

NO. 42050-3

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

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Appellant,

v.

BI-MOR, INC. d/b/a STUPID PRICES, FURNITURE OUTLET, LLC
and WASHINGTON STATE BOARD OF TAX APPEALS,

Respondents.

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

Bi-Mor and Furniture Outlet's interpretation of former RCW 82.08.050 rests on the flawed premise that Washington law recognizes a distinct form of retail sale, which they characterize as "a RCW 82.08.055 tax-included sale." Resp't Br. at 1. In relaxing restrictions on tax-included advertising, the Legislature did not create a new category of "retail sale." There is only one "retail sale" and only one measure of the sales tax.

Consistently with the Streamlined Sales and Use Tax Agreement, the Legislature has defined the "selling price" as "the total consideration" received from the buyer, less certain "separately stated" charges, including taxes "legally imposed on the consumer." RCW 82.08.010(1). The Legislature also mandated that retail sales tax be stated separately from the selling price "in any sales invoice or other instrument of sale." RCW 82.08.050(9). Tax liability is determined from a taxpayer's "books, records and invoices," which taxpayers are required to make available for review by the Department of Revenue (Department). RCW 82.32.070.

The statutory measure of the tax, the separate statement requirement, and the duty to maintain adequate "books, records and invoices" from which tax liability may be determined are interrelated statutory mandates that embody long-established tax policies central to the

fair and efficient administration of Washington's sales tax regime. The Legislature manifested its intent to further those policies by taking care to preserve the requirement to state the tax separately from the purchase price in "any sales invoice or other instrument of sale" when it created an exception to the separate statement requirement for "the advertised price."

The "advertised price" exception to the rule that the price quoted to the buyer excludes tax can and should be read consistently with both the statutory definition of "selling price" and with the requirement to separately state the tax in "any sales invoice or other instrument of sale" as applying only to the prices stated in the seller's advertising and marketing materials. Advertising a "tax-included" price does not excuse a seller from the statutory requirement to separately state the tax when issuing a receipt to the buyer, or from potential liability for failing to remit the full amount of tax due on a sale transaction when it fails to do so.

The Board's cursory reading of the advertising exception to the separate statement requirement does not keep faith with the legislative intent that is apparent from the face of the 1985 enactment and subsequent amendments, and its decision should be reversed.

II. ARGUMENT

A. Determining Sales Tax Liability From The Selling Price Stated On The Sales Receipt Is Not Inconsistent With The “Advertised Price” Exception In RCW 82.08.050.

Bi-Mor and Furniture Outlet argue that RCW 82.08.050 “clearly and unambiguously prohibits the Department from ever considering the advertised tax-included price to be the selling price.” Resp’t Br. at 7. The Department, however, did not consider the advertised price to be the selling price. Consistently with the applicable tax laws, the Department determined the “selling price” from Bi-Mor and Furniture Outlet’s books, records and invoices, not from their advertising or marketing materials. *See* RCW 82.32.070 (tax liability to be determined from business records). Bi-Mor and Furniture Outlet cannot avoid the tax consequences of the manner in which they chose to document the sale transactions on the actual sales receipts given to their customers by relying on the purported existence of advertising and marketing materials that purportedly complied with RCW 82.08.055.

Bi-Mor and Furniture Outlet were free to promote their businesses by advertising “Always No Tax,” “We Pay the Tax,” and “Tax Included.” But having elected to document the transactions as “seller absorption” sales (using Bi-Mor’s parlance), i.e. sales in which the seller agreed to pay the tax for the buyer, they are liable for sales tax on the gross amount charged. *Cf. TracFone Wireless, Inc. v. Dep’t of Revenue*, 170 Wn.2d

273, 289, 242 P.3d 810 (2010) (seller of prepaid wireless phones must pay the E-911 tax itself if it fails to collect the tax from consumers as a result of its chosen business model). A seller cannot represent to customers “Always No Tax” and “We Pay the Tax” and then deduct an amount that was not actually charged and collected as tax from its gross receipts.

B. The Separate Statement Requirement And The Conclusive Presumption Must Be Read Together, As They Were Before Their Separation Into Distinct Sentences In 1985.

Bi-Mor and Furniture Outlet argue the separate statement rule is unrelated to the conclusive presumption that the price quoted to the buyer excludes tax, which, they assert, “makes no reference whatsoever to the separate statement rule.” Resp’t Br. at 23. They are mistaken.

