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SUPREME COURT OF THE STATE OF WASHINGTON

DOT FOODS, INC.,

Appellant,

v.

DEPARTMENT OF REVENUE, STATE OF WASHINGTON,

Respondent.

RESPONDENT'S ANSWER TO PETITION FOR DISCRETIONARY REVIEW

ROBERT M. MCKENNA
Attorney General

CAMERON G. COMFORT
Sr. Assistant Attorney General
WSBA #15188

P.O. Box 40123
Olympia WA 98504-0123
(360) 664-9429

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I. INTRODUCTION

Petitioner Dot Foods, Inc., argues review should be granted under RAP 13.4(b)(1) and (b)(2) because the Court of Appeals' decision (reported at ___ Wn. App. ___, 173 P.3d 309 (2007)) disregards several settled principles of statutory interpretation. Dot also argues for review under RAP 13.4(b)(4) because the court afforded "some deference" to the administrative interpretation of respondent Department of Revenue.

Dot fails to show that the Court of Appeals' decision satisfies any of the criteria for granting review. The decision is entirely consistent with Stroh Brewery Co. v. Dep't of Revenue, 104 Wn. App. 235, 15 P.3d 692, review denied, 144 Wn.2d 1002 (2001), the only other appellate decision interpreting the exemption Dot claims. Thus, Dot's petition does not demonstrate any actual conflict; it merely reveals that Dot disagrees with the court's application of several well-established statutory construction tools. Furthermore, that the court chose to afford some deference to a reasonable administrative interpretation hardly qualifies as an issue of substantial public interest that this Court should review. Dot's petition should be denied.

II. RESTATEMENT OF THE ISSUES

RCW 82.04.423, the direct seller's exemption, provides a business and occupation (B&O) tax exemption for out-of-state sellers making sales

at wholesale or retail in Washington "exclusively to or through a direct seller's representative." RCW 82.04.423(1)(d). In turn, a "direct seller's representative" is a "person who buys consumer products . . . for resale, by the buyer or any other person, in the home or otherwise than in a permanent retail establishment, or who sells, or solicits the sale of, consumer products in the home or otherwise than in a permanent retail establishment." RCW 82.04.423(2).[1]

1. Does Dot qualify for the direct seller's exemption even though its representative did not exclusively solicit sales of consumer products in Washington?

2. Does Dot qualify for the direct seller's exemption even though its products were not sold exclusively "in the home or otherwise than in a permanent retail establishment"?

3. Did the Court of Appeals err in giving some deference to the Department's reasonable administrative interpretation of the exemption in RCW 82.04.423?

III. RESTATEMENT OF THE CASE

Dot, the nation's leading food redistributor, sells food and related products. CP at 118. Dot mostly sells consumer products, but it also sells non-consumer products. CP at 87 (¶ 2), 149, 161, 164-66.

[1] A copy of RCW 82.04.423 is attached as Appendix A.

During the tax periods at issue, Dot solicited sales in Washington through a wholly-owned subsidiary. Although neither Dot nor its wholly-owned subsidiary made sales in Washington from a permanent retail establishment, many of Dot's products were resold to consumers in permanent retail establishments such as convenience stores, see CP at 146, and other products were used as ingredients in products sold in permanent retail establishments such as grocery stores. CP at 88 (¶ 6).

In October 1997, the Department issued a letter ruling to Dot stating that Dot qualified for the direct seller's exemption. CP at 93-94.[2] The letter explained the ruling was based on the facts represented by Dot. CP at 94. It also listed several subsequent events that would render the ruling no longer binding, including "the facts change; . . . the applicable rule(s) change; the Department of Revenue publicly announces a change in the policy upon which this ruling is based; or Dot Foods, Inc. is notified in writing that this ruling is not valid." Id.

In late 1999, the Department revised WAC 458-20-246, the administrative rule interpreting RCW 82.04.423.[3] The revised Rule 246,

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[2] After receiving the favorable letter ruling from the Department, Dot created the wholly-owned subsidiary sales representative to take advantage of the ruling. See CP at 95. The wholly-owned subsidiary is a Delaware corporation. Id.

[3] Copies of revised and former Rule 246 are attached as Appendices B and C respectively.

in contrast to the former version, provided a detailed explanation of the direct seller's exemption.[4]

The revised rule's effective date was December 31, 1999. On February 1, 2000, the Department issued a one-page Special Notice for Direct Sellers informing taxpayers the Department had updated WAC 458-20-246. CP at 96. The notice explained that the Department had revised Rule 246 to provide guidance regarding the requirements of the direct seller's exemption, including the requirement that the retail sale of the consumer product must not occur in a permanent retail establishment. Id. The notice also told taxpayers that "[a]s of January 1, 2000, any reporting instructions directed specifically to individual taxpayers that are inconsistent with the revised rule have no effect." Id.[5]

The Department mailed the notice to Dot and Dot received it. CP at 89 (¶ 12). Dot nevertheless continued to take the direct seller's exemption for tax periods after December 31, 1999. CP at 91-92 (¶ 20). Several years later, the Department audited Dot and concluded Dot had erroneously taken the exemption after December 31, 1999. In late 2004, the Department issued a B&O tax assessment, including statutory interest

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[4] For the most part, the former version of the rule simply parroted the language of the exemption, with no real interpretation of the statutory language.

[5] The due date of an excise tax return for January 2000 would have been no earlier than February 25, 2000, several weeks after Dot received the notice. See RCW 82.32.045(1) (1999).

and penalties, for the period January 1, 2000, through December 31, 2003. CP at 90 (¶ 13), 98, 101. Dot eventually paid the assessment in June 2006. CP at 90 (¶ 16).

