Cite as Det. No. 07-0034E, 26 WTD 212 (2007)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Refund of	)	D E T E R M I N A T I O N
	)	
	)	No. 07-0034E
. . .	)	
	)	Registration No. . . .
	)	Doc. No. . . ./Audit No. . . .
	)	Docket No. . . .

[1] RCW 82.04.290, RCW 82.04.322, RCW 48.14.021: SERVICE B&O TAX – EXMPTION – M+C RECEIPTS – "TAXABLE" -- PLAIN LANGUAGE. Under the plain language in RCW 82.04.322, M+C receipts are not exempt from B&O tax because they are not "taxable" under RCW 48.14.0201. Specifically, M+C receipts are not "capable of being taxed" under RCW 48.14.0201 because section (6) of that statute exempts the M+C receipts from tax.

[2] RCW 82.04.290, RCW 82.04.322, RCW 48.14.021: SERVICE B&O TAX – EXMPTION – M+C RECEIPTS – "TAXABLE" – FEDERAL PREEMPTION. Because a federal statute preempts a Washington premiums tax on the M+C receipts, the receipts are not exempt from B&O tax because they are not "taxable" under the Washington premiums tax (RCW 48.14.0201).

[3] RCW 82.04.290, RCW 82.04.322, RCW 48.14.021: SERVICE B&O TAX – EXMPTION – M+C RECEIPTS – "TAXABLE" – LEGISLATIVE INTENT. Even if the language in RCW 82.04.322 were unclear, legislative intent supports the conclusion that the M+C receipts are not exempt from B&O tax. The legislative history regarding RCW 82.32.322 and RCW 48.14.0201 indicates an intent to ensure taxation of amounts received for health care while avoiding double-taxation.

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.

DIRECTOR'S DESIGNEE: Jeff Mahan, Appeals Review Manager

C. Pree, A.L.J. – Health care service contractor . . . protest[s] the denial of a refund of service business and occupation (B&O) tax [it] paid on receipts

of prepayments from the federal government for health care services provided under Title XVIII (Medicare) of the federal social security act. We conclude these receipts are not "taxable under RCW 48.14.0201" (Washington's premiums and prepayments tax) and therefore are not exempt from B&O tax under RCW 82.04.322. Accordingly, we deny the petition.[1]

ISSUE

Whether amounts the taxpayer received as prepayments from the federal government for health care services provided under Title XVIII (Medicare) of the federal social security act are "taxable under RCW 48.14.0201" (Washington's premiums and prepayments tax) and therefore exempt from B&O tax under RCW 82.04.322.

FINDINGS OF FACT

[Taxpayer] is a licensed health care service contractor under Chapter 48.44 RCW. . . .

The taxpayer's primary activities in Washington include offering health care coverage to employer groups and individuals. This coverage includes Medicare+Choice (M+C), which is offered to Medicare-eligible persons as an alternative to the federal government's fee-for-service program. Generally, the M+C program permits Medicare enrollees to select a managed care plan offered by participating private commercial insurers or other carriers.

The federal government pays participating carriers a certain premium amount per Medicare enrollee who selects the M+C program. The carrier then reimburses contracted physicians, hospitals, and other health care providers for services rendered to the Medicare enrollee in the carrier's M+C program.

The taxpayer did not pay the Washington premiums and prepayments tax (RCW 48.14.0201), but instead paid service B&O tax (RCW 82.04.290) on its receipts under the M+C program (net of claims the taxpayer paid under the program) for the period of January 1, 2000, through March 31, 2004. The taxpayer requested a refund of $. . . of the service B&O tax it paid during this period, claiming the receipts were exempt from B&O tax under RCW 82.04.322 because they are taxable under RCW 48.14.0201. The Audit Division denied the request because it concluded the payments were not taxable under RCW 48.14.0201, and the taxpayer appeals.

ANALYSIS

RCW 82.04.220 imposes the B&O tax "for the act or privilege of engaging in business activities." Persons, such as the taxpayer, who are engaged in a service business or business that is not specifically taxed under another B&O tax classification are generally required to pay B&O tax under RCW 82.04.290 measured by the "gross income of the business."

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

The issue in this case is whether the taxpayer is entitled to the exemption set forth in RCW 82.04.322, which provides:

> This chapter does not apply to any health maintenance organization, health care service contractor, or certified health plan in respect to premiums or prepayments that are taxable under RCW 48.14.0201.