The requirement to state the tax separately from the purchase price and the conclusive presumption that the price quoted to the buyer excludes tax, which is part of the same statutory provision, are simply two different ways of expressing *the same rule*: the sales tax and the purchase price are to be identified to the buyer as separate legal obligations, not lumped together. Before 1985, both expressions of the separate statement rule were stated in a single sentence that admitted no exceptions. AR 256. Their separation into two sentences in 1985 did not change the fact they are interrelated. *Cf. Great Northern Ry. Co. v. Cohn*, 3 Wn.2d 672, 686-

87, 101 P.2d 985 (1940) (amendatory statutes should be read in pari materia with superseded ones, as should sections of the same session law).

The 1985 amendment to RCW 82.08.050 changed the separate statement rule by carving out an exception to the conclusive presumption for “the advertised price,” while specifically requiring that the tax be stated separately “in any sales invoice or other instrument of sale.” Laws of 1985, ch. 168, § 1. This change permitted the tax to be lumped together with the purchase price for advertising and marketing purposes, while preserving the requirement to state the tax separately on the sales invoice.

The plain meaning of a statute is gleaned from “all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question.” *G-P Gypsum Corp. v. Dep’t of Revenue*, 169 Wn.2d 304, 309, 237 P.3d 256 (2010) (quoting *Dep’t of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002)).¹ By retaining the separate statement rule as to “any sales invoice or other instrument of sale,” the 1985 Legislature manifested its intent to further the tax policies it serves. See Appellant’s Br. at 26-34. The

¹ See also *Flight Options, LLC v. Dep’t of Revenue*, 154 Wn. App. 176, 181, 225 P.3d 354 (2010) (“Read in isolation, the statute appears to support [taxpayer’s] argument. But we must read statutes in light of the statutory scheme as a whole.”), *affirmed*, 172 Wn.2d 487, 259 P.3d 234 (2011).

Board's expansive interpretation of the advertising exception is contrary to the legislative intent apparent from the face of the 1985 session law.²

C. The Separate Statement Of Tax Is The Statutorily Mandated Means For Differentiating "Tax-Included" From "Seller Absorption" Sale Transactions.

Bi-Mor and Furniture Outlet assert that "all of taxpayer's retail sales were tax-included, as defined by the specific requirements of RCW 82.08.055." Resp't Br. at 2. In support, they cite to the Board's summary judgment order, which states, "The [sellers] advertise all their prices, in accordance with RCW 82.08.055, as always including the sales tax ('Always No Tax'), but do not separately state the amount of sales tax on receipts and invoices provided to customers." AR 21. Contrary to the Board's apparent assumption, the slogan "Always No Tax" does not mean tax is "included." On the contrary, it can only reasonably be understood as meaning that customers will pay *no* tax on their purchases, which was precisely the message Bi-Mor and Furniture Outlet intended to convey. In the words of Bi-Mor's president, Shane Baisch:

We decided to offer to cut the usual price in half, and further indicate that we would absorb the sales tax in that discount, by marketing and offering to the customers our trademarked "Always No Tax."

² "[T]he purpose of a statute includes not only what it sets out to change, but also what it resolves to leave alone." Lawrence M. Solan, *Statutory Interpretation, Morality, and the Text*, 76 Brook. L. Rev. 1033, 1046 (2011) (quoting *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98, 111 S. Ct. 1138, 113 L. Ed. 2d 68 (1991)).

AR 680.

Before 1985, it was unlawful in Washington for a seller to communicate to a buyer that it would “absorb” (i.e. pay) the sales tax on behalf of the buyer. See former RCW 82.08.120 (1984); *Irwin v. Sanders*, 49 Wn.2d 600, 603, 304 P.2d 697 (1956) (holding buyer liable for retail sales tax in addition to the agreed contract price for construction services because RCW 82.08.120 prohibited the seller from absorbing the tax). The 1985 changes to the sales tax laws authorized sellers to pay the sales tax for the buyer. See CP 29 (testimony explaining the bill would allow sellers “to pay the sales tax for the customer” when a buyer complains that an item offered for \$100 in Oregon would cost \$107.30 in Washington).

