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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.

REPLY BRIEF OF APPELLANTS

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ORIGINAL

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SUMMARY OF ARGUMENT

The Department expressly agrees with many points made in Taxpayers' opening brief, including the controlling legal principles that (1) statutes are applied according to their plain language and (2) activities, *not* contractual labels, control taxation. Resp. Br. at 10, 21, 26. The Department also agrees that the statutory definition of periodical "is not significantly different than" common dictionary definitions of the word. Resp. Br. at 28.

The Department's brief ignores, and thus does not dispute, many other dispositive points made by Taxpayers including (1) courts do not add words or clauses to statutes when those words were not used by the legislature, App. Br. at 8; (2) like the plain language of the statutory definition, common dictionary definitions of "periodical" do not contain format requirements, App. Br. at 9; and (3) the plain meaning of "publishing" is disseminating information to the public by creating and issuing printed materials," App. Br. at 12.

Yet contrary to these controlling principles, the Department asks this Court to re-write RCW 82.04.280 to add format requirements to the statutory definition of "periodical" that are outside the plain language of the statute. Resp. Br. at 28, 32. The Department makes such requests notwithstanding its concessions that it could find neither case law, nor

legislative history, nor dictionary definitions of the statutory terms to support adding the requested requirements. Resp. Br. at 32. The Department also asks the Court to re-write RCW 82.04.280 so that tax is imposed, not on activities that constitute “engaging in the business of ... publishing” as the statute provides but instead on the status of “being a publisher” (Resp. Br. at 9), which the Department would determine by contractual labels. Resp. Br. at 14. The Department further asks the Court to impose additional requirements that are not part of the statute (and for which the Department presents no authority whatsoever) – ownership of copyrights and editorial control. Yet as the Department admits, Taxpayers do exercise editorial control over their publications, they are the ones who control, among other things: the content, the sequence of that content, the publication schedule, and who they are distributed to.

The Department’s efforts in this case to add requirements to a B&O tax classification that have no foundation in the plain language of the tax statute mirror its arguments that were flatly rejected by a unanimous Supreme Court in *Agrilink Foods, Inc. v. Dep’t of Revenue*, 153 Wn.2d 392, 103 P.3d 1226 (2005), a case discussed at length in Taxpayer’s opening brief. App. Br. at 10, 11, 15. Yet the Department’s brief also ignores *Agrilink*, and thus does not dispute either the holdings of that case or their applicability here.

ARGUMENT

A. The Department seeks to add requirements that are not part of the statutory definition of periodical.

The Department effectively concedes that the trial court erred in basing its ruling on the proposition that, because Valpak is a periodical under the plain language of the statutory definition, the legislature must not have meant what it said. RP 46.¹ Thus, the Department pleads with the Court to decide this appeal on alternative grounds. Resp. Br. at 6.

The Department does *not* attempt to defend the trial court's reasoning and does not dispute the numerous authorities cited in Taxpayers' Appellate Brief (at 7-8) holding that the legislature's intent is determined by the plain meaning of the statutory words the legislature enacted. As the Washington Supreme Court has explained, a court must apply the plain language of a statute "even if it believes the Legislature intended something else but did not adequately express it." *Cerrillo v. Esparza*, 158 Wn.2d. 194, 201, 142 P.3d 155 (2006). Consequently, the Department resorts to attempting to re-write the statute to add requirements outside the statute's plain language in order to support its litigating position in this case.

¹ The trial court acknowledged that the "legislature has said in words, and the words that they used would allow this to fall within what counts as a periodical" but declined to apply the acknowledged plain language of the statute on the improper theory that "the legislature passed legislation that does more than they intended it to."

1. The Department's admittedly circular argument – using the word “publication” to create unwritten requirements the Department alleges (without authority) are typical characteristics of periodicals – is contrary to the plain language of the statute.

The Department agrees that words in statutes are accorded their “plain meaning.” Resp. Br. at 26. However, instead of according the word “publication” its undisputed plain meaning, the Department asks this court to “interpret” the appearance of the word “publication” in the “context” of defining “periodical” to be “narrower in scope” than its plain meaning. *Id.* Specifically, the Department seeks to use the word “publication” as a vehicle to add unwritten format (and content?)² requirements to the statute; requirements the Department says (without authority) are “typical ... characteristics” of periodicals. Resp. Br. at 28.