As a preliminary matter, we note that B&O tax exemptions are construed strictly, though fairly, and in keeping with the ordinary meaning of their language, against the taxpayer. *See, e.g., Budget Rent-a-Car, Inc. v. Department of Rev.*, 81 Wn.2d 171, 500 P.2d 764 (1972); *Group Heath Coop. v. Tax Comm'n*, 72 Wn.2d 422, 429, 433 P.2d 201 (1967); Det. No. 04-0102, 23 WTD 340 (2004); Det. No. 03-0079, 23 WTD 83 (2004). Thus, "the burden of showing qualification for the tax benefit afforded likewise rests with the taxpayer." *Group Health*, 72 Wn.2d at 429.

To be entitled to exemption under RCW 82.04.322, the taxpayer must prove that its receipts are "taxable under RCW 48.14.0201." RCW 48.14.0201(2) imposes the premiums and prepayments tax and provides, "the tax shall be equal to the total amount of all premiums and prepayments for health care services received by the taxpayer," multiplied by the 2% tax rate. However, RCW 48.14.0201(6)(a) states: "The taxes imposed in this section do not apply to . . . [a]mounts received by any taxpayer from the United States or any instrumentality thereof as prepayments for health care services provided under Title XVIII (medicare) of the federal social security act." Thus, the dispositive determination is the effect of RCW 48.14.0201(6)(a) on whether the taxpayer's receipts are "taxable under RCW 82.14.0201."

As we will explain in detail below, we conclude that the taxpayer's M+C receipts are not exempt under RCW 82.04.322 because they are not taxable under RCW 48.14.0201.

[1] Under the plain language in RCW 82.04.322, the M+C receipts are not exempt from B&O tax because they are not "taxable" under RCW 48.14.0201. Although Washington statutes do not define the word "taxable," its ordinary meaning is "capable of being taxed."[2] Thus, RCW 82.04.322 provides a B&O tax exemption for amounts capable of being taxed under RCW 48.14.0201. The taxpayer argues that because the M+C premiums are included "in the broad taxing language of RCW 48.14.0201(2)," they are capable of being taxed under that statute. We disagree.

The M+C receipts are not "capable of being taxed" under RCW 48.14.0201 because section (6) of that statute exempts the M+C receipts from tax. "Exempt" is defined as "free or released from a duty to which others are held." *Black's Law Dictionary* 593 (7th ed. 1999). Thus, because section (6) exempts the M+C receipts from the premiums tax, the receipts are not "taxable," in any ordinary sense of the word, under that statute.

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[2] "Words in a statute are given their ordinary and common meaning absent a contrary statutory definition." *John H. Sellen Constr. Co. v. Department of Rev.*, 87 Wn.2d 878, 882, 558 P.2d 1342 (1976). Absent other authority, Washington courts use Webster's Third New International Dictionary. *See, e.g., State v. Glas*, 106 Wn. App. 895, 905, 28 P.3d 216 (2001).

The taxpayer argues that because RCW 48.14.0201 imposes the premiums tax measured by "all premiums and prepayments for health care services received by the taxpayer," the M+C receipts are included in the tax base. Specifically, the taxpayer argues, the ordinary meaning of "all" is the "whole number of individuals or particulars,"[3] and, thus the M+C receipts are included in the "whole number of premiums." The taxpayer concludes, "Clearly, RCW 48.14.0201(6) exempts taxes that were previously imposed under RCW 48.14.0201(2)."

While we do not disagree with the taxpayer's definition of "all," we disagree with its conclusion that the M+C receipts are included in the premiums tax base. As explained above, the M+C receipts are exempt, *i.e.,* free of the tax, and therefore, not capable of being taxed by virtue of section (6) of that statute. In granting the B&O tax exemption, RCW 82.04.322 refers to RCW 48.14.0201, not only to section (2).

