

COURT OF APPEALS
DIVISION II

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

SPRINT SPECTRUM, LP,

Respondent/Cross-Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Appellant/Cross-Respondent.

**BRIEF OF APPELLANT/CROSS-RESPONDENT STATE OF
WASHINGTON, DEPARTMENT OF REVENUE**

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I. INTRODUCTION

The cross-appeals of the parties in this case from a Board of Tax Appeals decision present two tax issues concerning Sprint Spectrum, LP's business as a wireless telephone service provider. One issue is the applicability of the sales tax exemption for a "residential class of telephone service" in RCW 82.08.0289. However, because Sprint litigated and lost the same issue in a prior proceeding, collateral estoppel bars relitigation. This Court should decline to reach the merits of the issue, and it should reverse the Board's erroneous decision not to apply collateral estoppel.

The other tax issue is Sprint's liability for use tax on cell phones it provided to customers for free, on the condition that they agreed to enter into a contract with Sprint for a one- or two-year term of wireless services. The Board of Tax Appeals held that Sprint "sold" cell phones it gave to customers for \$0.00 in promotions promising "free" phones. The Board's decision is contrary to statutes defining "use" and "consumer," contrary to the evidence in the record, and contrary to this Court's decision in *Activate, Inc. v. Dep't of Revenue*, 150 Wn. App. 807, 209 P.3d 524 (2009), which dealt with the same issues. The decision on this issue should be reversed or remanded for improper procedure, findings of fact that are not supported by substantial evidence, and errors of law.

II. ASSIGNMENTS OF ERROR

1. The Board erred in concluding that collateral estoppel did not bar Sprint from relitigating its claim that certain wireless service sales qualified for the residential class of service exemption in RCW 82.08.0289. AR 98-99, Conclusion of Law No. 2.

2. The Board erred in making the following “findings,” which are not supported by substantial evidence:

a. Sprint receives money directly from the retail consumer for the “free phones” via its monthly service contract payments. AR 97, Finding of Fact No. 6.

b. Sprint’s cell phones and service contracts cannot be purchased and used separately. The purchase of the cell phone and wireless service is one purchase. Cell phones may be purchased only by signing a service contract. AR 97, Finding of Fact No. 8; AR 79, 83.

c. The cell phones were sold by Sprint in installments with a zero down payment, upon which sales tax was collected and paid to the Department. AR 75-76, 84.

d. The cell phones were not used to promote the wireless service business. AR 84.

e. The customer receives one receipt for the entire purchase of the phone, wireless service, and other items. AR 79.

f. The monthly service fee applies to the savings that a customer would receive on the amount the customer would have to pay in the store. AR 80.

g. The cell phones are not “free” to customers. AR 85.

3. The Board erred in concluding Sprint was not liable for use tax, as reflected in the following legal conclusions:

a. Because cell phones are core merchandise items to Sprint's business, they cannot be considered promotional items. AR 95.

b. The free cell phone is just a fully discounted phone sold as part of a single total package, and the total package is subject to retail sales tax. It should be treated the same as a "buy one, get one free" deal. AR 95.

c. The *Activate* case does not apply because Sprint sells the free phones for money received from the customer in the form of later payments on its service contracts. AR 95-96; AR 99, Conclusion of Law No. 3(b).

d. Sprint did not purchase these phones at retail as a consumer. Sprint did not use these phones as a "consumer" under the statutory definitions. AR 99, Conclusion of Law No. 3(a).

e. Under *McDonald v. Irby*, 74 Wn.2d 431, 445 P.2d 192 (1968), the phones cannot be considered gratuitous, and Sprint's collection of retail sales taxes on wireless fees satisfies Sprint's requirement to collect sales tax on the sale of its phones. AR 99-101, Conclusion of Law No. 3(c).

III. ISSUES

1. Is Sprint's claim that certain of its sales of wireless service are exempt under RCW 82.08.0289 collaterally estopped by the Board's final decision in BTA Docket No. 06-073, which rejected the same claim for a prior audit period?

2. Sprint provided certain cell phones to customers for free if the customers agreed to sign one- or two-year wireless service contracts.

a. Under the stipulated facts and exhibits and other evidence in the record, did the Board make findings that were not supported by substantial evidence regarding Sprint's distribution of these cell phones and the nature of Sprint's transactions with these customers?

b. Did the Board erroneously interpret or apply the statutory definitions of "use" and "consumer" and this Court's decision in *Activate*?

IV. STATEMENT OF THE CASE

A. Audit & Procedural Background

In a prior case that Sprint filed in 2006, the Board issued a final decision holding that Sprint's sales to customers it assigned a Customer Tax Type Code of "R" during the 1996 to 1999 audit period were not exempt from sales tax under RCW 82.08.0289. *Sprint Spectrum, L.P. v. Dep't of Revenue*, BTA No. 06-073 at 14, AR 571-84. Sprint filed a petition for judicial review but failed to serve the Board. The Superior Court dismissed the petition for that reason, and the Court of Appeals affirmed the dismissal. *Sprint Spectrum, L.P. v. Dep't of Revenue*, 156 Wn. App. 949, 952, 235 P.3d 849 (2010).

Meanwhile, in 2007, the Department assessed Sprint with various state taxes, including uncollected retail sales tax, and unreported use tax or deferred sales tax, for the audit period July 1, 1999, through December

2002. AR 835, ¶ 1.¹ During that period, Sprint sold wireless services, wireless telephones, and accessories. AR 836, ¶ 4.

Following an appeal to the Department's Appeals Division, AR 1131-40, Sprint timely filed an appeal before the Board of Tax Appeals. AR 1202. Sprint contended that the Department erred in assessing retail sales tax on Sprint's unreported revenues from sales of network telephone services to what it deemed residential customers, the same issue addressed in the 2006 case, and that the Department erred in assessing use tax on phones provided to customers without a charge at the point of sale in conjunction with their purchases of wireless telephone service. AR 836, ¶ 2. In addition to defending the claims on substantive grounds, the Department argued that Sprint was collaterally estopped from challenging the residential customer tax issue because it had lost the same argument in a prior case before the Board. AR 548-50.

In its Final Decision, the Board declined to apply collateral estoppel regarding the residential customer tax issue. AR 75, 94, 96.² The Board concluded that collateral estoppel did not apply because the case involved a different audit period and that the application of collateral

¹ The parties stipulated to a number of facts and exhibits. AR 835-1119. Citations to the record in this brief are primarily to the Board's administrative record ("AR __"), as numbered in the Board's Document Index for the case, which includes all exhibits, depositions, briefing, etc., and to the transcript of the hearing before the Board ("RP __"). The Board certified the administrative record at CP 39, 153.

² The complete Final Decision is at AR 74-103 and appended to this brief.

estoppel was contrary to public policy. AR 96-99. The Board addressed the merits of the issue and affirmed that portion of the Department's assessment. AR 96, 99. However, the Board reversed the Department's determination that Sprint owed use tax on cell phones it provided customers without charge if they signed wireless service contracts with a term of one or two years. AR 99-101.

Both sides sought review by the Thurston County Superior Court. The Department petitioned for review of the Board's decision not to apply collateral estoppel on the residential customer issue and its conclusion that Sprint had no liability for use tax on cell phones it distributed to customers without charge in return for the customer agreeing to purchase extended-term wireless service from Sprint. CP 291-96. Sprint sought review of the Board's ruling that it owed retail sales tax on sales of network telephone service to residential customers. CP 5-7.

The court consolidated the two cases. CP 40-41. Following briefing and a hearing, Judge Paula Casey entered an Order on Petitions for Review. CP 202-09. The court affirmed the Board on collateral estoppel and reversed the Board on the two tax issues. CP 208. On the use tax issue, the court held that the Board's findings that Sprint (a) received money directly from customers for the free phones through monthly service contract payments, (b) made zero-down installment sales

of the free phones, and (c) did not use the free cell phones to promote sales of its wireless services were not supported by substantial evidence as required by RCW 34.05.570(3)(e). CP 204-05, ¶¶ 5-7. The court also held that the Board erred in concluding that Sprint was not a “consumer,” and thus not liable for the use tax under the definitions of “consumer” in RCW 82.12.010(1) and RCW 82.04.190(1)(a). CP 205-07, ¶¶ 8-12.

Regarding the issue of the sales tax exemption in RCW 82.08.0289 for a “residential class of telephone service,” the court first ruled that the Board did not commit error in denying the application of collateral estoppel to bar Sprint from relitigating the issue. CP 207, ¶ 13.

Addressing the issue on the merits, the court ruled that the Board erred in distinguishing between wireline and wireless service, or services that are regulated and those that are not. *Id.* ¶ 14. Accordingly, it held that Sprint’s sales of wireless services to non-business customers qualified for the exemption. CP 208, ¶¶ 16, C.

The parties filed cross-appeals to this Court on the respective issues they lost before the trial court. CP 210-11 (Department’s appeal); CP 249 (Sprint’s appeal). Pursuant to General Order 2010-1 and further guidance the parties obtained from this Court, the Department addresses in this opening brief the invalidity of the Board’s actions in its decisions on the cell phone use tax issue and the collateral estoppel issue. The

Department will address the sales tax exemption for “residential class of telephone service” in response to Sprint’s opening brief.

B. Promotional Use Of Cell Phones In Sales Of Wireless Services

Sprint made retail sales of wireless telephone service and wireless telephones (also referred to as “phones,” “cell phones,” and “handsets”) at its own retail stores located in Washington during the audit period. AR 840, ¶ 30. Company-wide, Sprint’s sales of handsets and related accessories accounted for less than 20% of its net operating revenues during the tax period. AR 1153.

Sprint offered multiple phone models for sale, which it acquired from various manufacturers. AR 840, ¶ 30. Sprint arranged for cell phone manufacturers to send the cell phones it purchased to a warehouse in Kentucky, from which it shipped the cell phones to Sprint retail outlets for sale in various states, including Washington. Sprint purchased these cell phones from manufacturers without paying retail sales tax on the purchases. AR 840-41, ¶ 31. At the Sprint retail stores, store employees displayed a secured sample of each cell phone model available for sale, with the remainder stored off the sales floor. When a customer was ready to make a purchase, a store employee retrieved the phone from the stored inventory. *Id.* ¶ 32. All cell phones transferred from Sprint to a customer were configured to be used with Sprint’s wireless service. *Id.* ¶ 33.

During the audit period, Sprint sold some cell phones to customers at what was termed a “regular price.” Sprint collected retail sales tax from customers on the regular price. These were typically sales in which the customer did not purchase any wireless service or purchased wireless service on a month-to-month basis rather than entering into a service agreement legally binding them to a longer term. *Id.* ¶ 34. Sprint sold most cell phones at partial discounts off the regular price, including in promotions where it conditioned discounts upon the customers signing a service agreement legally binding them to purchase wireless service from Sprint for a term, typically one or two years, either as a new customer or as a returning customer. *Id.* ¶ 35. Sprint collected retail sales tax from customers on the discounted price of the cell phones. The applicability of the use tax to Sprint’s purchases of the undiscounted or partially discounted phones is not at issue in this appeal because Sprint resold those phones and collected retail sales tax on those sales.

In addition to the cell phones Sprint sold at the regular retail price or at a discount, Sprint also provided some cell phones to customers at 100% discounts, *i.e.*, discounts equal to the regular price, subject to the customers signing service agreements legally binding them to purchase wireless service from Sprint for a one- or two-year term, either as a new customer or as a

returning customer. AR 842, ¶ 36. The Department assessed use tax on Sprint's costs of purchasing these cell phones. AR 1134.³

When Sprint provided a fully discounted phone to a customer, the cash register price for the phone was \$0.00. AR 1003, 1011, 1026, 1036, 1045. Sprint has offered "free" or fully discounted cell phones as part of its promotions from at least 1999 through the present. AR 1092, page 87; *see* AR 1118 ("Handset Hotsheet" with early 2010 promotions, including two handsets to be provided "free" with a two-year wireless service agreement). Sprint advertised these promotions through various media. AR 1092, page 86. In every case where a customer received a free cell phone, receipt of the free phone was conditioned upon the customer purchasing either one or two years of wireless service from Sprint. AR 1001-03, 1009-11, 1024-26, 1032-34, 1043-45 (records of sales); AR 1079, page 34; *see also* AR 160-61; 1118-19 (2010 promotions requiring the purchase of a two-year term of wireless service).

Sprint's monthly recurring wireless service rates charged to customers did not vary depending upon whether a customer received an undiscounted, partially discounted, or free cell phone. AR 842, ¶ 37. Likewise, the early termination fee Sprint charged customers who cancelled their wireless service before the end of the required term did not

³ Sprint does not dispute the cost figures the Department used. AR 1078, page 31.

vary depending upon how much the customer paid (or didn't pay) for a cell phone. *Id.* ¶ 38; AR 1094, page 94.

C. Board's Decision Regarding Use Tax On Free Cell Phones

In a section of its Final Decision titled "Facts and Contentions," the Board summarized the evidence submitted by the parties, including the stipulated facts and exhibits, and the arguments of the parties. The Board designated the use tax issue concerning the free cell phones "Issue 3," and it addressed evidence regarding that issue on pages AR 77-85. Part of that evidence was the deposition testimony of Sprint's in-house tax counsel, Anthony Whalen, and his hearing testimony. *See* AR 1069-99; RP 8-75.

In its "Analysis and Conclusions" section, the Board concluded that Sprint was not a "consumer" of the free cell phones under the use tax statutes because it sold phones in the normal course of its business. AR 95. The Board rejected the Department's position that Sprint distributed the free cell phones for the primary purpose of promoting the sale of wireless services, which triggers use tax. Instead, the Board treated the transfer of the cell phone for \$0.00 and the customer's required purchase of extended-term wireless service as a "total package" retail sale to customers. *Id.* The Board determined that the retail sales tax Sprint collected from customers under its monthly billings for wireless services was sufficient to represent tax on the free cell phones because Sprint

recouped the cost of its partially and fully discounted phones from payments under the service agreements. *Id.* Addressing this Court's recent case discussing some of the identical tax issues, *Activate, Inc. v. Dep't of Revenue*, 150 Wn. App. 807, 209 P.3d 524 (2009), the Board concluded that the case was not controlling because the taxpayer in *Activate* was not a wireless service provider and only sold wireless services on commission for AT&T, whereas Sprint sold the free phones "for money received from the customer in the form of later payments on its service contracts." AR 95-96.

The Board's "Findings of Fact" regarding the use tax issue include only five brief findings. One of them merely stated: "The Board's findings of facts is set forth in its summary of the facts, above, and is adopted by reference as to Issue 3." AR 97, Finding of Fact No. 5. In addition to finding Sprint's witness Anthony Whalen to be credible, Finding of Fact No. 4, the Board found that Sprint received money directly from customers for the free phones via monthly service contract payments and "pays" retail sales tax on that money. AR 97. From this, the Court reached a legal conclusion, that use tax was not due on the fair market value of the phones. *Id.*, Finding of Fact No. 6. The Board also made a finding that Sprint was not the "consumer" of the free phones, but rather a

retailer. *Id.*, Finding of Fact No. 7.⁴ Finally, in Finding of Fact No. 8, the Board found that Sprint's cell phones and service contracts were interrelated, and that Sprint acted as a provider of wireless services rather than as an agent receiving a commission from a service provider. AR 97.

In its "Conclusions of Law" section, the Board held that use tax was not due on the cell phones because Sprint received payment in the form of the monthly service charges, an activation fee, or the early termination fee. AR 99, Conclusion of Law No. 3.a. The Board concluded Sprint did not purchase the cell phones "at retail" or "as a consumer" under the applicable statutes. *Id.*, Conclusion of Law No. 3.a.i. & ii. The Board held that *Activate* did not control because of different facts. *Id.*, Conclusion of Law No. 3.b. Instead, the Board relied on a case that did not concern taxes or the wireless service industry, *McDonald v. Irby*, 74 Wn.2d 431, 445 P.2d 192 (1968), to support its conclusion that Sprint's obligation to collect retail sales taxes on its wireless service contracts to customers satisfied any tax obligations it had with respect to the cell phones it provided to customers for \$0.00. AR 99-101, Conclusion of Law No. 3.c.

The Board's issue statement at the beginning of the Decision also reflects its conclusions. The Board described the wireless service

⁴ Because "consumer" is a defined statutory term, this also was actually a legal conclusion.

contracts as “priced to recover the cost of the phone in addition to the price for the wireless services” and indicated Sprint collected retail sales tax on those wireless contracts. AR 75. Posing the issue as whether the Department properly assessed use tax on Sprint for the free cell phones that Sprint “sold” to its customers under the statutory definitions of “use” and “consumer,” the Board concluded in the negative: “No, use tax is not payable for the cost of the phone because the phones were resold by Sprint in installments with a zero down payment, upon which sales tax was collected and paid to the Department.” *Id.*

V. ARGUMENT

Under established Washington case law, the Board should not have reached the merits of Sprint’s refund claim regarding the application of the retail sales tax exemption in RCW 82.08.0289 to Sprint’s wireless services. Sprint fully litigated that issue in a prior case and lost. The Board’s failure to apply collateral estoppel was a reversible error of law. *See* RCW 34.05.570(3)(d).

The Board’s determination that Sprint did not owe use tax on cell phones it provided to customers for free is likewise flawed. Sprint owed use tax on the free cell phones under the statutory definitions of “use” and “consumer” and this Court’s decision in *Activate, Inc. v. Dep’t of Revenue*, 150 Wn. App. 807, 209 P.3d 524 (2009). The Board’s decision is not

supported by substantial evidence, and the Board erroneously interpreted and applied the law. *See* RCW 34.05.570(3)(d) & (e). This Court should reverse the decision.

A. The Doctrine Of Collateral Estoppel Precludes Sprint From Relitigating Whether Wireless Services Qualify For The Retail Sales Tax Exemption In RCW 82.08.0289.

Sprint's attempt to relitigate the residential exemption issue decided in the prior BTA case should be barred by collateral estoppel. Sprint had a full and fair opportunity to litigate this issue in a prior case. The Board's refusal to apply collateral estoppel because the current case involved different audit periods was erroneous.⁵ AR 96-98. The Board is correct that refund actions involving different audit periods constitute separate claims.⁶ However, the Board confused issue preclusion (collateral estoppel) with claim preclusion (*res judicata*). *Christensen v. Grant County Hosp. Dist. No. 1*, 152 Wn.2d 299, 306, 96 P.3d 957 (2004). The determination whether collateral estoppel applies is a question of law that is reviewed *de novo*. *Id.* Accordingly, the Board's refusal to apply collateral estoppel should be reversed as an error of law. RCW 34.05.570(3)(d).

⁵ "This case is for a different, later audit period, and the Board routinely treats each tax appeal as a new case." AR 98, Conclusion of Law 2.d.i; *see also* AR 96-97 (stating in two paragraphs, "The Board does not apply the doctrine of collateral estoppel because it is a different audit period.").

⁶ *AOL, LLC v. Dep't of Revenue*, 149 Wn. App. 533, 551, 205 P.3d 159 (2009).

Collateral estoppel prevents relitigation of issues decided in a prior action involving the same parties. *Christensen*, 152 Wn.2d at 306. Claim preclusion applies when a party attempts to relitigate the same claim. *Id.* Collateral estoppel, or issue preclusion, is broader and bars relitigation of the underlying issues regardless of whether the claims are the same or different. *Id.* Therefore, it is irrelevant that the cases at issue involved different audit periods. The Board's refusal to apply collateral estoppel on that basis was a fundamental misunderstanding of collateral estoppel.

Collateral estoppel applies when four elements are met: (1) the issues are identical; (2) there was a final judgment on the merits in the prior adjudication; (3) the party against whom collateral estoppel is asserted was a party to, or in privity with a party to, the prior adjudication; and (4) the application of the doctrine does not work an injustice on the party against whom it is applied. *Christensen*, 152 Wn.2d at 307. Sprint's current refund claim reasserts exactly the same residential exemption issue between the same parties as in the prior action. In its prior decision, the Board decided this issue on the merits and found that Sprint's sales of wireless service to customers Sprint designated with a Customer Tax Type Code of "R" did not qualify for the exemption in RCW 82.08.0289. AR 584. The Board even acknowledged the issues were the same. AR 99 ("[T]he Board applies its prior decision by reference because the facts are

similar and there is no difference as to the legal analysis”). Thus, the first three elements of collateral estoppel are clearly met.

The fourth element, the injustice prong, is concerned with procedural fairness, and the court focuses on “whether the parties to the earlier adjudication were afforded a full and fair opportunity to litigate their claim in a neutral forum.” *Christensen*, 152 Wn.2d at 309. In addressing agency decisions, the court examines three factors to determine if the agency procedures provided a meaningful opportunity to litigate the issue: (1) whether the agency acted within its competence, (2) the differences between procedures in the administrative proceeding and court procedures, and (3) public policy considerations. *Christensen*, 152 Wn.2d at 308. The procedural prong focuses on whether the party had sufficient opportunity to gather evidence and present its case. *See Reninger v. State Dep’t of Corrections*, 134 Wn.2d 437, 451, 951 P.2d 782 (1998) (collateral estoppel applies to administrative agency decisions where hearing procedures are similar to those found in superior court). Finally, the public policy prong examines whether the Legislature intended the agency’s decision to have preclusive effect. *Christensen*, 152 Wn.2d at 314-15; *Restatement (Second) of Judgments* § 83(4) (1982).

All these elements are satisfied in this case. Sprint had a meaningful opportunity to fully litigate this issue before the Board in the

prior case and did so. The Board is a quasi-judicial agency separate from the Department, formed to provide a “convenient and economical forum” to decide state and local tax appeals. Laws of 1967, Ex. Sess., ch. 26, § 1, AR 801; RCW 82.03.010; RCW 82.03.190. Moreover, its members must be “qualified by experience and training in the field of state and local taxation.” RCW 82.03.020. Thus, the Board was competent to decide the taxability of Sprint’s wireless service in the prior case to the same extent the Public Employee Relations Commission was competent to decide the employment issues in *Christensen*. See *Christensen*, 152 Wn.2d at 319 (recognizing Commission’s statutory authority to decide labor issues).

In conducting formal hearings, the Board employs almost exactly the same procedures as those of superior courts in refund lawsuits. Taxpayers may conduct written discovery and depositions. WAC 456-09-510(1). Prior to the hearings, the parties file briefs outlining their arguments. WAC 456-09-550. At the hearings, taxpayers may present written evidence, call witnesses, and cross-examine the Department’s witnesses. WAC 456-09-550, -520. Finally, if a taxpayer disagrees with the Board’s decision, it may appeal the ruling to superior court. RCW 82.03.180. As in *Reninger*, there is very little that distinguishes a formal hearing before the Board from a refund action in superior court. See *Reninger*, 134 Wn.2d at 451 (describing hearings before the Personnel

Appeals Board). As such, the Board's hearing procedures do not provide a basis for refusing to apply collateral estoppel.

