Cite as Det. No. 13-0172R, 33 WTD 463 (2014)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition for Correction of Assessment of	)	D E T E R M I N A T I O N
	)	No. 13-0172R
. . .	)	Registration No. . . .

[1] RCW 82.04.065(5): DARK FIBER - EQUIPMENT OR APPARATUS. Dark fiber is telecommunications "equipment or apparatus" under the plain meaning of those terms. Det. No. 97-157, 17 WTD 69 (1988) is overruled to the extent it is inconsistent with ETA 3171.2009 or this determination.

[2] RCW 82.04.065(5); ETA 3171.2012: DARK FIBER - COMPETITIVE TELEPHONE SERVICE. Lease of dark fiber is a "competitive telephone service."

[3] RCW 82.04.065(5) – DARK FIBER – LEASES OF REAL PROPERTY – FIXTURES. Dark fiber is not real property under the three-prong test developed by Washington courts.

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.

Sohng, A.L.J. – Telecommunications company protests retail sales tax imposed on its leases of dark fiber on the grounds that (i) they are not "competitive telephone services" under RCW 82.04.065; or, alternatively, (ii) they are leases of real property not subject to retail sales tax. The petition is denied as to these issues. . . . [1]

ISSUES

1. Does the lease of dark fiber by a telecommunications company constitute a "competitive telephone service" under RCW 82.04.065(5)?

2. Does dark fiber constitute real property that is not subject to retail sales tax?

[1] Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410.

3. . . .

FINDINGS OF FACT

[Taxpayer] was a large telecommunications company . . . providing commercial and residential telephone and data services in . . . [multiple] states, including Washington.[2]

Taxpayer is subject to regulation by the Federal Communications Commission, as well as the Washington State Utilities and Transportation Commission. Taxpayer entered into Dark Fiber Lease Agreements (the "Agreements") with public utility districts ("PUDs"),[3] the . . . Power Administration[4] and other companies[5] (collectively, the "Carriers"), under which Taxpayer leased dark fiber from the Carriers for annual lease fees.

Dark fiber is an unused, unlit fiber-optic cable. Fiber optic cable transmits data in the form of light pulses. A "dark" cable is a cable through which light is not being transmitted. Fiber optic cables are typically composed of long, thin strands arranged in a bundle. The bundle or bundles are contained in a conduit that is buried underground. The Carriers that own the dark fiber frequently lay more lines than they need in order to avoid the costs of repeatedly re-laying the lines. Dark fiber can be leased to other companies, such as cable television and telephone companies that want to establish telecommunications connections or networks among their own locations. These lessees provide the necessary functional components and equipment to light the fiber.[6]

Under the Agreements, Taxpayer leased the dark fiber from the Carriers without any other equipment attached. Taxpayer "lit" the dark fiber with its own equipment and sold telecommunications services to its customers. The Agreements generally provided Taxpayer with the right to use the dark fibers, as well as rights to use certain "associated property" necessary for Taxpayer's use of the fibers, such as the conduits containing the fibers and manholes, handholes, and fiber distribution panels that are used to access the fibers. This associated property expressly excluded any electronic or optronic equipment.[7] The Agreements also required the Carrier to provide services in order to operate and maintain the fibers, to provide alternative routing in the event the Carrier loses its rights to the fiber, and to restore service in the event of a disruption.

The Audit Division examined Taxpayer's books and records for the period January 1, 2007, through June 30, 2011 (the "Audit Period"). Taxpayer treated the leases as wholesale purchases of dark fiber that they resold to its own customers. The Audit Division contends that the leases

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[2] . . .
[3] The PUDs include . . . municipal corporations.
[4] The . . . [Power Administration] is a federal nonprofit agency . . . and is one of four regional power marketing agencies within the U.S. Department of Energy. . . .
[5] . . .
[6] *See* http://www.webopedia.com/TERM/D/dark_fiber.html (last viewed May 22, 2013); *see also* http://www.techopedia.com/definition/15369/dark-fiber (last viewed May 22, 2013).
[7] *See* Dark Fiber Lease Agreement between Taxpayer and PUD . . . dated April 30, 2002, at ¶2.

were retail sales of "competitive telephone services" under RCW 82.04.065. On April 25, 2012, the Audit Division issued Assessment No. . . . in the amount of $. . . , including $. . . in use tax/deferred sales tax and $. . . in interest.

