

ORIGINAL

FILED  
JAN 14 2015  
11:07 AM PM 2:21  
STATE OF WASHINGTON  
BY [Signature]  
DEPUTY

No. 42050-3-II

---

**COURT OF APPEALS, DIVISION II  
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.

---

**RESPONDENTS' BRIEF**

---

Peter P. Perron  
Attorney for Respondents  
WSBA #26062  
Law Office of Peter Perron, PLLC  
19420 S.E. 240<sup>th</sup> Street  
Covington, WA 98042  
(206) 898-2805  
p3law@netos.com

## TABLE OF CONTENTS

I.	ASSIGNMENTS OF ERROR.....	1
A.	Appellant’s Assignments of Error.....	1
B.	Issues Pertaining to Assignments of Error.....	1
II.	STATEMENT OF THE CASE.....	2
III.	SUMMARY OF ARGUMENT.....	4
IV.	ARGUMENT.....	6
A.	Three Forms Of Sales Tax Treatment.....	6
B.	Determination Of Sales Tax.....	6
1.	Measure Of The Tax.....	6
2.	Presumption And Its Exceptions Are Unambiguous..	8
3.	DOR’s Statutory Interpretation Not Entitled To Deference.....	9
C.	Analysis Of Separate Statement Rule.....	10
1.	Buyer’s Tax Liability.....	10
2.	Statutory Joinder Remedy.....	11
3.	Evidence Of Buyer’s Tax Tender.....	12
4.	Sole Purpose Of Separate Statement Rule.....	13
5.	Buyer’s Payment Of The Tax-Included Price IS Payment Of The Sales Tax.....	14
6.	Sale Documentation Does Not Change The Tax Calculation.....	16
7.	Limited Application Of Separate Statement Rule.....	17

8.	DOR’s Alternative Purposes For The Separate Statement Rule Are Unsupported.....	18
9.	No Legal Nexus Between Separate Statement Rule And Determination Of Selling Price.....	22
D.	Definition Of “Selling Price”.....	24
1.	DOR Misconstrues Sales Tax As A Consumer Tax.....	24
2.	“Selling Price” Definition Does Not Overrule Governing Law.....	25
3.	All Separate Statement Provisions Have Same Legal Purpose.....	26
4.	Reference To Separately Stated Tax In Definition Of “Selling Price” Inapplicable To Both Tax-Included And Seller-Absorption Sales .....	27
5.	Subsequent Audits Cannot Change A Tax-Included “Selling Price”.....	27
6.	DOR’s Reading Of “Selling Price” Creates A Seller Absorption Sale.....	29
E.	Streamlined Sales And Use Tax Agreement.....	30
F.	WAC 458-20-107 (Rule 107) Invalid In Part.....	32
G.	Request For Attorney Fees.....	34
1.	Application Of RCW 4.84.185.....	34
2.	This Appeal Is Wholly Frivolous.....	35
3.	This Appeal Is Advanced Without Reasonable Cause.....	38
V.	CONCLUSION.....	42
APPENDICES:		
	APPENDIX A - Examples of Three Forms of Retail Tax Treatment.....	A-1

## TABLE OF AUTHORITIES

### Cases

<i>Biggs v. Vail</i> , 119 Wn.2d 129, 830 P.2d 350 (1992).....	35
<i>Bill Of Rights Legal Foundation v. Evergreen State College</i> , 44 Wn.App. 690, 723 P.2d 483 (1986).....	40
<i>Buffelen Lumber &amp; Mfg. Co. v. State</i> , 32 Wn.2d 40, 200 P.2d 509 (1948).....	37
<i>Clark Co. PUD No. 1 v. Dep't Revenue</i> , 153 Wn.App. 737, 222 P.3d 1232 (Div. 2, 2009).....	8
<i>Cockle v. Dep't Labor &amp; Indus.</i> , 142 Wn.2d 801, 16 P.3d 583 (2001).....	8
<i>Curhan v. Chelan County</i> , 156 Wn.App. 30, 230 P.3d 1083 (2010).....	34
<i>Duncan Crane Service, Inc. v. Dep't Revenue</i> , 44 Wn.App. 684, 723 P.2d 480 (1986).....	35
<i>Goad v. Hambridge</i> , 85 Wn.App. 98, 931 P.2d 200.....	34
<i>Highland School Dist. No. 203 v. Racy, et al.</i> , 149 Wn.App. 307, 202 P.3d 1024 (2009).....	34
<i>In Re MacGibbon</i> , 139 Wn.App. 496, 161 P.3d 441 (2007).....	35
<i>In Re Martinez</i> , 171 Wn.2d 354, 256 P.3d 277 (83219-6 WASC) (April 28, 2011)....	8
<i>Klickitat County v. Jenner</i> , 15 Wn.2d 373, 130 P.2d 880 (1942).....	26
<i>Krystad v. Lau</i> , 65 Wn.2d 827, 400 P.2d 72 (1965).....	37
<i>Lane v. Dep't Labor &amp; Ind.</i> , 21 Wn.2d 420, 151 P.2d 440 (1944).....	37

<i>Morrison-Knudsen Company v. Dep't Revenue,</i> 6 Wn.App. 306, 493 P.2d 802 (Div. 2, 1972).....	11
<i>Murray v. State,</i> 62 Wn.2d 619, 384 P.2d 337 (1963).....	10
<i>Pomeroy v. Anderson,</i> 32 Wn.App. 781, 649 P.2d 855 (1982).....	14
<i>Skimming v. Boxer,</i> 119 Wn.App. 748, 82 P.3d 707 (2004).....	34
<i>Sound Hyundai, Inc. v. Dep't Revenue,</i> Thurston Co. Sup. Court No. 88-2-02100-4 (1989).....	35
<i>State v. Houck,</i> 32 Wn.2d 681, 203 P.2d 693 (1949).....	37
<i>Tiger Oil v. Dep't Licensing,</i> 88 Wn.App. 925, 946 P.2d 1235 (Div. 2, 1997).....	9
<i>Waste Mgt. of Seattle v. Wash. Utils. &amp; Trans. Comm'n,</i> 123 Wn.2d 621, 869 P.2d 1034 (1994).....	8
<i>Weyerhaeuser v. Dep't Ecology,</i> 86 Wn.2d 310, 545 P.2d 5 (1976).....	9
<i>White v. State,</i> 49 Wn.2d 716, 306 P.2d 230 (1959).....	25
<b><u>Statutes</u></b>	
RCW 4.84.185.....	34
RCW 82.08.010.....	passim
RCW 82.08.020.....	25
RCW 82.08.050.....	passim
RCW 82.08.055.....	passim
RCW 82.32A.020(1).....	36

**Regulations and Rules**

WAC 458-20-107.....passim

**Other Authorities**

1 WTD 93 (1986).....17, 39

2 WTD 131 (1986).....13

2 WTD 135 (1986).....13

2 WTD 201 (1986).....13

3 WTD 181 (1987).....18

6 WTD 205 (1988).....13

6 WTD 291 (1988).....13

6 WTD 427 (1988).....13

9 WTD 15 (1989).....13

9 WTD 286-61 (1990).....13

16 WTD 194 (1996).....2, 15

18 WTD 378 (1999).....13

Streamlined Sales And Use Tax Agreement.....30-31

## I. ASSIGNMENTS OF ERROR

### A. Appellant's Assignments Of Error

As alleged on page 4 of its Opening Brief, appellant State of Washington Department of Revenue (hereinafter "DOR") assigned error to two holdings of the Board of Tax Appeals contained in the April 1, 2010 Summary Judgment Order.

### B. Issues Pertaining To Assignments Of Error

There is actually only one fundamental issue of law presented by this appeal: whether, in a RCW 82.08.055 tax-included sale, DOR can lawfully assess excise taxes measured upon the gross tax-included amount, rather than upon the price of the goods.

Analysis of the relevant authority will compel this court to hold, as did the Board of Tax Appeals and Thurston County Superior Court, that the answer to this issue is "No."