The Department's argument is: (1) assume, without any supporting authority, that periodicals “typically exhibit” certain characteristics, (2) since the statutory definition of periodical does *not* require any of the allegedly “typical” characteristics of periodicals, (3) one should conclude that the Legislature's unstated intent in using the word “publication” in the

² It is unclear whether the Department is asking the Court to add a content requirement. On the one hand, the Department describes its requested format requirements as being “in addition to containing articles.” Resp. Br. at 28. Consistent with the content requirement thus implied, the Department's Brief repeatedly disparages Valpak because its content consists of advertising “flyers” or “inserts” *E.g.* Resp. Br. at 2, 27, 29, and 30. Yet the Department does *not* recant its “agree[ment] that the definition of ‘periodical or magazine’ does not include content requirements.” CP 547.

“context” of defining periodicals must have been for the word publication – instead of its plain meaning – to mean only “those publications that are periodicals” as determined by exhibiting “one or more” of the unstated characteristics assumed to be “typical” of a periodical. Resp. Br. at 28-29.³

Not surprisingly, the Department “acknowledges” the “circularity in this reasoning.” Resp. Br. at 28. It is also a strained and unlikely construction of the statute that violates the undisputed principle that “Courts do not ‘add words or clauses to an unambiguous statute when the legislature chose not to include that language.’” App. Br. at 8, *quoting State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003).

The Department’s argument is also contrary to its admission that the statutory definition of periodical “is not significantly different than” common dictionary definitions of periodical. Resp. Br. at 28, n. 18. As

³ The “one or more” characteristics the Department says (without any supporting authority) are “typically exhibited” by periodicals “in addition to containing articles” are:

[1] Volume numbers, issue numbers, and issue dates; [2] mastheads; [3] covers; [4] binding; [5] tables of contents; [6] numbered pages in sequence; and [7] a designated area providing information about [a] the editorial staff, [b] circulation, [c] change of address instructions, [d] subscription rates, [e] a “stated interval” (e.g. “published monthly”), and [f] a statement that the publication is mailed at the periodicals postage rate.

Resp. Br. at 28-29. It is unclear whether the Department is arguing that the allegedly “typical” periodical characteristic of a “designated area providing information” requires all six pieces of information the Department lists or just “one or more” of those pieces of information.

noted in Taxpayers' brief (App. Br. at 9-10) and undisputed by the Department, *none* of the numerous dictionary definitions of periodical cited by either party make any reference to content or format requirements. Rather, their focus is on regular, periodic issuance, differing only in how they describe the frequency (i.e. *Webster's* describes it in terms of a maximum periodic length "usually used of a publication appearing more frequently than annually", and *American Heritage* in terms of a minimum periodic length "at intervals of more than one day").⁴

In making its argument, the Department ignores the Washington Supreme Court's holding in *Agrilink v. Dep't of Revenue*, 153 Wn.2d 392, discussed in App. Br. at 10, in which the Supreme Court refused to add an unwritten requirement to a B&O tax classification when the Legislature had expressly imposed such a requirement in other B&O tax provisions. In *Agrilink* it was an "end-product" requirement, here it is format requirements. However, as the Department acknowledges, the Legislature adopted definitions of "newspapers" and "periodicals or magazines" in

⁴ Since most dictionary definitions of periodical also use the word publication, it strains credulity to believe that those dictionary definitions also silently intend the word "publication" to mean only those publications exhibiting "one or more" of numerous unidentified characteristics "typical" of a periodical. Even if every dictionary definition did somehow intend for the word "publication" to convey such an unspoken, unlikely meaning it would be even more incredible if each author had in mind the same unspoken list of allegedly "typical" characteristics of a periodical as the one made up by the Department (which it should be noted, the Department has revised without explanation from its briefing below to add "binding" to its alleged list of typical characteristics of periodicals). Compare list at CP 547 with the revised list at Resp. Br. 28.

consecutive sessions and gave them contemporaneous effective dates. Resp. Br. at 8.⁵ Yet the Department ignores the fact (discussed in App. Br. at 10) that the statutory definition of “newspapers” contains binding and format requirements, while the statutory definition of “periodicals or magazines” does not.⁶ Thus, as in *Agrilink*, the Department’s attempt to infer unwritten requirements is the result of “not undertak[ing] an appropriate plain language analysis but, rather, add[ing] a requirement to [the statute] that the statutory text does not dictate.” *Agrilink*, 153 Wn.2d at 398.