The separate statement of tax differentiates a “tax-included” transaction from a “seller absorption” transaction.³ In effect, unless the seller separately states the tax on the sales receipt, it will be presumed the seller agreed to absorb (pay) the tax itself on the total amount received. This is not a “penalty,” Resp’t Br. at 36, but is simply the statutorily mandated result of a seller’s voluntary decision not to separately charge and collect tax from the buyer. Cf. *TracFone Wireless*, 170 Wn.2d at 289 (if tax is not separately collected from the buyer as required by statute, it can be paid by the vendor that is statutorily obliged to collect and remit it).

³ As shown by Appendix A to Respondent’s Brief, the tax consequences vary depending on whether the price includes tax or the seller agrees to pay the tax.

D. The Department Has Never Conceded, And The Record Does Not Establish, That Bi-Mor And Furniture Outlet's Advertising Practices Complied With The Requirements Of RCW 82.08.055.

Bi-Mor and Furniture Outlet's insistence that the Department "admits" they complied with the advertising requirements of RCW 82.08.055 is disingenuous considering they opposed the Department's attempt to discover their advertising practices. Resp't Br. at 2. AR 30, 105. Bi-Mor and Furniture Outlet moved for a protective order, arguing their advertising practices were not relevant even though they alleged compliance with the advertising restrictions in RCW 82.08.055 as the factual predicate for their appeal. AR 30, 98. The Board denied the motion and discovery relating to Bi-Mor's advertising practices was still ongoing when the Board entered summary judgment. AR 30-31.

The Department consistently has asserted that Bi-Mor and Furniture Outlet's advertising practices are not relevant in determining the "selling price" because the seller's "books, records and invoices" determine the "selling price," not its advertising and marketing materials.⁴ That is not an admission that they met the conditions for tax-included advertising. In auditing a business, the Department's auditors review the

⁴ The Department sought discovery of Bi Mor and Furniture Outlet's advertising practices in order to test their contention that they satisfied the requirements of RCW 82.08.055, an issue that is relevant if, and only if, they are correct that compliance with RCW 82.08.055 is a substitute for the requirement to separately state the tax on the sales receipt issued to the buyer.

business's business records, not its advertising materials. The Department would have no practical means of evaluating a business's advertising practices for the audit period, which typically spans four years. A "tax-included" price tag leaves the store with the item sold.

Bi-Mor and Furniture Outlet's compliance with RCW 82.08.055 raises a potential consumer protection issue, not an issue determining the measure of the retail sales tax. If a seller were to advertise a "tax-included" price but then add a charge for tax to the advertised price (rather than charging an amount equal to the advertised price by separately stating the tax and the purchase price as required by statute, *see, e.g.*, AR 713, 810), a consumer might allege a consumer protection act violation based on deceptive advertising.⁵ *See* RCW 19.86.020; *Quichocho v. Macy's Dep't Stores, Inc.*, 2008 Guam 9 (Guam Terr. 2008) (seller allegedly violated consumer protection law by adding a separately stated gross receipts tax to the advertised purchase price).

The Department has never conceded Bi-Mor and Furniture Outlet properly made "tax-included" sales. The only fact that is undisputed is that they backed out an amount for tax from their gross receipts in reporting sales revenues even though they did not separately charge and

⁵ The record includes a discussion of this issue in an email exchange between Alan Lynn, the Department's Rules Coordinator, and a staff member of the House Republican Caucus. AR 813.

collect the tax from their customers. That Bi-Mor and Furniture Outlet paid *some* amount of tax on each retail transaction does not mean they either collected the tax from the buyer or paid the *correct* amount of tax.

Without citation to authority, Bi-Mor and Furniture Outlet assert they were entitled to apply a “backing out protocol,” which they assert is “standard and accepted accounting and reporting practice in tax-included sales.” Resp’t Br. at 2. This “backing out protocol” conflicts with the measure of the sales tax. *See* RCW 82.08.010(1) (“selling price”).

E. Courts In Other Jurisdictions With Similar Statutes Hold That The Failure To Separately Charge An Amount Precludes A Taxpayer From Excluding An Amount That Otherwise Would Be Deductible From The Measure Of The Sales Tax.