## II. STATEMENT OF THE CASE

The administrative record shows that all of taxpayers' retail sales were tax-included, as defined by the specific requirements of RCW 82.08.055 (AR 21). The contested tax assessments themselves admit: "We explained that even though your advertisement of prices may be okay, ..." (AR 854, 896). DOR presented no contravening evidence to the Board that taxpayers' sales were not in compliance with RCW 82.08.055 (AR 22). In open court below, DOR admitted the tax-included nature of taxpayers' sales (Recording of December 17, 2010 Non-Jury Trial before Thurston County Superior Court). In its opening brief here, DOR does not deny that taxpayers made tax-included sales.

The record shows that taxpayers reported and remitted excise taxes to DOR based upon the actual prices of the goods. For each sale, taxpayers calculated the taxable selling prices of the goods by "backing out" the applicable sales tax rate from the gross tax-included amount paid. This is performed by dividing the gross tax-included amount by the applicable sales tax rate.<sup>1</sup> This "backing out" protocol is standard and accepted accounting and reporting practice in tax-included sales.<sup>2</sup>

The record shows, and DOR admits (Appellant's Brief, p. 2), that it assessed additional retail sales taxes and retailing B&O taxes as measured upon the gross tax-included amounts, rather than upon the actual selling prices of the goods as backed out and reported (AR 146, Lines 5-6).

---

<sup>1</sup> For example, if the gross tax-included amount is \$10.00, and assuming a sales tax rate of 9%, then \$10.00 divided by 1.09 = \$9.17 taxable selling price, and the sales tax is \$0.83.

<sup>2</sup> See, e.g., 16 WTD 194, 200 (1996) reference to the "backing out" determination of taxable price.

DOR deemed the gross tax-included amounts as the taxable selling prices *solely* on account of the allegation that the cash register receipts allegedly failed to indicate a separate line item for the sales tax portion of the gross tax-included amounts (AR 594-596, 636-638). Notwithstanding that the remedy for any such violation lies solely against the buyer, DOR made no attempt to pursue any of taxpayers' buyers for the alleged tax deficiency.

DOR asserts that "Most cash register receipts made no mention of sales tax. AR 227." (Appellant's Brief, p. 7.) AR 227 contains a verbal declaration by auditor Le that: "Most of the cash register tapes that I reviewed made no mention of tax." But the auditor failed to identify the extent of her actual "review" of said tapes. Further, DOR was only able to produce to the Board a handful of receipts dated within the audit period with an inaccurate separate statement of sales tax amount (AR 944).

The same AR 227 recites that cash register receipts were reviewed by DOR "to determine whether the Taxpayers properly charged and collected sales tax from their customers." This is a salient part of the facts of this case: that at all times DOR operated under the premise that the tax-included amounts paid by the buyers did not include the tax.

Based on this false factual assumption, and notwithstanding the statutory prohibition, DOR assessed each and every one of the more than half a million individual retail sales made by taxpayers during the respective audit periods (January 1, 2003 – March 31, 2006) (AR 850, 893).

### III. SUMMARY OF ARGUMENT

The issues presented by appellant in this appeal are controlled by well settled law.

Taxpayers were entitled to judgment below as a matter of law, because DOR is strictly forbidden from assessing excise taxes on the gross tax-included amount, pursuant to RCW 82.08.050(5) (2003). This is the sole provision in the law governing the determination of the amount of taxable selling price (and the amount of tax due) in tax-included retail sales. Being plain and unambiguous on its face, it precludes inquiry into legislative intent. DOR's contrary interpretation is not entitled to judicial deference.

In the summary judgment proceedings before the Board, DOR presented no genuine issue of material fact. The sole purpose of the separate statement rule is to resolve tender of the sales tax by the buyer. But in tax-included sales this is never a genuine fact issue, as the tax-included amount paid always includes the tax. DOR's entire argument regarding the application of the separate statement of tax rule to this case assumes the impossible factual premise of the buyer's non-payment of the tax, when the tax was already included in the buyer's tender as a matter of law (and by common sense).

Because authority holds that the separate statement rule concerns only the buyer's tender, the legal remedy for any violation of it lies solely against the buyer. In cases where DOR has yet to be paid the tax by the seller, and there is no separate statement evidence that the buyer tendered the sales tax to the seller, DOR's sole

statutory remedy is to join the buyer in the collection proceedings. RCW 82.08.050(6) (2003). This is why the separate statement rule has no legal nexus with a seller's liability.

The reference to separately stated taxes in the definition of "selling price" is misconstrued by DOR. The definition limits the exclusion of certain taxes from the "selling price" only where those taxes have actually been paid, as proven by a separate statement where necessary. The definition is also limited to "taxes imposed directly on the consumer", such as use tax. Sales taxes are not included within this definition.

The Streamlined Sales and Use Tax Agreement provides no legal authority for DOR's statutory interpretation of the separate statement rule. The Agreement sections cited by DOR do not actually state what DOR claims they do.

Nor does WAC 458-20-107 provide DOR with legal authority.

In tax-included sales, the selling price component, and the tax portion of the gross tax-included amount, are ascertained only by the backing-out calculation. Nothing as between the seller and the buyer change that calculation. DOR cannot "disallow" that calculation under the false premise of buyer non-payment.

The separate statement rule simply has no nexus whatsoever with the governing conclusive presumption statute regarding sales tax non-inclusion in a price, and its express exceptions. DOR's administrative interpretation of the evidentiary separate statement of tax rule is completely illogical and legally frivolous, in violation of RCW 4.84.185.

## IV. ARGUMENT

### A. Three Forms Of Sales Tax Treatment

There are three different lawful forms of sales tax treatment in a retail sale.

In most retail store sales, only the actual price of the goods or services is advertised or quoted to the buyer. The retail sales tax is an additional charge that is not shown on, or included in the quoted price. The total amount due is only disclosed to the buyer at the Point Of Sale. There is no invoice prior to payment, only a receipt generated after the sale has closed. This is the “traditional” form of sale (taxpayers’ terminology).

The 1985 enactment of RCW 82.08.055 created two additional forms of sales tax treatment. It permitted the sales tax to be either (a) included in the advertised price (a “tax-included” sale), or (b) paid only by the seller on the buyer’s behalf, i.e., the buyer does not actually pay the sales tax (a “seller absorption” sale).

Examples of each of these three forms of sale are shown in Appendix A.

### B. Determination Of Sales Tax

In the excise tax assessments at issue here, DOR deemed the measure of the tax (i.e. the taxable selling price) to be the gross tax-included amount of each RCW 82.08.055 tax-included sale made by taxpayers.

#### 1. Measure Of The Tax

At all times since the original 1985 enactment of tax-included retailing, RCW 82.08.050 has governed the measure of the sales tax in tax-included sales.

The third sentence of the former 82.08.050(5) (2003), which is the applicable statute in effect for the audit period, states:

**For purposes of determining the tax due from the buyer to the seller and from the seller to the department** it shall be conclusively presumed that the selling price quoted in any price list, sales document, contract or other agreement between the parties does not include the tax imposed by this chapter, but if the seller advertises the price as including the tax or that the seller is paying the tax, **the advertised price shall not be considered the selling price.** [emphasis added]

This 2003 version is identical to the statute as originally enacted in 1985. The current version of this statute is virtually identical.<sup>3</sup>

This sentence plainly and unqualifiedly prohibits DOR from considering the gross tax-included price as the taxable selling price of the goods. The term “advertised price” obviously means the gross tax-included number.

The decisions below of both the Board of Tax Appeals and the Superior Court acknowledged this.

The Board of Tax Appeals held that, so long as a seller lawfully creates a tax-included price amount as defined by RCW 82.08.055, then this sentence “clearly and unambiguously prohibits the Department from ever considering the advertised tax-included price to be the selling price, ...” (AR 26, CP 15).

The Superior Court affirmed, holding that the statutory prohibition is not only clear and unambiguous, but is an “unwavering mandate” (CP 188).

Taxpayers ask this Court to affirm this fundamental and proper reading of the statute.

---

<sup>3</sup> RCW 82.08.050(9) (2010).

It is important to note that this sentence has always been the exclusive governing provision in our laws governing the measure of the tax. Only this sentence is “For purposes of determining the tax due...” As such, this sentence by itself fully resolves the threshold legal issue of whether DOR can ever deem the gross tax-included amount as the taxable selling price of the goods.