On June 11, 2013, the Department's Appeals Division issued Determination No. 13-0172, holding that dark fiber constituted "equipment" and "apparatus" under RCW 82.04.065(5), and overruled Det. No. 97-157, 17 WTD 69 (1998) to the extent inconsistent. On reconsideration, Taxpayer represents that it relied on 17 WTD 69 when it filed its excise tax returns for the Audit Period.

ANALYSIS

1. Competitive Telephone Services

Washington imposes retail sales tax on each retail sale in this state. RCW 82.08.020. RCW 82.04.050 and 82.04.065, which govern the taxation of the telephone services at issue here, were amended in 2007 with an effective date of July 1, 2008. Laws of 2007, ch. 6, §§ 1002 - 1004. Thus, there are two versions of the statute that apply to the Audit Period of January 1, 2007, through June 30, 2011. For purposes of discussion, the Audit Period will be bifurcated into two periods: January 1, 2007 – June 30, 2008 ("Audit Period I"), to which the prior versions of the statutes apply; and July 1, 2008 – June 30, 2011 ("Audit Period II"), to which the amended versions of the statutes apply.

a. Audit Period I

During Audit Period I, RCW 82.04.050(5) provided that the term "retail sale" included "the providing of telephone service, as defined in RCW 82.04.065, to consumers." "Telephone service" was defined as "competitive telephone service or network telephone service . . ." under RCW 82.04.065(3). RCW 82.04.065(1) defined "competitive telephone service" to mean:

> [T]he providing by any person of telecommunications equipment or apparatus, or service related to that equipment or apparatus such as repair or maintenance service, if the equipment or apparatus is of a type which can be provided by persons that are not subject to regulation as telephone companies under Title 80 RCW and for which a separate charge is made.[8]

(Emphasis added.) The statute does not define "equipment" or "apparatus."[9] When statutory terms are not defined in the statute, we turn to their ordinary dictionary meanings. *See, e.g.*,

[8] [On appeal, the only contested statutory requirement was the issue whether Taxpayer provided "equipment" or "apparatus." Because the remaining requirements of RCW 82.04.065(1) were not contested on appeal, we do not address them in this determination.]

[9] For the purpose of this analysis we will discuss dark fiber in terms of equipment and apparatus because it constitutes, at a minimum, equipment and apparatus and is therefore competitive telephone service. However, contracts for the provision of dark fiber generally also include the provision of services related to the equipment and

Western Telepage, Inc. v. City of Tacoma, 140 Wn.2d 599, 609, 998 P.2d 884 (2000); *Palmer v. Dep't of Revenue*, 82 Wn. App. 367, 372, 917 P.2d 1120 (1996); *Garrison v. Wash. State Nursing Bd.*, 87 Wn.2d 195, 196, 550 P.2d 7 (1976). Non-technical terms may be given their dictionary definitions. *State v. Fjermestad*, 114 Wn.2d 828, 835, 791 P.2d 897 (1990).

The dictionary definition of the word "equipment" is as follows: "(1) the implements (as machinery or tools) used in an operation or activity: APPARATUS" or "(2) all the fixed assets other than land and buildings of a business enterprise." Webster's Third New International Dictionary 768 (3rd ed. 1993). Webster's Dictionary also provides the following synonyms and description under its entry for "equipment":

> **syn** EQUIPMENT, APPARATUS, MACHINERY, PARAPHENALIA, OUTFIT, TACKLE, GEAR, MATERIÉL can signify, in common, all the things used in a given work or useful in effecting a given end. EQUIPMENT usu. covers everything, except personnel . . . .

Id. The dictionary definition of the word "apparatus" is "[a] collection or set of materials, instruments, appliances, or machinery designed for a particular use . . . ." *Id.* at 102.