Although the Board did not find that the application of collateral estoppel would work an injustice, it stated "public policy" required Sprint to be given another opportunity to litigate the residential exemption issue. AR 99. The Board's decision did not provide a rationale for this conclusion other than the fact that Board members do not have to be attorneys. *Id.* The Board did not explain how a hearing before an agency whose members must be "qualified by experience and training in the field of state and local taxation" did not provide a full and fair opportunity to litigate an issue involving state tax statutes. *See* RCW 82.03.020. Nor did the Board point to any evidence that the Legislature did not intend the Board's decisions to have preclusive effect. As the court noted in *Carver v. State*, 147 Wn. App. 567, 574, 197 P.3d 678 (2008), "[t]he Legislature knows how to bar issue preclusion when it wants to do so." One example is RCW 50.32.097, which limits the application of collateral estoppel to employment security decisions. Here, there is no similar statutory provision barring preclusive effect. Thus, the presumption is that the Legislature intended normal rules of collateral estoppel to apply to the Board's decisions.

Failing to give preclusive effect to the Board's formal decisions would frustrate, rather than serve, the Legislature's intent. The Board was created to provide a forum to resolve state and local tax disputes. *See* Laws of 1967, Ex. Sess., ch. 26, § 1. If collateral estoppel were not applied to the Board's decisions, it would undermine the public policy of providing a "convenient and economical forum" to decide tax appeals because the parties would be able to relitigate the same issue in different cases year after year. *See Olympic Tug & Barge Inc. v. Dep't of Revenue*, ___ Wn. App. ___, 259 P.3d 338 (2011) (noting that taxpayers can avoid endless relitigation and obtain a binding result by electing a formal BTA hearing). Thus, "public policy" does not support the Board's refusal to apply collateral estoppel in this case.

Sprint argued below that it would be unjust to apply collateral estoppel in a case where it attempted to appeal, but the appeal was dismissed on procedural grounds. AR 125. As the party asserting that the application of collateral estoppel would be unjust, Sprint bears the burden of showing the injustice. *Garcia v. Wilson*, 63 Wn. App. 516, 522, 820 P.2d 964 (1991) (citing *Pend Oreille PUD No. 1 v. Tombari*, 117 Wn.2d 803, 819 P.2d 369 (1991)). However, there is no authority for Sprint's argument, and it runs counter to the principles that underlie the doctrine of collateral estoppel. Collateral estoppel is intended to promote judicial

economy and prevent harassment of the parties by preventing successive relitigation of an issue. *Reninger*, 134 Wn.2d at 449. Binding a party to a ruling that it failed to properly appeal from is no less just than binding it to a ruling where it did not advance the best arguments it could have during the case. *See Restatement (Second) of Judgments* § 27, comment c (new arguments may not be presented to obtain a different determination of the issue). In both situations, the party is bound by the mistakes it made.⁷

If a party were allowed to relitigate an issue merely because it failed to properly appeal a prior ruling, the party would be in the position to avoid collateral estoppel simply by choosing to file an untimely appeal. This would enable parties to litigate the same issue in different forums or advance different arguments until they succeeded. Such an outcome directly contradicts the purpose of collateral estoppel to prevent successive and vexatious litigation. Therefore, Sprint's failure to properly appeal the prior decision should not prevent the application of collateral estoppel.

As shown above, formal BTA hearings provide taxpayers a neutral forum and ample opportunity to fully and fairly litigate tax claims. Sprint availed itself of this opportunity in the prior case and vigorously advanced its legal theories through experienced tax counsel. The Board made no

⁷ In *Reninger*, the Court applied collateral estoppel because the employees had a full and fair opportunity to litigate the issue, even though the employees' appeal of the prior decision was dismissed because they filed the appeal in the wrong county. *Reninger*, 134 Wn.2d at 442 n.1, 454.

finding or conclusion to the contrary. Thus, applying collateral estoppel in this case does not work an injustice.

This Court should reject the Board's reasoning that judicial economy would be served by reaching the merits of the tax issue because "the Board applies its prior decision by reference because the facts are similar and there is no difference as to the legal analysis." AR 99. This reasoning is misplaced as it ignores the burden placed on the Department and the reviewing courts in litigating the issue for the second time. Collateral estoppel is intended not only to promote judicial economy, but also to prevent harassment and inconvenience to winning parties. *Reninger*, 134 Wn.2d at 449. Sprint's willingness to shoulder the cost of relitigating the issue is irrelevant. Collateral estoppel exists to prevent the burden Sprint's actions place on the courts and the Department. While the Board's decision to adopt its prior decision by reference did not cause the Board to expend any additional effort or expense in addressing the issue on the merits, the reviewing courts will devote significant resources to analyzing the issue, and the Department will need to expend significant resources relitigating the issue. Thus, the Board was wrong to conclude that judicial economy is unaffected by its refusal to apply collateral estoppel.

Moreover, collateral estoppel also implicates principles of repose. *Christensen*, 152 Wn.2d at 307. Once an issue is decided it should not be relitigated without good reason, even if it would not involve considerable effort. Therefore, the Board's ability to decide the issue on the merits with only a modest effort does not support its refusal to apply collateral estoppel. For these reasons, the Board erred as a matter of law in refusing to apply collateral estoppel to the issue of whether the retail sales tax exemption in RCW 82.08.0289 applies to Sprint's wireless service.

B. Multiple "Findings of Fact" In The Board's Decision Regarding The Free Cell Phones Are Unsupported By Substantial Evidence.

When reviewing an agency's findings of fact, the court looks for evidence that is substantial when viewed in light of the whole record before the court. RCW 34.05.570(3)(e). Substantial evidence is evidence that is sufficient to convince a fair-minded person of the truth or correctness of the order. *Ferry County v. Concerned Friends of Ferry County*, 155 Wn.2d 824, 833, 123 P.3d 102 (2005).

Here, reviewing the Board's factual findings concerning Sprint's practice of providing free cell phones in certain transactions is complicated by the way the Board set forth those findings. The Board provided a mere four findings of fact and the following statement, designated Finding of Fact No. 5: "The Board's finding of facts is set

forth in its *summary of the facts*, above, and is adopted by reference as to Issue 3.” AR 97 (emphasis added).

Under RCW 34.05.461(3), agencies issuing adjudicative orders must include a statement of their findings of fact and conclusions of law, “and the reasons and basis therefor, on all the material issues of fact, law, or discretion presented on the record.” The Board’s rules require the same. WAC 456-09-920(4). Formal findings of fact serve a necessary function for meaningful judicial review, and a failure to provide specific findings may hamper or effectively foreclose review. *Boeing Co. v. Gelman*, 102 Wn. App. 862, 870, 10 P.3d 475 (2000).

Finding of Fact No. 5 is vague, and it hampers judicial review. No section of the Final Decision carries the title “Summary of the Facts.” Even if the Board was referring solely to its description of the evidence submitted by the parties on the issue (including the stipulated facts and exhibits) in the “Facts and Contentions” portion of the Decision, Finding of Fact No. 5 is defective. The Board’s description of the evidence covers eight pages of the Decision. AR 77-85. Finding of Fact No. 5 does not indicate the Board’s reasons for “finding” that every bit of information contained in the offered exhibits or in Mr. Whalen’s deposition or hearing testimony is a material fact. Thus, the Board has failed to provide “the reasons and the basis therefor” on all material issues of fact.

The Board's reliance on Finding of Fact No. 5 as a substitute for entering specific, numbered findings of fact on all material facts is inadequate. Nonetheless, this Court has the authority to decide for itself what facts have been found in imperfect agency orders and to proceed to review those findings. *Tapper v. Employment Security Dep't*, 122 Wn.2d 397, 406, 858 P.2d 494 (1993). For the reasons set forth below, several of the Board's findings of fact, whether explicitly so designated or within the catchall description of Finding of Fact No. 5, are not supported by substantial evidence.

1. Customers do not pay for the free cell phones with zero down and payments over time under their wireless service contracts.

In Finding of Fact No. 6, the Board stated: "Sprint receives money *directly* from the retail consumer for the 'free phones' *via its monthly service contract payments* and pays retail sales tax on that money." AR 97 (emphasis added). This finding of fact implies that customers who receive a free cell phone are required to make payments on the phone over time, despite the undisputed fact that they are provided a receipt at the point of sale indicating the phone costs them \$0.00. AR 1003, 1011, 1026, 1036, 1045. The Board further stated that "the phones were resold by Sprint in installments with a zero down payment, upon which sales tax was collected and paid to the Department." AR 75. Based on testimony Mr.

Whalen gave at the hearing describing the wireless service contracts as “forced financing agreements” for the cell phones, the Board also found: “Thus, the customer is purchasing the phone over time; the same way a customer might purchase a piece of furniture with zero down and monthly payments over a set period.” AR 84; *see* RP at 53-54; *see also* AR 85 (“These phones should be more correctly called ‘zero down payment phones’ . . . than ‘free phones’ because their cost is collected back or recouped via the various fees, including monthly service fees.”)

The Department does not question that Sprint probably recoups the expense of providing free cell phones (or cell phones discounted to a sales price below its acquisition costs) in the pricing of the various fees owed under its wireless service contracts. Indeed, it must do so to be profitable. But there is a factual and legal difference between a zero-down installment contract for the purchase of an item and the service contracts here, which are priced to recoup Sprint’s expenses, including the costs of the free cell phones, but do not require any payments for the cell phones.

The actual documents reflecting Sprint’s transactions with customers conclusively demonstrate why the Board’s finding that free cell phones were purchased under an installment contract is not supported by substantial evidence:

Cash register receipts. Where customers received free cell phones, the only documents explicitly describing the make or model of the cell phones are the cash register receipts, all of which state the price of \$0.00. AR 1003, 1011, 1026, 1036, 1045 (receipts); AR 1081, page 44-45. The receipts contain no indication that customers will be required to make payments over time for the phones. They also contain no indication of any balance owing on the phones or of any financing charge the customer may be paying. They do not say how many payments the customer will be making over time to pay off the cell phone, or how much each payment on the phone will be. *Id.*

Sprint PCS Advantage Agreement. When customers agreed to sign a one- or two-year term of wireless service as a condition of receiving a free cell phone during the tax period, they signed a “Sprint PCS Advantage Agreement” in the store. The agreement required their consent to the particulars of the wireless service plan they chose, including the specified term, an early termination fee of \$150 if they terminated the contract before that time, and an activation fee of \$34.99. AR 1001-02, 1009-10, 1024-25, 1032-33, 1043-44. These store contracts incorporated standard terms and conditions contained in other documents and contained instructions for cancelling the wireless service or returning phones within the first 14 days. *Id.* However, the store contracts did not contain any

information whatsoever about the specific cell phone provided to the customer, the amount paid by the customer for the phone at the point of sale, whether \$0.00 or otherwise, or any amounts due in the future from the customer for the cell phone.

Standard terms & conditions. The standard terms and conditions for the wireless service contracts also are devoid of any description of payments over time for cell phones or any identifying information about the particular phone or payment plan procured by a customer. *See* AR 104-21. In fact, the wireless service terms and conditions seem unrelated to cell phone purchases. Both versions in the record state, “Phones and other equipment may be purchased and returned as provided in the purchase documents.” AR 109, 119.

Monthly invoices for wireless service. If customers were purchasing cell phones under a zero-down installment contract with payments over time, Sprint’s monthly invoices should reflect that fact, showing the installment owed for the month and the balance owing on the cell phone purchase. As with all the other contract documents in the record, however, the monthly invoices contain no mention of payments for cell phones. Rather, the amounts in the invoices pertain solely to wireless services. AR 1004-07, 1012-19, 1027-32, 1037-41, 1046-55. The regular monthly charges are not delayed payments for a cell phone, but “monthly

service charges,” which Sprint defines as “[t]he recurring charge for your rate plan and other services that’s billed one month in advance.” *See, e.g.*, AR 1028. Each invoice includes a section detailing the customer’s wireless plan, including the monthly recurring charge (\$39.99), the number of “anytime” and night and weekend minutes, and other details. Conspicuously absent from the plan details or any other portion of the invoices is any mention of the customer’s particular cell phone, payments owing that month on a cell phone, or the remaining balance due on an installment purchase. Sprint’s witness admitted that the invoices do not mention the handsets or any related equipment. AR 1084, page 55.

The invoice examples in the record do show an activation fee of \$34.99, and in some cases a credit reflecting a waiver of that fee. AR 1007, 1015, 1030, 1041. But rather than reflecting a payment under an installment plan for purchase of a cell phone, the activation fee was a one-time charge Sprint made when customers “activate a new Number, have us switch a Number to a different phone, have your current number changed, . . . [or] activate a different phone on your existing account” AR 106.

In short, the evidence does not support the Board’s findings that “Sprint receives money directly from the retail consumer for the ‘free phones’ via its monthly service contract payments” or that Sprint made

zero-down installment sales of the free phones.⁸ The evidence related to actual transactions is directly contrary to the Board's findings.⁹ Even Mr. Whalen agreed that customers did not buy the free cell phones over time. RP at 67-68.

Because the Board's findings on the material issue of whether customers who received a cell phone for \$0.00 paid for the phone in their wireless service contracts are not supported by substantial evidence, the decision should be reversed.

2. The Board mischaracterized the relationship of cell phone and wireless service purchases and documentation of those transactions.

The Board correctly stated in Finding of Fact No. 8 that Sprint's cell phones and service contracts were related. AR 97. Customers could obtain Sprint wireless service only through cell phones configured to be used with Sprint's service. AR 841, ¶ 33. However, the evidence does not support the Board's finding that "[o]ne cannot be purchased . . . without the other." AR 97, Finding of Fact No. 8. Likewise, the evidence is contrary to the Board's related findings that "[t]he purchase of the cell

⁸ What the Board apparently did was take Mr. Whalen's testimony about why Sprint discounts cell phones and structures its wireless pricing in this manner, *see, e.g.*, RP at 53-54, and translate it into a factual scenario concerning the transactions that does not match the actual evidence.

⁹ Sprint's contract documents also do not satisfy the legal requirements for an installment sale. In Washington, retail installment sale contracts must be in a single document and are required to contain terms including the sale price of the item, the amount of down payment, the amount of the balance owed by the buyer to the seller, and other information. RCW 63.14.020; 63.14.030.

phone and wireless service is one purchase” or that “[t]he customer receives one receipt for the entire purchase of the phone, wireless service, and other items (e.g., car charger).” AR 79.

Although a customer must have had a cell phone programmed to accept Sprint’s wireless service in order to use that service, cell phone and wireless service purchases could be made separately. The Board’s findings to the contrary are not supported by substantial evidence. Mr. Whalen testified in his deposition that customers could purchase wireless services without at the same time purchasing a cell phone, and that they could purchase a cell phone without also purchasing wireless services at the same time. AR 1080, 1089, page 40, 76.¹⁰ He said nothing to the contrary in his hearing testimony.

Similarly, the evidence contradicts the Board’s apparent finding that customers receive a single receipt for the “entire purchase” of wireless service and a cell phone or other equipment. AR 79. As explained above, customers obtaining a free cell phone upon signing an extended-term wireless contract received several documents, not one of which reflected the “entire” transaction. They received a small cash register receipt, the only document specifying what cell phone model the customer received.

¹⁰ For example, customers with existing wireless service contracts might have wanted to upgrade their cell phones to a newer model with more features, while keeping their existing number.

AR 1003, 1011, 1026, 1036, 1045. Customers also signed and received the Sprint PCS Advantage Agreement, reflecting their commitment to a wireless service plan of a specified term, the early termination fee, and the activation fee, and a copy of the standard terms and conditions. AR 104-21; AR 1001-02, 1009-10, 1024-25, 1032-33, 1043-44; RP at 46-47.

The Board made some additional errors in its “findings.” For instance, in describing Mr. Whalen’s deposition testimony, the Board included this statement: “The monthly service fee applies to the ‘savings that you would receive on the amount that you would have to pay in the store.’” AR 80 (citing Ex. S4-17, page 64-65, AR 1086). In the context of the deposition questions and answers, it is clear that when Mr. Whalen indicated “*this* is the savings you would receive,” he was referring to an in-store discount of \$150 called “instant savings,” not to the monthly recurring charges for wireless service. AR 1058-59, 1086. The Board’s incorrect description of the testimony also conflicts with the other evidence in the record indicating that monthly charges for wireless service were unrelated to charges or discounts on the cell phones Sprint sold or distributed without charge. AR 842, ¶ 37.¹¹

¹¹ The Board also summarized testimony incorrectly regarding the early termination fee, stating: “The early termination fee ‘fluctuates over the life of the contract [i.e.] how long you had the wireless service.’” AR 82 (citing Ex. S4-27, page 102, AR 1096). The Board failed to notice that Mr. Whalen’s testimony was specific to 2008, when Sprint began using a prorated fee. AR 1057, 1096. There is no evidence that

These findings are not supported by substantial evidence.

3. Sprint used the “free” cell phones to promote its wireless service business.

Within its description of Mr. Whalen’s hearing testimony, the Board stated: “Cell phones are ‘not used to promote the business.’” AR 84.¹² If the Board’s statement was intended to be a finding of fact that Sprint did not use the free cell phones it distributed to customers to promote its wireless service business, such a finding is not supported by substantial evidence.¹³

The Board’s statement is contrary to stipulated facts and the evidence of how Sprint actually conducted business in these transactions is contrary to the Board’s statement. First, Sprint provided free phones *only* to customers who qualified by agreeing to purchase wireless services from Sprint for a term of one or two years. AR 842, ¶ 36; AR 1001-02, 1009-

the early termination fee changed over the life of a wireless service contract during the tax period in this case, July 1999 through December 2002.

¹² Mr. Whalen testified that customers are focused heavily on the cell phones and the features associated with different models, and that the phones are major drivers for the customers. RP 54, 57. He also testified that selling cell phones is integral to Sprint’s business, and thus cell phones are not “promotional items,” even though Sprint does not realize a net gain from the sales. RP 55-56. Mr. Whalen’s opinion on what a “promotional item” is should be disregarded because the issue is controlled by statute, as discussed below in Part V.C.2.b.

¹³ A key legal issue in this case regarding use tax is whether Sprint acted as a “consumer” by distributing cell phones for the purpose of promoting its wireless service. See Part V.C.2, *infra*. Thus, whether Sprint “used” the free cell phones for promotional purposes is a mixed question of fact and law. For such questions, a court applies the substantial evidence standard to the raw facts found by the agency, but independently determines the applicable law and applies it to the facts. *Western Ports Transp., Inc. v. Employment Security Dep’t*, 110 Wn. App. 440, 450, 41 P.3d 510 (2002).

10, 1024-25, 1032-33, 1043-44; AR 1079, page 34. As Mr. Whalen acknowledged to the Board, Sprint wants to “lock a customer in” to the longest possible wireless service term in order to bring in more revenue. RP 29-30.

Second, and equally telling, the monthly wireless service rates Sprint charged to customers did not vary depending upon whether a customer received undiscounted (full price) phones, partially discounted phones, or free phones. AR 842, ¶ 37; RP 66-67. Likewise, the early termination fee Sprint charged customers who cancelled their wireless service before the end of the term did not vary depending upon what customers paid or did not pay for their cell phones. AR 1094, page 94; RP 67. And the same was true for the activation fee, unless it was waived because the customer already had an existing line or for some other reason. RP 60, 67.

In view of these stipulated and undisputed facts, the only reasonable inference for the Board to reach was that Sprint provided the free cell phones to customers for the purpose of promoting the sale of its wireless services. But other evidence in the record also supports this conclusion. For example, Sprint’s 2000 Form 10-K filed with the Securities & Exchange Commission stated that “as a part of Sprint Spectrum’s marketing plans, handsets are normally sold at prices below

Sprint Spectrum's cost." AR 1153. Sprint's internal documents reflected its marketing approach and losses on cell phones, which it referred to as "subsidies." Sprint defined a "subsidy" as the "amount of money we LOSE every time a handset leaves the door." AR 1103 (emphasis in original). As Mr. Whalen testified, Sprint lost about \$100 per cell phone on average. RP 15, 27-28; AR 1103, 1105. This is not a rational way for a for-profit company to conduct business, unless pricing the cell phones at a loss serves another purpose. Here, that purpose was obvious – to promote the sale of wireless services.

In addition, Sprint does not dispute that free cell phones were offered in "promotions." AR 1107 (referring to "promotions" and "promotional windows"); AR 1118 (Handset Hotsheet referring to "promotional window"). Along with partially discounted cell phones, Sprint offered promotions with free cell phones as part of its marketing continuously from the tax period through to the present. AR 1092, page 87. A recent Handset Hotsheet with 2010 promotions included two handsets to be provided "free" with a two-year wireless service agreement. AR 1118. Sprint advertised these free cell phone promotions through television, newspapers, brochures, and store signage. AR 1092, page 86.¹⁴

¹⁴ Throughout these proceedings, Sprint has refused to admit what seems abundantly clear from the actual evidence – that it provides free cell phones to some

In light of the whole record, the Board's finding that Sprint did not use the cell phones it provided to customers for free to promote the sale of wireless services is not supported by substantial evidence.

C. Sprint Owed Use Tax For The Cell Phones It Used To Promote The Sale Of Its Wireless Services.

The Board should have denied Sprint's refund request on the use tax it paid on cell phones it provided to customers without charge. The statutory language is unambiguous, and this Court's recent decision in *Activate, Inc. v. Dep't of Revenue*, 150 Wn. App. 807, 209 P.3d 524 (2009), gave the Board clear guidance it should have followed. The Board's decision is contrary to the applicable statutes and contains multiple errors of law. Accordingly, it should be reversed.

1. Use tax applies for the same reasons as in *Activate*.

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);¹⁵ RCW 82.12.020(1) (use tax); *Activate*, 150 Wn. App. at 814; *Glen Park Associates, LLC v. Dep't of Revenue*, 119 Wn. App. 481, 484 n.1, 82 P.3d 664, 667 (2003). The intent of use tax is "to tax the

customers in order to promote the sale of its wireless services. But despite refusing to admit that fact, Mr. Whalen was unable to deny it. RP 68.

¹⁵ Statutory citations in this brief are to the current version of the statute in the 2010 Revised Code of Washington unless otherwise indicated. Some of the subsection designations differ from those in effect during the tax period in this case, 1999-2002. The text of the provisions indicated is identical, however, in the earlier versions of the statutes, unless otherwise indicated.

privilege of using all tangible property within the state on which sales tax has not been paid.” *Sacred Heart Med. Ctr. v. Dep’t of Revenue*, 88 Wn. App. 632, 638, 946 P.2d 409 (1997). The use tax rate is determined by the applicable retail sales tax rate. RCW 82.12.020(4). The measure of the tax is the “value of the article used,” which usually is its purchase price. RCW 82.12.010(7)(a); RCW 82.12.020(4).