Bi-Mor and Furniture Outlet insist it is “illogical” to require a separate statement of tax because a buyer can readily calculate the tax. Resp’t Br. at 21. The Legislature, however, decided that separately stating the tax on the sales receipt is important even when a seller advertises a tax-included price. Under RCW 82.08.010(1) (“selling price”) and RCW 82.08.050(9), to exclude an amount in tax from the gross sale receipts, the tax must be stated separately on the receipt given to the buyer

Although no Washington appellate court has addressed the precise issue presented, courts addressing similar statutes have held that when the measure of the sales tax excludes “separately stated” charges, the failure to

separately state a charge precludes a taxpayer from backing out an amount that otherwise would be deductible from the measure of the tax. *See, e.g., Lash's Products Co. v. United States*, 278 U.S. 175, 176, 49 S. Ct. 100, 73 L. Ed. 251 (1929) (seller's failure to separately state federal excise tax from purchase price when billing customers precluded it from backing out the tax from its gross receipts); *Lake Grove Entm't, LLC v. Megna*, 81 A.D.3d 1191, 917 N.Y.S.2d 725, 727 (2011) (although seller's advertising materials stated "subject to applicable sales tax," seller's failure to separately charge tax precluded it from backing out amount for tax); *Spray Wax Car Wash, Inc. v. Collins*, 46 Ohio St.2d 164, 346 N.E.2d 696 (1976) (failure to separately state charges for labor and services precluded seller from backing out an amount from sales tax calculation).⁶

F. Bi-Mor And Furniture Outlet Are Bound To The Tax Consequences Of Their Business Decision Not To Separately Charge And Collect The Retail Sales Tax From Their Customers.

According to Bi-Mor and Furniture Outlet, the requirement to state the tax on the sales invoice applies to only "traditional" retail sales, not to those advertised as "tax-included" or "seller absorption" sales. Resp't Br.

⁶ *See also ADP Credit Corp. v. Sharp*, 921 S.W.2d 490 (Tex. App. 1996) (failure to separately identify interest component of lease financing contracts precluded seller from excluding amount for interest from measure of the sales tax); *Greenman's Trucking, Inc. v. Dep't of Revenue*, 6 Conn. App. 261, 504 A.2d 568 (1986) (seller's failure to separately state transportation charges on sales invoices precluded it from backing out the charges).

at 15. They argue the sales receipt does not matter at all. A seller could state no tax or even the wrong amount of tax because “nothing on the sales documentation between the parties can change the legal character or the analysis of a tax-included sale.” Resp’t Br. at 16. On the contrary, a seller’s billing practices are important in evaluating the tax due on any sale transaction, including one advertised as “tax-included.”

A retail seller acts in a fiduciary capacity as the state’s tax collector and may not profit at the expense of the State or the purchaser by either failing to collect sales tax or by retaining an amount improperly collected as “tax.” See RCW 82.08.050(2) (sales taxes are deemed to be held in trust by the seller). A seller must remit to the state any amount that it collects as tax, even if tax is not actually due. See *Kitsap-Mason Dairymen’s Ass’n v. Tax Comm’n*, 77 Wn.2d 812, 817, 467 P.2d 312 (1970); *Inky, Inc. v. Dep’t of Revenue*, BTA Docket No. 08-003 (December 8, 2008) (seller required to remit or refund erroneously collected amount labeled as “tax” on sales receipt).

In *Kitsap-Mason Dairymen*, the Washington Supreme Court rejected an argument similar to the one Bi-Mor and Furniture Outlet advance here. 77 Wn.2d at 817. In that case, the seller allowed customers a discount for prompt payment of delivered milk products. However, it charged and collected sales tax on the full amount stated on the original

invoice even if the customer qualified for the discount. In reporting and remitting excise taxes, the taxpayer backed out an amount for the sales taxes that were not actually due. The seller argued the amount of money it charged and collected as taxes was unimportant because a seller is liable to remit only the amount actually due in tax. The Washington Supreme Court disagreed, holding that the seller had to remit the entire amount it charged and collected as tax, including the overages. The Court observed that “[t]he integrity of the entire taxing system demands that funds collected as taxes be remitted to the state.” *Id.*

Bi-Mor and Furniture Outlet advertised “Always No Tax” and “We Pay the Tax” as a marketing strategy to compete more effectively against competitors like Wal-Mart. They were free to do so. But they were not entitled then to deduct an amount for tax from their sales receipts that they did not separately charge and collect from their customers. *Cf. TracFone Wireless*, 170 Wn.2d at 289 (seller of prepaid wireless phones was responsible to pay the E-911 tax itself if it failed to collect the tax as a result of its chosen business model).

G. The Department’s Discretionary Authority To Proceed Directly Against The Buyer Does Not Relieve The Seller Of Personal Liability For Uncollected Sales Tax.

