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STATE OF WASHINGTON

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**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

RICHARD AND ANNETTE BOWIE, d/b/a VALPAK OF WESTERN
WASHINGTON - NORTH, *et al.*,

Appellants,

v.

WASHINGTON DEPARTMENT OF REVENUE,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

This case is a tax dispute concerning printed material with which everyone is familiar – direct mail advertising. In this case, the specific advertising vehicle is a blue envelope containing coupons and advertisements for both local and national businesses. The envelopes are distributed under the trade name VALPAK® and appear regularly in mailboxes throughout most of Western Washington.

The appellants are local franchisees of a national company (“the Franchisees”) who are in the business of selling local advertising in Valpak envelopes using the national company’s “methods, formats, systems, specifications, standards, operating policies and procedures, and trademarks.” CP 227. They have been paying business and occupation tax for years under a general “service & other” category and now seek to qualify for a lower rate allowed to those in the business of publishing periodicals or magazines.

The trial court correctly granted summary judgment to the Department of Revenue. The Franchisees are not in the business of publishing, and Valpak envelopes do not qualify as “periodicals or magazines.” The Department requests that this Court affirm the trial court’s order.

II. RESTATEMENT OF THE ISSUES

1. Are the Franchisees “in the business of . . . publishing”

Valpak envelopes when (a) their franchise agreements with the national franchisor identify the franchisor as the sole publisher and preclude the Franchisees from themselves printing, publishing, or distributing Valpak envelopes, (b) the franchisor owns all the intellectual property rights in the finished products, (c) the franchisor has final veto power over the content of the envelopes, and (d) the Franchisees agree that the franchise agreements reflect their business relationship with the franchisor?

2. Are Valpak envelopes “periodicals or magazines” under RCW 82.04.280 when they (a) are not “publications” in the ordinary sense of that word, and (b) are not issued regularly at “stated intervals”?

III. STATEMENT OF THE CASE

The eight appellants are franchisees of Val-Pak Direct Marketing Systems, Inc. (VPDMS), a Delaware corporation headquartered in Florida. CP 227. As franchisees of VPDMS, appellants solicit advertisements for inclusion in Valpak envelopes, which are distributed in most of Western Washington to franchise-specific territories, and perform related tasks. CP 223-73; CP 277. The basic format of the Valpak product is a blue envelope with coupons and advertising flyers inside. CP 158; CP 285-372

(sample Valpak envelope set).¹ Valpak envelopes are mailed by VPDMS to approximately 158 different units of 10,000 addresses in Western Washington twelve times per year, under schedules created by the Franchisees. CP 6; CP 277. The envelopes contain both advertising solicited by the Franchisees in their respective territories and advertising solicited by VPDMS (primarily national advertisers). CP 220 (RFA No. 28). Franchise agreements control the respective authority of the Franchisees and VPDMS related to advertising solicitation and other aspects of the business. CP 159-60 (Bowie Dep.); CP 223-73 (Franchise Agreement); CP 386 (RFP No. 16). Language in the Franchise Agreement is especially pertinent in the context of determining whether the Franchisees are in the business of publishing Valpak envelopes and is discussed in detail in Part IV.A., *infra*.

In October 2002, appellants Richard and Annette Bowie submitted what is known as a request for letter ruling to the Department's Taxpayer Services Division, seeking an opinion on whether they could report the income from their franchise under the printing and publishing tax rate for business and occupation ("B&O") tax under RCW 82.04.280, rather than under the higher rate for unspecified "service and other" businesses in

¹ The Department uses the term "Valpak envelopes" in this brief to mean both the blue envelopes and their contents, unless the context indicates otherwise.

RCW 82.04.290.² CP 391-93. In their letter, the Bowies represented that they were the publishers of Valpak envelopes and focused the question on whether Valpak envelopes qualified as “periodicals or magazines” under RCW 82.04.280. *Id.*

The Taxpayer Services Division responded in December 2002 that the Bowies could report under the printing and publishing category, but rescinded that position shortly thereafter in a letter in March 2003. CP 395-97 (rescission letter). In the meantime, however, the Bowies and other Valpak franchisees had filed requests for refunds with the Department’s Taxpayer Account Administration Division for amounts they had allegedly overpaid starting in 1998. CP 399-402. The Franchisees then filed an appeal with the Department’s Appeals Division in April 2003, protesting the Taxpayer Services Division’s rescission of the December 2002 letter. CP 47-51. In May 2003, the Taxpayer Account Administration Division denied their refund claims. CP 404-10.

The Appeals Division issued a Final Executive Level Determination in December 2005, ruling that Valpak envelopes are not “publications,” and therefore are not “periodicals or magazines” under

² The process by which taxpayers may obtain an opinion from the Department regarding how they ought to be reporting and paying taxes is described in WAC 458-20-100(2)(a). The written opinion generally is referred to as a letter ruling. The process involves no hearings or evidentiary inquiries. The Department’s Taxpayer Information & Education unit issues the opinions based on the facts stated by the taxpayer in the letter ruling request.

RCW 82.04.280. CP 275-83. The Determination concluded the Franchisees are properly subject to the “service & other” B&O tax classification. CP 282. The Determination treated the Franchisees as publishers, but not printers,³ of Valpak envelopes, without discussion. CP 279. The Determination also mentioned the issue of whether Valpak envelopes are issued at “stated intervals,” an additional statutory requirement, but indicated the issue did not need to be reached. CP 282.

The Franchisees filed this tax refund action under RCW 82.32.180 in January 2006 in Thurston County, seeking a refund of taxes paid during January 1998 through January 2006, to the extent of the difference between the service & other B&O tax rate (1.5%) and the lower printing & publishing rate (0.484%). CP 5-10. The parties filed cross motions for summary judgment. CP 11, 437. Judge Richard Hicks entered an order granting summary judgment to the Department and denying the Franchisees’ motion for summary judgment on October 30, 2007. CP 712-14. In his oral ruling at the hearing on August 31, 2007, Judge Hicks held both that the Franchisees were not the publishers of Valpak envelopes and that Valpak envelopes did not qualify as “periodicals or magazines”

³ The Franchisees have never asserted they are the printers of Valpak envelopes, and their Franchise Agreements with VPDMS indicate they are not. *See* Part IV.A.2., *infra*. Nonetheless, they refused to admit they are not the printers in response to a Request for Admission, stating that they “contracted with [VPDMS] to physically print the plaintiffs’ publications.” CP 216 (RFA No. 13).

under RCW 82.04.280. RP 43-45.⁴ The Franchisees timely appealed. CP 710-14.