2. As the Department has previously acknowledged, the plain language of the statute does not contain an “on the publication” requirement.

In an argument reinforcing the trial court’s conclusion that Taxpayers would “win” if the court fell into the “ambush” of applying the statute in accordance with its plain language, (RP 47, discussed in App. Br. at 4-5) the Department now asks this Court to judicially re-write RCW

⁵ As the Department has explained, the Legislature enacted these content-neutral definitions in response to U.S. Supreme Court “decisions which restrict a state’s ability to base taxing decisions upon a publication’s content.” CP 123, *also* App. Br. at 8-9.

⁶ Instead, the Department attempts to characterize its strained interpretation of RCW 82.04.280 as “consistent” with a Florida case that construed a *sales tax* exemption for “circulated publications” as requiring an amorphous “unitary physical quality” based on the Florida court’s interpretation of the words “work” and “issue” neither of which appear in RCW 82.04.280. Resp. Br. at 29. Moreover, the Washington Supreme Court has recently explained that sales taxes and B&O taxes are distinctly different types of taxes when rejecting consideration of sales tax case law in deciding a B&O tax case. *Ford Motor Co. v. City of Seattle*, 160 Wn.2d 32, 42, 156 P.3d 185 (2007) (“B & O taxes, on the other hand, are not sales taxes. . . . B & O taxes are imposed on ‘the act or privilege of engaging in business activities’”).

82.04.280 to say that “the publication interval must be stated *on the publication.*” Resp. Br. at 32.

To make this argument the Department is forced to ask the Court to give “no consideration” (Resp. Br. at 26, n. 17) to the Department’s letter ruling for Taxpayers in which the Department, applying the plain language of the statute, acknowledged that “it is *not required by statute* that the intervals be stated on the publication for it to meet the definition of a magazine or periodical.” CP 42 (emphasis added).⁷ The Department does not dispute that the plain meaning of the word “stated” has no limitation on where or how the stated information is conveyed. Resp. Br. at 35-36.⁸ Moreover, the Department is forced to concede that the record undisputedly establishes both (1) that Valpak is “issued monthly under a regular schedule the Franchisees establish 18-24 months in advance” and (2) that it is stated on printed publication schedules as well as the internet. Resp. Br. at 35; CP 468-485, 466.

⁷ While the Department notes (Resp. Br. at 4) that, in order to support its denial of the refund claims now before this Court, it rescinded (CP 43) an earlier letter (CP 39) holding that Valpak is a periodical, the Department ignores the fact (discussed in App. Br. at 4) that it rescinded that ruling on the admittedly erroneous grounds that “advertising publications” are not periodicals because of their content. CP 78. The Department now “agrees with plaintiffs that the definition of ‘periodical or magazine’ does not include content requirements.” CP 547.

⁸ Referencing the following dictionary definition of “stated” from CP 518:

stated *adj.* 1. set or fix (as by rule or custom): established, regular ...
2.a. *obs.* unmistakably known: avowed b. set down explicitly: declared.

Webster’s Third New International Dictionary (1981).

The Department candidly admits that (1) there is “nothing in the legislative history” supporting its argument to add an “on the publication” requirement, (2) “The Department has found no dictionary definition” supporting its argument and (3) it was “unable to find any published cases” supporting its argument. Resp. Br. at 32.

In the absence of any authority to support its litigating position, the Department is relegated to asking this Court to add an unwritten “on the publication” requirement to RCW 82.04.280 by analogy to a modern federal postal regulation (Domestic Mail Manual 707 § 4.12.5) that requires material qualifying for second class mail rates to contain, *inter alia*, an “Information Statement” that in turn contains, among other things a “statement of frequency” simply because the phrase stated interval “appeared” nearly 130 years ago in the Post Office Appropriation Bill of 1879. Resp. Br. at 33. Moreover, the Department fails to inform the Court that federal statutes setting requirements for mail classifications were repealed in 1970 when Congress reorganized the former Post Office Department into the modern United States Postal Service. P.L. 91-375, 84 Stat. 760 (Aug. 12, 1970). Since 1970 the USPS and Postal Regulatory Commission are vested with broad discretion to “establish and maintain a fair and equitable classification system for all mail” 39 U.S.C. §§

3623(c)(i) and 3621. The postal regulations independently establish requirements for mailing classifications.