According to Bi-Mor and Furniture Outlet, “the separate statement rule has no legal nexus with a seller’s liability.” Resp’t Br. at 5, 11. They

argue that if a sales receipt does not mention tax, the buyer alone is liable for the tax under RCW 82.08.050(6), which they call “the statutory joinder remedy.” Resp’t Br. at 11. Bi-Mor and Furniture Outlet’s novel “statutory joinder” theory is contrary to established law.

A seller must collect “the full amount” of the tax due on each retail sale and is “personally liable” to the State for its failure to do so. RCW 82.08.050(1), (3); *White v. State*, 49 Wn.2d 716, 725, 306 P.2d 230 (1957). The Department may, but is not required to, proceed directly against the buyer to collect the tax. *See Washington Pub. Ports Ass’n v. Dep’t of Revenue*, 148 Wn.2d 637, 62 P.3d 462 (2003) (lessor is liable for uncollected leasehold excise tax just as a retailer is liable for uncollected sales tax, although the Department *may* collect the tax from the lessee).

The Department’s discretionary authority to proceed directly against the buyer does not relieve the seller of its personal liability for uncollected sales tax. The Department may, and usually does, recover the tax from the seller. *See TracFone Wireless*, 170 Wn.2d at 289 n.9 (it is “readily understandable” that the legislature makes the seller personally liable for uncollected E-911 excise taxes because “it would be a logistical and fiscal fiasco” for the Department to try to collect the tax from each individual consumer). The seller’s remedy is to recover the tax from the buyer. *See* RCW 82.08.050(4) (sales tax constitutes a debt from the buyer

to the seller); *Home Depot USA, Inc. v. Dep't of Revenue*, 151 Wn. App. 909, 917, 215 P.3d 222 (2009).⁷

H. The Retail Sales Tax Is “Legally Imposed Directly On The Consumer” Within The Meaning Of RCW 82.08.010(1) (“Selling Price”).

Whether taxes are included in the measure of the sales tax turns on which party bears the legal incidence of the tax. “Selling price” includes “the total amount of consideration” for which property is sold, without deduction for any “taxes imposed on the seller.” RCW 82.08.010(1)(a). In contrast, “selling price” does not include “any taxes legally imposed directly on the consumer that are separately stated on the invoice, bill of sale, or similar document given to the purchaser.” RCW 82.08.010(1)(b).

Bi-Mor and Furniture Outlet argue that Washington’s sales tax is not legally imposed on either party because it is a tax on the sale transaction itself. Resp’t Br. at 24. Bi-Mor confuses the taxable event with the legal incidence of the tax. That the taxable event is a “transaction” does not mean the sales tax is not legally imposed on the consumer. Transactions do not pay taxes; people do.

⁷ Of course, the seller may waive its right to collect the tax from the buyer by agreeing to pay the tax itself, which the buyer could assert as a defense in an action brought by the seller to recover the tax from the buyer. *Compare Irwin*, at 49 Wn.2d 603 (buyer could not rely on seller’s promise to pay sales tax where seller was statutorily prohibited from absorbing the tax). But the State’s right to hold the seller personally liable does not depend on whether the seller promised to pay the tax for the buyer or instead simply failed to collect it. RCW 82.08.050(3); *White*, 49 Wn.2d at 725.

“The legal incidence of a tax falls upon the person or entity who has the legal obligation to pay the tax.” *Canteen Service, Inc. v. State*, 83 Wn.2d 761, 762, 522 P.2d 847 (1974). Sales taxes may be imposed on the seller, the buyer, or both. *See generally* Am. Jur. 2d *Sales and Use Taxes* § 3 (2011). “Where a State requires that its sales tax be passed on to the purchaser and be collected by the vendor from him, this establishes as a matter of law that the legal incidence of the tax falls upon the purchaser.” *Confederated Tribes & Bands of the Yakama Indian Nation v. Gregoire*, 658 F.3d 1078, 1087 (9th Cir. 2011) (internal quotations omitted).

The buyer has the legal obligation to pay Washington’s sales tax. RCW 82.08.050(1) (“The tax hereby imposed *shall be paid by the buyer to the seller*, and each seller shall collect from the buyer the full amount of the tax payable in respect to each taxable sale...” (emphasis added). The seller is personally liable for the tax if it fails to collect and remit it. *Kitsap-Mason*, 77 Wn.2d at 816-17.