The taxpayer further argues that it is not necessary that the taxpayer actually pay the premiums tax for the RCW 82.04.322 exemption to apply. The taxpayer draws an analogy to RCW 82.04.320, which provides a B&O tax exemption "to any person in respect to insurance business upon which a tax based on gross premiums is paid to the state." Thus, the taxpayer argues, if the legislature intended that the premiums tax had to actually have been paid before the RCW 82.04.322 exemption could apply, it demonstrated in RCW 82.04.320 that it "is capable of writing an exemption that depends on the Taxpayer actually paying another tax." The taxpayer continues, "From the manner in which the Legislature drafted [RCW 82.04.322 and RCW 82.04.320], it is clear that different tests apply to these two exemption statutes."

We need not address whether the taxpayer must actually pay the premiums tax to qualify for the RCW 82.04.322 tax exemption. As explained above, because the legislature used the term "taxable," the receipts must be "capable of being taxed" under RCW 48.14.0201 to qualify for the RCW 82.04.322 exemption, and they are not.

[2] As a federal statute preempts a Washington premiums tax on the M+C receipts, the receipts are not exempt from B&O tax because they are not "taxable" under the Washington premiums tax (RCW 48.14.0201). A federal statute, 42 U.S.C. § 1395w-24, provides, "no state may impose a premium tax . . . with respect to payments to Medicare + Choice organizations." Because a federal law preempts state taxation of M+C receipts under a premiums tax, these receipts cannot be "taxable" under RCW 48.14.0201, Washington's premiums tax.

The taxpayer argues that the federal preemption does not negate its conclusion that the M+C receipts are "taxable" under RCW 48.14.0201. Specifically, the taxpayer argues, the 1997 federal preemption does not alter the plain meaning of "taxable" in RCW 82.04.322. We agree that the federal preemption does not alter the plain meaning of "taxable." However, as we concluded above, the M+C receipts are not "taxable" under RCW 48.14.0201, under the plain meaning of that word.

[3] *Websters Third New International Dictionary, p. 54.*

The taxpayer next argues the federal preemption does not alter "the scope of the Premiums Tax Regime as enacted by the Legislature." The taxpayer explains, "The Legislature exercises its sovereign authority to impose tax, as evidenced by the statutes, even if some outside force or power thwarts the state's actual collection of the tax. . . . The fact that a taxpayer may never remit tax on taxable revenues (because of bankruptcy or federal preemption) does not alter Washington's taxing scheme with respect to such revenues." We disagree. If the federal government preempts state taxation of receipts, those receipts are not "capable of being taxed," *i.e.*, the receipts are not taxable. In this case, the federal legislature specifically stated "no state may impose a premium tax" with respect to the receipts at issue. Accordingly, those receipts are not capable of being taxed, under a premiums tax statute, by the state.

The taxpayer further notes that four years passed between the creation of the premiums tax and the 1997 federal preemption, so "it is clear that the 1997 federal actions are not helpful in determining Washington legislative intention." We agree that a federal statute enacted four years after the enactment of a state statute is not helpful in determining the state legislature's intent; however, when the federal statute preempts state taxation of particular receipts, that preemption affects the determination of whether those receipts are capable of being taxed under the state tax system for periods after the effective date of the preemption. Accordingly, we conclude that because the federal preemption was in effect during the period at issue, the M+C receipts are not capable of being taxed under the state premiums tax.

The taxpayer next argues that the federal preemption prohibits the state from applying the B&O tax to the M+C receipts. The taxpayer explains, "the B&O tax is similar to a premiums tax in that it is measured on gross revenue and is imposed on the privilege of doing business in Washington."

The taxpayer explains, the broad language "with respect to payments to" was enacted "so as to avoid interpretational issues that may have resulted from using a narrower 'premiums' standard, such as whether a tax must be only imposed on insurance in order to be preempted." The taxpayer goes on to explain:

> Both the B&O tax and Premiums Tax are measured on gross revenue without the benefit of a deduction for operational costs. Both taxes are imposed for the privilege of doing business in Washington. Accordingly, the B&O tax is similar to a premium tax and the exemption under 42 USC § 1395w-24(g) applies. Thus, no B&O tax is due on M+C premiums, a result that is in keeping with Congressional intent.

