

Cite as 4 WTD 437 (1987)

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

In the Matter of the Petition )	<u>D</u> <u>E</u> <u>T</u> <u>E</u> <u>R</u> <u>M</u> <u>I</u> <u>N</u> <u>A</u> <u>T</u> <u>I</u>
<u>O</u> <u>N</u>	
For Correction of Assessments of)	
)	No. 88-10
)	
. . . )	Registration No. . . .
)	Tax Assessment No. . . .
.	
)	Tax Warrant No. . . .
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. . . )	Registration No. . . .
)	Tax Assessment No. . . .
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)	Tax Warrant Nos. . . .
)	

[1] **RULE 218:** SERVICE B&O TAX -- ADVERTISING SERVICES -  
- ADVERTISING THROUGH THE MAIL. Persons who perform  
advertising services by arranging for the printing  
and mailing of coupons and flyers are subject to  
Service B&O tax on the amounts received for  
performing such services.

[2] **RULE 143:** PRINTING AND PUBLISHING B&O TAX --  
ADVERTISING CIRCULARS. Persons who both print and  
publish circulars are taxable under the Printing and  
Publishing classification. Where taxpayer publishes  
(distributes) advertising circulars but does not  
print them, it does not qualify for the lower tax  
rate of Printing/Publishing B&O tax.

[3] **RULE 144 AND RULE 218:** RETAIL SALES TAX -- PRINTED  
MATTER -- ADVERTISING SERVICES. Sales of printed  
matter to an advertising service business for their  
own use or for the use of their clients are sales  
for consumption and subject to the retail sales tax.

[4] **RCW 82.08.050:** RETAIL SALES TAX -- LIABILITY OF BUYER -- DEFERRED SALES TAX. Where buyer has failed to pay sales tax to the seller, the Department may proceed directly against the buyer for collection of the tax. Payment of the sales tax is primarily the obligation of the buyer and is assessed as use tax (deferred sales tax). The use tax complements the sales tax and the same rates of tax applies.

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: December 13, 1985

#### NATURE OF ACTION:

Petition protesting reclassification of amounts reported by taxpayer as subject to Printing and Publishing B&O tax to being subject to Service B&O tax (higher rate of tax) and protesting assessment of use tax (deferred sales tax) where taxpayer did not pay sales tax on purchase of printed material.

#### FACTS AND ISSUES:

Krebs, A.L.J. (successor to Chandler, A.L.J.) -- . . . , a partnership, was succeeded by . . . as of January 1, 1984, who registered on March 20, 1984 . . . . The partnership and the corporation will be referred to collectively as the "taxpayer" except when it is necessary to refer to them individually as the "partnership" or "corporation."

The taxpayer has been engaged in the business of arranging for the printing of coupons and flyers and their distribution by mail to resident-recipients. This is done on behalf of the vendors who sell the products or services advertised in the coupons or flyers. The printing and mailing is done by a third party.

The Department of Revenue examined the partnership's business records for the period from January 1, 1981 through December 31, 1983. As a result of this audit, the Department issued Tax Assessment No. . . . on September 10, 1985 asserting excise tax liability in the amount \$ . . . and interest due in

the amount of \$ . . . for a total sum of \$ . . . which remains unpaid. On November 6, 1985, the Department issued Tax Warrant No. . . . .

The Department of Revenue examined the corporation's business records for the period from January 1, 1984 through December 31, 1984. As a result of this audit, the Department issued Tax Assessment No. . . . on September 10, 1985 asserting excise tax liability in the amount of \$ . . . and interest due in the amount of \$ . . . for a total sum of \$ . . . which remains unpaid. On November 6, 1985, the Department issued Tax Warrant No. . . . .

The taxpayer's protest involves Schedules II and III of the audit reports and the assessment of interest.

#### Schedule II

In Schedule II, amounts received by the taxpayer for its advertising services (arranging for the printing and mailing of coupons and flyers by third parties) were subjected to Service business and occupation (B&O) tax. A credit was given for amounts previously reported as subject to the Printing and Publishing B&O tax which has a lower tax rate.

The taxpayer disagrees with the auditor's classification of its business activity as advertising, taxable under Service B&O. The taxpayer points out that service industries derive their income primarily from expenditure of their time, an intangible, which is generally not resold several times such as materials by manufacturers, wholesalers, and retailers. Consequently, the taxpayer asserts that the latter have a lower tax rate than service industries which are not material intensive. The material intensive industries also generate sales and use taxes which service industries do not.

