Cite as Det. No. 02-0030E, 24 WTD 108 (2005)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

| | | |
|---|---|---|
| In the Matter of the Petition For Correction of Assessment and Refund of | ) | F I N A L<br>E X E C U T I V E L E V E L<br>D E T E R M I N A T I O N |
| | ) | No. 02-0030E |
| . . . | ) | Registration No. . . . |
| | ) | Docket No. . . . |
| | ) | FY . . . , FY . . . , FY . . . |
| | ) | Audit No. . . . |
| . . . | ) | Registration No. . . . |
| | ) | Docket No. . . . |
| | ) | FY . . . and FY . . . |
| | ) | Audit No. . . . |

RULE 245; RCW 82.04.065(2): RETAIL SALES TAX – NETWORK TELEPHONE SERVICE -- INTERNATIONAL TELEPHONE SERVICE. Foreign and international telephone services are subject to tax as network telephone services even though RCW 82.04.065(2) lacks a specific reference to foreign or international telephone services.

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: Janis P. Bianchi, Policy and Operations Manager, Appeals Division

Mahan, A.L.J. – Companies that provide international telecommunications services protest the assessment of additional retail sales tax, seek a refund of the taxes collected and paid on such services, and seek to have Det. No. 89-174, 7 WTD 283 (1989) overruled.[1]

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

ISSUE:

Does the definition of the term "network telephone services" in RCW 82.04.065(2) and the omission of the words "international" or "foreign" from the second sentence of that definition prevent the State of Washington from taxing international or foreign telecommunication services?

FACTS:

The taxpayers are telecommunication companies, providing voice, data and video communications services to businesses, consumers, and government entities. They furnish both domestic and international long distance toll call services.

The Department of Revenue (Department) audited the records of . . . (Taxpayer A) for the January 1, 1994 through December 31, 1998 period and issued a deficiency assessment. Under Schedule 2 of the assessment, the taxpayer was assessed additional retail sales tax on international services. The taxpayer had charged and collected retail sales tax only on the state portion of the retail sales tax rate on international calls to or from Washington and billed to equipment in Washington. It did not collect retail sales tax on the local portion of the retail sales tax rate on international calls to or from Washington and billed to equipment in Washington, and was assessed additional retail sales tax on such uncollected amounts.

The Department of Revenue (Department) audited the records of . . . (Taxpayer B) for the July 1, 1995 through December 31, 1999 period and issued a deficiency assessment. Under Schedule 2 of the assessment, the taxpayer was assessed additional retail sales tax on international services. The taxpayer had charged and collected retail sales tax only on the state portion of the retail sales tax rate on international calls to or from Washington and billed to equipment in Washington. It did not collect retail sales tax on the local portion of the retail sales tax rate on international calls to or from Washington and billed to equipment in Washington, and was assessed additional retail sales tax on such uncollected amounts.

The taxpayers protest the assessment of additional retail sales tax and seek a refund of the retail sales tax collected and paid on international telecommunication services. The taxpayers seek to have abated approximately $ . . . of the $ . . . in assessments. Taxpayer A claims it should also be awarded a refund of $ . . . , plus statutory interest. Taxpayer B claims it should also be awarded a refund of $ . . . , plus statutory interest.

Taxpayer A had previously sought a ruling on future tax liability with respect to the issue now raised on appeal. In Det. No. 89-174, 7 WTD 283 (1989), the Department concluded "international or foreign telecommunication services are properly taxable under RCW 82.04.065 as no statutory exclusion is provided." The taxpayers also seek to have this determination overruled.

ANALYSIS:

RCW 82.04.050(5) defines a retail sale to include telephone services as defined under RCW 82.04.065. Under RCW 82.04.065, the term "telephone service" includes "network telephone service," defined as:

> (2) "Network telephone service" means the providing by any person of access to a local telephone network, local telephone network switching service, toll service, or coin telephone services, or the providing of telephonic, video, data, or similar communication or transmission for hire, via a local telephone network, toll line or channel, cable, microwave, or similar communication or transmission system. "Network telephone service" includes interstate service, including toll service, originating from or received on telecommunications equipment or apparatus in this state if the charge for the service is billed to a person in this state. "Network telephone service" includes the provision of transmission to and from the site of an internet provider via a local telephone network, toll line or channel, cable, microwave, or similar communication or transmission system. "Network telephone service" does not include the providing of competitive telephone service, the providing of cable television service, the providing of broadcast services by radio or television stations, nor the provision of internet service as defined in RCW 82.04.297, including the reception of dial-in connection, provided at the site of the internet service provider.

