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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.

REPLY ON PETITION FOR REVIEW

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1. In cross-petitioning for review of additional issues the Department confirms that this case warrants Supreme Court review. The Department's Answer cross-petitions for review of two additional issues involving the plain meaning of RCW 82.04.280: (a) whether Valpaks are periodicals within the plain language of the statutory definition of "periodical" and (b) whether Taxpayers' activities creating and issuing Valpaks constitute "engaging in the business of publishing." (Answer at 2, 10, 17). The Department's cross-petition confirms that this case warrants Supreme Court review and Taxpayers join the Department's request that the Supreme Court review these two additional issues.

2. The parties agree (though for different reasons) that the construction of the statutory definition of "periodical" should be reviewed. Taxpayers' Petition notes that that Division II's *sua sponte* addition of an unwritten "intended audience" requirement to the statutory definition of periodical conflicts with the Supreme Court's oft-repeated instructions that courts cannot add language to an unambiguous statute. Petition at 6-9.¹ The Department does not dispute this fundamental principle of statutory construction, nor does the Department attempt to

¹ Last month the Supreme Court struck down an extra-statutory tax requirement, explaining "To achieve such an interpretation, we would have to import additional language that the legislature did not use." *Dot Foods, Inc. v. Dep't of Revenue*, ___ Wn.2d ___, 215 P.3d 185, 189 (Wash. 2009).

defend the Court of Appeals' undisputed violation of it. Rather, the Department suggests that Taxpayers' focus on the specifics of Division II's error in importing an unwritten requirement into the statute is too "narrow." Answer at 7. Instead the Department asks this Court to replace Division II's newly added "intended audience" requirement with a different one – that a periodical's publication interval must be "stated *on the publication.*" Answer at 16 (emphasis added).² The Department's current request to write an "on the publication" requirement into the statute is a reversal of the Department's earlier admission that "it is not required by statute that the intervals be stated on the publication." (CP42). As discussed in point 4 below, the Department of Revenue's revisions of statutory interpretations to add unwritten requirements to tax statutes provide a common, recurring theme in tax cases that this Court has reviewed. It is not surprising that the Court has regularly accepted review of such cases since a fair and effective tax system relies on taxpayers being able to figure out and accurately report their proper tax liabilities, an ability that is undermined when the Department changes its written guidance in order to assert new non-statutory based tax requirements. All Washington taxpayers have a substantial public interest in the proper

² The Department is also inconsistent in the specific words it asks the Court to import into the statute. Elsewhere it asks the Court to import the phrase "printed on the publication." Answer at 13. (emphasis added).

construction and application of the state's tax statutes to their business activities.

3. Taxpayers agree with the Department that Division II's remand undermines principles of judicial economy. The Department notes that the Court of Appeals' remand to develop a factual record regarding its newly added "intended audience" requirement is "inconsistent with ... the goal of avoiding piecemeal litigation." Answer at 18; see *Fox v. Sunmaster Products, Inc.*, 115 Wn.2d 498, 504, 978 P.2d 808 (1990) (regarding the "undesirability of piecemeal review"). The remand will consume both party and judicial resources but is unlikely to fully resolve this case because of the parties' dispute as to whether Taxpayers are "engaged in the business of publishing" under the plain language of RCW 82.04.280; an issue the Department notes has been "fully briefed" and is ripe for decision. Answer at 18. The Department accurately describes the "publishing" issue as "a significant issue that has been left unresolved, to the prejudice of all parties in this case." Answer at 11.

While the publishing issue warrants review, the Department's contention that Taxpayers are not "engaged in the business of publishing" merely because the franchise agreements assign the label of "publisher" to the franchisor (Answer at 18-19) does not address the meaning of the

statutory language and conflicts with the controlling decisions of this Court, which hold that “contractual labels are not determinative” of B&O tax consequences. *Rho Co., Inc. v. Dep’t of Revenue*, 113 Wn.2d 561, 570, 782 P.2d 986 (1989). The Department’s contractual label argument also ignores the actual activities performed by the Taxpayers as well as the activities performed by the franchisor contrary to this Court’s repeated instruction that the “*subject* of the [B&O] tax” is the “activity itself,” *AgriLink Foods, Inc. v. Dep’t of Revenue*, 153 Wn.2d 392, 398 103 P.3d 1226 (2005), *citing Fibreboard Paper Prods. Corp. v. State*, 66 Wn.2d 87, 90, 401 P.2d 623 (1965) (emphasis in original). As Taxpayers have shown, the plain meaning of “publishing” encompasses a broad array of activities involved in putting information into the public arena; activities that include, among others, Taxpayers’ development of the content of each issue, Taxpayers’ determination of the layout of each issue, Taxpayers’ establishment of the publication schedule, and Taxpayers’ determination of who will receive each issue. (CP 28-29, 532-33).³ In contrast, the activities performed by the franchisor – printing, collating, stuffing,

