Cite as 4 WTD 273 (1987)

BEFORE THE INTERPRETATION AND 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. 87-347
. . .)	Registration No. . . .
)	Tax Assessment No. . . .

[1] **RULE 141 AND RCW 82.04.050:** RETAIL SALES AND B&O TAX -- MAILING BUREAU. Taxpayer who mails advertising but otherwise does not conform to the Rule 141 description of a mailing bureau is not making retail sales. This activity is B&O taxable under the Service category.

[2] **RULES 141, 143, AND 218:** B&O TAX -- NEWSPAPER ADVERTISING -- MAIL DISTRIBUTION OF. Distribution of direct mail advertising wrapped in qualified community newspaper does not qualify for the Printing and Publishing B&O classification.

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: August 27, 1986

NATURE OF ACTION:

Department re-classified taxpayer's distribution of direct mail advertising from Service B&O to Retailing B&O and subjected income to retail sales tax. Taxpayer protests.

FACTS AND ISSUES:

Dressel, A.L.J. -- . . . (taxpayer) provides a direct mail service for advertisers. Its books and records were audited by the Department of Revenue (Department) for the period October 1, 1983 through December 31, 1985. As a result the Department issued the

above-referenced tax assessment for state excise taxes and interest totaling $ . . . . During the audit period the taxpayer reported the great majority of its income under the Service and Other Business Activities classification of the business and occupation tax. The Department determined that was error and re-classified the income for B&O purposes to the Retailing category and, in addition, subjected it to retail sales tax. The taxpayer is appealing that action in the present proceeding.

In its brief the taxpayer describes the activity at issue as follows:

> . . . is a national company engaged in the direct mail business. . . . has perfected its own unique form of direct mail advertising under the proprietary name . . . . Under . . . 's . . . program, individually preprinted advertising pieces are mailed as one piece, thereby permitting . . . to spread the fixed third-class postage cost among several advertisers. A sample of a recent . . . piece mailed from . . .'s . . ., Washington facility is attached as Exhibit A.
>
> . . . does not print advertising material itself. Advertisers contract with their own printers to produce and deliver the advertising material, pre-folded and prepared for mailing, to . . .'s facility. In accordance with third-class postal regulations, . . . does not place advertising pieces in envelopes nor does it label any customer's piece. Exhibit A includes, however, a sample of the separate detached address card which accompanies each . . . piece. Because . . .'s postal indicia on the detached address cards represents actual postage, . . . retains sole and exclusive control over the detached address cards until they are deposited in the U.S. mail.

After the taxpayer has received all of the pieces for a particular mailing, it assembles them by machine such that the smaller flyers or coupons are contained inside the largest folded piece. No further packaging is done. The advertisements are then mailed to addresses around the state with the referenced address card which typically includes discount coupons on its backside.

With 41 percent of the company's Washington distribution, there is an additional enclosure. A community-type newspaper, the . . . , serves as the "wrap piece" for the advertising that is sent to 466,155 Pierce and King County residences each week. There is no charge for the newspaper which has been previously accepted by the Department as qualifying as a "newspaper" as that word is defined in WAC 458-20-143 (Rule 143).

In mailing the advertising materials, whether with or without the newspaper, the taxpayer organizes its mailing pieces such that they are in the exact walk sequence of postal carrier routes. This enables the taxpayer to take advantage of the lowest third-class regular bulk mail rate which is categorized as carrier route presort. By consolidating the numerous advertising pieces for a single mailing and by arranging the distribution of those pieces as aforesaid, the taxpayer can distribute advertising much more economically for its customers than if the latter parties were to mail their ads individually.

The Department's basis for reclassifying the income from Service to Retailing B&O is WAC 458-20-141 (Rule 141). Under that administrative regulation mailing bureaus are described as altering, imprinting or improving tangible personal property which activities are included in the definition of "retail sale" as found in RCW 82.04.050. Thus, mailing bureaus are instructed in Rule 141 to report income for B&O purposes under the Retailing category and to collect retail sales tax.

The taxpayer counters by saying that it renders a service as opposed to making a retail sale. It suggests that its advertising service income has been properly reported under the Service category of the B&O tax and that it does not make retail sales because it simply assembles and mails the advertising materials it receives. Because it does not alter, imprint, or improve tangible personal property, it is not making retail sales and is not liable for retail sales tax on the income it receives for distribution of these advertising materials.

