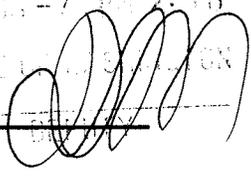


COURT OF APPEALS
DIVISION II

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No. 374099-II

BY: 

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

TRACFONE WIRELESS, INC.,

Appellant,

v.

WASHINGTON DEPARTMENT OF REVENUE,

Respondent.

TRACFONE'S BRIEF ON APPEAL

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ASSIGNMENT OF ERRORS

1. The trial Court erred in holding that Ch. 82.14B RCW imposes E-911 tax on prepaid wireless subscribers.
2. The trial Court erred in granting summary judgment to the Department of Revenue based on an assumed fact that is flatly contradicted by the record – that the taxes at issue “involved persons whose primary place of use is the state of Washington.”
3. The trial Court erred in holding TracFone liable for uncollected E-911 tax on prepaid airtime TracFone sold at wholesale.

ISSUES PRESENTED

1. Does Washington’s E-911 tax statute apply to prepaid wireless subscribers (retail purchasers) when: (a) the statute requires that the tax be collected as a separate line item on the subscriber’s billing statement when by its very nature, prepaid wireless has no subscriber billing statements; (b) the tax is imposed at a flat rate (\$0.20) *per month* of service used by the subscriber when prepaid wireless is not sold on a per month basis so that the number of months over which each retail purchase of prepaid airtime will be used is unknowable at the time of purchase; and (c) the tax is imposed in accordance with the federal Mobile Telecommunications Sourcing Act, which by its express terms does not apply to prepaid wireless?

2. If the statute imposes E-911 tax on retail purchasers of prepaid wireless, is TracFone secondarily liable for uncollected E-911 tax on its wholesale sales to third party retailers?

STATEMENT OF THE CASE

A. TracFone's prepaid wireless service.

TracFone is in the business of reselling prepaid wireless airtime. CP 11 ¶ 2. The company purchases wireless airtime from carriers that own and operate wireless telephone facilities and resells that airtime (under the TracFone brand name) on a prepaid basis. *Id.*, CP 369. Almost all of TracFone's sales of prepaid wireless airtime are wholesale sales to specialty and mass-market retailers who in turn resell TracFone branded handsets and prepaid wireless airtime cards at retail to consumers. CP 370 ¶ 4.¹ Prepaid airtime (and handsets) can be purchased from more than 60,000 outlets of various specialty and mass-market retailers including Wal-Mart, K-Mart, Target, Rite-Aid, Radio Shack, Safeway, *etc.* *Id.*, ¶ 8.

TracFone uses proprietary technology programmed directly into the handset to allow its handsets to work nationwide on more than 30 different underlying carrier networks. *Id.*, ¶ 11.² Once purchased, prepaid

¹ TracFone also sells a small amount (less than 15% of total sales) of prepaid wireless airtime directly to retail purchasers over the internet at its website www.tracfone.com. *Id.*, ¶ 9.

² Handsets can be activated either through TracFone's website or by calling a 1-800 number. *Id.*, ¶ 12.

airtime can be added to an active TracFone handset by entering a PIN number either directly onto the handset, by calling a 1-800 number, or through TracFone's website. *Id.*, ¶ 13.

Once prepaid airtime has been loaded onto a handset, that airtime can be used at any time so long as the phone is active – in other words prepaid airtime does not expire in an active handset. *Id.*, ¶ 14. Thus, for example, the prepaid airtime on a 60 minute airtime card could be fully used up in a single one hour phone call or might be used during a series of shorter calls spread out over several months. The flexibility to buy and add airtime as needed (or as the user can afford) is one of primary reasons for the growing popularity of prepaid wireless service. Because TracFone sells wireless service only on a prepaid basis, it does not issue subscriber billing statements. *Id.*, ¶ 10.

B. The E-911 tax.

In 1991 the Washington Legislature imposed an enhanced 911 excise tax on subscribers' use of traditional landline telephone service. Laws of 1991, Ch. 54 (CP 415-27). The 1991 tax was *not* imposed on any wireless telephone subscribers. In 1994 the Department of Revenue ("DOR") recommended that E-911 tax be extended to wireless subscribers. CP 442. The legislature, however, struck proposed

extensions from bills amending the E-911 tax in both 1994 and 1998. *Id.*, CP 429.

