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COURT OF APPEALS
DIVISION II

No. 36977-0-II

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STATE OF WASHINGTON
BY _____
DEPUTY

**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.

PETITION FOR REVIEW

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I. IDENTITY OF THE PETITIONERS

Petitioners Richard and Annette Bowie, d/b/a Valpak of Western Washington – North, *et al.* (“Taxpayers”) ask the Supreme Court to accept review of the Court of Appeals’ decision terminating review.

II. DECISION TO BE REVIEWED

Taxpayers seek review of the decision of the Court of Appeals Division II, issued May 5, 2009. A copy of the opinion is set forth in the Appendix at 1a to 8a. On June 24, 2009, the Court of Appeals denied Taxpayers’ Motion for Reconsideration. App. 9a.

III. ISSUE PRESENTED FOR REVIEW

The Court of Appeals, Division II, held *sua sponte* and without explanation or analysis that the statutory words “stated interval” mean that the Taxpayers “must provide the intended audience with its ... publication schedule,” as against Taxpayers’ contention (and the Department’s initial admission in a formal letter ruling) that Taxpayers had established a set monthly publication schedule that satisfies the plain meaning of the statutory “stated interval” requirement.

1. May the Court of Appeals add an unwritten requirement contrary to the plain language of an unambiguous tax statute?

2. Having conceived of an alternative interpretation of the statute adverse to the Taxpayers, may the Court of Appeals apply that

adverse interpretation in place of a reasonable interpretation of the statute that favors the taxpayer?

IV. STATEMENT OF THE CASE

A. Taxpayers' business.

Taxpayers are local, independent businesses that create and distribute printed publications ("Valpak") in franchised territories covering western Washington. CP 27-28.¹ They each do business under a form of the name Valpak of Western Washington. CP 1.

Taxpayers issue Valpaks monthly pursuant to a schedule they establish 18 months to two years in advance. CP 28. They work directly with the U.S. Postal Service to effectuate the scheduled in-home delivery dates. CP 533. Taxpayers post their publication schedule on the Internet (on their "Valpak" website) and in printed brochures.

B. The Department's ruling that Valpak meets the statutory definition of periodical.

In 2002, Taxpayers sought written guidance from the Department as to the proper B&O tax classification of their businesses. CP 35. In response, the Department issued a letter ruling that Valpak is a periodical as defined in RCW 82.04.280 and that "Valpak of Western Washington"

¹ Each edition of Valpak is a compilation of advertisements, printed one per page, arranged in an order determined by the Taxpayers, and enclosed in a distinctive blue envelope bearing the Valpak logo. CP 28. Each Taxpayer creates "zones" of 10,000 residential addresses within their franchised territory. *Id.* The content of a Valpak issue distributed within a given zone is identical. CP 29.

is subject to the B&O tax classification for “publishing ... periodicals” in RCW 82.04.280(1). CP 39-42. In so ruling, the Department expressly found that Taxpayers issue Valpak at “stated intervals” in accordance with the plain language of the statutory definition of periodical. CP 42.

C. The Department’s rescission of its ruling and ensuing litigation.

In response to the Department’s ruling, the Taxpayers began reporting their B&O taxes under the publishing periodicals classification and filed refund claims. CP 75.² After issuing refunds to two Valpak businesses, the Department “rescinded” its letter ruling and placed the Taxpayers’ refund claims on hold. CP 44, 76, 77. Although the Department admits that its only stated reason for rescinding the letter ruling was wrong, it has subsequently alleged various other reasons to avoid application of the plain language of the statute.³ *See e.g.* CP 14-16, 77-84. The contention it ultimately settled on to deny Taxpayers’ refund claims was that Valpaks are not “publications.” CP 67-69. Throughout

² Taxpayers had been paying B&O tax under the catchall “service and other” classification RCW 82.04.290(2), applicable to businesses that are not taxed under one of the more than 40 specific B&O classifications established in Chapter 82.04 RCW, such as the publishing periodicals classification in RCW 82.04.280(1).

