exemptions under the unique facts of this case.<sup>22</sup> Under the facts present here, neither exemption is less proper than the other.

Activate is also correct in that if a “separate charge” under RCW 82.04.050(1)(e) required an amount greater than \$0.00, as contended by the Department, then the special telephone resale exemption would be redundant since, as the Department even admits, the telephones that are sold for any amount greater than zero would unquestionably qualify for the regular resale exemption (RCW 82.04.050(1)(a)). See

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real answers. [One] can divide numbers into zero and get a real answer, zero.” See <http://mathforum.org/library/drmath/view/63315.html>; Appendix 3, attached.

<sup>21</sup> The two definitions provided by Activate are “[t]o set or ask (a given amount) as a price” and “to bill or invoice” in commercial transactions. Activate’s Brief at 38-39 (quoting The American Heritage Dictionary of the English Language, New College Edition (1979) at 226 and Black’s Law Dictionary at 294 (Revised Fourth Edition 1968) at 294). A “separate charge” of \$0.00 falls within these definitions.

<sup>22</sup> Activate also agrees with the Department when it states:

If a taxpayer qualifies for one exemption, the purchase is tax exempt regardless of whether the taxpayer also qualifies for another tax exemption. Once a transaction falls outside the definition of “retail sale” under one of the listed exceptions no retail sales tax (or use tax) is owed. Other unrelated exceptions to the definition do not change that result, so no conflict can result.

DOR Brief at 40.

Activate's Brief at 40. In other words, the only way to reconcile the two exemptions is to recognize that the Legislature had in mind a transaction where a telephone is merely "provided," even if for a listed price of \$0.00.

The Department next speculates as to what the Legislature's intent was in enacting these two separate resale exemptions. DOR Brief at 47-48. As this Court recently stated, its "objective is to ascertain and carry out the legislature's intent, and if the statute's meaning is plain on its face, we must give effect to that meaning." Pierce County v. State, 144 Wn.App. 783, 185 P.3d 594 (citing State ex rel. Citizens Against Tolls v. Murphy, 151 Wn.2d 226, 242, 88 P.3d 375 (2004)). RCW 82.04.050(1)(e)'s meaning is clear and unambiguous and the Court should give effect to that plain meaning as an expression of legislative intent.

The Department finally asks the Court to review the legislative history. DOR Brief at 49. Again, legislative history is inappropriate when the statute has a plain meaning; only when the statute is "susceptible to more than one reasonable meaning"—a situation not present here—does this Court "resort to various statutory construction aides, including legislative history." Pierce Co., 144 Wn.App. at 806 (citing Murphy, 151 Wn.2d at 242-43). Besides, the Department admits the statutory language is unambiguous. See DOR Brief at 5. Accordingly, both Activate and the Department seemingly concur that RCW 82.04.050(1)(e) is not ambiguous

and the Court should find no cause to look beyond the plain language of the statute itself to ascertain its meaning.

**III.**

**CONCLUSION**

In conclusion, the “free” cellular telephones at issue are not subject to use tax, and either of the resale exemptions—the regular (RCW 82.04.050(1)(a)) or special telephone (RCW 82.04.050(1)(e))—can be effectively employed here to exempt the premiums (telephones) from sales tax. This Court should reverse the trial court, and remand for entry of a judgment and refund in favor of Activate.

RESPECTFULLY SUBMITTED, this 20<sup>th</sup> day of November, 2008.



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Activate, Inc.*

**CERTIFICATE OF SERVICE**

I certify that on the date set forth below I served a copy of the foregoing Reply Brief of Appellant by United States Mail, postage prepaid, on the Respondent's counsel of record, as follows:

Heidi A. Irvin, Assistant Attorney General  
Donald F. Cofer, Senior Counsel  
Attorney General/Revenue Division  
P.O. Box 40123  
Olympia, WA 98504-0123

I declare under penalty of perjury pursuant to the laws of the state of Washington that the foregoing is true and correct.

DATED this 20<sup>th</sup> day of November, 2008 at Seattle, Washington.

  
\_\_\_\_\_  
Kristi Hartman

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# APPENDIX

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# **APPENDIX 1**



**NATURE OF ACTION:**

Real Estate Excise Tax was assessed on the transfer of real property from a corporation to a limited partnership. Partnership units were distributed pro rata to the corporate stockholders of record as of the date of the transfer.