Meanwhile, a national debate ensued over sourcing of wireless telephone service for state and local tax purposes. The U.S. Congress first considered the issue in 1998. In July 2000, it passed the Mobile Telecommunications Sourcing Act (“MTSA”), P.L. 106-252 (CP 360-68) creating the concept of a “place of primary use” for taxation of wireless telephone service. Importantly, prepaid wireless was expressly omitted from the MTSA, including its place of primary use provision. P.L. 106-252 § 116(c)(1), CP 362.

In 2002, the Washington Legislature implemented the MTSA in Washington, including the MTSA’s exclusion of prepaid wireless. Laws of 2002, Ch. 67. The Legislature stated its intent was to adopt the “uniform nationwide sourcing rules” established “by the United States Congress” in the MTSA. *Id.*, §1. The Final Bill Report expressly notes that Washington’s adoption of the MTSA would apply to both sales taxes and “state telephone access line taxes.” CP 445. Later the same session, the Legislature extended the E-911 tax to wireless subscribers having a place of primary use within Washington as determined by the MTSA. Laws of 2002, Ch. 341 § 8.

Using the same structure as the 1991 tax on traditional landline telephone service, E-911 tax is imposed on wireless subscribers (defined as “the retail purchaser”) at the flat rate of \$0.20 per taxable line per month. RCW 82.14B.030(4) (CP 312). The E-911 taxes on landline subscribers and wireless subscribers both employ a single, exclusive collection method – the tax is required to be stated as a separate line item on the subscriber’s “billing statement.” RCW 82.14B.040, 042 (CP 313). Because the tax is imposed on retail purchasers, there is no duty to collect the tax on wholesale sales. RCW 82.14B.200 (CP 315). A provider that fails to collect the tax on its retail sales may be held secondarily liable for the uncollected taxes, but there is no secondary liability for uncollected taxes on sales to wholesale buyers. *Id.*

C. Procedural History.

Almost all of TracFone’s sales are wholesale sales to third party retailers from whom TracFone receives resale certificates. CP 12, 119-125, and 370. TracFone has not collected E-911 tax from anyone. CP 371 ¶ 15. When TracFone discovered that the company preparing its tax returns had errantly paid amounts reported as Washington E-911 tax for the periods January through October 2003, TracFone ceased further

payments of uncollected E-911 on its tax returns. *Id.*, ¶¶ 16-17.³ In response, DOR assessed TracFone for *estimated* uncollected E-911 tax for November 2003 to December 2004 and instructed TracFone to begin collecting the monthly tax from subscribers. *Id.*, ¶ 19.⁴ The DOR, however, refuses to explain how TracFone is supposed to collect the monthly tax from persons with whom TracFone engages in no financial transactions and who do not purchase prepaid airtime on a monthly basis.

As required by RCW 82.32.180, TracFone paid the estimated assessment and filed this tax refund suit to contest the DOR's instructions that the company is required to collect the tax and to recover the amounts it had paid as estimated uncollected E-911 tax. CP 5, 322.

The trial Court granted summary judgment for the DOR dismissing TracFone's complaint by reasoning:

it appears to me [1] that the prepaid phone services that are utilized through purchasing a ... a prepaid card from some middle person or retail provider still means that TracFone is providing a radio access line, and [2] that the phone service we're dealing with in this particular lawsuit involves persons whose primary place of use is in the state of Washington.

³ The record does not reflect the basis on which the amounts remitted as E-911 tax were calculated by the tax compliance firm.

⁴ The assessment estimated TracFone's monthly liability for uncollected E-911 tax as 110% of the amount remitted on TracFone's October 2003 tax return.

That's the simplest terms, because as I read the statute, RCW 82.14B.020 deals with radio access lines, and RCW 82.04.065(13) with the primary place of use.

RP (1/25/08) at 35-36. Despite having dismissed TracFone's claim challenging the DOR's instructions that TracFone somehow collect the tax, the trial Court asserted "that's not my job in this particular case to trace those kinds of issues or to tell anyone how they should deal with this particular matter." *Id.* at 38. The trial Court also failed to address TracFone's claim challenging its liability for uncollected tax on wholesale sales under RCW 82.14B.200. *Id.* at 45-47.