The terms “buyer,” “purchaser,” and “consumer” are interchangeable for purposes of the retail sales tax. *See* RCW 82.08.010(3). “Consumer” is defined as “[a]ny person who purchases...any article of tangible personal property...” RCW 82.04.190. *See also* RCW 82.08.010(5) (“consumer” means the same thing for purposes of the B&O tax and the retail sales tax). Washington’s sales tax

is a tax “legally imposed on the consumer” within the meaning of RCW 82.08.010(1). Thus, the sales tax is excluded from the measure of the tax *if* the amount of tax is “separately stated on the invoice, bill of sale, or similar document given to the purchaser.” *Id.*

I. Bi-Mor And Furniture Outlet Present No Persuasive Answer To The Absurd Consequences The Legislature Sought To Avoid By Maintaining The Separate Statement Requirement.

In response to the argument that the separate statement of tax protects the buyer’s ability to obtain a refund of erroneously collected taxes, Bi-Mor and Furniture Outlet assert it is “impossible” for the tax to be erroneously collected when the buyer pays a “tax-included” amount. Resp’t Br. at 19. That is wrong. If a seller collects a “tax-included” amount from a tax-exempt customer or a tax-exempt product or service, the seller has erroneously collected tax. Without a separate statement of tax, however, the buyer would be unable to recover the tax.

In response to the argument that the failure to separately state the tax leaves the buyer vulnerable to liability for use tax,⁸ Bi-Mor asserts “no potential buyer liability can possibly exist where DOR has already been paid on the sale.” Resp’t Br. at 20. Without a separate statement of tax on

⁸ Use tax liability can arise when a taxpayer purchases goods or services from a seller that should charge retail sales tax on the sale, but for some reason does not. Use tax is a companion tax to the retail sales tax. It is imposed when a seller has not collected the retail sales tax. See RCW 82.08.020(1) (retail sales tax); RCW 82.12.020(1) (use tax); WAC 458-20-178(2); *Glen Park Assocs, LLC v. Dep’t of Revenue*, 119 Wn. App. 481, 484 n.1, 82 P.3d 664 (2003).

the sales invoice, however, the buyer would have no way of showing that sales tax had been paid. The separate statement of tax is precisely the proof needed that sales tax was paid. Sellers report and remit sales taxes on their aggregate taxable sales revenues, not on a transaction-by-transaction basis. *See* RCW 82.08.060 (Department to establish methods for the “aggregate collections of all taxes by the seller”). Short of auditing the seller, the Department would have no means to verify that a seller had paid tax on any particular sale transaction. Thus, the sales invoice issued to the buyer is critical to protect a buyer under audit from use tax liability.

In response to the argument that the separate statement requirement prevents deceptive trade practices, Bi-Mor claims, “the buyer always knows his or her out-of-pocket cost, and can always prove what was paid.” Resp’t Br. at 20. Without a separate statement of tax, however, the buyer does not know either the amount of tax or which party paid the tax. *Cf. TracFone Wireless*, 170 Wn.2d at 281 (separate statement of tax informs buyer of amount paid that is not part of the purchase price).

In response to the argument that the separate statement requirement prevents the anti-competitive practice of increasing sales revenues under the guise of waiving or absorbing the tax, Bi-Mor and Furniture Outlet assert they “engaged exclusively in tax-included sales,

not seller absorption sales.” Resp’t Br. at 21. Yet the undisputed evidence, including the testimony of Bi-Mor’s president, shows that Bi-Mor’s business model was based on the marketing strategy of offering to “absorb” the sales tax. AR 680. The sales receipts issued to customers were consistent with this intent. They either made no mention of tax or stated an amount of tax that was not added to the purchase price in stating the “total” charge. AR 234, 573, 595, 679.

Finally, Bi-Mor and Furniture Outlet make the bizarre claim that separately stating the tax would “assist the seller to perpetuate [a] fraudulent report to DOR” by suggesting that the buyer tendered an amount of tax when, in fact, the seller paid the tax on behalf of the buyer. Resp’t Br. at 21. The separate statement of tax on the sales receipts shows that the buyer’s legal obligation to pay the tax was discharged. There is nothing fraudulent about separately charging a tax that the seller actually pays out of its own pocket on behalf of the buyer. The legal incidence of the tax remains with the buyer although the funds to pay the tax are supplied by a third party. *Cf. Lash’s Products*, 278 U.S. 175 (legal incidence of the tax does not change merely because someone other than the taxpayer bears the economic burden of the tax).

