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NO. 83426-1

SUPREME COURT OF THE STATE OF WASHINGTON

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

Petitioners,

v.

WASHINGTON DEPARTMENT OF REVENUE,

Respondent.

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RESPONDENT'S ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves the application of RCW 82.04.280, a statute that provides a favorable business and occupation (“B&O”) tax rate to taxpayers in the business of publishing periodicals and magazines. The petitioners here are franchisees of a Florida company that distributes coupons and advertisements nationally by direct mail in blue envelopes under the trade name Valpak®. The Franchisees solicit advertisements from local businesses for placement in Valpak envelopes the Florida company mails to residents of Western Washington in the franchise territories.

Respondent, Washington State Department of Revenue, asks this Court to deny the petition for review. The issue the Petitioners raise, whether RCW 82.04.280 requires a “stated interval” of publication to be provided to the intended audience of a “periodical or magazine,” does not meet the standards of RAP 13.4(b). It is not an issue that would provide a final resolution to this case, nor would it provide significant precedent for other cases.

However, if this Court accepts review, it should address *all* issues raised in the case regarding the applicability of RCW 82.04.280. *See* RAP 13.4(d) (answer may raise issues briefed to the Court of Appeals). Thus, one question this case presents is whether Valpak envelopes meet the statutory definition of “periodical or magazine,” which means “a printed publication, other than a newspaper, issued regularly at stated intervals at least once every three months, . . .” RCW 82.04.280. Another question is

whether the Franchisees engage “in the business of . . . publishing” Valpak envelopes when the franchise agreement governing the Franchisees’ businesses unambiguously provides that the national franchisor in Florida, not the Franchisees, is the exclusive publisher of Valpak envelopes. Although the trial court decided both issues in the Department’s favor on summary judgment, the Court of Appeals did not address this alternative ground for affirming summary judgment.

II. STATEMENT OF ISSUES

RCW 82.04.280 provides a favorable tax rate for persons “engaging . . . in the business of . . . publishing newspapers, periodicals, or magazines,” where “periodical or magazine” is defined as “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.”¹ It is undisputed that Valpak envelopes are not “newspapers.”

1. Are Valpak envelopes “periodicals or magazines” under RCW 82.04.280 where they are not “printed publications” in the sense of a newspaper, periodical or magazine, and where they are not “issued regularly at *stated* intervals”?

2. Are the Franchisees “in the business of . . . publishing” Valpak envelopes where, among other things, their franchise agreements

¹ The Legislature amended RCW 82.04.280 in 2009, removing newspaper publishing from the section and placing it in a different section with a lower B&O tax rate of 0.2904 percent, compared to the rate of 0.484 percent for periodical or magazine publishing. The Legislature did not amend any of the statutory language relating to periodicals or magazines. Laws of 2009, ch. 461, §§ 1-3.

with the national franchisor identify the franchisor as the sole publisher and prohibit the Franchisees from themselves printing, publishing, or distributing Valpak envelopes, and the Franchisees admit that the franchise agreements reflect their business relationship with the franchisor?

III. RESTATEMENT OF THE CASE

To qualify for the preferential tax rate of 0.484 percent under RCW 82.04.280 rather than the catch-all rate of 1.5 percent under RCW 82.04.290, the Franchisees must establish they were engaged “in the business of . . . publishing . . . periodicals or magazines” during the tax period. The statute contains a definition of “periodical or magazine,” which requires that qualifying materials be a “printed publication . . . issued regularly at stated intervals at least once every three months, . . .” *Id.* In this refund action, the Franchisees have the burden of proving they paid an incorrect amount of tax. RCW 82.32.180.

The eight petitioners are franchisees of Val-Pak Direct Marketing Systems, Inc. (VPDMS), a corporation headquartered in Florida. CP 227. As franchisees of VPDMS, they solicit advertisements for placement in Valpak envelopes, which VPDMS distributes 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). VPDMS mails Valpak envelopes to over a million 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.