³ The Department had erroneously taken the position that Valpak does not qualify as a periodical because its content consists “entirely of advertising.” CP 78. The Department now “agrees with plaintiffs that the definition of ‘magazine or periodical’ *does not include content requirements.*” CP 547 (emphasis added).

the administrative appeals process the Department never repudiated its written conclusion that Taxpayers issue Valpak at “stated intervals.”

Unable to resolve the matter with the Department, Taxpayers commenced this tax refund suit under RCW 82.32.180. CP 5. On cross-motions for summary judgment, the Superior Court acknowledged that Valpak meets the plain language of the statutory definition of periodical, but dismissed Taxpayers’ refund claims on the theory that the legislature did not mean what it said. RP 43.

D. The Court of Appeals’ Opinion.

The Court of Appeals reversed, rejecting the Department’s argument that Valpaks are not printed publications and the trial court’s theory that the legislature did not mean what it said. App 5a-6a. However, instead of ordering judgment for Taxpayers, Division II (on its own initiative, without briefing, argument or even a request by either party) created its own new non-statutory requirement. The Court held, without explanation or analysis, that “‘stated interval’ means that the Taxpayers must provide the intended audience with its [sic] anticipated mailing or publication interval.” App. 7a. It then remanded the case for development of a factual record with respect to its newly created “provided [to] the intended audience” requirement. App. 8a. Taxpayers sought reconsideration on the grounds that the Court’s newly created

requirement is contrary to the plain language of the statutory definition.

Of note, the Department also objected to Division II's "intended audience" requirement.⁴ By order entered June 24, 2009 the Court of Appeals denied both parties' motions for reconsideration.

V. ARGUMENT IN SUPPORT OF REVIEW.

Taxpayers respectfully petition for review on the grounds that the Court of Appeals decision conflicts with the decisions of this Court and raises important issues of law. RAP 13.4(b)(1), (4). Division II's ruling conflicts with well-settled principles of statutory construction that this Court recently reaffirmed in *HomeStreet, Inc. v. Dep't of Revenue*, Docket No. 80544-0 (June 18, 2009). The Court's creation of non-statutory tax requirements is also an issue of substantial public importance warranting review because it sows confusion in the interpretation of tax statutes, undermining businesses' ability to predict and understand their tax obligations. See *Quill Corporation v. North Dakota*, 504 U.S. 298, 315, 112 S. Ct. 1904, 119 L. Ed. 2d 91 (1992) (clear and consistent rules in the judicial construction of tax laws "encourages settled expectations and, in doing so, fosters investment by businesses and individuals" as well as reducing litigation over tax liabilities). Division II's decision severely

⁴ The Department also sought reconsideration of the Court's creation of an "intended audience" requirement, asking instead for the creation of a requirement that a periodical's publication interval be stated "on the publication" itself, a requirement the Department notes the Court's opinion implicitly rejected.

undermines both tax predictability and the business environment by arbitrarily adding a requirement to a B&O tax classification that the Legislature did not impose. The decision also sows confusion by *sua sponte* injecting a requirement that was never asserted by the Department at any stage of this proceeding. In fact, the Department asked the Court to reconsider its newly created requirement and to make a substantially different addition to the statute.

A. Division II's Opinion contradicts the plain language of the statute and this Court's decisions by adding a requirement not imposed by the legislature.

This Court has repeatedly held that “a statute’s meaning must be derived from the wording of the statute itself.” *HomeStreet v. Dep’t of Revenue*, Slip Op. at 7, quoting *Wash. State Human Rights Comm’n v. Cheney Sch. Dist. No. 30*, 97 Wn.2d 118, 121, 641 P.2d 163 (1982). This Court has also emphasized that Courts “neither add language to nor construe an unambiguous statute.” *Cerrillo v. Esparza*, 158 Wn.2d 194, 201, 142 P.3d 155 (2006); *Agrilink Foods, Inc. v. Dep’t of Revenue*, 153 Wn.2d 392, 397, 103 P.3d 1226 (2005) (declining to add a requirement to an unambiguous tax statute).