IV. ARGUMENT

The trial court's order granting summary judgment to the Department effectuates the legislative intent reflected in the plain language of RCW 82.04.280. In this case, the Court may affirm on multiple bases.⁵

As a threshold matter, appellants are not in the business of "publishing," and therefore do not qualify for the printing and publishing tax rate in RCW 82.04.280, regardless of whether Valpak envelopes constitute "periodicals or magazines." They are in the business of providing advertising services, which is taxed at a higher rate under the "service and other" category in RCW 82.04.290(2).

Even if appellants were in the business of publishing Valpak envelopes, these materials are not "periodicals or magazines" under the definition in RCW 82.04.280. First, the definition uses the word "publication," not the term "printed materials." Valpak envelopes are

⁴ The trial court's ruling on the "publishing" issue was far from an "afterthought." Appellants' Brief at 5. Judge Hicks showed interest in the issue throughout the hearing. RP 5-11, 20-23, 36-39, 43, 45.

⁵ Because the standard of review is *de novo*, this Court may affirm the summary judgment order on any basis supported by the record, including on an issue not decided by the trial court. See *Int'l Brotherhood of Elec. Workers, Local No. 46 v. Trig Electric Construction Co.*, 142 Wn.2d 431, 435, 13 P.3d 622 (2000); *Redding v. Virginia Mason Medical Center*, 75 Wn. App. 424, 426, 878 P.2d 483 (1994).

printed materials that do not fall within the ordinary meaning of the word “publication.” Appellants’ interpretation of the definition is unlikely and strained. Second, appellants do not qualify for the printing and publishing tax rate because Valpak envelopes are not published regularly at “stated” intervals, as the statutory definition requires.

For any one or all of these reasons, the Department respectfully requests that this Court affirm the trial court’s order.

A. The Franchisees Are Not “In The Business Of . . . Publishing” Magazines Or Periodicals.

Washington imposes the B&O tax on every person “for the act or privilege of engaging in business activities,” and the tax applies to the “gross income of the business.” RCW 82.04.220. If a business is not taxed explicitly under a specific provision in RCW 82.04, the default B&O tax is found in RCW 82.04.290(2), which taxes gross income at 1.5%. This is known as the “service & other” category. One statute imposing a lower rate to specific business activities is RCW 82.04.280. This statute covers several different industries, including printing and publishing, and imposes the rate of 0.484%. In relation to this case, RCW 82.04.280 applies that rate to:

every person engaging within this state in the business of:
(1) Printing, and of publishing newspapers, periodicals, or magazines; . . .

As used in this section, “periodical or magazine” means a printed publication, other than a newspaper, issued regularly at stated intervals at least once every three months, including any supplement or special edition of the publication.

This version of the statute has been in place since 1994, and through a retroactivity clause, effective since July 1, 1993. Laws of 1994, ch. 112, §§ 1, 5. Before 1993, publishers of newspapers, periodicals and magazines were eligible for the reduced B&O tax rate, but no statutory definitions existed for any of the three. In 1993, the Legislature removed periodicals and magazines from the favorable tax rate and provided a definition of “newspapers.” *See* Laws of 1993, 1st Sp. Sess., ch. 25, §§ 303, 304; RCW 82.04.214.⁶ In the next session, the Legislature restored periodicals and magazines to the classification, adding the definition and making the changes retroactive. Laws of 1994, ch. 112, §§ 1, 5.⁷

The B&O tax statutes do not provide a specific rate for advertising service providers, which means such services should be taxed under the “service & other” rate in RCW 82.04.290(2). That rate applies to those engaging “in any business activity other than or in addition to an activity taxed explicitly under another section” of RCW 82.04. RCW

⁶ Under RCW 82.04.214, a “newspaper” is “a publication issued regularly at stated intervals at least twice a month and printed on newsprint in tabloid or broadsheet format folded loosely together without stapling, glue, or any other binding of any kind.”

⁷ The Department has a rule addressing publishers of newspapers, magazines, and periodicals, WAC 458-20-143. The rule has not been updated since 1983, so it does not address the definition in RCW 82.04.280.

82.04.290(2) (rate 1.5%). The Department has a rule, WAC 458-20-218, specifically addressing advertising service businesses. Rule 218 directs such taxpayers to apply the “service & other” tax rate to their gross income. Rule 218 provides in pertinent part:

Advertising agencies are primarily engaged in the business of rendering professional services, but may also make sales of tangible personal property to their clients or others or make purchases of such articles as agents in behalf of their clients. . . .

The gross income received for advertising services, including commissions or discounts received upon articles purchased as agents in behalf of clients, is taxable under the service and other business activities classification.

WAC 458-20-218.

The Franchisees do not print Valpak envelopes, but they claim to publish them. The record demonstrates the Franchisees are advertising service providers, not publishers. The trial court correctly concluded this was one basis on which to grant summary judgment to the Department.

1. Engaging in the business of publishing means being a publisher.

The Franchisees argue that they do not need to be publishers in order to be “in the business of . . . publishing” for purposes of RCW 82.04.280. Appellants’ Brief at 12-14. The clear implication of their briefing is that any business activity “related to” publishing qualifies. The Court should reject this assertion.

There can be no reasonable doubt that when the Legislature used the term “in the business of . . . publishing” it was referring to publishers. The Department and its predecessor agency certainly have thought so since 1935, when the Washington State Tax Commission adopted Rule 143, stating: “*Publishers* of newspapers, magazines and periodicals are taxable under the ‘Printing and Publishing’ classification upon the gross income derived from the publishing business.” Wash. State Tax Comm’n Rule 143 (1935) (emphasis added) (CP 461). The current version of the Department’s rule, WAC 458-20-143, contains the same language.⁸

The Department’s interpretation is reasonable and consistent with other provisions in the tax code. B&O taxes are imposed on every person “for the act or privilege of engaging in business activities,” not for the privilege of conducting a business related to a particular industry. *See* RCW 82.04.220. A single business can be engaging in more than one taxable business activity, and if those business activities have two different tax rates, those two tax rates will apply to the gross income received from each respective business activity. RCW 82.04.440(1). For example, a person may obtain jewelry for resale. If the person sells part of

⁸ If the Court determines that RCW 82.04.280 is ambiguous with regard to whether a person is “engaging . . . in the business of . . . publishing,” it should accord weight to the Department’s longstanding contemporaneous construction of the statute in this regard, particularly given the Legislature’s acquiescence in that construction despite amendments affecting the printing and publishing category. *See In re Sehome Park Care Center, Inc.*, 127 Wn.2d 774, 780, 903 P.2d 443 (1995).

the jewelry directly to consumers at a jewelry show booth and the remainder to a retail store, the former activity is “engaging . . . in the business of making sales at retail” and the latter activity is “engaging . . . in the business of making sales at wholesale.” RCW 82.04.250 (retailing – 0.471%); RCW 82.04.270 (wholesaling – 0.484%). The fact that a single taxpayer may be taxed on multiple taxable activities demonstrates the Legislature’s focus for taxing purposes on the actual business activities, rather than the particular industry.