SUMMARY OF ARGUMENT

By its plain language, Washington's E-911 Tax does not apply to prepaid wireless subscribers. First, the statute requires the tax to be collected from the subscriber as a separate line item on the subscriber's billing statement when a defining characteristic of prepaid service is that there are no subscriber billing statements (because the service is paid for in advance). Second, the statute imposes tax at the flat rate of \$0.20 *per month*. While regular telephone service (both landline and wireless) is sold and billed on a monthly basis, prepaid in stark contrast is sold in blocks of minutes, which purchasers may use in less than a month or over the course of many months. Third, the tax is only imposed on wireless subscribers that have a primary place of use within Washington under the

MTSA, yet the MTSA is expressly inapplicable to prepaid wireless including the MTSA's definition of primary place of use that the Washington Legislature incorporated by reference.

While TracFone believes that the above points unequivocally establish that the statute by its plain language does not apply to prepaid wireless subscribers, any ambiguity as to the scope of the tax is required to be construed in favor of taxpayers and against imposition of the tax.

Separately, even if the statute were deemed to impose tax on prepaid wireless subscribers (retail purchasers), under the statute's plain language TracFone had no duty to collect the tax (and no liability for uncollected tax) on its wholesale sales. Thus, at a minimum, TracFone is entitled to a refund of the estimated uncollected taxes paid on the 85% of its sales that were wholesale sales to third party retailers.

ARGUMENT

A. **The E-911 tax is not imposed on prepaid wireless telephone subscribers.**

A grant of summary judgment is subject to *de novo* review. *Qwest Corp. v. City of Bellevue*, 161 Wn.2d 353, 358, 166 P.3d 667 (2007). Additionally, the meaning of a statute is a question of law subject to *de novo* review. *Id.* "Where statutory language is plain and unambiguous courts will not construe the statute" instead determining the meaning from the plain language of the statute. *Agrilink Foods, Inc. v. Dep't of Revenue*,

153 Wn.2d 392, 396, 103 P.3d 1228 (2005). The plain meaning of a statute is determined by examining “all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question.” *Dep’t of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 11-12, 43 P.3d 4 (2002). In undertaking a plain language analysis, courts are careful to avoid “unlikely, absurd, or strained” results. *Burton v. Lehman*, 153 Wn.2d 416, 423, 103 P.3d 1230 (2005). For the reasons discussed below, the DOR’s assessment against TracFone for estimated uncollected E-911 assumed to be owed by unidentified retail purchasers of prepaid wireless airtime cards – most of whom bought the cards from third party retailers like Wal-Mart, Safeway or Radio Shack, not from TracFone – is contrary to the plain language of the applicable statute and achieves an absurd result.

- 1. The statute’s exclusive method for collecting the tax – as a separate line on the subscriber’s billing statement – is not applicable to prepaid wireless, which has no subscriber billing statements (because service is paid in advance).**

RCW 82.14B.040 provides a single, exclusive method for collection of E-911 from subscribers: “The amount of the tax *shall* be stated separately on the billing statement which is sent to the subscriber.” (emphasis added). As DOR officials readily acknowledge (CP 276, 290-91; 301-02) “the use of ‘shall’ indicates a mandatory directive.”

Cazzanigi v. G.E. Credit Corp., 132 Wn.2d 433, 443, 938 P.2d 819 (1997). Reiterating the mandatory nature of the statutorily required collection method in the very next section, the Legislature emphasized: “The state enhanced 911 excise taxes required by this chapter to be collected ... **must** be stated separately on the billing statement that is sent to the subscriber.” RCW 82.14B.042(3) (emphasis added). Like “shall”, “‘must’ is mandatory.” *Kelleher v. Ephrata School Dist. No. 165*, 56 Wn.2d 866, 872, 355 P.2d 989 (1960). If the legislature had intended to include prepaid wireless in its 2002 expansion of the E-911 tax it would not have limited the statute’s only stated collection method to be collection as a line item on the subscriber’s billing statement.