Division II’s *sua sponte* creation of an unwritten “intended audience” requirement directly conflicts with this Court’s well settled decisions on statutory interpretation. As this Court recently reaffirmed,

words in a statute are accorded their ordinary meaning as reflected in dictionary definitions. *HomeStreet v. Dep't of Revenue*, Slip Op. at 7. Yet despite acknowledging that the dictionary definition of “stated” is set, fixed, established or declared (App. 7a, n.8, citing *Webster's Third New International Dictionary*, 2228 (2002)), Division II summarily concludes, without explanation or analysis, that “‘stated interval’ means that the Taxpayers must provide the *intended audience* with its *anticipated* mailing or publication interval.” App. 7a (emphasis added). As discussed in fn. 6, *infra*, this newly created requirement is ambiguous. By judicial fiat an unambiguous statute has either been replaced by an ambiguous requirement or had one added to it.

Nothing in the ordinary meaning of the statutory language as reflected in the dictionary definition cited by the Court supports Division II’s creation of an “intended audience” requirement.⁵ Viewing a “stated interval” as one that is set, fixed, or established focuses on the consistent pattern of the interval length, i.e. weekly, monthly, quarterly. It is not surprising that “stated,” “set,” and “fixed” are identified as synonyms in *Roget's International Thesaurus* (6th Ed. 2001). The interval length has

⁵ Moreover, an “anticipated” interval is the opposite of a “stated interval.” Whereas “stated interval” focuses on provable facts of the past and present (set, fixed, established, declared), “anticipated interval” focuses on future possibilities and intentions. RCW 82.04.280 does not apply to businesses that *intend* to publish a periodical or *anticipate* doing so; it applies to businesses that are “*engaging* ... in the business of ... publishing ... periodicals.”

been set, established, and fixed by the Taxpayers as monthly. CP 28.

Thus Taxpayers issue Valpaks at “stated intervals.”

The Court’s requirement that the established interval be provided to an “intended audience” cannot be supported by the disjunctive presence of “declared” in the dictionary definition of “stated.” “Declaring” the interval simply requires that it be announced; it does not require declaration to any particular “audience” or in any particular manner. *Webster’s Third New International Dictionary*, 586. The Opinion acknowledges the undisputed fact that the publication interval is actually declared or announced, both by posting it on the Internet and through the distribution of printed publication schedules. App. 7a.

Consequently, none of the ordinary meanings of the word “stated” (as confirmed by the dictionary definition Division II cites in its Opinion) provide a basis for adding an unstated requirement to the statute that the set, fixed, and established monthly interval, despite its being declared by Taxpayers on the Internet and in printed publication schedules, *must also* be “provided” to some “intended audience.”

As this Court explained in *Agrilink* when rejecting the Department’s and Division II’s assertion of an unwritten requirement in another tax statute:

First we note the complete absence of any express language establishing such a requirement. Had the legislature intended to include [the purported] requirement, it might have done so by using a number of alternative constructions.

153 Wn.2d at 397. The same is true here. There is no express language in the statute requiring the publication interval be “provided to” any particular group or class, let alone an “intended audience.” If the Legislature had intended to require that a specific “audience” be notified of a publication’s issuance interval it would have done so expressly, with language such as “issued regularly at intervals *provided to*” recipients or advertisers or perhaps some other identifiable group. Under the plain meaning of the language actually used by the Legislature, Taxpayers issue Valpak at “stated intervals.”

B. Division II’s opinion violates settled law by construing a tax statute against the taxpayer.

Even if the term “stated interval” were ambiguous, (which it is not), the Court of Appeals acknowledged but failed to apply this Court’s longstanding directive that ambiguous tax statutes must be “construed ‘most strongly against the government and in favor of the taxpayer.’” App. 5a quoting *Qwest Corp. v. City of Bellevue*, 161 Wn.2d 194, 201, 166 P.3d 667 (2007) (quoting *Estate of Hemphill v. Dep’t of Revenue*, 153 Wn.2d 544, 552, 105 P.2d 391 (2005)). As this Court has repeatedly explained:

If any doubt exists as to the meaning of a taxation statute, the statute must be construed most strongly against the taxing power and in favor of the taxpayer.

