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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
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NO. 39643-2

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

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SPRINT SPECTRUM, LP

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE

Respondent.

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BRIEF OF APPELLANT

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## **I. INTRODUCTION**

At issue is the Administrative Procedure Act's service of process requirement. Sprint Spectrum and the Department of Revenue ("Department") were parties to a proceeding at the Board of Tax Appeals ("BTA"). The BTA issued a decision upholding the Department's position and Sprint Spectrum filed a petition for judicial review and served the petition on the Department. The Department moved to dismiss Sprint Spectrum's petition for lack of jurisdiction, claiming that the petitioner must serve the agency who issued the order being appealed—in this case, the BTA. The plain language of the statute has no such requirement, however. It merely requires service on "the agency," which in this case most reasonably refers to the agency with which the taxpayer has the dispute—the Department of Revenue.

## **II. ASSIGNMENTS OF ERROR**

The trial court erred in dismissing Sprint Spectrum's petition for judicial review. The issue is whether Sprint Spectrum was required to serve the Board of Tax Appeals as well as the Department of Revenue.

## **III. STATEMENT OF THE CASE**

The facts are undisputed. This case stems from an October 2001 assessment by the Department for uncollected sales tax on certain wireless sales. CP 5, 8. The case went through the administrative appeal process within the Department and from there to the BTA, which issued its decision on February 11, 2009. CP 7-20. Sprint timely filed its appeal on

March 6, 2009, and served both the Department of Revenue and the Attorney General's office. CP 4-6, 47-48. On May 13, 2009, the Department filed its Motion to Dismiss. CP 22-25. It was granted and this appeal ensued. *See* Notice of Appeal.

#### IV. ARGUMENT

##### **A. The Statute Is Not Specific as to the Agency to Be Served.**

RCW 34.05.542(2) governs the timeline for appeals from an administrative adjudication:

A petition for judicial review of an order shall be filed with the court and served on the agency, the office of the attorney general, and all parties of record within thirty days after service of the final order.

The statute uses the word "agency" in the singular and does not address the situation in which more than one agency is involved in the adjudication. This situation arises whenever the Legislature has created a separate agency for adjudicatory purposes, e.g. the BTA to review the Department of Revenue or the Board of Industrial Insurance Appeals to review the Department of Labor and Industries. It can also arise when an agency delegates its adjudicatory functions to the Office of Administrative Hearings, rather than conducting its own adjudications.

The statutory definition of agency is no more specific. RCW 34.05.010(2) provides:

"Agency" means any state board, commission, department, institution of higher education, or officer, authorized by law to make rules or to conduct adjudicative proceedings,

except those in the legislative or judicial branches, the governor, or the attorney general except to the extent otherwise required by law and any local governmental entity that may request the appointment of an administrative law judge under chapter 42.41 RCW.

Both the Department of Revenue and BTA are agencies under this definition.

Adjudicative agencies themselves do not agree as to which agency should be served when more than one agency is involved. For example, the Pollution Control Hearings Board interprets RCW 34.05.542 to require service on the parties, which would always include Department of Ecology, but does not require service on itself for a simple petition for review. WAC 371-08-555. The Personnel Appeals Board, on the other hand, requires service on itself and the employing agency. WAC 358-30-210.

The BTA has not taken a position as to whether service on it is required. It is the Department of Revenue, not the BTA, that brought the motion to dismiss. The BTA has not complained that it has been prejudiced in any regard or that it wanted to participate in the proceedings. In fact, the BTA's Clerk filed a declaration in the trial court, but the declaration simply stated that the BTA had not been served and the BTA did not take a position on the question of whether service was necessary. CP 21.

**B. The Most Reasonable Interpretation of “Agency” Is the Adversary Agency.**

Without a more specific definition, the most reasonable interpretation of “agency” is the agency with which the petitioner has the dispute, not the agency that merely conducts the hearing. Washington courts differentiate between quasi-judicial administrative agencies and enforcement agencies. *See Kaiser Aluminum & Chem. Corp. v. Dep’t of Labor & Indus.*, 121 Wn.2d 776, 781, 854 P.2d 611 (1993). The former are not generally permitted to bring judicial appeals or to participate as parties, even if named in the superior court action.<sup>1</sup> *Id.* at 785-86. “[A quasi-judicial agency] is in no sense a party litigant either in its own forum or in the superior and Supreme courts on appeal, as is the case of many regulatory bodies.” *Id.* at 785. Although the *Kaiser* court was discussing the Board of Industrial Insurance Appeals, its logic applies equally to the BTA, which is purely adjudicatory and cannot defend its decisions in the superior court.

If one agency cannot be a party to a court proceeding and another agency can, it makes better sense to serve the agency that will appear. The purpose of service of process and the reason that it is jurisdictional in nature is that it provides direct notice to other parties of the pendency of an action. *Pierce v. King County*, 62 Wn.2d 324, 382 P.2d 628 (1963). Given that the BTA cannot participate in an appeal, it is far more

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<sup>1</sup> The exception is when the adjudicatory agency’s procedures are being challenged. *Kaiser*, 121 Wn.2d at 782. In that event, however, presumably the petitioner would name the agency as a party so that it could defend those procedures.

reasonable for a petitioner to serve the Department of Revenue, which is the actual opponent in the case.<sup>2</sup> Moreover, once the appeal is filed in superior court, no one disputes that the parties need not serve the BTA with a copy of each pleading. It is not reasonable to make an exception of the petition for review, absent an express requirement in statute or rule.