If the Court had applied the statute in accordance with the plain meaning of those mandatory words, it would have concluded that the tax only applies to subscribers of traditional, billed wireless service. The mandatory collection provisions are flatly inconsistent with application of the tax to prepaid subscribers; their application to prepaid would require sellers of prepaid wireless airtime to create billing statements for the sole purpose of collecting a \$0.20 tax since prepaid service by its very nature has no need to send subscribers a “billing statement” for services the subscriber already paid for – especially when, as here, the subscriber typically buys the prepaid card from someone other than TracFone.

The fact that the postage costs alone would far exceed the amounts collected on the “billing statement” demonstrates the resulting absurdity. The DOR and the trial Court both try to avoid that absurd result by improperly re-characterizing the Legislature’s unambiguously mandatory language as being merely “optional” in order to justify holding TracFone liable for estimated uncollected tax. CP 278, 390; RP 43 (“I specifically do not find that the language ‘shall be separately stated on the billing statement’ requires that there has to be a billing statement sent out ... I’m not going there”).

The DOR’s treatment of unambiguously mandatory language as merely optional creates additional problems. First, because collection as separate line item on the billing statement sent to the subscriber is the *only* collection method provided in the statute, the DOR has been persistently unable to explain how TracFone is supposed to comply with the alleged duty to collect tax from retail purchasers. *E.g.* CP 227, 278, 294, 300, 304, and 326-27. The DOR’s persistent failure to provide such guidance is a direct violation of its statutory duty to provide taxpayers upon request with “clear instructions” how to comply with their tax obligations. RCW 82.32A.020(5). It is also a violation of the DOR’s duty under RCW 82.14B.061 to adopt rules necessary to the collection and administration of the E-911 tax.

Moreover, because failure to collect tax as required subject as seller to criminal penalties (RCW 82.14B.042), the DOR's inability to explain how a seller of prepaid airtime is supposed to collect the tax from retail purchasers would make the statute unconstitutionally vague. *City of Seattle v. Rice*, 93 Wn.2d 728, 731, 612 P.2d 792 (1980) (criminal sanctions require "fair notice . . . sufficiently specific" that a reasonable person is "not required to guess at" the required conduct. A statute imposing criminal penalties "must be sufficiently explicit to inform those who are subject to it what conduct" is required). It is axiomatic that the court will construe a statute as constitutional whenever possible. *State ex rel. Faulk v. CSG Job Center*, 117 Wn.2d 493, 500, 816 P.2d 725 (1991) In this case, the statute can be construed in a constitutionally valid manner by applying it in accordance with the plain meaning of the statute's language – it imposes tax on subscribers of regular billed wireless service, not on persons who purchase prepaid wireless airtime cards.

Second, the only "suggestion" the DOR offers – that TracFone "pay the tax itself and *not* collect it" (CP 390) (emphasis added) – flatly contradicts the plain language of the statute, which expressly requires that: "The state enhanced 911 excise taxes imposed by this chapter must be paid *by the subscriber*" and the seller "shall collect *from the subscriber* the full amount of the taxes payable." RCW 82.14B.042(1) (emphasis

added). It would also subject both TracFone and the retail purchasers to criminal sanctions. *Id.* (Subscribers who “fail to pay” and providers who “fail or refuse” to collect the tax are “guilty of a misdemeanor”).⁵ Administering the tax as the DOR proposes – so that providers of billed service collect the tax from subscribers but sellers of prepaid service pay the tax themselves without collecting it from retail purchasers – would also violate the competitive neutrality requirement of the federal Telecommunications Act. 47 U.S.C. § 253(b) (states must administer regulations to treat all telecommunications providers on a competitively neutral basis). By treating E-911 tax as a cost to be born by prepaid providers while billed service providers pass it as a separate line item puts prepaid service at a competitive disadvantage to billed service. In this highly price competitive industry, excluding the cost of separate line item taxes when establishing your prices is a major advantage.

If the DOR were correct that the statute applies to prepaid subscribers, the DOR’s disparate treatment of prepaid and billed service would violate equal protection requirements of both the state and federal constitutions since the statute does not create separate classifications.

Lone Star Cement Corp. v. City of Seattle, 71 Wn.2d 564, 570-71, 429

⁵ Embedding E-911 tax in the price of the airtime cards would also result in imposing the tax on constitutionally exempt purchasers like the Federal government or Indian tribes, in violation of RCW 82.14B.160.

