BEFORE THE BOARD OF TAX APPEALS
STATE OF WASHINGTON

PEGGY E. SKINNER dba SKINNER MONTESSORI SCHOOL,	)	
Appellant,	)	Docket No. 42847
and	)	
THE SKINNER SCHOOL, INC.,	)	
Appellant,	)	Docket No. 42848
v.	)	Re: Excise Tax Appeal
STATE OF WASHINGTON DEPARTMENT OF REVENUE,	)	FINAL DECISION
Respondent.	)	

This matter came before the Board of Tax Appeals (Board) for an informal hearing on November 30, 1993. Thomas M. Jeannet, CPA and Tax Consultant, appeared for Appellants, Peggy E. Skinner dba Skinner Montessori School and The Skinner School, Inc. (collectively referred to as the School). John M. Gray, Administrative Law Judge, Department of Revenue; Barbara Mertens, Director, Student Support Services/Private Education, Office of the Superintendent of Public Instruction; and Edward L. Faker, Assistant Director, Interpretation and Appeals Division, Department of Revenue, appeared for Respondent, Department of Revenue (Department).

ISSUES

KENNEY, Member--The state of Washington excludes from the reach of the business and occupation (B&0) tax tuition fees received by general purpose elementary, secondary, and collegiate institutions. RCW 82.04.170. The issue in this case is whether a private elementary school (kindergarten through the fourth grade), which is not accredited or approved by the Washington State Superintendent of Public Instruction (SPI), is eligible to exclude from the B&O tax amounts received as tuition when its students are accepted at grade level without examination by public schools.

FACTS

Both appeals concern one property that has been operated at the same location under different business forms and names by the same owner or owners during the period covered by this appeal. Prior to June 1, 1989, the enterprise was operated as a corporation under the name The Skinner School. Until December 31, 1991, it was operated as a sole proprietorship, Peggy E. Skinner dba Skinner Montessori School. Since January 1, 1992, it has operated as a corporation under the name Skinner Enterprises, Inc. Skinner Enterprises, Inc., is not a party to these appeals. Because the issues are identical in both dockets, we have consolidated the appeals and will issue one decision.

The School provides primary and elementary education on a preschool through fourth grade basis. In addition, after-hours child care is provided and school supplies are sold to students. During the period covered by this appeal, the School reported and paid B&O tax on its tuition income under the Service and Other Activities classification. It now seeks a refund for payments made since 1986 claiming the exemption on tuition charges provided by RCW 82.04.4282 under the provisions of RCW 82.04.170, WAC 458-20-114, and WAC 458-20-167. Although it is not accredited or approved by the SPI, the School's students are accepted by the Vancouver public schools at grade level, without examination, and with full credit for prior schooling.

The Department auditor, who verified the amount of the refund claims, referred them to the Department's Interpretations and Appeals Division for a ruling on their validity. In Determinations Nos. 91-135 (Peggy E. Skinner dba Skinner Montessori School) and 91-136 (The Skinner School, Inc.), an Administrative Law Judge (ALJ) denied the claims on the grounds that the School "was not created by the state or accredited by the state as an 'educational institution'". (Emphasis added.) The ALJ noted that the School's name "does not appear on the list of accredited schools issued by the state's Superintendent of Public Instruction." On reconsider-ation, the ALJ affirmed the denial considering, in addition to the SPI list of accredited schools, a listing of "'private schools which have been approved or provisionally approved by the State Board of Education'". The reconsideration also noted that the School did not "meet Rule 114's definition of 'educational insti-tution' as being generally accredited as such by the state." (Emphasis added.)