During the tax period, the statute imposed on “every person in this state a tax or excise for the privilege of using within this state as a consumer: (a) Any article of tangible personal property purchased at retail” RCW 82.12.020(1) (1998); *see* WAC 458-20-178(1) (use tax applies to the use as a consumer of articles of tangible personal property purchased at retail where the user has not paid retail sales tax on such property); *Seattle Filmworks, Inc. v. Dep’t of Revenue*, 106 Wn. App. 448, 454, 24 P.3d 460 (2001).¹⁶

The statutory definition of “use” governs in large part whether use tax applies. During most of the tax period at issue, the statutory definition provided:

¹⁶ The use tax statute incorporates by reference “insofar as applicable” the definitions in RCW 82.04 (business & occupation tax) and RCW 82.08 (retail sales tax), including the definition of “retail sale” in RCW 82.04.050. RCW 82.12.010(1); *Activate*, 150 Wn. App. at 814; *Seattle Filmworks*, 106 Wn. App. at 454 n.3. By doing so, the use tax statute incorporates many of the same exemptions that apply to the retail sales tax because those exemptions are embedded within the definition of “retail sale” in RCW 82.04.050.

(2) “Use,” “used,” “using,” or “put to use” shall have their ordinary meaning, and shall mean *the first act within this state by which the taxpayer takes or assumes dominion or control over the article* of tangible personal property (*as a consumer*), and include installation, storage, withdrawal from storage, or any other act preparatory to subsequent actual use or consumption within the state; . . .

RCW 82.12.010 (1998) (emphasis added). In 2002, the Legislature added the word “distribution” to the list of acts included as examples of a taxpayer assuming dominion or control over the tangible personal property. Laws of 2002, ch. 367, § 3; *see* RCW 82.12.010(5) (2010).

Under the statute, “use” of a product does not require “actual” use, such as taking a cell phone out of its packaging and using it to make phone calls. This Court rejected an argument to this effect in *Activate* and in prior cases involving other businesses. *Activate*, 150 Wn. App. at 818-23; *see Mayflower Park Hotel, Inc. v. Dep’t of Revenue*, 123 Wn. App. 628, 98 P.3d 534 (2004) (hotel “used” amenities and furnishings placed in guest rooms, even though the furnishing of lodgings was a “retail sale”); *Seattle Filmworks*, 106 Wn. App. at 460 (film processor “used” order forms it provided to customers by imprinting customer information on them before sending to customers).

In *Activate*, a sales representative for AT&T sold AT&T wireless service to customers in shopping mall kiosks. 150 Wn. App. at 810. *Activate* ran promotions that allowed customers to purchase a cell phone

from Activate at a substantial or full discount if the customer entered into a wireless service contract with AT&T with a specified minimum term. *Id.* The Department assessed use tax on the phones Activate gave away free of charge. *Id.* at 811. This Court affirmed the trial court’s summary judgment for the Department. *Id.* at 810, 826. This Court held that Activate was properly subject to use tax on the cell phones it provided customers free of charge because it had “used” them “as a consumer” under the applicable statutory definitions. *Id.* at 813-16. This Court rejected Activate’s argument that its purchases of the cell phones qualified as tax-exempt “sales for resale.” *Id.* at 817-23. In this case, the Board should have reached the same conclusions as this Court did in *Activate*.

2. Sprint used “as a consumer” the cell phones it provided to customers free of charge.

Applying the statutory definition of “use,” there is no dispute that Sprint was the person that took “dominion or control” over the cell phones it stocked in its retail stores in Washington. *See* AR 840-41, ¶¶ 31-32. The Board made no findings of fact or conclusions of law to the contrary. The issue is whether Sprint exercised that dominion or control “as a consumer.” *See* RCW 82.12.010(6)(a).

For purposes of use tax liability, the Legislature defined “consumer” to have a broader meaning than what might commonly be

understood as an individual household purchaser of goods. Sprint is a “consumer” under two different statutory provisions defining “consumer.” Under either of the provisions, Sprint’s use of the cell phones it provided to customers without charge was subject to use tax. The Board’s conclusions to the contrary constitute errors of law.

a. Sprint was a “consumer” under RCW 82.12.010(1) – distributing tangible personal property to promote sales.

Under RCW 82.12.010(1), “consumer” includes “any person who *distributes* or displays, or causes to be distributed or displayed, *any article of tangible personal property*, except newspapers, the primary purpose of which is *to promote the sale of products or services.*” (Emphasis added). Under the plain language of this statute and the evidence in the record, Sprint was a “consumer” of these cell phones.¹⁷ *See Activate*, 150 Wn. App. at 815-16, 822-23. Here, Sprint distributed cell phones to customers who agreed to purchase wireless services for a designated service period. Cash register receipts document that Sprint charged \$0.00 to customers who received what Sprint marketed as “free” phones in “promotions”

¹⁷ The Legislature added an additional sentence to this definition in June 2002: “With respect to property distributed to persons within this state by a consumer as defined in this subsection . . . , the use of the property shall be deemed to be by such consumer.” Laws of 2002, ch. 367, § 3. This clarification follows logically from the preceding sentence in the statute, which has been on the books since 1955, and from the statutory definition of “use.”

during “promotional windows.” AR 1003, 1011, 1026, 1045; AR 1107; AR 1118; AR 1092, page 86.

The evidence demonstrating Sprint’s use of the free cell phones to promote the sale of wireless services is outlined at pages 33 through 35 above. As in *Activate*, Sprint provided free cell phones only to customers who agreed to purchase wireless service for a term of one or two years. AR 842, ¶ 36; *Activate*, 150 Wn. App. at 810-11. As in *Activate*, Sprint’s monthly wireless service rates charged to customers did not vary depending upon whether a customer received an undiscounted phone, a partially discounted phone, or a free phone. AR 842, ¶ 37; *see Activate*, 150 Wn. App. at 811. Even without the other evidence described above, these two facts alone leave no reasonable doubt that Sprint provided the cell phones to customers for \$0.00 in order to promote the sale of wireless services.¹⁸

¹⁸ This Court in *Activate* was not the first to recognize why wireless service providers structure deals in this manner. In 1996, the Connecticut tax agency issued a policy statement on the taxation of cell phones declaring: “When a cellular telephone carrier or independent retailer . . . transfers cellular telephone equipment at no charge to a subscriber, *the carrier or retailer is using the property for promotional purposes*; . . . [U]se tax is due from the carrier or retailer based upon the purchase price paid by the carrier.” Connecticut Dep’t of Revenue Services, Policy Statement 96(5) (July 2, 1996) (emphasis added). In 2000, a Louisiana appellate court held a cellular service provider “used” free cell phones to entice customers to enter into telecommunications contracts. *Mercury Cellular Tel. Co. v. Calcasieu Parish of Louisiana*, 773 So.2d 914, 918 (La. App. 2000), *superseded by statute*; *see also Murray v. New Cingular Wireless Services, Inc.*, 432 F. Supp. 2d 788, 789, 791 (N.D. Ill. 2006) (in consumer rights case, court described an offer of a free Nokia wireless phone when the customer activated a qualified wireless service plan as “a promotion for wireless service”), *affirmed*, 523 F.3d 719 (7th Cir. 2008); AARP Public Policy Institute, *Breaking Up Is Hard to Do: Consumer*

The only logical inference to draw from the evidence in the record is that Sprint provided free cell phones to customers for the purpose of promoting the sale of its wireless services. Accordingly, Sprint was a “consumer” of those phones under RCW 82.12.010(1) and owed use tax on them.

b. The definition in RCW 82.12.010(1) applies to any tangible personal property.

The Board concluded Sprint was not a “consumer” in Finding of Fact No. 7 and Conclusion of Law No. 3.a. AR 97, 99. The Board’s reason for so concluding is found in its adoption of Sprint’s argument that cell phones are integral to Sprint’s business and “core merchandise items” it sells, rather than “promotional items.” AR 95; *see also* AR 91 (describing Sprint’s arguments). The Board stated, as Sprint argued at the hearing, that cell phones are unlike the examples of “promotional materials” listed in the Department’s rule interpreting RCW 82.12.010(1), WAC 458-20-17803. *Id.*

During closing argument, the Department’s counsel reminded the Board that the statutory definition applies to “any article of tangible personal property, except newspapers,” and argued that the description of “promotional material” in WAC 458-20-17803 is entirely consistent with

Switching Costs in the U.S. Marketplace for Wireless Telephone Service, #2007-18 at 5 (Oct. 2007) (the practice of offering free phones is an inducement for consumers to sign long-term wireless contracts and reduces customers’ ability to switch wireless carriers).

the statute, even though the listed examples include only advertising literature, circulars, posters, displays, and samples. RP 107-09; Rule 17803(4). Counsel also informed the Board that in *Activate*, this Court had rejected the same argument Sprint was making. RP 109-110; *Activate*, 150 Wn. App. at 816 n.9 (if the rule were interpreted to limit the phrase “any tangible personal property” to the examples of “promotional material” in the rule, the rule would be in conflict with the statute and would have to give way).

The Board’s ruling that Sprint was not a “consumer” under the definition in RCW 82.12.010(1) because the cell phones it distributed for \$0.00 were “core merchandise items” integral to Sprint’s business and not “promotional items” is contrary to the plain language in the statute. The Board’s conclusion disregards this Court’s ruling on the identical issue in *Activate*. Thus, the Board committed an error of law requiring reversal of its decision. Because Sprint was a “consumer” of the cell phones it distributed to customers for \$0.00 to promote sales of its wireless services, Sprint “used” those cell phones and owed use tax on the phones.

c. The material facts regarding Sprint’s use of cell phones to promote the sale of wireless service are the same as in *Activate*.

The Board erroneously concluded that *Activate* does not control the result in this case. AR 99, Conclusion of Law No. 3.b. For purposes

of applying the definition of “consumer” in RCW 82.12.010(1), the material facts are the same, and the result should be the same. Under the definition the question is whether the person distributes or displays any item of tangible personal property, except newspapers, for the primary purpose of promoting the sale of products or services. In both *Activate* and this case, the taxpayer provided free cell phones to customers conditioned on the customer entering into a wireless service contract of one or two years. AR 842, ¶ 36; *Activate*, 150 Wn. App. at 810-11. In both cases, the wireless service rates did not vary based on whether the customers purchased a discounted phone or received a free phone. AR 842, ¶ 37; *see Activate*, 150 Wn. App. at 811.

The Board distinguished *Activate* on the basis that Sprint receives money for the phones “directly from the retail consumer” in the form of payments under the wireless service contracts. AR 95-96. As explained at pages 25 through 29, that assertion is not supported by substantial evidence. The Board also distinguished *Activate* on the basis that Sprint “pays retail sales tax” on income from “later taxable payment” for the phones made under the wireless contracts, whereas *Activate* received sales commissions for selling wireless service that were not subject to retail sales tax. AR 96. This reasoning also incorrectly assumes customers

receiving a free cell phone make payments for that phone in their wireless service contracts.

Moreover, it demonstrates another mistake in the Board's application of the law. Because customers do not actually make payments over time to Sprint for their "free" cell phones, the retail sales taxes Sprint collects and remits to the Department under wireless service contracts are not for the "sale" of the free cell phones. Sprint's wireless customers owed retail sales tax, which Sprint collected from them, on the charges for *network telephone service* they received under their wireless service contracts. RCW 82.04.050(5) (2002); RCW 82.04.065 (2002). Sprint did not collect retail sales tax on the cell phones it provided for \$0.00 as a sale of tangible personal property under RCW 82.04.050(1) because there was no "sale" – the phones were "free." If Sprint had sold the cell phones for \$50.00 instead of \$0.00, the sales would have been subject to retail sales tax as sales of tangible personal property under RCW 82.04.050(1) *at the time of the sale*, regardless of any additional retail sales taxes owed in the future on the monthly wireless services.

In other words, Sprint may have considered its cell phone/wireless service deals part of a "total package," as the Board explained, but the deals triggered two different tax liabilities, not a "total package" retail sales tax. *See* AR 95. Just as in *Activate*, the record does not support a

conclusion that the monthly wireless service fees include an “embedded” sales tax for the cell phones. *Activate*, 150 Wn. App. at 818.

Furthermore, that Activate worked on commission as an agent selling wireless service for AT&T, while Sprint is not an agent but the actual wireless service provider, is immaterial under the definition of “consumer” in RCW 82.12.010(1). Both Activate and Sprint distributed cell phones for \$0.00 to customers to promote sales of wireless services. As “consumers,” both were properly subject to use tax on the value of the cell phones.

d. Sprint also was a “consumer” under RCW 82.04.190(1)(a) – purchasing without reselling.

Sprint also was a “consumer” under a different statutory provision, rendering its “use” of the free cell phones taxable to Sprint. “Consumer” includes:

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

RCW 82.04.190(1)(a) (emphasis added). Sprint “purchased” the free cell phones it gave to customers. It “owned” and “held” the cell phones until it gave them to customers. Sprint “used” the cell phones for a purpose other

than reselling them as tangible personal property, *i.e.*, as a promotional device to induce customers to purchase wireless services from Sprint.

What constitutes a purchase for “resale” in the definition of “consumer” in RCW 82.04.190(1)(a) is the same as it is in the purchase for resale exemption, RCW 82.04.050(1)(a). Under RCW 82.04.050(1), a “retail sale” is “every sale of tangible personal property . . . to all persons irrespective of the nature of their business” The definition applies generally to all sales of tangible personal property, “*other than* a sale to a person who . . . (a) Purchases for the purpose of resale as tangible personal property in the regular course of business without intervening use by such person, . . .” RCW 82.04.050(1)(a) (emphasis added).

Taxpayers who claim an exemption bear the burden of proving they qualify for it. *Activate*, 150 Wn. App. at 818. To qualify for the resale exemption, Sprint must establish that it (1) purchased tangible personal property for resale, (2) resold the property in its regular course of business, and (3) that it did not use the property before the resale.

Activate, 150 Wn. App. at 817; *Glen Park Assocs.*, 119 Wn. App. at 493; *Seattle Filmworks*, 106 Wn. App. at 457.

Sprint failed to qualify for the exemption under (2) and (3). It failed to “resell” the cellular telephones it gave customers at no charge. But even if there was a “resale” as contemplated in RCW 82.04.050(1)(a),

Sprint made “intervening use” of the cellular telephones, for the same reasons as discussed above. Sprint “made intervening use of these phones by using them as part of the marketing promotion” to sell its wireless services. *Activate*, 150 Wn. App. at 818-19. Just as in *Activate*, the same facts that demonstrate the Department properly assessed Sprint for use tax on the cell phones also preclude Sprint from proving it made no intervening use of the cell phones. *See id.* at 816-23.

Accordingly, Sprint was a “consumer” of the free cell phones under RCW 82.04.190(1). The Board erroneously concluded otherwise. AR 99, Conclusion of Law No. 3.a.¹⁹

3. The Board erred in relying on *McDonald v. Irby* to conclude no use tax was owed on the free cell phones.

While distinguishing *Activate*, a case with similar facts concerning some of the identical tax issues, the Board relied heavily on a tort case concerning common carrier liability to support its conclusions. *McDonald v. Irby*, 74 Wn.2d 431, 445 P.2d 192 (1968); AR 99-101, Conclusion of Law No. 3.c. In *McDonald*, the court held that an airport parking business

¹⁹ This Court addressed a third definition of “consumer” in *Activate*, RCW 82.04.190(2)(a). It applies to any person that is subject to B&O tax under the general service classification in RCW 82.04.290. It applied to *Activate*, which received commissions from AT&T taxable under RCW 82.04.290. *Activate*, 150 Wn. App. at 810, 815. The Board apparently confused the discussion in *Activate* of this “consumer” definition with the Court’s rulings on the other definitions of “consumer.” Because the definition in RCW 82.04.190(2)(a) does not apply here, it does not provide a basis for imposing use tax on Sprint, and the Department has never asserted that it did. The two other definitions of “consumer” applied in *Activate* do apply here.

should be held to the standard of care of a common carrier where it charged \$1.00 per day for parking and made no additional charge for transportation to the airport. 74 Wn.2d at 435-37. The court held the parking fee necessarily included the cost of the transportation. *Id.* at 435-36. In the court's view, the service was not "gratuitous," and calling the service free was "economically unrealistic." *Id.*

After describing *McDonald* at length, the Board concluded that to say the fully discounted phones are "free" is to be "economically unrealistic." AR 101. Similarly, fully discounted phones are "not gratuitous" because the cost of the phones must of necessity be an element in determining the wireless service charge. *Id.*

The Department has never disputed that Sprint prices its wireless service to cover the expenses Sprint incurs in transferring cell phones to customers at less than its acquisition costs. Thus, the Department agrees that as an "economic reality," the customers ended up paying for the phones they received for "free." But the same could be said for *any* of Sprint's costs of doing business. Sprint agreed that its wireless services were priced to recoup the cost of cell phone towers and other costs. RP at 61. Focusing on "economic reality" does not answer the tax question here, which is determined by application of the controlling statutes to the

evidence. RCW 82.12.010(1), .010(6)(a), .020; RCW 82.04.050(1)(a), .190(1)(a). The Board erred in relying on *McDonald*.

VI. CONCLUSION

Under RCW 34.05.574(1), this Court should set aside the Board's Final Decision and remand the issues of collateral estoppel and the applicability of use tax to Sprint's distribution of free cell phones to the Board with instructions enter an order in the Department's favor

RESPECTFULLY SUBMITTED this 12th day of October, 2011.

ROBERT M. MCKENNA
Attorney General

A handwritten signature in black ink, appearing to read "Heidi A. Irvin", written over a horizontal line.

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Attorneys for Appellant/Cross-Respondent
Washington State Department of Revenue

APPENDIX

A

BEFORE THE BOARD OF TAX APPEALS
STATE OF WASHINGTON

SPRINT SPECTRUM L.P.,

Appellant,

v.

STATE OF WASHINGTON
DEPARTMENT OF REVENUE,

Respondent.

Docket No. 08-152

RE: Excise Tax Appeal

FINAL DECISION

RECEIVED
SEP 24 2010

ATTORNEY GENERALS OFFICE
REVENUE DIVISION

This matter came before the Board of Tax Appeals (Board) on August 19, 2010, for a formal hearing pursuant to the rules and procedures set forth in chapter 456-09 WAC (Washington Administrative Code). Michele Radosevich and Richard Wiley, Attorneys, represented the Appellant, Sprint Spectrum, L. P. (Sprint). Heidi A. Irvin and Brett Durbin, Assistant Attorneys General, represented the Respondent, State of Washington Department of Revenue (Department).

By agreement, the parties presented Issue 3, listed below, first since it involved witness testimony. Sprint called Anthony Whalen, Sprint Senior State Tax Counsel, as its witness on Issue 3. The parties presented Issues 1 and 2 based upon exhibits (documents) and argument.

The Board heard the testimony, reviewed the evidence, and considered the arguments made on behalf of both parties. The Board now makes its decision as follows:

ISSUES

1. Do sales of wireless services to non-business customers of Sprint qualify as a "residential class of telephone service" that is exempt from telecommunications sales tax pursuant to RCW 82.08.0289? The Department argues that collateral estoppel applies because this issue was litigated in a prior appeal, *Sprint Spectrum L. P. v Department of Revenue*, BTA Docket No. 06-073 (2009), involving the same parties and issues. The Board ruled against Sprint in that appeal; Sprint appealed to the court of appeals and the appeal was dismissed on a procedural issue.

1
2 Answer: No, wireless services to non-business customers of Sprint do not qualify for
3 exemption. The Board applies the same legal analysis as in its prior decision, BTA
4 Docket No. 06-073. The Board does not apply the doctrine of collateral estoppel
5 because it is a different audit period, and judicial economy would not be promoted.

- 6 2. Does Sprint's designation of a customer as "residential" for its internal accounting
7 purposes qualify as a "residential class of telephone service" that is exempt from
8 telecommunications sales tax pursuant to RCW 82.08.0289 when Sprint does not
9 have a separate type of service restricted to residential customers and does not require
10 that its 'residential' customers use their service primarily for domestic or non-
11 business purposes? The Department argues that collateral estoppel applies because
12 this issue was litigated in a prior appeal, *Sprint Spectrum L. P. v Department of*
13 *Revenue*, BTA Docket No. 06-073 (2009), involving the same parties and issues. The
14 Board ruled against Sprint in that appeal; Sprint appealed to the court of appeals and
15 the appeal was dismissed on a procedural issue.

16 Answer: No, Sprint's designation does not exempt the services. The Board applies
17 the same legal analysis as its prior decision on the merits from BTA Docket No. 06-
18 073. The Board does not apply the doctrine of collateral estoppel because it is a
19 different audit period, and judicial economy would not be promoted.

- 20 3. Under the statutory definitions of "use" and "consumer," did the Department properly
21 assess use tax on Sprint for the cell phones that Sprint sold to its customers along with
22 one or two-year wireless services contracts that were priced to recover the cost of the
23 phone in addition to the price for the wireless service, and upon which sales tax was
24 collected?

25 Answer: No, use tax is not payable for the cost of the phone because the phones were
resold by Sprint in installments with a zero down payment, upon which sales tax was
collected and paid to the Department.

1 Issues 1 and 2, residential service exemption.

2 During the audit period, Sprint used Cincinnati Bell Information Systems' (CBIS)
3 Precedent 2000 Customer Service System, also known as "P2K." This system required the use
4 of a "customer type code" and "customer type description" when billing was initially set up.
5 These codes were set by CBIS to track and record revenues by customer type, "R" for
6 residential; "B" for business. CBIS then used these codes in its subsystem for tax billing. The
7 various sub-codes are set forth in the stipulations.

8 During the term of the audit, there was nothing in Sprint's terms and conditions of service
9 that restricted a customer with a Tax Type Code of R from using Sprint's service for business
10 purposes or a business customer from using his/her service for non-business purposes. The
11 customers received a designated number of minutes of local usage in exchange for payment of
12 monthly charges, regardless of whether the customer was identified as a residential (R) or
13 business (B) customer. If the customer exceeded his/her designated monthly minutes, then
14 additional fees were charged, regardless of whether they were an R or B customer. Separate
15 charges for toll service were also imposed, regardless of whether they were an R or B customer.

16 Issue 3, fully discounted cell phones.

17 Pursuant to RCW 82.04.220, Sprint is subject to the retailing B&O tax measured by the
18 "value of products, gross proceeds of sales, or gross income of the business." Pursuant to RCW
19 82.04.250, the same rate is applied to all aspects of Sprint's sales.¹ The retail sales tax is
20 imposed on the provision of wireless (cellular) telephone services to customers pursuant to RCW
21 82.04.065.² Sprint collects and pays retail sales tax on the amount its customers pay for cell
22 phones, monthly service fees, and activation fees.³

23 In its June 2002 sample, the Department has identified 385 cell phones that were fully
24 discounted.⁴ Of those, the costs to Sprint (upon which the use tax is based) ranged between
25 \$5.11 and \$644.48. There were 24 phones costing between \$5.11 and \$92.07; 19 phones costing

¹ Determination No. 08-0309 at 3.