P.2d 909 (1967) (equal protection requires that tax be applied consistently to all taxpayers that are members of the same class). Again, the statute can be construed in a constitutional manner by recognizing that by its plain language the statute only applies to billed services, not prepaid.

The plain language of the Legislature's requirement that the tax "must" and "shall" be collected as a separate line item on the "billing statement" that is "sent" to the subscriber establishes that the tax is not imposed on prepaid wireless – which is paid for in advance and therefore does not even involve billing statements. Undefined statutory terms are accorded their "usual and ordinary meaning." *Burton*, 153 Wn.2d at 422. The usual and ordinary meaning of a "billing statement" is a "bill sent by a creditor. It gives a summary of activity on an account, including balance, purchases, payments, credits, and finance charges."

www.financialglossary.net/definition/360-Billing_Statement. Consistent with this usual and ordinary meaning, the DOR has adopted an administrative rule explicitly recognizing that billing statements are issued by creditors to their debtors. WAC 458-20-17803(4)(a) explains "the primary purpose of billing statements and statements of account is *to secure payment* for goods or services *previously purchased*." (emphasis added). Since prepaid wireless airtime, by its very nature, is paid for at the time of sale, there is no need to "secure payment" for "previous

purchases” (in stark contrast to traditional billed landline and wireless telephone service, which uses billing statements to collect charges incurred for the prior month). The legislature’s mandate of an exclusive collection method that is inherently inapplicable to prepaid unambiguously establishes that the statute does not apply to prepaid.

Consistent with this plain language analysis, the record reflects that the statute was drafted by representatives of the wireless industry who understood that “prepaid wireless was excluded” from the tax “based on how the tax was to be collected.” CP 320.

The Michigan Court of Appeals recently reached the same conclusion, holding that an E-911 tax imposed according to the customer’s “billing” address by its plain language did not apply to prepaid wireless subscribers. Determining the ordinary meaning of the word “billing” by reference to the dictionary definition as either “a statement of money owed for goods or services supplied” or to send a list of charges to”, the Court of Appeals held that because billing “entails actually sending bills on an account to a customer ... there can be no billing address if there is no billing.” *TracFone Wireless, Inc. v. Dep’t of Treasury*, 2008 WL 2468462 (Mich. App. June 19, 2008). Like Michigan’s statute, the Washington statute by requiring collection through a billing statement does not apply to prepaid, which by its very nature does not have billing statements

because all services are paid in advance. The issue of whether E-911 taxes or surcharges do or were intended to cover prepaid wireless is by no means unique to Washington. Numerous states which historically had a statute, similar to Washington's, providing for collection from wireless subscribers by a separate line item on the subscriber's billing statement have amended their statutes to expressly cover prepaid wireless. *See, e.g.* Conn. Gen. Stat. 16-256g (2007); Neb. Rev. Stat. Ann. § 86-457 (2007); Ohio Rev. Code Ann. § 4931.616; Okla. Stat. tit. 4391.61 (2005); 35 Pa. Stat. Ann. § 7021.4(b)(4); R.I. Gen. Laws § 39-21-62, 39-21.1-14; Tenn. Code Ann. 7-86-108(a)(1)(B)(iv); and W. Va. Code §24-6-6b (2006). TracFone has repeatedly offered to work with the DOR to amend Washington's statute to cover prepaid and several DOR officials have opined that a statutory change is the best solution. CP 347, 350. The Department has identified extension of E-911 to both prepaid wireless and voice over internet protocol subscribers for possible inclusion in a broad telecom tax reform bill. CP 384-86, 358.

2. **The statute imposes E-911 Tax at a flat rate (\$0.20) per month of taxable service, a rate that cannot be calculated on prepaid because it is sold in blocks airtime minutes, not by the month.**

The inapplicability of the current E-911 tax to prepaid wireless is also reflected in its rate structure. RCW 82.14B.030(4) imposes E-911

Tax at the rate of “twenty cents *per month*” for each taxable line. (emphasis added). Although regular, billed telephone service (both landline and wireless) is sold on a monthly basis (CP 451); prepaid service - in stark contrast - is *not* sold on a monthly basis; it is sold in blocks of minutes of use. TracFone sells prepaid wireless airtime cards in various increments generally ranging between 60 minutes and 400 minutes. CP 370. Those minutes do not expire on an active handset. *Id.* Thus, the purchaser of a 60 minute card could use the entire 60 minutes on a single one hour call immediately after purchasing the card or for numerous shorter calls irregularly spread over many months. There is no way to know at the time a person walks into a Safeway or Radio Shack and purchases a prepaid wireless airtime card over how many months the prepaid airtime on that card will be used.