It is both unlikely and strained to speculate that the Washington Legislature, when enacting a state tax statute in 1994, was laboring under the unstated, erroneous belief that federal postal regulations were interpreting language in a long repealed federal statute and that the Legislature silently intended the meaning of its new tax statute to be controlled by select parts of the federal postal regulations.

In addition, the unstated inference of the Department's argument – that second class mail⁹ is intended to apply to all periodicals – is also false. Under the 1879 statute cited by the Department, second class postage rates applied only to a specific subset of “newspapers and other periodicals” that met several limiting criteria. Act of March 3, 1879 c. 180 § 14, 20 Stat. 355.¹⁰ Third class mail rates, on the other hand applied to, among other things “books, transient newspapers and periodicals” and other printed matter that did not meet the second class mail limitations. *Id.* at § 17.

⁹ The USPS did not adopt phrase used by the Department “periodicals class” until 1996, two years after the statutory definition of periodical in RCW 82.04.280.

¹⁰ Those requirements included, among others that second class matter be mailed to “paid subscribers.” *Id.* Yet as the Department does *not* assert that RCW 82.04.280 requires periodicals to be sold to subscribers. CP 488-89 (Answer to Interrog. No. 57).

It is undisputed that Valpak is “issued regularly at stated intervals at least once every three months” as required by the plain language of the statute. As the Department explains, its objection is that “their *contents* include no *statement of frequency* and display no information pertaining to their frequency.” Resp. Br. at 35 (emphasis added).

As the Department has previously acknowledged, under the plain language of the statute “it is not required by statute that the intervals be stated on the publication.” CP 42. As the Courts have repeatedly held, the Department cannot impose a requirement not found in the statute. *Agrilink*, 153 Wn.2d at 398; *Lone Star Indus., Inc. v. Dep’t of Revenue*, 97 Wn.2d 630, 634, 647 P.2d 1013 (1982) (invalidating Department rule imposing a requirement outside the plain language of the statute).

B. Under the plain language of RCW 82.04.280, tax is imposed on activities that constitute “engaging in the business of ... publishing” not – as the Department asks the Court to re-write the statute – on the status of “being a publisher.”

The Department agrees that B&O tax is imposed on *activities*. Resp Br. at 7, 10. Yet again the Department asks this Court to judicially re-write RCW 82.04.280 so that instead of tax being imposed on activities that constitute “engaging in the business of publishing” as the statute expressly provides, the Department asks that tax be imposed instead on the status of “being a publisher.” Resp. Br. at 9-14.

Building on the false foundation that RCW 82.04.280 only applies to the status of “being a publisher” the Department argues Taxpayers “agreed that VPDMS is the publisher.” Resp. Br. at 14. The Department’s litigating position is thus contrary to its admission that taxation is not based on “contract labeling.” Resp. Br. at 21, *citing Rho Co., Inc. v. Dep’t of Revenue*, 113 Wn.2d 561, 570, 782 P.2d 986 (1989) (“contractual labels are not determinative” of B&O tax consequences).¹¹

Next, the Department argues that Taxpayers are not “the publisher” of the Valpak publications they create and distribute based on the statement (made without any supporting authority) that “[p]ublishers typically own copyrights, trademarks and other intellectual property.” Resp. Br. at 18. The Court should disregard this unsupported contention. RAP 10.3(a)(5); *Oregon Mut. Ins. Co. v. Barton*, 109 Wn. App. 405, 418, 36 P.3d 1065 (2001) (“Argument must be supported by citation to legal authority”);¹² *Yeats v. Estate of Yeats*, 90 Wn.2d 201, 209, 580 P.2d 617

¹¹ The Department’s suggestion (Resp. Br. at 9) that, by labeling Taxpayers “advertising service providers,” they become ineligible for the publishing classification is contradicted by the Department’s admission that “advertising income” of those engaged in publishing periodicals is taxable under the publishing classification (CP 40) as well as by its admission that the “B&O tax statutes do not provide a specific classification for advertising service providers.” Resp. Br. at 8. The Department does not dispute this Court’s instruction that the “specific prevails over the general,” *Medical Consultants Northwest, Inc. v. Dep’t of Revenue*, 89 Wn. App. 39, 49, 947 P.2d 784 (1997), discussed in App. Br. at 14.