Further, this sentence is presented as a conclusive presumption, which as a matter of law cannot be rebutted. A conclusive presumption has no condition precedent, nor any “precondition” as asserted by DOR (Appellant’s Brief, p. 3, line 3). A conclusive presumption simply stands on its own as a rule of substantive law.

*This one sentence of RCW 82.08.050(5) (2003) begins and concludes the legal analysis of the measure of the tax in tax-included sales.*

## 2. Presumption And Its Exceptions Are Unambiguous

In arguing that the foregoing sentence does not mean what it says, and that it is not “for purposes of determining the tax due”, DOR asks this Court to examine legislative intent for the prohibition. But because there is no ambiguity in this statute, there is no need for any inquiry into legislative intent or history. *Clark Co. PUD No. 1 v. Dep’t Revenue*, 153 Wn.App. 737, 747, 222 P.3d 1232 (Div. Two 2009), quoting *Cockle v. Dep’t Labor & Indus.*, 142 Wn.2d 801, 808, 16 P.3d 583 (2001). Where a statute is unambiguous, legislative intent is determined from the text of the statute alone. *In Re Martinez*, 171 Wn.2d 354, 256 P.3d 277 (83219-6 (WASC)) (April 28, 2011), citing *Waste Management of Seattle, Inc. v. Wash. Utils.*

*& Trans. Comm'n*, 123 Wn.2d 621, 629, 869 P.2d 1034 (1994). The entirety of DOR's purported authority of legislative history (Appellant's Brief, pp. 35-50, and Appendices) is of no legal effect, and is no authority for its position.

### 3. DOR's Statutory Interpretation Not Entitled To Deference

DOR also asserts that its own interpretation of the foregoing sentence is entitled to judicial deference and substantial weight (Appellant's Brief, p. 11). But whether an agency's construction of a statute is accorded deference depends on whether the statute is ambiguous. Absent ambiguity, there is no need for the agency's expertise in construing the statute. *Tiger Oil v. Dep't Licensing*, 88 Wn.App. 925, 931, 946 P.2d 1235 (Div. Two 1997).

Furthermore, the courts do not defer to an agency interpretation that conflicts with the statute. *Id.* Notwithstanding the plain wording of the statutory prohibition, DOR's interpretation here is that it *must* consider the tax-included amount as the taxable selling price. This position, diametrically opposed to the statute, is not entitled to judicial deference. *Weyerhaeuser v. Dep't of Ecology*, 86 Wn.2d 310, 314, 545 P.2d 5 (1976).

This Court is therefore left with nothing but DOR's oft-stated conclusion, unsupported by any precedent or other authority.

In its opening brief, DOR presents no direct response to the statutory prohibition; it avoids any discussion of the operative words "shall not." In focusing exclusively on the separate statement of tax rule, DOR's entire argument diverts us

from this governing prohibition to an altogether different legal issue, that of the consumer's own tax liability.

### C. Analysis Of Separate Statement Rule

Had taxpayers not collected the sales tax from their buyers, then a discussion of the buyers' liability might have some relevance in this case. But the dispute here concerns only the correctness of the amount of tax, not whether the buyers paid it, or whether the taxpayers collected it. Thus the buyers' liability, and the underlying fact issues, are not at issue here. But because DOR has framed this appeal exclusively around the separate statement rule, taxpayers must address it.

#### 1. Buyer's Tax Liability

While the sales tax is a tax on the sale, the primary obligation to pay sales tax is upon the buyer. *Murray v. State*, 62 Wn.2d 619, 623, 384 P.2d 337 (1963).

The former RCW 82.08.050(1) (2003) (applicable to the audit period) states:

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 ...

The current version is virtually identical.<sup>4</sup>

This statute creates the buyer's legal liability for the sales tax. As with any potential liability, when a buyer does not pay the tax, there must be recourse to the buyer (assuming of course that DOR remains unpaid from the seller).

---

<sup>4</sup> RCW 82.08.050(1) (2010).

## 2. Statutory Joinder Remedy

Should the parties not be able to prove that the buyer has discharged its fundamental obligation to tender the sales tax to the seller, *DOR's sole remedy is to proceed against the buyer*. The former RCW 82.08.050(6) (2003) states:

**Where a buyer has failed to pay to the seller the tax imposed by this chapter** and the seller has not paid the amount of the tax to the department, the department may, in its discretion, proceed directly against the buyer for collection of the tax, ... [emphasis added]

The current version is the same in substance.<sup>5</sup>

Thus, in cases where: (a) the seller has not remitted the sales tax to DOR and a deficiency exists, and (b) there is a supported factual finding that the buyer failed to pay the sales tax to the seller, DOR is permitted to join the buyer in the audit proceedings. The buyer then becomes jointly liable with the seller for the remittance deficiency (as previously and independently determined by law). Either the buyer or the seller could be forced to pay both the tax and the audit interest. *Morrison-Knudsen Company v. Dep't Revenue*, 6 Wn.App. 306, 312, 493 P.2d 802 (Div. 2 1972).

Therefore, in such cases DOR may elect either to join the buyer and proceed against both parties jointly, or elect to proceed separately against the buyer (so long as there is no double collection). This is fundamental procedural law, and at all times in this litigation DOR has refused to address or discuss this remedy.

---

<sup>5</sup> RCW 82.08.050(10) (2010).

### 3. Evidence Of Buyer's Tax Tender

As with most questions of liability, there are underlying issues of fact which must be resolved before DOR may exercise its joinder remedy.

Assuming a pre-existing tax deficiency (i.e. a threshold finding of sales tax non-remittance by the seller), some such deficiency cases might also present the fact issue of whether the buyer ever paid the tax to the seller in the first place. In order to adjudge the buyer's liability in those circumstances, the separate statement rule has always defined the best methodology whereby any party to the sale can conclusively prove to DOR that the buyer actually tendered the sales tax. As with any fact issue of payment, the best evidence is a receipt.

The separate statement rule was first enacted in 1965. The first sentence of the former RCW 82.08.050(5) (2003) (as applicable during the audit period) states:

The tax required by this chapter to be collected by the seller shall be stated separately from the selling price in any sales invoice or other instrument of sale.

The current version is the same in substance.<sup>6</sup>

In those deficiency cases where the fact of the buyer's tender of the tax is genuinely at issue (i.e. where the payment of tax is truly uncertain and unknown), the separate statement rule provides that resolution of that payment issue is best proven by a separate line item for that tax. Where the fact of payment is not otherwise apparent from the transaction, it is resolved as a matter of law by a line item receipt for the tax payment, segregated from the cost of the goods.

---

<sup>6</sup> RCW 82.08.050(9) (2010).

#### 4. Sole Purpose Of The Separate Statement Rule

Because a buyer's questionable tender of tax is best proven by a receipt for the payment, this is precisely the purpose of the separate statement rule. The rule exists solely to resolve that fact issue of tender, in order that DOR can determine whether the buyer is liable and should be joined pursuant to statute.

*Accordingly, every reported case which has dealt with the separate statement rule in any context holds that this is the sole purpose of the rule.<sup>7</sup>*

---

<sup>7</sup> **As proof that the retail sales tax was collected**, the invoice or other records from the [personal property] leasing company must show the sales tax separately stated from the rental payments. 2 WTD 131 (1986).

**As proof that the retail sales tax was collected** [from the personal property lessee], the invoice or other records from the leasing company must show the sales tax separately stated from the rental payment. If not, the [lessee] shall be liable. 2 WTD 135 (1986).

RCW 82.08.050 sets forth **evidentiary requirements** for the determination of sales tax paid by buyer. 2 WTD 201, 205 (1986).

Only when seller documentation establishes that the tax has been separately stated and charged, and that such amount has been remitted to the seller by the buyer, **will the buyer be deemed to have paid the tax.** *Id.*, at 206.

The separate statement determines **whether the sales tax had been collected and paid.** 6 WTD 205 (1988).

The auditor assessed tax in the absence of **proof that sales tax had been paid by the taxpayer to the seller** of the items acquired. 6 WTD 291 (1988).