In the meantime, after receiving the assessment, Dot began to report and pay B&O tax without taking the direct seller's exemption. CP at 90 (¶ 15). A few months later, Dot filed this action under RCW 82.32.180, seeking a refund of its fourth quarter 2004 B&O tax payment. CP at 5-10. By amended complaint, Dot added refund claims with respect to the assessment it paid in June 2006 and for B&O taxes paid for the period February 2005 through April 2006. CP at 22-31, 90 (¶ 17).

The trial court granted summary judgment to the Department. CP at 327-30. The Court of Appeals affirmed: "Under our interpretation of RCW 82.04.423, a direct seller must exclusively sell consumer products in Washington in order to qualify for the exemption. Therefore, Dot Foods does not qualify for the exemption, and we affirm." 173 P.3d at 313. (¶ 14). The decision then addressed several other arguments raised by the parties and the court, in dicta, concluded that a seller may not take the direct seller's exemption if its products ever are sold in a permanent retail establishment. Id. at 313-16 (¶¶15-28).

IV. REASONS WHY REVIEW SHOULD BE DENIED

A. The Court Of Appeals' Conclusion That RCW 82.04.423 Requires Direct Sellers To Exclusively Sell Consumer Products In Washington Does Not Conflict With Any Decision Of This Court Or The Court Of Appeals.

The Court of Appeals applied well-known principles of statutory construction to conclude that a seller must exclusively sell consumer products in Washington to qualify for the direct seller's exemption. Dot, however, argues the court "erred in reading the word 'exclusively' into RCW 82.04.423(2)'s requirement that a direct seller's representative . . . 'solicit the sale of consumer products.'" Pet. at 7. Dot claims the criteria in RAP 13.4(b)(1) and (2) are present because the court's decision "conflicts with established precedent requiring that statutory language be interpreted according to its plain meaning and disallowing the import of words into the statute that the Legislature did not use." Pet. at 10. The court's decision does not conflict with any of the authority Dot cites, and the requirements of RAP 13.4(b)(1) and (2) are not met.

Before this case, RCW 82.04.423 had been interpreted by the Washington appellate courts only once, in Stroh Brewery Co. v. Dep't of Revenue, 104 Wn. App. 235, 15 P.3d 692, review denied, 144 Wn.2d 1002 (2001). The court's decision here is completely consistent with Stroh, and Dot does not contend otherwise. In Stroh, the Court of Appeals

held that "fairly and consistently interpreted, the exemption does not apply if either the direct seller's representative or anyone else sells the direct seller's products in a permanent retail establishment." 104 Wn. App. at 242. Although the Stroh court did not discuss the exemption's consumer product requirement, it implicitly held that the products must be sold exclusively "in the home or otherwise than in a permanent establishment."

Because Dot does not argue the decision in this case conflicts with Stroh, it in effect admits the decision does not actually conflict with any decision of this Court or the Court of Appeals. Instead of identifying a genuine conflict, Dot seems to contend the court's alleged misapplication of certain statutory construction principles creates a "conflict" within the meaning of RAP 13.4(b)(1) and (2). Pet. at 7-10 (discussing four cases). Dot's assertion is without merit.

First, the Court of Appeals' decision neither ignores the plain meaning of the statutory language nor adds words to RCW 82.04.423(2). Rather, the court construed the direct seller's exemption as a whole:

> RCW 82.04.423(1)(d) states that the exemption applies only to sellers who make sales "exclusively to or through a direct seller's representative." Subsequently, RCW 82.04.423(2) specifically limits the definition of "direct seller's representative" to one who buys or sells consumer products. Therefore, construing the statute as a whole properly imputes the exclusivity requirement to the

> consumer products requirement. Dot Foods has not met its burden of proving that the exemption should be read otherwise.

173 P.3d at 313 (¶ 12). In contrast, Dot's proposed interpretation effectively reads "exclusively" out of the statute.

Second, so-called rules of statutory construction are not statements of law. They are merely "rules in aid of construing legislation and an aid in the process of determining legislative intent." Johnson v. Continental W., Inc., 99 Wn.2d 555, 559, 663 P.2d 482 (1983).[6] "Every statute is an independent communication, for which either the intended or understood meaning may be different. For this reason, a decision on a point of statutory construction has little relevance as a precedent for the construction of any other statute." 2A Norman A. Singer, Statutes and Statutory Construction § 45.15 (6th rev. ed. 2000).[7]

Third, Dot's "plain meaning" and "importing of words" arguments do not demonstrate that the Court of Appeals' decision conflicts with any of the four decisions Dot cites. None of them construes RCW 82.04.423 or language in any other tax statute similar to that in RCW 82.04.423.

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[6] Accord United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 221, 73 S. Ct. 227, 97 L. Ed. 260 (1952) ("Generalities about statutory construction help us little. They are not rules of law but merely axioms of experience. They do not solve the special difficulties in construing a particular statute. The variables render every problem of statutory construction unique.").

[7] See also United States v. Jin Fuey Moy, 241 U.S. 394, 402, 36 S. Ct. 658, 60 L. Ed. 1061 (1916) ("Every question of construction is unique, and an argument that would prevail in one case may be inadequate in another.").

Rather, the statutory construction issues in those cases are completely different than the one presented here. Therefore, none of the four cases presents a "conflict" within the meaning of RAP 13.4(b)(1) and (2).