¹² When no authority is cited, the Court of Appeals “presume[s] that counsel after diligent search, has found none.” 109 Wn.2d at 418 (citations omitted).

(1978) (refusing to consider proposition for which “no authority is cited.”). Moreover, the Department’s proposition is demonstrably false.

Although the Department the department attempts (again without citation to supporting authority) the rights of a copyright owner to the status of “being a publisher,” as a matter of law, ownership of a copyright “vests initially in the *author*.” 17 U.S.C. § 201 (emphasis added).¹³ Thus the inside cover of books frequently identifies the author as the owner of the copyright, *not* the publisher. Thus, for example, current best-seller The Last Lecture, is copyrighted by its author Randy Pausch, not by the “publisher” Hyperion Books. Likewise, Pillars of the Earth is copyrighted by its author, Ken Follet, not the “publisher” of either the current paperback edition, Penguin (USA), Inc. or the 1978 hardcover edition, William Morrow & Company. Consequently ownership of copyrights does not provide any indication as to whether a person enjoys the status of “being a publisher.”

The Department also argues that Taxpayers are not “the publisher” of the Valpak publications they create and distribute based on the unsupported statement that an “indicator of a publisher is editorial

¹³ Like other intellectual property, a copyright owner may either transfer ownership or license the rights to others. As the Department points out, Taxpayer’s license rather than own the intellectual property used in their publications.

control.”¹⁴ Resp. Br. at 19. As discussed above, Courts do not consider arguments unsupported by authority. Even if one were to assume *arguendo* that (1) the statute should be re-written to impose tax on “being a publisher” rather than activities that constitute the business of publishing (as the plain language of the statute provides) and (2) editorial control is an “indicator” of “being a publisher” then, as the Department concedes, the Taxpayers do have editorial control over their publications. *Id.* In fact, as the Department acknowledges, Taxpayers’ editorial control over their publications includes the “exclusive right” to approve or reject advertisements proposed by VPDMS or other franchisees. Resp. Br. at 15, *quoting* franchise agreement §3.1(b).

Thus, the Department’s argument is reduced to the suggestion that VPDMS’s reservation of the right to reject advertisements that do not meet the franchisor’s guidelines gives VPDMS “the ultimate editorial authority,” Resp. Br. at 19, a different standard than the “editorial control” the Department says is a characteristic of “being a publisher.” However, as VPDMS itself testified, its guidelines basically “inform franchisees about relevant legal requirements” such as “federal restrictions on advertisements for alcohol ... use of currency images in advertisements” *etc.* CP 571-72. Taxpayers have the right, which they have exercised, to

¹⁴ Presumably this would mean that Scholastic as “the publisher,” rather than author J.K. Rowling, “controls” the content of Rowling’s Harry Potter novels.

establish their own, more stringent advertising standards. CP 527-30. Consequently, during the entire eight year period at issue, 1998 through 2006, VPDMS *never* rejected a single ad run in any of the Taxpayers' publications! CP 572. In contrast, applying the Taxpayers' more stringent standards, the Bowies alone (one of the Taxpayers) annually reject on average 25-35 advertisements proposed by VPDMS and other prospective advertisers. CP 587. Even if there were any authority for "editorial control" to govern the B&O tax classification at issue, that authority is in fact exercised by the Taxpayers.

Most importantly for purposes of applying the plain language of the statute, the Department does not dispute that the ordinary meaning of "publishing" is the process of creating and issuing printed matter for distribution (App. Br. at 12) or that "Publishing includes the stages of the development, acquisition, copyediting, graphic design, production ... and marketing and distribution" of printed materials. *Id.*, quoting <http://en.wikipedia.org/publishing>. The undisputed activities conducted by Taxpayers fall within the plain meaning of the word publishing.