ANALYSIS AND CONCLUSIONS

The School contends that it is an "educational institution" which is authorized to deduct from the B&O tax the amounts it receives as "tuition fees". RCW 82.04.170 defines both tuition fee and educational institution:

> "Tuition fee" includes library, laboratory, health service and other special fees, and amounts charged for room and board by an educational institution when the property or service for which such charges are being made is furnished exclusively to the students or faculty of such institution. "Educational institution," as used in this section, means only those institutions created or generally accredited as such by the state, or defined as a degree granting institution under RCW 28B.85.010(3)[1] and accredited by an accrediting association recognized by the United States secretary of education, and offering to students an educational program of a general academic nature or those institutions which are not operated for profit and which are privately endowed under a deed of trust to offer instruction in trade, industry, and agri-culture, but not including specialty schools, business colleges, other trade schools, or similar institutions.

RCW 82.04.4282 provides for the B&O deduction: "In computing tax there may be deducted from the measure of tax amounts derived from . . . (5) tuition fees . . .".

RCW 82.04.170 was amended in 1985 in a manner which does not affect these appeals. The School claims its right to a deduc-tion in the language which defines "educational institution" as one which is "generally accredited as such by the state . . . offering to students an educational program of a general academic nature . . .".

The School unquestionably offers educational programs of a general academic nature. The question we must decide is if it is an "educational institution" which is "generally accredited as such by the state".

The School contends that it meets the definition of an "educa-tional institution" in WAC 458-20-114 (Rule 114). The School also asserts that it is not denied the deduction solely because of the definition of "private school" in WAC 458-20-167 (Rule 167).

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[1] RCW 28B.05.030(1) defines "degree granting institution". Montessori schools are not degree granting institutions. In 1992, the citation to RCW 28B.85.010(3) was substituted for a prior citation to RCW 28B.05.030(1) in RCW 82.04.170. The only differ-ence between the two cited statutes is the substitution of "entity" in 28B.85.010(3) for "educational institution" in 28B.05.030(1).

Rule 114 states, in pertinent part: "'Educational institutions' which may deduct 'tuition fees' are those which have been created or generally accredited as such by the state . . . and which offer to students an educational program of a general academic nature . . .". (Emphasis added.)

Rule 167 states, in pertinent part: "As used herein: An 'educational institution' means only those institutions defined as such in WAC 458-20-114; the term 'private school' means all schools which are excluded from said definition. . . . Persons operating private schools are taxable under the service and other business activities classification upon gross income derived from tuition fees, rental of rooms and equipment and other service income." (Emphasis added.)

"Private school" is defined in WAC 180-90-115 as a "nonpublic school, including parochial or independent schools . . . carrying out a program for any or all of the grades one through twelve." Under that definition, it is clear that this School is a private school. But that would not necessarily foreclose its right to the deduction if it qualifies under Rule 114.

The School testified that its students are accepted at grade level, without examination, by Vancouver public and private schools which are a "part of the uniform school system". The acceptance of its students, without challenge from the state, amounts to the "tacit 'approval' of SPI". That "approval" leads the School to conclude that although it is not actually accredited by the state as an "educational institution", it is, in effect, "generally accredited as such".

In further support of its refund claim, the School cites language which was included in Rule 114 from the time it was adopted by the Tax Commission in 1943 until its deletion in 1984. The rule, before amendment, included as an example of institutions allowed to deduct tuition fees from the B&O tax: "(c) Schools whose students and credentials are accepted without examination by the schools referred to in (a) and (b) above, and which are not specialty schools, business colleges, other trade schools or similar institutions."[2]

The language above was deleted from Rule 114 in 1984. The School contends that simply deleting the example in the rule does not change the meaning of the statute. It is the School's

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[2] The schools referred to by "(a) and (b)" are, generally, the public schools and private schools which comprise the "uniform school system", according to the School.

conten-tion that until the example was deleted, it "fell squarely within the exampled category". The language deleted in 1984 would clearly entitle the School to the deduction.

The Department does not deny that the School's students are accepted by the public schools, but contends that the example was wrong; that it was never authorized by the statute. The 1984 deletion of that language was simply the correction of a long-standing mistake, according to the Department. Rule 114, the Department says, now merely repeats the statutory definition of "educational institution" and the phrase "generally accredited as such" without further definition. There is no right in the statute, according to the Department, for this School to deduct its tuition fees from the B&O tax.