Franchise Agreements control the respective authority of the Franchisees and VPDMS related to publishing, printing, advertising solicitation, intellectual property rights, editorial control, and other aspects of the business. CP 159-60; CP 223-73 (Franchise Agreement); CP 386. The Franchise Agreement grants each Franchisee “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 229, § 3.1(a).² However, the Franchisees have no right to publish Valpak envelopes:

The Franchise here granted does not include any right on the part of FRANCHISEE to itself print, publish or distribute VAL-PAK Envelopes or Advertising Inserts bearing the Marks or to cause any third party to do any of the foregoing, . . . and FRANCHISEE is expressly prohibited from engaging in any of such activities.

CP 230 (emphasis added); *see also* CP 232 (VPDMS is “the sole publisher and distributor” of Valpak envelopes).

In 2002, petitioners Richard and Annette Bowie sought an opinion from the Department’s Taxpayer Services Division regarding whether they could report the income from their franchise under the printing and publishing tax rate for B&O tax under RCW 82.04.280, rather than under

² The term “COMPANY” is defined as VPDMS. CP 227.

the higher catch-all rate for unspecified “service and other” businesses in RCW 82.04.290.³ CP 391-93. The Taxpayer Services Division responded that the Bowies could report under the printing and publishing category, but rescinded that letter ruling in writing three months later. CP 395-97. In the meantime, however, the Bowies and several other Valpak franchisees had filed requests for refunds for amounts they allegedly had overpaid since 1998. CP 399-402. The Franchisees then filed an administrative appeal protesting the Taxpayer Services Division’s rescission of the letter ruling. CP 47-51. The Department denied the refund claims. CP 404-10.

The Department’s Appeals Division ruled that Valpak envelopes were not “publications,” and therefore were not “periodicals or magazines” under RCW 82.04.280. CP 275-83. The determination concluded the Franchisees instead were properly subject to the “service & other” B&O tax rate under RCW 82.04.290. CP 282.

The Franchisees filed a *de novo* tax refund action under RCW 82.32.180 in Thurston County, seeking a refund of taxes paid from January 1998 through January 2006, in the amount of the difference between the service & other B&O tax rate and the lower printing & publishing rate. CP 5-10. The trial court granted summary judgment to the Department on cross-motions for summary judgment. CP 11, 437,

³ 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). Such an opinion generally is referred to as a letter ruling. The process involves no hearings or evidentiary inquiries. The Taxpayer Services Division issues opinions based on the facts provided by the taxpayer.

712-14. In his oral ruling, the trial judge held both that the Franchisees were not the publishers of Valpak envelopes and that the envelopes did not qualify as “periodicals or magazines” under RCW 82.04.280. RP 43-45.

On appeal, the parties briefed both the issue of whether Valpak envelopes qualified as “periodicals or magazines” under RCW 82.04.280 and whether the activities of the Franchisees qualified as engaging “in the business of . . . publishing.” The Court of Appeals examined the statutory definition of “periodical or magazine” and held that Valpak envelopes were “printed publications.” *Bowie v. Dep’t of Revenue*, 150 Wn. App. 17, 20-23, 206 P.3d 675 (2009). The Court also concluded that “stated interval” means the Franchisees must have provided the intended audience of Valpak envelopes with the mailing or publication interval, but held material issues of fact existed on that issue and remanded the case to the trial court. *Id.* at 23-24. The Court did not decide the issue whether the Franchisees were engaged in the business of publishing Valpak envelopes, apparently believing the trial court had not yet addressed the issue. *Id.* at 24 n.9 (indicating the trial court would need to address this issue “for the first time” only if it found the “stated interval” requirement had been met).

