Cite as Det. No. 99-143R, 21 WTD 106 (2002)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Correction of Assessment of . . .	)))))))	F I N A L D E T E R M I N A T I O N No. 99-143R[1] Registration No. . . . FY. . ./Audit No. . . .

[1] RCW 82.04.260: B&O TAX -- FOOD MANUFACTURING. RCW 82.04.260 does not establish a sub-category of food manufacturing for B&O tax purposes, applicable to all food manufacturing. Rather, it establishes a handful of specific and narrow classifications, applicable to only a few crops and food products, and limited to certain types and stages of processing.

[2] RCW 82.04.260: B&O TAX -- MANUFACTURING -- SOYBEANS INTO SOYBEAN OIL -- CANOLA INTO CANOLA OIL. RCW 82.04.260's provision relating to manufacturing soybeans into soybean oil and canola into canola oil does not cover all participants in the manufacturing process, between receipt of the beans for processing and creation of finished oil.

[3] STATUTES -- CONSTRUCTION -- ASSUMING UNINTENTIONAL OMISSIONS. The Department cannot assume the Legislature unintentionally left something out of a statute and read the "omission" into the statute.

[4] RULE 100(5): B&O TAX -- ISSUE OF FIRST IMPRESSION; INDUSTRY-WIDE IMPACT. That an issue is one of first impression or has industry-wide impact or significance does not allow the Department greater flexibility in interpreting applicable tax statutes.

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.

[1] The original determination, Det. No. 99-143, is published at 21 WTD 97 (2002).

NATURE OF ACTION:

A processor of raw vegetable oils into specialty cooking and salad oils seeks reconsideration of Det. No. 99-143, which determined the taxpayer's activity was manufacturing, but did not come within the special business and occupation (B&O) tax classification in RCW 82.04.260 relating to certain manufacturers of vegetable oils.[2]

FACTS:

Prusia, A.L.J. -- The taxpayer is a corporation doing business in . . ., Washington. Its principal activity is processing partially refined soybean and canola oil into "finished" cooking and salad oils. It purchases soybean and canola oil in bulk, by the rail carload, modifies the oil to meet the requirements of various categories of users, packages the oil, and sells the packaged oil to wholesalers and distributors. It makes sales both in Washington and out of state. The facts are set out in Det. No. 99-143, and will be repeated here only to the extent required for clarity.

The taxpayer petitions for reconsideration of Det. No. 99-143.[3] In that determination, we reversed the Audit Division's classification of the activity under the wholesaling B&O classification.[4] However, we also rejected the taxpayer's contention that the appropriate classification of its business for B&O tax purposes was under either of two classifications in RCW 82.04.260 -- a trader in specified agricultural commodities or a specified manufacturer of vegetable oils. We determined the appropriate B&O classification of the taxpayer's activity was general manufacturing, subject to the higher B&O rate set out in RCW 82.04.270. We remanded the file for adjustment of the assessment consistent with our determination.

On reconsideration, the taxpayer makes eight arguments. First, it contends RCW 82.04.260 establishes a sub-category of food manufacturing for B&O tax purposes, applicable to all food manufacturing. Related to the first argument, it contends Det. No. 99-143 singles the taxpayer out for a higher B&O rate than is applicable to other food manufacturers, resulting in grossly unfair, unjust, and discriminatory treatment.

Third, the taxpayer contends Det. No. 99-143 misinterpreted former RCW 82.04.260(2) (since renumbered as subsection (1)(a)), and that properly interpreted, the category established in that subsection covers the taxpayer's activity. It argues the phrase "the business of manufacturing soybeans into soybean oil [or] canola into canola oil" covers all participants in the manufacturing process, between receipt of the beans or canola for processing and creation of "finished" or useable oil. It is a participant in that process. Under that argument, the taxpayer asserts Det. No. 99-143 failed to give weight to the following facts. The oils the taxpayer purchases for further processing are so minimally processed they cannot be sold for consumption or industrial use, and must be further processed. The business of manufacturing soybeans into useable or finished soybean oil, and manufacturing canola into useable or finished canola oil, is a multi-step process,

[2] Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410.
[3] The taxpayer filed a petition for reconsideration on July 27, 1999, and supplemented the petition on April 3, 2000.
[4] The Audit Division examined the taxpayer's books and records, and issued an assessment, for the period January 1, 1994 through September 30, 1997. The total amount of the assessment was $. . . .

and the taxpayer's activities are a necessary link in a chain of manufacturing steps before oils are sold and distributed to wholesalers and industrial users. Said another way, the taxpayer's role in the manufacturing process is that of a relay team member which is responsible for the intermediate and final steps of the total process.

