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(Court of Appeals No. 73663-9-I)

SUPREME COURT OF THE STATE OF WASHINGTON

MORPHO DETECTION, INC.,

Petitioner,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Respondent.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

The Court of Appeals interpreted the statute imposing use tax on federal contractors consistently with its plain meaning and the Legislature's intent. Any person engaged in the business of improving buildings "under, upon, or above real property *of or for* the United States," including installing tangible personal property therein or thereto, is defined as a "consumer." RCW 82.04.190(6) (emphasis added). A use tax is imposed on any person who uses within this state as a "consumer" any article of tangible personal property. RCW 82.12.020. The Court correctly held that Morpho Detection, Inc., a federal contractor, is subject to the tax.

The United States contracted with and paid Morpho to install 46 explosive detection systems at two Washington airports. Those airports are owned by municipalities, not the federal government. RCW 82.04.190(6) imposes tax on all persons improving buildings "for the United States," not just when the United States owns or has a property interest in the real property where the work occurs. The Legislature in RCW 82.04.190(6) used the word "or" in its disjunctive, rather than conjunctive, sense. In other words, work can be performed (1) on real property of the United States, or (2) for the United States. Because

Morpho improved airports *for* the United States, it is a “consumer,” and the Department properly assessed use tax.

Morpho seeks this Court’s review, but does not discuss whether any of this Court’s RAP 13.4 criteria for granting discretionary review apply. Instead, Morpho imagines conceptual flaws in the Court of Appeals decision based on ungrounded supposition. Morpho also raises new arguments it did not make to the Court of Appeals. Morpho argued to the Court of Appeals that RCW 82.04.190(6) was plain and unambiguous. It now suggests the statute is ambiguous and should be construed in its favor. Morpho also seeks to create a constitutional reason for this Court to grant review, but the Court of Appeals decided only the statutory issues raised in Morpho’s summary judgment motion. The Court of Appeals decision is correct and well-reasoned, and because none of the criteria in RAP 13.4 are satisfied, this Court should deny discretionary review.

II. COUNTERSTATEMENT OF THE ISSUE

For purposes of imposing use tax, a “consumer” includes any person engaged in the business of improving buildings “under, upon, or above real property of or for the United States,” including installing tangible personal property therein or thereto. RCW 82.04.190(6). The United States contracted with and paid Morpho to install explosive detection systems at two municipally-owned Washington airports. Did the

Court of Appeals correctly hold that Morpho was a “consumer” under RCW 82.04.190(6)?

III. COUNTERSTATEMENT OF THE FACTS

A. Morpho’s Contracts And Washington Work

Morpho entered into two national contracts with the Transportation Security Administration (TSA) to manufacture and install explosive detection systems at airports across the country. CP 176-367. TSA determined that the 46 systems at issue in this case would be installed at Washington airports, specifically the Seattle-Tacoma and Spokane International Airports. *See* CP 36-54.

Morpho received over \$48 million to manufacture and install those 46 systems. CP 36. The systems are used to screen checked baggage for explosives. The contracts required Morpho to perform “site installation support” for systems at airports across the country. CP 206, 299-300. Morpho technicians completed “installation checklists” that detailed the various steps to installing a system. CP 473-505 (checklists for Washington systems).

Morpho was involved throughout the deployment and installation of systems at Washington airports. In sum, Morpho’s Washington activities included the following:

- Morpho contracted with TSA to perform “rigging,” or movement of the systems from trucks outside the airport to their destination within the airport, and supervised subcontractors that performed this work. CP 88, 510-11, 516, 518, 522, 525-26.
- Morpho assembled the internal components of the systems, which could take up to a year from start to finish based on delays in obtaining parts. CP 34, 44-46, 206, 511.
- Morpho assisted another contractor in conducting site acceptance tests that assured systems performed adequately. CP 530-31, 543.
- Morpho worked with another contractor to “integrate” some of the systems into baggage handling systems. *See* CP 548-57.
- Morpho assisted another contractor in conducting integrated site acceptance tests to assure this integration worked. CP 529-30.
- Morpho designed and implemented a multiplex network that allowed TSA employees to monitor images from remote viewing stations. *See* CP 514-15, 527-28, 553.