Retail sales tax paid to a builder must have been separately stated on the invoice, and the invoice must be made available to the Department, before a determination can be made **that the tax has been paid.** 6 WTD 427 (1988).

Where sales tax is not separately stated, there is a conclusive presumption **that it has not been paid.** 9 WTD 15 (1989).

The separate statement is **proof that sales tax was paid by the taxpayer-lessee.** 9 WTD 286-61 (1990).

The separate statement is evidence that sales tax was charged either by him or the vendors, and **paid by the homeowners on the purchase.** 18 WTD 378 (1999).

DOR appears to concede this important point of law: “Requiring the seller to separately state the tax ... provid(es) conclusive evidence the buyer paid the tax at the point of sale.” (Appellant’s Brief, p.28.) DOR further asserts that without a separate statement of tax: “Thus, these customers would be unable to rely on the sales receipts as proof that they had paid the correct amount of tax ...” (Appellant’s Brief, p. 30.)

But despite this ostensible acknowledgement of the rule’s true purpose, DOR then takes a leap of logic and concludes that in the absence of separate statement evidence that the buyer paid the sales tax due, it can therefore *unilaterally increase the amount of the tax which should have been paid*, from both the buyer to the seller, and from the seller to DOR. This position has no support in the law, and is starkly frivolous.

#### 5. Buyer’s Payment Of The Tax-Included Price IS Payment Of The Sales Tax

DOR asserts the impossibility that a tax-included price “is ambiguous as to both the amount of tax and whether the seller or buyer agreed to pay the tax” (Appellant’s Brief, p. 27), and cites to *Pomeroy v. Anderson*, 32 Wn.App. 781, 649 P.2d 855 (1982). *Pomeroy* provides no such support. It was decided prior to the enactment of tax-included retailing, and dealt with a privately negotiated contract which failed altogether to speak to sales tax treatment and was truly ambiguous on the issue of tax treatment.

All of taxpayers' sales here were tax-included. In a tax-included sale, if the buyer paid the tax-included price, *then absolutely the tax was included and paid*. No one, not even DOR, can genuinely claim sales tax non-payment by a tax-included buyer. The fact of tax tender is self-evident and self-proving by the very nature of the sale. The requisite words and fonts described in RCW 82.08.055 mean what they say, and constitute terms of sale. Otherwise, a buyer would have no idea what he or she is to pay!

Only in traditional sales can there ever exist a genuine issue of whether the buyer actually paid the tax. Only the traditional form of sale presents the goods price number alone without any accompanying tax terms. Only the traditional form of sale is inherently silent on sales tax treatment. Thus the potential need for evidence of tax payment arises only in that traditional form of sale.

Conversely, in both the tax-included and seller absorption forms of sales, tax payment is self-evident and certain. *This precludes any possible buyer liability for non-payment in each of those forms of sale, and any inquiry into that fact.*

Likewise, the amount of sales tax in a tax-included sale cannot possibly be said to be ambiguous – it is always precisely determinable. Granted, as provided in 16 WTD 194 (1986), one has to perform the “backing out” calculation in order to arrive at the tax amount, but *there is only one possible correct tax amount*, irrespective of anything else. The fact that the backing out calculation is performed after the sale does not mean that the correct tax amount is unknowable, or in any way “ambiguous.” DOR’s assertion as quoted above is an absurdity.

## 6. Sale Documentation Does Not Change The Tax Calculation

Even if a tax-included seller were to report an incorrect sales tax figure to DOR, this does not entail that the buyer did not pay the correct tax. This would be a mere reporting error, not a real-life tax payment error by the buyer.

Even if a tax-included seller were to issue the buyer a receipt for an incorrect amount of tax (or fail to issue a tax receipt at all), this also does not entail that the buyer did not actually pay the correct tax. Again, this would be a mere administrative error, as *there is only one possible correct amount of tax within a tax-included price, and it is that correct amount that is what was paid by the buyer.*

These observations further underscore the folly of DOR's position. Nothing on the sales documentation between the parties can change the legal character or the analysis of a tax-included sale. If the tax-included amount was paid by the buyer, and the backed-out tax amount remitted by the seller to DOR, *then as a matter of law there can be no possible tax deficiency.* What the parties themselves may or may not have stated the tax amount to be, cannot alter the post-sale backing-out calculation.

In a tax-included sale, it is *the applicable sales tax rate* that determines the tax portion of the price paid by the buyer (and the taxable goods price), not what the parties might state on their documents. The combination of the tax rate, and the tax-included number, are the only elements in the backing-out calculation. DOR cannot change the tax rate, nor the tax-included amount paid by the buyer. No sale invoice or receipt can change the one correct answer to that calculation.

## 7. Limited Application Of Separate Statement Rule

Following the original 1985 enactment of tax-included retailing, DOR adopted its own amendment to WAC 458-20-107 (Rule 107) on January 7, 1986.

DOR relies here on the following rule language, which today is still in Rule 107:

Even when prices are advertised as including the sales tax, the actual sales invoices, receipts, contracts, or billing documents must list the retail sales tax as a separate charge. Failure to comply with this requirement may result in the retail sales tax due and payable to the state being computed on the gross amount charged even if it is claimed to already include all taxes due.

(Appellant's Brief, p. 13; Appendix C.)

This rule language was erroneous when adopted, and remains erroneous today, as it directly contradicts the RCW 82.08.050 statutory prohibition on taxing the gross tax-included amount.

No prior case has ever actually upheld this interpretive rule. The separate statement rule has never been applied to either a tax-included sale, nor to a seller-absorption sale.<sup>8</sup>

Tax authority supports the taxpayer's argument. The sole reported case dealing with the separate tax statement rule in the context of a tax-included sale carved out the rule's limit. Det. No. 86-232, 1 WTD 93 (August 27, 1986) held:

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.**  
[emphasis added]

---

<sup>8</sup> All of the separate statement cases cited in footnote 7 dealt only with traditional retail sales or leases.

This holding effectively struck down the above-quoted interpretive language of Rule 107 upon which DOR relies (including the current version of the Rule). This holding is directly on point, and still stands today as precedent.

To date, DOR has never actually responded to 1 WTD 93 (1986), much less offered any legal argument for why it is not the law.

There is also a subsequent Determination, 3 WTD 181 (1987), which quoted the same language of Rule 107 as quoted above. That Determination, however, is of no precedential value. Despite quoting Rule 107, 3 WTD 181 did not even render a pronouncement of any kind on it. Nor did it: (a) deal with a tax-included sale, (b) address the prior holding of 1 WTD 93, (c) analyze any of the operative statutes (including the joinder remedy), or (d) discuss the legal purpose of the separate statement rule. The tone of 3 WTD 181 is very much like DOR's argument here, consisting of a simple quoting of the separate statement rule, without any analysis of its legal purpose and applicability.

8. DOR's Alternative Purposes For The Separate Statement Rule Are Unsupported

DOR argues that the separate statement rule ought to apply in all forms of retailing, because of "the important policies served by the separate statement requirement" (Appellant's Brief, p. 10). DOR offers several alternative purposes for the rule, but there are no other recognized purposes in the law apart from resolution of the buyer's tender of the tax.

DOR claims that “Requiring the seller to separately state the tax on sales invoices protects the buyer’s ability to obtain a refund of erroneously collected taxes by providing evidence that the buyer paid the tax at the point of sale.” (Appellant’s Brief, p. 28.) DOR even suggests that in a tax-included sale, “the buyer may not even be aware that it paid the tax.” (Appellant’s Brief, p. 29.) *But it is impossible for the tax to be “erroneously collected” from the buyer when a tax-included amount is tendered.*

As pointed out above, the requisite “backing out” calculation produces only one possible correct result for the selling price and sales tax figures. And it is that one correct amount which was collected. It makes no sense in a transactional analysis to say that a different amount of tax was collected. Because *the analysis can only be done with the post-sale calculation*, the seller is always deemed to have collected that one correct tax amount within the tax-included total. Nothing that DOR can say can change this logic.