Both sides moved for reconsideration of the Court of Appeals decision. The Department asked the Court to clarify that the “stated interval” must have been provided on the “printed publication” and to recognize that there were no disputed material facts requiring remand. Dep’t of Revenue’s Motion for Reconsideration at 3-8. The Department also asked the Court to consider the alternative ground for affirming

summary judgment, that the Franchisees were not engaged in the business of “publishing.” *Id.* at 9-21. The Court of Appeals denied both motions for reconsideration without comment.

IV. REASONS WHY REVIEW SHOULD BE DENIED

The Franchisees seek review of the following statement in the Court of Appeals decision: “We conclude that a ‘stated interval’ means that the Taxpayers must provide the intended audience with its anticipated mailing or publication interval.” *Bowie*, 150 Wn.2d at 23-24. The Franchisees argue review should be accepted because the ruling is in conflict with principles of statutory construction enunciated in this Court’s prior decisions and because it is confusing, thereby creating an issue of substantial public importance. *See* RAP 13.4(b)(1), (4). Contrary to the Franchisees’ arguments, this narrow issue does not merit this Court’s review.

A. The Court of Appeals Decision Is Not in Conflict With Any Decision Of This Court.

The Franchisees do not argue that the Court of Appeals decision in this case is in conflict with an actual decision of this Court. Rather, they argue that the Court of Appeals decision fails to properly apply guidelines for statutory construction enunciated in some decisions of this Court. Petition at 5-12 (argument discussing statutory construction principles).

So-called “rules” of statutory construction are “not statements of law.” *Johnson v. Continental West, Inc.*, 99 Wn.2d 555, 559, 663 P.2d 482 (1983). They are merely “rules in aid of construing legislation and an

aid in the process of determining legislative intent.” *Id.*; see *Hama Hama Co. v. Shoreline Hearings Bd.*, 85 Wn.2d 441, 446, 536 P.2d 157 (1975) (principles of statutory interpretation are “sometimes useful,” but not controlling). Because every statute is an independent legislative communication with an intended or understood meaning that may be different from other statutes, “a decision on a point of statutory construction has little relevance as a precedent for the construction of any other statute.” 2A N. Singer & J.D. Singer, *Statutes and Statutory Construction* § 45:15 (7th ed. 2007); see *United States v. Jin Fuey Moy*, 241 U.S. 394, 402, 36 S. Ct. 658, 60 L. Ed. 1065 (1916) (“[E]very question of construction is unique, and an argument that would prevail in one case may be inadequate in another.”).

For instance, the issue in *HomeStreet*, which petitioners cite, was how to apply the words “amounts derived from interest” in RCW 82.04.4292 to amounts HomeStreet retained when servicing mortgage loans. *HomeStreet, Inc. v. State of Washington*, 166 Wn.2d 444, 455, 210 P.3d 297 (2009). The Court of Appeals decision in this case addresses whether Valpak envelopes are “periodicals or magazines” under RCW 82.04.280. The Court of Appeals decision is not in conflict with any other appellate decision in this state because no other decision has construed the definition of “periodical or magazine” in RCW 82.04.280.

B. The Petition Does Not Raise An Issue Of Substantial Public Interest Necessitating Review.

The Franchisees argue that the interpretation of “stated interval” by the Court of Appeals adds a requirement not contained in RCW 82.04.280 (providing the publication interval to the intended audience), which in turn “sows confusion.” Petition at 5-6. This confusion, the Franchisees argue, creates an issue of “substantial public interest” under RAP 13.4(b)(4) because the decision undermines the predictability of tax liability.

This is not an issue of substantial public interest meriting review. Requiring the publication interval to be provided to the intended audience is not confusing. It is a standard requirement and component of periodicals and magazines. *See* Part V.A., pages 11-17.

The record demonstrates that the Franchisees do not provide the intended audience of Valpak envelopes, individuals who receive them in the mail and might use the coupons, with a “stated interval” of publication. This is because Valpak envelopes do not contain any statement of how often they are published. *See* CP 285-372 (sample envelope). Instead, the Franchisees have deemed the interval between mailings important only to advertisers, to whom they provide a mailing schedule that includes submission deadlines for advertising copy. CP 163-65; CP 419-30. Advertisers may also obtain the mail dates and copy deadlines 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 ¶ 14; CP 432-36. These are undisputed facts.

