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**IN THE 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.

PETITIONERS' SUPPLEMENTAL BRIEF

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INTRODUCTION

The Court granted review of two issues in this case: (1) whether Valpaks are “periodicals” as defined in RCW 82.04.280; and (2) Whether the Taxpayers are “engaged in the business of ... publishing” under RCW 82.04.280. First, as the Department and the Superior Court have each acknowledged, the Valpaks created and issued by Taxpayers monthly meet the plain language of the statutory definition of “periodical.” The statute does not contain an “on the publication” requirement. Nor does the statute contain the “intended audience” requirement judicially drafted by Division II. Second, the activities performed by the Taxpayers in creating the content and layout of their Valpaks, establishing their publication schedule and determining who their Valpaks are distributed to constitute engaging in the business of publishing.

STATEMENT OF THE CASE

A. Taxpayers’ business.

Appellants, Richard and Annette Bowie d/b/a Valpak of Western Washington North, *et al.* (collectively “Taxpayers”) are local, independent businesses that create and issue printed publications (“Valpaks”) monthly in franchised territories covering western Washington. CP 27-28. The Taxpayers issue Valpaks to more than 1.5 million Washington households every month. CP 28-29. Each Taxpayer is a franchisee of Valpak Direct

Marketing Systems, Inc. ("VPDMS"), a Delaware corporation with its principal place of business in Florida. CP 27, 227, 531.

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 Val-Pak logo. CP 28.

The Taxpayers create the content and layout of the Valpaks they issue. The Taxpayers: (1) establish advertising standards for their publications; (2) obtain orders from local advertisers; (3) work with the advertisers to design the advertisements; (4) edit the proofs; (5) approve or disapprove non-local advertisements, (6) organize the pages in the sequence they desire; (7) hire VPDMS to print, collate, stuff, and address Valpaks pursuant to Taxpayers' orders and instructions; (8) decide whether to include a local promotion on the cover and, if so, what local promotion; (9) compile the specific addresses to which the Valpaks they create will be mailed; (10) determine the frequency of publication – since 1993 Taxpayers have issued Valpaks monthly; (11) set the publication schedule (Taxpayers collectively establish a single publication schedule throughout Washington, which is set 18 to 24 months in advance); and (12) work directly with the local U.S. Postal Service to effectuate the scheduled in-home delivery dates. CP 28-29, 527, 532-33.

Each Taxpayer has the exclusive right to create Valpaks and place orders with VPDMS for the printing and mailing of Valpaks issued by that Taxpayer in its franchised territory. CP 29, 229-30, 533.

B. Procedural history.

In 2002, the Department issued a letter ruling holding that the Taxpayers are properly taxable under RCW 82.04.280(1), the B&O tax classification applicable to persons “engaged the business of publishing ... periodicals.” CP 39-42. After issuing refunds to two Valpak businesses, the Department rescinded the letter ruling on the erroneous grounds that Valpaks are not “periodicals” because their 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. Despite admitting its error, the Department has asserted an ever-changing array of arguments to try to justify its revocation of the letter ruling. *See e.g.* CP 14-16, 77-84.

On cross-motions for summary judgment, the Superior Court acknowledged that Valpaks “fall within what counts as a periodical” under the statutory definition (RP 46) and consequently when pressed by the Department refused to base its ruling on the statute, explaining:

I’m not going to fall into the same ambush I think you fell into of meeting Mr. Edwards on his own ground, because if you go there he might win.

RP 47, lines 19-22. While the Court of Appeals reversed the Superior Court for reaching beyond the language of the statute,¹ Division II nevertheless grafted an unwritten requirement to the statutory definition by asserting, without explanation or analysis, that a periodical's publication interval must be "provided" in some unidentified manner to an undefined "intended audience." *Bowie*, 150 Wn. App. at 23.