In a case virtually identical to this one, the North Dakota Supreme Court considered whether service on the Office of Administrative Hearings was required when appealing one of its orders. *North Dakota Dept. of Human Services v. Ryan*, 672 N.W.2d 649 (2004). The petitioner had served his appeal on the Department of Human Services, which had taken disciplinary action against him, but had not served the Office of Administrative Hearings that actually conducted the administrative appeal and issued the order in question. *Id.* at 656-57. The relevant statute required that “a notice of appeal shall be served upon the administrative agency concerned.” N.D.C.C. § 28-32-42(4). The court found that because the Office of Administrative Hearings could not be named as a party, the “administrative agency concerned” was the Department of Human Services. *Id.* at 657. The same logic should prevail here.

**C. At Best, the Statute is Ambiguous and Should Not be Read to Deprive the Court of Jurisdiction.**

Even if RCW 35.05.542’s reference to “agency” could be read to include the BTA, the reference is at the very least ambiguous and could

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<sup>2</sup> The BTA is responsible for preparing the Administrative Record, but this ministerial task could certainly be accomplished without requiring that it receive original service of process of the petition for judicial review.

refer to either the Department of Revenue or the BTA. Ambiguity in a procedural statute requires that the statute be liberally construed. See *Moore v. Keeseey*, 26 Wn.2d 31, 39-40, 173 P.2d 130 (1946), *State ex rel. Buschmann v. Superior Court for Chelan Cty.*, 165 Wn.2d 624, 627-28, 5 P.2d 1041 (1931).

This rule of statutory construction was applied by the Wisconsin Supreme Court in similar circumstances to those here.

The general rule is that “strict compliance with procedural statutes is necessary to obtain jurisdiction to review administrative agency decisions.” Where, however, a “procedural statute lacks ‘specific direction’ clearly indicating who is to be served with notice, ‘an ambiguity exists.’” ***Ambiguity in a procedural statute requires the statute to be liberally construed so as to permit a determination upon the merits of the controversy if such construction is possible. Accordingly, these rules require that we resolve the ambiguity in favor of All Star unless its decision to name and serve DOT exclusively was neither reasonable nor logical under all the circumstances.***

*All Star Rent A Car, Inc. v. Wisconsin Dept. of Transportation*, 716 N.W.2d 506, 516 (Wis. 2006) (citations omitted) (emphasis added). In *All Star*, the service statute specifically called for service on the agency that issued the order being appealed, the Division of Hearings and Appeals, but because the statutory definition of “agency” did not include “division,” the court found ambiguity. *Id.* at 515. The court went on to find that All Star had not acted reasonably, but only because a separate notice that All Star had received with the order directed service on the Division of Hearings

and Appeals.<sup>3</sup> Id. at 516-17. No such notice or instruction was given in this case.

**D. The Department's Position is Contrary to Good Public Policy and Has No Support in Case Law.**

The principle enunciated by the Wisconsin Supreme Court in *All Star* is not remarkable. Public policy requires that the rules governing access to the judicial system are straightforward and easy to understand. Particularly when the government is itself a potential defendant in an action, it should not be able to shield itself by writing the rules in a confusing way and taking advantage of the resultant errors.

Yet that is precisely what the Department is doing in this case. It was not prejudiced in any fashion by the fact that the BTA did not receive service of the petition for judicial review. In fact, the Department initially began defending the action. Then it reversed direction and filed a motion to dismiss in an effort to avoid the merits of Sprint Spectrum's petition.

There is no caselaw support for the Department's position. The Department relied on *Banner Realty, Inc. v. Dept. of Revenue*, 48 Wn.App. 274, 738 P.2d 279 (1987) to buttress its argument. However, the case does not support the Department's position for two reasons: first, it interprets the old APA, ch. 34.04 RCW, which was repealed in 1988; and second, the court was not presented with the same question.

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<sup>3</sup> The Wisconsin Court of Appeals, using the same rule of statutory construction, concluded that All Star had acted reasonably. *All Star Rent A Car, Inc. v. Wisconsin Dep't of Transportation*, 688 N.W. 2d 681 (Wis. App. 2004).

The old APA phrased its service requirement differently than the current statute. While the current statute merely recites that the petition should be “served on the agency,” the former statute provided:

The petition shall be served and filed within thirty days after the service of the final decision of the agency. Copies of the petition shall be served upon the agency . . .

Former RCW 34.04.130 (repealed in 1988 Wash. Laws, ch. 288). The first sentence unambiguously uses agency to refer to the agency issuing the order, and therefore, the rules of statutory construction suggest that the same word in the next sentence has the same meaning. See *Cowles Publ'g Co. v. State Patrol*, 109 Wn.2d 712, 722, 748 P.2d 597 (1988) (when similar words are used in different parts of a statute, the meaning is presumed to be the same throughout). No such rule aids the attorney trying to interpret the current statute.

The Department has tried to brush over the changed wording by citing RCW 34.05.001, which states the Legislature’s intent that the case law interpreting former ch. 34.04 RCW remain in effect “unless this chapter clearly requires otherwise.” This expression of intent, by its own terms, has an exception for changed language. Moreover, 20 years have passed in which the new APA has been interpreted numerous times. It would be indeed a trap for the unwary were a petitioner seeking review of an administrative decision required to interpret the new statute’s service requirements in light of existing practices in 1987.

Second, the *Banner* case does not indicate whether Banner served the Department of Revenue. Banner apparently did not argue that that it timely served the Department, so the court did not decide whether service on the Department was sufficient. Banner's argument and the court's decision deal with whether the APA service requirements are jurisdictional in nature, not on which agency is to be served. *See* 48 Wn. App. at 277.

#### V. CONCLUSION

For the above reasons, this Court should reverse the trial court and remand the case for consideration on the merits.

RESPECTFULLY SUBMITTED this 12th day of October, 2009.

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**CERTIFICATE OF SERVICE**

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the state of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On this date I caused to be served in the manner noted below a copy of this document on the following counsel of record:

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