1. The Court of Appeals' decision is not in conflict with Densley v. Dep't of Retirement Systems.

In Densley v. Dep't of Ret. Systems, 162 Wn.2d 210, 173 P.3d 885 (2007), this Court interpreted RCW 41.40.170(3) to determine whether it provided retirement service credit for military service that is not "active federal service." Although the Court noted that "[s]tatutory construction cannot be used to read additional words into the statute," the Court actually applied the notion that "[w]hen the legislature uses two different words in the same statute, courts . . . will presume that the legislature intended these two phrases to have different meanings." 162 Wn.2d at 219-20 (¶¶ 15-16). The Court concluded that RCW 41.40.170(3) was plain and unambiguous. Id. at 221 (¶ 21).

The statutory construction issue in Densley is totally unrelated to the statutory construction issue in this case. Therefore, the Court of Appeals' decision does not conflict with Densley.

2. The Court of Appeals' decision is not in conflict with Sacred Heart Med. Ctr.

In Sacred Heart Med. Ctr. v. Dep't of Revenue, 88 Wn. App. 632, 635, 946 P.2d 409 (1997), the Court of Appeals interpreted RCW

82.08.0293(3)(b), a statute exempting from retail sales tax "food products which are furnished, prepared or served as meals: . . . (b) Which are provided to senior citizens, disabled persons, or low-income persons by a not-for-profit organization organized under chapter 24.03 or 24.12 RCW." The case turned on the meaning of the word "provided." Id. at 637 ("DOR's overly-narrow interpretation [of 'provided'] conflicts with the statute's plain meaning."). That holding has no relevance here. The statutory construction issues in Sacred Heart and this case are unrelated, and the two decisions are not in conflict.

3. The Court of Appeals' decision is not in conflict with Lone Star or Agrilink.

Dot argues this "Court has held that a taxpayer's sales of other products that do not qualify for an exemption does not disqualify the taxpayer from claiming the exemption with respect to the products that do qualify for the exemption." Pet. at 9-10, citing Lone Star Indus., Inc. v. Dep't of Revenue, 97 Wn.2d 630, 647 P.2d 1013 (1982), and Agrilink Foods, Inc. v. Dep't of Revenue, 153 Wn.2d 392, 103 P.3d 1226 (2005). But again, the statutory construction issues in those two cases are entirely different than the statutory construction issue in this case.

In Lone Star, the Court addressed "whether the purchase of iron grinding balls and firebrick, used in the manufacture of cement, is subject

to a retail sales tax (RCW 82.08) and use tax (RCW 82.12)." 97 Wn.2d at 631. To resolve that issue, the Court needed to construe the definition of "retail sale" in RCW 82.04.050. The Court concluded that "one who purchases tangible personal property for the purpose of consuming it in the production of a new article of tangible personal property of which the original property becomes an ingredient or component is not a 'retail sale' for taxation purposes." Id. at 634.

How Lone Star supports Dot's argument that the Court of Appeals erred in construing RCW 82.04.423 to require direct sellers to exclusively sell consumer products in Washington is a mystery, particularly given that the statutory language considered in Lone Star did not contain the word "exclusively." See 97 Wn.2d at 633. As the statutory construction issue in this case is unrelated to the one in Lone Star, no conflict exists.

Agrilink likewise fails to support Dot's argument that the Court of Appeals erred in construing the direct seller's exemption in a manner that gives meaning to the word "exclusively" in RCW 82.04.423(1)(d). In Agrilink, this Court interpreted RCW 82.04.260(4), a statute providing a B&O tax preference for "every person engaging within this state in the business of slaughtering, breaking and/or processing perishable meat products and/or selling the same at wholesale only and not at retail; . . . ." See 153 Wn.2d at 394. The Court concluded that RCW 82.04.260(4)'s

plain language "does not include a perishable finished product requirement." Id. at 397. The statutory construction issue in Agrilink clearly is unrelated to the statutory construction issue in this case.[8]

In sum, the Court of Appeals' construction of the exclusivity requirement in RCW 82.04.423(1)(d) does not conflict with any decision of this Court or the Court of Appeals. Therefore, no basis exists under RAP 13.4(b)(1) and (2) to review that part of the court's decision.

B. The Court Of Appeals' Interpretation Of The "In The Home Or Otherwise Than In A Permanent Retail Establishment" Requirement Neither Conflicts With Any Decision Of This Court Nor Raises An Issue Of Substantial Public Importance.

The Court of Appeals agreed with the Department (and the Stroh court) that "RCW 82.04.423, when construed as a whole, limits the direct seller's exemption to those whose products are never sold in a permanent retail establishment." See 173 P.3d at 313 (¶ 15) and 316 (¶ 28) (endorsing the Department's interpretation).[9] Dot mischaracterizes the court's ruling as a holding that "Dot Foods failed to qualify for the direct seller's exemption . . . because Dot Foods' consumer products are

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[8] Dot also cites Group Health Coop. of Puget Sound, Inc. v. State Tax Comm'n, 72 Wn.2d 422, 433 P.2d 201 (1967), for the proposition that "a taxpayer has the burden of establishing eligibility for an exemption." Dot, however, does not seem to contend that the Court of Appeals' decision conflicts with Group Health.

[9] The Department argued in Stroh that a "seller qualifies for the exemption only if no one ever sells its products in a permanent retail establishment." 104 Wn. App. at 239. The Department based that argument on its interpretation of RCW 82.04.423(2). See id. at 240. Stroh conceded that this "reading of the statute was reasonable." The Court of Appeals agreed. Id. at 242.

eventually sold by others at retail." Pet. at 11.[10] According to Dot, the court's decision "improperly rewrote RCW 82.04.423" and "conflicts with the plain statutory language, and improperly defers to the Department's recently revised regulation, ..." Id. Dot argues that review is appropriate under RAP 13.4(b)(1) and (4). Pet. at 11-18 (discussing several cases). Dot is wrong.