J. The Department Correctly Applied Its Own Precedents.

Bi-Mor and Furniture Outlet argue that “every reported case which

has dealt with the separate statement rule in any context holds” that “the sole purpose of the rule” is to prove the buyer paid sales tax. Resp’t Br. at 13. By “every reported case,” they mean published determinations issued by the Department’s Appeals Division.⁹

Each of the determinations explains that the sales tax must be separately stated on the sales invoice issued to a customer as proof that sales tax was paid. Bi-Mor and Furniture Outlet claim this shows that the separate statement requirement is irrelevant because a “tax included” transaction is “self-proving” on the issue whether the buyer paid tax. Resp’t Br. at 15. Their argument simply assumes the answer to the issue raised. Moreover, as previously discussed, the separate statement rule serves multiple purposes, not just one. Appellant’s Br. at 26-34.

Bi-Mor and Furniture Outlet rely on Det. No. 96-119, 16 WTD 194 (1996) to support the proposition that the “backing out protocol” is “standard and accepted accounting and reporting practice in tax-included

⁹ Taxpayers have the option to pursue an administrative appeal with the Department’s Appeals Division before seeking further review at the Board of Tax Appeals or in superior court. See RCW 82.32.160, .170, .180; RCW 82.03.190. The Department’s Appeals Division issues a written determination to taxpayers that pursue an administrative appeal. RCW 82.32.160, .170; WAC 458-20-100(5)(d). The Legislature has authorized the Department to designate certain written determinations as precedential and make them available for public inspection. RCW 82.32.410. The Department exercises this authority to illustrate how the tax statutes and administrative rules apply in particular factual contexts. The published determinations are available online at <http://taxpedia.dor.wa.gov>. The Department maintains a searchable database that cross-references its determinations and advisory notices to the applicable statutes and administrative rules. See <http://dor.wa.gov/content/FindALawOrRule/TaxResearch/Default.aspx>.

sales.” Resp’t Br. at 2. That administrative appeal involved coin-operated pool tables, subject to the special tax treatment applicable to vending machine or similar sales. *See* RCW 82.08.050 (“On all retail sales through vending machines, the tax need not be stated separately from the selling price or collected separately from the buyer.”); RCW 82.08.080. No sales receipts were issued to the customer. The Department determined the taxpayer could back out the tax if he posted a sign visible to all customers that tax was included. The determination is inapposite because this case does not involve vending machine or similar sales and because the sellers issued receipts for all retail sales. AR 562.

Bi-Mor and Furniture Outlet incorrectly argue that Det. No. 86-232, 1 WTD 93 (1986) is “[t]he sole reported case dealing with the separate statement rule in the context of a tax-included sale...” Resp’t Br. at 18. That determination involved the proper classification of the taxpayer’s business activities, which consisted of constructing and selling signs, banners, paintings, and posters. The primary issue was whether the taxpayers’ activities were non-taxable “advertising services.”¹⁰ AR 267. The precedential value of the determination lies in its clarification of the distinction between making retail sales and providing services in the

¹⁰ A secondary issue was whether the Department was estopped from reclassifying the taxpayer’s activities under the retailing classification based on previous advice to the taxpayer.

context of advertising-related business activities.

The separate statement of tax was not at issue. However, the Department advised the taxpayer that, going forward, “the sales tax shall be separately stated from the purchase price, unless the taxpayer advertises the price as including the tax in the exact manner as provided in RCW 82.08.055.” 1 WTD 93, at 9. AR 273.

According to Bi-Mor, “this holding effectively struck down the ...language of Rule 107 upon which DOR relies.” Resp’t Br. at 18. The determination is neither on point nor precedential as to the separate statement requirement.¹¹ The determination does not even mention Rule 107. The phrase quoted is dictum that apparently was intended to alert the taxpayer that writing “sales tax included” on an invoice might not suffice to prove sales tax was properly charged and collected under the then-recent amendments.¹²

The published determination that actually is the relevant administrative precedent is Det. No. 87-178, 3 WTD 181 (1987), which the Department issued soon after the Legislature authorized “tax included”

¹¹ Moreover, the Department cannot “invalidate” its own administrative rules via a published determination. The Appeals Division is required to act consistently with the Department’s interpretive rules in deciding administrative appeals. WAC 458-20-100(5).