Fourth, the taxpayer states its is the only processor of its kind in Washington, and argues it is likely its activities have not been clearly and specifically categorized under RCW 82.04.260 only because of its uniqueness.

Fifth, the taxpayer contends that if former RCW 82.04.260(2) does not clearly cover its activity, there is sufficient ambiguity in the classification that the taxpayer should be afforded relief under a fairness concept the taxpayer labels the "Fair Tax Doctrine," as stated in *Weyerhauser Timber Co. v. Henneford*, 185 Wash. 46, 53 P.2d 308 (1936). That is, "in case of doubt, taxing statutes are most strongly construed against the government and in favor of the citizen." *Henneford* at page 51.

Sixth, the taxpayer states it faces fierce competition from processors in others states, it is the only processor of its type in Washington, and taxing it under a higher rate than the special rate it seeks likely will put it out of business. It contends former RCW 82.04.260(2) has sufficient flexibility that, for public policy reasons, the Department should apply the special rate to the taxpayer.

Seventh, the taxpayer argues its business has major industry-wide impact, in that its presence changes the statewide oil pricing structure, allowing thousands of food operators in the state to enjoy substantial dollar savings, which total millions of dollars annually. For that reason, the Department should apply the lower tax rate to its activities.

Eighth, the taxpayer argues the spirit and letter of RCW 82.04.260, as argued in its third argument, together with the first impression guideline in WAC 458-20-100 (Rule 100), "gives the Department the discretion, authority, and flexibility to rule [the taxpayer's] activities as appropriate for RCW 82.04.260(1)(a) tax status."

ISSUES:

1. Does RCW 82.04.260 create a sub-category of food manufacturing applicable to all food manufacturing?

2. Does taxing the taxpayer under the general manufacturing B&O classification subject the taxpayer to a higher B&O rate than is applicable to other food manufacturers?

3. Are the activities of a manufacturer of "finished" soybean and canola oils that begins its processing with partially-processed oils purchased from other processors a manufacturer covered by former RCW 82.04.260(2) (since renumbered subsection (1)(a))?

4. Can the Department categorize the taxpayer's activity under RCW 82.04.260 on the assumption that the Legislature would have specifically categorized the taxpayer's activity under that statute had it been made aware of the taxpayer's business?

5. Is RCW 82.04.260 ambiguous, and if so, must the ambiguity be resolved in favor of including the taxpayer's activity under the special oil manufacturing classification in that statute?

6. Is RCW 82.04.260 sufficiently flexible that the Department may include the taxpayer's activity under the special oil B&O classification in that statute?

7. Is the taxpayer's industry-wide impact argument a basis for applying the rate it seeks to its activities?

8. Does the Department's "issue of first impression" guideline in Rule 100 provide the Department with discretion and flexibility to interpret RCW 82.04.260 as applying to the taxpayer's activities?

DISCUSSION:

B&O tax is imposed upon the privilege of engaging in business activities within Washington. The measure of the tax as well as the tax rate vary depending upon the nature (or classification) of the activity. RCW 82.04.220.

RCW 82.04.260 specifies the measure of tax and tax rate applicable to buyers, wholesalers, manufacturers, and processors of certain foods and byproducts. The version in effect during the audit period provided, in relevant part:

> (1) Upon every person engaging within this state in the business of buying wheat, oats, dry peas, dry beans, lentils, triticale, canola, corn, rye and barley, but not including any manufactured or processed products thereof, and selling the same at wholesale; the tax imposed shall be equal to the gross proceeds derived from such sales multiplied by the rate of 0.011 percent.
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> (2) Upon every person engaging within this state in the business of manufacturing wheat into flour, barley into pearl barley, soybeans into soybean oil, canola into canola oil, canola meal, or canola byproducts, or sunflower seeds into sunflower oil; as to such persons the amount of tax with respect to such business shall be equal to the value of the flour, pearl barley, oil, canola meal, or canola byproduct manufactured, multiplied by the rate of 0.138 percent.

RCW 82.04.270 specifies the measure of tax and tax rate applicable to most wholesalers. The version in effect during the audit period provided, in pertinent part:

> (1) Upon every person except persons taxable under subsections (1) or (8) of RCW 82.04.260 engaging within this state in the business of making sales at wholesale; as to such

> persons the amount of tax with respect to such business shall be equal to the gross proceeds of sales of such business multiplied by the rate of 0.484 percent.