The Franchisees rely on the recent *Ford Motor* case in support of their argument that “the business of . . . publishing” periodicals or magazines is not limited to publishers, but applies to “all persons engaged in businesses activities that are part of the business of publishing.” Appellants’ Brief at 14. See *Ford Motor Co. v. City of Seattle*, 160 Wn.2d 32, 156 P.3d 185 (2007), *cert. denied*, ___ U.S. ___, 128 S. Ct. 1224 (2008). *Ford Motor* does not support that proposition.

Ford Motor concerned the applicability of Seattle and Tacoma B&O taxes to Ford’s automobile wholesaling activities. One issue was whether the cities could impose the wholesaling B&O tax on Ford’s income derived from selling automobiles to car dealers in the cities, when those car dealers took title of the vehicles upon delivery to a carrier at Ford’s vehicle assembly plants outside Washington. Ford contended it

was making sales at wholesale at those locations, rather than in Seattle and Washington. Ford engaged in other activities in the cities, including advertising, sending representatives to meet with dealers and parts representatives, and marketing and selling warranties. 160 Wn.2d at 38.

The court in *Ford Motor* had no need to decide whether Ford was engaged in the business of making sales at wholesale, because this point was undisputed. *Id.* at 38, 42. In addition, Ford stipulated that all of its activities in Seattle and Tacoma were for the business purpose of selling Ford products to dealers located there and helping them sell Ford products to their retail customers. *Id.* at 38. The court did hold that under the city ordinances, “[e]ngaging in the business of wholesaling encompasses more business activities than merely making sales.” *Id.* at 42. It did *not* hold, as the Franchisees argue, that the business of making sales at wholesale “encompasses any business activity ‘related to’ the business of selling.” Appellants’ Brief at 13.

What the Franchisees imply in their argument is that if an entity other than Ford Motor had been performing the Washington-based activities (e.g., meeting with dealers) as an agent or independent contractor for Ford Motor, that other entity also would have been engaged in the business of wholesaling Ford vehicles because the activities were “related to” the wholesale sales. But even if that were the case under the

Seattle and Tacoma tax ordinances, which is doubtful, it is not true under the state B&O statutes. To be taxable for engaging in the business of wholesaling in Washington, a person must actually make sales at wholesale. RCW 82.04.060 (defining “sale at wholesale”); RCW 82.04.270 (tax on wholesalers). The tax is based on “gross proceeds of sales.” RCW 82.04.270.

If an independent contractor for Ford Motor came to Seattle and Tacoma and solicited sales from local car dealers for Ford vehicles, under the state B&O tax, that independent contractor would not qualify for the wholesaling B&O tax, but would be subject to the “service & other” B&O tax on the gross income from its services to Ford Motor. Only Ford Motor, which actually makes the sales, qualifies for the wholesaling tax.

Likewise, the printing and publishing classification does not extend to virtually any business activity “related to” the printing and publishing industries. In order to qualify as a “person engaging . . . in the business of . . . publishing newspapers, periodicals, or magazines” under RCW 82.04.280, a person must actually be the publisher of the newspaper, periodical, or magazine. Just as a young independent contractor who delivers newspapers every morning on a bicycle is not engaged in the business of publishing that newspaper, nor is an independent contractor who solicits and helps prepare advertising for that newspaper.

Assuming Valpak envelopes are “publications,” which is a matter in dispute discussed below, the Franchisees do not qualify for the printing and publishing tax rate unless they can establish they are the publishers of Valpak envelopes. The undisputed evidence demonstrates to the contrary.

2. The Franchisees agreed that VPDMS is the publisher of Valpak envelopes in their Franchise Agreements.

The Franchisees’ rights concerning Valpak envelopes are governed by their Franchise Agreements with VPDMS. Each of the agreements contains virtually identical language addressing the fact that VPDMS is the publisher of Valpak envelopes. For instance, the Preamble to each agreement states:

COMPANY is engaged in the business of publishing and distributing by direct mail promotional literature and packages known as VAL-PAK Envelopes, as defined in Section 2 hereof, and of promoting and selling advertising services associated with VAL-PAK Envelopes. COMPANY grants, to persons it approves, franchises to offer and sell, in designated geographic areas, advertising in VAL-PAK Envelopes using COMPANY’S methods, formats, systems, specifications, standards, operating policies and procedures, and trademarks.

CP 149 ¶ 4; CP 227.⁹ The Franchise Agreements grant specified rights to each franchisee, including “the right and license to sell advertising inserts or other advertising products offered by COMPANY to be placed in VAL-PAK Envelopes to be distributed solely within the Territory” CP

⁹ The term “COMPANY” is defined as VPDMS. CP 227.

229, § 3.1(a).¹⁰ A second franchise right is “the exclusive right to order Mailings of VAL-PAK Envelopes distributed into the Territory, and to approve each Advertising Insert which COMPANY or any other Val-Pak franchisee proposes to place in any VAL-PAK Envelope to be mailed within the Territory.” CP 229-30, § 3.1(b). Franchisees also have “the right and license to use the Marks in connection with the activities” described above, “in accordance with the VAL-PAK System.” CP 230, § 3.1(d). The Agreements define these rights as the “Franchise” and define the “Franchised Business” as “the business of selling such advertising and ordering Mailings pursuant to the Franchise.” CP 230.

Noticeably absent from the Franchise Agreements is any grant of the right to franchisees to publish Valpak envelopes. In fact, franchisees are expressly prohibited from doing so:

The Franchise here granted does not include any right on the part of FRANCHISEE to itself print, publish or distribute

¹⁰ Capitalized terms in the Franchise Agreements are defined just after the Preamble, except where otherwise noted, and include the following:

“Mailing” means a distribution by COMPANY of VAL-PAK Envelopes by direct mail . . . which FRANCHISEE requests to be made within a specified geographic area in the Territory and within a specified period of time.

“Marks” means the trade names, trademarks, logos or other commercial symbols used from time to time to identify the goods and advertising services which are part of the VAL-PAK System, including, without limitation, the trademark “VAL-PAK®,” a federally registered trademark . . . and associated logos.

“VAL-PAK System” means the methods, formats, systems, specifications, standards, and operating policies and procedures established by COMPANY from time to time for use in the offer and sale of advertising in VAL-PAK Envelopes and such other advertising products as COMPANY may offer to its franchisees from time to time, and the Production and distribution of VAL-PAK Envelopes . . . by COMPANY.
CP 228-29.

VAL-PAK Envelopes or Advertising Inserts bearing the Marks or to cause any third party to do any of the foregoing, or to use the Marks other than in connection with the offer, sale and promotion of advertising in VAL-PAK Envelopes in accordance with the VAL-PAK System, and FRANCHISEE is expressly prohibited from engaging in any of such activities.