The Court of Appeals' decision neither conflicts with the plain statutory language nor does it improperly defer to the Department's interpretation. First, the decision is entirely consistent with Stroh in which the court concluded that "fairly and consistently interpreted, the exemption does not apply if either the direct seller's representative or anyone else sells the direct seller's products in a permanent retail establishment." 104 Wn. App. at 242.

Second, the Court did not mechanically defer to the Department's interpretation. Rather, after thoughtfully considering the statutory language and applying useful statutory construction tools, it concluded that the Department's interpretation "is reasonable; it construes the statute as a whole, giving meaning to every word; and it complies with the legislature's intent to apply the B&O tax as broadly as possible." 173

[10] The Court of Appeals did not hold that Dot failed to qualify for the direct seller's exemption merely because its "consumer products are eventually sold by others at retail." Pet. at 11. Dot fails to qualify for the exemption because many of its products are resold in permanent retail establishments.

P.3d at 316 (¶ 28). Reading a statute as a whole and giving meaning to every word is standard statutory construction practice and a far cry from blindly deferring to the Department's administrative interpretation.

1. The Court of Appeals' decision is not in conflict with United Parcel or Everett Concrete.

In United Parcel Serv., Inc. v. Dep't of Revenue, 102 Wn.2d 355, 687 P.2d 186 (1984), this Court construed former RCW 82.12.0254, which at that time provided:

> "The provisions of this chapter shall not apply . . . in respect to the use by the holder of a carrier permit issued by the Interstate Commerce Commission of any motor vehicle or trailer whether owned by or leased with or without driver to the permit holder and used in substantial part in the normal and ordinary course of the user's business for transporting therein persons or property for hire across the boundaries of this state if the first use of which within this state is actual use in conducting interstate or foreign commerce . . . ."

Id. at 357 (quoting RCW 82.12.0254 (1980)). In construing the statutory language in favor of the Department, the Court applied the maxim cited by Dot that "where the Legislature uses certain statutory language in one instance, and different language in another, there is a difference in legislative intent." Id. at 362. But once again, the statutory construction issue addressed in United Parcel is totally unrelated to the statutory construction issue in this case. Therefore, the decision in United Parcel and the Court of Appeals' decision in this case do not conflict.

Dot also argues that "the Court of Appeals erred in holding that the Legislature used 'language identical to the federal statute'" because "[i]n fact, the Legislature employed different language than that used by Congress, indicating its intention to adopt a definition of 'direct seller' different from that under federal law." Pet. at 13 n.2. Dot misstates the court's reasoning.

The court did not state, as Dot implies, that the two statutes are identical. Rather, the court simply noted the obvious: "the legislature used language ('direct seller') identical to that in the federal statute to describe which out-of-state sellers qualified for the exemption[.]" 173 P.3d at 317 (¶ 37). The court then agreed with the Department that the Legislature's use of language from a federal statute (26 U.S.C. § 3508) directed at a specific activity, direct selling, indicates an intent to limit the B&O tax exemption to those "sellers who acted in a manner similar to the federal statute's direct seller." Id. Contrary to Dot's argument, that unremarkable proposition does not conflict with Everett Concrete .[11]

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[11] See Everett Concrete Prods., Inc. v. Dep't of Labor & Indus., 109 Wn.2d 819, 826, 748 P.2d 1112 (1988) ("a court need not adopt the construction placed on a similar statute in another state if the language of the statute in the adopting state is substantially different from the language of the original statute."). Furthermore, the court in Everett Concrete addressed the phrase "upon all public works" in RCW 39.12.020 and the scope of Washington's prevailing wage law. Thus, the statutory construction issue addressed in Everett Concrete is totally unrelated to the statutory construction issue in this case and no conflict exists.

2. The Court of Appeals' decision does not improperly defer to the Department's 2000 revised rule and is not in conflict with the decisions Dot cites.

Dot argues the Court of Appeals' decision improperly defers to the Department's 2000 revised rule in conflict with four cases. Pet. at 13-16 (citing Bird-Johnson Corp. v. Dana Corp., 119 Wn.2d 423, 833 P.2d 375 (1992); Agrilink Foods, Inc. v. Dep't of Revenue, 153 Wn.2d 392, 103 P.3d 1226 (2005); Edelman v. State ex rel. Public Disclosure Comm'n, 152 Wn.2d 584, 99 P.2d 386 (2004); and Budget Rent A Car Corp. v. Dep't of Licensing, 144 Wn.2d 889, 31 P.3d 1174 (2001)). These cases note several circumstances in which a court should not defer to an agency rule (e.g., the interpretation conflicts with the relevant statute). But none of the circumstances is present in this case and no conflict exists.

First, contrary to Dot's argument, the Court of Appeals did not blindly defer to the Department's interpretation. Rather, after concluding that RCW 82.04.423 is ambiguous, it did what courts do. The court used various statutory construction tools in an effort to glean the Legislature's intent. See 173 P.3d at 314 (¶ 18) and 315 (¶ 25). Applying these well-established principles, the court concluded the Department's interpretation was the correct one:

> We construe ambiguous tax exemptions strictly, though fairly, and in keeping with the statutory language. Stroh, 104 Wn. App. at 240 . . . (quoting Safeway, Inc., 96

> Wn. App. at 160, . . .). The Department's interpretation of the exemption complies with this standard: it is reasonable; it construes the statute as a whole, giving meaning to every word; and it complies with the legislature's intent to apply the B & O tax as broadly as possible. We affirm the trial court's ruling and endorse the Department's interpretation of the direct seller's exemption.