It is the Taxpayers, not VPDMS, who develop the contents of their Valpak publications: thus the Taxpayers (1) "select the type and mix of advertising content and the individual advertisers they would like to include" in their publications, (2) solicit advertisements from targeted

advertisers, (3) “accept or reject advertisements from VPDMS and other franchisees” (4) “determine the organization and sequence of the advertisements that constitute the contents of their” publications and (5) determine whether (and if so, what) local promotion to have printed on the cover. CP 29, 532. It is the Taxpayers, not VPDMS, that decide who their publications will be distributed to; the Taxpayers create the distribution zones to which their publications will be mailed and maintain and update those mailing lists. CP 28-29, 533. It is also the Taxpayers, not VPDMS, who set the publication schedule for the Valpak publications they distribute in their franchised territories. Taxpayers have been issuing Valpak monthly since 1993 in accordance with schedules the Taxpayers establish. CP 28, 533. Taxpayers also work with the U.S. Postal Service to arrange for the specific in-home delivery date of each edition of Valpak that Taxpayers issue in western Washington. CP 533. Under the plain language of the statute these undisputed activities conducted by the Taxpayers are “engaging in the business of publishing” taxable under RCW 82.04.280.

C. If the statute were ambiguous, controlling case law requires the court to construe the statute in favor of the Taxpayers.

The Department does not dispute the well-settled rule (discussed in App. Br. at 15, that Washington Courts construe ambiguous tax statutes

“most strongly against the taxing power and in favor of the taxpayer.” *Agrilink*, 153 Wn.2d at 396-397. Instead, the Department pleads that “the doctrine of noscitur a sociis” would be a “more appropriate” “principle of statutory construction” to apply if the Court finds that RCW 82.04.280 is ambiguous. Resp. Br. at 37.

In making this plea the Department makes no attempt to explain why the doctrine of noscitur a sociis would allegedly be “more appropriate.” Far from being “more appropriate” the doctrine is not even applicable. It is used to help “determine the meaning of a word used in a series.” *Port of Seattle v. Dep’t of Revenue*, 101 Wn.App. 106, 113, 1 P.3d 607 (2000). Thus, in *Port of Seattle*, the Court noted that the phrase “mass public transportation terminal” could reasonably include an airport terminal. However, since the phrase was “found in a list of structures that support ground transportation” and was “sandwiched between phrases denoting infrastructure for ground transportation” the Court concluded that the “Legislature meant to include only terminals for ground transportation and not airport terminals in this statute.” *Id.* at 114.¹⁵

¹⁵ Similarly, in *Shurgard Mini-Storage of Tumwater v. Dep’t of Revenue*, 40 Wn.App. 721, 727, 700 P.2d 1176 (1985) the court found that the word “warehouse” appearing in a sentence enumerating “businesses ... regulated by the state” referred to storage warehouses regulated under former Chapters 81.92 or 21.09 RCW and not the type of general rental facilities operated by the plaintiffs, which the Court noted were “free from any similar type of licensing or regulation by the State.”

In stark contrast, neither the word “publication” nor the phrase “stated interval” appear in a list in RCW 82.04.280, let alone a list of typical characteristics of a periodical (in the case of the Department’s efforts to infuse “publication” with additional meanings) or a list of content requirements (in connection with the Department’s effort to invoke “stated interval” to support its objection that “the content of the Valpak envelopes does not contain a statement of frequency” Resp. Br. at 35).

Moreover, the Department does not cite any case in which a Washington court has rejected the long-standing rule that ambiguous tax statutes are construed in favor of the taxpayer, let alone one in which it did so by invoking a “principle of statutory construction” to construe an ambiguous tax in favor of the Department. To the contrary, as shown in Taxpayers brief (App. at 15), the Washington Supreme Court has invoked the rule construing tax statutes in favor of taxpayers at least three times in the past three years while ruling in favor of taxpayers.¹⁶

CONCLUSION

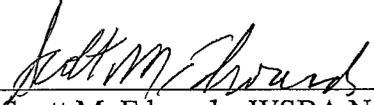
For the reasons discussed above and in Taxpayer’s Appellate Brief, Valpak are periodicals under the plain language of the statutory definition

¹⁶ The Department unsuccessfully attempted in *Agrilink* to promote the doctrine of *nocitur a sociis*, an argument the Court did not deem worth mentioning in its decision. *Agrilink* DOR Supplemental Br. at 9, excerpt provided in Appendix A hereto.

in RCW 82.04.280. By creating and distributing Valpak, the Taxpayers are engaged in the business of publishing periodicals and are properly taxable under RCW 82.04.280(1). Taxpayers respectfully request the Court of Appeals to reverse the dismissal of their Complaint with instructions to enter summary judgment in their favor.