RCW 82.04.240 specifies the measure of tax and tax rate applicable to most manufacturers. The version in effect during the audit period provided, in pertinent part:

> Upon every person except persons taxable under RCW 82.04.260(2), (3), (4), (5), (7), (8), or (9) engaging within this state in business as a manufacturer; as to such persons the amount of the tax with respect to such business shall be equal to the value of the products, including byproducts, manufactured, multiplied by the rate of 0.484 percent.
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> The measure of the tax is the value of the products, including byproducts, so manufactured regardless of the place of sale or the fact that deliveries may be made to points outside the state.

Any activity that has not been specifically classified or exempted from B&O taxation is subject to B&O tax at the other business or service classification rate. RCW 82.04.290(4).

RCW 82.04.110 defines the term "manufacturer" as follows:

> "Manufacturer" means every person who, either directly or by contracting with others for the necessary labor or mechanical services, manufactures for sale or for commercial or industrial use from his or her own materials or ingredients any articles, substances, or commodities.

In Det. No. 99-143, we found that the taxpayer's processing activity constituted manufacturing. The taxpayer does not disagree with that finding. The taxpayer's disagreement with Det. No. 99-143 is the determination's conclusion that the special manufacturing classification in former RCW 82.04.260(2) did not apply to its activities.

We have considered the arguments the taxpayer makes on reconsideration, and the facts it emphasizes on reconsideration. We continue to believe the taxpayer's activities do not fit within the special manufacturing classification in former RCW 82.04.260(2) (currently codified as RCW 82.04.260(1)(a)). We incorporate here by reference our analysis of this issue in Det. No. 99-143. We will now address the new or revised arguments the taxpayer makes on reconsideration.

[1] We find that RCW 82.04.260 does not establish a sub-category of food manufacturing for B&O tax purposes, applicable to all food manufacturing. It establishes a handful of specific and narrow classifications, applicable to only a few crops and food products, and expressly limited to certain types of processing. For example, manufacturing wheat into wheat flour is covered, but not manufacturing oats into oat flour. *See* WAC 458-20-234 (Rule 234). Manufacturing sunflower seeds into sunflower oil is covered, but not manufacturing sesame seeds into oil or peanuts into oil. Manufacturing of seafood products is expressly limited to products that remain in a raw state at the completion of the manufacturing by the taxpayer. Manufacturing of perishable meat products is limited to slaughtering, breaking, and/or processing, and we have

concluded that activity does not include manufacturing that combines meat with other food items to produce a different final product. Det. No. 98-190, 18 WTD 402 (1999).

The taxpayer contends Det. No. 99-143 singles it out for a higher B&O rate than is applicable to other food manufacturers, resulting in grossly unfair, unjust, and discriminatory treatment. That is simply not the case. Manufacturers of food products are subject to the B&O rate applicable to manufacturing in general, unless their activities fall within a specific category. For example, in Det. No. 98-190, *supra*, we determined the activity of manufacturing chicken products which combine chicken meat with other food items to produce a different product, such as frozen chicken Kiev, is subject to the general manufacturing rate, not the special rate in RCW 82.04.260 applicable to slaughtering.

[2] We disagree with the taxpayer's third argument, that the Legislature intended the phrase "the business of manufacturing soybeans into soybean oil [or] canola into canola oil" to cover all participants in the manufacturing process, between receipt of the beans or canola for processing and creation of "finished" or useable oil. We disagree for several reasons.

First, statutory language is to be construed strictly, though fairly, in keeping with the ordinary meaning of the language employed. *Group Health Coop. of Puget Sound, Inc. v. Wash. State Tax Comm'n*, 72 Wn.2d 422, 433 P.2d 201 (1967). The literal or plain meaning of the provision relied upon by the taxpayer is that processors whose manufacturing process begins with soybeans or canola and ends with soybean oil or canola oil are subject to a the special rate. The taxpayer's manufacturing process does not fit that profile.

Second, RCW 82.04.110 defines the term "manufacturer" with reference to the articles or commodities a person manufactures "from his or her own materials or ingredients." The materials or ingredients from which the taxpayer manufactures specialty oils are oils, not beans or canola. It is a manufacturer of partially refined oils into finished or specialty oils.

Third, statutory language should be construed so that no word is superfluous, void, or insignificant. *UPS v. Dept. of Revenue*, 102 Wn.2d 355, 687 P.2d 186 (1984). The taxpayer's argument would have us give little significance to the words "soybeans into" and "canola into."