173 P.3d at 316 (¶28).[12]

Second, revised Rule 246 is consistent with RCW 82.04.423, including the provision stating that "[t]he direct seller may take the exemption only if the retail sale of the consumer product takes place either in the home or otherwise than in a permanent retail establishment. . . ." WAC 458-20-246(4)(b)(i)(B). That interpretation logically flows from the structure and language of the exemption, the Legislature's deliberate use of the term "direct seller," and the repeated "in the home or otherwise than in a permanent retail establishment" requirement in RCW 82.04.423(2).

In sum, this is not a case in which the administrative interpretation conflicts with the statute it implements. Therefore, the Court of Appeals' decision here does not conflict with Bird-Johnson, Agrilink, Edelman, or Budget Rent A Car.[13]

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[12] The court also explained why it found unpersuasive Dot's interpretation of RCW 82.04.423(2). 173 P.3d at 315 (¶¶ 24-25).

[13] Dot also argues the court improperly added "by [sic] any other person" into what it calls clause two of RCW 82.04.423(2), in conflict with Densley. Pet. at 16. The court did no such thing. Rather, because "clause two" applies only to retail sales by a direct seller to a consumer, the "or any other person" language is unnecessary to ensure that the exemption is limited to sales of consumer products occurring "in the home or

3. The Court of Appeals' decision does not misread or conflict with Ass'n of Wash. Bus., nor does it raise an issue of substantial public interest that this Court should decide.

Dot argues that the Court of Appeals' decision misreads and is in conflict with Ass'n of Wash. Bus. v. Dep't of Revenue, 155 Wn.2d 430, 120 P.3d 46 (2005). According to Dot, that the court afforded "some deference" to the Department's rule conflicts with the following statement from Ass'n of Wash. Bus.: "'Reviewing courts are not required to give any deference whatsoever to the agencies' views on . . . the correctness and desirability of the agencies' interpretations.'" Pet. at 17 (quoting 155 Wn.2d at 446-47). Dot contends that the court's "limited view" of Ass'n of Wash. Bus. is "particular [sic] erroneous" and presents an issue of "substantial public concern" because the Department "revised its longstanding interpretation of statutory language, without a legislative change, and without articulating any changed circumstances or other facts justifying a 180 degree change of heart." Pet. at 17-18 (citing Dimension Fin. Corp. v. Bd. of Governors of Federal Reserve System, 744 F.2d 1402 (10th Cir. 1984); Kiblen v. Pickle, 33 Wn. App. 387, 653 P.2d 1338 (1982)).

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otherwise than in a permanent retail establishment." See 173 P.3d at 313-14 (¶ 16) (citing Resp't Br. at 19), and 316 (¶ 28) (endorsing the Department's interpretation).

Dot seems to read Ass'n of Wash. Bus. as precluding a court from affording any deference to an agency's interpretation of an ambiguous statute, even one that is reasonable.[14] This makes no sense and, indeed, cannot be squared with Ass'n of Wash. Bus., in which this Court stated: "When a statute is ambiguous (i.e., subject to more than one reasonable interpretation), the agency's adoption of one of the possible reasonable choices in entitled to some deference." 155 Wn.2d at 447 n.17.

Here, no rational basis exists to conclude the Court of Appeals considered itself to be bound by the Department's rule. Rather, the court applied various statutory construction tools to determine legislative intent.

Moreover, implicit within Dot's argument is the mistaken notion that an agency is powerless to change an erroneous administrative interpretation of a statute absent legislation. That is not the law. See, e.g., Dep't of Ecology v. Theodoratus, 135 Wn.2d 582, 957 P.2d 1241 (1998) (where Department of Ecology originally acted ultra vires in measuring a water right, it did not act arbitrarily and capriciously in abandoning unlawful practice and switching to new practice).[15]

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[14] See Pet. at 16-17 (arguing the Court of Appeals misread Ass'n of Wash. Bus. "to hold that 'regardless of whether the rule is interpretative or legislative . . . we may still afford some deference to the Department's reasonable interpretation of the ambiguous statutory language in RCW 82.04.423.'").

[15] See also Seven Star, Inc. v. United States, 873 F.2d 225, 227 (9th Cir. 1989) ("Our courts have never held that any agency cannot change its collective mind on a legal issue."); Mesa Verde Const. Co. v. Northern Cal. Dist. Council of Laborers, 861 F.2d

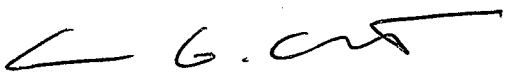
Dot is incorrect in arguing that the Court of Appeals' decision conflicts with Ass'n of Wash. Bus. Dot also is mistaken in arguing the decision presents an issue of substantial public concern.[16]

V. CONCLUSION

The Court of Appeals' unanimous decision affirming the superior court's summary judgment in favor of the Department is carefully reasoned, entirely consistent with Stroh, and correctly interprets and applies RCW 82.04.423. None of the criteria for accepting review in RAP 13.4(b) are satisfied. Therefore, this Court should deny Dot's petition for discretionary review.

RESPECTFULLY SUBMITTED this 8th day of February, 2008.

ROBERT M. MCKENNA
Attorney General



CAMERON G. COMFORT
Sr. Assistant Attorney General
WSBA #15188
Attorneys for Respondent

1124, 1134 (9th Cir.1988) (en banc) (NRLB "is free to change its interpretation of the law if its interpretation is reasonable and not precluded by Supreme Court precedent.").

