

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Correction of)	<u>D E T E R M I N A T I O N</u>
Assessment of)	
)	No. 98-193
)	
...)	Registration No. ...
)	FY. . . /Audit No. ...
)	
)	

- [1] MISCELLANEOUS: RETROACTIVE EFFECT OF STATUTES. When a statute is curative or clarifying, it will be given retroactive effect upon finding that the statute being clarified was ambiguous, the new statute was intended as a clarification of that ambiguity, and the clarification does not conflict with published case law.
- [2] RCW 82.04.297: INTERNET PROVIDERS, SELECTED BUSINESS SERVICES. When all three criteria to treat RCW 82.04.297 as a clarification exist, it will be given retroactive effect. Therefore, internet services were subject to the B&O tax under the selected business services classification during the period July 1, 1993 through June 30, 1998 and under the services and other activities classification thereafter.

Headnotes are provided as a convenience for the reader and are not in any way a part of the decision or in any way to be used in construing or interpreting this Determination.

NATURE OF ACTION:

An internet provider protests the assessment of selected business services business and occupation (B&O) tax on its receipts from customers for access to the internet.¹

FACTS:

Coffman, A.L.J. -- The taxpayer is an internet provider. It provides its customers access to the Internet through telephone connections to its servers. The Audit Division of the Department of

¹ Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410.

Revenue (Department) reviewed the taxpayer's books and records for the period November 9, 1994 through June 30, 1997. The taxpayer had reported its gross receipts from providing internet access under the services and other activities B&O tax classification. The Audit Division believing that the proper B&O tax classification was selected business services², assessed taxes under that classification and gave the taxpayer a credit for B&O taxes paid under the services and other activities classification. The B&O tax rate for selected business services was higher than the services and other activities rate.

The taxpayer argues the 1997 Senate Bill 5763 (Laws of 1997, chapter 304) applies prospectively only. This act defined internet services and amended RCW 82.04.055(1)(d) as follows:

(1) "Selected business services" means:

(d) Information services, including but not limited to electronic data retrieval or research that entails furnishing financial or legal information, data or research, internet service as defined in RCW 82.04.297, general or specialized news, or current information unless such news or current information is furnished to a newspaper publisher or to a radio or television station licensed by the federal communications commission.

(Added language is underlined.) The taxpayer agrees that it provides internet services as defined in RCW 82.04.297.³ RCW 82.04.297 (1) states:

The provision of internet services is a selected business service activity and subject to tax under RCW 82.04.290(1), but if RCW 82.04.055 is repealed then the provision of internet services is taxable under the general service business and occupation tax classification of RCW 82.04.290.

Further, the taxpayer agrees that subsequent to the effective date of RCW 82.04.297, it was subject to tax at the rate for selected business services. The taxpayer claims Senate Bill 5763, changed the B&O tax classification and therefore applies prospectively only. The Audit Division states Senate Bill 5763 was a clarification of RCW 82.04.055 and thus applies retroactively.

ISSUE:

Is the 1997 legislative enactment, Senate Bill 5763, a clarifying act requiring retroactive application; or, is it an amendment to the selected business services B&O tax classification requiring prospective application?

² The selected business services B&O tax classification existed during the period July 1, 1993 through June 30, 1998. Effective July 1, 1998, activities previously classified as selected business services are subject to the B&O tax under the services and other activities classification.

³ RCW 82.04.297 was enacted as section 4 of Senate Bill 5763.

DISCUSSION:

[1] The taxpayer agrees with the above statement of the issue in this appeal. Generally, amendatory acts apply prospectively only. *In re F.D. Processing, Inc.*, 119 Wn. 2d 452, 460, 832 P.2d 1303 (1992). However, “[c]urative statutes, i.e., statutes which clarify ambiguities in older legislation without changing prior case law, presumably act retroactively.” *Washington Waste Systems, Inc. Clark Cty.*, 115 Wa.2d 74, 78, 794 P.2d 508 (1990). By prior case law the court is referring to decisions of the highest court. *See State of Washington v. Crediford*, 130 Wn.2d 747, 760, 927 P.2d 1129 (1996) (“once a statute has been construed by the highest court of the state, that construction operates as if it were originally written into it,” quoting *Johnson v. Morris*, 87 Wn.2d 922, 927, 557 P.2d 1299 (1976)).

Under Washington law, a new legislative enactment is presumed to be an amendment rather than a clarification of existing law. This presumption may be rebutted, however, if circumstances indicated that the Legislature intended to clarify an existing statute. One well recognized indication of legislative intent to either clarify or amend is the existence or nonexistence of ambiguities in the original act. In general, legislative enactments change *unambiguous* statutes and legislative clarifications interpret *ambiguous* statutes.

Marine Power and Equip. Co. v. The Human Rts. Comm., 39 Wa.App. 609, 615, 694 P.2d 697 (1985). (Emphasis in original, citations omitted.)

To sustain the assessment, we must find that:

1. RCW 82.04.055(1)(d) was ambiguous as applied to internet services;
2. Senate Bill 5763 was intended as a clarification of that ambiguity; and
3. The clarification does not conflict with published case law;

1. Ambiguity.

Section 1 of Senate Bill 5763 states the legislature’s findings including: “*The legislature* further finds that there is no clear statutory guidance as to how internet services should be classified for tax purposes. . . .” The emphasized language clearly states that the legislature believed an ambiguity existed in the statute (RCW 82.04.055(1)(d)).

Senate Bill 5763 was entitled: “AN ACT Relating to *prohibiting the taxation of internet service providers as network telephone services providers*; amending RCW 82.04.055 and 82.04.065; adding a new section to chapter 35.21 RCW; and declaring an emergency.” This bill was introduced in response to the City of . . .’s attempt to subject internet services to retail sales tax

as a network telephone service”.⁴ Thus, there is further support for the finding that there was an ambiguity in RCW 82.04.055(1)(d).

Finally, the taxpayer provides its customers access to internet sites. From these sites, the customers are able to retrieve data, conduct research, obtain general or specialized news, and current information. The taxpayer does not personally maintain this data. It is maintained by the persons who maintain the various sites on the internet. The taxpayer provides access to the data. This distinction may be seen as an ambiguity.

We find that RCW 82.04.055(1)(d) was ambiguous.

2. Clarification.

Legislative intent is determined not only from the language of the statute, but may be deciphered by the reasons for the act. As discussed above, the intent was not to change the B&O tax classification of internet services, but to prevent the imposition of retail sales tax on these services. This purpose supports finding Senate Bill 5673 to be a clarification.

Further, Section 1 of Senate Bill 5763 states, in part: “The legislature finds . . . *intends to ratify the state's current treatment of such services.*” (Emphasis added.) This language clearly demonstrates that the legislature believed that the Department was properly interpreting the statute by treating internet service providers taxable under the selected business services B&O tax classification.

We find that Senate Bill 5763 was intended as a clarification.

3. Prior case law.

There are no published cases interpreting RCW 82.04.055(1)(d).

[2] We find all three criteria to treat Senate Bill 5763 as a clarification exist. Therefore, internet services were subject to the B&O tax under the selected business services classification during the period July 1, 1993 through June 30, 1998 and under the services and other activities classification thereafter.

DECISION AND DISPOSITION:

Taxpayer's petition is denied.

Dated this 10th day of November 1998.

⁴ The taxpayer concurs that this was the event leading to Senate Bill 5763.