The requirement that a genuine publication – a newspaper, magazine, or periodical – be published at a “stated interval” creates a significant barrier to the Franchisees’ argument that they qualify for this favorable tax rate. The requirement, however, is squarely imposed by the statutory language and does not present an issue of substantial public interest requiring review by this Court.

C. Resolution Of The Franchisees’ “Stated Interval” Issue Might Not Resolve The Case.

This Court also should deny the Franchisees’ petition because the goal of efficient judicial administration will not be served by accepting review of the “stated interval” issue as the Franchisees have posed it. If this Court were to accept review only of the Franchisees’ issue, the case would remain unresolved if this Court were to decide in the Franchisees’ favor because the Court of Appeals did not address the alternative ground for affirming summary judgment for the Department, that is, whether the Franchisees engaged in the business of “publishing.” Appellate review only resolves this case if an appellate court decision resolves all the grounds for sustaining the summary judgment. Accordingly, review of the single limited issue in the petition will not facilitate the efficient decision of this case on the merits. *See* RAP 1.2.

V. REASONS WHY THE COURT SHOULD ADDRESS ADDITIONAL ISSUES IF IT ACCEPTS REVIEW

If review is warranted at all in this case, it would be to review all the issues briefed in the Court of Appeals and presented by the record.

These issues all concern the application of a single statute, RCW 82.04.280, to the Franchisees' business activities and to Valpak envelopes.

If review were granted, the Court therefore should examine whether the trial court's summary judgment should be affirmed because Valpak envelopes do not qualify as "periodicals or magazines." The Court also should address the alternative ground for affirming the summary judgment, which is that the Franchisees are not the publishers of Valpak envelopes and thus are not persons engaged "in the business of . . . publishing."

The decision of the Court of Appeals to remand without addressing whether the Franchisees are in the business of publishing unnecessarily causes a piecemeal appeal. A significant issue has been left unresolved, to the prejudice of all parties in this case.

A. An Envelope With Loose Coupons Inside Is Not A "Periodical Or Magazine" Under RCW 82.04.280.

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, including any supplement or special edition of the publication." Under the ordinary and natural use of these words, which demonstrate legislative intent, Valpak envelopes are not "periodicals or magazines." The Court should therefore examine this issue first if it accepts review in this case.

1. Valpak envelopes are not periodicals or magazines.

The Court of Appeals concluded that Valpak envelopes “are printed pieces of paper comprising a ‘printed publication.’” *Bowie*, 150 Wn. App. at 23. However, this Court has instructed that courts should consider the meaning words are ordinarily given, “taking into account the statutory context, basic rules of grammar, and any special usages 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 treatise); *In re Sehome Park Care Center, Inc.*, 127 Wn.2d 774, 778, 903 P.2d 443 (1995) (look to whole statute). Notably, the statute uses the words “printed publication,” not “printed material.” Use of the word “publication” instead of a generic term indicates the Legislature did not intend to extend the definition of “periodical or magazine” to any printed materials distributed to the public (e.g., direct mail advertising, political campaign flyers, mail order catalogs, etc.). As an appellate court in Florida recognized in this context, “[a] publication may consist of printed material, but not all printed material constitutes a publication.” *Dep’t of Revenue v. Val-Pak Direct Marketing Systems, Inc.*, 862 So.2d 1, 4 (Fla. Ct. App. 2003) (holding Valpak envelopes are not “circulated publications” under sales tax exemption for advertising publications).