[16] Dot also states the Court of Appeals ignored certain legislative history allegedly supporting Dot's interpretation of the direct seller's exemption. Pet. at 18-19. However, unlike the court, Dot fails to mention other legislative history adverse to its position reflecting that the Legislature intended to provide a limited B&O tax exemption to a discrete group of out-of-state sellers. See 173 P.3d at 318 (¶ 318); Reply to Amicus Br. at 6-10.

RCW 82.04.423
Exemptions — Sales by certain out-of-state persons to or through direct seller's representatives.

(1) This chapter shall not apply to any person in respect to gross income derived from the business of making sales at wholesale or retail if such person:

(a) Does not own or lease real property within this state; and

(b) Does not regularly maintain a stock of tangible personal property in this state for sale in the ordinary course of business; and

(c) Is not a corporation incorporated under the laws of this state; and

(d) Makes sales in this state exclusively to or through a direct seller's representative.

(2) For purposes of this section, the term "direct seller's representative" means a person who buys consumer products on a buy-sell basis or a deposit-commission basis for resale, by the buyer or any other person, in the home or otherwise than in a permanent retail establishment, or who sells, or solicits the sale of, consumer products in the home or otherwise than in a permanent retail establishment; and

(a) Substantially all of the remuneration paid to such person, whether or not paid in cash, for the performance of services described in this subsection is directly related to sales or other output, including the performance of services, rather than the number of hours worked; and

(b) The services performed by the person are performed pursuant to a written contract between such person and the person for whom the services are performed and such contract provides that the person will not be treated as an employee with respect to such purposes for federal tax purposes.

(3) Nothing in this section shall be construed to imply that a person exempt from tax under this section was engaged in a business activity taxable under this chapter prior to the enactment of this section.

[1983 1st ex.s. c 66 § 5.]

Notes:
Reviser's note: The effective date of 1983 1st ex.s. c 66 is August 23, 1983.

APPENDIX A

458-20-245 << 458-20-246 >> 458-20-247

WAC 458-20-246 No Washington State Register filings since 2003

Sales to or through a direct seller's representative.

(1) **Introduction.** RCW 82.04.423 provides an exemption from the business and occupation (B&O) tax on wholesale and retail sales by a person who does not own or lease real property in the state, is not incorporated in the state, does not maintain inventory in this state, and makes sales in this state exclusively to or through a "direct seller's representative." This rule explains the statutory elements that must be satisfied in order to be eligible to take this exemption.

(2) **Background.** The statutory language describing the direct seller's representative is substantially the same language as contained in the federal Tax Equity and Fiscal Responsibility Act (TEFRA) of 1982, PL 97-248. See 26 USC 3508. The federal law designates types of statutory nonemployees for social security tax purposes. The purpose of the direct seller provision in the federal tax law is to provide that a direct seller's representative is not an employee of the direct seller, thereby relieving the direct seller of a tax duty. Under the federal law, the direct seller is a business that sells its products using a representative who either purchases from the direct seller and resells the product or sells for or solicits sales on behalf of the direct seller. Retail sales are limited to those occurring in the home or in a temporary retail establishment, such as a vendor booth at a fair.

The 1983 Washington state legislature used the same criteria to delineate, for state tax purposes, the necessary relationship between a direct seller and a direct seller's representative.

(3) **The direct seller's exemption.** The exemption provided by RCW 82.04.423 is limited to the B&O tax on wholesaling or retailing imposed in chapter 82.04 RCW (Business and occupation tax). A direct seller is subject to other Washington state tax obligations, including, but not limited to, the sales tax under chapter 82.08 RCW, the use tax under chapter 82.12 RCW, and the litter tax imposed by chapter 82.19 RCW.

(4) **Who may take the exemption.** The B&O tax exemption may be taken by a person (the direct seller) selling a consumer product using the services of a representative who sells or solicits the sale of the product as outlined in statute. There are ten elements in the statute that must be present in order for a person to qualify for the exemption for Washington sales. The person must satisfy each element to be eligible for the exemption. The taxpayer must retain sufficient records and documentation to substantiate that each of the ten required elements has been satisfied. RCW 82.32.070.

(a) The four statutory elements describing the direct seller. RCW 82.04.423 provides that a direct seller:

(i) Cannot own or lease real property within this state. For example, if the direct seller's representative is selling vitamins door to door for the direct seller, but the direct seller owns or leases a coffee roasting factory in the state, the direct seller is not eligible for this exemption; and

(ii) Cannot regularly maintain a stock of tangible personal property in this state for sale in the ordinary course of business. This provision does not, however, prohibit the direct seller from holding title to the consumer product in the state. For instance, the direct seller owns the consumer products sold by the direct seller's representative when the representative is making retail sales for the direct seller. However, the personal property must not be a stock of goods in the state that is for sale in the ordinary course of business. The phrase "sale in the ordinary course of business" means sales that are arm's length and that are routine and reasonably expected to occur from time to time; and

(iii) Is not a corporation incorporated under the laws of this state; and

(iv) Makes sales in this state exclusively to or through a direct seller's representative. This provision of the statute describes how sales by the direct seller may be made. To be eligible for the exemption, all sales by the direct seller in this state must be made to or through a direct seller's representative. The direct seller may not claim any B&O tax exemption under RCW 82.04.423 if it has made sales in this state using means other than a direct seller's representative. This requirement does not, however, limit the methods the direct seller's representative may use to sell these products. For example, the representative can use the mail or the internet, if all other conditions of the exemption are met. The direct seller's use of mail order or internet, separate from the representative's use, may or may not be found to be "sales in this state" depending on the facts of the situation. If the direct seller's use of methods other than to or through a direct seller's representative constitutes "sales in this state," the exemption is lost. Additionally, a direct seller does not become ineligible for the exemption due to action by the direct seller's representative that is in violation of the statute, such as selling a product to a permanent retail establishment, if the department finds by a review of the facts that the ineligible sales are irregular, prohibited by the direct seller, and rare.