² *Id.*

³ Department's Trial Brief at 2; Exhibits S2-105, 127, 137, and 146.

⁴ Exhibit 2-10, line 1.

1 between \$102.94 and \$163.74; and one phone each at \$210.09, \$300.62, \$460.35, and \$644.48.

2 The remaining 268 phones cost between \$10.04 and \$93.94.⁵

3
4 Stipulation of facts:

- 5 • Sprint made retail sales of wireless telephone service and wireless telephones at
6 Sprint retail stores; Sprint offered multiple models for sale, which it acquired
7 from various manufacturers.⁶
- 8 • Sprint arranged for cell phone manufacturers to send the cell phones it purchased
9 to a warehouse in Kentucky, from which the cell phones were shipped to Sprint in
10 retail outlets for sale in various states, including Washington.⁷
- 11 • At the Sprint retail stores, employees displayed a secured sample of each cell
12 phone model available for sale. When a customer was ready to make a purchase,
13 a store employee retrieved the desired cell phone from the stored inventory.⁸
- 14 • All cell phones transferred from Sprint to a customer were configured to be used
15 with Sprint's wireless service.⁹
- 16 • During the audit period, some customers purchased phones along with a service
17 agreement legally binding them to purchase wireless service from Sprint for a
18 longer term, typically one or two years.¹⁰
- 19 • During the audit period, most of the cell phones were sold at a "partial discount"
20 off the "regular price." Some discounts were conditioned upon the customers
21 signing a service agreement legally binding them to purchase wireless service
22 from Sprint for an extended term, typically one or two years, either as a new or
23 returning customer. The use tax is not an issue for these "partially discounted"
24 phones.¹¹
- 25 • During the audit period, some customers purchased phones without also
purchasing a plan, or purchased a month-to-month plan with their phone. In these

⁵ Exhibit R4-3-11.

⁶ Stipulation, ¶ 30.

⁷ Stipulation, ¶ 31.

⁸ Stipulation, ¶ 32.

⁹ Stipulation, ¶ 33.

¹⁰ Stipulation, ¶ 34.

¹¹ Stipulation, ¶ 35.

1 cases Sprint collected retail sales tax on the regular price, i.e., non-discounted
2 selling price of the phones. The use tax is not an issue for these sales.¹²

- 3 • During the audit period, Sprint “transferred some cell phones to customers at
4 discounts equal to the regular price, subject to customers signing service
5 agreements legally binding them to purchase wireless service from Sprint for a
6 term, typically one or two years, either as a new or returning customer. The use
7 tax on these “fully discounted phones” is at issue in this appeal.¹³
- 8 • Sprint’s monthly wireless service rates did not vary depending on whether a
9 customer received undiscounted, partially discounted, or fully discounted
10 phones.¹⁴
- 11 • The service agreements for a term, typically one or two years, provided for a
12 customer who cancelled their service prior to the agreed-upon term of service to
13 pay an “early termination fee,” typically \$150.00 for each phone deactivated
14 prior to the end of the agreed term.¹⁵

15 Deposition testimony in stipulation of facts.

16 The following deposition testimony of Anthony Whalen, Sprint representative, is set
17 forth in Stipulated Exhibit S4 concerning the industry-wide business model for selling cell
18 phones (“handsets”) for less than the manufacturer’s suggested retail price, or for less than the
19 wholesale cost to Sprint:

- 20 • The purchase of the cell phone and wireless service is one purchase.¹⁶ The
21 customer agrees to service plan, phone activation fee and early termination fee for
22 both their service and their phone.¹⁷ The customer receives one receipt for the
23 entire purchase of the phone, wireless service, and other items (e.g., car
24 charger).¹⁸

25 ¹² Stipulation, ¶ 34.

¹³ Stipulation, ¶ 36.

¹⁴ Stipulation, ¶ 37.

¹⁵ Stipulation, ¶ 38.

¹⁶ Exhibit S4-15, deposition pages 55-56.

¹⁷ Exhibit S4-13, deposition page 49, and Exhibit S4-15, deposition page 56.

¹⁸ Exhibit S4-12-14.

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- In addition to the discount available for either of the extended service contracts, the amount of a discount on a phone depends upon various factors, such as in-store activation, mail-in savings on selected devices (which may be the manufacturer's or Sprint's own rebate, depending on circumstances), and instant savings that depend on how long a customer has been with Sprint.¹⁹
 - The customer does not entirely pay for the phone and service on the day they obtain the phone and purchase a service plan in the store; there may be an early termination fee due later, and the service fee is collected monthly.²⁰ The monthly service fee applies to the "savings that you would receive on the amount that you would have to pay in the store."²¹
 - Discounting the price of a cell phone "all the way down to zero in the store" evolved over time:
 - It is one result of the "United States credit model," i.e., "the customer can get more—better handsets that do more advanced things without a large initial cash outlay."
 - With Sprint's first offers of \$50.00 and \$100.00 "you had to really want a cell phone—where our competitors were doing much more than that. But over time that has evolved to Sprint will have cell phones that . . . discount the price all the way down to zero in the store."²²
 - If a phone is fully discounted, the receipt for the over-the-counter sale in the store will state "one each \$0.00," which means that the customer for that particular handset "did not pay any cash at the time he walked out of the store."²³
 - The marketing department prices the phones based on factors that include what competitors are doing, what customers are expecting, what their customers are willing to pay, their cost, what market segment they are trying to reach with the particular product, if it is an older model that they

24 ¹⁹ Exhibit S4-17, deposition page 54; Exhibit S4-18, deposition pages 67-68; and Exhibit S4-21, deposition pages 80-81.

25 ²⁰ Exhibit S4-15, deposition pages 54-56.

²¹ Exhibit S4-17, deposition pages 64-65.

²² Exhibit S4-22-23, deposition pages 85-86.

²³ Exhibit S4-12, deposition page 45.

1 or the manufacturer would like to sell out, the need to make a profit on the
2 phones, and customer retention.²⁴

3 ○ The discounted phone prices “last the length of the marketing of the
4 phone,” which could be open-ended.²⁵

- 5 • Instead of recovering part or all of the wholesale cost of the cell phone from
6 revenue collected at the store, when a phone is sold to a customer at less than its
7 cost, the cost is recovered by the monthly fee, the activation fee, and the early
8 termination fee.²⁶

9 ○ The cell phone service agreement is priced “on a nationwide basis, taking
10 into consideration the costs, which include the handset costs.”²⁷

11 ○ In other words:

- 12 ■ The price charged for the cell phone takes into consideration the
13 price charged “at the point of sale for the handset” and the
14 “additional revenues” from the service fee, activation fee, and
15 early termination fee.²⁸
- 16 ■ Sprint recoups the subsidy of the phone “through its pricing of its
17 service sold at the same time and in connection with the sale of
18 that handset, as well as the early termination fee and the other fees
19 associated with that.”²⁹
- 20 ■ Sprint offers differing levels of phone discounts in accordance with
21 the length of the service contract (\$75.00 for the one-year
22 commitment and \$150.00 for the two-year commitment) because
23 “Sprint gets a longer life to recoup the cost of that handset subsidy,
24 rather than a shorter [life], and so you’re willing to give a bigger
25 handset subsidy.”³⁰
- 26 ■ Current wireless service customers who have had service for at
27 least 22 months can get a bigger discount than someone who has

24 Exhibits S4-20, deposition page 77, and S4-24, deposition pages 92-93. See also Exhibits S5-7, 9, 10 and 14.

25 Exhibits S4-7, deposition page 25, and S4-8, deposition page 26.

26 Exhibit S4-22-23, deposition pages 84 -86.

27 Exhibit S4-25, deposition page 94.

28 Exhibit S4-24, deposition page 93.

29 Exhibit S4-26, deposition page 107.

30 Exhibit S4-29-30, deposition pages 113-14.

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only been a customer for one year because Sprint has “already been able to recoup most of their handset subsidy.”³¹

- Phone prices can also be discounted by the application of “credits” that “customer care or retail people can give to deal with customer issues . . . they could reduce the price of a handset at the store.”³²
- The early termination fee “fluctuates over the life of the contract”³³ [i.e.] how long you had the wireless service.”
- The store employees do not handle sales of cell phones that are partially discounted differently than they do the sales of phones that are fully discounted.³⁴
- The “Handset Hot Sheet” is a marketing document that identifies Sprint’s pricing of handsets during a particular promotional window.³⁵ It was provided in response to questions concerning the discounts or prices of handsets and the factors that go into that.³⁶
 - E.g., as represented on Exhibit S6 “Handset Hot Sheet,” Sprint lists the “net price after 2 YR” for the various phones that have different “regular prices.” In all cases, the net price is less than the regular price, and in two cases the net price is noted as “free.”
 - In one of the two cases in which net price after two years is noted as “free” (Sanyo 2500 with a regular price of \$149.99), the phrase “net price after two years” means “that is a phone that you could walk into a store and sign-up for a two-year agreement, early termination fee, . . . activation fee . . . , but you get one of those receipts that say ‘zero’ on it.”³⁷
 - In other words, the net price at the point of sale is “free,” and the customer pays \$0.00 at the cash register on the day the phone is obtained.³⁸

³¹ Exhibit S4-30, deposition page 114.
³² Exhibit S4-25, deposition page 95.
³³ Exhibit S4-27, deposition page 102.
³⁴ Exhibit S4-8, deposition page 29.
³⁵ Exhibit S4-23, deposition page 87.
³⁶ Exhibit S4-24, deposition pages 91-92.
³⁷ *Id.* at page 89. The regular price is the suggested retail price (“SRP”). See e.g., Exhibit S5-3 and deposition testimony at
³⁸ Exhibit S4-24, deposition page 92.

1 Witness: Anthony Whalen, Sprint Senior State Tax Counsel.³⁹

2 Sprint Spectrum is in the business of selling wireless products and services, i.e., Sprint
3 “sells a package of phones and services.” The purchase of the device and the plan is related: the
4 fee paid at the store for the device depends on the plan the customer decides to purchase, as well
5 as the asking price of the particular phone that the customer choose. When a phone is partially
6 or fully discounted, Sprint, in effect, subsidizes the wholesale cost. Sprint must “recoup” as
7 much of that loss as possible through fees agreed to by the customer at the time of the sale, i.e.,
8 (1) the activation fee, (2) the plan fee (either the 12-month or 24-month plan), and (3) the early
9 termination fee, which replaces the lost revenue from the plan fee that would have been applied
10 monthly to the cost of the phone but for the early termination of the extended plan. Mr. Whalen
11 identifies the issue in this appeal as whether use tax should be paid on a phone when Sprint sells
12 a phone and discounts the price so that the amount paid at the store at the time of sale is zero.

13 Customers come into the store to sign on as a new customer or to purchase a new phone.
14 There are about 20 devices around the store for the customers to choose from. When they say
15 they are interested in a device or a plan, the store employees assist them with their purchase.
16 Cell phones can only be purchased when a service contract is signed. Cell phones cannot be
17 purchased at retail from a manufacturer. Sprint, like T-Mobile, Verizon, and AT&T, purchases
18 cell phones for resale to customers from manufacturers who make phones that can only be used
19 with the company’s service; the cell phones have different electronics for each provider.

20 Sprint also offers additional discounts (“instant rebates” or waivers) based upon its
21 market advertisements, which vary over time. For example, Sprint typically charges a one-time
22 activation fee of \$34.99, which is collected in the first monthly billing. The activation fee is
23 sometimes waived as a marketing tool. The monthly service charges are standard and not
24 waived, although they can vary based upon the specific plan chosen and the number of
25 participants in the plan.

 The amount of discount for a specific cell phone varies over time and depends on market
 competition. The only discounts available for a newer model cell phone might be those available
 for service plans (\$150.00 for the two-year plan and \$75.00 for a one-year plan); later in time,
 when newer yet model phones are available with improved technology or features, additional

³⁹ The witness is familiar with Sprint's marketing of cell phones and service contracts; Mr. Whalen is the designated company spokesman for this appeal.

1 discounts or rebates might be available, resulting in an even lower discounted price or a fully
2 discounted price. As an example, a “hot sheet” of phone prices (updated January 13, 2010) and
3 discounts is provided in Exhibit S6-1 and 6-2. The pricing of discounts varies with market
4 conditions; Sprint does not necessarily make more money from a higher priced phone (requiring
5 some payment) than a fully discounted phone. Even “hot” models, such as Blackberries or I-
6 Phones,⁴⁰ typically sell for discounts. The manufacturers of cell phones also offer incentives or
7 rebates to cell phone companies from time to time on specific phone models. The technology
8 and features (model) on cell phones changes over time, sometime rapidly. Some types of phones
9 are only available with a specific cell phone company: for example, I-Phones.

10 For customers, the phones are the most important thing, and phones are “very, very
11 important to both Sprint and the customer.” They are typically looking for a phone with certain
12 features, and the phone is either the driver or one of the major drivers for its customers. Sprint
13 may not realize a “net gain” from the sale of cell phones, but it is “integral to the business.” Cell
14 phones are “not used to promote the business.”

15 The prevailing U.S. industry practice is to sell cell phones at a discount (for less than
16 their fair market value or cost of purchase from the cell phone manufacturer) and recoup some or
17 all of the discount back by the monthly service contract (which typically runs one or two years),
18 the activation fee, and, if applicable, the required early termination penalty fee. Sprint refers to
19 the discounted pricing of its cell phones as a “subsidy,” which is reduced by the various fees
20 collected over time (e.g., monthly payments under the service contracts) to recoup the cost of the
21 phone.

22 Mr. Whalen explains that this is the marketing approach for selling phones in the United
23 States. In Europe and elsewhere, the customer is willing to pay the full retail price for their
24 phone up front. Mr. Whalen explains the different “credit mentality” of the U.S. customer: the
25 U.S. customer is willing to pay for a phone over the course of the contract, which Mr. Whalen
26 terms a “forced financing agreement.”

27 Thus, the customer is purchasing the phone over time; the same way a customer might
28 purchase a piece of furniture with zero down and monthly payments for a set period. Sprint
29 states that its customers understand that the cell phone is really not “free” because they cannot
30 receive a fully discounted cell phone without signing a standard one-year or two-year service

⁴⁰ The I-Phone is Apple product currently only available on an AT&T service contract.

1 contract that obligates them to significant monthly payments and an early termination penalty
2 fee.

3 The cell phones against which the use tax has been assessed are not “free” because the
4 customer is paying or agreeing to pay certain fees. These phones should be more correctly called
5 “zero down payment phones” or “fully discounted phones” than “free phones” because their cost
6 is collected back or recouped via the various fees, including monthly service charges. The
7 service charges provide revenue to Sprint that also covers a variety of costs, including its cell
8 phone tower network, communication centers, marketing, administrative costs, and profits. Mr.
9 Whalen concludes that the phones cannot be considered “free” when acquiring the phone has
10 “lots of stipulations and the customers don’t think they got something free.”

11 Sprint provides the data on its average subsidy for full and partially discounted cell phone
12 sales. All of the service contracts have an early termination fee that recoups most of the cost of
13 the cell phone discount provided at the beginning of the contractual relationship with the
14 customer.

15 Mr. Whalen’s testimony is uncontroverted.⁴¹

16 **Sprint’s arguments:**

17 Issues 1 and 2. Residential service exemption:

- 18 • Sprint contends that its charges for network telephone services, other than toll services,
19 were excluded from sales tax by RCW 82.08.0289 when sold to customers classified as
20 residential in Sprint’s tax billing subsystem.
- 21 • The “residential class” of telephone service that is excluded from sales tax by RCW
22 82.08.0289 is any service that the customer uses primarily for non-commercial purposes.
- 23 • Individuals who subscribe to telephone service for predominantly social or domestic
24 purposes are “residential customers” within the meaning of RCW 82.08.0289.
 - 25 ○ WUTC tariffs classify service as residential if the predominant use of the service
is social or domestic in nature, and not business, professional, institutional, or
otherwise occupational in nature.

⁴¹ The Department presented no witnesses. The facts presented by the Department are limited to those set forth in the stipulated facts and exhibits described above.

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- The dichotomy between residential and business services set forth in the WUTC tariffs represents the modern articulation of the historically recognized dichotomy between telephone service used for social and domestic purposes and telephone service used for commercial purposes.
- Delivery to a residence is merely a surrogate method of identifying the probably social and domestic use of a service.
- RCW 82.08.0289 must be construed as excluding all network telephone service other than toll service from sales tax where the predominant use of the service can reasonably be identified as social and domestic, absent indications of contrary usage.
- If there is any doubt as to the meaning of a taxing statute, it is to be construed in favor of the taxpayer and against the taxing body; *Paccar, Inc. v. Washington Department of Revenue*, 85 Wn. App. 48, 930 P.2d 954 (1997).
- Sprint’s method of identifying residential customers was valid.
- Sprint’s wireless service is predominantly a residential class of service.
- Sprint’s wireless service is furnished to a residence.
- Sprint contends that individuals subscribing to telephone service predominantly for social and domestic purposes subscribe to a residential class of services, and are thus “residential customers” under RCW 82.08.0289(1)(a).
- Sprint contends that its service is a residential class of service, even by the Department’s standards, because it is tied or furnished to the customer’s place of residence as a matter of fact and as a matter of law.
- A “residential class of service” is a service that is sold to a residential customer.
- Telephone companies may identify their residential customers for sales tax purposes, even though they are not required to file tariffs with the WUTC that define residential and business customers.
- The Department’s rulings are contrary to the statutory mandate in RCW 82.08.0289 that all residential customers be treated the same and that residential customers bear less of the impact of the sales tax.

Issue 3. Use tax assessed on fully discounted cell phones.

1 Sprint contends that RCW 82.12.020 does not apply, i.e., it is not liable for the use tax on
2 fully discounted phones, because it was selling the fully discounted phones at retail and not using
3 them as a consumer:

- 4 • Sprint is selling even “fully discounted” phones at retail without any intervening use
5 because valuable consideration is being paid in every transaction: the service contract
6 fee, the activation fee, and (potentially) the termination fee.
- 7 • Sprint recovers the cell phone discounts over the course of the customer’s long-term
8 service contract.
 - 9 ○ To make its expensive phones more affordable, Sprint typically offers “rack”
10 instant cell phone rebates of \$150.00 for a two-year wireless service commitment
11 and \$75.00 for a one-year commitment. Stip. Exhibit S5-7.
 - 12 ○ There may be other discounts offered, depending on inventory supply, risk of
13 obsolescence, competition, and other factors. Stip. Exhibit S5-7.
 - 14 ○ A “fully discounted” cell phone is a phone for which the discount offered equals
15 the so-called “regular price” of the phone. Stip. Facts ¶ 36.
 - 16 ○ For example, a phone regularly priced at \$150.00 might be sold for \$0.00 down
17 and consideration in the form of a two-year service contract, a \$34.99 “activation
18 fee,” and a promise to pay \$150.00 if service is cancelled prematurely.
 - 19 ○ The extended term ensures that Sprint will recover the discount (which it calls a
20 “subsidy”) over the course of the contract.
 - 21 ○ Sprint collects and remits sales tax on charges for the service, including the
22 portion that is allocated to the recovery of the cost of the cell phone discount.
 - 23 ○ Customers purchasing a cell phone with month-to-month service do not receive
24 discounts on the phone because there is no assurance that they will remain
25 customers long enough to recover the cost of the discount.
- The use tax is was provided for in RCW 82.12.020(1) during the audit period as follows:
 - There is levied and collected from every person in this state a tax or excise for
the privilege of **using** within this state as a **consumer** any:(a) Article of
tangible personal property **purchased at retail**, or acquired by lease, gift, . . .
 - (Emphasis added by Sprint.)

- 1
- Sprint did not make a taxable “use” of the fully discounted cell phones because it did not purchase the phones that were eventually sold fully discounted “at retail,” and did not “use” them as a “consumer.”
 - “Sale at retail” Sprint’s purchase of the phones that were eventually sold fully discounted falls within the statutory definition of “sale at retail” and “retail sale” in RCW 82.04.050 (1)(a), which provided during the audit period as follows:

6 *“Sale at retail” or “retail sale” means every sale of tangible personal property (including articles produced, fabricated, or imprinted) to all persons irrespective of the nature of their business and including, among others, without limiting the scope hereof, persons who install, repair, clean, alter, improve, construct, or decorate real or personal property of or for consumers other than a sale to a person who presents a resale certificate . . . and who: (a) Purchases for the purpose of resale as tangible personal property in the regular course of business without intervening use by such person, . . . (Emphasis added by Sprint.)*

- 11
- Sprint’s business activity is making retail sales of tangible personal property and telephone services. (Stip. Facts ¶ 30, RCW 82.04.050(1) and (5)). Sprint purchases and resells cell phones in the regular course of its retail business. (Stip. Facts ¶¶ 30, 34-36). Sprint pays B&O tax under the “retail” classification for all revenues from sales of phones and wireless service. The fully discounted cell phones were purchased for the purpose of resale in the regular course of Sprint’s retail business.
 - Sprint resold the cell phones purchased.
 - “Sale” means any transfer of the ownership of, title to, or possession of property *for a valuable consideration* and includes any activity classified as a “sale at retail” or “retail sale” under RCW 82.04.050.
 - The “selling price” on which the sales tax is calculated means the “consideration . . . paid or delivered by the buyer to a seller.”
 - Sprint transferred ownership, title to, and possession of the fully discounted cell phones for a valuable consideration that included the customer’s legally binding agreements to purchase Sprint’s wireless services for an extended term (Stip. Fact. ¶¶ 36 and 38, Stip. Exhibit S2-99, S2-105, S2-107, S2-119, and S2-122), and to pay Sprint \$34.99 per phone (denominated as an “activation fee”).

1 ▪ Thus, the facts in this case are materially different than in *Activate, Inc. v.*
2 *Washington State Department of Revenue*, 150 Wn. App. 807, 209 P.3d 524
3 (2009), where Activate’s argument that it had transferred the phones for
4 valuable consideration was rejected, not because the wireless service
5 agreements were not “valuable consideration,” but because the trial court had
6 found that there was no “compensation [to Activate] directly from the
7 consumer.”

8 • Sprint collected and paid to the Department retail sales tax when there was a charge to the
9 customer, both any up-front payments for partially discounted phones and the service
10 fees that are sold with both fully and partially discounted phones. Thus, because part of
11 the charge for a fully discounted or partially discounted phone is in the monthly service
12 fee, all or part of the sales tax due on the sale of these fully or partially discounted phones
13 is also collected with each monthly charge for the phone included in the monthly service
14 fee.

15 • Sprint did not “use” the fully discounted phones as a “consumer.” The Department
16 erroneously contends, but does not prove, that Sprint made intervening use of the fully
17 discounted cell phones by using them to promote the sale of its wireless service.