2. Valpak envelopes are not publications issued regularly at a “stated interval.”

A second reason why Valpak envelopes do not qualify as “periodicals or magazines” is that they do not contain a “stated interval” describing how frequently they are issued. On this point, the Court of

Appeals did not focus solely on dictionary definitions, though the Franchisees argued it should. The Court concluded “stated interval” means the “intended audience” must be provided with the “mailing or publication interval.” *Bowie*, 150 Wn. App. at 23-24.

The Department agrees that a publisher must provide the intended audience of a “periodical or magazine” qualifying under RCW 82.04.280 with the publication interval. But the Court of Appeals should have held that the “stated interval” must be printed on the publication.⁴ This is the only way to give effect to the plain language of the statute.

Moreover, the Department’s construction of the phrase “issued regularly at stated intervals” is consistent with a long history and a well-established meaning of the phrase in connection with periodical publications. The phrase first appeared in the Post Office Appropriation Act of 1879, which amended the existing requirements for admitting a publication to a second-class postal rate. 20 Stat. 355, 358-59, ch. 180 (1879); *see* Department’s Answer to Appellants’ Motion for Reconsideration at 7-16 & Appendix A; Brief of Respondent at 33. The 1879 statute extended this preferential postal rate to newspapers and other periodicals “issued at stated intervals, and as frequently as four times a

⁴ The Franchisees argue the Department never asserted any need for qualifying publications to provide the intended audience with a mailing or publication interval. Petition at 6. They are incorrect. The Department has asserted throughout this litigation that a “stated interval” must be printed on the publication in order to qualify under RCW 82.04.280. *See, e.g.*, CP 456-60, 543-44, 702-05. Periodicals and magazines with statements indicating they are “published 51 weeks of the year” or “published monthly” necessarily provide the “intended audience” of the publication, the readers, with a mailing or publication interval. *See* CP 411-17 (providing examples of “stated intervals” contained in *State Tax Notes*, *Washington Bar News*, and *Sunset*).

year” 20 Stat. at 359, ch. 180 at § 10; *see also* § 14. In 1904, the United States Supreme Court recognized that a publication with the words “Issued Monthly” appearing on the front page met the requirement of being regularly issued at “stated intervals.” *Houghton v. Payne*, 194 U.S. 88, 95, 24 S. Ct. 590, 48 L. Ed. 888 (1904). By 1932, the Postmaster General had issued formal regulations governing postal rates under the 1879 statute, which were codified in the first Code of Federal Regulations. The regulations required qualifying second-class mail to be “issued at stated intervals” “as frequently as four times a year,” among other things. *See* 39 C.F.R. §§ 5.20, 5.21(a) (1938). Recent Postal Service requirements for the periodicals rate are virtually identical. *See* 39 C.F.R. pt. 3001, subpart C, app. A § 411.31 (2006); Brief of Respondent at 33.

During the same period, the Washington Legislature enacted the Revenue Act of 1935, which contained a retail sales tax exemption for the sale and distribution of newspapers. In a rule defining “newspaper” for purposes of the exemption, the State Tax Commission included the requirement that an exempt newspaper be “issued regularly at stated intervals” of at least once a week. Wash. State Tax Comm’n Rule 143 (1936). The Legislature amended the Revenue Act in 1937 to add a new preferential B&O tax rate, now codified in RCW 82.04.280, for persons “in the business of printing and of publishing newspapers, periodicals or magazines.” Laws of 1937, ch. 227, § 1. The Legislature enacted no definition of “newspaper,” “periodical,” or “magazine,” leaving intact the Tax Commission’s definition of “newspaper” in Rule 143.

When the Legislature finally enacted a statutory definition of “newspaper” in 1993 and a statutory definition of “periodical or magazine” in 1994, the definition of “newspaper” in the Department’s rule had not changed substantially from the version adopted by the State Tax Commission in 1936. *See* WAC 458-20-143 (last amended in 1983). The 1993 statutory definition of “newspaper” eliminated any content-based requirements appearing in the rule definition (*i.e.*, “general interest,” “current events”), but retained the rule’s requirement that the publication be “issued regularly at stated intervals[.]” Laws of 1993, Sp. Sess., ch. 25, § 304 (codified at RCW 82.04.214). Likewise, the 1994 amendment to RCW 82.04.280 added the definition of “periodical or magazine”: “a printed publication, *other than a newspaper, issued regularly at stated intervals at least once every three months[.]*” Laws of 1994, ch. 112, § 1 (emphasis added).