CP 230 (emphasis added).

If the foregoing provisions in the Franchise Agreements were not enough to identify the actual publisher of Valpak envelopes, an additional clause to which the Franchisees agreed confirms the point:

COMPANY, as the sole publisher and distributor in the United States of VAL-PAK Envelopes, agrees to produce, publish and distribute within the Territory VAL-PAK Envelopes in Mailings for which FRANCHISEE has submitted Final Orders, all in accordance with the VAL-PAK System, . . . and within the provisions of the Operating Manual.

CP 232, § 4.3 (emphasis added).

Appellant Richard Bowie, an owner of the two largest franchises in this case, agreed in his deposition that the Franchise Agreement describes his business relationship with VPDMS as a franchisee. CP 159-60. For purposes of participating in the Valpak direct mail advertising business, the Franchisees signed contracts in which they agreed that they were not, and could not be, publishers, printers or distributors of Valpak Envelopes. The Franchisees are not “in the business of . . . publishing” Valpak envelopes; rather, the Franchise Agreements show they are in the business

of selling advertising and providing related services.¹¹ Moreover, the other evidence produced in discovery is consistent with this conclusion.

3. The Franchisees' role in the process of creating the Valpak envelopes does not equate to that of a publisher.

As a part of selling advertising for inclusion in Valpak envelopes and ordering mailings for their respective territories, the Franchisees perform a variety of tasks. These include:

- making visits or calls to existing or potential local advertisers
- taking orders from local advertisers
- working with local advertisers to lay out the coupon design on a VPDMS form using VPDMS-approved format options
- transmitting the coupon layout form to VPDMS and communicating with VPDMS using VPDMS software
- receiving the proof from VPDMS and obtaining the advertiser's approval of the proof
- offering local advertisers the opportunity to advertise on VPDMS's website, Valpak.com
- contracting with a vendor to keep mailing lists up to date
- providing VPDMS with an updated mailing list for each mailing of Valpak envelopes
- determining whether to accept in their mailings advertisements provided by VPDMS or by franchisees operating outside their territories
- determining what promotion to place in the upper right corner of one side of the blue envelopes, which is reserved for franchisees to use
- determining and providing to VPDMS the order of advertising inserts to be included in each mailing of Valpak envelopes.

¹¹ The witness declarations the Franchisees submitted in summary judgment briefing did not identify the Franchisees as "publishers" of Valpak envelopes. *See* CP 27-30; CP 527-28; CP 531-34; CP 571-73; CP 587-88. Nor did they take the position that any language in the Franchise Agreements is false or inaccurate.

CP 161-63, 166-90, 193-95, 198, 200-207, 605-19, 620-22, 623-24, 625-26, 627-32, 638-41 (Bowie Dep.); CP 377-78, 380-81 (Interrogatory Nos. 24-26, 28, 32-33). These activities do not transform the Franchisees from being in the business of providing advertising services to being in the business of publishing.

The Franchisees cannot deny that VPDMS produces the Valpak envelopes, not the Franchisees. Their Franchise Agreements make this clear:

4.3 COMPANY'S Production of VAL-PAK Envelopes. . . . FRANCHISEE and COMPANY acknowledge and agree that COMPANY: (d) shall produce and distribute, or arrange for the production and distribution, of all VAL-PAK Envelopes to be distributed within the Territory, which production shall include, without limitation: (i) the graphics preparation and printing, from final proofs provided by the FRANCHISEE, of all Advertising Inserts other than those supplied by FRANCHISEE in accordance with Section 8.2 hereof; (ii) collation and insertion of Advertising Inserts, including those supplied by FRANCHISEE in accordance with Section 8.2 hereof; (iii) labeling and direct mailing of VAL-PAK Envelopes; and (iv) any other services provided by COMPANY as part of the VAL-PAK System.

CP 232, § 4.3(d);¹² *see also* CP 188, 196-97.

Publishers typically own copyrights, trademarks, and other intellectual property related to the published works. Copyright owners

¹² The Franchise Agreements define "Production" as "the publication of VAL-PAK Envelopes for a Mailing and all the services performed in connection therewith, including but not limited to, graphics preparation, printing, addressing, collation and insertion." CP 229.

have the exclusive right and authority to reproduce and distribute to the public, i.e., publish, copyrighted works. 17 U.S.C. § 106(1), (3). Here, *all* the intellectual property related to the Valpak business is owned by VPDMS, as the Franchisees admit. CP 199 (referring to this fact); CP 215 (RFA No. 11). The Franchisees have no right to use the name Valpak or any of VPDMS's intellectual property other than as provided in the Franchise Agreements.

Another indicator of a publisher is editorial control. The Franchisees have some control over the contents of the Valpak envelopes mailed in their territories by working with advertisers to prepare a coupon or flyer layout form, accepting or rejecting advertising inserts solicited by VPDMS or other franchisees (for which Franchisees are paid if they accept), determining what local promotions to place in one corner of the blue envelopes, and determining the order of advertising inserts in each mailing of the envelopes. *See* CP 381-82 (Interrogatory No. 36).

Despite the foregoing, however, the Franchise Agreements clearly give VPDMS the ultimate editorial authority, not its franchisees.

FRANCHISEE and COMPANY acknowledge and agree that COMPANY:

(a) *shall have final approval over the form and content of each individual item to be included in a VAL-PAK Envelope, but shall not have the authority to withhold approval of any item based on the mix of such items;*

(b) shall have the sole discretion to determine the appearance and style of VAL-PAK Envelopes, and to modify them from time to time; . . .

CP 232, § 4.3 (emphasis added); CP 382 (admitting VPDMS has “final veto power”).

The Franchisees are not publishers of Valpak envelopes; VPDMS is the publisher. The Franchisees are persons authorized to sell advertising for inclusion in Valpak envelopes and to perform related services for Valpak envelopes mailed into the franchise territories. They perform these activities as independent contractors of VPDMS and not as joint venturers or partners in VPDMS’s business. CP 235, § 6.1. They own no intellectual property with the Valpak name, and they do not have the final editorial approval over Valpak envelopes.

The Franchisees suggest in briefing here, as they did below, that the title of publishers is just a “label” or “title” VPDMS “assigned itself” in the Franchise Agreement. Appellants’ Brief at 11-12; CP 522. The trial court properly rejected that suggestion. RP 45 (“it’s more than just a label”). Appellants’ argument contradicts the evidence in the record. Mr. Bowie agreed in his deposition that the Franchise Agreement describes his business relationship with VPDMS for his two franchises. CP 159-60. Thus, the detailed provisions in the Franchise Agreement of the respective roles and rights of the parties necessarily constitute more than mere

“labels” or “titles.” Moreover, nothing in the Franchisees’ actual activities (described above) is inconsistent with the provisions in the Franchise Agreement.