Fourth, the taxpayer's argument would have us expansively read what amounts to a partial exemption from the manufacturing B&O tax. For us to do so would be contrary to the rule of construction applied by the courts that exemptions will be narrowly construed in favor of the application of the tax. *See, Budget Rent-A-Car, Inc. v. Department of Revenue*, 81 Wn.2d 171, 500 P.2d 764 (1972); *Evergreen-Washelli Memorial Park Co. v. Dept. of Revenue*, 89 Wn.2d 660, 574 P.2d 735 (1978); *Overton v. Economic Assistance Authority*, 96 Wn.2d 552, 637 P.2d 652 (1981); *Martinelli v. Dept. of Revenue*, 80 Wn. App. 930, 940, 912 P.2d 521 (1996).

Fifth, we have held a manufacturer that produces intermediate substances enumerated in RCW 82.04.260 does not qualify for the special rate provided by the statute, if the qualifying substances are merely intermediate substances produced in a continuous production process that produces non-qualifying final products. It is the final products that are taxed and determine

whether the taxpayer qualifies for the special rate. If the qualifying intermediate substance is withdrawn from the manufacturing process for sale or some different industrial or commercial use, it is the final product, and the B&O tax, at the special rate, applies to its value. *See*, Det. No. 98-190, *supra*. In the taxpayer's industry, the upstream manufacturer withdraws the oil from the manufacturing process and sells it. At that point, the B&O tax applies, and the partially refined oil is the product to which the special rate applies. The taxpayer's activities constitute a separate manufacturing process, which is not a qualifying one under the statute.

[3] The taxpayer's fourth argument is that it's likely its activities have not been clearly and specifically categorized under the statute only because of its uniqueness. It's not clear whether the taxpayer means to argue that the Legislature overlooked the taxpayer because it is the only manufacturer of its kind, or the Legislature simply did not attempt to list every manufacturer it intended to cover. In either case, the argument does not provide a basis for reading the taxpayer's activities into the statute. If the Legislature simply overlooked the taxpayer, the taxpayer's only avenue of relief is to ask the Legislature to cure the oversight. It is well settled that courts and administrative bodies will not read into an act provisions they conceive the legislative body has unintentionally omitted. *Dept. of Labor & Industries v. Cook*, 44 Wn.2d 671, 269 P.2d 962 (1954). If the taxpayer's argument is the latter, we cannot assume the Legislature had in mind exceptions it did not express when we have before us an act in which certain exceptions are clearly and concisely set forth. The maxim, affirmative specification excludes implication, generally expressed using the venerable Latin phrase, *expressio unius est exclusio alterius*, would apply here. *State v. Roadhs*, 71 Wn.2d 705, 430 P.2d 586 (1967).

We disagree with the taxpayer's fifth argument, that there is sufficient ambiguity in the classification that the taxpayer should be afforded relief under a fairness doctrine or under the principle that an ambiguous statute must be construed against the government and in favor to the citizen. We find this subsection of RCW 82.04.260 clear on its face. It clearly and narrowly circumscribes the activities to which it applies.

The taxpayer articulately and compelling argues that, for public policy reasons, the Department should apply the special rate in RCW 82.04.260 to its activities. We do not doubt that the taxpayer's presence in the state benefits the state's food operators, or that applying the B&O tax rate in RCW 82.04.260(1)(a) would improve its competitive position relative to other oil manufacturers, all of which are located outside Washington. However, those are arguments the taxpayer must address to the Legislature. Industry-wide impact or significance, and the ability of the taxpayer to remain in business, are not factors RCW 82.04.260 allows the Department to consider in determining the applicability of the statute. As an administrative body, the Department does not have the discretion to rewrite the law.

[4] The taxpayer contends the following sentence in Rule 100(5) gives the Department the discretion, authority, and flexibility to rule in the taxpayer's favor: "A taxpayer may request an executive level reconsideration when the determination decided an issue of first impression or an issue which has industry-wide impact or significance." The taxpayer's reliance on that portion of Rule 100 is misplaced. The sentence sets out a guideline for when the Department is more

likely to exercise its discretion to grant executive level reconsideration, rather than ordinary reconsideration. The sentence does [not] mean the Department has greater discretion or flexibility in interpreting statutes when an issue is one of first impression or has industry-wide impact or significance.

We continue to conclude that the taxpayer's manufacturing activity does not fall within RCW 82.04.260, and therefore the rate set out in RCW 82.04.270 applies to its manufacturing activities. We deny the petition for reconsideration, and affirm Det. No. 99-143.

Finally, we again refer the taxpayer to Rule 193 and Rule 136, which discuss the reporting requirements of persons who both manufacture and sell their products in this state, and the taxation of persons who manufacture products in this state and sell them in interstate or foreign commerce.

DECISION AND DISPOSITION:

The taxpayer's petition for reconsideration is denied.

Dated this 25th day of April, 2000.