*See also* WAC 458-20-245 (Rule 245).

The taxpayers contend that RCW 82.04.065(2) should be either interpreted or construed such that international services are not taxed as network telephone services. 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, 608-609, 998 P.2d 884 (2000*); Multicare Med. Ctr. v. Department of Soc. & Health Servs.*, 114 Wn.2d 572, 582, 790 P.2d 124 (1990).

At the outset, then, we must determine whether we can rely on the plain language of the statute to answer the issue raised by the taxpayer. In *Western Telepage*, the court found that the first sentence of RCW 82.04.065(2) was not ambiguous with respect to the issue before it. At issue in that case was whether paging services were subject to tax as network telephone services. The court concluded: "On its face, the statute [RCW 82.04.065] is not ambiguous. It defines precisely the range of activity that falls within its purview -- the transmission of telephonic, video, data, or similar communication by telephone line or microwave." *Western Telepage*, 140 Wn.2d at 609.[2]

[2] In *Western Telepage*, 140 Wn2d at 610, the court discussed outside sources of legislative history as an alternative holding, but did so in answer to arguments pressed by the taxpayer, not because such discussion was necessary for the holding given the unambiguous nature of the terms.

Similarly, in the present case, the first sentence precisely defines the scope of the services subject to tax as network telephone services. The services are defined as "access to a local telephone network, local telephone network switching service, *toll service*, or coin telephone services . . . ." (Emphasis added.) They also include "communication or transmission for hire, via a local telephone network, *toll line* or channel. . . ." (Emphasis added.) Although some of the services defined as network telephone services are qualified by the use of the word "local," toll services and transmissions over toll lines have no similar geographic limitation. The language in the first sentence on its face is not ambiguous. It does not limit the toll services or the transmissions over toll lines subject to tax only to interstate and intrastate services, as opposed to international services.

The taxpayer asserts that a different interpretation is required, based largely on a departmental rule, WAC 458-20-193D (Rule 193D), concerning the public utility tax. To understand the taxpayer's argument some history is necessary. The development of the law regarding the taxation of telecommunications was recently summarized in *Western Telepage*, 140 Wn.2d at 602-603, as follows:

> Until 1981, the Legislature imposed a public utility tax on traditional telephone services. Former RCW 82.16.010 (1965), amended by Laws of 1981, ch. 144, sec. 2. Recognizing the impending revolution in telecommunications services and wishing to 'level the playing field' between regulated telephone businesses and emerging, nonregulated telecommunications companies, the Legislature broadened the definition of companies susceptible to the state public utilities tax by amending former RCW 82.16.010. Former RCW 82.16.010(6), the 1981 predecessor to RCW 82.04.065, stated:
>
> > 'Telephone business' means the business of providing access to a local telephone network, local telephone network switching service, toll service, or coin telephone services, or providing telephonic, video, data, or similar communication or transmission for hire, via a local telephone network, toll line or channel, or similar communication or transmission system. It includes cooperative or farmer line telephone companies or associations operating an exchange. 'Telephone business' does not include the providing of competitive telephone service, or the providing of cable television service.
>
> Laws of 1981, ch. 144, sec. 2(6).
>
> As predicted, the telecommunications industry underwent unprecedented change in the 1980's. The breakup of the AT&T telephone system monopoly involving the local Bell operating companies, *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131 (D.D.C 1982), *aff'd*, 460 U.S. 1001, 103 S. Ct. 1240, 75 L. Ed. 2d 472 (1983), the onset of new, competitive long distance telephone services, and the development of new telecommunications services such as cable television, cellular telephones, and Internet-based services were major mileposts in that industry-wide change. Several of these new

> service industries sought and obtained exemptions from the public utilities tax, which are reflected in the present language of RCW 82.04.065, . . .[footnote omitted.]