It follows that there can be no refund claim when the “backing out” calculation is used to determine the tax. The calculation yields the correct tax, and the buyer cannot dispute that mathematical answer.

Likewise, there can never be a legitimate refund claim in a seller-absorption sale where the buyer pays no tax.

Therefore, if the purpose of the separate statement rule is to protect refund claims, as DOR asserts, then it must only apply in traditional sales. Only in a traditional sale can the buyer have possibly paid an incorrect amount of tax.

DOR further claims that “If the sales invoice does not separately state the sales tax, the buyer potentially remains liable for use tax or deferred sales tax if its records are subsequently audited.” (Appellant’s Brief, p. 30.) As a matter of law, however, no potential buyer liability can possibly exist where DOR has already been paid on the sale. *DOR begs the question that a buyer remains liable for use tax or deferred sales tax, where it is never liable for sales tax collection in the first place.* DOR’s out-of-state citations to *Noar Trucking* and *Giant Tiger Drugs* provide no support whatsoever for this claim. These two cases merely recognize that use tax may be assessed against a buyer where the seller did not properly remit sales tax, such that a tax deficiency still remained from the original retail sale. In addition, neither of these cases dealt with tax-included sales, or contemporary tax law in this state. They are both of no precedential value.

DOR further claims that “Separately stating the tax helps to prevent consumers from being misled as to the applicability and the amount of the tax” and that absent a separate statement, “a seller may engage in deceptive practices with impunity.” (Appellant’s Brief, p. 32.) DOR points to the fact that some of taxpayers’ receipts showed equal amounts for the “subtotal” and the “total.” But the buyer always knows his or her out-of-pocket cost, and can always prove what was paid. Note that there is absolutely no evidence in the record showing that any receipt ever failed to indicate the actual amount tendered by the buyer. Again, the issue of the buyer’s tender of tax is never genuine in tax-included sales, because only the backing-out calculation renders the determination of the tax portion paid.

Thus, any allegation of the buyer being “misled” is nonsensical where the tax portion is calculable with the backed-out equation. Anyone can perform that calculation at any time. Moreover, once DOR has been paid, the case is over, and nothing about the buyer’s performance remains at issue.

Finally, DOR claims that the absence of a separate statement creates “an unfair competitive advantage over other retailers...” (Appellant’s Brief, p. 34). DOR asserts that “A seller may not increase its sales revenues under the guise of waiving or absorbing the tax, and then claim a deduction from its sales revenues for an amount that was not separately stated as “tax.” (Appellant’s Brief, p. 35.) But taxpayers here engaged exclusively in tax-included sales, not seller absorption sales.

Even in DOR’s hypothetical where a seller agreed to absorb the sales tax but fraudulently reports it as tax-included in an attempt to reduce the taxable price (Appellant’s Brief, p. 35), DOR already has a full panoply of remedies to deal with that tax fraud, including RCW 82.08.050(5) (2010) (liability for seller’s solicitation of purchasers to participate in unlawful exemption) and RCW 82.32.090(7) (2010) (50% tax avoidance penalty). In DOR’s hypothetical, a global requirement to separately state tax would not have prevented that fraud. In fact, *separately stating the tax would actually assist the seller to perpetrate the fraudulent report to DOR, by separately documenting a tax item as the basis for the fraudulent deduction, when it was not actually tendered.* In addition, creating a receipt which separately states an untendered item allows such a seller to use the buyer as an ostensible accomplice to the fraud. This is not the purpose of the separate statement rule.

There is no legal authority for, nor logic to, DOR's proffered alternative purposes. The law recognizes but one purpose for a separately stated tax receipt, to evidence a tax payment by a buyer when it is uncertain. Its application is necessarily limited to cases where a tax payment to the seller is genuinely at issue – in a traditional form of sale where the seller has failed to remit and a tax deficiency exists in the first place. RCW 82.08.050(6) (2003).

9. No Legal Nexus Between Separate Statement Rule And Determination Of Selling Price

DOR's position is that the separate statement rule is a "precondition" for the conclusive presumption and the tax-included exception. (Appellant's Brief, pp. 3, 5.) But the separate statement rule has nothing whatsoever to do with the determination of the amount itself of the sales tax to be paid. Not logically, factually, or as a matter of law.

First, the statutory presumption regarding non-inclusion of sales tax in traditionally-quoted selling prices, and its exceptions, are "conclusive", meaning that no pre-condition is necessary in order for that one sentence to determine the tax due. As pointed out above, it is a fundamental point of law that a conclusive presumption stands on its own, and no condition precedent is needed, or possible.

Second, even in those traditional retail cases where the buyer's tender of the tax may not be readily ascertainable, any unavailability of a separate statement of the tax does not allow DOR to go back and arbitrarily re-determine *the amount* of

the sales tax which should have been tendered. Indeed, to even inquire whether the sales tax has in fact been paid by the buyer (and demand separate statement evidence thereof), necessarily means that the correct amount of that sales tax has already been pre-determined. *It makes no logical or legal sense to suggest that an alleged failure to pay a specific amount should therefore increase that amount which should have been paid.* No legal authority supports such a leap of logic.

Third, arguing the separate statement rule as grounds to illogically inflate the taxable selling price defeats the entire concept and meaning of a tax-included sale. To do so undermines the very legal status of a tax-included sale. DOR is attempting here to expand the legal definition of a tax-included sale as set forth in RCW 82.08.055. DOR may not usurp the function of the legislature and unilaterally forfeit the legislatively-bestowed rights and benefits of tax-included retailing. That legal right is protected by the simple RCW 82.08.050 prohibition on deeming a gross tax-included amount as a taxable “selling price”.

Plainly put, if DOR’s position was law, i.e. that the separate statement rule is an important pre-condition to the statutory prohibition, then why does the governing prohibition make no reference whatsoever to the separate statement rule?

Taxpayers ask this Court to take notice that, in 26 years of tax-included retailing, no Washington case (nor any other tax-included jurisdiction) has ever upheld such an assessment as we have here. DOR characterizes its reading of the separate statement rule as a “long standing interpretation”, but case law has consistently held that the purpose of the rule has nothing to do with the

determination of the tax amount. Only the sentence which begins: “For purposes of determining the tax due”<sup>9</sup>, is for the purposes of determining the amount of tax due.

#### D. Definition of Taxable “Selling Price”

Another of DOR’s line of argument is to cite to the statutory definition of a taxable “selling price” (the former RCW 82.08.010(1) (2004) as applicable), which purports to exclude from the selling price, among other things, “taxes legally imposed directly on the consumer that are separately stated...”.

DOR reads this definition to mean that if the sales tax is not separately stated, it must therefore be included in the taxable “selling price.” This interpretation is wholly frivolous.

#### 1. DOR Misconstrues Sales Tax As A Consumer Tax

Like the separate statement rule itself, DOR’s reading of the exclusions from the “selling price” also contains a false premise.

The reference to “separately stated” taxes in the statutory definition includes only those taxes that are “legally imposed directly on the consumer.” RCW 82.08.010(1). But the sales tax is not a tax imposed on any of the parties to a sale, much less the “consumer.”

---

<sup>9</sup> For purposes of determining the tax due from the buyer to the seller and from the seller to the department, ... the advertised (tax-included) price shall not be considered the selling price. RCW 82.08.050(5) (2003).

RCW 82.08.020(1) levies the sales tax “on each retail sale.” The sales tax is a tax on the transaction itself. *White v. State*, 49 Wn.2d 716, 725, 306 P.2d 230 (1959). The sale transaction is the event upon which the tax is imposed. The sales tax, like a transfer tax, is a tax on the transaction. The taxable event for sales tax purposes is not a person, nor one’s status as a “consumer.”

An example of a tax “imposed directly on the consumer” is use tax, where the party’s own use of personal property is a taxable action.

It is a complete misconstruction of the statutory exclusions from the “selling price” to argue that sales taxes are “imposed directly on the buyer.” Just because RCW 82.08.010 imposes a primary duty upon the buyer *to pay* the sales tax, this does not mean as a matter of law that the sales tax is “imposed” upon the buyer.

As the tax agency for the state, DOR knows full well what the sales tax is, and intentionally misleads this Court with this fundamental falsehood.