The taxpayer asserts that it spends 63 percent of its total income just for printing and mailing and only 15 percent for wages; and this is unlike advertising agencies (service industry) that charge primarily for their time. The taxpayer believes that its business activities are more closely related to TV, radio, newspapers and billboards which have a lower tax rate than service business activities.

The taxpayer also alleges that, when it commenced operations in . . . , it was advised by the Department to classify its income as printing and publishing. The taxpayer has no documentation on this advice.

The taxpayer points to WAC 458-20-143 (Rule 143), . . . , and asserts that because it mails out coupons once each quarter or four times each year, it was always considered a publisher of periodicals. The taxpayer asserts that its tax classification should not depend on whether it prints its own coupons.

The taxpayer asserts that it, as a "direct mail advertiser," has not received any special attention because it is in a new industry. Its competition are TV, radio, newspaper and billboards which have a lower tax rate than Service B&O. The taxpayer strongly believes that the reclassification of its income to Service B&O gives unfair advantage to its competition and is discriminatory to direct mail advertisers such as itself. The taxpayer believes a classification of Printing/Publishing or Radio and TV Broadcasting is more consistent with the intent of Title 82 RCW and administrative regulations.

### Schedule III

In Schedule III, amounts paid by the taxpayer to a printing and mailing company for the printing and mailing of advertising flyers and coupons were subjected to use tax (deferred sales tax) because the taxpayer was the purchaser/consumer and did not pay sales tax. The taxpayer concedes that it was liable for the sales tax on its purchases and that the use tax complements the sales tax when purchases are made without payment of the sales tax.

The taxpayer asserts that it was not aware that the printing/ mailing company was not charging sales tax and that use tax was thus due to the state. The taxpayer asserts that if it had been aware of the situation it could have adjusted its rates to include those costs and remain profitable. However, in a good year its profit is \$ . . . , and the use tax obligation is \$ . . . . The taxpayer feels that it cannot absorb this burden. The taxpayer has notified the printer to charge sales tax retroactive to January 1, 1985 and increased its rates to help absorb the cost.

The taxpayer requests the Department to pursue collection of the sales tax from the printer as it was their error in not collecting the sales tax and the printer did not have any valid resale certificate to avoid collecting the sales tax. If this is not done by the Department, the taxpayer requests a settlement of 50 percent of the use tax obligation on the basis that the use tax assessment will create a significant

hardship on its business and on the basis that the use tax avoidance was not intentional.

### Assessment of Interest

The taxpayer requests an abatement of the interest totaling \$ . . . on the basis that any underpayment of tax was not intentional. The taxpayer asserts that any underpayment was caused by the lack of clear language in the administrative regulations that relate to its business and occupation tax classification and the error on the part of the printer in not charging sales tax which resulted in use tax consequences.

### DISCUSSION:

#### Schedule II

The central issue is whether the taxpayer's business activities are subject to Service B&O tax, as found by the auditor or Printing/Publishing B&O tax as reported by the taxpayer.

The taxpayer enters into participation agreements with "advertisers" who are interested in having their products and services advertised by the mailing of coupons and flyers. The "Participation Agreement" in pertinent part states ( . . . ):

[Taxpayer] agrees to provide assistance in planning and preparation of rough copy. It is the sole responsibility of . . . to provide the following: proof, printing, insertion, addressing, postage, envelopes, and mailing for the distribution specified in the Agreement for the total sum of \$\_\_\_\_\_ . . .

The taxpayer engages and pays third parties to do the printing and mailing. The taxpayer charges its customer, the advertiser, for preparing and mailing the advertising material according to the size of the material and quantity mailed out. The taxpayer does not itemize its costs or charges for printing and mailing in contracting with or in billing the advertiser-vendor of the products and services. Each mailing will include a number of coupons and flyers advertising the products and services of a number of participating advertisers-vendors.

[1] WAC 458-20-218 (Rule 218), . . . , in pertinent part provides:

Advertising agencies are primarily engaged in the business of rendering professional services, but may also make sales of tangible personal property to their clients or others or make purchases of such articles as agents in behalf of their clients. Articles acquired or produced by advertising agencies may be for their own use in connection with the rendition of an advertising service or may be for resale as tangible personal property to their clients.

#### BUSINESS AND OCCUPATION TAX

The gross income received for advertising services, including commissions or discounts received upon articles purchased as agents in behalf of clients, is taxable under the service and other business activities classification. (Emphasis supplied.)