18 ○ Cell phones that happened to be fully discounted were not being used to promote
19 the sale of cell phone service:

- 20 ▪ Sprint’s sale of cell phones is an integral part of its business model, i.e.,
21 Sprint is in the business of selling both cell phones and wireless service,
22 and the sales of both phones and service are the real object of its business.
23 ▪ The advertisement of a “free cell phone “when signing a service contract
24 is no different than retail clothing store sale advertisement for “buy one,
25 get one free,” i.e., it is part of a “goods and services package,” and the
 sales tax is paid on the entire revenue stream from the sale of that goods
 and services package.
 ▪ The discounting is merely a “pricing technique,” and no one thinks that
 “buy one, get one free” or a “free” phone means the item is really free.

- 1 o In contrast, in *Activate*, the taxpayer admitted that it offered fully discounted
2 phones “solely as an inducement to secure the sale of retail cellular telephone
3 services for a minimum period.” *Activate, Inc. v. Department, supra*. *Activate*
4 was also described as “distributing” the phones.
5 o Prior to June 1, 2002, the terms “use,” “used,” “using” and “put to use” were
6 defined in RCW 82.12.010 as follows:

7 “Use,” “used,” “using” and “put to use” shall have their ordinary meaning,
8 and shall mean the first act within this state by which the taxpayer takes or
9 assumes dominion and control over the article of intangible personal
10 property (as a consumer), and include installation, storage, withdrawal
11 from storage, or any other act preparatory to subsequent actual use or
12 consumption within this state.

- 13 o The term “distribution” was added as another qualifying act following the
14 “withdrawal from storage” example.
15 o Every retailer exercises dominion and control over its inventory: withdrawal
16 from inventory for sale to a customer (Stip. Facts ¶ 32) does not turn a sale into a
17 “use;” “Withdrawal from storage” and “distribution” do not have the same
18 connotation as pulling a phone from inventory in the regular course of selling
19 them.
20 o The Department’s unproven theory that Sprint made intervening use of the fully
21 discounted phones by using them to promote sales of wireless service contracts is
22 also flawed for the following reasons:
23 ▪ RCW 82.04.190: “Consumer” means the following:
24 (1) Any person who purchases, acquires, owns, holds, or uses any article of
25 tangible personal property irrespective of the nature of the person’s business and
including, among others, without limiting the scope hereof, persons who install,
repair, clean, alter, improve, construct, or decorate real or personal property of or
for consumers other than for the purpose of: (a) Resale as tangible personal
property in the regular course of business; . . .

 (2) Any person engaged in any business activity taxable under RCW 82.04.290
(i.e., the service category of the B&O tax). . . .

 (9) [A]ny person who distributes, displays . . . any article of tangible personal
property, except newspapers, the primary purpose of which is to promote the sale
of products or services.”

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- The Board must look carefully at the precise language of the statute. The fully discounted cell phones do not meet the “primary purpose” promotional use test or the examples in WAC 458-20-17803. Nor are the fully discounted phones “premiums” as described in WAC 458-20-116.
- As described above, Sprint is in the business of selling cell phones; it purchases phones for resale in the regular course of its business.
- When a cell phone is fully discounted by the application of the extended service discount, Sprint is reselling the phone because the revenue generated from the extended service agreements partially offsets the cost of the phone resold to the customer.
- The fully discounted phone is not being given away “free,” but is being transferred in return for consideration as defined by Washington law in RCW 82.04.040(1):

"Sale" means any transfer of the ownership of, title to, or possession of property for a valuable consideration and includes any activity classified as a "sale at retail" or "retail sale" under RCW 82.40.050. It includes lease or rental, conditional sale contracts, and any contract under which possession of the property is given to the purchaser but title is retained by the vendor as security for the payment of the purchase price. It also includes the furnishing of food, drink, or meals for compensation whether consumed upon the premises or not.

- When a cell phone is fully discounted by the application of the extended service discount, the cell phone is not being used “primarily for the purpose of promoting the sale of wireless service” within the meaning of the statute.
- The cell phone is not being used as either “promotional material” within the meaning of WAC 458-20-17803(4) or a “premium” within the meaning of WAC 458-20-116(2)(b). From these examples, it can be concluded that the use tax applies only when the item is “totally outside the realm” of what the business is selling, but Sprint is in the business of selling cell phones.

- 1 • The purpose of the use tax is to tax the “privilege of using all tangible property . . . on
2 which sales tax has not been paid.” *Activate, Inc. v. Department, supra*, at 814.
- 3 ○ When the sales of both phones and service are combined, as here, the total
4 consideration paid for the combination of the fully discounted phone and service
5 is subject to sales tax, which Sprint collected and paid to the Department.
- 6 ○ In this case, collecting use tax on the fully discounted phones levies a duplicative
7 use tax.
- 8 • The cases cited by the Department are inappropriate, because Sprint pays sales tax on 100
9 percent of its cell phone sales, which includes the portion of the monthly payments made
10 on the extended service contracts that is designed to recover some of the cost of the
11 phones.
- 12 • The Department asserts that, had Sprint charged just \$1.00 for the phones on which use
13 tax is assessed, then sales tax would have applied to that \$1.00, and the Department
14 would not have assessed a use tax on the cost of such partially discounted phones.⁴²
- 15 ○ Sprint contends that this outcome does not make sense.
- 16 ○ Sprint’s “consistent pricing scheme” sometimes results in zero payment in the
17 store and sometimes results in a charge in the store; in either event, these sales
18 meet the definition of “sale” in RCW 84.04.040(1) because “consideration” has
19 been paid for the phone in the form of the customer’s agreement to the activation
20 fee, service fee, and early termination fee.⁴³
- 21 ○ That is, the sale of a phone cannot be “promotional” if it may be acquired “free,”
22 but is “promotional” if a customer happens to pay \$10.00 for it.

21 ⁴² Department’s Reply Brief at 14 (“Ironically, Sprint could have avoided use tax liability and qualified for resale
22 exemption if it had charged customers even a nominal amount, such as \$1, for the cell phones. . . . [T]he Department
23 would have recognized the transaction as a “retail sale,” just as it did for the cell phones Sprint sold at partially
24 discounted prices, even if the prices were below Sprint’s cost to acquire the phones.” See Stip. Facts. ¶ 35. Unlike
25 some states, Washington is a state that does not impose additional tax on retailers for the difference between their
wholesale cost and a below-cost discounted price to customers. Under this approach, a retailer that charges
customers \$1 for cell phones that cost the retailer \$100 at wholesale owes no use tax and is considered to make a
'resale,' while a retailer that gives the same cell phone to customers for \$0.00 owes use tax on the \$100 value of the
item.” At the hearing, in response to the Board’s question, the Department confirmed that the same principle would
apply if the “price” was less than a dollar, and even if the “price” was only one cent.

⁴³ Sprint notes that this state’s definition of “sale” differs from Louisiana’s definition in a case relied upon by the
Department (*Mercury Cellular Tel. Co. v. Calcasieu Parish of Louisiana*, 733 So.2d 914, 918 (La. Ct. App. 2000));
In that case, the Louisiana Civil Code defined “sale” as a “transfer for a price in money.” See Stip. Facts. ¶ 35.

- 1 o The Department's application of the use tax is illogical and introduces "lots of
2 unpredictability" into Sprint's business.

3 **The Department's arguments:**

4 • Issues 1 and 2, residential service exemption.

5 • The Department's arguments on the merits are set forth in its briefs and *Sprint Spectrum*
6 *L. P. v Department of Revenue*, BTA Docket No. 06-073 (2009), involving the same
7 parties and issues.

8 • The Department argues that the doctrine of collateral estoppel applies, and the Board
9 should rule against Sprint for this reason alone. It cites various cases in support:

10 o *Reninger v. State Dep't of Corrections*, 134 Wn.2d 437, 449, 951 P.2d 782 (1998)
11 holds that four elements must be met: (1) the issues are identical, (2) there was a
12 final judgment on the merits in the prior adjudication, (3) the party against whom
13 collateral estoppels is asserted was a party to, or in privity with a party to, the
14 prior adjudication, and (4) the application of the doctrine does not work an
15 injustice on the party against whom it is applied.

16 o *Christensen v. Grant County Hosp. Dist. No. 1*, 152 Wn.2d 299, 96 P.3d 957
17 (2004) holds that three additional elements must be met for the doctrine to apply
18 to agency decisions: (1) the agency acted within its jurisprudence, (2) the
19 differences between procedures in the administrative proceeding and court
20 procedures, and (3) public policy considerations. The Department argues that
21 these factors are met because (1) the Board of Tax Appeals specializes in
22 resolving tax disputes, (2) the Board's procedures are almost identical to superior
23 court procedures, and (3) with respect to public policy, the Board was established
24 to resolve tax disputes in a manner almost identical to superior court actions under
25 RCW 82.32.180 (citing Laws of 1967, Ex. Sess., ch. 26, § 1).

23 Issue No. 3, fully discounted cell phones.

24 The Department's assessment of use tax concerns only the value of "free cell phones."
25 The Department does not assess use tax on the partially discounted phone sales. The
 Department agrees that discounted phones are not taxable under the use tax law even though they

1 may be sold for less than their fair market value or the amount paid by Sprint to acquire them
2 from the manufacturer. The Department's assessment of the use tax issue is \$85,946; see Notice
3 of Appeal, page 3, 6.2; and Stipulation 1-3.

- 4 • The Department argues for application of the use tax for the free cell phones.
- 5 • The Department admits that no use tax is due on cell phones sold at a discount. Even if
6 the discount were one dollar or even one cent, no use tax would be due.
- 7 • The Department argues that the statutes require imposition of a use tax on free
8 promotional items.
- 9 • The Department calculates its assessment based upon Sprint's average cost of purchase of
10 the free phones, which is approximately \$59.99 from information provided by Sprint.
- 11 • The Department admits that Sprint collected and paid retail sales tax on all of its sales,
12 including the payments on the monthly service contracts.
- 13 • The Department cites RCW 82.12.010; RCW 82.12.010(9); RCW 82.04.190(1)(a); WAC
14 458-20-17803 (Use tax on promotional material); and WAC 458-20-116 (Sales and/or
15 use of labels, name plates, tags, premiums, and advertising material).

16 ANALYSIS AND CONCLUSIONS

17 Issues 1 and 2, residential service exemption.

18 The Board applies the same analysis to Issues No. 1 and 2 as set forth in *Sprint Spectrum*
19 *L. P. v Department of Revenue*, BTA Docket No. 06-073 (2009), involving the same parties and
20 issues. The Board does not apply the doctrine of collateral estoppel because it is a different audit
21 period. The facts presented are similar, and the same legal analysis applies. The Board chooses
22 not to recite the prior decision in this decision for reasons of efficiency, and adopts it by
23 reference.

24 Issue 3, fully discounted cell phones on which use tax is assessed.

25 The Department cites RCW 82.12.010; RCW 82.12.010(9); RCW 82.04.190(1)(a); WAC
458-20-17803 (Use tax on promotional material); and WAC 458-20-116 (Sales and/or use of
labels, name plates, tags, premiums, and advertising material). The Department argues for an
imposition of both a retail sales tax (undisputed) and a use tax on the sale of "free cell phones."
Sprint argues that its cell phone discount program, which includes free cell phones, does not fall

1 within the application of either of these regulations. Sprint cites RCW 82.04.050(1)(a) and RCW
2 82.04.040; it points out that Sprint is not a consumer under these statutes because it did not
3 intend to use the phones, and it sells them in its normal course of business. The Board agrees.

4 Sprint is in the business of selling cell phone service. Its service requires both a cell
5 phone and a service contract. The business approach employed is the same as its competitors.
6 The provision of a cell phone, whether free or discounted, is an integral part of the business it
7 operates. Providing cell phones is a necessity; providing cell phones is not “promotional
8 material” or “labels, name plates, tags, premiums, and advertising materials” as described in the
9 Department’s cited regulations.

10 Sprint pays sales tax on all of the monies it receives including from its service contracts.
11 It is clear from the testimony that the “free cell phones” and the “discounted cell phones” are
12 being subsidized and paid for from the dollars generated by the required (one or two-year) contract
13 payments. The “free cell phone” advertisement is similar to a retailer offering a customer a “buy
14 one, get one free” sale, which is typically treated as a “50 percent off” sale by the Department.
15 The cell phone is a core merchandise item; it is not a promotional item or a premium. The
16 Department implicitly acknowledges this result when it admits the “free cell phone” issue would
17 not be analyzed the same if the free phone had a price of \$0.01 or \$1.00. Here, the “free phone”
18 is just another discounted cell phone sold as part of the total package; the total package is subject
19 to the retail sales tax. Both parties agree Sprint pays sales tax on all of the items it sells,
20 including the cell phone and monthly service contract fees.

21 Both parties cite and discuss *Activate, Inc. v Dep’t of Revenue*, 150 Wn. App. 807, 209
22 P.3d 524 (2009). The Board finds the *Activate* case is not controlling because the factual
23 circumstances here are different. In *Activate*, the taxpayer was engaged in a different business
24 relationship, and retail sales tax was not being paid on all of the transactions. *Activate, Inc.*, only
25 received commission income from the transaction involving the phone – an activity not taxed
explicitly under chapter 82.04 RCW.⁴⁴ In this case, Sprint sells the “free phones” for money

⁴⁴ *Activate, Inc.*, sold cellular telephone equipment and wireless service plans in Washington. It conducted its business in shopping mall kiosks. It was a representative for AT&T and received a commission for every extended agreement its customers entered into with AT&T. *Activate* ran promotional advertisements that allowed retail customers to purchase substantially discounted or fully discounted (free) phones, provided that the retail customer agreed to purchase one of AT&T’s service plans. *Activate, Inc.*, did not pay retail sales tax on the amount of its commissions. It did collect and pay retail sales tax on partially discounted phones; it did not collect use tax on the value of its “free phones” (fully discounted phones). The court held that use tax was due on the value of the “free phones.” It held that *Activate, Inc.*, did not sell the phones “for money directly from the retail consumer” (*Activate*,

1 received from the customer in the form of later payments on its service contracts. Activate, Inc.,
2 did not receive later taxable payment for the phones; it only received a onetime commission
3 payment that was not subject to the retail sales tax. Sprint does receive money directly from the
4 retail consumer for the “free phones” and pays retail sales tax on that income.

5 FINDINGS OF FACT

- 6 1. The Board has jurisdiction over the facts at issue.
- 7 2. The Board separated the appeal into three issues:
 - 8 1. Do sales of wireless services to non-business customers of Sprint qualify as a
9 “residential class of telephone service” that is exempt from
10 telecommunications sales tax pursuant to RCW 82.08.0289? The Department
11 argues that collateral estoppel applies because this issue was litigated in a
12 prior appeal, *Sprint Spectrum L. P. v Department of Revenue*, BTA Docket
13 No. 06-073 (2009), involving the same parties and issues. The Board ruled
14 against Sprint in that appeal; Sprint appealed to the court of appeals and lost
15 on a procedural issue.
Answer: No, wireless services to non-business customers of Sprint do not
16 qualify for exemption. The Board applies the same legal analysis as its prior
17 decision on the merits from BTA Docket No. 06-073. The Board does not
18 apply the doctrine of collateral estoppel because it is a different audit period.
 - 19 2. Does Sprint’s designation of a customer as “residential” for its internal
20 accounting purposes qualify as a “residential class of telephone service” that
21 is exempt from telecommunications sales tax pursuant to RCW 82.08.0289
22 when Sprint does not have a separate type of service restricted to residential
23 customers and does not require that its ‘residential’ customers use their
24 service primarily for domestic or non-business purposes? The Department
25 argues that collateral estoppel applies because this issue was litigated in a
prior appeal, *Sprint Spectrum L. P. v Department of Revenue*, BTA Docket
No. 06-073 (2009), involving the same parties and issues. The Board ruled

supra, page 818, pg. 23). The Court noted that it declined to hold for Activate because such a ruling would have allowed the “free phones” to escape taxation under both the retail sales tax and use tax provisions (*Activate*, supra, page 825, pg. 39).

1 against Sprint in that appeal; Sprint appealed to the court of appeals and lost
2 on a procedural issue.

3 Answer: No, Sprint's designation does not exempt the services. The Board
4 applies the same legal analysis as its prior decision on the merits from Docket
5 No. 06-073. The Board does not apply the doctrine of collateral estoppel
6 because it is a different audit period.

- 7 3. Under the statutory definitions "use" and "consumer," did the Department
8 properly assessed use tax on Sprint for the cell phones that Sprint provided to
9 its customers without charge ("for free") when the customers agreed to
10 purchase one- or two-year wireless services contracts?

11 Answer: No, use tax is not payable for "fully discounted phones."

12 3. The Board findings as to Issues 1 and 2 are adopted from the summary of the
13 stipulated facts set forth in BTA Docket No. 06-073, except for the differences set
14 forth above in the Board's summary of the facts for this case.

15 4. Anthony Whalen, Sprint Senior State Tax Counsel (witness on the fully discounted
16 cell phone use tax issue) was credible and his testimony was uncontested.

17 5. The Board's finding of facts is set forth in its summary of the facts, above, and is
18 adopted by reference as to Issue 3.

19 6. Sprint receives money directly from the retail consumer for the "free phones" via its
20 monthly service contract payments and pays retail sales tax on that money. A use tax
21 is not additionally due for the fair market value of the "free phones."

22 7. Sprint is not a consumer of the "free phones," it is a retailer.

23 8. Sprint sells cell phones and service contracts. Sprint's cell phones and service
24 contracts are interrelated. One cannot be purchased or used without the other. Sprint
25 is a provider of cell phone service; it is not a vendor receiving a commission for its
sale of cell phones and service contracts from a cell phone provider.

Any Conclusion of Law that should be deemed a Finding of Fact is hereby adopted as
such.

From these findings, the Board comes to these

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CONCLUSIONS OF LAW

1. The Board has jurisdiction over this appeal (RCW 82.03.130).
2. As to Issues 1 and 2, the Doctrine of Collateral Estoppel:
- a. The doctrine of collateral estoppel, or “issue preclusion,” bars *relitigation* in a subsequent proceeding involving the same parties.⁴⁵ The doctrine is applied “to enforce repose” if an administrative agency has acted in a judicial capacity and “resolved *disputed issues of fact*.”⁴⁶
 - b. The doctrine of collateral estoppel:
 - i. Is a “means of preventing the endless *relitigation* of issues already actually litigated by the parties and decided by a competent tribunal.”⁴⁷
 - ii. “[P]romotes judicial economy and prevents inconvenience, and even harassment, of parties.”⁴⁸
 - iii. Is meant to prevent “*retrial* of one or more of the crucial issues or “determinative *facts* determined in previous litigation.”⁴⁹
 - c. The three criteria for deciding whether to apply collateral estoppel to the findings of an administrative body are (1) whether the agency acting within its competence made a *factual* decision, (2) agency and court procedural differences, and (3) policy considerations.⁵⁰
 - d. The doctrine does not apply to Issues 1 and 2 because:
 - i. The case is for a different, later audit period, and the Board routinely treats each tax appeal as a new case. The Board’s prior decision was on the merits; the decisions at the superior court and the court of appeals were based upon a procedural ruling; the Board is reluctant to bar an appeal on the merits of its decision for this new audit period.
 - ii. The prior decision was rendered upon the parties’ cross motions for summary judgment and the material facts were stipulated. The Board did not make findings of fact from conflicting factual testimony, or

24 ⁴⁵ *Christensen, supra*, at 306.

⁴⁶ *Id.* at 307. Emphasis added.

⁴⁷ *Reinger, supra*, at 449.

⁴⁸ *Id.*

⁴⁹ *Christensen, supra*, at 306. Emphasis added.

⁵⁰ *Reinger, supra*, at 450.

1 resolve disputed issues of fact.⁵¹

2 iii. Judicial economy is served because the Board applies its prior decision
3 by reference because the facts are similar and there is no difference as
4 to the legal analysis.

5 iv. Public policy: Public policy requires that Sprint be given an
6 opportunity to resolve this complex legal question in an appeal from
7 this Board, particularly because there is no requirement that members
8 of this Board be lawyers or otherwise have the same qualifications as
9 superior and appellate court judges;⁵² The purpose of this Board is to
10 provide a “convenient and economical forum in which the appeals of
11 individual taxpayers may be determined;”⁵³ If Sprint is willing to bear
12 the cost and other burdens of an appeal, the policy of “convenient and
13 economical forum” is not affected.

14 3. As to Issue 3:

15 a. Use tax is not due on the cell phones for which Sprint receives payment in the
16 form of a portion of the activation fee, the monthly service charge, and (if
17 applicable) the early termination fee.

18 i. RCW 82.12.020(1)(a) does not apply because Sprint did not purchase
19 any of its phones at retail as a consumer; it purchased all of its phones
20 at wholesale.

21 ii. RCW 82.04.04.190 does not apply to Sprint for all the reasons Sprint
22 briefed and argued, as set forth above.

23 b. The facts present in this case are different than *Activate, Inc. v Dep't of*
24 *Revenue*, 150 Wn. App. 807, 209 P.3d 524 (2009); it is not controlling on the
25 result here.

c. The case of *McDonald v. Irby, et al.*, 74 Wn.2d 431, 445 P.2d 192 (1968)
supports this Board's conclusion that the total of the sales tax paid by
customers on the phone and service package at the time the customer acquires
the phone in the store and at the later times when invoices for activation fees,

⁵¹ *Id.* at 449-50.

⁵² RCW 82.03.020.

⁵³ Laws of 1967, § 1.

1 monthly service fees, and (if applicable) early termination fees are paid
2 satisfies Sprint's requirement to collect sales tax on the sale of its phones,
3 irrespective of whether or some or all of the price of the phone is paid as part
4 of the activation fee, the monthly service fee, or (if applicable) the early
5 termination fee.

- 6 i. In *McDonald*, two of the defendants operated a service station and
7 parking lot near Sea-Tac. By billboard and direct mailing to airline
8 travel services, airlines, and airline patrons, they advertised that their
9 parking service for a \$1-per-day fee included transportation to and
10 from the airport; business competitors offered a similar service.⁵⁴
- 11 ii. Customers who had parked their car there were injured in a collision
12 while being driven to the airport,⁵⁵ the law provided that defendants
13 owed them a higher duty of care if they were a "common carrier."⁵⁶
- 14 iii. The criteria for determining whether the defendants operated as a
15 common carrier were: (1) the carriage must be part of the business, (2)
16 the carriage must be for hire or remuneration, and (3) the carrier must
17 represent that this service is a part of the particular business in which it
18 is engaged.⁵⁷
- 19 iv. The court said it was "beyond dispute that transportation from the
20 parking lot to and from the airport is an integral part . . . of defendants'
21 business."⁵⁸
- 22 v. The defendants contended that they were not a common carrier
23 because they did not meet the second criteria, i.e., because they charge
24 \$1.00 per day for parking *and make no additional charge for the*
25 *transportation.*⁵⁹
- vi. The court disagreed: "To say that the transportation is free is to be
economically unrealistic. There is no requirement that a passenger

⁵⁴ *McDonald v. Irby, et al.*, 74 Wn.2d 431, 432, 445 P.2d 192 (1968).