## 2. “Selling Price” Definition Does Not Overrule Governing Law

This statutory definition of “selling price” does not, as a matter of law, trump the third sentence of the former RCW 82.08.050(5) (2003). Notwithstanding its argument regarding said definition, DOR is still prohibited outright from taxing the tax-included amount. DOR fails to explain how its reading of the selling price definition can overrule the statutory prohibition on taxing the tax-included amount. If the legislature had truly “acquiesced” in DOR’s interpretation of the separate statement rule, it would have never enacted the statutory prohibition.

### 3. All Separate Statement Provisions Have Same Legal Purpose

Notwithstanding that as a matter of law the sales tax is not a tax on the consumer, the references to “separately stated” consumer items in the statutory definition of “selling price” have the same purpose as the separate statement rule itself, i.e. to ensure that any item to be excluded from the selling price has *actually been paid*. This is good tax policy. The measure of the tax has always been the cost of goods to the buyer or consumer, not the cost to the seller. *Klickitat County v. Jenner*, 15 Wn.2d 373, 382, 130 P.2d 880 (1942). Accordingly, it would not be just to deduct or exclude from the “selling price” any item that was not actually tendered by the buyer to the seller. Otherwise, the parties would be free to trump up and distort their sales documents with false and unpaid deductions, in a fraudulent effort to reduce the taxable selling price.

Just as DOR neglects the sole legal purpose of the separate statement rule in arguing a global application of it to all forms of retailing, it uses the same false premise here in citing to the definition of “selling price.” Specifically, the false premise is that *all retail transactions necessarily present a fact issue as to whether an item to be excluded from the “selling price” may not have actually been paid*, such that the statutory evidence of a separate line item receipt is needed to resolve that issue.

As argued above, non-payment of tax is a legal impossibility in statutory tax-included sales and seller absorption sales. Only in some traditional sales will the buyer’s performance not be a moot issue.

#### 4. Reference To Separately Stated Tax In Definition Of “Selling Price”

##### Inapplicable To Both Tax-Included Sales And Seller Absorption Sales

Given the purpose of a separate statement of tax, a tax-included sale necessarily excludes the sales tax from the taxable “selling price” of the goods, because in tendering the tax-included amount, the sales tax is always a separate charge that is paid by the buyer. Therefore a tax that is “included” in the payment is always excludable from the “selling price”, regardless of whether or not it is stated separately on the receipt. Where the fact of payment is resolved, the issue of separate statement is moot.

Likewise, seller-absorption sales necessarily exclude the tax from the taxable “selling price”, because we know that the buyer paid no tax. It is not that the sales tax magically disappears, rather the seller simply absorbs the buyer’s obligation to pay. How can the tax in these cases be made part of the taxable “selling price” when we know the buyer does not pay it? DOR’s argument entails that *an unpaid item* can be considered to be part of the taxable “selling price.”

#### 5. Subsequent Audits Cannot Change A Tax-Included “Selling Price”

While it is certainly possible that a tax-included buyer might subsequently be audited, as DOR suggests, it would never be proper for DOR to even inquire whether the sales tax was separately stated, as there is never a genuine fact issue of whether that tax-included buyer paid the sales tax. Even if the tax was not separately stated, the tax was “included”, and there is no possible buyer liability.

Moreover, contrary to DOR's assertion that a sale receipt is the only audit-acceptable proof of tax payment in a tax-included sale (Appellant's Brief, p. 30), proof of the payment itself is proof of payment of the correct tax. Again, because there is only one correct tax portion given a tax-included figure and the tax rate. The fact that a tax-included buyer might be subsequently audited adds nothing to the legal analysis of a tax-included sale.

DOR's faulty reading of the "selling price" definition in a subsequent buyer audit would result in an infinite tax. If the original amount of sales tax on a sale is not separately stated, DOR argues that the gross sale proceeds are now the statutory "selling price", and accordingly the new amount of tax due is now greater. But that greater amount of tax is also never "separately stated" anywhere in the sales documents, and as such the gross sale revenue, plus the new greater tax, must then become the new "selling price." In other words, the logical end of DOR's reading of the separate statement reference in the statutory definition is to continually increase the "selling price" because of continual violations of the separate statement requirement. This is another absurdity.

For this reason, *all* statutory references to "separately stated" taxes are inapplicable to both tax-included and seller-absorption sales. In those forms of sale, the buyer has no potential liability, and can never be joined pursuant to RCW 82.08.050(6) (2003).

Even if a buyer in a traditional sale were subsequently audited, the separate statement requirement is not always applicable. *As long as the seller has remitted*

*the correct amount of tax to DOR, it does not matter what amount of sales tax (or other items) the buyer may or may not have paid. Nothing as between the buyer and the seller remains at issue. The case is already over.* This is why even in the absence of a separate statement of tax, this definition of “selling price” cannot be read to invoke the statutory joinder remedy. Where the joinder remedy is not possible because DOR has been paid, any lack of separately stated tax is meaningless.

#### 6. DOR’s Reading Of “Selling Price” Creates A Seller Absorption Sale

DOR’s reading that non-separately stated sales tax is includable within the “selling price” purports to magically convert a tax-included sale into a seller-absorption sale. If the tax portion of the gross “tax-included” price is to be included in the taxable “selling price”, then it is no longer a sales tax, because the new “selling price” is by the same statute defined as the “total amount of consideration” for the goods. So if what was formerly the tax portion is no longer a tax, then logically no tax was paid by the buyer, only the price of the goods. And if no tax was paid, then the sale can no longer be considered “tax-included” pursuant to RCW 82.08.055, because no tax was ever included in the payment.

What DOR has done is to effectively re-characterize the sale transaction as a seller-absorption sale, where the buyer pays only the price of the goods. What was the backed-out tax-included “selling price” is now the tax-excluded “selling price” of a seller-absorption sale. This despite that there was no RCW 82.08.055 statutory

notice that the seller was absorbing the tax on behalf of the buyer, nor such an agreement between the parties to the sale.

Moreover, DOR has never responded to this argument, because it refuses to even acknowledge the differences in each form of retail tax treatment. DOR argues below that the tax treatment of any retail sale is “irrelevant.” This is no excuse for failing to grapple with the leaps of logic it presents.

DOR’s citation to the statutory definitions of “selling price” lend no legal support whatsoever to its position.

E. Streamlined Sales And Use Tax Agreement

DOR argues that “The Streamlined Agreement requires states to exclude amounts received for interest, financing, or carrying charges, and taxes legally imposed on the consumer, but only if the amount is ‘separately stated on the invoice, bill of sale, or similar document given to the purchaser.’” (Appellant’s Brief, p. 19.) DOR offers no authority for this argument.

The current Streamlined Sales and Use Tax Agreement, Appendix C, Administrative Definition of “Sales Price”, actually states in relevant part:

States may exclude from “sales price” the amounts received for charges included in paragraphs (C) through (F) above, if they are separately stated on the invoice, billing, or similar document given to the purchaser.

(SSUTA, Appendix C, Page 136, Lines 6-8.

Note that the referenced “paragraphs (C) through (F) above” make no mention of sales taxes. Paragraph C is: “Charges by the seller for any services

necessary to complete the sale, other than delivery and installation charges.” Paragraph D is: “Delivery charges.” Paragraph E is: “Installation charges.” Paragraph F is: “Credit for any trade-in, as determined by state law.” SSUTA, Appendix C, Page 136, Lines 1-5. DOR misquotes what the Agreement says.

Nevertheless, DOR proceeds to analogize a sales tax with the Streamlined Agreement’s reference to “delivery charges.” DOR asserts that the Agreement states that “Delivery charges that are not separately stated on the invoice given to the buyer *must* be included in the measure of the sales tax, even if they otherwise would be exempt under the state’s sales tax laws.” (Appellant’s Brief, p. 20). But those “delivery charges” as set forth in paragraph (D) cited above are among the items which states “may” exclude, pursuant to SSUTA, Appendix C, Page 136, Line 6. Contrary to DOR’s assertion, there is no mandate.