**FACTS AND ISSUES:**

Burroughs, A.L.J.--The Department of Revenue examined the records of Island, Clallam, Snohomish, Lewis, Whatcom, Jefferson, Kitsap, and Mason Counties regarding the taxpayer's transfer of real property to an existing limited partnership. On its Real Estate Excise Tax Affidavits at the time of the transfers, the taxpayer claimed an exemption from real estate excise tax for "partial dissolution of corporation under WAC 458-61-320(2) with no liabilities assumed." The Property Tax Division, by letter dated April 11, 1986, disallowed the claimed exemption, reasoning that WAC 458-61-320(2) (Rule 320) "refers to an exemption from real estate excise tax on the full or complete dissolution of a corporation, not its partial dissolution." Tax plus delinquent penalties, for a total amount of \$667,202.02, were assessed.

Pursuant to a request dated May 21, 1986, the Property Tax Division again considered additional information and arguments submitted by the taxpayer. This petition was rejected by letter dated July 11, 1986. The taxpayer has appealed to this office.

**TAXPAYER'S EXCEPTIONS:**

The taxpayer has submitted two arguments for our consideration: First, that the tax was wrongfully assessed because the transfer involved the partial liquidation of the taxpayer, and was a transfer without consideration. Second, that the tax was improperly based on values for the property which do not correspond to realistic fair market values.

The taxpayer has described the factual background in its brief submitted at the hearing as follows:

[The taxpayer] wished to terminate its timber production and land development business in the State of Washington. This was effected in December 1985 by transferring the following assets to [the partnership], a newly formed Delaware limited partnership: (1) certain Timber Development Properties, (3) \$1.5 million in cash, and (4) certain Installment Notes. Partnership units of the Partnership were not given to the Corporation in return for these assets. Rather, the partnership units were distributed pro rata to the stockholders of record of the Corporation as of the date of the transfer.\* Thus, the real properties that were transferred from the

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\* Note: Distribution of partnership units was made directly by the limited partnership, an unrelated entity, to the corporate taxpayer's shareholders.

Corporation to the partnership were transferred for no consideration. Although the Timber Properties were encumbered by a nonrecourse loan in the amount of \$22.5 million, the limited partnership took the Timber Properties "subject to" this nonrecourse loan and did not assume the loan (and in fact no party has any personal liability for the loan). (Bracketed inclusions ours.)

The taxpayer, by extensive briefs and argument, has raised the following points in support of its initial contention that the transfer involved no consideration:

First:

The transaction between ...[the taxpayer corporation]... and [the limited partnership]... is not taxable because no consideration passed to ...[the taxpayer]... in return for the conveyance of property. The law as developed over the last 30 years has clearly established that a transfer is taxable only when the transferor receives consideration directly from the transferee.

...

The Department of Revenue has thus far held the position that the creation of ...[the limited partnership]... and the distribution of partnership units to ...[the taxpayer's]... shareholders was consideration for the transfer that was "due to" ...[the taxpayer]... itself. This position misconstrues the facts of the matter and departs from the approach to tax administration that has been mandated and enforced by the courts of the state. The creation of ...[the taxpayer]... was a distinct legal act effected by the ...[taxpayer's]... shareholders. The Corporation did not bargain for the issuance of partnership units. It did not establish the issuance as a condition for the conveyance of the property. Construing the issuance of partnership units as consideration for the Corporation's action is completely unwarranted.

...

...[The taxpayer]... received no cash for the transferred properties, received no interest in the limited partnership, and received no surrendered or redeemed stock from its own shareholders. ...[The taxpayer]... received nothing whatsoever of value in return for the transfer of the properties. The transfer was therefore not a "sale" and the counties have no authority to impose a tax.

(Taxpayer's Memorandum submitted September 3, 1986.) (Bracketed inclusions ours.)

Second:

The conveyance of real estate in question was merely a transfer, without consideration, from one related entity to another. Since no

consideration was given, RCW 82.45 is not applicable. Although there are no Department of Revenue regulations directly on point, this transfer is substantively identical to a transfer between two subsidiary corporations because the shareholders of the Corporation and the partners of the Partnership owned their interests in identical proportions as of the day of the transfer. Consequently, the regulation that states that transfers between two subsidiary corporations are exempt from excise taxation, should be applicable."

(Taxpayer's Memorandum dated May 1, 1986.)

Third:

Partial dissolution of Corporation pursuant to WAC 458-61-320(2).

. . . .

