

NO. 81022-2

SUPREME COURT OF THE STATE OF WASHINGTON

DOT FOODS, INC.,

Petitioner,

v.

DEPARTMENT OF REVENUE, STATE OF WASHINGTON,

Respondent.

**DEPARTMENT OF REVENUE'S ANSWER TO AMICUS CURIAE
BRIEF OF THE DIRECT SELLING ASSOCIATION**

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I. INTRODUCTION

Amicus Curiae Direct Selling Association (DSA) introduces a new issue that was not raised below by either party, contrary to the well-established principle that appellate courts generally “will not address arguments raised only by amici.” Sundquist Homes, Inc. v. Snohomish County PUD No. 1, 140 Wn.2d 403, 413, 997 P.2d 915 (2000). This Court should decline to address the issue DSA raises.

II. ARGUMENT

Throughout this excise tax refund action, respondent Department of Revenue has argued and briefed three bases for denying Dot Foods’ claim to the direct seller’s exemption provided by RCW 82.04.423. They are:

- 1) Dot Foods’ products were sold at retail in permanent retail establishments. CP at 179-84; Br. of Resp’t at 16-22; Respt.’s Answer to Pet. for Discretionary Review at 12-15; Resp’t Dep’t of Revenue’s Supplemental Br. at 12-16.
- 2) Dot Foods sold non-consumer products in addition to consumer products through its representative. CP at 177-78; Br. of Resp’t at 23-28; Respt.’s Answer to Pet. for Discretionary Review at 6-12; Resp’t Dep’t of Revenue’s Supplemental Br. at 5-12.
- 3) Dot Foods’ representative was a corporation and only a natural person can qualify as a direct seller’s representative. CP at 185-86; Br. of Resp’t at 28-32.

DSA asks this Court to address an entirely unrelated issue because it “disagrees” with the Department’s “interpretation and contention that in order for sales to be made ‘to or through’ a direct selling representative

(DSR), the DSR must directly receive the order and then relay it to the out-of-state company.” Amicus Curiae Br. at 4. DSA urges this Court to hold that RCW 82.04.423 “applies to all sales where 1.) a commission is paid to a DSR or 2.) the sale is attributable to the agency or actions by a DSR.” *Id.* at 10. DSA’s arguments are focused exclusively on an Excise Tax Advisory (ETA 2041.04.426) issued by the Department on July 1, 2008, and WAC 458-20-246(4)(a)(iv), which the ETA interprets. *Id.* at 6-9. However, neither the Department nor Dot Foods has mentioned or relied on the ETA in the superior court, the Court of Appeals, or this Court. Nor has the Department ever argued, as DSA implies, that Dot Foods’ refund claim should be denied because Dot Foods’ representative did not directly receive orders and then relay them to Dot Foods.¹

DSA’s arguments are entirely unrelated to the three arguments the Department has made as to why Dot Foods does not qualify for the direct seller’s exemption. Therefore, the issue DSA attempts to introduce has not been properly raised and it should not be addressed by this Court. Sundquist Homes, 140 Wn.2d at 413.

Moreover, if the Court agrees with the Court of Appeals that Dot Foods does not qualify for the direct seller’s exemption either because Dot

¹ The Department’s summary judgment brief did quote from WAC 458-20-246(4)(a)(iv). CP at 17. But the Department did so in support of the argument that clause one of RCW 82.04.423(2) applies to wholesaling direct sellers and clause two of subsection (2) applies to retailing direct sellers. *See id.* That issue is unrelated to the issue DSA argues. Furthermore, the part of Rule 246(4)(a)(iv) quoted by the Department came from an entirely different paragraph than the one containing the sentence mentioned by DSA regarding Internet sales.

Foods sold non-consumer products in addition to consumer products or because its products were sold at retail in permanent retail establishments, then there would be no reason to address the issue DSA attempts to introduce into this case. Since either of these bases would result in a denial of Dot Foods' refund claim, it would be unnecessary to address any possible additional reason for denying the claim. See, e.g., Burién v. Kiga, 144 Wn.2d 819, 828, 31 P.3d 659 (2001) (declaring initiative void under Wash. Const. art. II, § 19 and declining to reach other issues raised by the parties).

This Court also should decline to consider DSA's newly-raised argument because the factual record regarding the activities of Dot Foods' representative has not been adequately developed. "In general, an appellate court is confined to the evidence presented to the trial court." State v. Elmore, 139 Wn.2d 250, 302, 985 P.2d 289 (1999). The purpose of this rule is to "afford[] the trier of fact the full opportunity to consider all admissible evidence." Id.

The Department and Dot Foods entered into a factual stipulation that provided a general overview of the activities of Dot Foods' representative. See CP 87-89. The stipulation, however, did "not preclude either party from offering evidence to establish additional facts not in contradiction with this stipulation." CP at 86. The Department chose not to pursue discovery related to the activities of Dot Foods' representative because it believed, based on the three arguments the

Department intended to assert, that Dot Foods clearly did not qualify for the direct seller's exemption.

The superior court denied Dot Foods' summary judgment motion and granted summary judgment to the Department. CP at 327-30. "Based on the arguments of counsel and the pleadings and evidence presented," the court concluded that no genuine issues of material facts existed and that the Department was entitled to summary judgment as a matter of law. CP at 329. DSA's issue, however, was not presented to the superior court. If this Court were to conclude that the courts below cannot be affirmed without addressing DSA's issue, then the Court should remand the case to the superior court to allow the parties an opportunity to develop the necessary factual record. First, this would allow the Department the opportunity, after obtaining discovery related to the role of Dot Foods' representative (Dot Transportation, Inc.) in Dot Foods' Washington sales, to determine whether it wishes to argue that Dot Foods was disqualified from the direct seller's exemption under the provisions of WAC 458-20-246(4)(a)(iv). Second, if the Department were to choose to pursue the argument, the superior court then would have a full opportunity to consider all material facts before ruling on the issue.

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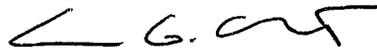
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III. CONCLUSION

The issue that DSA raises in its amicus brief is not properly before this Court and should not be addressed.

RESPECTFULLY SUBMITTED this 9th day of January, 2009.

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