Clearly, the taxpayer's business activity is the rendition of advertising services to its customers, the participating advertisers-vendors. Generally, advertising agencies contract on behalf of their clients for publication space in newspapers, magazines and periodicals; or contract for media time by radio and television broadcasters; or contract for billboard space rentals. In this case, the taxpayer uses the printed word distributed by mail as the medium for advertising. Nonetheless, the taxpayer is rendering an advertising service.

[2] The taxpayer had reported its business income as subject to Printing/Publishing B&O tax and believes it was proper. Rule 143, . . . , in pertinent part provides:

#### BUSINESS AND OCCUPATION TAX

PRINTING AND PUBLISHING. Publishers of newspapers, magazines and periodicals are taxable under the printing and publishing classification upon the gross income derived from the publishing business.

Persons who both print and publish books, music, circulars, etc., or any other item, are likewise taxable under the printing and publishing classification. However, persons, other than publishers of newspapers, magazines or periodicals, who publish such things and do not print the same,

are taxable under either the wholesaling or retailing classification, measured by gross sales, and taxable under the service classification, measured by the gross income received from advertising.

. . . .

The retailing or wholesaling classification applies to articles of tangible personal property sold to persons for whom no advertising service is rendered and also to charges to clients for such articles if separately stated from charges for advertising services in billings rendered. (Emphasis supplied.)

The taxpayer is not a publisher of newspapers, magazines and periodicals. Coupons and advertising flyers mailed out quarterly or periodically do not constitute periodicals. The New World Dictionary, Second College Edition, provides the following definitions:

Periodical: published at regular intervals, as weekly, monthly, etc.; a periodical publication.

Publication: the printing and distribution, usually for sale, of books, magazines, newspapers, etc.; something published, esp. a periodical.

Circular: an advertisement, letter, etc., usually prepared in quantities for extensive circulation.

While the taxpayer's printed material is distributed periodically, that by itself does not make it a periodical publication. See WAC 458-20-127 (Rule 127), . . . , for discussion of periodicals as items sold or distributed in the same manner as magazines to the reading public. The taxpayer distributes the coupons and flyers advertising the products and services of the participating vendors who sell such products and services. We believe that the printed material are basically advertising circulars which are arranged for and distributed by the taxpayer in rendering its advertising service. The taxpayer does not "both print and publish . . . circulars, etc. or any other item." Therefore, the taxpayer is not taxable under the Printing and Publishing classification. Rule 143. The taxpayer publishes "such things" (circulars or any other item, which includes coupons) but does not print the same. Therefore, the taxpayer is "taxable" under the Service classification, measured by the

gross income received from advertising." Rule 143. We conclude that the auditor properly reclassified the income reported under the Printing and Publishing classification to the Service classification.

It is noted that if the taxpayer separately stated its charges for advertising services from the charges for the printed material, the latter charges would be taxable under the Retailing classification and subject to retail sales tax. See Rule 143. In this case, the taxpayer did not separately state its charges.

The taxpayer feels that the classification of Printing/Publishing or Radio and TV Broadcasting should apply to it because it competes with them and it would be more consistent with the intent of Title 82 RCW and the administrative regulations.

The primary objective of statutory construction is to carry out the intent of the legislature. The intent must be determined primarily from the statutory language itself. Christie-Lambert v. McLeod 39 Wn. App. 298 (1984). What the legislature intended is to be deduced, as far as possible, from what the legislature said. St. Paul & Tacoma Lumber Co. v. State, 40 Wn.2d 347 (1952). An administrative agency may not interpret the statutes it implements in a manner which has the effect of amending them. In re Meyers, 105 Wn. 2d 257 (1986).

The legislature clearly and unambiguously provided the statutory taxable classifications for Printing and Publishing and for Radio and TV Broadcasting in RCW 82.04.280; and in RCW 82.04.290, the Service classification for those persons engaged in business activities not specifically enumerated in other sections who render any type of service which does not constitute a sale at retail or wholesale. To include the taxpayer's business activity of rendering an advertising service within the taxpayer's requested classifications would in effect be amending the statutes which we cannot do.

The Department cannot give consideration to the taxpayer's allegation that when it commenced operations in . . . , it was advised by the Department to classify its income as subject to Printing and Publishing B&O tax where the taxpayer has no documentation to support the allegation. See Excise Tax Bulletin (ETB) 419.32.99, . . . .