DOR seems to admit this in observing that: “The Streamlined Agreement gives member states *the option* to exclude incidental charges or services needed to complete a sale ...” (Appellant’s Brief, p. 19.) So if inclusion of certain incidental charges in the selling price is optional to member states, as the Agreement states, why does DOR assert that it is mandatory in Washington?

Finally, DOR admits “The Governing Board (to the Agreement) has not yet adopted an interpretive rule relating to the exclusion of separately stated taxes from the “sales price.” (Appellant’s Brief, p. 19.) Even if that Board were to do so, any such ruling has no force of law in this state until it would be ratified and adopted by our legislature.

The Streamlined Sales And Use Tax Agreement therefore offers no authority for DOR's position that sales taxes not separately stated must be included in the taxable "selling price", even in tax-included sales. The Agreement states no such proposition.

Thus, contrary to DOR's conclusion, the Board's summary judgment order is not today, and was not when issued, "out of compliance with the Streamlined Agreement" (Appellant's Brief, p. 18.) Nor is our statutory prohibition on taxing the tax-included price "out of compliance." If that were truly the case, the statutory prohibition would have been repealed back in 2003, when Washington became a member state to the Agreement.

The Agreement is no authority for taxing a tax-included amount.

F. WAC 458-20-107 (Rule 107) Invalid in Part

The former WAC 458-20-107 (1990) (Rule 107) was in effect during the audit periods in this case. The last two sentences of subsection (1)(c) state:

Even when prices are advertised as including the sales tax, the actual sales invoices, receipts, contracts, or billing documents must list the retail sales tax as a separate charge. Failure to comply with this requirement may result in the retail sales tax due and payable to the state being computed on the gross amount charged, even if it claimed to already include all taxes due.

This portion of Rule 107 has remained unaltered since DOR's early 1986 rule amendment which first interpreted the 1985 statutory enactment of tax-included retailing.

DOR's citation to its own interpretive rule as authority for its position in this case is of no consequence. Administrative rules are not themselves legal authority. They are simply an agency's interpretation of law.

This particular portion of Rule 107 falsely assumes a legal nexus between separate statement evidence of tax payment by the buyer, and the determination of the amount of that tax. This official interpretation of the RCW 82.08.050 prohibition on taxing the sales tax is to ignore it. DOR has unlawfully invented its own means of re-determining the amount of tax due.

No legal nexus exists between these two separate issues. The amount of tax due is determined first. Thereafter, if the seller has not remitted it to DOR, and the transaction is not clear on payment by the buyer, then proof of payment can be sought. But no law authorizes the subsequent re-determination of the *amount* of tax, irrespective of whether or not it was ever paid by the buyer. Again, RCW 82.08.050(5) expressly forbids a re-determination of the amount.

The Court below affirmed this point of law, and ruled that this portion of Rule 107 is in direct conflict with RCW 82.08.050(5) (2003) (and the current version of that statute). CP 188. And in 1 WTD 93 (1986), DOR itself precluded use of the separate statement rule to measure the tax. The lack of any nexus between these independent issues should be affirmed once again.

Taxpayers specifically request that this Court strike down that portion of Rule 107 which is in conflict with the statute, and like the Superior Court, rule that it is *ultra vires* and void as a matter of law.

G. Request For Attorney Fees

1. Application Of RCW 4.84.185

RCW 34.05.598 states that the provisions of RCW 4.84.185 relating to civil actions that are frivolous and advanced without reasonable cause apply to petitions for judicial review (of an administrative decision) under this chapter. This appeal constitutes a “judicial review” pursuant to RCW 34.05.570, both with respect to review of the Board’s order, and review of DOR’s administrative rules.

RCW 4.84.185 states in pertinent part:

In any civil action, the court having jurisdiction may, upon written findings by the judge that the action, counterclaim, cross-claim, third party claim, or defense was frivolous and advanced without reasonable cause, require the nonprevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action, counterclaim, cross-claim, third party claim, or defense.

The purpose of RCW 4.84.185 is to compensate those parties forced to defend against a frivolous claim. *Highland School District No. 203 v. Racy, et al.*, 149 Wn.App. 307, 316, 202 P.3d 1024 (2009).

A lawsuit is frivolous if, when considering the action in its entirety, it cannot be supported by any rational argument based in fact or law. *Curhan v. Chelan County*, 156 Wn.App. 30, 37, 230 P.3d 1083 (2010), *Skimming v. Boxer*, 119 Wn.App. 748, 756, 82 P.3d 707 (2004). An appeal is frivolous when there are no debatable issues over which reasonable minds could differ, and there is so little merit that the chance of reversal is slim. *Goad v. Hambridge*, 85 Wn.App. 98, 105, 931 P.2d 200, rev. den., 132 Wn.2d 1010, 940 P.2d 654 (1997).

Nothing in the statute requires a court to find that the action was brought in bad faith or for purposes of delay or harassment. *Highland*, supra, at 311. However, the position taken by the non-prevailing party must be wholly frivolous. *In Re MacGibbon*, 139 Wn.App. 496, 508, 161 P.3d 441 (2007). The action or lawsuit is to be interpreted as a whole. *Biggs v. Vail*, 119 Wn.2d 129, 136-37, 830 P.2d 350 (1992).

The amount and methodology for imposing sanctions under RCW 4.84.185 is left to the court. *Highland*, supra, at 314. The only requirement is that attorney fees awarded under the statute may not exceed those actually incurred. *Id.*, at 316.

## 2. This Appeal Is Wholly Frivolous

Primarily, this appeal is wholly frivolous because, in taxing the tax-included prices, DOR intentionally violated the governing law for the measure of the tax.

It is DOR's burden to cite legal authority for its desired nexus between the separate statement rule and the determination of the tax amount. But throughout this litigation, DOR has never offered "even a plausible theory to justify its regulatory position." *Duncan Crane Service, Inc. v. Dep't of Revenue*, 44 Wn.App. 684, 688, 723 P.2d 480 (1986).

DOR's unsupported position in this case is reminiscent of its conclusory arguments made in *Sound Hyundai, Inc. v. State of Washington Dep't of Revenue*, Thurston County Superior Court No. 88-2-02100-4 (1989). In that case the Court observed: "The Department's position on this point is supported only by argument,"

and that DOR “simply declares that extended warranties sold by the retail seller of the property are part of the (taxable) retail sale.” AR 1034-1035.

DOR’s refusal to address the lack of logic in its interpretation of the separate statement rule, and its refusal to directly address the governing statutory prohibition, has been most frustrating for the taxpayers. RCW 82.32A.020(1) and (5) (“Washington Taxpayers’ Rights and Responsibilities”) dictate that any taxpayer in this state has the right to receive a written explanation of the basis for any tax assessment, and the clear and current supporting law. But rather than comply, and explain exactly how disallowing the backing-out protocol does not violate the statutory prohibition, DOR continues to simply reiterate its desired end that it can increase the tax due, under the false factual premise of buyer non-payment. In its current briefing of the separate statement rule, DOR not only fails to acknowledge the separate statement rule’s sole evidentiary purpose as declared by case law, but also its statutory joinder remedy. This despite taxpayers having raised these issues from the inception of this litigation.

The administrative record shows, among other things, that as early as July 31, 2007, taxpayers’ accountant asked DOR about the “penalty” for a hypothetical violation of the separate statement rule. AR 845. To this day, DOR has refused to acknowledge that it is an issue of buyer’s potential liability, and that its remedy is to join the buyer.

Even when confronted with legal authority pronouncing the purpose of the separate statement rule, DOR has always failed to address the leap of logic in

demanding proof of the buyer's tax payment when the tax was obviously included and paid in each tax-included sale.

For purposes of the seller's remittance to DOR, the backing-out calculation is the only lawful methodology (and the only logical methodology) to determine the selling price and the tax amount paid. The mathematical calculation begins with only the tax-included total, and the tax rate. Despite being paid in full on this basis, DOR has yet to answer why the analysis of the sale is not concluded, and why it can thereafter commence an inquiry into what the buyer may or may not have done in the sale. DOR's position is fraught with many unanswered fundamental questions, and it is inadequate to continually fail to even acknowledge these questions.