While an “E-911 Tax Guide” jointly prepared by the DOR and the Military Department “recommends” that one month of tax should be collected by the seller on each prepaid card sold at the time of purchase, the guide also readily acknowledges that the recommended collection scheme would result in systematic over collection from subscribers who make multiple purchases in a month. CP 317. One of the guide’s drafters confirmed “this is a guide, not part of a statute.” The guide does not

attempt to implement the statute's language but merely suggests "how it might work ... as a guide, not necessarily as a statute." CP 295-96.

Collecting one month's worth of tax on each prepaid airtime card as DOR "recommends" would be unlawful under the current statute. The resulting systematic over-collection from those who make multiple purchase in a month and systematic under-collection from persons who do not purchase cards every month would violate the statute's command that the tax "shall be uniform for all radio access lines." RCW 82.14B.020.

Disregarding the express statutory mandate that the tax be imposed uniformly, the trial Court granted summary judgment for the DOR notwithstanding its "concern" that its ruling approves a construction of the statute that requires systematic collection of the wrong amount of tax. RP (1/25/08) at 39. As discussed in more detail in point B below, the trial Court's acceptance of the DOR's position that "sellers of prepaid service ... *must* collect the tax *at the time of sale*," CP 309, also fails to address the problem that TracFone does not generally sell its prepaid service to the retail purchasers on whom the tax is actually imposed and consequently is not even involved in the financial transaction during which the DOR asserts that the tax "must" be collected from the retail purchaser.

3. The statute imposes E-911 tax at a flat monthly rate, a method that cannot be calculated on prepaid because it is sold in blocks of airtime minutes, not by the month

By the plain language of the statute, E-911 tax is only “imposed on [wireless] lines whose place of primary use is located within the state.” RCW 82.14B.030(4). Place of primary use is a concept created by the U.S. Congress in the MTSA to establish uniform standards for sourcing taxes imposed on regular billed wireless service. CP 360. Washington’s Legislature adopted the MTSA for taxation of wireless service, including the E-911 tax. CP 445. Consequently, the E-911 tax statute expressly incorporates the MTSA’s definition of place of primary use for determining which wireless lines will be taxed:

“Place of primary use” has the meaning ascribed to it in the federal mobile telecommunications sourcing act, *P.L. 106-252*.

RCW 82.14B.020(9) (emphasis added). CP 311. The MTSA is inapplicable to prepaid wireless, which is expressly omitted from the Act’s definition of place of primary use. P.L. 106-252, § (2)(a). Under the plain language of the statute, E-911 tax is not imposed on prepaid wireless because under the MTSA the place of primary use is not applicable to prepaid wireless.

The DOR argued below (without citing supporting legal authority) that the legislature should be deemed to have silently intended to expand the MTSA's place of primary use definition in order to impose E-911 tax on prepaid wireless. CP 143-44; 393.⁶ Yet the argument requires (1) re-writing the statute to replace a broad reference to the MTSA with a more narrow, reference to a single sentence within the MTSA and (2) attributing to the Legislature an unspoken intent for the narrow reference it did not actually use to cause the incorporated language to have a different meaning than it does in the MTSA. Such a distortion of the statute violates the fundamental principal that the Legislature's intent is to be determined from the language the legislature actually used. *Agrilink*, 153 Wn.2d at 396. It also violates the prohibition against courts re-writing statutes. *In re Estate of Black*, 153 Wn.2d 152, 162, 102 P.3d 791 (2004).