B. Procedural Facts

The Department of Revenue audited Morpho’s activities at the Sea-Tac and Spokane airports. CP 39-54, 562. At issue in this case is the assessment of \$4,191,799 in use tax plus associated penalties and interest. CP 562. The Department’s internal Appeals Division affirmed the

assessment. CP 559-70. Morpho paid the assessment and sued for a refund in Thurston County Superior Court under RCW 82.32.180. CP 10-15 (amended complaint). Morpho's amended complaint asserted several reasons why it was not a "consumer" within the definition contained in RCW 82.04.190(6). CP 13. The amended complaint also asserted Due Process, Commerce Clause, and Supremacy Clause challenges to its tax liability. CP 13-15. Morpho sought summary judgment, raising statutory issues only. CP 16-27. The trial court granted summary judgment to Morpho, ruling that RCW 82.04.190(6) did not apply because the United States does not own the Sea-Tac or Spokane airports. CP 653, RP 30-31.

Division One of the Court of Appeals reversed and held that the Department should be granted partial summary judgment. Opinion at 1.¹ At issue was the definition of "consumer" in RCW 82.04.190(6). That definition makes those engaged in improving buildings upon real property of or for the United States "consumers" who owe the use tax:

Consumer means:

...

(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, . . . , including the installing or attaching of any article of tangible personal property therein or

¹ The Opinion was originally unpublished. The Court of Appeals has since granted the Department's motion to publish.

thereto, whether or not such personal property becomes a part of the realty by virtue of installation

RCW 82.04.190(6) (emphasis added).

The Court of Appeals distilled and rejected Morpho's various arguments about the meaning of the statute. The Court of Appeals reasoned that the word "for" is a "function word" used "to indicate the person or thing that something is to be delivered to." Opinion at 10. The Court explained that Morpho provided no authority for its argument that the antecedent to the word "for" was "real property." Opinion at 9. The Court also explained that Morpho's reading of the statute was absurd because a related statute using nearly identical wording would then be read to impose a likely unconstitutional tax directly on the federal government.² Opinion at 12-13. The Court of Appeals summarized the parties' arguments, explaining that Morpho's argument was "unsupported by authority or other persuasive argument" and that the Department had the "only reasonable reading" of the statute. Opinion at 13. The Court of

² The statutory scheme for taxation of federal government contracting involves interplay between sales and use tax statutes. First, construction work performed for the United States is excluded from the definition of a "retail sale" for sales tax purposes. RCW 82.04.050(12). The same work is then brought back into the statutory scheme through the definition of "consumer" in RCW 82.04.190(6). *See also* RCW 82.12.020(1)(a) (imposing a use tax on "consumer" of personal property). This results in a lower amount of tax in the federal contracting situation compared to the non-federal contracting situation because the sales tax for construction generally is imposed on the charge for both labor and materials, while sales or use tax imposed on the government contractor is imposed only on the materials.

Appeals reversed and remanded for an order granting partial summary judgment to the Department. Opinion at 14.

IV. REASONS WHY THIS COURT SHOULD DENY REVIEW

Morpho raises two categories of arguments why this Court should accept review, and they are both without merit. First, Morpho asserts that the Court of Appeals incorrectly applied various rules of statutory interpretation. But the Court of Appeals correctly held that the Department offered the only reasonable interpretation of RCW 82.04.190(6). Second, Morpho makes a passing argument that the Court of Appeals's interpretation of the statute was unconstitutional. This argument was not raised below or addressed in the Court of Appeals decision. The summary judgment proceedings below and the Court of Appeals's review addressed only the proper reading of the statute. Morpho chose to bring a summary judgment motion addressing only the statutory issues. CP 16-27. Morpho's constitutional challenges should be raised on remand to the trial court, not for the first time before this Court.

A. The Court Of Appeals Decision Is Consistent With This Court's Prior Decisions.

Under RAP 13.4(b)(1), this Court may accept review if the decision of the Court of Appeals conflicts with a decision of the Supreme Court. RAP 13.4(b)(1) does not apply, because this Court has never

decided whether RCW 82.04.190(6) applies to work performed on non-federal property. Therefore, the decision of the Court of Appeals could not conflict with a decision of the Supreme Court on this central issue.