The Department agrees that in determining how to tax a particular business, courts (and the Department) should not rely exclusively on contract labeling, but should also consider the parties’ actual conduct. *See Rho Company, Inc. v. Dep’t of Revenue*, 113 Wn.2d 561, 571, 782 P.2d 986 (1989); Appellants’ Brief at 11.¹³ The evidence here is completely consistent with the terms of the Franchise Agreement, not contrary to it.

In their arguments, the Franchisees alternatively describe their business activities as “creating and distributing,” “preparing and issuing,” and “disseminating information” through Valpak envelopes. Appellants’ Brief at 1-2, 5, 12-13. They relegate the role of VPDMS to a “mailing bureau.” Appellants’ Brief at 14.

Assuming without conceding the Franchisees do “create” Valpak envelopes, being a “creator” of a product does not make one a publisher of or in the business of publishing that product. William Strunk, Jr. and E. B.

¹³ The Franchisees assert the Department “refuses to be bound” by contractual language, citing to an administrative determination, Det. No. 99-216E, 18 W.T.D. 264 (1999). In that case, an out-of-state manufacturer sold goods to Washington customers f.o.b. the manufacturer’s out-of-state manufacturing plant. The administrative law judge relied on prior Washington Supreme Court cases in holding that the commercial delivery terms in the manufacturer’s contracts were not binding for tax purposes in determining the place of sale. 18 W.T.D. at 272. The Department did not “refuse to be bound” by contract terms in Det. No. 99-216E. It followed caselaw that had been on the books since 1955.

White are the “creators,” as authors, of *The Elements of Style*, but MacMillan Publishing Company is the publisher.¹⁴

In addition, “creating” advertising is completely consistent with being in the advertising service business. The Department’s rule for advertising agencies, for instance, specifically acknowledges the “creative” aspect of that business activity by stating the retail sales tax applies to purchases advertising agencies make of “plates, engravings, electrotypes, etchings, and other articles . . . for use . . . in rendering an advertising service.” WAC 458-20-218.

Similarly, under the North American Industrial Classification System (NAICS) maintained by the United States Census Bureau, “advertising agencies” are described as establishments “primarily engaged in *creating* advertising campaigns and placing such advertising in periodicals, newspapers, radio and television, or other media” and organized to provide a full range of services including “*creative services*” and “placing advertising.” *2007 NAICS Definition, 541810 Advertising Agencies* (emphasis added; available at <http://www.census.gov/>)

¹⁴ The Franchisees note that Frank Blethen holds the title of “Publisher” with the Seattle Times Company, which is in the business of publishing, in support of an argument that being in the business of publishing means “much more than holding the title of ‘publisher.’” Appellants’ Brief at 13. Mr. Blethen also holds the title of Chief Executive Officer. Mr. Blethen’s job titles do not support the Franchisees’ argument. The Franchisees are confusing business entity activities with a common executive job title in the publishing industry. See WAC 458-20-105 (distinguishing “employees,” who are not subject to B&O tax, from “persons engaging in business,” who are taxable).

eos/www/naics/htmls/5/541810.htm). The NAICS definition for the

“direct mail advertising” industry also mentions the creative process:

This industry comprises establishments primarily engaged in (1) *creating and designing* advertising campaigns for the purpose of distributing advertising materials (e.g., coupons, flyers, samples) . . . by mail or other direct distribution; and/or (2) preparing advertising materials . . . for mailing or other direct distribution. These establishments may also compile, maintain, sell, and rent mailing lists.

2007 NAICS Definition, 541860 Direct Mail Advertising (emphasis added;

<http://www.census.gov/eos/www/naics/htmls/5/541860.htm>).¹⁵

The Franchisees’ characterization of VPDMS as a mere “mailing bureau” is disingenuous. In addition to producing, printing, and mailing Valpak envelopes, VPDMS has “final approval over the form and content of each individual item” placed in a Valpak envelope and has the “sole discretion” to determine the appearance and style of Valpak envelopes, in addition to the “right to reject any Advertising Insert.” CP 232, § 4.3. VPDMS owns all the copyrights and trademarks associated with Valpak products, and the Franchisees own none. CP 215 (RFA No. 11).

In sum, under the undisputed facts, the Franchisees are properly taxed under the “service & other” category as advertising service businesses, rather than as publishers under RCW 82.04.280. The trial court’s order should be affirmed on this basis.

¹⁵ Outside this litigation, the Franchisees identify themselves as being in the business of direct mail advertising. CP 643-54.

B. Valpak Envelopes Do Not Meet The Definition Of “Periodicals Or Magazines” In RCW 82.04.280.

The Franchisees argue that Valpak envelopes are periodicals under the plain language of the statutory definition in RCW 82.04.280.

Appellants’ Brief at 5-7. However, they fail to examine that plain language or demonstrate how it applies to the facts of this case. Instead, they primarily focus on statements the Department made during administrative proceedings or the trial court’s statements in the oral ruling on summary judgment, creating and rebutting arguments that are not part of this litigation.¹⁶ Tax refund claims in Superior Court are *de novo* proceedings under RCW 82.32.180, and the standard for appellate review of a summary judgment order is *de novo*. Thus, such arguments do not create a reason to rule in the Franchisees’ favor.

If attention is focused where it belongs, on the actual words of the statutory definition, two issues merit attention. The first is whether the Legislature intended the word “publication” to include traditional categories of printed publications (e.g., books, magazines) or any printed material of whatever nature distributed publicly. If the former, summary judgment for the Department may be affirmed on this basis alone. The

¹⁶ For instance, the trial court did not rule, as the Franchisees imply, that a “periodical or magazine” under RCW 82.04.280 excludes advertising publications, nor has the Department taken a position in this litigation that the statutory definition is other than content neutral. *See* Appellants’ Brief at 8-9.

second issue is whether the “stated interval” at which a publication is issued must be stated in or on the publication, as opposed to on some other document or a website. If the answer is “yes,” this is another basis on which to affirm summary judgment for the Department.

The ordinary and common sense meanings of both “publication” and “stated intervals” within the context of RCW 82.04.280 support the trial court’s summary judgment for the Department. In contrast, the Franchisees’ interpretation, equating Valpak envelopes with “periodicals or magazines,” is unlikely and strained. The trial court was unwilling to reach so far, and this Court should be too.

1. The definition in RCW 82.04.280 does not open the door for any printed material whatsoever to be considered a “periodical or magazine.”