This conveyance is a transfer of real property from a corporation being partially and voluntarily liquidated to all of its shareholders in proportion to their present stock ownership . . ."

(Statements in support of claim of exemption on the Real Estate Excise Tax Affidavit dated December 18, 1986.)

Fourth:

[T]he Department has no power to construe the benefits gained by the third party shareholders as consideration passing to ...[the taxpayer].... The law requires a focus on the transaction between the transferor and the transferee and does not permit a determination of tax based on alternative transactions that the parties might have made.

(Taxpayer's Memorandum submitted September 3, 1986.) (Bracketed inclusion ours.)

In support of its contention that the transfer involved no consideration, the taxpayer has cited and discussed the following as authority: Christensen v. Skagit County, 66 Wn.2d 95 (1965); Attorney General Opinion 74-14; WAC 458-61-320(3); Attorney General Opinion 77-6; Estep v. King County, 66 Wn.2d 76 (1965); Weaver v. King County, 73 Wn.2d 183 (1968) (*en banc*); Ban-Mac, Inc. v. King County, 69 Wn.2d 49 (1966) (*per curiam*); Doric v. King County, 57 Wn.2d 640 (1961); and Deer Park Pine Industry, Inc. v. Stevens County, 46 Wn.2d 852 (1955).

The taxpayer has further argued that, even if the transfer is found to be taxable, the value which the Department has assigned to the properties (approximately \$47.7 million) has no relationship to their true value. For federal tax purposes the lands were valued at \$33 million. In addition, the partnership unit value as listed on the Pacific Exchange of roughly \$11 per unit is argued to be probative of a lower valuation.

## DISCUSSION:

Chapter 82.45 RCW provides for a one percent excise tax upon real estate sales. "Sale" is defined in RCW 82.45.010 as "any conveyance, grant, assignment, quit claim, or transfer of the ownership of or title to real property, including standing timber, or any estate or interest therein for a valuable consideration. . . ." WAC 458-61-030(2) defines "consideration" as "Money or anything of value . . . paid or delivered or contracted to be paid or delivered . . . in return for real property. . . ."

We have considered at great length all of the taxpayer's contentions and authorities. The taxpayer has strenuously argued that, because the corporation itself received nothing of value as a result of the transfer, there was no consideration. We disagree, and hold that real estate at issue was transferred in exchange for valuable consideration.

The court in McDonald v. Murray, 5 Wn.App 68 (1971) summarized the legal principles relating to third-party contracts as follows:

A third-party beneficiary is one who, though not a party to the contract, will nevertheless receive direct benefits therefrom. In determining whether or not a third-party beneficiary status is created by a contract, the critical question is whether the benefits flow directly from the contract or whether they are merely incidental, indirect or consequential. 17 Am. Jur.2d Contracts, Section 305 (1964). An incidental beneficiary acquires no right to recover damages for nonperformance of the contract. Restatement of Contracts, Section 147 (1932). "[I]t is not sufficient that the performance of the promise may benefit a third person, but that it must have been entered into for his benefit, or at least such benefit must be the direct result of performance and so within the contemplation of the parties." (Footnote omitted.) 17 Am. Jur.2d Contracts, Section 304 (1964). "The question whether a contract is made for the benefit of a third person is one of construction. The intention of the parties in this respect is determined by the terms of the contract as a whole construed in the light of the circumstances under which it was made." Grand Lodge of Scandinavian Fraternity of America v. United States Fid. & Guar. Co., 2 Wn.2d 561, 569, 98 P.2d 971 (1940).

In regard to the requisite intent, in Vikingstad v. Bagott, 46 Wn.(2d) 494, 282 P. (2d) 824, we recognized the rule stated in 81 A.L.R.1271, 1287, that such "intent" is not a desire or purpose to confer a benefit upon the third person, nor a desire to advance his interests, but an intent that the promisor shall assume a direct obligation to him.

The issue of to whom consideration must move is squarely addressed in 1 Williston on Contracts, Section 113:

Whether a benefit to the promisor is or is not a sufficient consideration, a detriment to the promisee is. This is equivalent to saying that if the promisee parts with something at the promisor's request, it is immaterial whether the promisor receives anything, and necessarily involves the conclusion that the consideration given by the promisee for a promise need not move to the promisor, but may move to anyone requested by the offer. The commonest illustration of consideration moving to one other than the promisor is the consideration for a guaranty, and a mere reference to this class of cases is sufficient authority. (Footnotes omitted, and emphasis added.)

[1] Thus, anything of value intended to move directly from the promisee to a third party designated by the promisor as a result of a contract is consideration, regardless that it does not move to the promisor.

In this case, the taxpayer corporation (promisor) agreed to transfer its corporate timberlands to an existing limited partnership. As part of the overall plan, the limited partnership (promisee) was to distribute, pro rata, partnership units to the corporation's shareholders of record as of the transfer date. The promisee (the limited partnership) thus parted with something of value which, as a direct and intended result of the contract, flowed to third party beneficiaries, the promisor's shareholders. Such constitutes consideration given in exchange for the conveyance of real estate, and renders the transaction a "sale" for purposes of the real estate excise tax.

Although the taxpayer has strenuously argued that the distribution of partnership units was not bargained-for consideration, we think it unlikely that the taxpayer's shareholders would have maintained this viewpoint had the partnership failed to distribute the partnership units after receiving the corporate timberlands from the taxpayer. It is even further unlikely that the taxpayer, through its shareholders, would have initially even consented to the transfer of timberlands to the partnership had the transfer of partnership units to the taxpayer's shareholders not been agreed upon.

The taxpayer has further argued that WAC 458-61-320(3), which exempts transfers between two subsidiary corporations from excise taxation, should be applicable, since the shareholders of the Corporation and the partners of the Partnership owned their interests in identical proportions as of the day of the transfer.

[2] The very terms of WAC 458-61-320(3) provide only for transfers between "two or more subsidiary corporations." Not only must the entities be "corporations," they must also be "subsidiaries" of one common corporate parent. The rule merely recognizes that there is no change in value of the corporate parent's net worth when two of its subsidiaries exchange property. In the taxpayer's case, not only are both entities not corporations, they are also not owned by one corporate parent. We decline to extend the rule further than its obvious intent.

As to the taxpayer's original claim on the Tax Affidavit that the transfer was a "[p]artial dissolution of Corporation pursuant to WAC 458-61-320(2)," we must disagree. WAC 458-61-320(2) reads as follows:

The real estate excise tax applies to all real property transfers between a corporation and its stockholders, officers, corporate affiliates, or other parties, except the following transfers which are not taxable:

. . .

(2) Corporate dissolution, except in a case where the stockholders assumed or agreed by contract to assume the liabilities of the dissolving corporation. In such event, the real estate excise tax applies to the extent of the liabilities assumed by the stockholder. (Emphasis added.)

Black's Law Dictionary, Revised Fourth Edition (1968), describes corporate dissolution as follows:

The dissolution of a corporation is the termination of its existence as a body politic. This may take place in several ways; as by act of the legislature, where that is constitutional; by surrender or forfeiture of its charter; by expiration of its charter by lapse of time; by proceedings for winding it up under the law; by loss of all its members or their reduction below the statutory limit. (Emphasis added.)

The taxpayer did not dissolve, and still operates today. Although the taxpayer originally used the term "partial dissolution" on its Tax Affidavit, we are constrained to observe that being "partially dissolved" is as impossible as being "a little bit pregnant." A corporation either does or does not dissolve; it cannot partially dissolve.

[3] The addendum to the tax affidavits and the taxpayer's federal income tax treatment (as disclosed at the hearing) indicate that the transaction was in fact in the nature of a "partial liquidation." There is no provision in the statutes or regulations which exempts a transfer of real property in partial liquidation to all of its shareholders in proportion to their stock ownership. The rule cited by the taxpayer exempts only transfers in corporate dissolution, a circumstance which is not applicable here. Accordingly, the taxpayer's argument on this point must fail.

Because we have determined that there was in fact consideration, we need not further examine the Department's power to "construe the benefits gained by the third party shareholders as consideration passing to [the taxpayer]." (Bracketed inclusion ours.)

The taxpayer lastly contends that the tax was not based on the true value of the properties. We note, however, that the Property Tax Division has not yet had an opportunity to properly examine the taxpayer's arguments as to this

issue. Thus, it is appropriate that this case be referred back to that Division for further consideration of the properties' valuation and for the issuance of new assessments, if necessary. If the taxpayer does not agree with the Property Tax Division's determination of valuation, further review by this office would then be appropriate.

**DECISION AND DISPOSITION:**

The taxpayer's petition for correction of assessment is denied with the following exception: The Property Tax Division will review the taxpayer's contentions regarding the properties' valuation and issue a new assessment, payment of which will be due on the date set forth therein. . . .

DATED this 10th day of February 1987.

# **APPENDIX 2**

In accordance with WAC 458-20-112, the “value of products” includes the value of by-products and is determined by the gross proceeds of sales. RCW 82.04.070 defines the gross proceeds of sales as the value proceeding or accruing from the sale of tangible personal property. In the absence of sales of similar products as a guide to value, such value may be determined upon a cost basis. In such cases, all direct and indirect costs attributable to the particular article extracted or manufactured shall be included.

When determining the value of extracted or manufactured products delivered out of state, the taxpayer may deduct actual transportation costs from the gross proceeds of sales.

WAC 458-20-115 defines packing materials to include all boxes, crates, bottles, cans, bags, drums, cartons, wrapping papers, cellophane, twines, gummed tapes, wire, bands, excelsior, waste paper, and all other materials in which tangible personal property may be contained or protected within a container for transportation or delivery to a purchaser. Purchases of packing materials by persons who sell tangible personal property contained therein or protected thereby are purchases for resale. The purchaser must give a resale certificate to the seller to support that these purchases are for resale.

This schedule allows a tax credit for purchases of packing materials on which (VARIABLE 1) was paid in error.

WAC 458-20-115 explains that sales of packing materials are sales for resale. However, sales of containers to persons who retain title to the containers are sales for consumption and are subject to retail sales or use tax. Such containers are usually returned to the vendor of the products contained therein, and in most cases, involve a security deposit.

This schedule asserts (VARIABLE 1) on such containers not for resale.

WAC 458-20-116 defines “premium” as an item offered free of charge or at a reduced price to prospective customers as an inducement to buy.

Sales of premiums are sales for resale and not subject to retail sales tax when:

- Sold to persons who pass title to the premium along with the other articles sold by them.
- Sold to persons who, in turn, sell the premiums to customers at a reduced price.

Sales of premiums are for consumption and subject to retail sales tax when:

- The purchaser does not pass title with other articles which are sold by them.
- Offered as an inducement to customers at no charge and with no requirement that the customers purchase any other article or service.

According to WAC 458-20-118, a license to use real estate merely grants a right to use the real property of another but does not confer exclusive control or dominion over the same. Usually, where the grant conveys only a license to use, the owner controls such things as lighting, heating, cleaning, repairing, and opening and closing the premises. Examples cited include the rental of cold storage lockers, storage spaces, safe deposit boxes, space within a park or fair grounds to a concessionaire, and recreational boat launch facilities.

Generally, in the case of rooms in hotels or motels, a license to use real estate is taxable if the rental is for periods of less than 30 continuous days. RCW 82.04.050 (2)(f) specifically defines all services of hotels, motels, or similar businesses as being retail sales. Thus, the rentals of meeting rooms or ballrooms are

# APPENDIX 3



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## Is Zero a Number?

Date: 07/05/2003 at 15:37:20

From: Joe

Subject: Zero and infinity

If infinity is not a number, then is zero really a number? I see that it is not recognized as a real number but as a whole number, integer, etc. It seems as though zero has been accepted as a number and infinity has been accepted as a concept. This question stems from an argument about  $1/0 = \text{infinity}$ .

Date: 07/05/2003 at 20:27:30

From: Doctor Jaffee

Subject: Re: Zero and infinity

Hi Joe,

Zero is a number; in fact, it is a real number. It is on the number line right between 1 and -1. You can add, subtract, and multiply with 0 and get real answers. You can divide numbers into zero and get a real answer, zero.

You can't say anything like that about infinity. It is not on the number line and you can't do computations with it.

Now, consider  $1/0$ . You know that  $1/1 = 1$ ,  $1/0.1 = 10$ ,  $1/0.01 = 100$ ,  $1/0.001 = 1000$ , etc... Pick a power of 10 as large as you want and I can find a number larger than 0 that I can divide into 1 and get your number as a result.

In other words, as we divide numbers into 1 and those numbers get closer and closer to 0, the quotient gets larger and larger with no boundary. We conclude then, that  $1/0 = \text{infinity}$ .

For more about dividing by zero, see the Dr. Math FAQ:

Dividing by Zero

<http://mathforum.org/dr.math/faq/faq.divideby0.html>

I hope this explanation helps. Write back if you want to discuss the problem any more or if you have other questions.

- Doctor Jaffee, The Math Forum  
<http://mathforum.org/dr.math/>

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