Morpho instead argues that the Court of Appeals decision conflicts with this Court's prior decisions about statutory interpretation. But the Court of Appeals followed this Court's guidelines for statutory interpretation. The Court of Appeals cited several of this Court's cases in rejecting application of the last antecedent rule in this circumstance. Opinion at 8 n.1. The Court of Appeals also followed this Court's dictates that statutory language should be interpreted based on the statute's context, related provisions, and the statutory scheme as a whole. Opinion at 5, 9-10; *Lake v. Woodcreek Homeowners Ass'n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010). Furthermore, the Court of Appeals applied the principle that statutes should be interpreted to avoid absurd results. Opinion at 10; *see also Estate of Bunch v. McGraw Residential Ctr.*, 174 Wn.2d 425, 433, 275 P.3d 1119 (2012).

Morpho finds flaws in the Court of Appeals's logic, but only by misreading the decision. For instance, the Court of Appeals did not rule that authority is required to interpret an unambiguous statute. Pet. at 13. The Court of Appeals merely remarked that Morpho did not offer

authority for its argument that the Department's interpretation of the statute violated the normal rules of grammar. Opinion at 8.

Similarly, Morpho charges that the Court of Appeals mistakenly thought it was applying a tax exemption statute.³ Pet. at 13, 17 n.20. Morpho's only evidence is a statement in the decision of the general principle that exemptions are construed narrowly, which was embedded at the end of a discussion about the background rules of statutory interpretation. Opinion at 5-6. The Court of Appeals never in its analysis stated that it was narrowly construing the statute.

Morpho also posits that the Court of Appeals decision "could be read" as presuming the agency's interpretation was correct. Pet. at 15 n.16. Absolutely nothing in the Court of Appeals opinion suggests that it deferred to the agency's interpretation of the statute.

Lastly, Morpho appears to argue, for the first time in this Court, that the statute is ambiguous and must be construed in the taxpayer's favor. Pet. at 16-17. At the trial court and the Court of Appeals, Morpho

³ There are two basic canons of construction for tax statutes. One is that if a statute that imposes tax is ambiguous, it should be construed in the taxpayer's favor. *See Tesoro Ref. & Mktg. Co. v. Dep't of Revenue*, 164 Wn.2d 310, 317, 190 P.3d 28 (2008) (describing but not applying canon). But this canon only applies if the Legislative intent of a tax statute cannot reasonably be discerned. *See Estate of Hitchman*, 100 Wn.2d 464, 670 P.2d 655 (1983) (explaining that this canon "has been generally overemphasized and exaggerated"). On the flip side, a tax exemption statute is strictly construed in favor of the Department. *See Simpson Inv. Co. v. Dep't of Revenue*, 141 Wn.2d 139, 149-50, 3 P.3d 741 (2000). The Department has not argued that RCW 82.04.190(6) is a tax exemption statute, nor did the Court of Appeals state that it was.

only argued that the statute was unambiguous. CP 16-27; Resp.'s Ct. of App. Br. The Court of Appeals did not directly address the ambiguity argument because Morpho did not make it.

Regardless, the mere fact that Morpho disagrees with the Court of Appeals's analysis does not make the statute ambiguous. *See Bowie v. Dep't of Revenue*, 171 Wn.2d 1, 11 n.7, 248 P.3d 504 (2011) (explaining that while a tax statute is ambiguous if susceptible to two reasonable interpretations, it is not ambiguous merely because different interpretations are conceivable). The Court of Appeals held that the Department's interpretation was the "only reasonable reading," and that the statute was unambiguous. Opinion at 13, 14 n.6. Morpho's disagreement with the conclusion of the Court of Appeals does not create an issue worthy of review.

Morpho simply offers no colorable argument that the Court of Appeals misconstrued the general rules of statutory interpretation or the rules surrounding the interpretation of tax statutes specifically. The Court of Appeals decision was logical, methodical, and thorough. It correctly held that Morpho was a "consumer" under RCW 82.04.190(6). It did not address the constitutional challenges in Morpho's amended complaint, which have not yet been addressed at the trial court, and which can be addressed there on remand.

B. The Decision Of The Court Of Appeals Does Not Conflict With Any Other Court Of Appeals Decision.

RAP 13.4(b)(2) addresses whether the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals. The decision below is the first Court of Appeals decision to address whether work performed for the United States on land the United States does not own is within the “consumer” definition in RCW 82.04.190(6). The decision therefore does not conflict with any other Court of Appeals decision, and Morpho does not argue to the contrary.