Agrilink, 153 Wn.2d at 396-97, quoting *Ski Acres, Inc. v. Kittitas County*, 118 Wn.2d 852, 856, 827 P.2d 1000 (1992). Even if Division II's *sua sponte* creation of an unwritten, unrequested "intended audience" requirement were a reasonable construction of the statute and thus created an ambiguity, applying an "intended audience" requirement violates the rule that ambiguities in tax statutes "must be construed most strongly ... in favor of the taxpayer." *Id.*

As this Court reaffirmed in *Agrilink*, "a statute is not ambiguous merely because different interpretations are conceivable," the alternative construction must be reasonable. 153 Wn.2d at 396 (citations omitted). While the Court of Appeals was able to conceive of an "intended audience" requirement (a requirement never even suggested or conceived by the Department during the nearly six years of this dispute), Taxpayers respectfully contend that it is not a reasonable construction of the statute, having no basis in the language used by the Legislature. As in *Agrilink*, Division II's ability to conceive of a non-statutory requirement does not cause the statute to be ambiguous. 153 Wn.2d at 397-98 ("DOR's continued reliance on the strained reasoning of the Court of Appeals is unavailing.").

However, even if Division II's "intended audience" requirement was deemed a reasonable construction of the statute, the Court was required to resolve the resulting ambiguity in favor of the Taxpayers and against the Department.⁶ *Qwest*, 161 Wn.2d at 201. In this case that rule requires adopting the reasonable construction that Taxpayers' Valpak publications, which are issued regularly at monthly intervals pursuant to a schedule posted by the Taxpayers on their Internet website and in printed publication schedules satisfies the "stated interval" requirement of RCW 82.04.280. The reasonableness of this construction of the statute is evidenced by (1) the Department's letter ruling holding that Valpak meets the statutory "stated interval" requirement (CP 42); (2) the trial court's acknowledgement that Taxpayers' Valpak publications are periodicals based on the words the legislature used in the statutory definition (RP 46) and (3) the dictionary definition of "stated" cited by Division II in its opinion. App. 7a.

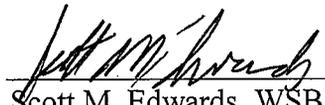
⁶ Division II's newly created "intended audience" requirement is itself ambiguous as to whose intention identifies the audience to whom the publication interval must be "provided." There are at least three possibilities: (1) the Legislature's intention identifies the intended audience; (2) the Department's intention determines what "audience" the publication schedule must be provided to; or (3) the Taxpayers' intention determines the audience. The latter (taxpayer's intention) is the construction that favors taxpayers and is the most reasonable construction of the Court of Appeals' language. The record in this case is undisputed that Taxpayers have fulfilled their intent to provide printed publication schedules (with intervals) to their advertisers (whose purchasing decisions are driven in part by the publication schedule) and also to make the interval generally available by posting it on the Taxpayers' Internet website where anyone in the world can see it.

VI. CONCLUSION

Taxpayers respectfully request that the Washington Supreme Court accept review of the decision of the Court of Appeals, Division II issued May 5, 2009, which decision construes a tax statute contrary to its acknowledged plain meaning and against taxpayers in conflict with well-settled principles established by this Court. The decision also inserts a requirement of taxation not imposed by the legislature. These significant departures from established law severely undermine settled expectations and predictability of business tax liabilities.

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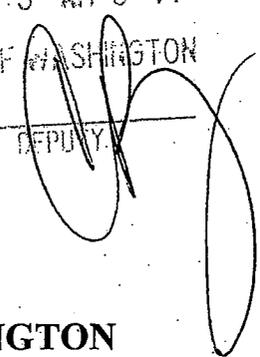
APPENDIX

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

Richard and Annette Bowie, d/b/a **Valpak of Western Washington** – North, R&L Associates LLP, d/b/a Valpak of Western Washington – South, Direct Mail Works, Inc., d/b/a Valpak of Western Washington – East, ERSSER Enterprises, Inc., d/b/a Valpak of Western Washington – West, Smart Advertising Solutions, Inc., d/b/a Valpak of Western Washington – NW, Jeff and Kim Goodman, d/b/a Valpak of Western Washington NW, D&J Marketing, Inc. formerly d/b/a Valpak of Western Washington – South, Poste Masters, Inc. formerly d/b/a Valpak of Western Washington – Central, Korke & Kompany, Inc. formerly d/b/a Valpak of South Puget Sound, Target Marketing, Inc. formerly d/b/a Valpak of the Inland Northwest, and American Directory Service, Inc. formerly d/b/a Valpak of the Inland Northwest,

Appellants,

v.