Against this backdrop, the taxpayers argue that, because the first sentences of the current and predecessor statutes are nearly identical and Rule 193D exempted international and interstate toll charges from the public utility tax, the new statute should be interpreted so as to exempt international toll charges from retail sales tax.[3] In effect, the taxpayers contend that Rule 193D should define the scope of the first sentence of the new statute.

The specific language of Rule 193D at issue reads as follows:

> In computing public utility tax, there may be deducted from gross income so much thereof as is derived from actually transporting persons or property or transmitting communications or electrical energy, from this state to another state or territory or to a foreign country and vice versa.

Although definitions in a rule can be used to define the terms of an unambiguous statute,[4] the problem with the taxpayers' argument is that Rule 193D did not define or interpret the language in the predecessor to RCW 82.04.065. Rather, it attempted to implement RCW 82.16.050(6), which provides a deduction from the public utility tax for amounts prohibited under the "Constitution or laws of the United States." By its own terms, Rule 193D seeks to avoid an "impermissible burden upon interstate or foreign commerce." Rule 193D neither defined network telephone services nor does it lead to a different interpretation of the first sentence of RCW 82.04.065(2).[5]

Moreover, because the legislature in 1983 removed network telephone services from the public utility tax and made such services subject to retail sales tax, the public utility tax deduction relied on by the taxpayers no longer applies to the services at issue. In fact, the legislature employed a

---

[3] Contrary to the taxpayers' argument, the statutory development, as outlined in *Western Telepage*, does not express an intent to limit the language used in the first sentence of RCW 82.04.065(2) to describe only interstate activities. Rather than evincing an intent to limit the scope of services subject to taxation, the history outlined in *Western Telepage* shows a series of actions by the legislature to increase the scope of activities subject to tax concomitant with the onset of increased competition in the industry, except for services specifically excluded (e.g., cable television and internet based services). No exclusion for international toll services was provided in any enactment.

[4] *See, e.g., International Ass'n of Fire Fighters Local 3266, AFL-CIO v. Department of Ret. Sys.*, 97 Wn. App. 715, 719-20, 987 P.2d 115 (1999); *Anderson v. Department of Ecology*, 34 Wn. App. 744, 748-49, 664 P.2d 1278 (1983) (cases relying on WAC definitions); *see also, Choi v. City of Fife*, 60 Wn. App. 458, 462, 803 P.2d 1330 (1991) (resorting to dictionary when term not defined in either statute or regulation).

[5] The predecessor statute's definition of a "telephone business" did not contain a limitation on interstate or international toll calls, as the taxpayers continue to suggest. Rather, the limitation came from the imposition of tax under the public utility tax (RCW 82.16) and the Department's rule (Rule 193D) interpreting the public utility tax. No similar limiting rule or statutory provision is provided under the retail sales tax provisions (RCW 82.08). The legislature was presumably aware of this difference when it removed taxation of "telephone business" from the public utility tax and, instead, imposed tax on "telephone service" under RCW 82.04. *See, e.g., State v. Peterson*, 100 Wn.2d 788, 791, 674 P.2d 1251 (1984) (legislature is presumed to have been aware of pertinent administrative regulations in existence when it enacts a statute). The taxpayers' continued reliance on Rule 193D is misplaced.

new standard in the second sentence of RCW 82.04.065 in order to address constitutional concerns. The statute now taxes only interstate services "originating from or received on telecommunications equipment or apparatus in this state if the charge for the service is billed to a person in this state." The United States Supreme Court subsequently cited this standard as meeting constitutional requirements. *See Goldberg v. Sweet*, 488 U.S. 252, 263 (1989) (Washington is "a state which taxes the origination or termination of an interstate telephone call billed or paid within that State."); Det. No. 94-071, 14 WTD 232 (1995). Although no express reference to international services is made with respect to this standard, the Department has reasonably applied the same standard for such retail taxable services, in accordance with RCW 82.08.0254.