¹² Bi-Mor claims the Department “has never actually responded to 1 WTD 93 (1986). Resp’t Br. at 18. On the contrary, the Department thoroughly discussed the determination in briefing to the Board and explained why it does not stand for the proposition Bi-Mor reasserts here. See AR 214-15.

advertising. Det. No. 87-178, 3 WTD 181 (1987). AR 274. The determination involves a restaurant owner whose menu prices stated “tax included.” The guest checks and cash register receipts issued to customers stated the tax-included price, without a separate charge for sales tax. The seller backed out the sales tax in calculating its sales revenues. The determination explains that the requirement to state the tax separately from the selling price on the receipts issued to customers applies even though a seller uses “tax included” advertising. *Id.* at 7.¹³

K. The Undisputed Facts Show That Bi-Mor And Furniture Outlet Did Not Correctly Charge And Collect The Sales Tax During Any Part Of The Audit Period.

BiMor and Furniture Outlet challenge the factual basis for the challenged audit assessment, asserting it is supported by only a “handful of receipts.” Resp’t Br. at 3. A tax assessment is presumed correct and a taxpayer has the burden of proving error. *AOL, LLC v. Dep’t of Revenue*, 149 Wn. App. 533, 554, 205 P.3d 159 (2009). A taxpayer cannot meet its burden merely by asserting that a tax assessment is wrong. Rather, it must establish “the correct amount of the tax.” RCW 82.32.180. Bi-Mor and

¹³ Taxpayers have a duty to seek clarification from the Department when they are unsure of their tax obligations. RCW 82.32A.030(2). In addition to published determinations, the Department issues excise tax advisories and other publications to ensure taxpayers are adequately informed about the requirements of the tax laws, including a publication that specifically addresses a seller’s responsibilities in the context of “tax-included” advertising. AR 810-12 (“Advertising - Tax Included in Price”). *See also* AR 807 (“Sales Tax Included in the Price”); AR 712-13 (letter ruling re: adequacy of cash register receipt). All of these publications are consistent with WAC 458-20-107, which states the Department’s contemporaneous interpretation of the 1985 enactment.

Furniture Outlet cannot meet their evidentiary burden. The cash register tapes and other documents produced in discovery constitute the entire universe of documents available for review. AR 571, 589. They do not include even a single example of a sales receipt that shows the tax was separately charged and collected.¹⁴ AR 228.

L. Bi-Mor And Furniture Outlet Are Not Entitled To Attorney Fees.

Bi-Mor and Furniture Outlet argue the Department's appeal is "wholly frivolous" and claim entitlement to an award of attorney fees under RCW 4.84.185. Resp't Br. at 35. A frivolous action is one that cannot be supported by any rational argument on the law or facts. *Goldmark v. McKenna*, 172 Wn.2d 568, 582, 259 P.3d 1095 (2011). The Department's arguments are fully supported by statutes enacted by the Legislature, undisputed facts from the administrative record, well-established principles of statutory interpretation, the legislative history of the 1985 session law, a long line of appellate decisions holding that taxpayers cannot avoid the tax consequences of their chosen methods of doing business, and case law from other jurisdictions interpreting similar statutory language in addressing analogous disputes. These arguments

¹⁴ Moreover, Mr. Baisch testified in deposition that Bi-Mor and Furniture Outlet did not have a policy of separately stating the sales tax on cash register receipts at any time during the audit period. AR 562-564, 566. He asserted that separately stating the tax was neither "needed" nor "required" and "makes no sense at all" in the context of their "tax included" business model." AR 573.

obviously are not frivolous, and Bi-Mor and Furniture Outlet therefore would not be entitled to attorney fees even if they were to prevail in this appeal.

III. CONCLUSION

When read in context, the advertising exception to the separate statement requirement cannot mean what the Board interpreted it to mean. Even if the Board's reading of the statute were a plausible interpretation, it is certainly not the intended one. The Legislature never intended to excuse sellers from the duty to separately charge and collect sales tax when it authorized tax-included advertising. Thus, the Department respectfully asks this Court to affirm the validity of WAC 458-20-107 and to reverse the Board's summary judgment order.

RESPECTFULLY SUBMITTED this 14th day of December, 2011.

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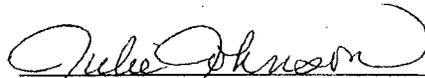
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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 14th day of December, 2011, at Tumwater, WA.



Julie Johnson, Legal Assistant

WASHINGTON STATE ATTORNEY GENERAL

December 14, 2011 - 3:38 PM

Transmittal Letter

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