ARGUMENT

A. Valpaks meet the statutory definition of periodical in RCW 82.04.280.

The statute defines a "periodical" as a "printed publication, other than a newspaper, issued regularly at stated intervals at least once every three months." RCW 82.04.280. The Department acknowledges that Taxpayers' Valpaks are "issued monthly under a regular schedule the [Taxpayers] establish 18-24 months in advance," Resp. Br. at 35 and readily concluded in its letter ruling, "the publication meets the definition of periodical under RCW 82.04.280." CP 42. The Superior Court likewise acknowledged that Valpaks meet the statutory definition: "The legislature has said in words, and the words that they used would allow this to fall within what counts as a periodical." RP 46, lines 17-19. Yet the Department now asks this Court to judicially re-write the statute to say

¹ *Bowie v. Dep't of Revenue*, 150 Wn. App. 17, 22, 206 P.3d 675 (2009) ("the trial court's reasoning ... cannot form a basis for [excluding Valpaks] from the definition provided in RCW 82.04.280.").

that “the publication interval must be stated *on the publication.*” Resp. Br. at 32; Cross-Petition at 13 (“the Court of Appeals should have held that the ‘stated interval’ must be printed *on the publication.*”) (emphasis added).² The Department’s litigating position is contrary to the well established proscription against adding language to unambiguous statutes, *Dot Foods, Inc. v. Dep’t of Revenue*, 166 Wn.2d 912, 920, 215 P.3d 185 (2009) (“We cannot add words or clauses to a statute when the legislature has chosen not to include such language”).

1. The statute does not require that “the publication interval must be stated *on the publication.*”

The statute does not contain the words the Department now asks this Court to add (words that both the Superior Court and Court of Appeals declined to add to the statute). *Agrilink Foods, Inc. v. Dep’t of Revenue* 153 Wn.2d 392, 397, 103 P.3d 1226 (2005) (“we note the

² The Department’s Cross-Petition (at 12) indicates it may also reprise its admittedly circular argument that Valpaks are not “publications” on the theory that they do not exhibit “one or more” of a changing list of format characteristics the Department contends (without authority) are “typically exhibit[ed]” by “publications that are periodicals.” Resp. Br. at 28. As the Court of Appeals noted in rejecting this argument, the statutory definition does not contain any format requirements. 150 Wn. App. at 22-23. If the Legislature had intended to impose format requirements for periodicals it would have done so expressly, as it did in the definition of “newspaper” in RCW 82.04.214 adopted in the same act. *Agrilink Foods, Inc. v. Dep’t of Revenue* 153 Wn.2d 392, 397, 103 P.3d 1226 (2005) (“If the legislature had intended to include a finished product requirement in RCW 82.04.260(4) it would have done so in the same manner” as it did in RCW 82.04.260(1)(a) and (b)). This argument is also a repudiation of the Department’s admission in the letter ruling that Valpak “is a printed publication.” CP 40.

complete absence of any express language establishing such a requirement.”). Also, the Department’s current litigating position is directly contrary to its prior admission 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). Moreover, the Department candidly admits that (1) there is “nothing in the legislative history” supporting its quest to add an unwritten “on the publication” requirement; (2) it “has found no dictionary definition” supporting its argument; and (3) it was “unable to find any published cases” supporting the addition of an unwritten “on the publication requirement.” Resp. Br. at 32.

In the absence of statutory language, legislative history, dictionary definitions, or case law to support its change of position and attempt to add an unwritten “on the publication” requirement to the statute, the Department is relegated to seeking “guidance” from the Post Office Appropriation Bill of 1879, based on the false premise that modern United States Postal Service regulations requiring that mail contain an “Information Statement” containing, among numerous other pieces of information a “Statement of Frequency” to qualify for periodical class postage rates somehow “explains” what the phrase “stated intervals” meant in that 19th century statute’s list of requirements for the former

“second class” postage rates. Resp. Br. at 33-34. While the phrase “stated interval” appeared in the 1879 Post Office Appropriations Bill, modern postal regulations do *not* purport to interpret the meaning of the phrase in that long-repealed³ statute, let alone support the Department’s effort to add an unwritten “on the publication” requirement to the Legislature’s 1993 statutory definition of periodical for B&O tax purposes. As this Court has repeatedly held, the Department “cannot add words or clauses to a statute when the legislature has chosen not to do so.” *Dot Foods*, 166 Wn.2d at 920 (rejecting Department’s effort to add a requirement not provided in the statute); *Agrilink*, 153 Wn.2d at 398 (rejecting the Department’s effort to add an end-product requirement not expressly provided in the statute); and *Lone Star Indus., Inc. v. Dep’t of Revenue*, 97 Wn.2d 630, 633-34, 647 P.2d 1013 (1982) (rejecting the Department’s effort to add a primary purpose requirement not provided in the statute).

³ 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 the 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.

