Cite as Det. No. 86-297, 2 WTD 23 (1986)

THIS DETERMINATION HAS BEEN OVERRULED OR MODIFIED IN WHOLE OR PART BY DET. NO. 01-006, 20 WTD 124 (2001)

BEFORE THE INTERPRETATION AND APPEALS SECTION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition	)	D E T E R M I N A T I O N
For Correction of Assessment of	)	
	)	No. 86-297
	)	
. . .	)	Registration No. . . .
	)	Tax Assessment No. . . .

[1] **RULE 194 & RCW 82.04.460**: B & O TAX -- APPORTIONMENT -- MAGAZINE SALES -- OUT-OF-STATE PLACE OF BUSINESS.Apportionment under RCW 82.04.460 is proper only if the taxpayer maintains a place of business outside of the state of Washington. Where a magazine subscription business terminated its out-of-state office, apportionment no longer applied.

[2] ETB 419: B & O TAX - ESTOPPEL - ERRONEOUS INSTRUCTIONS - ORAL. Estoppel will not be invoked against the Department unless the erroneous instructions from the Department are in writing. Relief denied taxpayer who claimed that auditor told him out-of-state income was deductible regardless of whether the taxpayer maintained out-of-state office.

[3] **RULE 224 AND RCW 82.04.290**: B & O TAX - CLASSIFICATION - STATUTORY CONSTRUCTION - MAGAZINE SUBSCRIPTIONS.
RCW 82.04.290 is narrowly construed, not ambiguous and therefore the meaning is derived from what the Legislature has said. Proper B&O tax rate classification for seller of magazine subscriptions is Service and Other Activities.

Headnotes are provided as a convenience for the reader and are not in any way a part of the decision or in any way to be used in construing or interpreting this Determination.

TAXPAYER REPRESENTED BY: . . .

DATE OF HEARING: January 15, 1986

NATURE OF ACTION:

Petition to deduct from measure of B&O tax income from out-of-state magazine subscribers.

FACTS AND ISSUES:

Dressel, ALJ -- . . . (taxpayer) is in the business of selling, managing, advertising, and promoting magazine subscriptions. The Department of Revenue conducted an examination of its books and records for the period December 1, 1981 through March 31, 1985. As a result, the above-referenced tax assessment was issued September 24, 1985 for tax and interest totaling $16,371. That entire amount remains outstanding at this writing.

Prior to 1982 the taxpayer maintained an office in California in addition to its one in Washington. In a 1982 audit by the Department the taxpayer was allowed to deduct commission income generated by the out-of-state office from the measure of its Washington B&O tax liability in accordance with WAC 458-20-194 (Rule 194). A similar deduction was not permitted in the recent audit, however. Although approximately 40 percent of total income for the subject audit period come from out-of-state sources including California, the office in that state had been abandoned. On the basis that the California office had ceased operations, the auditor concluded that apportionment of the non-Washington income was no longer appropriate.

The taxpayer claims that it was misled by statements made by the 1982 auditor which is why it continued to deduct income from out-of-state sources even after closure of the California office. The taxpayer maintains that in his verbal statements, at least, the auditor attached no qualifications such as the maintenance of an out-of-state place of business to his advice that the out-of-state income was deductible. The taxpayer acknowledges that the written instructions from the 1982 audit specify the necessity for an out-of-state office, but the taxpayer claims that it never received a copy of those instructions.

Secondly, the taxpayer argues that its commission income has been improperly classified for B&O tax purposes as being Service and Other Business Activities. It suggests a more appropriate category would be that of Travel Agent. It reasons that its activities are analogous to those of a travel agent in that it derives commissions for obtaining magazine subscriptions while a travel agent derives commissions for making travel and lodging arrangements.

The issues which need to be resolved, then, are two in number: (1) whether the Department is estopped from disallowing deductions for income from magazine subscriptions by out-of-state customers because of its allegedly erroneous or incomplete advice; and (2) whether the commission income of this magazine subscription company has been improperly B&O classified as Service and Other Business Activities.