The Legislature defined “periodical or magazine” in part as “a printed publication, other than a newspaper.” RCW 82.04.280. The Franchisees argue Valpak envelopes are periodicals under the plain language of the statutory definition. The trial court concluded otherwise, as did the Department in its determination of the administrative appeal. The Department’s position was then and is now that Valpak envelopes are not “periodicals or magazines” because they are not “publications” in the

ordinary sense of that word.¹⁷ See CP 275-83. In other words, the word “publication” in the statutory definition means something narrower in scope than any printed material whatsoever that is publicly distributed. When all relevant language is considered, the plain language of RCW 82.04.280 does not support the Franchisees’ interpretation.

When construing a statute, a court’s goal is to give effect to legislative intent. *Enterprise Leasing, Inc. v. City of Tacoma*, 139 Wn.2d 546, 552, 988 P.2d 961 (1999). The court looks first to the plain language of the statute to determine its meaning. *Id.* Under the plain meaning rule, courts should consider the meaning words are ordinarily given, “taking into account the statutory context, basic rules of grammar, and any special usages stated by the legislature on the face of the statute.” *Dep’t of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002) (quoting 2A Norman J. Singer, *Statutes and Statutory Construction* § 48A:16, at 809-10 (6th ed. 2000)); *In re Sehome Park Care Center, Inc.*, 127 Wn.2d 774, 778, 903 P.2d 443 (1995) (look to whole statute). Words may be given their ordinary meaning by reference to a dictionary.

¹⁷ The Franchisees quote the Department as stating “the Valpak publication is a printed publication” and that it “meets the definition of periodical under RCW 82.04.280.” Appellants’ Brief at 6. They are quoting from the December 2002 letter ruling that the Department’s Taxpayer Services Division rescinded only three months later in March 2003, and which rescission the Department’s Appeals Division affirmed in December 2005 when it held Valpak envelopes are not “publications” under RCW 82.04.280. The Court should give the rescinded letter ruling no consideration.

Nonetheless, courts will avoid a literal reading of a statute that produces unlikely, absurd, or strained consequences. *State v. McDougal*, 120 Wn.2d 334, 350, 841 P.2d 1232 (1992).

Here, the word “publication” is contained in a definition of “periodical or magazine,” in a statute providing a preferential tax rate to printers and publishers of newspapers, periodicals and magazines. In this context, interpreting the word “publication” to include envelopes with loose advertising inserts would result in strained and unlikely consequences.

The dictionary definition of the word “publication” provides several common meanings of the word, ranging from a “public announcement” to “the act or process of issuing copies . . . for general distribution to the public,” to “a published work.” *Webster’s Third New International Dictionary* at 1836 (2002). The word “work” is defined in turn as “something produced by the exercise of creative talent or expenditure of creative effort: artistic production <literary, scientific, and artistic [work]s” *Id.* at 2634. These words should be considered in the context of what is being defined in the statute, which is periodicals and magazines, which in turn allows consideration of the typical components of periodicals and magazines.

The Department acknowledges there is some circularity in this reasoning, but the dictionary definitions of all these terms are circular, with “periodical” defined as a “magazine or other publication” and “magazine” defined as “a periodical that usu. contains a miscellaneous collection of articles, stories, poems, and pictures and is directed at the general reading public.” *Webster’s Third New International Dictionary* at 1357, 1680.¹⁸ Rather than demonstrating any analytical flaw in the Department’s position, the overlap in these definitions suggests the Legislature intended the word “publication” to mean what it ordinarily would mean in the context of periodicals and magazines.

Publications that are periodicals or magazines typically exhibit one or more of the following characteristics, in addition to containing articles: volume numbers, issue numbers, and issue dates; mastheads; covers; binding; tables of contents; numbered pages in sequence; and a designated area providing information about the editorial staff, circulation information, change-of-address instructions, subscription rates, a “stated interval” (e.g., “published monthly”), and a statement that the publication

¹⁸ The definition of “periodical or magazine” in RCW 82.04.280 is not significantly different than that in *Webster’s Third New International Dictionary* (2002), which defines “periodical” as “a magazine or other publication of which the issues appear at stated or regular intervals – usu. used of a publication appearing more frequently than annually but infrequently used of a newspaper.” *Id.* at 1680. This is more evidence that the Legislature did not intend its definition to result in a strained interpretation of the term.

is mailed at the periodicals postage rate. Valpak envelopes exhibit *none* of these characteristics. *See* CP 213-15 (RFA Nos. 1, 3, 6, 7, 8, 9, 10). In short, there is nothing on the face of the blue envelopes or the coupons and advertisements inside to suggest to a person examining a Valpak envelope that it is the type of printed material ordinary people would consider a periodical or magazine.

The Department's interpretation of the word "publication" is consistent with an appellate decision from VPDMS's home state, Florida, in which the court held that a sales tax exemption for "free, circulated publications that are published on a regular basis, the content of which is primarily advertising," did not apply to Valpak envelopes. *Dep't of Revenue v. Val-Pak Direct Marketing Systems, Inc.*, 862 So.2d 1, 3-5 (Fla. Dist. Ct. App. 2003). The court reversed the trial court's summary judgment for VPDMS and held that Valpak envelopes were not "circulated publications." It quoted dictionary definitions, then concluded:

As these definitions indicate, publication is a word commonly used to describe newspapers, magazines, and books. Contrary to the argument advanced by VPDMS, publication is not commonly understood as synonymous with printed materials. *A publication may consist of printed material, but not all printed material constitutes a publication.* A publication is presented in an identifiable form as a work or an issue. *A published work or an issue of a publication necessarily has a unitary physical quality like the unitary physical quality of a newspaper, magazine, or book.* Although it need not be bound together, a

publication is identifiable as a discrete physical item, such as a newspaper, magazine, or book. *An assortment of separate printed advertisements on separate pieces of paper inserted in an envelope cannot be properly described as a work or an issue and therefore is not a publication.*

Id. at 4 (emphasis added). Thus, the Florida appellate court determined Valpak envelopes failed to qualify even as “publications” for purposes of a tax exemption directed specifically to advertising publications. Not every printed advertising vehicle qualifies as a “publication.”

The Franchisees’ construction of RCW 82.04.280 would allow virtually any printed material distributed at least quarterly to qualify as a magazine or periodical. In addition to envelopes with loose coupons inserted, this could include political campaign postcards and flyers, or commercial, political, or religious doorhangers or leaflets. Even if the word “publication” in isolation could reasonably be interpreted to include loose coupons in an envelope, Valpak envelopes should not be considered “publications” for purposes of RCW 82.04.280. If they were, the result would be an unlikely or strained reading of the statute that would allow any printed material meeting the distribution frequency requirements to qualify for a favorable tax rate intended only for printers and for publishers of *newspapers, magazines and periodicals*. Nothing in the statute indicates the Legislature intended this tax benefit for distributors of loose direct mail advertisements.