WASHINGTON DEPARTMENT OF
REVENUE,

Respondent.

No. 36977-0-II

PUBLISHED OPINION

HOUGHTON, J. — Richard and Annette Bowie, d/b/a Valpak of Western Washington-North, as franchisees of Valpak Direct Marketing Systems, Inc., create and distribute advertising coupon mailings to Washington residential addresses. The Department of Revenue (DOR), at their request, categorized this activity as “publishing” and taxed them under the business and occupations (B&O) tax rate applicable to persons engaged in the publishing business. The DOR later rescinded this decision. The Bowies and other Valpak Marketing franchisees (Taxpayers)¹ sought superior court review of the rescission. In ruling on cross motions for summary judgment, the trial court granted summary judgment to the DOR. The Taxpayers appealed. We reverse and remand for further proceedings.

FACTS

On October 14, 2002, the Taxpayers asked the DOR to confirm their status as publishers of periodicals under RCW 82.04.280, which imposes a B&O tax on persons engaged “in the business of . . . [p]rinting, and of publishing newspapers, periodicals, or magazines.” Clerk’s Papers (CP) at 35. After the Taxpayers verified that they distributed coupons at stated intervals, as required under the statute for periodicals and magazines, the DOR confirmed their publisher status.

¹ Although some of the facts pertain only to the Bowies’ actions, for clarity we refer to them and the other franchisees as the Taxpayers. The other franchisees are: R&L Associates LLP, d/b/a Valpak of Western Washington – South, Direct Mail Works, Inc., d/b/a Valpak of Western Washington – East, ERSSER Enterprises, Inc., d/b/a Valpak of Western Washington – West, Smart Advertising Solutions, Inc., d/b/a Valpak of Western Washington – NW, Jeff and Kim Goodman, d/b/a Valpak of Western Washington NW, D&J Marketing, Inc. formerly d/b/a Valpak of Western Washington – South, Poste Masters, Inc. formerly d/b/a Valpak of Western Washington – Central, Korki & Kompany, Inc. formerly d/b/a Valpak of South Puget Sound, Target Marketing, Inc. formerly d/b/a Valpak of the Inland Northwest, and American Directory Service, Inc. formerly d/b/a Valpak of the Inland Northwest.

In December 2002 and January 2003, the Taxpayers sought refunds for overpaid taxes based on the DOR's classification of the Taxpayers' activities as publishing under RCW 82.04.280. The DOR issued two refund checks.

In March 2003, however, the DOR rescinded its determination because, although the Taxpayers sell advertising space in the mailings, "[t]he actual printing and mailing is provided by a third party." CP at 44. The Taxpayers filed an administrative appeal.²

A DOR appeals division administrative law judge (ALJ) found that the Taxpayers' activities did not include the publication of periodicals because the coupons constituted neither a "periodical or magazine" nor a "printed publication" under RCW 82.04.280. The ALJ ruled that because the mailings were not publications, they did not qualify as periodicals or magazines for tax purposes.

The Taxpayers filed a complaint for a tax refund and a notice of appeal in superior court. The parties cross-moved for summary judgment.

In discussing its ruling on the cross motions, the trial court noted that it remained troubled that a bound coupon collection, such as "Boat Trader," would qualify as a periodical under the B&O statute whereas coupons stuffed in an envelope would not. Report of Proceedings (RP) at 44. The trial court acknowledged that the statute's plain language included the coupon mailings within the definition of periodical.³ It then went on to examine the legislative history and intent behind the statute and concluded that "the legislature passed

² WAC 458-20-100 sets out the DOR administrative appeal process.