The B&O tax is not a "premium or similar tax." Instead, it is imposed for the privilege of engaging in business activities in Washington. RCW 82.04.220. "Business . . . is a broad and virtually all-encompassing commercial activity." *Budget Rent-A-Car, Inc. v. Department of Rev.*, 81 Wn.2d 171, 173, 500 P.2d 764 (1972); *see also O'Leary v. Department of Rev.*, 105 Wn.2d 679 (1986); Det. No. 94-071, 14 WTD 232 (1995). Business "includes all activities engaged in with the object of gain, benefit, or advantage." RCW 82.04.140. In contrast, a premiums tax is designed as a tax on insurance (or insurance-like) activities. Specifically, Washington's premiums tax applies only to "insurers" and is measured by "premiums." *See* RCW 48.14.020. Thus, unlike the B&O tax, it is narrowly directed to a specific type of business

and a specific type of receipt. Accordingly, we conclude that the federal preemption does not preclude imposition of the B&O tax with respect to the M+C receipts.

[3] Even if the language in RCW 82.04.322 were unclear, legislative intent supports the conclusion that the M+C receipts are not exempt from B&O tax. In the discussion above, we concluded that under the plain language in RCW 82.04.322, the M+C receipts are not exempt from B&O tax because they are not "taxable" under RCW 48.14.0201. When construing an unambiguous statute or rule we look to the wording of the statute or rule, "not to outside sources such as legislative intent." *Western Telepage, Inc. v. City of Tacoma*, 140 Wn.2d 599, 608-9, 998 P.2d 884 (2000*); Multicare Med. Ctr. v. Department of Soc. & Health Servs.*, 114 Wn.2d 572, 582, 790 P.2d 124 (1990); Det. No. 02-0030E, 24 WTD 108 (2005). Nonetheless, in part because the taxpayer extensively addressed this issue, we will briefly review the legislative history.

The purpose of construing a statute is to ascertain and give effect to the intent and purpose of the legislature. *See, e.g., Port of Seattle v. Department of Rev.*, 101 Wn. App. 106, 112, 1 P.3d 607, 610 (2000). Further, we note again that B&O tax exemptions are to be construed strictly, though fairly, and in keeping with the ordinary meaning of their language, against the taxpayer. *See, e.g., Budget Rent-a-Car, Inc. v. Department of Rev*., 81 Wn.2d 171, 500 P.2d 764 (1972); *Group Heath Coop. v. Tax Comm'n*, 72 Wn.2d 422, 429, 433 P.2d 201 (1967); Det. No. 04-0102, 23 WTD 340 (2004); Det. No. 03-0079, 23 WTD 83 (2004).

The legislative history regarding RCW 82.32.322 and RCW 48.14.0201 indicates an intent to ensure taxation of amounts received for health care while avoiding double-taxation. Specifically, the legislative history indicates an intent to raise revenue to fund the other provisions of the Washington State Health Services Reform Act of 1993. *See, e.g.,* Wa. State Senate, Final Bill Report, E2SSB 5304 (1993); Wa. State Senate Health & Human Services Committee and the House Health Care Committee, The Washington Health Services Act of 1993, An Information Kit (May 1993). Nothing in the legislative history indicates an intention to eliminate all taxation of M+C receipts.

The Washington Health Services Act of 1993 implemented many health care reforms and was funded in large part by the tax regime found in RCW 48.14.0201 and RCW 82.04.322. These provisions were intended to "raise additional funds" in order to provide additional "state subsidies" for health care. *See* Wa. State Senate, Final Bill Report, E2SSB 5304 (1993); Wa. State Senate Health & Human Services Committee and the House Health Care Committee, The Washington Health Services Act of 1993, An Information Kit, p.1 and 27 (May 1993). As intended, these provisions ensure taxation of amounts received for health care services at a higher rate, without subjecting the amounts to double-taxation. Thus, the premiums tax under RCW 48.14.0201, at 2%, is a substitute for the lower B&O tax at which the industry was generally previously taxed. *See* RCW 82.04.290. To eliminate double-taxation, the legislature concurrently enacted RCW 82.04.322, which exempted from the B&O tax certain receipts subject to the new premiums tax. Because these are revenue-raising provisions, it is consistent with legislative intent to consider them as ensuring taxability at higher rates where possible, rather than freeing certain amounts from any tax burden.

In summary, the legislative history provides further support for our conclusion that the taxpayer's M+C receipts are not "taxable under RCW 48.14.0201" and therefore are not exempt from B&O tax under RCW 82.04.322.

DECISION AND DISPOSITION

The taxpayer's refund petition is denied.

Dated this 7th day of February 2007.