⁵⁵ *Id.* at 432-33

⁵⁶ *Id.* at 434.

⁵⁷ *Id.* at 435.

⁵⁸ *Id.*

⁵⁹ *Id.* at 435-36.

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pay a *separate* sum in order that the transportation be for a reward. With 98 percent of their parking customers using the transportation, the *cost of its operation must, of necessity*, be an element in determining the parking fee. *The service is not gratuitous.*⁶⁰

vii. Applying that logic to the facts in this case, the Board concludes that to say that the fully discounted phone is free is to be economically unrealistic. There is no requirement that a customer pay a separate sum at the time of acquisition in the store in order for the phone sale to be a reward. Because almost all of Sprint's phone sales are made to customers who receive either a fully or partially discounted phone, the cost of the phones must, of necessity, be an element in determining the fee. The fully discounted phone is not gratuitous.

Any Finding of Fact that should be deemed a Conclusion of Law is hereby adopted as such.

From these conclusions, this Board enters this

DECISION

In accordance with RCW 84.08.130, this Board sustains the Department's Determination No. 08-0309 on Issues 1 and 2; it sets aside the Department's Determination as to Issue 3.

DATED this 24 day of September, 2010.

BOARD OF TAX APPEALS

Terry Sebring
TERRY SEBRING, Chair

Kay S. Slonim
KAY S. SLONIM, Vice Chair

Stephen L. Johnson
STEPHEN L. JOHNSON, Member

⁶⁰ *Id.* Emphasis added.

APPENDIX

B

part; 1937 c 227 § 2, part; 1935 c 180 § 5, part; Rem. Supp. 1949 § 8370-5, part.]

Retroactive effective date—Effective date—2004 c 153: See note following RCW 82.08.0293.

Effective dates—Part headings not law—2003 c 168: See notes following RCW 82.08.010.

82.04.050 "Sale at retail," "retail sale." (1)(a) "Sale at retail" or "retail sale" means every sale of tangible personal property (including articles produced, fabricated, or imprinted) to all persons irrespective of the nature of their business and including, among others, without limiting the scope hereof, persons who install, repair, clean, alter, improve, construct, or decorate real or personal property of or for consumers other than a sale to a person who:

(i) Purchases for the purpose of resale as tangible personal property in the regular course of business without intervening use by such person, but a purchase for the purpose of resale by a regional transit authority under RCW 81.112.300 is not a sale for resale; or

(ii) Installs, repairs, cleans, alters, imprints, improves, constructs, or decorates real or personal property of or for consumers, if such tangible personal property becomes an ingredient or component of such real or personal property without intervening use by such person; or

(iii) Purchases for the purpose of consuming the property purchased in producing for sale as a new article of tangible personal property or substance, of which such property becomes an ingredient or component or is a chemical used in processing, when the primary purpose of such chemical is to create a chemical reaction directly through contact with an ingredient of a new article being produced for sale; or

(iv) Purchases for the purpose of consuming the property purchased in producing ferrosilicon which is subsequently used in producing magnesium for sale, if the primary purpose of such property is to create a chemical reaction directly through contact with an ingredient of ferrosilicon; or

(v) Purchases for the purpose of providing the property to consumers as part of competitive telephone service, as defined in RCW 82.04.065; or

(vi) Purchases for the purpose of satisfying the person's obligations under an extended warranty as defined in subsection (7) of this section, if such tangible personal property replaces or becomes an ingredient or component of property covered by the extended warranty without intervening use by such person.

(b) The term includes every sale of tangible personal property that is used or consumed or to be used or consumed in the performance of any activity defined as a "sale at retail" or "retail sale" even though such property is resold or used as provided in (a)(i) through (vi) of this subsection following such use.

(c) The term also means every sale of tangible personal property to persons engaged in any business that is taxable under RCW 82.04.280 (1), (2), and (7), 82.04.290, and 82.04.2908.

(2) The term "sale at retail" or "retail sale" includes the sale of or charge made for tangible personal property consumed and/or for labor and services rendered in respect to the following:

(a) The installing, repairing, cleaning, altering, imprinting, or improving of tangible personal property of or for consumers, including charges made for the mere use of facilities in respect thereto, but excluding charges made for the use of self-service laundry facilities, and also excluding sales of laundry service to nonprofit health care facilities, and excluding services rendered in respect to live animals, birds and insects;

(b) The constructing, repairing, decorating, or improving of new or existing buildings or other structures under, upon, or above real property of or for consumers, including the installing or attaching of any article of tangible personal property therein or thereto, whether or not such personal property becomes a part of the realty by virtue of installation, and also includes the sale of services or charges made for the clearing of land and the moving of earth excepting the mere leveling of land used in commercial farming or agriculture;

(c) The constructing, repairing, or improving of any structure upon, above, or under any real property owned by an owner who conveys the property by title, possession, or any other means to the person performing such construction, repair, or improvement for the purpose of performing such construction, repair, or improvement and the property is then reconveyed by title, possession, or any other means to the original owner;

(d) The cleaning, fumigating, razing, or moving of existing buildings or structures, but does not include the charge made for janitorial services; and for purposes of this section the term "janitorial services" means those cleaning and caretaking services ordinarily performed by commercial janitor service businesses including, but not limited to, wall and window washing, floor cleaning and waxing, and the cleaning in place of rugs, drapes and upholstery. The term "janitorial services" does not include painting, papering, repairing, furnace or septic tank cleaning, snow removal or sandblasting;

(e) Automobile towing and similar automotive transportation services, but not in respect to those required to report and pay taxes under chapter 82.16 RCW;

(f) The furnishing of lodging and all other services by a hotel, rooming house, tourist court, motel, trailer camp, and the granting of any similar license to use real property, as distinguished from the renting or leasing of real property, and it is presumed that the occupancy of real property for a continuous period of one month or more constitutes a rental or lease of real property and not a mere license to use or enjoy the same. For the purposes of this subsection, it is presumed that the sale of and charge made for the furnishing of lodging for a continuous period of one month or more to a person is a rental or lease of real property and not a mere license to enjoy the same;

(g) The installing, repairing, altering, or improving of digital goods for consumers;

(h) Persons taxable under (a), (b), (c), (d), (e), (f), and (g) of this subsection when such sales or charges are for property, labor and services which are used or consumed in whole or in part by such persons in the performance of any activity defined as a "sale at retail" or "retail sale" even though such property, labor and services may be resold after such use or consumption. Nothing contained in this subsection may be construed to modify subsection (1) of this section and noth-

ing contained in subsection (1) of this section may be construed to modify this subsection.

(3) The term "sale at retail" or "retail sale" includes the sale of or charge made for personal, business, or professional services including amounts designated as interest, rents, fees, admission, and other service emoluments however designated, received by persons engaging in the following business activities:

(a) Amusement and recreation services including but not limited to golf, pool, billiards, skating, bowling, ski lifts and tows, day trips for sightseeing purposes, and others, when provided to consumers;

(b) Abstract, title insurance, and escrow services;

(c) Credit bureau services;

(d) Automobile parking and storage garage services;

(e) Landscape maintenance and horticultural services but excluding (i) horticultural services provided to farmers and (ii) pruning, trimming, repairing, removing, and clearing of trees and brush near electric transmission or distribution lines or equipment, if performed by or at the direction of an electric utility;

(f) Service charges associated with tickets to professional sporting events; and

(g) The following personal services: Physical fitness services, tanning salon services, tattoo parlor services, steam bath services, turkish bath services, escort services, and dating services.

(4)(a) The term also includes the renting or leasing of tangible personal property to consumers.

(b) The term does not include the renting or leasing of tangible personal property where the lease or rental is for the purpose of sublease or subrent.

(5) The term also includes the providing of "competitive telephone service," "telecommunications service," or "ancillary services," as those terms are defined in RCW 82.04.065, to consumers.

(6)(a) The term also includes the sale of prewritten computer software to a consumer, regardless of the method of delivery to the end user. For purposes of this subsection (6)(a), the sale of prewritten computer software includes the sale of or charge made for a key or an enabling or activation code, where the key or code is required to activate prewritten computer software and put the software into use. There is no separate sale of the key or code from the prewritten computer software, regardless of how the sale may be characterized by the vendor or by the purchaser.

The term "retail sale" does not include the sale of or charge made for:

(i) Custom software; or

(ii) The customization of prewritten computer software.

(b)(i) The term also includes the charge made to consumers for the right to access and use prewritten computer software, where possession of the software is maintained by the seller or a third party, regardless of whether the charge for the service is on a per use, per user, per license, subscription, or some other basis.

(ii)(A) The service described in (b)(i) of this subsection (6) includes the right to access and use prewritten computer software to perform data processing.

(B) For purposes of this subsection (6)(b)(ii), "data processing" means the systematic performance of operations on

data to extract the required information in an appropriate form or to convert the data to usable information. Data processing includes check processing, image processing, form processing, survey processing, payroll processing, claim processing, and similar activities.

(7) The term also includes the sale of or charge made for an extended warranty to a consumer. For purposes of this subsection, "extended warranty" means an agreement for a specified duration to perform the replacement or repair of tangible personal property at no additional charge or a reduced charge for tangible personal property, labor, or both, or to provide indemnification for the replacement or repair of tangible personal property, based on the occurrence of specified events. The term "extended warranty" does not include an agreement, otherwise meeting the definition of extended warranty in this subsection, if no separate charge is made for the agreement and the value of the agreement is included in the sales price of the tangible personal property covered by the agreement. For purposes of this subsection, "sales price" has the same meaning as in RCW 82.08.010.

(8)(a) The term also includes the following sales to consumers of digital goods, digital codes, and digital automated services:

(i) Sales in which the seller has granted the purchaser the right of permanent use;

(ii) Sales in which the seller has granted the purchaser a right of use that is less than permanent;

(iii) Sales in which the purchaser is not obligated to make continued payment as a condition of the sale; and

(iv) Sales in which the purchaser is obligated to make continued payment as a condition of the sale.

(b) A retail sale of digital goods, digital codes, or digital automated services under this subsection (8) includes any services provided by the seller exclusively in connection with the digital goods, digital codes, or digital automated services, whether or not a separate charge is made for such services.

(c) For purposes of this subsection, "permanent" means perpetual or for an indefinite or unspecified length of time. A right of permanent use is presumed to have been granted unless the agreement between the seller and the purchaser specifies or the circumstances surrounding the transaction suggest or indicate that the right to use terminates on the occurrence of a condition subsequent.

(9) The term also includes the charge made for providing tangible personal property along with an operator for a fixed or indeterminate period of time. A consideration of this is that the operator is necessary for the tangible personal property to perform as designed. For the purpose of this subsection (9), an operator must do more than maintain, inspect, or set up the tangible personal property.

(10) The term does not include the sale of or charge made for labor and services rendered in respect to the building, repairing, or improving of any street, place, road, highway, easement, right-of-way, mass public transportation terminal or parking facility, bridge, tunnel, or trestle which is owned by a municipal corporation or political subdivision of the state or by the United States and which is used or to be used primarily for foot or vehicular traffic including mass transportation vehicles of any kind.

(11) The term also does not include sales of chemical sprays or washes to persons for the purpose of postharvest

treatment of fruit for the prevention of scald, fungus, mold, or decay, nor does it include sales of feed, seed, seedlings, fertilizer, agents for enhanced pollination including insects such as bees, and spray materials to: (a) Persons who participate in the federal conservation reserve program, the environmental quality incentives program, the wetlands reserve program, and the wildlife habitat incentives program, or their successors administered by the United States department of agriculture; (b) farmers for the purpose of producing for sale any agricultural product; and (c) farmers acting under cooperative habitat development or access contracts with an organization exempt from federal income tax under 26 U.S.C. Sec. 501(c)(3) of the federal internal revenue code or the Washington state department of fish and wildlife to produce or improve wildlife habitat on land that the farmer owns or leases.

(12) The term does not include the sale of or charge made for labor and services rendered in respect to the constructing, repairing, decorating, or improving of new or existing buildings or other structures under, upon, or above real property of or for the United States, any instrumentality thereof, or a county or city housing authority created pursuant to chapter 35.82 RCW, including the installing, or attaching of any article of tangible personal property therein or thereto, whether or not such personal property becomes a part of the realty by virtue of installation. Nor does the term include the sale of services or charges made for the clearing of land and the moving of earth of or for the United States, any instrumentality thereof, or a county or city housing authority. Nor does the term include the sale of services or charges made for cleaning up for the United States, or its instrumentalities, radioactive waste and other by-products of weapons production and nuclear research and development.

(13) The term does not include the sale of or charge made for labor, services, or tangible personal property pursuant to agreements providing maintenance services for bus, rail, or rail fixed guideway equipment when a regional transit authority is the recipient of the labor, services, or tangible personal property, and a transit agency, as defined in RCW 81.104.015, performs the labor or services.

(14) The term does not include the sale for resale of any service described in this section if the sale would otherwise constitute a "sale at retail" and "retail sale" under this section. [2010 c 112 § 14; 2010 c 111 § 201; 2010 c 106 § 202. Prior: 2009 c 563 § 301; 2009 c 535 § 301; prior: 2007 c 54 § 4; 2007 c 6 § 1004; prior: 2005 c 515 § 2; 2005 c 514 § 101; prior: 2004 c 174 § 3; 2004 c 153 § 407; 2003 c 168 § 104; 2002 c 178 § 1; 2000 2nd sp.s. c 4 § 23; prior: 1998 c 332 § 2; 1998 c 315 § 1; 1998 c 308 § 1; 1998 c 275 § 1; 1997 c 127 § 1; prior: 1996 c 148 § 1; 1996 c 112 § 1; 1995 1st sp.s. c 12 § 2; 1995 c 39 § 2; 1993 sp.s. c 25 § 301; 1988 c 253 § 1; prior: 1987 c 285 § 1; 1987 c 23 § 2; 1986 c 231 § 1; 1983 2nd ex.s. c 3 § 25; 1981 c 144 § 3; 1975 1st ex.s. c 291 § 5; 1975 1st ex.s. c 90 § 1; 1973 1st ex.s. c 145 § 1; 1971 ex.s. c 299 § 3; 1971 ex.s. c 281 § 1; 1970 ex.s. c 8 § 1; prior: 1969 ex.s. c 262 § 30; 1969 ex.s. c 255 § 3; 1967 ex.s. c 149 § 4; 1965 ex.s. c 173 § 1; 1963 c 7 § 1; prior: 1961 ex.s. c 24 § 1; 1961 c 293 § 1; 1961 c 15 § 82.04.050; prior: 1959 ex.s. c 5 § 2; 1957 c 279 § 1; 1955 c 389 § 6; 1953 c 91 § 3; 1951 2nd ex.s. c 28 § 3; 1949 c 228 § 2, part; 1945 c 249 § 1, part; 1943 c 156 § 2, part; 1941 c 178 § 2, part; 1939 c 225 § 2, part;

(2010 Ed.)

1937 c 227 § 2, part; 1935 c 180 § 5, part; Rem. Supp. 1949 § 8370-5, part.]

Reviser's note: This section was amended by 2010 c 106 § 202, 2010 c 111 § 201, and by 2010 c 112 § 14, each without reference to the other. All amendments are incorporated in the publication of this section under RCW 1.12.025(2). For rule of construction, see RCW 1.12.025(1).

Retroactive application—2010 c 112: See note following RCW 82.32.780.

Purpose—2010 c 111: "The 2009 legislature enacted Engrossed Substitute House Bill No. 2075 (chapter 535, Laws of 2009), an act relating to the excise taxation of certain products and services provided or furnished electronically. The bill took effect July 26, 2009.

Engrossed Substitute House Bill No. 2075, at eighty-five pages, was a comprehensive piece of legislation that made major changes to state and local sales and use taxes, as well as the state business and occupation tax. Moreover, Engrossed Substitute House Bill No. 2075 was a complex piece of legislation because of the intricate interrelationship between the sales tax and the business and occupation tax and also because the bill affects the taxation of products and services that involve technologies that are changing rapidly.

Because of the complexity and length of Engrossed Substitute House Bill No. 2075, it was the legislature's expectation that, in the course of implementing the bill, ambiguities and unintended consequences would be discovered, which, if not corrected, will unsettle expectations. Thus, the legislature further anticipated that it would need to consider legislation in the 2010 legislative session to address these issues.

Therefore, the purpose of this act is to clarify ambiguities, correct unintended consequences, restore expectations, and conform the law to the original intent of the legislature." [2010 c 111 § 101.]

Retroactive application—2010 c 111: "(1) Except as provided in subsection (2) of this section, this act applies both prospectively and retroactively to July 26, 2009.

(2) Sections 202, 402, and 502 of this act, and those provisions of sections 401 and 501 of this act that eliminate the sales and use tax exemptions in RCW 82.08.02082 and 82.12.02082, apply prospectively only." [2010 c 111 § 902.]

Effective date—2010 c 111: "This act takes effect July 1, 2010." [2010 c 111 § 903.]

Effective date—2010 c 106: See note following RCW 35.102.145.

Finding—Intent—Construction—Effective date—Reports and recommendations—2009 c 563: See notes following RCW 82.32.780.

Intent—Construction—2009 c 535: See notes following RCW 82.04.192.

Severability—2007 c 54: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [2007 c 54 § 32.]

Part headings not law—Savings—Effective date—Severability—2007 c 6: See notes following RCW 82.32.020.

Findings—Intent—2007 c 6: See note following RCW 82.14.495.

Findings—2005 c 515: "The legislature finds that:

(1) Public entities that receive tax dollars must continuously improve the way they operate and deliver service so citizens receive maximum value for their tax dollars; and

(2) An explicit statement clarifying that no sales or use tax shall apply to the entire charge paid by regional transit authorities for bus or rail combined operations and maintenance agreements that are provided to such authorities in support of their provision of urban transportation or transportation services is necessary to improve efficient service." [2005 c 515 § 1.]

Effective date—2005 c 514: See note following RCW 83.100.230.

Part headings not law—Severability—2005 c 514: See notes following RCW 82.12.808.

Effective date—2004 c 174: See note following RCW 82.04.2908.

Retroactive effective date—Effective date—2004 c 153: See note following RCW 82.08.0293.

Effective dates—Part headings not law—2003 c 168: See notes following RCW 82.08.010.

Retroactive application—Effective date—2002 c 178: See notes following RCW 67.28.180.

[Title 82 RCW—page 15]

82.04.180 "Successor." (1) "Successor" means:

(a) Any person to whom a taxpayer quitting, selling out, exchanging, or disposing of a business sells or otherwise conveys, directly or indirectly, in bulk and not in the ordinary course of the taxpayer's business, more than fifty percent of the fair market value of either the (i) tangible assets or (ii) intangible assets of the taxpayer; or

(b) A surviving corporation of a statutory merger.

(2) Any person obligated to fulfill the terms of a contract shall be deemed a successor to any contractor defaulting in the performance of any contract as to which such person is a surety or guarantor. [2003 1st sp.s. c 13 § 11; 1985 c 414 § 6; 1961 c 15 § 82.04.180. Prior: 1955 c 389 § 19; prior: 1949 c 228 § 2, part; 1945 c 249 § 1, part; 1943 c 156 § 2, part; 1941 c 178 § 2, part; 1939 c 225 § 2, part; 1937 c 227 § 2, part; 1935 c 180 § 5, part; Rem. Supp. 1949 § 8370-5, part.]

Effective dates—2003 1st sp.s. c 13: See note following RCW 63.29.020.

82.04.190 "Consumer." "Consumer" means the following:

(1) Any person who purchases, acquires, owns, holds, or uses any article of tangible personal property irrespective of the nature of the person's business and including, among others, without limiting the scope hereof, persons who install, repair, clean, alter, improve, construct, or decorate real or personal property of or for consumers other than for the purpose of:

(a) Resale as tangible personal property in the regular course of business;

(b) Incorporating such property as an ingredient or component of real or personal property when installing, repairing, cleaning, altering, imprinting, improving, constructing, or decorating such real or personal property of or for consumers;

(c) Consuming such property in producing for sale as a new article of tangible personal property or a new substance, of which such property becomes an ingredient or component or as a chemical used in processing, when the primary purpose of such chemical is to create a chemical reaction directly through contact with an ingredient of a new article being produced for sale;

(d) Consuming the property purchased in producing ferrosilicon which is subsequently used in producing magnesium for sale, if the primary purpose of such property is to create a chemical reaction directly through contact with an ingredient of ferrosilicon; or

(e) Satisfying the person's obligations under an extended warranty as defined in RCW 82.04.050(7), if such tangible personal property replaces or becomes an ingredient or component of property covered by the extended warranty without intervening use by such person;

(2)(a) Any person engaged in any business activity taxable under RCW 82.04.290 or 82.04.2908; (b) any person who purchases, acquires, or uses any competitive telephone service, ancillary services, or telecommunications service as those terms are defined in RCW 82.04.065, other than for resale in the regular course of business; (c) any person who purchases, acquires, or uses any service defined in RCW 82.04.050(2) (a) or (g), other than for resale in the regular course of business or for the purpose of satisfying the person's obligations under an extended warranty as defined in

RCW 82.04.050(7); (d) any person who purchases, acquires, or uses any amusement and recreation service defined in RCW 82.04.050(3)(a), other than for resale in the regular course of business; (e) any person who purchases or acquires an extended warranty as defined in RCW 82.04.050(7) other than for resale in the regular course of business; and (f) any person who is an end user of software. For purposes of this subsection (2)(f) and RCW 82.04.050(6), a person who purchases or otherwise acquires prewritten computer software, who provides services described in RCW 82.04.050(6)(b) and who will charge consumers for the right to access and use the prewritten computer software, is not an end user of the prewritten computer software;

(3) Any person engaged in the business of contracting for the building, repairing or improving of any street, place, road, highway, easement, right-of-way, mass public transportation terminal or parking facility, bridge, tunnel, or trestle which is owned by a municipal corporation or political subdivision of the state of Washington or by the United States and which is used or to be used primarily for foot or vehicular traffic including mass transportation vehicles of any kind as defined in RCW 82.04.280, in respect to tangible personal property when such person incorporates such property as an ingredient or component of such publicly owned street, place, road, highway, easement, right-of-way, mass public transportation terminal or parking facility, bridge, tunnel, or trestle by installing, placing or spreading the property in or upon the right-of-way of such street, place, road, highway, easement, bridge, tunnel, or trestle or in or upon the site of such mass public transportation terminal or parking facility;

(4) Any person who is an owner, lessee or has the right of possession to or an easement in real property which is being constructed, repaired, decorated, improved, or otherwise altered by a person engaged in business, excluding only (a) municipal corporations or political subdivisions of the state in respect to labor and services rendered to their real property which is used or held for public road purposes, and (b) the United States, instrumentalities thereof, and county and city housing authorities created pursuant to chapter 35.82 RCW in respect to labor and services rendered to their real property. Nothing contained in this or any other subsection of this definition shall be construed to modify any other definition of "consumer";

(5) Any person who is an owner, lessee, or has the right of possession to personal property which is being constructed, repaired, improved, cleaned, imprinted, or otherwise altered by a person engaged in business;

(6) Any person engaged in the business of constructing, repairing, decorating, or improving new or existing buildings or other structures under, upon, or above real property of or for the United States, any instrumentality thereof, or a county or city housing authority created pursuant to chapter 35.82 RCW, including the installing or attaching of any article of tangible personal property therein or thereto, whether or not such personal property becomes a part of the realty by virtue of installation; also, any person engaged in the business of clearing land and moving earth of or for the United States, any instrumentality thereof, or a county or city housing authority created pursuant to chapter 35.82 RCW. Any such person is a consumer within the meaning of this subsection in respect to tangible personal property incorporated into,

installed in, or attached to such building or other structure by such person, except that consumer does not include any person engaged in the business of constructing, repairing, decorating, or improving new or existing buildings or other structures under, upon, or above real property of or for the United States, or any instrumentality thereof, if the investment project would qualify for sales and use tax deferral under chapter 82.63 RCW if undertaken by a private entity;

(7) Any person who is a lessor of machinery and equipment, the rental of which is exempt from the tax imposed by RCW 82.08.020 under RCW 82.08.02565, with respect to the sale of or charge made for tangible personal property consumed in respect to repairing the machinery and equipment, if the tangible personal property has a useful life of less than one year. Nothing contained in this or any other subsection of this section may be construed to modify any other definition of "consumer";

(8) Any person engaged in the business of cleaning up for the United States, or its instrumentalities, radioactive waste and other by-products of weapons production and nuclear research and development;

(9) Any person who is an owner, lessee, or has the right of possession of tangible personal property that, under the terms of an extended warranty as defined in RCW 82.04.050(7), has been repaired or is replacement property, but only with respect to the sale of or charge made for the repairing of the tangible personal property or the replacement property;

(10) Any person who purchases, acquires, or uses services described in RCW 82.04.050(6)(b) other than:

(a) For resale in the regular course of business; or

(b) For purposes of consuming the service described in RCW 82.04.050(6)(b) in producing for sale a new product, but only if such service becomes a component of the new product. For purposes of this subsection (10), "product" means a digital product, an article of tangible personal property, or the service described in RCW 82.04.050(6)(b);

(11)(a) Any end user of a digital product or digital code. "Consumer" does not include any person who is not an end user of a digital product or a digital code and purchases, acquires, owns, holds, or uses any digital product or digital code for purposes of consuming the digital product or digital code in producing for sale a new product, but only if the digital product or digital code becomes a component of the new product. A digital code becomes a component of a new product if the digital good or digital automated service acquired through the use of the digital code becomes incorporated into a new product. For purposes of this subsection, "product" has the same meaning as in subsection (10) of this section.