C. The Court Of Appeals Did Not Address Constitutional Issues.

RAP 13.4(b)(3) is not met because no constitutional issues were involved in the Court of Appeals decision. Morpho’s amended complaint raised both statutory and constitutional issues. CP 13-15. Morpho moved for summary judgment on only statutory issues. CP 16-27. The Court of Appeals therefore only addressed statutory issues surrounding whether Morpho meets the definition of a “consumer” under RCW 82.04.190(6).

Morpho attempts to “constitutionalize” its statutory argument by asserting that the Court of Appeals’s statutory interpretation would result in an unconstitutional statute. Pet. at 18-20. Morpho has not raised this issue in the trial court or the Court of Appeals. Morpho made a tactical decision to separate its statutory and constitutional issues, and to raise only

statutory issues in its summary judgment motion. CP 16-27. The Supreme Court should not grant review of this issue for the first time on appeal. *Snohomish Cnty. v. Anderson*, 124 Wn.2d 834, 839, 881 P.2d 240 (1994) (new constitutional argument that was not briefed or argued in the trial court will not be considered on appeal).

Furthermore the principal constitutional issue surrounding the definition of “consumer” at issue in this case has already been addressed by the nation’s highest court. The United States Supreme Court upheld the statutory scheme at issue against a Supremacy Clause challenge shortly after the statute was enacted. *Washington v. United States*, 460 U.S. 536, 103 S. Ct. 1344, 75 L. Ed. 2d 264 (1983).

A brief background about Washington’s taxation of contractors and construction is necessary to understand the context of RCW 82.04.190(6) and the United States Supreme Court litigation. Since 1941, Washington has imposed the retail sales tax on the purchaser of construction work, based on the full price of the construction project (labor and materials). *Washington*, 460 U.S. at 538. This general sales tax statute for construction projects cannot be imposed when the United States purchases the work, however, because the Supremacy Clause prevents states from directly taxing the United States. *United States v. New Mexico*, 455 U.S. 720, 102 S. Ct. 1373, 71 L. Ed. 2d 580 (1982).

Therefore, on federal projects, the incidence of the tax is switched from the purchaser to the contractor. Washington enacted a use tax on federal contractors in 1975. Laws of 1975, ch. 90. That tax is calculated based on the value of the personal property installed (materials are taxed, labor is not). *Washington*, 460 U.S. at 539.

The United States challenged the statute on Supremacy Clause grounds shortly after it was enacted. *Id.* at 540. The United States argued the tax was invalid because Washington circumvented federal tax immunity and targeted federal contracting. *Id.* at 541. The Court disagreed, reasoning that the “tax on federal contractors is part of the same structure, and imposed at the same rate, as the tax on the transactions of private landowners and contractors.” *Id.* at 545. The Court rejected any claim of discriminatory treatment: “In short, Washington has not singled out contractors who work for the United States for discriminatory treatment.” *Id.* at 546.

For the first time in its petition for review to this Court, Morpho seeks to factually distinguish *Washington v. United States*. Pet. at 19-20. But Morpho’s Supremacy Clause argument does not lend itself to being litigated for the first time in this Court. Facts potentially relevant to the claim are not in the record. Morpho asserts that under the Court of Appeals decision, two separate categories of taxpayers would owe the use

tax, both the Ports of Seattle and Spokane (the airports' owners), and Morpho (the installer of the explosive detection systems). Morpho argues that under the Court of Appeals's reading of RCW 82.04.190(6), there will actually be two "consumers" because the Ports would also be "consumers" under RCW 82.04.190(1). Pet. at 19. Morpho then asserts that this would constitute unconstitutional discrimination in federal contracting. *See* Pet. at 19-20.

Whether the Ports of Seattle and Spokane could have been considered "consumers" under this new theory would be determined by whether they exercised dominion and control over the systems. *See Activate, Inc. v. Dep't of Revenue*, 150 Wn. App. 807, 814, 209 P.3d 524 (2009); RCW 82.12.010(6) (defining "use"). Because this issue has not been litigated, the extent to which the municipalities, as opposed to the TSA, exercised dominion and control over the systems, is not in the record. To the extent the record addresses that issue at all, it appears that the TSA, not the Ports, has primary control over the systems. *See, e.g.*, CP 512 (deposition testimony that TSA employees or their contractors operated the systems). It is undisputed that the TSA purchased the systems. There is also no evidence in the record that the Ports paid use tax on the systems, which is consistent with the conclusion that the TSA

rather than the Ports exercised dominion and control over the systems. In any event, this issue should not be addressed for the first time on appeal.