In addition, the taxpayer takes the position that those advertising materials distributed with the [newspaper] are not subject to retail sales tax because of the statutory exemption from same which is allowed to qualified newspapers. The taxpayer extends that argument to B&O tax by contending that income from the distribution of the newspaper advertising is not only exempt by statute from retail sales tax but also is properly B&O categorized as Printing and Publishing rather than Service. Because it has reported all of its income under the higher Service classification rate, the taxpayer claims it is due a refund of B&O tax on the newspaper portion of its total advertising distributions which it says should have been taxed at the lower Printing and Publishing rate.

Finally, taxpayer argues that it functions as a government contractor in that it assists the U.S. Postal Service in distributing mail by presorting its advertising publications for efficient dissemination. Were the Department permitted to impose the Washington sales tax on the taxpayer's operation, it would, in effect, be levying a tax against the United States in violation of the Supremacy Clause of the U.S. Constitution. Also, such a tax on the described activity would be violative of the Equal Protection clauses of the U.S. and Washington Constitutions in that the

taxpayer's distribution of advertising through the mail would be subject to a tax which would not be imposed on such distribution were it accomplished through newspaper supplements or via door-to-door delivery persons.[1]

The issues to be decided hereafter, then, are: (1) Is the taxpayer's direct mail advertising a retail sale activity subject to Retailing B&O and retail sales tax? (2) Is that portion of the taxpayer's mailings which is sent with the . . . newspaper exempt of retail sales tax and subject to the Printing and Publishing B&O classification? (3) Is Washington's retail sales taxation of the taxpayer's direct mail advertising business unconstitutional?

DISCUSSION:

Section 458-20-141 of the Washington Administrative Code (Rule 141) addresses mailing bureaus. The rule reads in part as follows:

> Mailing bureaus mail material for the publishing industry and also mail folders, bulletins, form letters, advertising publications, flyers, and similar material for other customers. As part of these services, the bureaus also label, fold, enclose and seal. All of these activities come within the definition of "sale at retail" (RCW 82.04.050) as constituting "labor and services rendered in respect to . . . the . . . altering, imprinting or improving of tangible personal property of or for consumers."
>
> The gross proceeds received by mailing bureaus from charges made to consumers, whether such charges are itemized or lump sum, are taxable under the retailing classification.

The statutory law upon which the quoted portion of Rule 141 is based is RCW (Revised Code of Washington) 82.04.050 which defines "retail sale." The statute reads in part:

> (1) "Sale at retail" or "retail sale" means every sale of tangible personal property (including articles produced, fabricated, or imprinted) to all persons irrespective of the nature of their business and including, among others, without limiting the scope hereof, persons who install, repair, clean, alter, improve, construct, or decorate real or personal property of or for consumers . . .

---

[1]In making this argument the taxpayer apparently is addressing only the advertising which is mailed without the . . . newspaper.

> (2) The term "sale at retail" or "retail sale" shall include the sale of or charge made for tangible personal property consumed and/or for labor and services rendered in respect to the following: (a) The installing, repairing, cleaning, altering, imprinting, or improving of tangible personal property of or for consumers, including charges made for the mere use of facilities in respect thereto . . .

[1] The administrative rule, which is designed to "implement" the statute, presumes that, in addition to their mailing function, mailing bureaus also label, fold, enclose and seal. It further presumes that labeling, folding, enclosing and sealing equate to installing, repairing, cleaning, altering, improving, constructing or decorating of personal property so, therefore, the former activities constitute "retail sales" pursuant to the statutory definition of that term.

Of the numerous administrative rules promulgated by the Department of Revenue which address particular business endeavors, the one which most closely describes the taxpayer's activity is WAC 458-20-141 which purports to tell what mailing bureaus do. At first glance "mailing bureau" seems to be a pretty good categorization of the taxpayer. When one examines more closely, however, the actual work of the taxpayer, one sees that the detailing of a mailing bureau's operations as contained in the rule does not exactly track with what this particular taxpayer does. The taxpayer here claims that it receives the advertising materials in a completely ready-for-mailing state such that the taxpayer doesn't even have to fold them. All it has to do is assemble the assorted flyers[2] one inside another and mail them with the detached address card to residences around the state. The taxpayer insists that it does not label[3], fold, enclose, or seal. It follows, based on the connection between the rule and the statute as previously stated, that if the taxpayer doesn't do any of the activities singled out in the rule, it is not engaged in making retail sales.