Courts should take into account “any special usages stated by the legislature on the face of the statute.” *Campbell & Gwinn*, 146 Wn.2d at 11; *see* 2A N. Singer & J.D. Singer, *Statutes and Statutory Construction* § 47:27 (7th ed. 2007) (words may have different meanings when used in the context of a special subject); *see also City of Spokane ex rel. Wastewater Mgt. Dep’t v. Dep’t of Revenue*, 145 Wn.2d 445, 452, 38 P.3d 1010 (2002) (technical language in a tax statute should be given its technical meaning when used in its technical field or as a term of art).

If review is granted, the Court should reject the Franchisees’ approach to statutory interpretation, which relies almost exclusively on

stringing together dictionary definitions of individual words. Courts may consider dictionary definitions to learn how words are ordinarily used, but the meaning of words in the context of the statute as a whole takes precedence over any “mechanical definition.” *One Pacific Towers Homeowners’ Ass’n v. HAL Real Estate Investments, Inc.*, 148 Wn.2d 319, 330, 61 P.3d 1094 (2002); see *State ex rel. Port of Seattle v. Dep’t of Public Service*, 1 Wn.2d 102, 112, 95 P.2d 1007 (1939) (“It is always an unsafe way of construing a statute or contract to divide it by a process of etymological dissection, into separate words, and then apply to each, thus separated from its context, some particular definition given by lexicographers, and then reconstruct the instrument upon the basis of these definitions.”). To give effect to the Legislature’s intent, this Court should apply the same meaning to “stated interval” in RCW 82.04.280 that Congress, the United States Postal Service, the United States Supreme Court, the State Tax Commission, the Department, and others have given the term since at least the beginning of the last century: the interval or frequency of publication must be stated on the publication.

Finally, the Court should reject the Franchisees’ argument that requiring a qualifying publication to state how often it is published is an “unwritten” requirement. The requirement arises by the Legislature’s use of a term with a special, but well-established meaning – “stated interval.” In contrast, by relying on dictionary definitions, the Franchisees offer an interpretation of the word “stated” that imposes no requirements on where, how, or to whom the information is provided. Petition at 7-8.

Under their proposed interpretation, the Franchisees could satisfy the requirements of RCW 82.04.280 merely by writing the publication interval on a napkin and handing it to someone or by providing the information to a single person over the telephone. In effect, they interpret the statute as if it read “issued regularly at least once every three months” rather than “issue regularly at stated intervals at least once every three months.” In other words, they read “at stated intervals” out of the statute. If review is accepted, this Court should apply the “stated interval” requirement to the undisputed facts in this case by giving effect to all the language in the definition of “periodical or magazine,” so as not to render portions of it meaningless or superfluous. *See Lakemont Ridge Homeowners Ass’n v. Lakemont Ridge Ltd. Partnership*, 156 Wn.2d 696, 699, 131 P.3d 905 (2006).

B. This Court Should Address The Alternative Ground For Affirming The Summary Judgment Order: The Franchisees Are Not The Publishers Of Valpak Envelopes.

To qualify for a refund, a taxpayer must prove it paid more tax than was properly due. *See* RCW 82.32.180 (burden of proof on taxpayer seeking refund). The absence of proof of *any* required statutory element disqualifies the taxpayer from obtaining a refund based on a preferential tax rate. Before the Court of Appeals ordered a remand to the trial court on the “stated interval” issue, it should have determined whether the Franchisees met the remaining elements of RCW 82.04.280. If not, summary judgment for the Department should have been affirmed.