D. Morpho Articulates No Issue Of Substantial Public Interest.

Morpho does not argue that the fairly technical statutory issue concerning a small portion of the definition of a “consumer” in RCW 82.04.190(6) is one of substantial public interest under RAP 13.4(b)(4). Because Morpho has made no effort to explain or assert why its case meets this criterion, it is not satisfied. *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 492 n.2, 933 P.2d 1036 (1997) (concluding that only those issues properly argued before this Court will be considered for review). In any event, there are several reasons why review of this case does not rise to the level of substantial public interest for this Court to grant review.

1. The Court of Appeals applied straightforward statutory interpretation principles, and an earlier federal case supports its conclusion.

Though the statute at issue is somewhat lengthy, the Court of Appeals decision involved a straightforward application of this Court’s statutory interpretation principles. The Court of Appeals’s interpretation conforms to this Court’s guideline that absent contrary intent, “or” is used disjunctively. *Tesoro Ref. & Mktg. Co. v. Dep’t of Revenue*, 164 Wn.2d 310, 319, 190 P.3d 28 (2008). The Court of Appeals interpreted RCW 82.04.190(6), which applies to those engaged in the business of improving

buildings or other structures “under, upon, or above real property of *or for* the United States” (emphasis added). Rejecting Morpho’s argument that the words “of” and “for” must have the same antecedent of “real property,” the Court of Appeals agreed with the Department that work performed for the United States fit within the statute. Opinion at 10. The Department’s interpretation was the only reasonable reading consistent with the language of the statute and the overall legislative scheme. Opinion at 13. The decision is thorough and well-reasoned, and it forges no new ground in terms of how statutory interpretation is approached.

A federal decision arising out of the same facts supports the reasonableness of the Court of Appeals decision. The United States Court of Appeals also addressed RCW 82.04.190(6) in the context of a contract dispute between Morpho and the TSA. *Morpho Detection, Inc. v. Transp. Sec. Admin.*, 717 F.3d 975 (D.C. Cir. 2013). Morpho sought a contract adjustment from TSA based on Washington’s imposition of the use tax on Morpho. The D.C. Circuit rejected Morpho’s appeal, holding that “Morpho should have known it might reasonably be determined to be a ‘consumer’ whose business activities in Washington were subject to the use and B & O taxes.” *Id.* at 982.

2. The ability of contractors and the United States to address taxes by contract reduces the public importance under RAP 13.4(b)(4).

Federal contractors are able to address the use tax statute in their business relationships with the federal government. By including the cost of the use tax in their bids or contracts with the United States, the tax consequences of federal contracting can be accounted for in a commercial setting. In fact, this is what the United States Supreme Court assumed would occur when it addressed the statute in 1983. *See Washington v. United States*, 460 U.S. at 544. And this ability to plan and contract for sufficient compensation to cover Washington's tax may explain why the specific issue in this case did not result in any known appellate decisions in the first 40 years that RCW 82.04.190(6) was in place.

3. The Court of Appeals decision is quite narrow.

Lastly, the absence of any constitutional issues in this appeal undermines any argument that this Court should accept review under RAP 13.4(b)(4) as well as RAP 13.4(b)(3). The summary judgment motion at issue in the Court of Appeals decision raised fairly narrow and technical statutory construction issues. Morpho's amended complaint, however, alleged Due Process, Commerce Clause, and Supremacy Clause claims. CP 13-15. None of these constitutional claims have been litigated

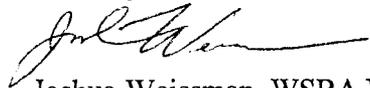
yet, further diminishing the public importance of the portion of the case before the Court at this time.

V. CONCLUSION

Morpho does not mention or explain why any of this Court's criteria for discretionary review are met, and none are. This case involved straightforward statutory interpretation, and the Court of Appeals issued a thorough, logical opinion that is entirely consistent with this Court's guidelines. This Court should deny review.

RESPECTFULLY SUBMITTED this 13th day of May, 2016.

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PROOF OF SERVICE

I certify that I served a copy of this document via email, pursuant to agreement, 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 13th day of May, 2016, at Tumwater, WA.



Candy Zilinskas, Legal Assistant

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Please file the attached Answer to Petition for Review. Per phone conversation, a Supreme Court No. has not been assigned. Thank you.