³ The statute defines periodicals as printed publications "issued regularly at stated intervals," excluding newspapers. RCW 82.04.280.

legislation that does more than they [sic] intended it to.” RP at 46. The trial court granted the DOR’s motion, reasoning that an average person and legislator would not find that coupons in an envelope constituted a periodical.⁴ The Taxpayers appeal.

ANALYSIS

PRINTED PUBLICATION

The Taxpayers first contend that the trial court erred in granting the DOR summary judgment based on its reasoning that the coupon mailings are not periodicals within the plain meaning of the B&O statute, RCW 82.04.280. The DOR counters that the Taxpayers’ coupon mailings do not fall within the statute’s term “printed publication” and, therefore, are not periodicals.

We review a grant of summary judgment de novo, engaging in the same inquiry as the trial court and viewing the facts and reasonable inferences from those facts in the light most favorable to the nonmoving party.⁵ *Overton v. Consol. Ins. Co.*, 145 Wn.2d 417, 429, 38 P.3d 322 (2002). We consider summary judgment appropriate where “there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c).

In reviewing the trial court’s interpretation of RCW 82.04.280, we look to the statute’s plain meaning in order to fulfill our obligation to give effect to legislative intent.⁶ *Lacey Nursing Ctr., Inc. v. Dep’t of Revenue*, 128 Wn.2d 40, 53, 905 P.2d 338 (1995). To do so, we neither add

⁴ The trial court did not address whether the coupons were issued at stated intervals.

⁵ The trial court likewise reviewed the matter de novo as specified in RCW 82.32.180.

⁶ Both parties rely on the plain meaning of the words in the statute.

language to nor construe an unambiguous statute. *Cerrillo v. Esparza*, 158 Wn.2d 194, 201, 142 P.3d 155 (2006). “Ambiguities in taxing statutes are construed ‘most strongly against the government and in favor of the taxpayer.’” *Qwest Corp. v. City of Bellevue*, 161 Wn.2d 353, 364, 166 P.3d 667 (2007) (internal quotation marks omitted) (quoting *Estate of Hemphill v. Dep’t of Revenue*, 153 Wn.2d 544, 552, 105 P.3d 391 (2005)).

RCW 82.04.280 imposes a tax on “every person engaging within this state in the business of . . . [p]rinting, and of publishing newspapers, periodicals, or magazines.” The statute defines a “periodical or magazine” 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.” RCW 82.04.280.

Webster’s Dictionary defines a periodical as “a magazine or other publication of which the issues appear at stated or regular intervals.” *WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY* 1680 (2002). It defines a publication as “communication . . . to the public,” such as a “public announcement,” “the act or process of issuing copies . . . for general distribution,” or “a published work.” *WEBSTER’S, supra*, 1836.

The plain meaning of RCW 82.04.280 requires only “a printed publication . . . issued regularly at stated intervals.” Although the conventional/dictionary definition of “periodical” is narrower than “publication,” by including all “publications” in enacting RCW 82.04.280, the legislature chose to adopt a broad definition of “periodical.” Moreover, in enacting the statute, the legislature did not impose any format or any content requirements. *See generally Agrilink Foods, Inc. v. Dep’t of Revenue*, 153 Wn.2d 392, 397, 103 P.3d 1226 (2005) (analyzing plain language of tax statute and declining to add a requirement not included by the legislature).

Our Supreme Court notes that it “does not subject an unambiguous statute to statutory construction and has ‘declined to add language to an unambiguous statute even if it believes the Legislature intended something else but did not adequately express it.’” *Cerrillo*, 158 Wn.2d at 201 (quoting *Kilian v. Atkinson*, 147 Wn.2d 16, 20, 50 P.3d 638 (2002)). Thus, the trial court’s reasoning that “the legislature passed legislation that does more than they [sic] intended it to,” cannot form a basis for a decision to exclude the coupon mailings from the definition provided under RCW 82.04.280. RP at 46.

The DOR urges us to rely on the Florida case *Dep’t of Revenue v. Val-Pak Direct Marketing Sys., Inc.*, 862 So. 2d 1 (Fl. Ct. App. 2003). We decline to do so.

In deciding whether the Florida mailings qualified for a sales tax exemption, the *Val-Pak* court determined:

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 properly be described as a work or an issue and therefore is not a publication.