The simple statutory words "shall not" by themselves preclude DOR's attempt to circumvent the prohibition. Where the language of the statute is clear and unambiguous, and can have only one meaning, there is no room for construction. *Krystad v. Lau*, 65 Wn.2d 827, 400 P.2d 72 (1965); *State v. Houck*, 32 Wn.2d 681, 203 P.2d 693 (1949); *Lane v. Dep't of Labor and Industries*, 21 Wn.2d 420, 151 P.2d 440 (1944). This rule has been applied to taxing statutes. *Buffelen Lumber & Mfg. Co. v. State*, 32 Wn.2d 40, 200 P.2d 509 (1948).

The complete absence of supportive legal authority for DOR's argument that the separate statement rule is for purposes of determining the tax due, its failure to address case law on point, and its refusal to abide by the simple statutory prohibition on taxing a tax-included figure, all underscore the stark frivolity of DOR's position.

### 3. This Appeal Is Advanced Without Reasonable Cause

In its briefing (and throughout this litigation), DOR focused solely on the separate statement rule itself, characterizing it as a “precondition for excluding the tax from the seller’s gross receipts in determining the taxable ‘selling price’.” (Appellant’s Brief, p. 3.) DOR argues all around its desired application of separate statement, while failing to squarely address the governing prohibition on taxing a tax-included price amount. DOR offers no explanation of how the separate statement rule might actually overrule the prohibition on taxing the sales tax. This avoidance of any analysis of the prohibition itself renders this appeal a donut of circular reasoning. DOR’s briefing leaves a void on the core legal issue of the statutory prohibition of its assessments.

The closest DOR comes to dealing with the prohibition is a proffered distinction between the tax-included number stated on the price tag, and the same tax-included number appearing on the receipt. DOR claims that “a price advertisement cannot be equated with an actual sales invoice or other document that evidences the parties’ agreement.” (Appellant’s Brief, p.25.) DOR expressly argued below (AR 204), and continues to maintain here, that it did not tax the advertised tax-included price in violation of the statute, but merely taxed the “invoiced” tax-included price because only the invoice reflects the actual agreement of the parties. This proposition, *that the two equal numerals, the advertised tax-included price and the tax-included price on the receipt, are somehow different due to which piece of paper they are written on*, is no analysis of the law. It is not even rational – the law

plainly concerns only the tax-included number. It is the tax-included price number which is forbidden from taxation, *regardless of where that number might appear*.

Thus we are left asking why this appeal has been filed. DOR makes no request for a modification of existing law. Indeed, one cannot seek a modification of existing law without first acknowledging what it is. No legal circumstances or rational policies have been offered for why this Court should overturn the fundamental statutory prohibition on taxing a tax-included price.

DOR also offers no rational policy argument for overturning 1 WTD 93 (1986) (at AR 265-273), which excluded tax-included sales from the separate statement requirement. Why should the tax be separately stated in a tax-included sale, when the tax portion is determined by the backing-out calculation, and we already know that it was collected by the seller? DOR cannot articulate a rational policy for this. In addition, what rational policy can justify a requirement to issue a receipt for tax in a seller absorption sale, where the buyer pays no tax?

DOR cannot articulate a rational policy for any factual scenario inherent in its position. All of the proffered policies in its brief are based on nonsensical facts.

DOR asserts that “The receipts Bi-Mor and Furniture Outlet issued indicate that the sales tax was not charged or collected.” (Appellant’s Brief, p. 30.) But how can this possibly be where the tax was always stated to be “included” in the tender?

DOR asserts that the lack of a separate statement in tax-included sales “misleads the buyer as to the amount of sales tax the seller ostensibly is paying for the buyer.” (Appellant’s Brief, p. 33). But how can this possibly be when the tax

amount is calculable by the backing-out equation, and anyone is free to perform this calculation?

DOR asserts that “Stating a separate charge for ‘tax’ and then not adding the stated amount to the price of the goods sold deceptively suggests to the buyer that the seller is waiving or refunding the sales tax, which is prohibited by RCW 82.08.120.” (Appellant’s Brief, p.34.) But no one did any such thing here. More importantly, why would a separately stated charge have to be added to the “price of the goods sold”? DOR’s position is that non-separately stated items must be added.

Finally, DOR asserts that “A seller may not increase its sales revenues under the guise of waiving or absorbing the tax, and then claim a deduction from its sales revenues for an amount that was not separately stated as ‘tax’.” (Appellant’s Brief, p. 35.) But why would any seller want to increase its sales revenues to begin with? And again, there is absolutely nothing in the record to support the allegation that taxpayers here were making seller-absorption sales. All sales complied with the tax-included requirements of RCW 82.08.055.

All DOR has done throughout this litigation is to demand its desired outcome. DOR has never altered its arguments, and having made the exact same arguments below, this is an additional reason for imposition of sanctions. See, *Bill of Rights Legal Foundation v. Evergreen State College*, 44 Wn.App. 690, 697, 723 P.2d 483 (1986).

This appeal also fails to present any argument that the Board’s decision in this case was not a matter of judicial discretion. It clearly was within the Board’s

jurisdiction. Given that, DOR does not articulate any public policy served by continuing this litigation. Simply taking another bite at the apple at this stage because it is procedurally available does not constitute “reasonable cause” under RCW 4.84.185. This appeal is brought for purposes of delay, in violation of RAP 18.9(a).

Taxpayers therefore request that the Court make the requisite written findings that this appeal presents no rational argument for avoiding the statutory prohibition on taxing the sales tax, and direct further proceedings as necessary in accordance with RAP 18.1.

## V. CONCLUSION

Taxpayers ask this Court to affirm the summary judgment order of the Board of Tax Appeals on the grounds argued above.

Even if this Court were to decide the first assignment of error in DOR's favor (i.e. that the separate statement rule is required for all forms of sales, even where buyer's tax tender is certain), resolution of the fact issue of buyer's tender to the seller is still not determinative of the legal issue of the measure of the tax (and its amount). In the context of the single sentence in RCW 82.08.050(5) (2003) governing the determination of the tax due, and its conclusive presumption format, the separate statement rule is simply a *non-sequitur*.

Due to the complete absence of logic in DOR's position, taxpayers further ask this Court to enter written findings that this appeal is frivolous and advanced without reasonable cause, pursuant to RCW 4.84.185.

DATED: November 14, 2011

Respectfully Submitted,



PETER P. PERRON, WSBA #26062

Law Office of Peter Perron, PLLC  
19420 S.E. 240<sup>th</sup> Street  
Covington, WA 98042  
(206) 898-2805 Phone  
(425) 432-6677 Fax  
[p3law@netos.com](mailto:p3law@netos.com) Email

# APPENDIX A

# THE 3 FORMS OF SALES TAX TREATMENT

(Assume Price of \$10.00 Price & Sales Tax Rate of 9.0%)

## Traditional Sale:

10.00 Advertised Price (cost of goods, no statutory words)

10.00 Selling Price

0.90 Sales Tax Collected

10.90 Total Amount Paid By Buyer

0.90 Sales Tax Remitted By Seller

## Tax Included Sale:

10.00 Advertised Price (cost of goods + words "tax included")

9.17 Selling Price (per backed-out tax calculation)

0.83 Sales Tax Collected

10.00 Total Amount Paid By Buyer

0.83 Sales Tax Remitted By Seller

## Seller Absorption:

10.00 Advertised Price (cost of goods + statutory notice)

10.00 Selling Price

0.00 Sales Tax Collected

10.00 Total Amount Paid By Buyer

0.90 Sales Tax Remitted By Seller

DECLARATION OF SERVICE

I hereby declare under penalty of perjury under the laws of the State of Washington that on November 14, 2011, I mailed a copy of Respondents' Brief to the following parties and/or counsel, by first-class U.S. mail, postage prepaid:

Ms. Rosann Fitzpatrick  
Assistant Attorney General  
Revenue Unit  
P.O. Box 40123  
Olympia, WA 98504-0123

DATED: November 14, 2011

  
\_\_\_\_\_  
Peter P. Perron

NOV 14 2011  
11:00 AM  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY