

Cite as Det. No. 99-118, 20 WTD 266 (2001)

BEFORE THE APPEALS DIVISION  
DEPARTMENT OF REVENUE  
STATE OF WASHINGTON

In the Matter of the Petition For Correction of )	<u>D E T E R M I N A T I O N</u>
Assessment of )	
)	No. 99-118
)	
... )	Registration No. . . .
)	FY. . . /Audit No. . . .

RULE 143; RCW 82.04.280; ETA 901: B&O TAX -- PUBLISHING -- PERIODICAL -- SUPPLEMENT. Whether regional directories are supplements or special editions of a single publication, or separate publications issued annually depends upon whether all issues are intended to be distributed to the same readers at least once every three months.

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.

NATURE OF ACTION:

A Washington Corporation, which published industry specific directories, protests the reclassification of its advertising receipts.<sup>1</sup>

FACTS:

M. Pree, A.L.J. -- . . . (taxpayer) published industry specific directories in Washington. Originally, most directories were published annually for customers located in the Northwest United States. The taxpayer reported its advertising receipts under the service and other activities business and occupation (B&O) tax classification. In the early 1990s, the taxpayer began to supplement its directory by publishing directories in other regions of the country. Then, with a change in the law, the taxpayer began reporting its receipts under the printing and publishing classification.

The Department of Revenue (Department) reviewed the taxpayer's books and records for the period January 1, 1993 through December 31, 1995. On November 19, 1997, the Department's Audit Division issued the assessment referenced above. The taxpayer protested the assessment

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<sup>1</sup> Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410.

of \$. . . business and occupation tax plus interest resulting from the reclassification of the taxpayer's income from the printing and publishing classification to the service and other activity classification.

The taxpayer's primary publications are industry specific. They are known as ". . ." and ". . .'s." The taxpayer only protests the portion of the assessment for ". . ." These are essentially specialized phone book yellow pages. The disputed receipts were not from the sale of the directories, but rather from the sale of advertising space in the directories. After printing, the taxpayer gives the directories away.

The taxpayer contracts with three different printers to print the pages, the covers, and bind the directories. The taxpayer paid sales/use tax to the printers. Independent agencies located both within and without Washington sell the advertising space.

The taxpayer publishes various editions of the publication for different regions of the country. Each edition has phone numbers for . . . services and goods in the particular region as well as for advertisers from other areas who wish to be listed in that region. Otherwise, the regional directories are essentially the same except for geographic differences. The taxpayer expanded to these regions in part to keep its sales staff busy selling advertising throughout the year.

The taxpayer contends the directories meet the definition of periodicals. They are printed publications, which are not newspapers. According to the taxpayer, it publishes the directories at regular intervals of at least once every three months, but typically every month or two. The intervals do not appear to be stated other than each regional directory will identify a month and year. Some directories contain designations indicating yearly intervals for those regions, such as "1996 Edition" or "14<sup>th</sup> Annual Edition."

The Audit Division found that the directories did not meet the statutory requirement that a periodical be issued at regular intervals of at least once every three months. For 1995, the Audit Division found all but one directory<sup>2</sup> was published once annually for each region. The Audit Division reasoned that the taxpayer's customers purchased advertising space to promote their business and increase their sales. Therefore, normally, a business in one region would be less likely to advertise in another region. While the format of the publication would remain the same, the Audit Division determined each edition was a separate publication rather than a special edition or supplement. Likewise, the taxpayer generally distributed the publications by region, not nationally.

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<sup>2</sup> The directory for one state was published twice during 1995.

## ISSUE:

Were the directories periodicals, for which the advertising receipts were subject to taxation under the printing and publishing classification?

## DISCUSSION:

A special, low rate of business and occupation (B&O) tax is imposed upon receipts of printers and publishers under RCW 82.04.280, which provides in part:

Upon every person engaging within this state in the business of: (1) Printing, and of publishing newspapers, periodicals, or magazines;

...

As used in this section, "periodical or magazine" means a printed publication, other than a newspaper, issued regularly at stated intervals at least once every three months, including any supplement or special edition of the publication.

This portion of the statute was last revised in 1994.<sup>3</sup> While the definition of periodicals and magazines changed, publishers of periodicals and/or magazines were always entitled to a special rate of tax on advertising income. WAC 458-20-143 (Rule 143) and ETA 901. Other publishers (except newspapers) who did not print their publications were taxed at the higher service and other activities rate on their advertising income. The taxpayer is not a printer, only a publisher. Therefore, if the directories do not qualify as magazines or periodicals, the taxpayer's advertising receipts are taxable at the higher rate.

The statute does not define "publication." In the June 8, 1994 Special Notice, the Department recognized publications qualify as periodicals regardless of content. *See also Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 229 (1987). We must differentiate a single publication issued frequently, from several similar publications issued less frequently to determine whether publications are issued at least every three months. By using the language, "including any supplement or special edition of the publication" the legislature intended to tax advertising receipts from supplements or special editions in a similar manner as receipts from magazines or periodicals. However, the legislature may have considered that special editions and supplements are inherently not issued at regularly stated intervals.

The Washington Supreme Court provided guidance regarding how we should interpret statutes such as RCW 82.04.280:

The words of a statute, unless otherwise defined, should be given their usual and ordinary, everyday meaning. *Streng*, at 29 [89 Wn.2d 23, 569 P.2d 60 (1977)]; *New*

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<sup>3</sup> Other portions of RCW 82.04.280 were revised in 1998.

*York Life Ins. Co. v. Jones*, 86 Wn.2d 44, 47, 541 P.2d 989 (1975). If a tax statute is ambiguous the statute must be construed most strongly against the taxing authority. *Puyallup v. Pacific N.W. Bell Tel. Co.*, 98 Wn.2d 443, 448, 656 P.2d 1035 (1982); *Department of Rev. v. Hoppe*, 82 Wn.2d 549, 512 P.2d 1094 (1973); *Gould v. Gould*, 245 U.S. 151, 62 L. Ed. 211, 38 S. Ct. 53 (1917).

Regarding exemptions and deductions *Group Health Coop. of Puget Sound, Inc. v. State Tax Comm'n*, 72 Wn.2d 422, 429, 433 P.2d 201 (1967) states:

In connection with each, the burden of showing qualification for the tax benefit afforded likewise rests with the taxpayer. And, statutes, which provide for either are, in case of doubt or ambiguity, to be construed strictly, though fairly and in keeping with the ordinary meaning of their language, against the taxpayer.

*Group Health v. Department of Rev.* 106 Wn.2d 391, 401-402, 722 P.2d 787 (1986)

If RCW 82.04.280 did not exist, the taxpayer's advertising receipts would be taxed under the higher rate of the service and other activities classification. RCW 82.04.280 confers a benefit upon the taxpayer. Therefore, under the rules of statutory interpretation, we must construe RCW 82.04.280 narrowly.

The Audit Division contends each directory was a separate publication issued annually. The taxpayer contends the entire set of directories constituted a single publication with supplements or special editions issued at least every three months. We must determine whether the regional directories were supplements or special editions of a single publication, or separate publications issued annually.

There appear to be at least two requirements in RCW 82.04.280, which may be relevant in this case. First, did the taxpayer issue the directories regularly at stated intervals at least once every three months? While during the audit period it appears directories were issued at least every three months, we fail to see any "stated" interval of at least three months or less. At least one of the directories provided by the taxpayer includes on the cover "1996 Edition" implying an annual publication. On the title page, most of the directories designate the month as well as the year of publication. This review of the sample directories submitted by the taxpayer reveals somewhat contradictory evidence regarding whether they are separate regional publications printed annually or supplemental editions of a single publication issued at regularly stated intervals at least once every three months.

While the definition of "periodical or magazine" includes any supplement or special edition, RCW 82.04.280 requires that if used to meet the "at least every three months" requirement, the supplements or special editions be issued regularly at stated intervals. However, "special editions" are special, not regular. They are not expected or intended to be issued at stated intervals.

Supplements add to the original. Clearly, the taxpayer issues annual directories. To determine whether the supplements are part of the original, we should look to see if the readers received the original directories, which were supplemented, or if they only received the supplements because the supplements were in fact separate publications. Rather than look at the content of the directories to determine whether or not the regional directories are separate publications or supplemental editions of a single publication, we believe it is more appropriate to examine their distribution. If the taxpayer distributed the directories in a manner indicating an intent that all or most of the readers of the original directory were intended to receive supplements at least every three months, we could consider the regional directories part of the original publication. If however, the taxpayer distributed the directories by region, with most of the directories applicable to a specific region distributed primarily within that region, we would consider each directory a separate publication.

We understand that advertisers may vary in a single publication depending upon where it is distributed. Likewise, we understand identical advertisements may appear in different publications. A better test would be the commonality or lack thereof of the intended readers of the publication; those to whom the publication is ultimately circulated. If each batch of the supplemental editions is intended to be distributed to the same readers, then they would truly be supplements of the same publication. If on the other-hand, a specific edition is distributed to readers in a particular location rather than all readers of the publication, we would consider that regional directory a single publication issued annually, not a periodical eligible for the reduced tax rate.

The taxpayer stated all [advertisers] received all directories. The proper analysis would be to consider not whether advertisers received all directories, but [whether] the actual readers to whom the directories are actually distributed [received all directories].

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#### DECISION AND DISPOSITION:

We remand the file to the Audit Division to review records the taxpayer makes available to the Audit Division within the next 60 days, or longer if the Audit Division agrees. The taxpayer's petition is granted if it establishes the regional directories were distributed in similar proportions to its readers throughout the nation. Otherwise, the assessment will be sustained. After the Audit Division provides the taxpayer notice of its findings, either the assessment will be denied, or if sustained, the taxpayer will be granted an opportunity for reconsideration.

Dated this 30<sup>th</sup> day of April 1999.