

Cite as Det No. 12-0388, 32 WTD 267 (2013)

BEFORE THE APPEALS DIVISION  
DEPARTMENT OF REVENUE  
STATE OF WASHINGTON

In the Matter of the Petition for Refund	)	<u>D E T E R M I N A T I O N</u>
	)	
	)	No. 12-0388
...	)	
	)	
	)	Registration No. . . .
	)	
	)	Docket No. . . .
	)	

RCW 82.04.272: TAX ON WAREHOUSING AND RESELLING PRESCRIPTION DRUGS. Qualification for the preferential business and occupation tax rate under RCW 82.04.272 requires that the reseller sell pharmaceutical drugs subject to regulation by the federal drug enforcement administration, be registered with the federal drug enforcement administration, and be licensed by the Washington board of pharmacy. Licensure by another state's board of pharmacy is insufficient.

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.

Valentine, A.L.J. – [Taxpayer] appeals the denial of a refund request. Taxpayer asks the Department of Revenue (Department) to find it eligible for the preferential rate that applies to the Prescription Drug Warehousing Business & Occupation (B&O) tax classification. We find that Taxpayer does not meet the requirements for the preferential rate because it is not registered with the federal drug enforcement administration (DEA) and not licensed by the Washington board of pharmacy. We deny the petition.<sup>1</sup>

### ISSUES

1. May a taxpayer that is not registered with the DEA qualify for the preferential rate under RCW 82.04.272 when the taxpayer is not required to be registered with the DEA?

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

2. May a taxpayer that is not licensed with the Washington board of pharmacy qualify for the preferential rate under RCW 82.04.272 when the taxpayer is registered with a comparable agency of another state, or when the carrier that delivers the taxpayer's products is registered with the Washington board of pharmacy?

### FINDINGS OF FACT

Taxpayer is a . . . pharmaceutical company specializing in wholesale sales of prescription drugs . . . Taxpayer is a wholly-owned subsidiary of its . . . parent company . . .

Taxpayer does not manufacture any of the pharmaceutical products it sells. Taxpayer purchases the drugs it warehouses and sells from [its parent company] which manufactures the pharmaceuticals overseas. Taxpayer maintains its inventory in a warehouse located in [State A]. Taxpayer distributes and sells product only in the United States. Its customers are pharmaceutical wholesalers, retailers, and health care providers.

None of the products Taxpayer warehouses and resells is classified by the DEA as a controlled substance.<sup>2</sup> Thus, Taxpayer is not required to register with the DEA,<sup>3</sup> and Taxpayer is not in fact registered with the DEA.

Nor is Taxpayer licensed with the Washington board of pharmacy. Taxpayer is registered with the [State B] Department of Health . . . , and with the federal Food and Drug Administration. Taxpayer also states that [Shipping Company], the company that ships and delivers the products Taxpayer sells to its Washington customers, is licensed with the Washington board of pharmacy.

Taxpayer learned of the preferential rate that applies to the Prescription Drug Warehousing B&O tax classification<sup>4</sup> through a Special Notice issued by the Department on October 2, 2008.<sup>5</sup> Relying on the Notice, Taxpayer filed its refund request with the Department on October 25, 2011. Taxpayer asked for a refund in the amount of \$. . . , for the time-period of third-quarter 2010 through first-quarter 2011.<sup>6</sup> The Department's Taxpayer Account Administration (TAA)

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<sup>2</sup> Taxpayer provides a list of its products including the trade names and ingredients (Exhibit C). Taxpayer also provides a list of drugs the DEA classifies as controlled substances (Exhibit E). The list is dated April 17, 2012. Taxpayer's products are not included on the DEA's list of controlled substances. The DEA lists its schedules of controlled substances in 21 CFR § 1308.

<sup>3</sup> For information about registration requirements, see 21 C.F.R. § 1301.11(a) (2012).

<sup>4</sup> The preferential rate provided in RCW 82.04.272 is 0.138 percent.