DISCUSSION:

[1] Rule 194 is titled "Doing business inside and outside the state" and reads in part:

> When the business involves a transaction taxable under the classification service and other business activities, the tax does not apply upon any part of the gross income received for services incidentally rendered to persons in this state by a person who does not maintain a place of business in this state and who is not domiciled herein. However, the tax applies upon the income received for services incidentally rendered to persons outside this state by a person domiciled herein who does not maintain a place of business within the jurisdiction of the place of domicile of the person to whom the service is rendered. (Emphasis supplied.)

The taxpayer provides services, the selling of magazine subscriptions, both inside and outside the state. It does not maintain a place of business in a jurisdiction other than Washington. If follows then that if its services are incidentally rendered to persons outside the state, the income from those services is B&O taxable.

According to the TP's representative, income from states other than Washington was the result of solicitations emanating from the Seattle office.

The statute which Rule 194 implements, RCW 82.04.460, does not speak in terms of services "incidentally" rendered. The rule itself doesn't define "incidental." When a term is used but not defined in a statute, it must be given its usual and ordinary meaning usually ascertained from dictionaries. Marino Property v. Port of Seattle, 88 Wn.2d 822, 567 P.2d 1125 (1977). It is only logical to extend that holding to a word used but not defined in an administrative rule. According to Webster's New World Dictionary (Second College Edition, 1974), the first definition of the adjective, incidental, is "happening as a result of or in connection with something more important . . ."

We believe the taxpayer's out-of-state activity fits this definition. Approximately 60 percent of total income is from Washington, out-of-state solicitation is accomplished from the Seattle office, and the processing of orders is presumed to have taken place in Washington. Under those circumstances we find the out-of-state service activity is incidental or "happening . . . in connection with something more important."

Because the taxpayer has no out-of-state place of business and the out-of-state services are "incidentally rendered," the income therefrom is B&O taxable under Rule 194.

[2] Having established that we are now in a position to address the effect of the allegedly erroneous reporting instructions received from the Department. Excise Tax Bulletin (ETB) 419.32.99 is pertinent. It reads:

STATE OF WASHINGTON DEPARTMENT OF REVENUE

EXCISE TAX BULLETIN:

ETB 419.32.99 Issued April 30, 1971

ORAL INSTRUCTIONS RELATING TO TAX LIABILITY:

Are oral instructions or interpretations by employees of the Department of Revenue binding upon the department?

RCW 82.32.300 provides for the administration of Washington state excise tax laws by the:

> . . . tax commission [department of revenue] . . . which shall prescribe forms and rules of procedure . . . shall make and publish rules and regulations not inconsistent therewith necessary to enforce their provisions, which shall have the same force and effect as if specifically included therein, unless declared invalid by the judgment of a court of record not appealed from.

In the exercise of this statutory authority, the department has determined that it cannot authorize, nor does the law permit, the abatement of a tax or the cancellation of interest on the basis of a taxpayer's recollection of oral instructions by an agent of the department.

The Department of Revenue gives consideration, to the extent of discretion vested in it by law, where it can be shown that failure of a taxpayer to report correctly was due to written instructions from the department or any of its authorized agents. The department cannot give consideration to claimed misinformation resulting from telephone conversations or personal consultations with a department employee.

There are three reasons for this ruling:

(1) There is no record of the facts which might have been presented to the agent for his consideration.

(2) There is no record of instructions or information imparted by the agent, which may have been erroneous or incomplete.

(3) There is no evidence that such instructions were completely understood or followed by the taxpayer.

In King Cy., etc. Assn. v. State etc. Bd., 54 Wn.2d 1, the court ruled that:

> Estoppel will never be asserted to enforce a promise which is contrary to the statute and to the policy thereof.