(b)(i) For purposes of this subsection, "end user" means any taxpayer as defined in RCW 82.12.010 other than a taxpayer who receives by contract a digital product for further commercial broadcast, rebroadcast, transmission, retransmission, licensing, relicensing, distribution, redistribution or exhibition of the product, in whole or in part, to others. A person that purchases digital products or digital codes for the purpose of giving away such products or codes will not be considered to have engaged in the distribution or redistribution of such products or codes and will be treated as an end user;

(ii) If a purchaser of a digital code does not receive the contractual right to further redistribute, after the digital code is redeemed, the underlying digital product to which the digital code relates, then the purchaser of the digital code is an end user. If the purchaser of the digital code receives the contractual right to further redistribute, after the digital code is redeemed, the underlying digital product to which the digital code relates, then the purchaser of the digital code is not an end user. A purchaser of a digital code who has the contractual right to further redistribute the digital code is an end user if that purchaser does not have the right to further redistribute, after the digital code is redeemed, the underlying digital product to which the digital code relates; and

(12) Any person who provides services described in RCW 82.04.050(9). Any such person is a consumer with respect to the purchase, acquisition, or use of the tangible personal property that the person provides along with an operator in rendering services defined as a retail sale in RCW 82.04.050(9). Any such person may also be a consumer under other provisions of this section. [2010 c 111 § 202; 2010 c 106 § 204; 2009 c 535 § 302; 2007 c 6 § 1008; 2005 c 514 § 103. Prior: 2004 c 174 § 4; 2004 c 2 § 8; 2002 c 367 § 2; prior: 1998 c 332 § 6; 1998 c 308 § 2; prior: 1996 c 173 § 2; 1996 c 148 § 4; 1996 c 112 § 2; 1995 1st sp.s. c 3 § 4; 1986 c 231 § 2; 1985 c 134 § 1; 1983 2nd ex.s. c 3 § 27; 1975 1st ex.s. c 90 § 2; 1971 ex.s. c 299 § 4; 1969 ex.s. c 255 § 4; 1967 ex.s. c 149 § 6; 1965 ex.s. c 173 § 4; 1961 c 15 § 82.04.190; prior: 1959 ex.s. c 3 § 3; 1957 c 279 § 2; 1955 c 389 § 20; prior: 1949 c 228 § 2, part; 1945 c 249 § 1, part; 1943 c 156 § 2, part; 1941 c 178 § 2, part; 1939 c 225 § 2, part; 1937 c 227 § 2, part; 1935 c 180 § 5, part; Rem. Supp. 1949 § 8370-5, part.]

Reviser's note: This section was amended by 2010 c 106 § 204 and by 2010 c 111 § 202, each without reference to the other. Both amendments are incorporated in the publication of this section under RCW 1.12.025(2). For rule of construction, see RCW 1.12.025(1).

Purpose—Retroactive application—Effective date—2010 c 111: See notes following RCW 82.04.050.

Effective date—2010 c 106: See note following RCW 35.102.145.

Intent—Construction—2009 c 535: See notes following RCW 82.04.192.

Part headings not law—Savings—Effective date—Severability—2007 c 6: See notes following RCW 82.32.020.

Findings—Intent—2007 c 6: See note following RCW 82.14.495.

Effective date—2005 c 514: See note following RCW 83.100.230.

Part headings not law—Severability—2005 c 514: See notes following RCW 82.12.808.

Effective date—2004 c 174: See note following RCW 82.04.2908.

Severability—Effective date—2002 c 367: See notes following RCW 82.04.060.

Findings—Intent—Effective date—1998 c 332: See notes following RCW 82.04.29001.

Findings—Intent—1996 c 173: See note following RCW 82.08.02565.

Findings—Effective date—1995 1st sp.s. c 3: See notes following RCW 82.08.02565.

Additional notes found at www.leg.wa.gov

82.04.192 Digital products definitions. (1) "Digital audio works" means works that result from the fixation of a series of musical, spoken, or other sounds, including ring-tones.

82.12.820	Exemptions—Warehouse and grain elevators and distribution centers.
82.12.825	Exemptions—Property and services that enable heavy duty diesel vehicles to operate with onboard electrification systems.
82.12.832	Exemptions—Use of gun safes.
82.12.834	Exemptions—Sales/leasebacks by regional transit authorities.
82.12.841	Exemptions—Farming equipment—Hay sheds.
82.12.845	Use of motorcycles loaned to department of licensing.
82.12.850	Exemptions—Conifer seed.
82.12.855	Exemptions—Replacement parts for qualifying farm machinery and equipment.
82.12.860	Exemptions—Property and services acquired from a federal credit union.
82.12.865	Exemptions—Diesel, biodiesel, and aircraft fuel for farm fuel users.
82.12.880	Exemptions—Animal pharmaceuticals.
82.12.890	Exemptions—Livestock nutrient management equipment and facilities.
82.12.900	Exemptions—Anaerobic digesters.
82.12.910	Exemptions—Propane or natural gas to heat chicken structures.
82.12.920	Exemptions—Chicken bedding materials.
82.12.925	Exemptions—Dietary supplements.
82.12.930	Exemptions—Watershed protection or flood prevention.
82.12.935	Exemptions—Disposable devices used to deliver prescription drugs for human use.
82.12.940	Exemptions—Over-the-counter drugs for human use.
82.12.945	Exemptions—Kidney dialysis devices.
82.12.950	Exemptions—Steam, electricity, electrical energy.
82.12.955	Exemptions—Use of machinery, equipment, vehicles, and services related to biodiesel or E85 motor fuel.
82.12.956	Exemptions—Hog fuel used to generate electricity, steam, heat, or biofuel.
82.12.957	Exemptions—Forest derived biomass.
82.12.962	Exemptions—Use of machinery and equipment in generating electricity.
82.12.963	Exemptions—Use of machinery and equipment using solar energy to generate electricity.
82.12.964	Use of machinery and equipment used in generating electricity—Effect of exemption expiration.
82.12.965	Exemptions—Semiconductor materials manufacturing.
82.12.9651	Exemptions—Gases and chemicals used in production of semiconductor materials.
82.12.970	Exemptions—Gases and chemicals used to manufacture semiconductor materials.
82.12.975	Computer parts and software related to the manufacture of commercial airplanes.
82.12.980	Exemptions—Labor, services, and personal property related to the manufacture of superefficient airplanes.
82.12.983	Exemptions—Wax and ceramic materials.
82.12.985	Exemptions—Insulin.
82.12.986	Exemptions—Eligible server equipment.
82.12.991	Exemptions—Bottled water—Prescribed to patients.
82.12.992	Exemptions—Bottled water—No readily available source of drinking water.
82.12.995	Exemptions—Certain limited purpose public corporations, commissions, and authorities.
82.12.998	Exemptions—Weatherization of a residence.

Changes in tax law—Liability: RCW 82.08.064, 82.14.055, and 82.32.430.

Direct pay permits: RCW 82.32.087.

82.12.010 Definitions. For the purposes of this chapter:

(1) The meaning ascribed to words and phrases in chapters 82.04 and 82.08 RCW, insofar as applicable, has full force and effect with respect to taxes imposed under the provisions of this chapter. "Consumer," in addition to the meaning ascribed to it in chapters 82.04 and 82.08 RCW insofar as applicable, also means any person who distributes or displays, or causes to be distributed or displayed, any article of tangible personal property, except newspapers, the primary purpose of which is to promote the sale of products or services. With respect to property distributed to persons within this state by a consumer as defined in this subsection (1), the use of the property is deemed to be by such consumer.

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(2) "Extended warranty" has the same meaning as in RCW 82.04.050(7).

(3) "Purchase price" means the same as sales price as defined in RCW 82.08.010.

(4)(a)(i) Except as provided in (a)(ii) of this subsection (4), "retailer" means every seller as defined in RCW 82.08.010 and every person engaged in the business of selling tangible personal property at retail and every person required to collect from purchasers the tax imposed under this chapter.

(ii) "Retailer" does not include a professional employer organization when a covered employee coemployed with the client under the terms of a professional employer agreement engages in activities that constitute a sale of tangible personal property, extended warranty, digital good, digital code, or a sale of any digital automated service or service defined as a retail sale in RCW 82.04.050 (2)(a) or (g), (3)(a), or (6)(b) that is subject to the tax imposed by this chapter. In such cases, the client, and not the professional employer organization, is deemed to be the retailer and is responsible for collecting and remitting the tax imposed by this chapter.

(b) For the purposes of (a) of this subsection, the terms "client," "covered employee," "professional employer agreement," and "professional employer organization" have the same meanings as in RCW 82.04.540.

(5) "Taxpayer" and "purchaser" include all persons included within the meaning of the word "buyer" and the word "consumer" as defined in chapters 82.04 and 82.08 RCW.

(6) "Use," "used," "using," or "put to use" have their ordinary meaning, and mean:

(a) With respect to tangible personal property, except for natural gas and manufactured gas, the first act within this state by which the taxpayer takes or assumes dominion or control over the article of tangible personal property (as a consumer), and include installation, storage, withdrawal from storage, distribution, or any other act preparatory to subsequent actual use or consumption within this state;

(b) With respect to a service defined in RCW 82.04.050(2)(a), the first act within this state after the service has been performed by which the taxpayer takes or assumes dominion or control over the article of tangible personal property upon which the service was performed (as a consumer), and includes installation, storage, withdrawal from storage, distribution, or any other act preparatory to subsequent actual use or consumption of the article within this state;

(c) With respect to an extended warranty, the first act within this state after the extended warranty has been acquired by which the taxpayer takes or assumes dominion or control over the article of tangible personal property to which the extended warranty applies, and includes installation, storage, withdrawal from storage, distribution, or any other act preparatory to subsequent actual use or consumption of the article within this state;

(d) With respect to a digital good or digital code, the first act within this state by which the taxpayer, as a consumer, views, accesses, downloads, possesses, stores, opens, manipulates, or otherwise uses or enjoys the digital good or digital code;

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(e) With respect to a digital automated service, the first act within this state by which the taxpayer, as a consumer, uses, enjoys, or otherwise receives the benefit of the service;

(f) With respect to a service defined as a retail sale in RCW 82.04.050(6)(b), the first act within this state by which the taxpayer, as a consumer, accesses the prewritten computer software;

(g) With respect to a service defined as a retail sale in RCW 82.04.050(2)(g), the first act within this state after the service has been performed by which the taxpayer, as a consumer, views, accesses, downloads, possesses, stores, opens, manipulates, or otherwise uses or enjoys the digital good upon which the service was performed; and

(h) With respect to natural gas or manufactured gas, the use of which is taxable under RCW 82.12.022, including gas that is also taxable under the authority of RCW 82.14.230, the first act within this state by which the taxpayer consumes the gas by burning the gas or storing the gas in the taxpayer's own facilities for later consumption by the taxpayer.

(7)(a) "Value of the article used" is the purchase price for the article of tangible personal property, the use of which is taxable under this chapter. The term also includes, in addition to the purchase price, the amount of any tariff or duty paid with respect to the importation of the article used. In case the article used is acquired by lease or by gift or is extracted, produced, or manufactured by the person using the same or is sold under conditions wherein the purchase price does not represent the true value thereof, the value of the article used is determined as nearly as possible according to the retail selling price at place of use of similar products of like quality and character under such rules as the department may prescribe.

(b) In case the articles used are acquired by bailment, the value of the use of the articles so used must be in an amount representing a reasonable rental for the use of the articles so bailed, determined as nearly as possible according to the value of such use at the places of use of similar products of like quality and character under such rules as the department of revenue may prescribe. In case any such articles of tangible personal property are used in respect to the construction, repairing, decorating, or improving of, and which become or are to become an ingredient or component of, new or existing buildings or other structures under, upon, or above real property of or for the United States, any instrumentality thereof, or a county or city housing authority created pursuant to chapter 35.82 RCW, including the installing or attaching of any such articles therein or thereto, whether or not such personal property becomes a part of the realty by virtue of installation, then the value of the use of such articles so used is determined according to the retail selling price of such articles, or in the absence of such a selling price, as nearly as possible according to the retail selling price at place of use of similar products of like quality and character or, in the absence of either of these selling price measures, such value may be determined upon a cost basis, in any event under such rules as the department of revenue may prescribe.

(c) In the case of articles owned by a user engaged in business outside the state which are brought into the state for no more than one hundred eighty days in any period of three hundred sixty-five consecutive days and which are temporarily used for business purposes by the person in this state,

the value of the article used must be an amount representing a reasonable rental for the use of the articles, unless the person has paid tax under this chapter or chapter 82.08 RCW upon the full value of the article used, as defined in (a) of this subsection.

(d) In the case of articles manufactured or produced by the user and used in the manufacture or production of products sold or to be sold to the department of defense of the United States, the value of the articles used is determined according to the value of the ingredients of such articles.

(e) In the case of an article manufactured or produced for purposes of serving as a prototype for the development of a new or improved product, the value of the article used is determined by: (i) The retail selling price of such new or improved product when first offered for sale; or (ii) the value of materials incorporated into the prototype in cases in which the new or improved product is not offered for sale.

(f) In the case of an article purchased with a direct pay permit under RCW 82.32.087, the value of the article used is determined by the purchase price of such article if, but for the use of the direct pay permit, the transaction would have been subject to sales tax.

(8) "Value of the digital good or digital code used" means the purchase price for the digital good or digital code, the use of which is taxable under this chapter. If the digital good or digital code is acquired other than by purchase, the value of the digital good or digital code must be determined as nearly as possible according to the retail selling price at place of use of similar digital goods or digital codes of like quality and character under rules the department may prescribe.

(9) "Value of the extended warranty used" means the purchase price for the extended warranty, the use of which is taxable under this chapter. If the extended warranty is received by gift or under conditions wherein the purchase price does not represent the true value of the extended warranty, the value of the extended warranty used is determined as nearly as possible according to the retail selling price at place of use of similar extended warranties of like quality and character under rules the department may prescribe.

(10) "Value of the service used" means the purchase price for the digital automated service or other service, the use of which is taxable under this chapter. If the service is received by gift or under conditions wherein the purchase price does not represent the true value thereof, the value of the service used is determined as nearly as possible according to the retail selling price at place of use of similar services of like quality and character under rules the department may prescribe. [2010 c 127 § 4; 2009 c 535 § 304; 2006 c 301 § 3; 2005 c 514 § 104. Prior: 2003 c 168 § 102; 2003 c 5 § 1; 2002 c 367 § 3; 2001 c 188 § 3; 1994 c 93 § 1; prior: 1985 c 222 § 1; 1985 c 132 § 1; 1983 1st ex.s. c 55 § 2; 1975-'76 2nd ex.s. c 1 § 1; 1975 1st ex.s. c 278 § 52; 1965 ex.s. c 173 § 17; 1961 c 293 § 15; 1961 c 15 § 82.12.010; prior: 1955 c 389 § 24; 1951 1st ex.s. c 9 § 3; 1949 c 228 § 9; 1945 c 249 § 8; 1943 c 156 § 10; 1939 c 225 § 18; 1937 c 191 § 4; 1935 c 180 § 35; Rem. Supp. 1949 § 8370-35.]

Reviser's note: The definitions in this section have been alphabetized pursuant to RCW 1.08.015(2)(k).

Intent—Construction—2009 c 535: See notes following RCW 82.04.192.

Effective date—Act does not affect application of Title 50 or 51 RCW—2006 c 301: See notes following RCW 82.32.710.

Effective date—2005 c 514: See note following RCW 83.100.230.

Part headings not law—Severability—2005 c 514: See notes following RCW 82.12.808.

Effective dates—Part headings not law—2003 c 168: See notes following RCW 82.08.010.

Finding—Intent—Retroactive application—2003 c 5: "The legislature finds that in the enactment of chapter 367, Laws of 2002, some use tax exemptions were not updated to reflect the change in taxability regarding services. It is the legislature's intent to correct this omission by amending the various use tax exemptions so that services exempt from the sales tax are also exempt from the use tax. Sections 1 through 19 of this act apply retroactively to June 1, 2002. The department of revenue shall refund any use taxes paid and forgive use taxes unpaid as a result of the omission." [2003 c 5 § 20.]

Effective date—2003 c 5: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [March 18, 2003]." [2003 c 5 § 21.]

Severability—Effective date—2002 c 367: See notes following RCW 82.04.060.

Finding—Intent—Effective date—2001 c 188: See notes following RCW 82.32.087.

Additional notes found at www.leg.wa.gov

82.12.020 Use tax imposed. (1) There is levied and collected from every person in this state a tax or excise for the privilege of using within this state as a consumer any:

(a) Article of tangible personal property acquired by the user in any manner, including tangible personal property acquired at a casual or isolated sale, and including by-products used by the manufacturer thereof, except as otherwise provided in this chapter, irrespective of whether the article or similar articles are manufactured or are available for purchase within this state;

(b) Prewritten computer software, regardless of the method of delivery, but excluding prewritten computer software that is either provided free of charge or is provided for temporary use in viewing information, or both;

(c) Services defined as a retail sale in RCW 82.04.050 (2)(a) or (g), (3)(a), or (6)(b), excluding services defined as a retail sale in RCW 82.04.050(6)(b) that are provided free of charge;

(d) Extended warranty; or

(e)(i) Digital good, digital code, or digital automated service, including the use of any services provided by a seller exclusively in connection with digital goods, digital codes, or digital automated services, whether or not a separate charge is made for such services.

(ii) With respect to the use of digital goods, digital automated services, and digital codes acquired by purchase, the tax imposed in this subsection (1)(e) applies in respect to:

(A) Sales in which the seller has granted the purchaser the right of permanent use;

(B) Sales in which the seller has granted the purchaser a right of use that is less than permanent;

(C) Sales in which the purchaser is not obligated to make continued payment as a condition of the sale; and

(D) Sales in which the purchaser is obligated to make continued payment as a condition of the sale.

(iii) With respect to digital goods, digital automated services, and digital codes acquired other than by purchase, the

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tax imposed in this subsection (1)(e) applies regardless of whether or not the consumer has a right of permanent use or is obligated to make continued payment as a condition of use.

(2) The provisions of this chapter do not apply in respect to the use of any article of tangible personal property, extended warranty, digital good, digital code, digital automated service, or service taxable under RCW 82.04.050 (2)(a) or (g), (3)(a), or (6)(b), if the sale to, or the use by, the present user or the present user's bailor or donor has already been subjected to the tax under chapter 82.08 RCW or this chapter and the tax has been paid by the present user or by the present user's bailor or donor.

(3)(a) Except as provided in this section, payment of the tax imposed by this chapter or chapter 82.08 RCW by one purchaser or user of tangible personal property, extended warranty, digital good, digital code, digital automated service, or other service does not have the effect of exempting any other purchaser or user of the same property, extended warranty, digital good, digital code, digital automated service, or other service from the taxes imposed by such chapters.

(b) The tax imposed by this chapter does not apply:

(i) If the sale to, or the use by, the present user or his or her bailor or donor has already been subjected to the tax under chapter 82.08 RCW or this chapter and the tax has been paid by the present user or by his or her bailor or donor;

(ii) In respect to the use of any article of tangible personal property acquired by bailment and the tax has once been paid based on reasonable rental as determined by RCW 82.12.060 measured by the value of the article at time of first use multiplied by the tax rate imposed by chapter 82.08 RCW or this chapter as of the time of first use;

(iii) In respect to the use of any article of tangible personal property acquired by bailment, if the property was acquired by a previous bailee from the same bailor for use in the same general activity and the original bailment was prior to June 9, 1961; or

(iv) To the use of digital goods or digital automated services, which were obtained through the use of a digital code, if the sale of the digital code to, or the use of the digital code by, the present user or the present user's bailor or donor has already been subjected to the tax under chapter 82.08 RCW or this chapter and the tax has been paid by the present user or by the present user's bailor or donor.

(4)(a) Except as provided in (b) of this subsection (4), the tax is levied and must be collected in an amount equal to the value of the article used, value of the digital good or digital code used, value of the extended warranty used, or value of the service used by the taxpayer, multiplied by the applicable rates in effect for the retail sales tax under RCW 82.08.020.

(b) In the case of a seller required to collect use tax from the purchaser, the tax must be collected in an amount equal to the purchase price multiplied by the applicable rate in effect for the retail sales tax under RCW 82.08.020.