We conclude that dark fiber meets the plain meaning of the dictionary definitions of both "equipment" and "apparatus" described above. Dark fiber is both an implement used in an operation or activity (namely, telecommunications operations), as well as a fixed asset other than land and buildings of a business enterprise. Thus, dark fiber fits squarely within the dictionary definition of "equipment." Furthermore, dark fiber constitutes a thing used in a given work or useful in effecting a given end and, thus, meets the supplemental description of "equipment" provided in Webster's Dictionary. We also conclude that dark fiber constitutes an "apparatus" because it is a material or instrument designed for a particular use (namely, telecommunications operations). Because dark fiber is "equipment" or "apparatus," the provision of such dark fiber to Taxpayer constitutes a "competitive telephone service" under RCW 82.04.065(1).[10]

RCW 82.04.050(5) also required that the telephone service be provided "to consumers." RCW 82.04.190(2)(b) provided that "consumer" means "any person who purchases, acquires, or uses any telephone service as defined in RCW 82.04.065, other than for resale in the regular course of business." Taxpayer was a "consumer" because it did not resell the leased dark fiber in the regular course of its business. Rather, Taxpayer "lit" the dark fiber with its own equipment to enable the high-speed transmission of voice and data communications, which it then sold to its own customers. Because Taxpayer was a "consumer" to whom "telephone services" were provided, it was subject to retail sales tax under RCW 82.04.050(5) during Audit Period I.

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apparatus. We need not discuss that service component here in order to conclude that dark fiber is a competitive telephone service.

[10] *See* footnote 8 for a clarification that dark fiber may also include a service component, but at a minimum is equipment and apparatus.

b. Audit Period II

Effective July 1, 2008, RCW 82.04.050(5) provides that the term "retail sale" includes "the providing of 'competitive telephone service,' 'telecommunications service,' or 'ancillary services,' as those terms are defined in RCW 82.04.065, to consumers." "Competitive telephone service" has the same meaning that it had under the previous version of RCW 82.04.065:

> [T]he providing by any person of telecommunications equipment or apparatus, or service related to that equipment or apparatus such as repair or maintenance service, if the equipment or apparatus is of a type which can be provided by persons that are not subject to regulation as telephone companies under Title 80 RCW and for which a separate charge is made. RCW 82.04.065(5).[11]

Excise Tax Advisory 3171.2012 ("ETA 3171"), entitled "Taxation of Dark Fiber (unlit fiber optic cable)," was issued on April 4, 2012 to provide guidance on the taxation of dark fiber used in telecommunications services. ETA 3171 provides:

> "Dark fiber" falls within the definition for "competitive telephone service" ("CTS") and is therefore subject to retail sales tax. CTS is defined as "…providing by any person of telecommunications equipment or apparatus, or services related to the equipment or apparatus…" RCW 82.04.065(5).
>
> CTS is included within the definition of "retail sale." RCW 82.04.050(5). The sale of CTS to a consumer is thus subject to retail sales tax and retailing B&O tax, unless exempt by law.

Although ETA 3171 makes clear that dark fiber is included in the definition of "competitive telephone service" and is retail sales taxable, Taxpayer argues ETA 3171 is contrary to the statute, as well as published Department precedent. Taxpayer claims that that dark fiber cannot be considered "equipment or apparatus" as those terms are commonly understood. We have already concluded, above, that dark fiber constitutes both equipment and apparatus under their ordinary dictionary definitions. This analysis is equally applicable for Audit Period II.

Taxpayer relies on Det. No. 97-157, 17 WTD 69 (1998), for its argument that dark fiber is not a "competitive telephone service." That determination involved a purchaser of fiber optic cable whose network ran from Washington to Canada. In addressing whether the cable was telecommunications equipment or apparatus, the Department held:

> We believe that the telecommunications equipment or apparatus referred to in the statute is the apparatus that allows access to the telecommunications system, such as telephones or faxes.

[11] RCW 82.04.065 was renumbered in 2009 and "competitive telephone service" was previously defined under RCW 82.04.065(1). The definition itself was not amended. Laws of 2009, ch. 535, § 413.