The taxpayers also argue that the reference to "interstate" services in the second sentence of RCW 82.04.065(2) is a limitation on the toll services included in the first sentence. Alternatively, the taxpayers argue that the term expands on a limited definition, assuming that the application of Rule 193D to the predecessor statute limited the scope of the first sentence to intrastate services. Because we found that the application of Rule 193D to the predecessor statute does not limit the scope of the first sentence of the new statute, we address only the first argument, whether the term "interstate" acts as a limitation on the type of toll service referenced in the first sentence of RCW 82.04.065(2).

Applying the ordinary meaning to the words employed in the second sentence, the statutory language does not limit the range of services subject to tax. The precise phrase used in the second sentence is that the term network telephone services "includes interstate service." Generally, "the term 'include' is construed as a term of enlargement, not as a term of limitation." *Wheeler v. Department of Licensing*, 86 Wn. App. 83, 88, 936 P.2d 17 (1997); *see also Publishers Bldg. Co. v. Miller*, 25 Wn.2d 927, 940, 172 P.2d 489 (1946) (under the terms of a lease, the duty to repair premises "including plumbing" did not limit the obligation only to plumbing); 2A Norman Singer, *Sutherland Statutory Construction* § 47.07 (5th ed. 1992) (the term conveys "the conclusion that there are items includable, though not specifically enumerated . . . ."). Further, *Black's Law Dictionary* 766 (7th ed. 1999) defines the word "include" to mean: "To contain as a part of something. The participle including typically indicates a partial list . . . ."

The predecessor to RCW 82.04.065 and post-1983 amendments to RCW 82.04.065(2) provide good illustrations of the use of the word "includes." The predecessor statute provided that telephone service "includes cooperative or farmer line telephone companies or associations operating an exchange." Laws of 1981, ch. 144, sec. 2(6). It would be a strained and unrealistic result for that phrase to be interpreted to exclude from tax telephone exchanges other than ones operated by cooperative or farmer line telephone companies. As a general rule, "[s]trained, unlikely or unrealistic interpretations are to be avoided." *Bour v. Johnson*, 122 Wn.2d 829, 835, 864 P.2d 380 (1993); *Simpson Inv. Co. v. Department of Rev.*, 141 Wn.2d 139, 149, 3 P.3d 741 (2000). RCW 82.04.065(2) was amended in 1997 to include a new third sentence: "'Network telephone service' includes the provision of transmission to and from the site of an internet provider via a local telephone network, toll line or channel, cable, microwave, or similar communication or transmission system." Laws of 1997, ch. 304, sec, 5. Again, it would be strained and unrealistic to

conclude that this sentence limited the scope of what constitutes transmission services only to those to and from an internet provider.

Consequently, the use of the phrase "includes interstate service" in the second sentence of the current statute is only indicative of a partial, nonexclusive identification of services considered network telephone services. Under ordinary usage, the wording of the second sentence does not limit the scope of network telephone services to interstate services as the taxpayers suggest.

Although a challenge to interpret, when read in its entirety and using the ordinary meaning for the words employed, RCW 82.04.065 is not ambiguous. Consequently, rules of construction, including the requirement that ambiguous statutes imposing tax are to be construed against the Department, are not applicable. *See Western Telepage*, 140 Wn.2d 609, n. 5. As a result, we do not address the various rules of construction raised either by the taxpayers or by the Department.

Even assuming that the statute was ambiguous and taxpayers were successful in their arguments that the statute should be construed in the manner they suggest, the result would likely not be as they envision. Under such a scenario, although international telecommunication services might not be subject to retail sales tax, this does not mean such revenues would be excluded from all taxation. As a general principle the B&O tax is imposed upon virtually all business activities carried on within the state. *See, e.g., Impecoven v. Department of Rev.*, 120 Wn.2d 357, 363, 841 P.2d 752 (1992); *Time Oil Co. v. State*, 79 Wn.2d 143, 146, 483 P.2d 628 (1971). Because we find the statute to be unambiguous and to include the international long distance services provided by the taxpayers, we also do not reach this issue.

## DECISION AND DISPOSITION:

The taxpayers' petition to correct the assessment, for a refund of taxes previously paid, and to overrule Det. No. 89-174, 7 WTD 283 (1989) is denied.

Dated this 26th day of March 2002.