Although it could be argued that the taxpayer is a retailer in that it "encloses"[4] certain advertising pieces within others, we don't find such a position capable of being sustained. 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 Wa.2d 822, 567 P.2d 1125 (1977).

---

[2]With the . . . newspaper where applicable.

[3]Other than the detached address card.

[4]See Rule 141.

No valid reason is seen for not applying the same treatment to an administrative rule. According to Webster's New World Dictionary, (second college edition, copyright 1974), "enclose" is defined thusly:

> 1. to shut in all around; hem in; fence in; surround 2. to insert in an envelope, wrapper, etc., often along with something else [to enclose a check with one's order] 3. to contain

The taxpayer does not "shut in all around" the advertising materials at issue nor does what it does otherwise fit the definition. Only the side of the flyers next to the folded side of the wrap piece is contained. The other three sides are open.

It is, therefore, concluded that the taxpayer's direct mail operation as described above and by the taxpayer's attorney, is a service business subject to the Service and Other Activities classification of the B&O tax. Accordingly, its activities are not of a retail nature and are not subject to Retailing B&O or retail sales tax. We wish to note, however, that if the taxpayer's mail advertising functions change such that its activities parallel more closely those of a typical mailing bureau as described in Rule 141, it should report its taxes in accordance with that rule.

Frankly, we perceive that it was the Department's intent to include the taxpayer within the group that is taxable according to the provisions of Rule 141. We do agree, though, with the taxpayer's attorney that we would be required to ignore the precise words of the rule to find that the taxpayer's business operation fits the rule as presently written. The taxpayer should be permitted to rely on the literal expression of the administrative regulation. If the Department subsequently amends the rule so that it conforms more closely to what this taxpayer actually does, new and different tax applications may very well attach. It is the taxpayer's responsibility to keep apprised of such changes in the rules or statutes. See ETB 310.32.101.230, ...

Also, before moving on to the next issue, we wish to observe that we understand the reason for the auditor's reclassification of the taxpayer's income in this case. It was based on a letter of several years ago which incorrectly described the taxpayer's activities. Taxpayer's counsel has explained that discrepancy to our satisfaction.

We next address the issue of whether or not the income derived from the mailing of advertising with the . . . newspaper is subject to B&O tax under the Printing and Publishing classification rather than the Service and Other Activities classification. WAC 458-20-143 (Rule 143) states in part:

WAC 458-20-143 Publishers of newspapers, magazines, periodicals.

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.

[2] The taxpayer here is neither the printer nor publisher of the newspaper or the advertising sections contained therein. The printing of both is done by third party contractors at the behest of the [newspaper] and the advertising businesses (or advertising agencies) respectively. It is also they who cause the printed material to be published and distributed even if the taxpayer is the agent who effects the final stage in that distribution. In so doing the taxpayer is rendering a service. It is not selling tangible personal property. Its service of distribution is also not one of the limited number of service functions which are included within the retail sale definition at RCW 82.04.050. Of the business activities addressed in chapter 458-20 WAC, the taxpayer's comes closest to that described in Rule 141 (mailing bureau) and in WAC 458-20-218 (Rule 218-advertising agency). We have already decided, however, that this particular taxpayer doesn't fit the former category. If it fits the latter, its gross income is generally subject to the Service B&O tax.[5] Perhaps a better category, considering that the taxpayer also does not perform many of the typical advertising agency functions and limits its role almost exclusively to the distribution aspect of advertising, is the catch-all rule on Service and Other Business Activities, WAC 458-20-224 (Rule 224). Under this authority businesses not otherwise classified in chapter 82.04 RCW are also B&O taxable under the Service category. Because both rules specify the same category and rate, we decline to choose one rule over the other. We conclude that income realized from the taxpayer's distribution of advertising with the . . . newspaper is taxable just like income resulting from its advertising distributions without the newspaper, viz; under the Service and Other Activities category of the B&O tax.

The third issue, the constitutionality of the sales tax on direct mail advertising, is moot in that we have already ruled, for other reasons, that sales tax does not apply. The same is true of the taxpayer's argument that income from advertising distributed with the . . . newspaper is exempt of retail sales tax because of the newspaper exemption of RCW 82.08.0253.

---

[5]Rule 218.

DECISION AND DISPOSITION:

The taxpayer's petition is granted in large part and denied in small part.

DATED this 20th day of November 1987.