The Department, in adopting regulations implementing acts adopted by the Legislature, must do its best to determine the meaning and implications of the words. In this case, the Depart-ment determined that an earlier interpretation had been in error. It is within the Department's authority to make that determination. We do not read in the statute any prohibition of the Department's pre-1984 example, nor do we read any specific authorization.

The School complains that the Department's notification that Rule 114 would be changed was not sufficient. It also contends that it contacted "many similarly situated taxpayers" and concludes from that survey that the Department's notification procedures were inadequate. It did not identify the number or names of the tax-payers it contacted.

The Department testified that prior to the public hearing on the proposed rule changes, Department records were reviewed to determine if any taxpayers were claiming the deduction under the provisions of Rule 114(c). None were found. The Department also testified that it followed required notification procedures to publicize the proposed change. The Notice of Intention to Adopt, Amend, or Repeal Rule included a reference to Section (c). The amended rule showing all of the changes being considered was also mailed with the notice. In addition, a partial transcript of the final public hearing was submitted by the Department showing that the change in the tuition deduction was referred to in the opening remarks.

Rule 114 is lengthy and covers a number of subjects. The primary purpose of the 1984 revision was to clarify the definition of "bona fide dues" for private clubs. The sections dealing with "tuition fees" may not have received as much attention as they might have if that section had been the central focus. That is unfortunate. However, it appears that the

Department followed required procedures and attempted to notify those who might be interested in or affected by the rule change.

We live in a world of many laws and rules. Institutions and individuals are often not aware of much that influences and affects them until they are directly and immediately confronted with a problem. Until the School tried to obtain a tax refund, it was not aware of the change in regulations. Neither the Department nor the School can be faulted for that. The reality is that, in our complex society, we simply cannot be aware of all that affects us or of every person or organization that may be affected by what we do.

The School contends that the Department's initial determinations and the redeterminations are inconsistent. The list of schools considered was expanded to include the State Board of Education's list of approved schools. Including the additional list demonstrates that accreditation is not the sole criterion for the deduction, the School contends. In addition, using the Board of Education's list of "private" schools validates the language included in Rule 114 before it was amended. It was only before 1984 that the term "educational institution" referred specifically to private schools, according to the School. The School contends that choosing the Board of Education's list is arbitrary and is no more persuasive than other "equally qualified listings." Finally, the School notes that, in the original denials, the ALJ had stated that the School was not "accredited by the state", while the redeterminations stated that the School was not among educational institutions "generally accredited as such by the state." The language in the redeterminations is the language of the statute.

We agree that accreditation is not the sole criterion for the deduction. If that were so, the Legislature would not have used the term "generally accredited as such". The issue we must decide here is how that phrase is to be interpreted and how it is to be applied. We do not see the relevance of the School's concern about Rule 114's reference to private schools. And in the absence of the identification of other "equally qualified listings", we are not persuaded that the ALJ's choice of the Board of Education's list was inappropriate.

The purpose of asking for a reconsideration is to have the facts and reasoning of the original decision reviewed to determine if it is valid or if it must be "corrected". The redetermined decision may affirm, reverse, or amend the original decision. The basis for the original decision may be changed. Ultimately, requesting a reconsideration is no different than making the original request. For practical purposes, the redetermination is a new decision, superseding the earlier one.

The School contends that a Departmental review of the amount of tax paid when the refund was initially applied for and certification as to the correct amount by a Department auditor is tantamount to confirmation by the Department that the refund is justified. Simply confirming an amount is an arithmetic, not a policy, function. It would have been preferable if the Department had determined the validity of the claim before reviewing the amount, but that is a policy matter which is outside the purview of this Board.