(5) For purposes of the tax imposed in this section, "person" includes anyone within the definition of "buyer," "purchaser," and "consumer" in RCW 82.08.010. [2010 1st sp.s. c 23 § 206; 2009 c 535 § 305; 2005 c 514 § 105. Prior: 2003 c 361 § 302; 2003 c 168 § 214; 2003 c 5 § 2; 2002 c 367 § 4; 1999 c 358 § 9; 1998 c 332 § 7; 1996 c 148 § 5; 1994 c 93 § 2; 1983 c 7 § 7; 1981 2nd ex.s. c 8 § 2; 1980 c 37 § 79; 1977

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or consumed in whole or in part by such persons in the performance of any activity defined as a "sale at retail" or "retail sale" even though such property, labor and services may be resold after such use or consumption. Nothing contained in this subsection shall be construed to modify subsection (1) of this section and nothing contained in subsection (1) of this section shall be construed to modify this subsection.

(3) The term "sale at retail" or "retail sale" shall include the sale of or charge made for personal, business, or professional services including amounts designated as interest, rents, fees, admission, and other service emoluments however designated, received by persons engaging in the following business activities:

(a) Amusement and recreation services including but not limited to golf, pool, billiards, skating, bowling, ski lifts and tows, day trips for sightseeing purposes, and others, when provided to consumers;

(b) Abstract, title insurance, and escrow services;

(c) Credit bureau services;

(d) Automobile parking and storage garage services;

(e) Landscape maintenance and horticultural services but excluding (i) horticultural services provided to farmers and (ii) pruning, trimming, repairing, removing, and clearing of trees and brush near electric transmission or distribution lines or equipment, if performed by or at the direction of an electric utility;

(f) Service charges associated with tickets to professional sporting events; and

(g) The following personal services: Physical fitness services, tanning salon services, tattoo parlor services, steam bath services, turkish bath services, escort services, and dating services.

(4) The term shall also include the renting or leasing of tangible personal property to consumers and the rental of equipment with an operator.

(5) The term shall also include the providing of telephone service, as defined in RCW 82.04.065, to consumers.

(6) The term shall also include the sale of canned software other than a sale to a person who presents a resale certificate under RCW 82.04.470, regardless of the method of delivery to the end user, but shall not include custom software or the customization of canned software.

(7) The term shall not include the sale of or charge made for labor and services rendered in respect to the building, repairing, or improving of any street, place, road, highway, easement, right of way, mass public transportation terminal or parking facility, bridge, tunnel, or trestle which is owned by a municipal corporation or political subdivision of the state or by the United States and which is used or to be used primarily for foot or vehicular traffic including mass transportation vehicles of any kind.

(8) The term shall also not include sales of chemical sprays or washes to persons for the purpose of postharvest treatment of fruit for the prevention of scald, fungus, mold, or decay, nor shall it include sales of feed, seed, seedlings, fertilizer, agents for enhanced pollination including insects such as bees, and spray materials to: (a) Persons who participate in the federal conservation reserve program, the environmental quality incentives program, the wetlands reserve program, and the wildlife habitat incentives program, or their successors administered by the United States depart-

ment of agriculture; (b) farmers for the purpose of producing for sale any agricultural product; and (c) farmers acting under cooperative habitat development or access contracts with an organization exempt from federal income tax under 26 U.S.C. Sec. 501(c)(3) or the Washington state department of fish and wildlife to produce or improve wildlife habitat on land that the farmer owns or leases.

(9) The term shall not include the sale of or charge made for labor and services rendered in respect to the constructing, repairing, decorating, or improving of new or existing buildings or other structures under, upon, or above real property of or for the United States, any instrumentality thereof, or a county or city housing authority created pursuant to chapter 35.82 RCW, including the installing, or attaching of any article of tangible personal property therein or thereto, whether or not such personal property becomes a part of the realty by virtue of installation. Nor shall the term include the sale of services or charges made for the clearing of land and the moving of earth of or for the United States, any instrumentality thereof, or a county or city housing authority. Nor shall the term include the sale of services or charges made for cleaning up for the United States, or its instrumentalities, radioactive waste and other byproducts of weapons production and nuclear research and development.

(10) Until July 1, 2003, the term shall not include the sale of or charge made for labor and services rendered for environmental remedial action as defined in RCW 82.04.2635(2). [2002 c 178 § 1; 2000 2nd sp.s. c 4 § 23. Prior: 1998 c 332 § 2; 1998 c 315 § 1; 1998 c 308 § 1; 1998 c 275 § 1; 1997 c 127 § 1; prior: 1996 c 148 § 1; 1996 c 112 § 1; 1995 1st sp.s. c 12 § 2; 1995 c 39 § 2; 1993 sp.s. c 25 § 301; 1988 c 253 § 1; prior: 1987 c 285 § 1; 1987 c 23 § 2; 1986 c 231 § 1; 1983 2nd ex.s. c 3 § 25; 1981 c 144 § 3; 1975 1st ex.s. c 291 § 5; 1975 1st ex.s. c 90 § 1; 1973 1st ex.s. c 145 § 1; 1971 ex.s. c 299 § 3; 1971 ex.s. c 281 § 1; 1970 ex.s. c 8 § 1; prior: 1969 ex.s. c 262 § 30; 1969 ex.s. c 255 § 3; 1967 ex.s. c 149 § 4; 1965 ex.s. c 173 § 1; 1963 c 7 § 1; prior: 1961 ex.s. c 24 § 1; 1961 c 293 § 1; 1961 c 15 § 82.04.050; prior: 1959 ex.s. c 5 § 2; 1957 c 279 § 1; 1955 c 389 § 6; 1953 c 91 § 3; 1951 2nd ex.s. c 28 § 3; 1949 c 228 § 2, part; 1945 c 249 § 1, part; 1943 c 156 § 2, part; 1941 c 178 § 2, part; 1939 c 225 § 2, part; 1937 c 227 § 2, part; 1935 c 180 § 5, part; Rem. Supp. 1949 § 8370-5, part.]

Retroactive application—Effective date—2002 c 178: See notes following RCW 67.28.180.

Findings—Construction—2000 2nd sp.s. c 4 §§ 18-30: See notes following RCW 81.112.300.

Findings—Intent—Effective date—1998 c 332: See notes following RCW 82.04.29001.

Effective dates—1998 c 308: "(1) Sections 1 through 4 of this act take effect July 1, 1998.

(2) Section 5 of this act takes effect July 1, 2003." [1998 c 308 § 6.]

Effective date—1998 c 275: "This act takes effect July 1, 1998." [1998 c 275 § 2.]

Effective date—1997 c 127: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect July 1, 1997." [1997 c 127 § 2.]

Severability—1996 c 148: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1996 c 148 § 7.]

services reflected in the price, if provided alone, would be taxed as services and not as separate retail or wholesale sales.

(3) Therefore, the intent of this act is to maintain the application of the law and not to extend retail treatment to activities not previously treated as retail activities. Services that are otherwise subject to tax as a service under RCW 82.04.290(2), including but not limited to engineering, architectural, surveying, flagging, accounting, legal, consulting, or administrative services, remain subject to tax as a service under RCW 82.04.290(2), if the person responsible for the performance of those services is not also responsible for the performance of the constructing, building, repairing, improving, or decorating activities. Additionally, unless otherwise provided by law, a person entering into an agreement to be responsible for the performance of services otherwise subject to tax as a service under RCW 82.04.290(2), and subsequently entering into a separate agreement to be responsible for the performance of constructing, building, repairing, improving, or decorating activities, is subject to tax as a service under RCW 82.04.290(2) with respect to the first agreement, and is subject to tax under the appropriate section of chapter 82.04 RCW with respect to the second agreement, if at the time of the first agreement there was no contemplation by the parties, as evidenced by the facts, that the agreements would be awarded to the same person." [1999 c 212 § 1.]

82.04.055 "Selected business services."

Reviser's note: RCW 82.04.055 was amended by 1997 c 304 § 3 without reference to its repeal by 1997 c 7 § 5. It has been decodified for publication purposes under RCW 1.12.025.

82.04.060 "Sale at wholesale," "wholesale sale."

"Sale at wholesale" or "wholesale sale" means: (1) Any sale of tangible personal property, any sale of services defined as a retail sale in RCW 82.04.050(2)(a), any sale of amusement or recreation services as defined in RCW 82.04.050(3)(a), any sale of canned software, or any sale of telephone service as defined in RCW 82.04.065, which is not a sale at retail; and (2) any charge made for labor and services rendered for persons who are not consumers, in respect to real or personal property, if such charge is expressly defined as a retail sale by RCW 82.04.050 when rendered to or for consumers: PROVIDED, That the term "real or personal property" as used in this subsection shall not include any natural products named in RCW 82.04.100. [2002 c 367 § 1; 1998 c 332 § 5; 1996 c 148 § 3; 1983 2nd ex.s. c 3 § 26; 1961 c 15 § 82.04.060. Prior: 1955 ex.s. c 10 § 4; 1955 c 389 § 7; prior: 1949 c 228 § 2, part; 1945 c 249 § 1, part; 1943 c 156 § 2, part; 1941 c 178 § 2, part; 1939 c 225 § 2, part; 1937 c 227 § 2, part; 1935 c 180 § 5, part; Rem. Supp. 1949 § 8370-5, part.]

Severability—2002 c 367: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [2002 c 367 § 7.]

Effective date—2002 c 367: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect June 1, 2002." [2002 c 367 § 8.]

Findings—Intent—Effective date—1998 c 332: See notes following RCW 82.04.29001.

Severability—Effective date—1996 c 148: See notes following RCW 82.04.050.

Construction—Severability—Effective dates—1983 2nd ex.s. c 3: See notes following RCW 82.04.255.

82.04.062 "Sale at wholesale," "sale at retail" excludes sale of precious metal bullion and monetized bullion—Computation of tax. (1) For purposes of this chapter, "wholesale sale," "sale at wholesale," "retail sale,"

and "sale at retail" do not include the sale of precious metal bullion or monetized bullion.

(2) In computing tax under this chapter on the business of making sales of precious metal bullion or monetized bullion, the tax shall be imposed on the amounts received as commissions upon transactions for the accounts of customers over and above the amount paid to other dealers associated in such transactions, but no deduction or offset is allowed on account of salaries or commissions paid to salesmen or other employees.

(3) For purposes of this section, "precious metal bullion" means any precious metal which has been put through a process of smelting or refining, including, but not limited to, gold, silver, platinum, rhodium, and palladium, and which is in such state or condition that its value depends upon its contents and not upon its form. For purposes of this section, "monetized bullion" means coins or other forms of money manufactured from gold, silver, or other metals and heretofore, now, or hereafter used as a medium of exchange under the laws of this state, the United States, or any foreign nation, but does not include coins or money sold to be manufactured into jewelry or works of art. [1985 c 471 § 5.]

Severability—Effective date—1985 c 471: See notes following RCW 82.04.260.

82.04.065 Telephone and telecommunications-related definitions. (Contingent expiration date.)

(1) "Competitive telephone service" means the providing by any person of telecommunications equipment or apparatus, or service related to that equipment or apparatus such as repair or maintenance service, if the equipment or apparatus is of a type which can be provided by persons that are not subject to regulation as telephone companies under Title 80 RCW and for which a separate charge is made.

(2) "Network telephone service" means the providing by any person of access to a telephone network, telephone network switching service, toll service, or coin telephone services, or the providing of telephonic, video, data, or similar communication or transmission for hire, via a telephone network, toll line or channel, cable, microwave, or similar communication or transmission system. "Network telephone service" includes the provision of transmission to and from the site of an internet provider via a telephone network, toll line or channel, cable, microwave, or similar communication or transmission system. "Network telephone service" does not include the providing of competitive telephone service, the providing of cable television service, the providing of broadcast services by radio or television stations, nor the provision of internet service as defined in RCW 82.04.297, including the reception of dial-in connection, provided at the site of the internet service provider.

(3) "Telephone service" means competitive telephone service or network telephone service, or both, as defined in subsections (1) and (2) of this section.

(4) "Telephone business" means the business of providing network telephone service, as defined in subsection (2) of this section. It includes cooperative or farmer line telephone companies or associations operating an exchange.

(5) "Charges for mobile telecommunications services" means any charge for, or associated with, the provision of commercial mobile radio service, as defined in section 20.3,

Title 47 C.F.R. as in effect on June 1, 1999, or any charge for, or associated with, a service provided as an adjunct to a commercial mobile radio service, regardless of whether individual transmissions originate or terminate within the licensed service area of the mobile telecommunications service provider.

(6) "Customer" means: (a) The person or entity that contracts with the home service provider for mobile telecommunications services; or (b) the end user of the mobile telecommunications service, if the end user of mobile telecommunications services is not the contracting party, but this subsection (6)(b) applies only for the purpose of determining the place of primary use. The term does not include a reseller of mobile telecommunications service, or a serving carrier under an arrangement to serve the customer outside the home service provider's licensed service area.

(7) "Designated data base provider" means a person representing all the political subdivisions of the state that is:

(a) Responsible for providing an electronic data base prescribed in 4 U.S.C. Sec. 119(a) if the state has not provided an electronic data base; and

(b) Approved by municipal and county associations or leagues of the state whose responsibility it would otherwise be to provide a data base prescribed by 4 U.S.C. Secs. 116 through 126.

(8) "Enhanced zip code" means a United States postal zip code of nine or more digits.

(9) "Home service provider" means the facilities-based carrier or reseller with whom the customer contracts for the provision of mobile telecommunications services.

(10) "Licensed service area" means the geographic area in which the home service provider is authorized by law or contract to provide commercial mobile radio service to the customer.

(11) "Mobile telecommunications service" means commercial mobile radio service, as defined in section 20.3, Title 47 C.F.R. as in effect on June 1, 1999.

(12) "Mobile telecommunications service provider" means a home service provider or a serving carrier.

(13) "Place of primary use" means the street address representative of where the customer's use of the mobile telecommunications service primarily occurs, which must be:

(a) The residential street address or the primary business street address of the customer; and

(b) Within the licensed service area of the home service provider.

(14) "Prepaid telephone calling service" means the right to purchase exclusively telecommunications services that must be paid for in advance, that enables the origination of calls using an access number, authorization code, or both, whether manually or electronically dialed, if the remaining amount of units of service that have been prepaid is known by the provider of the prepaid service on a continuous basis.

(15) "Reseller" means a provider who purchases telecommunications services from another telecommunications service provider and then resells, uses as a component part of, or integrates the purchased services into a mobile telecommunications service. "Reseller" does not include a serving carrier with whom a home service provider arranges for the services to its customers outside the home service provider's licensed service area.

(16) "Serving carrier" means a facilities-based carrier providing mobile telecommunications service to a customer outside a home service provider's or reseller's licensed service area.

(17) "Taxing jurisdiction" means any of the several states, the District of Columbia, or any territory or possession of the United States, any municipality, city, county, township, parish, transportation district, or assessment jurisdiction, or other political subdivision within the territorial limits of the United States with the authority to impose a tax, charge, or fee. [2002 c 67 § 2; 1997 c 304 § 5; 1983 2nd ex.s. c 3 § 24.]

Finding—Contingency—Court judgment—Effective date—2002 c 67: See notes following RCW 82.04.530.

Findings—Severability—Effective date—1997 c 304: See notes following RCW 35.21.717.

Construction—Severability—Effective dates—1983 2nd ex.s. c 3: See notes following RCW 82.04.255.

License fees or taxes on telephone business by cities: RCW 35.21.712 through 35.21.715.

Sales tax exemption for certain network telephone service: RCW 82.08.0289.

82.04.065 "Competitive telephone service," "network telephone service," "telephone service," "telephone business." (Contingent effective date.) (1) "Competitive telephone service" means the providing by any person of telecommunications equipment or apparatus, or service related to that equipment or apparatus such as repair or maintenance service, if the equipment or apparatus is of a type which can be provided by persons that are not subject to regulation as telephone companies under Title 80 RCW and for which a separate charge is made.

(2) "Network telephone service" means the providing by any person of access to a local telephone network, local telephone network switching service, toll service, or coin telephone services, or the providing of telephonic, video, data, or similar communication or transmission for hire, via a local telephone network, toll line or channel, cable, microwave, or similar communication or transmission system. "Network telephone service" includes interstate service, including toll service, originating from or received on telecommunications equipment or apparatus in this state if the charge for the service is billed to a person in this state. "Network telephone service" includes the provision of transmission to and from the site of an internet provider via a local telephone network, toll line or channel, cable, microwave, or similar communication or transmission system. "Network telephone service" does not include the providing of competitive telephone service, the providing of cable television service, the providing of broadcast services by radio or television stations, nor the provision of internet service as defined in RCW 82.04.297, including the reception of dial-in connection, provided at the site of the internet service provider.

(3) "Telephone service" means competitive telephone service or network telephone service, or both, as defined in subsections (1) and (2) of this section.

(4) "Telephone business" means the business of providing network telephone service, as defined in subsection (2) of this section. It includes cooperative or farmer line

Finding—1993 c 488: "The legislature finds that ride sharing and vanpools are the fastest growing transportation choice because of their flexibility and cost-effectiveness. Ride sharing and vanpools represent an effective means for local jurisdictions, transit agencies, and the private sector to assist in addressing the requirements of the Commute Trip Reduction Act, the Growth Management Act, the Americans with Disabilities Act, and the Clean Air Act." [1993 c 488 § 1.]

Annual recertification rule—Report—1993 c 488: "The department shall adopt by rule a process requiring annual recertification upon renewal for vehicles registered under RCW 46.16.023 to discourage abuse of tax exemptions under RCW 82.08.0287, 82.12.0282, and 82.44.015. The department of licensing in consultation with the department of transportation shall submit a report to the legislative transportation committee and the house and senate standing committees on transportation by July 1, 1996, assessing the effectiveness of the department of licensing at limiting tax exemptions to bona fide ride-sharing vehicles." [1993 c 488 § 6.]

Severability—1980 c 166: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1980 c 166 § 4.]

Ride-sharing vehicles—Special plates: RCW 46.16.023.

82.08.02875 Exemptions—Vehicle parking charges subject to tax at stadium and exhibition center. The tax levied by RCW 82.08.020 does not apply to vehicle parking charges that are subject to tax under RCW 36.38.040. [1997 c 220 § 203 (Referendum Bill No. 48, approved June 17, 1997).]

Referendum—Other legislation limited—Legislators' personal intent not indicated—Reimbursements for election—Voters' pamphlet, election requirements—1997 c 220: See RCW 36.102.800 through 36.102.803.

Part headings not law—Severability—1997 c 220: See RCW 36.102.900 and 36.102.901.

82.08.0288 Exemptions—Lease of certain irrigation equipment. The tax levied by RCW 82.08.020 shall not apply to the lease of irrigation equipment if:

(1) The irrigation equipment was purchased by the lessor for the purpose of irrigating land controlled by the lessor;

(2) The lessor has paid tax under RCW 82.08.020 or 82.12.020 in respect to the irrigation equipment;

(3) The irrigation equipment is attached to the land in whole or in part; and

(4) The irrigation equipment is leased to the lessee as an incidental part of the lease of the underlying land to the lessee and is used solely on such land. [1983 1st ex.s. c 55 § 5.]

Effective dates—1983 1st ex.s. c 55: See note following RCW 82.08.010.

82.08.0289 Exemptions—Certain network telephone service. (Contingent expiration date.) (1) The tax levied by RCW 82.08.020 shall not apply to sales of:

(a) Network telephone service, other than toll service, to residential customers;

(b) Network telephone service which is paid for by inserting coins in coin-operated telephones;

(c) Mobile telecommunications services, including any toll service, provided to a customer whose place of primary use is outside this state.

(2) The definitions in RCW 82.04.065, as well as the definitions in this subsection, apply to this section.

(a) "Residential customer" means an individual subscribing to a residential class of telephone service.

(b) "Toll service" does not include customer access line charges for access to a toll calling network. [2002 c 67 § 6; 1983 2nd ex.s. c 3 § 30.]

Finding—Contingency—Court judgment—Effective date—2002 c 67: See notes following RCW 82.04.530.

Construction—Severability—Effective dates—1983 2nd ex.s. c 3: See notes following RCW 82.04.255.

82.08.0289 Exemptions—Certain network telephone service. (Contingent effective date.) (1) The tax levied by RCW 82.08.020 shall not apply to sales of:

(a) Network telephone service, other than toll service, to residential customers.

(b) Network telephone service which is paid for by inserting coins in coin-operated telephones.

(2) As used in this section:

(a) "Network telephone service" has the meaning given in RCW 82.04.065.

(b) "Residential customer" means an individual subscribing to a residential class of telephone service.

(c) "Toll service" does not include customer access line charges for access to a toll calling network. [1983 2nd ex.s. c 3 § 30.]

Construction—Severability—Effective dates—1983 2nd ex.s. c 3: See notes following RCW 82.04.255.

82.08.0291 Exemptions—Sales of amusement and recreation services or personal services by nonprofit youth organization—Local government physical fitness classes. The tax imposed by RCW 82.08.020 shall not apply to the sale of amusement and recreation services, or personal services specified in RCW 82.04.050(3)(g), by a nonprofit youth organization, as defined in RCW 82.04.4271, to members of the organization; nor shall the tax apply to physical fitness classes provided by a local government. [2000 c 103 § 8; 1994 c 85 § 1; 1981 c 74 § 2.]

Effective date—1994 c 85: "This act shall take effect July 1, 1994." [1994 c 85 § 2.]

82.08.02915 Exemptions—Sales used by health or social welfare organizations for alternative housing for youth in crisis. The tax levied by RCW 82.08.020 shall not apply to sales to health or social welfare organizations, as defined in RCW 82.04.431, of items necessary for new construction of alternative housing for youth in crisis, so long as the facility will be a licensed agency under chapter 74.15 RCW, upon completion. [1998 c 183 § 1; 1997 c 386 § 56; 1995 c 346 § 1.]

Effective date—1997 c 386 §§ 56, 57: "Sections 56 and 57 of this act are necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and take effect July 1, 1997." [1997 c 386 § 71.]

Effective date—1995 c 346: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and shall take effect immediately [May 13, 1995]." [1995 c 346 § 4.]

82.08.02917 Youth in crisis—Definition—Limited purpose. For the purposes of RCW 82.08.02915 and 82.12.02915, "youth in crisis" means any youth under

NO. 42304-9-II

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SPRINT SPECTRUM, LP,

Respondent/Cross-Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,

Appellant/Cross-Respondent.

CERTIFICATE OF
SERVICE

I certify that I served a copy of Brief of Appellant/Cross-Respondent State of Washington, Department of Revenue and this Certificate of Service via U.S. Mail, postage prepaid, through Consolidated Mail Services, and electronically by email on the following:

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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 12 day of October, 2011, at Tumwater, WA.

[Signature]
Candy Zilinskas, Legal Assistant