The DOR's unsupported suggestions that the Legislature had an unstated intent to tax more broadly than the MTSA is also expressly refuted by the Legislature's statutory declaration of intent to conform to the "uniform nationwide sourcing" provisions "established by the United States Congress" in the MTSA. Laws of 2002, Ch. 67 §1. The DOR's argument also fails to give full effect to federal statutes by "look[ing] to

⁶ This is a curious argument in light of the testimony of the DOR's Legislative Liaison, who "very much" doubted that the Legislature was even aware of prepaid wireless when it expanded the E-911 tax. CP 276-77.

the statute in its entirety – all of its provisions” as Washington Courts have required. *Skamania County v. Columbia River Gorge*, 144 Wn.2d 30, 43, 26 P.3d 241 (2001). Congress was explicit in its omission of prepaid wireless from the definition of place of primary use, the Legislature’s wholesale adoption of the MTSA as the basis for expanding the E-911 tax to wireless cannot be deemed to have silently intended something contrary to the explicit omission of prepaid – especially in light of the Washington statute’s structural inapplicability to prepaid discussed above.

Consistent with both (1) the Legislature’s stated intention to adopt “national uniform standards” of the MTSA for both sales taxes and E-911 tax and (2) the MTSA’s exclusion of prepaid, the Legislature has not applied the place of primary use to impose sales tax on prepaid wireless but has established an separate provision explicitly applicable to prepaid. RCW 82.32.520(3)(c). Similarly, any expansion of the E-911 tax to subscribers of prepaid service will require legislative action imposing the tax and establishing the applicable rate and collection method.

The trial Court completely avoided any discussion of the MTSA when dismissing TracFone’s complaint on summary judgment. Nevertheless the court based its summary judgment ruling on the mistaken belief “that the phone service we’re dealing with in this particular lawsuit involves persons whose primary place of use is the state of Washington.”

12/17/07 RP 35. There are two factual defects in this statement. First, the amounts at issue here do not deal with any actual persons at all – the amounts at issue were nothing more than estimates. Second, a place of primary use is expressly defined as a *street address*, “which must be” either “the residential street address or primary business street address of the customer,” P.L. 106-252 §117(a), CP 367, and TracFone does not need or require street address information to activate a handset, the only information required is a zip code to chose which underlying carrier network on which to activate the handset. CP 371. Despite the statute’s definition of place of primary use as a street address, the trial Court said “it seems to me that a zip code does identify the primary use.” RP (1/25/08) at 48. The court’s ruling is directly contrary to the well settled principal that “Legislative definitions included in the statute are controlling.” *State v. Watson*, 146 Wn.2d 947, 954, 51 P.3d 66 (2002).

Moreover, the Court’s factual error precluded summary judgment for the DOR. Summary judgment is improper when there are genuine issues of material fact. *Marquis v. City of Spokane*, 130 Wn.2d 97, 105, 922 P.2d 43 (1996). A material fact is one which may affect the outcome of the case. “The court must consider all facts submitted and all reasonable inferences from the facts in the light most favorable to the nonmoving party.” – in favor of TracFone in this case. *Wilson v.*

Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). “Any doubts as to the existence of a genuine issue of material fact are resolved against the moving party.” *Voorde Poorte v. Evans*, 66 Wn. App. 358, 361, 832 P.2d 105 (1992). The trial Court’s express reliance on an unsupported factual assumption should have prevented the Court from granting summary judgment to the DOR but when the factual error was brought the Court’s attention, its response was to “simply rule as a matter of law that I believe it was, the place of primary use is Washington and whether or not there’s a fact to support that can be argued by either side.” RP 49-50.

4. Any ambiguity as to the scope of imposition of the tax must be resolved in favor of TracFone.

TracFone is confident that the plain language and structure of the statute conclusively establish that the legislature did not intend to extend E-911 tax on prepaid wireless services when it enacted RCW 82.14B.030(4) in 2002. If it were possible to “reasonably” construe the statute – imposing a monthly E-911 tax to be collected on the billing statement on wireless lines identified by the criteria in a federal statute that expressly excludes prepaid – as nevertheless applying to prepaid wireless airtime, at best the statute would be ambiguous.⁷ Interestingly, in

⁷ “A statute is ambiguous if ‘susceptible to two or more reasonable interpretations,’ but ‘a statute is not ambiguous merely because different interpretations are conceivable.’” *Agrilink*, 153 Wn.2d at 396.