DATED: June 9, 2008

PERKINS COIE LLP

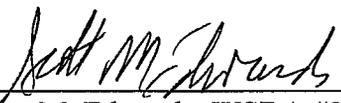
By: 
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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing document
was served this day by hand delivery, at the following addresses:

Heidi Irvin
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DATED this 9th day of June, 2008.



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NO. 74478-5

SUPREME COURT OF THE STATE OF WASHINGTON

AGRILINK FOODS, INC.,

Petitioner,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Respondent.

RESPONDENT'S SUPPLEMENTAL BRIEF

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must, in fact, be perishable meat.” If this Court finds that the language of the statute is ambiguous, the Court of Appeals still correctly concluded that it only applies if the end product is a perishable meat product.

1. Legislative history shows that RCW 82.04.260(4) was intended only as a preferential tax rate for “meat packers.”

The plain meaning of RCW 82.04.260(4) is unambiguous.

Nothing in the statute suggests that it can be extended to include processing nonperishable meat products. If, however, the Court does find that the statute is ambiguous, it is appropriate to consider legislative intent.

If Agrilink’s reading of the statute were correct, the tax rate would be reduced on manufacturing and selling at wholesale any product, perishable or nonperishable, that contains a meat ingredient. For example, a manufacturer/seller of cosmetics containing animal products would be entitled to the lower tax rate. Such an interpretation of the statute directly conflicts with the intent of the Legislature.

In 1967, the Legislature passed Engrossed Senate Bill 255, enacting the preferential rate now codified in RCW 82.04.260(4).¹⁸ The conference committee described the effect of SB 255 by stating that it “[r]educes B&O tax on meat packers from .44% to .33%.”¹⁹ The language in the report is consistent with the plain language of the statute. In describing “slaughtering, breaking and processing perishable meat

¹⁸ Laws of 1967, Ex. Sess., ch. 149, § 10(8).

¹⁹ Free Conference Committee Report on SB 255, 1967, reprinted in *Digest of the Enacted Laws, Reg. & Ex. Sess.* 1967 at 4 (Appendix A). (Over time, the tax rate has been further reduced.)

products” the conference committee collectively referred to these manufacturers as “meat packers.” Agrilink has offered no history that would indicate a legislative intent to lower taxes for manufacturers and sellers of nonperishable food products that use meat as an ingredient.

The conference committee’s reference to “meat packers” is reflective of the language used in the statute. RCW 82.04.260(4) addresses slaughtering, breaking, or processing perishable meat products, and selling the same at wholesale. Under the doctrine of *noscitur a sociis*, “the meaning of words may be indicated or controlled by those with which they are associated.”²⁰ In applying the doctrine, the courts “adopt the sense of the words which best harmonizes with the context.”²¹ Each of these manufacturing operations results in a perishable meat product, in the form of a slaughtered animal, a cut of meat, or a perishable meat product. Selling the same at wholesale can only refer to the perishable meat products produced by these manufacturing activities.

2. In lowering the manufacturing and selling tax on the end product, the Legislature created a constitutionally sound tax preference.

Agrilink is requesting a refund of tax on a combination of activities: manufacturing and selling.²² It contends that the manufacturing operation is entitled to the lower tax because perishable meat is an

²⁰ *State v. Jackson*, 137 Wn.2d 712, 729, 976 P.2d 1229 (1999) (quoting *Ball v. Stokely Foods, Inc.*, 37 Wn.2d 79, 87-88, 221 P.2d 832 (1950)).

²¹ *Jackson*, 137 Wn.2d at 729 (quoting *McDermott v. Kaczmarek*, 2 Wn. App. 643, 648, 469 P.2d 191(1970)(quoting 50 Am. Jur. *Statutes* § 247 (1944)).

²² Stipulated Facts at Exhibit H.