Cite as Det No. 09-0254R, 30 WTD 36 (2011)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Refund	)	D E T E R M I N A T I O N
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	)	No. 09-0254R
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	)	Registration No. . . .
	)	Document No. . . ./Audit No. . . .
	)	Docket No. 200809-0037
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RCW 82.04.260(4) – B&0 TAX – PERISHABLE MEAT PRODUCTS – RETAIL SALES. The preferential B&O tax rate for the slaughtering, breaking and/or processing of perishable meat products does not apply to retail sales of meat products.

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.

Kreger, A.L.J. – A company operating supermarkets in Washington (Taxpayer) seeks reconsideration of our determination that the lower tax rate provided by RCW 82.04.260(4) for the slaughtering, breaking and/or processing of perishable meat products, does not apply to retail sales of meat products that are broken and/or processed in the Taxpayer's deli and meat departments. We affirm our decision that the statutory language restricting the activity to products sold "at wholesale only and not at retail" precludes the Taxpayer's retail sales from being classified as slaughtering, breaking and/or processing perishable meat products under the statute. We deny the Taxpayer's petition for reconsideration and affirm the Audit Division's denial of the Taxpayer's refund request.[1]

[1] Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410. Nonprecedential portions of this determination have been deleted.

ISSUE

Whether the inclusion of a joint modifier "and/or" before "selling the same at wholesale only and not at retail" in RCW 82.04.260(4) can be read to apply to both wholesale and retail sales of perishable meat products?

FINDINGS OF FACT

[Taxpayer] is [an out-of-state] Corporation engaged in the business of operating grocery stores in Washington State. Taxpayer filed two refund requests on September 11, 2008. The first was filed by the Taxpayer's predecessor . . . for asserted overpayments of tax between January 1, 2002, through December 31, 2007.[2] In June of 2006, the original account was closed . . . and a new reporting account was opened. . . . The second refund request covered the period June 1, 2006, through December 31, 2007. On August 25, 2008, and November 7, 2008, the Audit Division denied the refund requests. We issued our initial determination on September 19, 2009, affirming the denials. The Taxpayer timely petitioned for reconsideration of that determination.

The Taxpayer's supermarkets contain meat departments and delis where perishable meat products are processed and/or broken into smaller components for sale at retail to consumers patronizing the Taxpayer's stores.[3]

ANALYSIS

RCW 82.04.260(4) creates a special B&O tax rate equal to 0.138% imposed "[u]pon every person engaging within this state in the business of slaughtering, breaking and/or processing perishable meat products and/or selling the same at wholesale only and not at retail." (hereinafter, slaughtering and breaking rate).

It is not contested that the Taxpayer breaks and/or processes perishable meat products in its stores, rather what is disputed is whether this rate can apply to retail sales of those same products.

The words of a statute, unless otherwise defined, should be given their usual and ordinary, everyday meaning. *Strenge v. Clarke*, 89 Wn.2d 23, 29, 569 P.2d 60 (1977).

The Taxpayer notes that in *Agrilink Foods, Inc. v. Dep't of Revenue*, 153 Wn. 2d 392, 397, 103 P.3d 1226 (2005) (*Agrilink)*, the court identified four activities "separately entitled to the lower rate" as "(1) slaughtering, (2) breaking, (3) processing, or (4) selling at wholesale." In *Agrilink*, the court concluded that "the second 'and/or' negates any requirement that a taxpayer must also

[2] We will refer to the Taxpayer and its predecessor collectively as "the Taxpayer."

[3] There may be a nominal and occasional wholesale sale, but the refund claim is not based on this activity but rather was made for the retail sales.

sell a 'perishable meat product.'" *Id*. The issue in *Agrilink* was whether the [meat processing activity must result in a perishable finished product. The court held the statute did not impose such a requirement, in part because other subsections of RCW 82.04.260 contained language imposing finished product requirements, while RCW 82.04.260(4) did not. *Id.*]

On reconsideration the Taxpayer renews its emphasis on the "and/or" disjunctives in the statute to assert that the product of the first three activities may be sold at retail and still qualify for the lower rate. The Taxpayer asserts that [in] applying the analysis articulated in the *Agrilink* decision there are four different qualifying activities eligible for the slaughtering and breaking rate. The court concluded that the perishable finished product requirement applicable to the first three activities did not apply to the fourth qualifying activity of selling these products at wholesale. Therefore, the Taxpayer asserts that the wholesale sale activity of the fourth activity should not preclude retail sales from qualifying for the first three activities. We disagree. The Taxpayer's proposed construction would render the "only and not at retail" limiting language in the statute superfluous.