2. The statute does not require that a periodical's publication interval be "provided" to an undefined "intended audience."

Like the Department's renewed plea to add an unwritten "on the publication" requirement to the statute, Division II's *sua sponte* creation of an unwritten "intended audience" requirement is contrary to this Court's well settled decisions on statutory interpretation. The Court recently reaffirmed that words in a statute are accorded their ordinary meaning as reflected in dictionary definitions. *HomeStreet, Inc. v. Dep't of Revenue*, 166 Wn.2d 444, 451, 210 P.3d 297 (2009). Yet despite acknowledging that the ordinary meaning of "stated" is set, fixed, established, or declared, *Bowie*, 150 Wn. App. at 24, n.8 (citing *Webster's Third New International Dictionary*, 2228 (2002)), Division II summarily concluded, without explanation or analysis, that "'stated interval' means that the Taxpayers must provide the *intended audience* with its *anticipated* mailing or publication interval." 150 Wn. App. at 23-24 (emphasis added).

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. 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 been set, established, and fixed by the Taxpayers as monthly. CP 28. Thus Taxpayers issue Valpaks at “stated intervals.”

Division II's newly-minted 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* at 586. As Division II acknowledged, the publication interval is actually declared or announced, both by posting it on the Internet and through the distribution of printed publication schedules. 150 Wn. App. at 24.

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.”

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.” As in *Agrilink* “the Court of Appeals did not undertake an appropriate plain language analysis but rather added a requirement ... that the statutory text did not dictate.” 153 Wn.2d at 398.

B. Taxpayers are “engaged in the business of . . . publishing” Valpaks under RCW 82.04.280.

Despite having issued a letter ruling holding that Taxpayers are engaged in the business of publishing Valpaks and, therefore, properly taxable under RCW 82.04.280 (CP 39-42), the Department asks this Court to consider whether Taxpayers’ activities constitute “engaging in the business of . . . publishing” under RCW 82.04.280.

The Department has made three arguments in support of its efforts to now deny the applicability of the statute:(1) the classification only applies to persons with the title of “publisher” and the franchise agreements assign the label of “publisher” to VPDMS Resp. Br. at 14-16; (2) the unsupported contention that “publishers typically own copyrights

... and other intellectual property related to the published works,” Resp. Br. at 18; and (3) the unsupported contention that “another indicator of a publisher is editorial control.” Resp. Br. at 19.⁴ The Department’s title of “publisher” argument erroneously elevates contractual labels over analysis of the activities performed by the parties in violation of this Court’s holding that 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), as well as this Court’s rulings that the “*subject* of the tax” is the “activity itself.” *Agrilink*, 153 Wn.2d at 398, *citing Fibreboard Paper Prods. Corp. v. State*, 66 Wn.2d 87, 90, 401 P.2d 623 (1965) (emphasis in original).

Since “publishing” is an undefined term, it is accorded its ordinary meaning. The ordinary meaning of “publishing” is disseminating information to the public by creating and issuing printed materials:

Publishing is the process of production and dissemination of literature or information – the *activity of putting information into the public arena*. ... Publishing *includes the stages* of the development, acquisition, copyediting, graphic design, production – printing (and its electronic equivalents), and marketing and distribution

⁴ In its cross-petition, the Department merely referenced the portions of the parties’ appellate briefs addressing the issue.

<http://en.wikipedia.org/wiki/publishing>; <http://wordnet.princeton.edu>
 (“publishing: the business of issuing printed matter for ... distribution”);⁵
 and D. Brownstone and I. Franck, *The Dictionary of Publishing*, (Van
 Nostrand Reinhold Company 1982) (“publishing: 1. As a process, the
 securing, physical preparation, manufacture, and distribution of
 publications and *all related functions*.”) (emphasis added). As discussed
 at pp. 2-3, the Taxpayers’ business activities involve disseminating
 information to the public by creating and issuing Valpaks. Thus, the Court
 of Appeals noted that engaging in the business of publishing
 “encompass[es] more than simply being the designated publisher.” 150
 Wn. App. at 24, *citing Ford Motor Co. v. City of Seattle*, 160 Wn.2d 32,
 156 P.3d 185 (2007) *cert. denied* 128 S.Ct. 1224 (2008) (holding that
 “engaging in the business of making sales” encompasses all business
 activities “related to” selling, including *inter alia*, “advertising, sending
 representatives to meet with [customers], imparting information about new
 products, discussing problems and customer satisfaction concerns, and
 marketing.”).