If a seller uses a direct seller's representative to sell "consumer products" in Washington, and also has a branch office, local outlet, or other local place of business, or is represented by any other type of selling employee, selling agent, or selling representative, no portion of the sales are exempt from B&O tax under RCW 82.04.423. For example, a person who uses representatives to sell consumer products door to door and who also sells consumer products through retail outlets is not eligible for the exemption. The phrase "sales exclusively to ... a direct seller's representative" describes wholesale sales made by the direct seller to a representative. The phrase "sales exclusively ... through a direct seller's representative" describes retail sales made by the direct seller to the consumer. The B&O tax exemption provided by RCW 82.04.423 is limited to these types of wholesale and retail sales.

APPENDIX B

(b) The six statutory elements describing the direct seller's representative. RCW 82.04.423 provides the following elements that relate to the direct seller's representative:

(i) How the sale is made. A direct seller's representative is "a person who buys consumer products on a buy-sell basis or a deposit-commission basis for resale, by the buyer or any other person, in the home or otherwise than in a permanent retail establishment, or who sells, or solicits the sale of, consumer products in the home or otherwise than in a permanent retail establishment." The direct seller sells the product using the services of a representative in one of two ways, which are described by two clauses in the statute. The first clause ("a person who buys ... for resale" from the direct seller) describes a wholesale sale by the direct seller. The second clause (a person who "sells or solicits the sale" for the direct seller) describes a retail sale by the direct seller.

(A) A transaction is on a "buy-sell basis" if the direct seller's representative performing the selling or soliciting services is entitled to retain part or all of the difference between the price at which the direct seller's representative purchases the product and the price at which the direct seller's representative sells the product. The part retained is remuneration from the direct seller for the selling or soliciting services performed by the representative. A transaction is on a "deposit-commission basis" if the direct seller's representative performing the selling or soliciting services is entitled to retain part or all of a purchase deposit paid in connection with the transaction. The part retained is remuneration from the direct seller for the selling or soliciting services performed by the representative.

(B) The location where the retail sale of the consumer product may take place is specifically delineated by the terms of the statute. The direct seller may take the exemption only if the retail sale of the consumer product takes place either in the home or otherwise than in a permanent retail establishment. The resale of the products sold by the direct seller at wholesale is restricted by the statute through the following language: "For resale, by the buyer or any other person, in the home or otherwise than in a permanent retail establishment." This restrictive phrase requires the product be sold at retail either in the home or in a nonpermanent retail establishment. Regardless of to whom the representative sells, the retail sale of the product must take place either in the buyer's home or in a location that is not a permanent retail establishment. Examples of permanent retail establishments are grocery stores, hardware stores, newsstands, restaurants, department stores, and drug stores. Also considered as permanent retail establishments are amusement parks and sports arenas, as well as vendor areas and vendor carts in these facilities if the vendors are operating under an agreement to do business on a regular basis. Persons selling at temporary venues, such as a county fair or a trade show, are not considered to be selling at a permanent retail establishment.

(ii) What product the direct seller must be selling. The direct seller must be selling a consumer product, the sale of which meets the definition of "sale at retail," used for personal, family, household, or other nonbusiness purposes. "Consumer product" includes, but is not limited to, cosmetics, cleaners and soaps, nutritional supplements and vitamins, food products, clothing, and household goods, purchased for use or consumption. The term does not include commercial equipment, industrial use products, and the like, including component parts. However, if a consumer product also has a business use, it remains a "consumer product," notwithstanding that the same type of product might be distributed by other unrelated persons to be used for commercial, industrial, or manufacturing purposes. For example, desktop computers are used extensively in the home as well as in businesses, yet they are a consumer product when sold for nonbusiness purposes.

(iii) How the person is paid. The statute requires that "substantially all of the remuneration paid to such person, whether or not paid in cash, for the performance of services described in this subsection is directly related to sales or other output, including the performance of services, rather than the number of hours worked." The remuneration must be for the performance of sales and solicitation services and it must be based on measurable output. Remuneration based on hours does not qualify. A fixed salary or fixed compensation, without regard to the amount of services rendered, does not qualify.

Remuneration need not be in cash, and it may be the consumer product itself or other property, such as a car.

(iv) How the contract is memorialized. The services by the person must be performed pursuant to a written contract between the representative and the direct seller. The requirement that the contract be in writing is a specific statutory condition of RCW 82.04.423.

(v) What the contract must contain. The sale and solicitation services must be the subject of the contract. The contract must provide that the representative will not be treated as an employee of the direct seller for federal tax purposes.

(vi) The status of the representative. A person satisfying the requirements of the statute should also be a statutory nonemployee under federal law, since the requirements of RCW 82.04.423 and 26 U.S.C. 3508 are the same. The direct seller must maintain proof the representative is a statutory nonemployee.

(5) **Tax liability of the direct seller's representative.** The statute provides no tax exemption with regard to the "direct seller's representative." The direct seller's representative is subject to the service and other activities B&O tax on commission compensation earned for services described in RCW 82.04.423. Likewise, a direct seller's representative who buys consumer products for resale and does in fact resell the products is subject to either the wholesaling or retailing B&O tax upon the gross proceeds of these sales. Retail sales tax must be collected and remitted to the department on retail sales unless specifically exempt by law. For example, certain food products are statutorily exempt from retail sales tax (see WAC 458-20-244).