The final clause reads "and/or selling the same at wholesale only and not at retail." The "same" refers to the slaughtered, broken and/or processed perishable meat. Thus, taxpayers eligible for the rate may engage in one, a combination of, or all three of these activities to produce the qualifying products **and** then sell those products at wholesale, **or** a taxpayer can also qualify for the rate if all they do is sell these products at wholesale. However, the rate only applies to wholesale sales.

We again note that this construction is also consistent with the legislative history of the slaughtering and breaking rate. The addition of the qualifying "and not at retail" language to the slaughtering breaking rate was added by HB 72 effective July 1, 1983. HB 72 was Department of Revenue request[ed] legislation. The February 14, 1983 Fiscal Note prepared by the Department of Revenue for HB 72 describes the change to the slaughtering and breaking rate as follows:

> With the addition of the wording in 82.04.260(7)[[4]] limiting the application to wholesale only and not at retail the special B&O tax rate (.0033) for slaughtering, breaking and/or processing perishable meat products and/or selling the same, will not be usable by retailers. At present, a few of the beneficiaries of this special rate are integrated firms who conduct such activities at wholesale and also sell the meat products in their retail outlets.

[4] On July 1, 1998 RCW 82.04.260 was re-numbered. Det. No. 00-089R, 24 WTD 25 (2005). At that time, the provision for the preferential tax rate for "perishable meat products" was moved to RCW 82.04.260(4). *Id.*

(Emphasis in original).[5] We must construe statutes to give effect to all of the language and to render no portion meaningless or superfluous. *Lakemont Ridge Homeowners Ass'n v. Lakemont Ridge Ltd. P'ship*, 156 Wn. 2d 696, 699, 131 P.3d 905 (2006). We also must construe the statute so as "to avoid strained or absurd consequences." *Deaconess Medical Center v. Dep't of Revenue*, 58 Wn. App. 783, 795 P.2d 146 (1990). We reaffirm our conclusion that the plain language of the statute, limits this rate to only wholesaling activity and accordingly affirm the Audit Division's denial of the Taxpayer's refund request because the Taxpayer is selling its perishable meat products at retail and so is not eligible for the slaughtering and breaking rate provided by RCW 82.04.260(4). . . .

DECISION AND DISPOSITION

The Taxpayer's petition for reconsideration is denied and the Audit Division's denial of the Taxpayer's refund petition is affirmed.

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Dated this 6th day of April, 2010.

[5] The February 1, 1983, Bill Summary for "HB 72:Miscellaneous Excise Tax Provisions" similarly notes:

> A reduced B&O tax rate is currently paid by meat processors. Under the current statute, retailers as well as wholesalers qualify for the reduced B&O tax rate. It is the position of the Department of Revenue that the reduced rate was intended to benefit solely meat processors selling at wholesale and, as such, HB 72 restricts the availability of a reduced B&O tax rate to meat processors selling at wholesale.

Similarly a May 11, 1983 Memorandum on the "Analysis of HB 72 As Amended By The Senate" from the Office of Program Research of the House of Representatives, authored by the House Ways and Means Committee, describes the revision to the slaughtering and breaking rate as follows:

> Limit the .33% special rate for meat processing B&O tax to wholesalers. Current law is unclear as to whether meat processors at the retail level should by the .33% wholesale meat processing tax or the .44% retail B&O tax. Under this section of the bill, all meat processors at the retailing level would by the .44% retail B&O tax. Most retail meat processors already by the .49% [sic] tax but some have been attempting to pay only the .33% tax.