<sup>5</sup> Previously, the Department was of the opinion that a taxpayer needed to operate a warehouse in Washington State in order to qualify for the preferential rate. The Special Notice advised that the Department had reconsidered its position on whether a business with warehousing activity exclusively outside Washington was eligible for the preferential rate, and had determined these businesses could qualify assuming they met the other conditions of RCW 82.04.272. See [http://dor.wa.gov/docs/pubs/specialnotices/2008/sn\\_08\\_drugwarehouse.pdf](http://dor.wa.gov/docs/pubs/specialnotices/2008/sn_08_drugwarehouse.pdf).

<sup>6</sup> Taxpayer paid the higher general B&O tax rate (0.484 percent) on Wholesalers under RCW 82.04.270.

Section denied the refund claim, because Taxpayer is not registered with the federal drug enforcement administration (DEA) and not licensed by the Washington board of pharmacy.<sup>7</sup>

Taxpayer asserts that since it is not required to register with the DEA, registration should not be required in order to qualify for the preferential B&O tax rate under RCW 82.04.272. In support of this assertion, Taxpayer submits the following quote from a U.S. Department of Justice website: “DEA strongly opposes the use of a DEA registration number for any purpose other than the one for which it was intended, to provide certification of DEA registration in transactions involving controlled substances.”<sup>8</sup> Taxpayer argues that the Washington State legislature did not intend to differentiate between pharmaceutical wholesalers distributing and selling prescription drugs based on whether the drugs are classified by the DEA as controlled substances.

In addition, Taxpayer contends that its licensure through the [State B] Department of Health . . . is sufficient to meet the licensing requirement of RCW 82.04.272(2)(b) because the statute references “the state board of pharmacy” but does not expressly identify the Washington board of pharmacy. In the alternative, Taxpayer contends that the [Shipping Company] license is sufficient to meet the licensing requirement.

#### ANALYSIS

RCW 82.04.272 reads:

- (1) Upon every person engaging within this state in the business of warehousing and reselling drugs for human use pursuant to a prescription; as to such persons, the amount of the tax shall be equal to the gross income of the business multiplied by the rate of 0.138 percent.
- (2) For the purposes of this section:
  - (a) “Prescription” and “drug” have the same meaning as in RCW 82.08.0281; and
  - (b) “Warehousing and reselling drugs for human use pursuant to a prescription” means the buying of drugs for human use pursuant to a prescription from a manufacturer or another wholesaler, and reselling of the drugs to persons selling at retail or to hospitals, clinics, health care providers, or other providers of health care services, *by a wholesaler or retailer who is registered with the federal drug enforcement administration and licensed by the state board of pharmacy.*

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<sup>7</sup> TAA also initially determined that Taxpayer did not qualify for the preferential rate because it was a drug manufacturer. However, this determination was based on a misunderstanding of information contained on the Internet, and we are now convinced that Taxpayer does not manufacture the drugs at issue.

<sup>8</sup> See <http://www.deadiversion.usdoj.gov/faq/prescriptions.htm#rx-5>.

(Emphasis added.) The goal of statutory construction is to ascertain and carry out the Legislature's intent, and if the statute's meaning is plain on its face, the plain meaning must be given effect as an expression of legislative intent. *State v. J.M.*, 144 Wn. 2d 472, 28 P.3d 720 (2001). "The legislative intent should be derived primarily from the statutory language." *Duke v. Boyd*, 133 Wn.2d 80, 87, 942 P.2d 351 (1997). "Words in a statute must be given their usual and ordinary meaning unless a contrary intent appears." *Streng v. Clarke*, 89 Wn.2d 23, 29, 569 P.2d 60 (1977).

Washington courts have indicated that they will not construe a plain and unambiguous statute; that is, they will not resort to canons of construction or legislative history to analyze the meaning of a statute when the meaning is plain. The Washington Supreme Court explained this rule in *AgriLink Foods, Inc. v. Dep't of Revenue*, 153 Wn.2d 392, 396-7, 103 P.3d 1226 (2005):

Where statutory language is plain and unambiguous courts will not construe the statute but will glean the legislative intent from the words of the statute itself, regardless of contrary interpretation by an administrative agency. A statute is ambiguous if "susceptible to two or more reasonable interpretations," but "a statute is not ambiguous merely because different interpretations are conceivable."