³ Interestingly, on this issue the Court of Appeals specifically cited this Court’s ruling in *Ford Motor Co. v. City of Seattle*, 160 Wn.2d 32, 38, 156 P.3d 185 (2007), *cert. denied*, 128 S.Ct. 1224 (2008), that B&O taxation of “the business of making sales” encompasses virtually any activity associated with selling, including “advertising, sending representatives to meet with [customers], imparting information about new products, discussing problems and customer satisfaction concerns, and marketing” for the proposition that “engaging in the business of publishing should encompass more than simply being the designated publisher.” 150 Wn.App. at 20, n.9.

addressing, and depositing Valpak envelopes in the mail in accordance with orders placed by the Taxpayers (CP 29, 533) – are specifically classified by the Department as “mailing bureau” activities, not publishing. WAC 458-20-141(3) (“Activities conducted by mailing bureaus include, ... addressing, labeling, binding, folding, enclosing, sealing, tabbing, and mailing the mail pieces.”).

4. This case shares two key characteristics with other tax cases this Court has reviewed. The Supreme Court should review this case because it shares two key characteristics with other tax cases the Court has reviewed. First, this case involves the Department of Revenue changing its interpretation of a tax statute. Second, this case involves the addition of unwritten requirements to a tax statute.

Just last month this Court decided *Dot Foods, Inc. v. Dep't of Revenue*, ___ Wn.2d ___, 215 P.3d 185 (2009), a case in which the Court noted that the purported tax requirements under review were only asserted after the Department had “revised its interpretation of the qualifications needed” under the disputed tax statute. *Id.* at 186. On review, the Court held the Department’s newly asserted requirements had no basis in the language of the statute. *Id.* at 189 (“The wording of the statute has not changed since its enactment; only the Department’s interpretation and application of the statute have changed ... we reject the Department’s

interpretation. To do otherwise would add words to and rewrite an unambiguous statute.”). In *HomeStreet, Inc. v. Dep’t of Revenue*, 166 Wn.2d 444, 210 P.3d 397 (2009), as in *Dot Foods*, the taxpayer had been receiving the benefit of the disputed tax statute until the Department revised its interpretation of the statute’s requirements. 166 Wn.2d at 447. After granting review, this Court held that *HomeStreet’s* financial transactions met the plain language of the disputed statute. 166 Wn.2d at 455. And in *Agrilink v. Dep’t of Revenue, supra* 153 Wn.2d 392, the Department similarly changed its interpretation of a tax statute to assert an extra-statutory requirement. Although the Department had long recognized that beef jerky manufacturers are taxable under RCW 82.04.260(4) for “processing perishable meat products” because the manufacturing process is performed on perishable (raw) meat even though the resulting end-product is no longer perishable, the Department asserted a non-statutory perishable end-product requirement to deny the same taxation for Agrilink’s processing of raw beef into canned chili con carne. 153 Wn.2d at 395. After granting review, the Supreme Court reversed, holding that “the plain language of RCW 82.04.260(4) does not include a perishable finished product requirement. First we note the absence of any express language establishing such a requirement.” 153 Wn.2d at 397.

This case follows the same pattern as *Dot Foods*, *HomeStreet*, and *Agrilink*. The Department initially issued Taxpayers a letter ruling, holding that Taxpayers are properly taxable under RCW 82.04.280 for “engaging in the business of publishing periodicals.” CP 39-42. The Department subsequently revised its interpretation of the statute. CP 44. While the Department’s written letter ruling conceded the obvious, that “the publication meets the definition of a periodical under RCW 82.04.280. It is *not required by statute* that the intervals be stated *on the publication*” (CP 42) (emphasis added), the Department has completely reversed its position and now boldly asks this Court to add an unwritten “on the publication” requirement to the statute. Answer at 13, 16. As in *Agrilink*, “the Court of Appeals did not undertake an appropriate plain language analysis, but, rather, added a requirement ... that the statutory text does not dictate.” 153 Wn.2d at 398.

5. CONCLUSION

For the reasons set forth above and in the Petition for Review 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.

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DATED this 23rd day of October, 2009.


Theresa Trotland