The ETB is self-explanatory and controls the instant situation for the reasons expressed therein. The Department is not bound by the allegedly erroneous oral instructions given by its auditor. There is no verifiable evidence of what was said to the auditor, of what his response to the taxpayer was, or that his instructions were heeded by the taxpayer. Were the instructions in writing these evidenting shortcomings likely could have been overcome. Furthermore, the taxpayer's representative has contacted the Department auditor who supposedly imparted the incorrect advice about deducting out-of-state sales. That individual has no specific recollection of giving such oral instructions although he did acknowledge that his command of the Revenue Act is greater now than in 1982 when the advice was allegedly given. Even if we were to consider a present statement in corroboration of previous incorrect, oral advice, it would have to be stronger than that of the auditor whose comment, in our opinion, falls far short of corroboration.

The taxpayer's petition is denied as to this item.

[3] The second argument presented by the taxpayer is that its income should be taxed at the Travel Agent rate rather than at the higher 1.5 percent Service and Other Business Activities rate. The pertinent statute is RCW 82.04.290 which reads:

> Tax on other business or service activities. Upon every person engaging within this state in any business activity other than or in addition to those enumerated in RCW 82.04.230, 82.04.240, 82.04.250, 82.04.255, 82.04.260, 82.04.270, and 82.04.280; as to such persons the amount of tax on account of such activities shall be equal to the gross income of the business multiplied by the rate of 1.50 percent. This section includes, among others, and without limiting the scope hereof (whether or not title to materials used in the performance of such business passes to another by accession, confusion or other than by outright sale), persons engaged in the business of rendering any type of service which does not constitute a "sale at retail" or a "sale at wholesale." . . . (Emphasis ours.)

The business activities enumerated in RCWs 82.04.230, .240, .250, .255, .260, .270, and .280 are extractors, retailers, real estate brokers, buyers and wholesalers of certain agricultural commodities, flour and oil manufacturers, seafood product manufacturers, fruit and vegetable processors, research and development organizations, perishable meat products processors and wholesalers, nuclear fuel assemblies, travel agents, certain international activities, stevedoring and associated activities, low-level waste disposers; insurance agents, brokers, and solicitors; wholesalers, distributors, printers, publishers, highway contractors, extracting or processing for hire, cold storage warehouse operation, insurance general agents, and radio and television broadcasting.

In Lynch v. Department of Labor and Industries, 19 Wn.2d 802 (1944), the Supreme Court stated:

> The fundamental purpose or object of all judicial construction or interpretation of legislative enactments is to ascertain, if possible, and give effect to, the intention of the lawmakers. Layton v. Home Indemnity Co., 9 Wn.(2d) 25, 113 P.(2d) 538, and authorities therein cited.
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> In the process of arriving at the intent of the legislative body, the first resort of the courts is to the context and subject matter of the legislation, because the intention of the lawmaker is to be deduced, if possible, from what it said. Behrens v. Commercial Waterway Dist. No. 1, 107 Wash. 155, 181 Pac. 892, 185 Pac. 628; In re Sanborn, 159 Wash. 112, 292 Pac. 259.

There is not much doubt about what the legislature said in RCW 82.04.290. It specifically excluded from coverage those activities referenced in RCWs 82.04.230 - .280. It said all others are subject to the Service and Other Business Activities classification. The business of selling and promoting magazine subscriptions is not specifically excluded in the cited statutes, so the Service classification at the 1.5 percent rate is the proper niche for this taxpayer.

Furthermore, this is a matter in which the Department has no discretion. It does not possess the authority to tax at the travel agent's rate even if it agreed with the taxpayer's analogy. RCW 82.04.290 says that businesses not otherwise listed in the preceding statutes shall pay the Service rate of 1.5 percent. Use of the word "shall" indicates the intent of the legislature that the Service rate is mandatory for businesses not otherwise classified.

The taxpayer's petition is denied as to this second issue.

DECISION AND DISPOSITION:

The taxpayer's petition is denied.

DATED this 21st day of November 1986.