Thus, the Taxpayers’ business activities – by which they (among
 other things) develop the content of their publications, determine the

⁵ Both websites were visited on August 17, 2007, and again on March 3,
 2008.

layout of their publications, establish the publication schedule for their publications, and determine who will receive their publications constitute “engaging in the business of publishing” within the ordinary meaning of the undefined statutory language.⁶

In contrast, the activities performed by VPDMS – printing, collating, stuffing, and addressing Valpaks in accordance with orders placed by Taxpayers would be taxed as “mailing bureau services,” 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.”).⁷

The Court should ignore the Department’s unsupported contention (Resp. Br. at 18-19) that Taxpayers are not engaged in the business of publishing because VPDMS and the advertisers are the owners of copyrights and trademarks on materials appearing in the Valpaks that Taxpayers create and issue. *Grant County v. Bohne*, 89 Wn.2d 953, 958, 577 P.2d 138 (1978) (declining to consider unsupported contention

⁶ These publishing activities performed by Taxpayers were expressly confirmed by VPDMS. CP531-533.

⁷ Because Washington’s B&O tax is only imposed on business activities conducted “within this State” (RCW 82.04.200) and VPDMS performs its mailing bureau services in Florida, the B&O tax classification of VPDMS’s activities is not at issue in this case. Nevertheless it is worth emphasizing that the Taxpayers are properly taxable under the publishing periodicals B&O tax classification regardless of which classification VPDMS would be taxable under if it were engaged in business in Washington.

because “where no authorities are cited, the court may assume that counsel, after diligent search, has found none.”). In any event the Department’s unsupported contention – that only “publishers” own copyrights – is patently false. Ownership of a copyright “vests initially in the author.” 17 U.S.C. § 201. Thus the inside cover of a book frequently identifies the author as the owner of the copyright, not the publisher.

The Court should also ignore unsupported contention that an “indicator of a publisher is editorial control.” Resp. Br. at 19. Even if one were to assume *arguendo* that (1) the statute should be re-written to change the incident of the tax from “engaging in the business of ...publishing” to the status of “being a publisher” as the plain language of the statute provides and (2) editorial control is an “indicator” of “being a publisher” it is undisputed that the Taxpayers have editorial control over their publications. 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). Moreover, it is a right that the Taxpayers regularly exercise. CP 587-88.

Finally, 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). RCW 82.04.280(1) provides a specific tax classification

(engaging in the business of publishing periodicals) while the classification urged by the Department is a general, catchall classification reserved only for activities “other than” those “enumerated in ... RCW 82.04.280” and the nearly 40 other specific B&O tax classifications in RCW Chapter 82.04. RCW 82.04.290(2).

C. Even if the statute were ambiguous (which it is not) it would have to be construed in favor of the Taxpayers.

As the Court of Appeals acknowledged “ambiguities in taxing statutes are construed ‘most strongly against the government and in favor of the taxpayer.’” 150 Wn. App at 21, *quoting Qwest Corp v. City of Bellevue*, 161 Wn.2d 353, 364, 166 P3d 155 (2006) (*quoting Estate of Hemphill v. Dep’t of Revenue*, 153 Wn.2d 544, 552, 105 P.3d 391 (2005)). Thus even if any the Department’s proposed “on the publication” requirement, Division II’s *sua sponte* creation of an “intended audience requirement, or the Department’s efforts to change the incident of the tax from the activities of “engaging in the business of publishing” to the status of being a “publisher” were reasonable constructions of the statute (which they are not), the resulting ambiguity would need to be resolved in favor of Taxpayers, thereby confirming the Department’s original construction in its letter ruling that Taxpayers are engaged in the business of publishing periodicals and therefore properly taxable under RCW 82.04.280.

CONCLUSION

For the reasons discussed above, and in Taxpayer's Appellate Brief, Reply Brief and Petition for Revue, Valpaks are periodicals under the plain language of the statutory definition in RCW 82.04.280. By creating and issuing Valpaks, 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 to order the entry of summary judgment in favor of Taxpayers.

DATED: January 27, 2010

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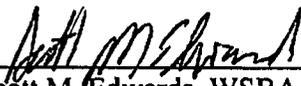
CERTIFICATE OF SERVICE

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