Several times in their opening brief, the Franchisees describe Valpak envelopes as “printed circulars” or “circulars.” Appellants’ Brief at 1, 2, 5. This is a far more accurate characterization of Valpak envelopes than “publication,” as reflected in dictionary definitions of the noun “circular”:

An announcement, advertisement, or directive typically in the form of a printed leaflet intended to be sent to many persons or otherwise distributed widely.

Webster’s Third New International Dictionary at 409.

A printed advertisement, directive, or notice intended for mass distribution; a flyer.

Wiktionary, www.wiktionary.org; see also *Webster’s II New College Dictionary* at 203 (1999) (same as prior, except no reference to “flyer”).

Significantly, none of the definitions relied on by the parties of the nouns “publication” or “periodical” mentions “circulars.” Valpak envelopes are accurately described as “circulars,” not as “publications” or “periodicals.”

Summary judgment for the Department should be affirmed because Valpak envelopes are not “publications” and therefore do not qualify as “periodicals or magazines” under RCW 82.04.280.

2. Valpak envelopes are not issued regularly at “stated intervals,” as required by RCW 82.04.280.

Putting aside the question of whether Valpak envelopes are properly considered “publications” for purposes of RCW 82.04.280, the

trial court's order granting summary judgment to the Department and denying the Franchisees' motion may be affirmed on yet another basis. Under RCW 82.04.280, a "periodical or magazine" is a "printed publication, other than a newspaper, issued regularly at stated intervals at least once every three months." Though Valpak envelopes are issued "regularly" and "at least once every three months," they are not issued at "stated intervals."

The question is whether, when the Legislature used the phrase "stated intervals" in this definition, it intended that the publication interval be stated on the publication. Historical use of the phrase in relation to newspapers and periodicals indicates this was the Legislature's intent. The Franchisees fail to address this issue in their opening brief on appeal, despite requesting that the Court grant summary judgment in their favor.

The phrase "stated intervals" is not defined in RCW 82.04.280, and nothing in the legislative history of the 1994 act that added the definition of "periodical or magazine" specifically addresses this phrase. The Department has found no dictionary definition of the phrase "stated interval," though *Webster's Third New International Dictionary* uses the term in multiple definitions, including "current account," "periodical," and "probation." Likewise, the Department has been unable to find any published cases discussing what the term means, though it appears in

many contexts in cases, including in reference to newspapers and periodicals. *See Puget Sound Publishing Co. v. Times Printing Co.*, 33 Wash. 551, 557, 74 P. 802 (1903) (citing definitions of “newspaper”).¹⁹

Guidance to legislative intent exists, but lies elsewhere. By 1994, when the Legislature added the definition in RCW 82.04.280, the phrase “stated interval” had been used in statutes related to periodicals for over a century. The phrase appeared, for instance, in the United States Postal Service (“USPS”) Post Office Appropriation Bill of 1879, which outlined requisite periodical characteristics for admitting a publication to a second class postage rate. *See* 20 Stat. 355, 358, ch. 180 (1879).

Today requirements are similar, and to qualify for the USPS periodical rate (previously second class), a publication must be “regularly issued at stated intervals at least four times a year.” 39 C.F.R. pt. 3001, subpt. C, app. A. § 411.31 (2006). Federal regulations explain what this means: every issued copy of a publication must include a statement “showing how many issues are to be published each year and at which regular intervals (for example: daily; weekly; quarterly; four times a year

¹⁹ In other jurisdictions, statutes describing periodicals or courts interpreting a statute with no definition have used the phrase “stated periods” instead of “stated intervals.” *See William O. McMahon, Inc. v. Comm’r of Internal Revenue*, 45 T.C. 221, 228 (1965) (the word “periodical” implies a written publication supplied “at stated periods of time”); *Philstan Trading, Ltd. v. United States*, 45 Cust. Cl. Ct. 45 (1960) (tariff act limiting free entry for periodicals required the described publications to be “issued regularly at stated periods”).

in January, February, October, and November; weekly during school year; monthly except during July and August).” *USPS Domestic Mail Manual*, 707 Periodicals §§ 4.7.2; 4.11.2.²⁰ The Court has no doubt noticed such statements in periodicals. See CP 412-17.

Postal regulations bear distinct similarities to the “periodical or magazine” definition in RCW 82.04.280 and have been relatively unchanged in this respect since 1879. The Department’s predecessor agency adopted similar language in its 1935 rule, which defined “newspaper” in part as “issued regularly at stated intervals of at least once a week, . . .” for purposes of the newspaper sales tax exemption. Washington State Tax Comm’n Rule 143 (1935); CP 461. The Legislature then used similar language in 1993 when it provided a definition for “newspaper” in RCW 82.04.214. Thus, when it used the phrase “stated intervals” in amending RCW 82.04.280 in 1994, the Legislature logically intended a similar interpretation of the phrase as the Department had used since 1935 and the USPS had applied since 1879.

In the Franchisees’ Western Washington territories, Valpak envelopes are issued monthly under a regular schedule the Franchisees establish 18-24 months in advance. CP 28, ¶ 6. However, Valpak

²⁰ 39 C.F.R. § 211.2(a)(2) provides that regulations of the Postal Service include the Domestic Mail Manual. The *USPS Domestic Mail Manual* is available online at <http://pe.usps.gov/text/dmm300/707.htm>.

envelopes and their contents include no statement of frequency and display no information pertaining to their frequency. *See* CP 213 (RFA No. 2); CP 285-372 (sample Valpak envelope).

The Franchisees distribute a printed mailing schedule to *advertisers* and argued below that this satisfies the “stated interval” requirement. *See* CP 419-30; CP 518. However, this interpretation of the statute effectively reads the “stated interval” requirement out of the statute. The Valpak mailing schedule is nothing more than a schedule; it is not an official statement of how frequently Valpak envelopes are issued. The schedules consist of dates, spanning 12-18 months, and they are printed in Valpak flyers (not Valpak envelopes), brochures, and other materials *for the benefit of prospective advertising clients*, not their targeted consumers. CP 163-65; CP 419-30. The mailing dates also are available on the Valpak.com website, which is VPDMS’s website, but only after following “Advertise with Us” links for at least four screens. CP 151, ¶ 4; CP 432-36.

In the trial court, the Franchisees argued, based on dictionary definitions of the word “stated,” that their mailing schedules²¹ were sufficient to meet the “stated intervals” requirement in RCW 82.04.280

²¹ What the Franchisees used to call their “mailing schedule” they now refer to as their “publication schedule.” *Compare* CP 151, 419-430, 468-85 (“mailing” schedules) *with* CP 28, ¶ 7; CP 163, 465-66, 533 (referencing “publication schedules”).

because the issue dates were “fixed” and “declared.” CP 518. They argued that the stated interval need not be “set out in any particular place or by any particular means” and that the Department was trying to add a requirement not found in the statute. *Id.* Under the Franchisees’ theory, then, one could satisfy the “stated interval” requirement by handwriting a publication interval on a paper napkin and handing it to someone.