862 So.2d at 4. Although the Florida court states that it does not impose a binding requirement, under its analysis no unbound printed matter would qualify under its definition of “publication.” Moreover, the Taxpayers’ work setting the order in which the coupons appear, as well as the coupon mailing’s envelope, provide the mailings with a “unitary physical quality.” *Val-Pak*, 862 So.2d at 4; *see* CP at 286.

Here, as the trial court acknowledged, “The legislature has said in words, and the words that they [sic] used would allow this to fall within what counts as a periodical, whether that’s what the legislature intended or not.” RP at 46. We agree the coupon mailings fit, at least in part, within the definition of “periodical” or “magazine” because the mailings are printed pieces of paper comprising a “printed publication.” See RCW 82.04.280. We must next decide whether the Taxpayers issue the publications at stated intervals.

STATED INTERVALS

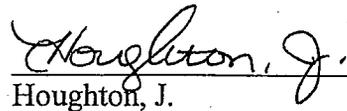
To fall within the B&O statute, a publication must issue “regularly at stated intervals at least once every three months.”⁷ RCW 82.04.280. We conclude that a “stated interval” means that the Taxpayers must provide the intended audience with its anticipated mailing or publication interval.⁸ Although the publication or mailing schedules are available to advertising clients through brochures and on the Valpak website, it is unclear whether they are readily available to recipients of the mailings. The DOR disputes this availability and argues that accessing the schedules on the website requires linking through four screens of information under the “Advertise With Us” link at www.valpak.com. Resp’t’s Br. at 35; see CP at 432. This disputed fact creates a material issue that precludes summary judgment here. The remedy is to reverse and remand for the trial

⁷ As noted, because the trial court decided the coupon mailings did not constitute a printed publication, it failed to reach this issue.

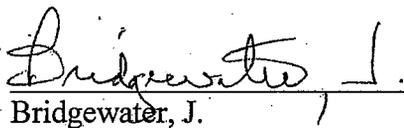
⁸ The definitions of “stated” include “set,” “fixed,” “established,” and “declared.” WEBSTER’S, *supra*, 2228.

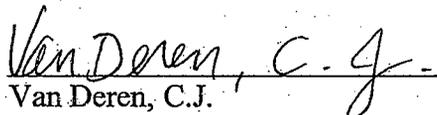
court to determine whether the Taxpayers disseminate the coupon mailings regularly at stated intervals.

Reversed and remanded.⁹


Houghton, J.

We concur:


Bridgewater, J.


Van Deren, C.J.

⁹ Because the issue whether the coupon mailings qualify as “publications” or “periodicals” remains undecided, we do not reach the issue whether taxpayers “engage[d] within this state in the business of . . . [p]rinting, and of publishing” the coupon mailings. RCW 82.04.280. Although it appears that engaging in the business of publishing should encompass more than simply being the designated publisher of the printed matter, *Ford Motor Co. v. City of Seattle, Exec. Svcs. Dep’t*, 160 Wn.2d 32, 156 P.3d 185 (2007), *cert. denied*, 128 S. Ct. 1224 (2008), the trial court will need to address this issue for the first time only in the event it determines that the mailings issued at “stated intervals.”

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
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DIVISION II

JUN 25 2009
PERKINS COIE LLP

RICHARD and ANNETTE
BOWIE,
Appellants,

v.

WASHINGTON DEPARTMENT
OF REVENUE,
Respondent.

No. 36977-0-II

ORDER DENYING MOTION TO
RECONSIDER

FILED
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STATE OF WASHINGTON
BY *[Signature]*
CLERK

APPELLANT moves for reconsideration of the Court's decision terminating review, filed May 5, 2009. Upon consideration, the Court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. Houghton, Bridgewater, Van Deren

DATED this 24th day of June, 2009.

FOR THE COURT:

Van Deren, C.J.
CHIEF JUDGE

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PANEL: Jj. Houghton, Bridgewater, Van Deren

DATED this 24th day of June, 2009.

FOR THE COURT:

Van Doren, C.G.
CHIEF JUDGE

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