17 WTD at 74 (emphasis in original).

Because we have already concluded, for the reasons stated above, consistent with ETA 3171, that dark fiber fits within the ordinary definitions of "equipment" and "apparatus," 17 WTD 69 may be read as being inconsistent. We overruled 17 WTD 69 to the extent that it is inconsistent with ETA 3171 or this decision. Because dark fiber is "equipment" or "apparatus,"[12] the provision of such dark fiber to Taxpayer constitutes a "competitive telephone service" under RCW 82.04.065(1).

RCW 82.04.050(5) also requires that the "competitive telephone service" be provided "to consumers." RCW 82.04.190(2)(b) was also amended effective July 1, 2008 and now provides that "consumer" means "any person who purchases, acquires, or uses any competitive telephone service, ancillary services, or telecommunications service, as those terms are defined in RCW 82.04.065, other than for resale in the regular course of business." As we already concluded above, Taxpayer was a "consumer" because it does not resell the leased dark fiber in the regular course of its business. Rather, Taxpayer "lit" the dark fiber with its own equipment to enable the high-speed transmission of voice and data communications, which it then sold to its own customers. Because Taxpayer was a "consumer" to whom "competitive telephone services" were provided, it was subject to retail sales tax under RCW 82.04.050(5) during Audit Period II.

Taxpayer also relies on legislative history dating back to 1981 in support of its argument that dark fiber cannot be "equipment" or "apparatus." Taxpayer's appeal petition refers to the "Questions and Answers Re: House Bill No. 61," which provided:

> 2.) What do the terms "equipment, apparatus or service" mean that are referred to in the definition of "competitive telephone service?
>
> Telephone equipment and apparatus refers to the physical telephone instruments that are provided to customers. These include such items as the normal home or business telephone (rotary or touchtone dial), all the way up to large business systems such as private branch exchanges (PBC's) or Centrex.

In determining the meaning of statutes, we must ascertain and carry out the legislature's intentions. *City of Spokane v. County of Spokane*, 158 Wn.2d 661, 672-73, 146 P.3d 893 (2006). Washington courts employ a "plain meaning" approach to interpreting statutes, absent ambiguity. If the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent. *State v. J.M.*, 144 Wn.2d 472, 480, 28 P.3d 720, 724 (2001). When the statutory language is clear and unambiguous, the statute's meaning is determined from its language alone; courts will not look beyond the language and do not need to resort to extrinsic aids, such as statutory construction principles and legislative history. *See, e.g., Indoor Billboard/Washington, Inc. v. Integra Telecom of Washington, Inc.*, 162 Wn.2d 59, 170 P.3d 10 (2007); *Hi-Way Fuel Co. v. Estate of Allyn*, 128 Wn. App. 351, 115 P.3d 1031 (2005); *City of Olympia v. Drebick*, 156 Wn.2d 289, 126 P.3d 802 (2006); *Cockle v. Dep't of Labor &*

[12] *See* footnote 9.

Indus., 142 Wn.2d 801, 808, 16 P.3d 583 (2001); *Timberline Air Serv., Inc. v. Bell Helicopter-Textron, Inc.*, 125 Wn.2d 305, 312, 884 P.2d 920 (1994).

Here, we have determined that dark fiber constitutes "equipment" or "apparatus" under the plain meaning of those terms, as they are used RCW 82.04.065. Because there is no ambiguity, it is inappropriate to look beyond that plain meaning and into legislative history in determining their meaning. Even if there was ambiguity, we do not read the legislative history as implying that dark fiber is not telecommunications equipment or apparatus. Taxpayer's petition is denied.

2. Is Dark Fiber Real Property?

Taxpayer argues, in the alternative, that the lease of dark fiber is a lease or license to use real property that is exempt from sales or use tax. Washington courts have adopted a three-prong test to determine whether an item is a fixture (*i.e.,* real property) or personal property:

> (1) Actual annexation to the realty, or something appurtenant thereto;
> (2) Application to the use or purpose for which the realty is purchased; and
> (3) Intention of the party to make the annexation a permanent part of the realty.

See, e.g., Western Ag. Land Partners v. Dep't of Revenue, 43 Wn. App. 167, 716 P.2d 310 (1986); *Dep't of Revenue v. Boeing Co.*, 85 Wn.2d 663, 538 P.2d 505 (1975); *Oden v. Seattle*, 72 Wn.2d 221, 432 P.2d 642 (1967).