The threshold question, then, is whether the language of RCW 82.04.272 is plain and unambiguous, or is susceptible to two or more reasonable interpretations with respect to whether the Legislature intended to limit the preferential tax rate to wholesalers and retailers registered with the DEA, and whether the "state board of pharmacy" referenced in the statute refers to the Washington board of pharmacy or any state board of pharmacy.

RCW 82.04.272 clearly and unambiguously requires anyone claiming the preferential rate to be registered with the DEA. Even if the statute were ambiguous, the legislative history contradicts Taxpayer's assertion that the Washington State Legislature did not intend to differentiate between wholesalers warehousing and reselling prescription drugs based on whether the drugs are classified by the DEA as controlled substances.

The Department notes that the title of the legislative act reads as follows:<sup>9</sup>

AN ACT Relating to the business and occupation taxation of warehousing and reselling of *pharmaceutical drugs subject to regulation by the federal drug enforcement administration* and the state board of pharmacy; amending 82.04.270, 82.04.280, 82.04.290, and 82.04.250; adding a new section to chapter 82.04 RCW; and providing an effective date.

Laws of 1998, Ch. 343 (Emphasis added.)

Regarding the latter issue, it is the Department's position that, although two different interpretations of "the state board of pharmacy" might be "conceivable," two different

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<sup>9</sup> In support of reliance on a bill title as an indication of legislative intent, see *Covell v. City of Seattle*, 127 Wn.2d 874, 905 P.2d 324 (1995).

interpretations are not “reasonable.” The statute references “the” state board of pharmacy, not “a” state board of pharmacy. The Legislature’s use of the word “the” denotes a specific state board of pharmacy. The statute was enacted by the Washington State Legislature for the purpose of assigning a specific B&O tax rate to entities “engaging within this state” in specific business activities. It is the Department’s opinion that any reading of the statute interpreting “the state board of pharmacy” as any one of 50 state boards of pharmacy rather than the Washington board of pharmacy is not reasonable.

Again, even if the statute were ambiguous, the Department’s opinion on this issue is supported by a review of the legislative history of the statute.<sup>10</sup> H.B. Rep. (ESHB 2933), 55<sup>th</sup> Leg., Reg. Sess. (Wash. March 11, 1998), contains the following brief statement that is included in a summary of the testimony in favor of the bill as provided by two of the sponsors:<sup>11</sup> “The proposed tax treatment applies only to pharmaceutical drugs that are regulated by the Federal Drug Enforcement Administration *and Washington State Board of Pharmacy*.” (Emphasis added.)

Based on the plain meaning and legislative history of RCW 82.04.272, we conclude that, in order to qualify for the preferential tax rate authorized by RCW 82.04.272, the wholesaler or retailer must be registered with the DEA and licensed by the Washington board of pharmacy.<sup>12</sup>

#### DECISION AND DISPOSITION

Taxpayer’s petition for refund is denied.

Dated this 2nd day of January 2013.

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<sup>10</sup> In support of reliance on a bill report to aid in statutory interpretation, see *Barstad v. Stewart Title Guarantee Co.*, 145 Wn.2d 528, 537-38, 39 P.3d 984 (2002); *In re Personal Restraint of Quackenbush*, 142 Wn.2d 928, 935-36, 16 P.3d 638 (2001); and *C.J.C. v. Corporation of the Catholic Bishop*, 138 Wn.2d 699, 746, 985 P.2d 262 (1999).

<sup>11</sup> Testimony in favor of the bill was provided by Representative Radcliff and Hubie McMorrow of the Washington Wholesale Druggists’ Association.

<sup>12</sup> RCW 82.04.272 requires the actual buyer/re-seller of the prescription drugs be licensed by the state board of pharmacy (in addition to the DEA registration requirement) in order for that entity to qualify for the preferential tax rate. The Department concludes that whether the company that ships and delivers the prescription drugs on behalf of the buyer/re-seller is licensed with the state board of pharmacy is not relevant to whether the buyer/re-seller qualifies for the preferential rate. The statute, by its plain language, clearly requires the buyer/re-seller itself be licensed.