The School also cites Department Determination No. 87-297, 4 WTD 75 (1987), in support of its claim for exemption. In the determination of that case, the ALJ noted that the Department had determined that a liberal application of the phrase "generally accredited as such by the state" was appropriate. In this case, the School believes that the Department's interpretation of the phrase is too narrow. As the Department notes in its brief, the ALJ's comments in that case were dicta and not binding. In any event, the ALJ's observation in that case was not buttressed by sufficient examples to make it persuasive.

DECISION

The standards for accreditation are listed in a publication, Standards for Accreditation, issued by the Commission on Schools, Northwest Association of Schools and Colleges. The standards cover a wide variety of matters, ranging from physical plant and teaching materials to teacher qualifications and student/teacher ratios. Once a school is accredited, it must submit an "Annual Report to the Association" for review and determination of its current status. In accreditation, the SPI is the administrative arm of the Board of Education.

In lieu of accreditation, a private school may choose to be included in the list of "approved private schools" published by the Board of Education. Application forms and standards for approval are published by the SPI. The physical plant, teacher qualifications, course offerings, and number of hours of instruction, among other matters, are reviewed to determine if the school meets minimum standards. The final determination of "approval" or "provisional approval" is made by the Board of Education. Once a school is approved, annual Certificates of Compliance must be filed with the SPI.

The choice as to whether to be "approved" or "accredited", or neither, is that of the private school. Accreditation is a more involved process than approval and involves more rigorous require-ments. Accreditation is of value to a private school in

recruiting students. Until 1986, the School was on the approved list. After that, however, it apparently chose not to reapply.

The basis for the decision in this appeal lies in our understanding of the meaning of the phrase "generally accredited as such" in RCW 82.04.170. The Department's brief included a confusing digression about the referent in the statute for the phrase "as such." In this case, it is hard to read the statute in a manner to find "as such" referring to anything other than "educa-tional institutions". We agree with the School that if the Legislature meant to restrict the exemption to institutions actually accredited by the state, it would not have added the qualifying words "generally" and "as such".

The Standards for Accreditation notes: "Some schools (especially smaller schools), by their very nature, may be compelled to seek alternative ways of meeting some portions of the standards. Where this occurs, the school shall submit explanations delineating these alternative measures."

It is clear that the Commission on Education and the Board of Education do not believe that "accreditation" should act as an insurmountable hurdle for entities that want to qualify as "educa-tional institutions". Alternative procedures and methods are provided by both organizations.

It seems equally clear that the Legislature believes that schools that cannot meet the standards for accreditation should have an alternative method of qualifying for the deduction. That need for an alternative, it seems to us, is adequately met by the Board of Education's allowing institutions to apply for "approval" in lieu of seeking "accreditation".

Although the fact that the students of the School are accepted by the accredited public schools without examination cannot be ignored, it is not sufficient to meet the legislative standard as we understand it. It does not seem reasonable that the Legislature would set a standard which can be met by inaction. It seems more likely that to be "generally accredited as such" would require an affirmative act by both the state and the school. Requiring "approval" in lieu of "accreditation" meets that condition.

The School had ample opportunity to apply for approval. It had done so in the past. But during the period of this appeal, it chose not to. It should not now argue that its failure to apply for and meet the standards for approval, as it had done in the past, should be rewarded and that it should stand on the same ground as those schools which did apply and did meet the required standards.

The Determination of the Department of Revenue is upheld.

DATED this _____ day of _____, 1994.

BOARD OF TAX APPEALS

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LAWRENCE KENNEY, Member

I concur.

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LUCILLE CARLSON, Vice Chair

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Pursuant to WAC 456-10-755, you may file a petition for reconsideration of this Final Decision. You must file the petition for reconsideration with the Board of Tax Appeals within ten days of the date of mailing of the Final Decision. You must also serve a copy on all other parties. The filing of a petition for reconsideration suspends the Final Decision until action by the Board. The Board may deny the petition, modify its decision, or reopen the hearing.