As to the taxpayer's assertion that its taxability under the Service classification gives an unfair advantage to its competition and is discriminatory, and thus unconstitutional, we believe those are matters which properly should be addressed to the legislature or to the courts. The Department, as an administrative agency, must presume the constitutionality and validity of the laws it administers. The Department does not have authority to determine the constitutionality of the laws it administers; only the courts have that power. Bare v. Gorton, 84 Wn. 2d 380 (1974).

### Schedule III

The taxpayer has conceded that it was liable for the sales taxes on its purchases of the printed material used in rendering its advertising services. It did not pay sales tax because the printing/mailing company did not charge sales tax. Thus, the taxpayer became liable for the use tax in the same amount because of the complementary nature of the sales tax and use tax which the taxpayer recognizes. WAC 458-20-178 (Rule 178).

[3] The taxpayer requested the Department to pursue collection of the sales tax from the printer as it was their error in not collecting the sales tax and the printer did not have any valid resale certificate to avoid collecting the sales tax. Sales of printed matter to advertising agencies who purchase for their own use or for the use of their clients are sales for consumption and subject to the retail sales tax. WAC 458-20-144 (Rule 144).

[4] Sales tax statute, RCW 82.08.050, in pertinent part provides:

Where a buyer [the taxpayer in this case] has failed to pay to the seller [the printer in this case] the tax imposed by this chapter and the seller has not paid the amount of the tax to the department, the department may, in its discretion, proceed directly against the buyer for collection of the tax . . .  
(Bracketed words supplied.)

Thus, where the Department is proceeding directly against the buyer, the taxpayer in this case, it is seeking collection of the sales tax; that is, the "deferred sales tax" as the terminology used by the auditor. The same rates of tax apply whether use tax or sales tax is assessed.

The taxpayer's assertion that the collection of the sales tax is the responsibility of the printer/seller is correct as far as it goes. If the seller for any reason fails to collect the sales tax, it becomes personally liable to the Department for payment of the tax. However, the seller is only secondarily liable as the payment of the sales tax is primarily the obligation of the taxpayer-buyer. See RCW 82.08.050 where it further provides:

The amount of the tax, until paid by the buyer to the seller or to the department, shall constitute a debt from the buyer . . . and any buyer who refuses to pay any tax due under this chapter shall be guilty of a misdemeanor.

Furthermore, under RCW 82.12.020, the state may proceed directly against the taxpayer-user for payment of the use tax.

The taxpayer has proposed a settlement of 50 percent of the use tax obligation because of the hardship on its business and no intent to avoid the tax. We must reject this offer of settlement. Otherwise, we would be engaging in selective enforcement of the Revenue Act which the Department has no authority or discretion to engage in.

#### Assessment of Interest

RCW 82.32.050 in pertinent part provides:

If upon examination of any returns or from other information obtained by the department it appears that a tax . . . has been paid less than that properly due, the department shall assess against the taxpayer such additional amount found to be due and . . . shall add thereto interest at the rate of nine percent per annum from the last day of the year in which the deficiency is incurred until date of payment. (Emphasis supplied.)

RCW 82.32.105 in pertinent part provides:

If the department of revenue finds that . . . the failure of a taxpayer to pay any tax by the due date was the result of circumstances beyond the control of the taxpayer, the department of revenue shall waive or cancel any interest . . . imposed under this chapter with respect to such tax. The department of revenue shall prescribe rules for the

waiver or cancellation of interest . . . imposed by  
this chapter. (Emphasis supplied.)

Administrative Rule WAC 458-20-228 (Rule 228) states the two situations under which a waiver or cancellation of interest will be considered by the Department as follows:

1. The failure to pay the tax prior to issuance of the assessment was the direct result of written instructions given the taxpayer by the department.
2. Extension of the due date for payment of an assessment was not at the request of the taxpayer and was for the sole convenience of the department.

The taxpayer's basis for waiver of interest is that any underpayment of tax was not intentional, that the underpayment was caused by the lack of clear language in the administrative regulations that relate to its B&O tax classification, and that the use tax (deferred sales tax) consequences were caused by the error of the printer in not charging sales tax.

The taxpayer's reasons do not come within the ambit of the two situations of Rule 228 which permits waiver of interest. The assessment of interest upon tax deficiencies determined to be due is routine and usual as well as mandatory. Interest is simply assessed upon monies due the state earlier which by reason of nonpayment have been at the use and disposal of the taxpayer.

For the reasons expressed and the law set forth, there can be no waiver of the assessment of interest.

DECISION AND DISPOSITION:

The taxpayer's petition is denied.

DATED this 19th day of January 1988.