(a) Subject to the agreement of the representatives, the direct seller may elect to remit the B&O taxes of the representatives and collect and remit retail sales tax as agents of the representatives through an agreement with the department. The direct seller's representative

should obtain a tax registration endorsement with the department unless otherwise exempt under RCW 82.32.045. (See also WAC 458-20-101 on tax registration.)

(b) Every person who engages in this state in the business of acting as a direct seller's representative for unregistered principals, and who receives compensation by reason of sales of consumer products of such principals for use in this state, is required to collect the use tax from purchasers, and remit the same to the department of revenue, in the manner and to the extent set forth in WAC 458-20-221. (Collection of use tax by retailers and selling agents.)

(6) **The retail sales and/or use tax reporting responsibilities of the direct seller.** A direct seller is required to collect and remit the tax imposed by chapter 82.08 RCW (Retail sales tax) or 82.12 RCW (Use tax) if the seller regularly solicits or makes retail sales of "consumer products" in this state through a "direct seller's representative" even though the sales are exempt from B&O tax pursuant to RCW 82.04.423.

[Statutory Authority: RCW 82.32.300. 99-24-007, § 458-20-246, filed 11/19/99, effective 12/31/99; 84-24-028 (Order 84-3), § 458-20-246, filed 11/30/84.]

WAC 458-20-246 Sales to or through a direct seller's representative. Under RCW 82.04.423, the business and occupation tax does not apply to any out-of-state person in respect to the gross income derived from the business of making sales in this state of "consumer products" at wholesale or retail to or through a "direct seller's representative," subject to certain requirements explained more fully below. The effective date of this exemption is August 23, 1983. For an outline of the tax liability of persons making sales of goods which originate in other states to customers in Washington, other than sales to or through a "direct seller's representative," see WAC 458-20-193B.

DEFINITIONS

For purposes of the exemption explained herein, the following definitions shall apply:

The term "consumer product" means any article of tangible personal property, or component part thereof, of the type sold for personal use or enjoyment. The term includes only those kinds of items of tangible personal property which are customarily sold at stores, shops, and retail outlets open to the public in general. It includes such things as home furnishings, clothing, personal effects, household goods, food products, and similar items purchased for personal use or consumption. The term does not include commercial equipment, manufacturing items, industrial use products, and the like, including component parts thereof. However, if a product is primarily used for personal use or enjoyment, it remains a "consumer product" within this definition notwithstanding that a portion of the product's distribution is for commercial, industrial, or manufacturing purposes.

A "direct seller's representative" is a person who (a) buys "consumer products" on a buy-sell basis or a deposit-commission basis for resale, by the buyer or any other person, in the home or other than in a permanent retail establishment or (b) sells or solicits the sale of "consumer products" in the home or other than in a permanent retail establishment. In order to be considered a "direct seller's representative" a person must also show that:

1. Substantially all of the remuneration paid, whether or not paid in cash, for the performance of services is directly related to sales or other output, including the performance of services, rather than the number of hours worked; and

2. The services performed are performed pursuant to a written contract between such person and the person for whom the services are performed and such contract provides that the person will not be treated as an employee with respect to such services for federal tax purposes.

BUSINESS AND OCCUPATION TAX

WHOLESALING AND RETAILING. The business and occupation tax does not apply to an out-of-state seller making wholesale or retail sales to or through a "direct seller's representative." The out-of-state seller must show that it is represented in this state by a "direct seller's representative," as defined above. In addition, the out-of-state seller must also show that it:

1. Does not own or lease real property within this state;

2. Does not regularly maintain a stock of tangible personal property in this state for sale in the ordinary course of business;

3. Is not a corporation incorporated under the laws of this state; and

4. Makes sales in this state exclusively to or through a "direct seller's representative."

Thus, a representative who solicits sales of "consumer products" in this state, other than in a permanent retail establishment, and also meets the other requirements of the law as set forth above, qualifies as a "direct seller's representative." If the out-of-state seller and the instate representative can factually establish compliance with all of the above listed requirements, the out-of-state seller is exempt from business and occupation tax.

The exemption is available only where an out-of-state seller is present in this state and represented exclusively by a "direct seller's representative." If an out-of-state seller makes wholesale or retail sales of "consumer products" in Washington to or through a "direct seller's representative" and also has a branch office, local outlet, or other local place of business, or is represented by any other employee, agent, or other representative, no portion of the sales are exempt from business and occupation tax.

The business and occupation tax likewise applies to the gross income of a "direct seller's representative" who buys "consumer products" for resale and does in fact resell the products. The measure of the business and occupation tax is the gross proceeds of sales.

SERVICE. The law provides no similar business and occupation tax exemption with regard to the compensation paid to the "direct seller's representative." Thus, the representative will remain subject to the business and occupation tax on all commissions or other compensation earned.

SALES AND USE TAX

An out-of-state vendor is required to pay or collect and remit the tax imposed by chapter 82.08 or 82.12 RCW if the vendor regularly solicits or makes retail sales of "consumer products" in this state through a "direct seller's representative," as defined above, even though such sales are exempt from business and occupation tax pursuant to RCW 82.04.423.

Every person who engages in this state in the business of acting as a "direct seller's representative" for unregistered principals, and who receives compensation by reason of sales of "consumer products" of such principals for use in this state, is required to collect the use tax from purchasers, and remit the same to the department of revenue, in the manner and to the extent set forth in WAC 458-20-221. [Statutory Authority: RCW 82.32-.300. 84-24-028 (Order 84-3), § 458-20-246, filed 11/30/84.]

APPENDIX C