The parties briefed the trial court on whether the Franchisees were engaged “in the business of . . . publishing.” CP 443-50, 519-23, 537-43, 697-700. In addition, the evidentiary record on the question is robust. CP 159-63, 166-90, 193-95, 198, 200-207, 605-19, 620-32, 638-41 (Bowie Dep.); CP 223-73 (Franchise Agreement); CP 215, 377-78, 380-82 (answers to discovery requests). The trial court in its oral ruling rejected the Franchisees’ claim that they published Valpak envelopes, indicating that this provided an alternative basis for granting summary judgment to the Department. RP 45.

The parties also fully briefed this issue in the Court of Appeals. Appellants’ Brief at 11-15; Respondent’s Brief at 7-23; Appellants’ Reply at 11-16. The Court of Appeals, however, ended its analysis after examining the statutory definition of “periodical or magazine.” *See generally*, Department’s Motion for Reconsideration at 9-21.

By remanding the case on the “stated interval” issue without addressing the alternative ground for affirming summary judgment, the Court of Appeals acted inconsistently with standard procedure and the goal of avoiding piecemeal litigation. *See Wilson Court L.P. v. Tony Maroni’s Inc.*, 134 Wn.2d 692, 952 P.2d 590 (1998); *Failor’s Pharmacy v. Dep’t of Soc. & Health Servs.*, 125 Wn.2d 488, 493, 886 P.2d 147 (1994) (both stating Court will sustain summary judgment upon any theory established in the pleadings and supported by proof).⁵

⁵ The trial court *did* rule in the Department’s favor on this issue, but even if it had not, the Court of Appeals should have considered the issue. *See Int’l Brotherhood of*

If this Court accepts review, it should conclude that being engaged “in the business of . . . publishing” a “periodical or magazine” under RCW 82.04.280 means a taxpayer must be the publisher of the periodical or magazine. Here, VPDMS, not the Franchisees, is the publisher of Valpak envelopes distributed in Western Washington. The Franchisees engage in the business of selling advertising services, not the business of publishing. *See* Brief of Respondents at 7-14 and Department’s Motion for Reconsideration at 12-18 (why engaging in the business of publishing means being the publisher); Brief of Respondents at 14-23 and Department’s Motion for Reconsideration at 19-21 (discussing evidence establishing that the Franchisees did not publish Valpak envelopes). The undisputed evidence demonstrates that the Franchisees do not qualify for the “publishing” B&O tax rate:

- Under the Franchise Agreement, VPDMS is the “sole publisher and distributor” of Valpak envelopes, and the Agreement *expressly prohibits* the Franchisees from themselves printing, publishing, or distributing Valpak envelopes. CP 230, 232.
- Mr. Bowie, the owner of the two largest franchises in this case, agreed that the Franchise Agreement accurately describes his business relationship with VPDMS. CP 159-60. The Franchisees have not argued in their briefing that any language in the Franchise Agreement is false or inaccurate.
- Other evidence the Department obtained in discovery is consistent with the Franchise Agreement. *See* Brief of Respondent at 17-23 and evidence cited therein.

Elec. Workers, Local No. 46 v. Trig Electric Constr. Co., 142 Wn.2d 431, 435, 13 P.3d 622 (2000) (because review of summary judgment is *de novo*, court may affirm summary judgment on any basis supported by record, including on an issue not decided by trial court).

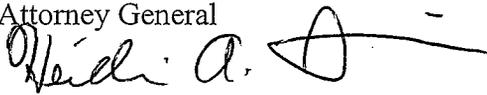
The Court of Appeals should not have left this alternative basis for affirming the summary judgment unresolved.

VI. CONCLUSION

The Franchisees' petition for review does not meet the criteria of RAP 13.4(b). However, if the Court does grant review, it should address the statutory definition of "periodical or magazine" in its entirety and decide whether the Franchisees are the publishers of Valpak envelopes.

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