This Court should decline the Franchisees’ invitation simply to examine the word “stated” in RCW 82.04.280 without considering its context in the definition of “periodical or magazine” and without considering the historical use of the term “stated interval” in relation to periodicals. Words in a statute should not be considered in a vacuum. The Legislature may be presumed to have been aware of relevant federal standards, or at a minimum, that magazines and periodicals typically state how often they are published.²²

Properly considered in its statutory context in the definition of “periodical or magazine,” the phrase “stated interval” means the frequency of publication must be stated on the publication itself. Valpak envelopes contain no “stated interval” of their issuance, and they do not even contain

²² This is a “background fact” of which judicial notice can be taken in determining legislative intent. See *Dep’t of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002).

an issue date.²³ Accordingly, as a matter of law, Valpak envelopes do not qualify as “periodicals or magazines,” and this Court should affirm the trial court’s grant of summary judgment to the Department.

C. The Court Should Affirm The Trial Court Even If It Finds RCW 82.04.280 Is Ambiguous.

The parties in this case are not taking the position that RCW 82.04.280 is ambiguous. If the Court concludes otherwise, the result should be the same – the trial court’s order should be affirmed.

The Franchisees argue that RCW 82.04.280, as a taxing statute, should be interpreted in favor of taxpayers and against the Department. The Court should keep in mind that the guides to interpreting ambiguous tax statutes exist alongside other statutory interpretation guidelines. “[A]ll the rules of statutory construction are relevant” in the tax statute context, not just the guidelines concerning taxing statutes or exemption or deduction statutes. 3A Norman J. Singer, *Statutes and Statutory Construction* § 66:3 at 25 (6th ed. 2003). Rules of statutory construction are not statements of law. “Rather, they are rules in aid of construing legislation and an aid in the process of determining legislative intent.”

²³ Assuming that a publication issue date on the publication would be sufficient to satisfy the “stated interval” requirement, which the Department does not concede, the evidence demonstrates Valpak envelopes have no such feature. See CP 458-60 and evidence cited therein. In opposing the Department’s motion, the Franchisees did not contest this fact, nor do they do so on appeal.

Johnson v. Continental West, Inc., 99 Wn.2d 555, 559, 663 P.2d 482 (1983).

A more appropriate rule of statutory construction to apply if RCW 82.04.280 is ambiguous is the doctrine of *noscitur a sociis*, under which the meaning of doubtful words may be determined by their relationship with other associated words and phrases. *See Port of Seattle v. Dep't of Revenue*, 101 Wn. App. 106, 113, 1 P.3d 607 (2000) (term "mass public transportation terminal" meant only terminals for ground transportation and not airport terminals); *Shurgard Mini-Storage of Tumwater v. Dep't of Revenue*, 40 Wn. App. 721, 727, 700 P.2d 1176 (1985) (term "public service business" in statute, which included "warehouse" as an example, did not include operation of mini-storage facilities).

The word "publication" and the phrase "stated intervals" in RCW 82.04.280 appear in a definition of "periodical or magazine."²⁴ By including both "periodical" and "magazine" as words being defined, instead of just "periodical," the Legislature gave additional clues as to how it intended the definition should be interpreted. In other words, the word "periodical" should not be given an interpretation inconsistent with the common understanding of the word "magazine" by giving the word

²⁴ The Franchisees avoid using the word "magazine" in their briefing, and they do not contend Valpak envelopes are "magazines." Courts may not avoid or ignore words in a statute. *In re Parentage of J.M.K.*, 155 Wn.2d 374, 393, 119 P.3d 840 (2005).

“publication” a meaning so broad it would include any printed material whatsoever. Applying the doctrine of *noscitur a sociis* leads to the conclusion that Valpak envelopes are not “publications” and accordingly, do not qualify as “periodicals or magazines.”

By the same token, the phrase “stated intervals” should be considered in light of the context of the definition as a whole, not just by applying a dictionary definition of the word “stated.” The statutory construction rules that provide the best means for ascertaining legislative intent here are the rules that direct the Court to consider the words “publishing,” “periodical,” “publication,” and “stated interval” in their statutory context and to avoid strained or unlikely interpretations. *See Dep’t of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002); *Simpson Investment Co. v. Dep’t of Revenue*, 141 Wn.2d 139, 149, 3 P.3d 741 (2000).²⁵

Regardless of whether RCW 82.04.280 is considered ambiguous or unambiguous, the trial court reached the correct result in granting summary judgment to the Department.

²⁵ The Franchisees also cite the principle that a specific statute prevails over a general statute. They argue they are taxable under RCW 82.04.280 because it is a “specific” tax classification, unlike the “service & other” classification under RCW 82.04.290(2), a “general” classification. Appellants’ Brief at 14-15. This guideline applies only if there is an “inescapable conflict” between general and specific provisions. *State v. Austin*, 59 Wn. App. 186, 199, 796 P.2d 746 (1990). Here, no conflict exists because RCW 82.04.290(2) applies only when a specific tax rate for an activity does not exist. A business activity either falls within a specified tax rate, or it falls within RCW 82.04.290(2). It can never fall within both, so there can never be a conflict.

V. CONCLUSION

The Department requests that this Court affirm the trial court's grant of summary judgment to the Department and denial of the Valpak Franchisees' motion for summary judgment. The Franchisees do not qualify for the printing and publishing B&O tax rate because they are not engaged in the business of publishing Valpak envelopes and because Valpak envelopes are not "periodicals or magazines" under the definition in RCW 82.04.280.

RESPECTFULLY SUBMITTED this 2nd day of May, 2008.

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DIVISION II
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NO. 36977-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

RICHARD AND ANNETTE
BOWIE, d/b/a VALPAK OF WESTERN
WASHINGTON – NORTH, et al.,

Appellants,

v.

WASHINGTON DEPARTMENT OF
REVENUE,

Respondent.

DECLARATION OF
MAILING

Candy Zilinskas, states and declares as follows:

I am a citizen of the United States of America and over 18 years of age and I am competent to testify to the matters set forth herein. On May 2, 2008, I provided a true and correct copy of Brief of Respondent and this Declaration of Mailing electronically via email to:

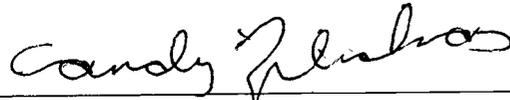
SEdwards@perkinscoie.com and by US Mail Postage Prepaid via

Consolidated Mail Service to:

Scott M. Edwards
Perkins Coie
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed this 2nd day of May, 2008, in Olympia, Washington.

A handwritten signature in cursive script, appearing to read "Candy Zilinskas", written over a horizontal line.

CANDY ZILINSKAS
Legal Assistant