In applying this test, Taxpayer relies on Det. No. 00-122, 20 WTD 461 (2000). With respect to the first prong, the Department stated in 20 WTD 461 as follows:

> [T]he conduit, manholes, and other structures that make up the line are firmly affixed to the soil. The strands of cable, on the other hand, are attached to the conduit, and are removable. This raises the question whether the strands of cable satisfy the first prong, or should be treated separately from the conduit and other items that are clearly annexed to the soil. We believe the better argument is that the cable also is sufficiently annexed to the real property to satisfy the first prong. The cable is specifically fabricated for burial in underground conduit, and is a necessary functioning part of the underground transmission system . . . .

Taxpayer's reliance on 20 WTD 461 is misplaced; that determination is clearly distinguishable from the facts of this case. 20 WTD 461 involved the purchase an entire fiber-optic cable network that was buried underground almost exclusively over existing easements granted by railroads, cities, and counties. The entire network included the conduit, manholes, fiber optic cables, and other structures. Under those specific facts, the Department held that the entire telecommunications network, along with the necessary easements, was "real property" for purposes of the real estate excise tax.[13]

[13] RCW 82.45.032(1) provides that "real estate" or "real property" means any interest, estate, or beneficial interest in land or anything affixed to land, including the ownership interest or beneficial interest in any entity which itself

The facts here are substantially different and do not involve the same or even similar type of transaction. We do not have the sale of an entire telecommunications infrastructure contained exclusively through real property easements. Rather, we have only the lease of dark fiber, which Taxpayer then "lights" with its own equipment so that it can provide voice and data services to its own customers. Under the circumstances given here, we hold that 20 WTD 461 is inapplicable and that dark fiber is not real property, and to the extent it can be read as inconsistent, it is overruled.

We now apply the three-prong fixture test enumerated in *Western Ag*. The dark fiber at issue here is unattached to the conduit or to the soil, and as such, is easily removable through manholes, handholes, and other access points with little, if any, digging. Therefore, we hold that the dark fiber is not annexed to the real property and fails the first prong of the three-part test.[14] The dark fiber is not a fixture, and therefore, not real property.

Furthermore, our conclusion is consistent with rulings on similar issues in other states. *See, e.g.*, Ruling 2007-3, issued by the Connecticut Department of Revenue. Like the facts of the instant case, that ruling involved the mere lease of dark fiber to businesses, including telecommunications providers. That ruling stated:

> Fiber optic cable does not become a fixture when contained in an underground conduit. Under such circumstances, the fiber optic cable remains "free of an unattached to the realty."[citing *Waterbury Petroleum Products, Inc. v. Canaan Oil & Fuel Co., Inc.*, 193 Conn. 208, 217, 477 A.2d 988 (1984).] A cable can be removed by pulling it through the conduit that contains it, and replaced by pulling a new cable through the conduit, without extensive digging. . . . Accordingly, the fiber optic cable is not a fixture, and the lease of dark fiber is therefore not a lease of real property.

See also GIL-2007-4 (Colo. Dep't of Revenue, Dec. 4, 2007) ("Dark fiber is taxable if it retains its identity as tangible personal property and can be separated from the real property without damage."); Kansas Private Letter Ruling No. P-2008-004 (April 2, 2008)(holding that because fiber optic cable was unattached to anything other than at its ends, it did not constitute "annexation to the realty" under Kansas law). While these rulings are not binding on the Department, we nevertheless recognize them as supportive of our conclusion here. Taxpayer's petition is denied.

3. . . .

owns land or anything affixed to land. The term includes used mobile homes, used floating homes, and improvements constructed upon leased land.

[14] [Having held that Taxpayer failed the first prong of the three-part test, we do not reach the other two prongs of the test. However, we note parenthetically that Taxpayer presented no evidence of the Carriers' intent to make the dark fiber a permanent part of the realty.]

DECISION AND DISPOSITION

The petition is denied in part and granted in part.

Dated this 19th day of December 2013.