attempting to justify its assessment of TracFone, the DOR's own internal analysis concedes "the E-911 statute's reference to the Federal MTSA (referenced by the Taxpayer) creates some ambiguity in applying the statute." CP 325. As the Washington Supreme Court has recently and repeatedly reaffirmed, "ambiguities in taxing statutes are construed 'most strongly against the government and in favor of the taxpayer.'" *Qwest*, 161 Wn.2d at 364, quoting *Estate of Hemphill v. Dept' of Revenue*, 153 Wn.2d 544, 522, 105 P.3d 391 (2005) (quoting *Dep't of Revenue v. Hoppe*, 82 Wn.2d 549, 552, 512 P.2d 1094 (1973))⁸. Thus, even if the mandatory use of "the billing statement" as the exclusive method to collect the tax, the flat monthly rate, and incorporation of a federal statute that expressly omits prepaid, are merely ambiguous rather than conclusive as to the omission of prepaid from the statute, the end result is the same – the state E-911 tax as currently written does not apply to prepaid wireless subscribers.

⁸ *Also Agrilink*, 153 Wn.2d at 396 ("[i]f 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" quoting *Ski Acres, Inc. v. Kittitas County*, 118 Wn.2d 852, 857, 827 P.2d 1000 (1992)).

B. Even if the statute as currently drafted were construed to impose E-911 tax on prepaid wireless subscribers (retail purchasers), TracFone had no statutory duty to collect the tax and, therefore, was not liable for uncollected taxes on its sales of prepaid wireless airtime to wholesale purchasers.

E-911 tax is imposed on the “subscriber.” RCW 82.14B.042(1).

“Subscriber” is defined by statute as “the retail purchaser.” RCW 82.14B.020(8). TracFone is *not* a retail purchaser of prepaid wireless; it is a reseller. There is no dispute, TracFone is *not* a “subscriber” and has *no* direct liability for the tax.

Rather, the DOR assessed TracFone on the theory that it is secondarily liable for taxes owed by retail purchasers of prepaid wireless (whose residential or primary business street address is within Washington) on the theory that TracFone failed to comply with its alleged statutory duty to collect the tax from the retail purchaser at the time of the retail sale. CP 229.

Surprisingly, the DOR argues that TracFone has a duty to collect the tax from retail purchasers even when TracFone did not make the retail sale. CP 107-118. The DOR’s position is flatly rejected by the plain language of the applicable statute. The statute does *not* require collection of tax (and consequently does not impose liability for failing to collect) on sales to persons from whom the seller either obtains a resale certificate or otherwise establishes that the “buyer” is “not a subscriber.” RCW

82.14B.042, 200.⁹ Given the statutory definition of subscriber as “the retail purchaser,” the statute plainly means that there is no duty to collect the tax on wholesale sales – the duty to collect only applies to sales in which the person on whom the duty is imposed is actually selling to the retail purchaser who owes the tax. In the context of this case, the statute means that even if E-911 tax was imposed on retail purchasers of prepaid wireless, TracFone is not required to collect tax from a Washington resident who buys a prepaid airtime card from their local Safeway or Rite Aid (or any one of the more than 60,000 retail outlets that sell TracFone prepaid airtime cards).

During the period at issue, January 2003 through December 2004, more than 85% of the units of prepaid airtime subscribers loaded onto TracFone handsets assigned Washington area codes had been purchased from third party retailers. CP 370, ¶ 9. Thus, even if E-911 applied to prepaid wireless and TracFone had a duty to collect the tax, the statute limits TracFone’s potential liability for uncollected tax to the less than 15% of its sales that were made to retail purchasers. Unfortunately the

⁹ RCW 82.14B.200(1) states that the seller can establish that it was not required to collect tax by taking “a resale certificate or equivalent document under RCW 82.04.470” or otherwise proving “that a sale of the use of a ... radio access line was not a sale to a subscriber.”

trial Court refused to rule on TracFone's claim for refund of taxes assessed on TracFone's wholesale sales.

CONCLUSION

For the reasons discussed above, prepaid wireless service is not subject to E-911 tax under the plain language of Ch. 82.14B RCW. TracFone respectfully request the Court of Appeals to reverse the dismissal of its Complaint with instructions to enter judgment for TracFone refunding all estimated E-911 taxes paid or in the alternative for a refund of taxes on TracFone's wholesale sales of prepaid wireless airtime.

DATED: August 7, 2008

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CERTIFICATE OF SERVICE

STATE OF WASHINGTON
BY
DEPUTY

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

David Hankins
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DATED this 7th day of August, 2008.



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