

BEFORE THE BOARD OF TAX APPEALS
STATE OF WASHINGTON

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| SIRIUS XM RADIO, INC., |) | |
| |) | Docket No. 22-013 |
| Appellant, |) | |
| |) | RE: Excise Tax Appeal |
| v. |) | |
| |) | FINAL ORDER GRANTING |
| STATE OF WASHINGTON |) | SIRIUS XM’S MOTION FOR |
| DEPARTMENT OF REVENUE, |) | SUMMARY JUDGMENT AND |
| |) | DENYING DEPARTMENT’S |
| Respondent. |) | CROSS-MOTION |
| |) | |
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This matter came before the Board of Tax Appeals (Board) on January 30, 2024, Vice Chair Rosann Fitzpatrick presiding, with Board Chair Claire Hesselholt and Board Member Mathew Randazzo participating on the panel. The Appellant, Sirius XM Radio, Inc., (Sirius XM) was represented by Jeffrey A. Freidman and Daniel H. Schlueter, of Eversheds Sutherland, LLP. The Respondent, State of Washington, Department of Revenue (Department), was represented by Assistant Attorneys General Jessica Fogel and Nam Nguyen. Jeremy Gove and Jaime Lane, of Eversheds Sutherland, LLP, and Scott Edwards, of Lane Powell, PC, were present as observers.

Pursuant to WAC 456-09-545 and the Board’s pre-hearing order, dated October 9, 2023, the parties filed cross-motions for summary judgment. The Board heard the oral arguments of counsel and considered the written materials filed in this matter, including the following:

- Sirius XM’s Notice of Appeal;
- Sirius XM’s Motion for Summary Judgment;
- Declaration of George White in Support of Sirius XM’s MSJ, with Exhibits A1 to A10;
- Declaration of Daniel Schlueter in Support of Sirius XM’s MSJ, with Exhibits A12 to A16;
- Declaration of Shari Levinson in Support of Sirius XM’s MSJ;
- Department of Revenue’s Motion for Summary Judgment;
- Declaration of Lizeth Mogollan in Support of Department’s MSJ, with Exhibits R1 to R8;
- Declaration of Jessica Fogel in Support of Department’s MSJ, with Exhibits R9 to R14;

Sirius XM's Response to Department's Motion for Summary Judgment;
Department's Response to Sirius XM's Motion for Summary Judgment.

Based on the parties' written submissions and oral arguments, the Board concludes that "there is no genuine issue as to any material fact and that a party is entitled to judgment as a matter of law."¹ The Board denies the Department's motion for summary judgment and grants summary judgment to Sirius XM.

NATURE OF THE APPEAL

Sirius XM challenges the Department's determination that the retail sales tax applies to its subscription internet radio service. Sirius contends the service qualifies as the exempt sale of "audio or video programming by a radio or television broadcaster" under RCW 82.08.0208(5)(a). It is undisputed that Sirius XM is a radio broadcaster and that the exemption applies to programming accessible via internet as well as by satellite. The parties dispute whether the "Sirius XM On Demand" feature embedded in Sirius XM's internet streaming service takes it outside the broadcaster exemption under RCW 82.08.0208(5)(b). That provision disallows the exemption for "programming that is sold on a pay-per-view basis or that allows the buyer to access a library of programs at any time for a specific charge for that service."

The issue in this case is whether Sirius XM's subscription internet radio service is disqualified from the sales tax exemption for sales of audio programming by a radio broadcaster under RCW 82.08.0208(5) and WAC 458-20-15503(509) because the internet service gave the buyer access to on-demand programming in addition to live-streamed programming.

Based on the undisputed facts, the Board finds that, during the 2014 through 2017 tax years, Sirius XM's internet radio service was a "regular" programming service that provided subscribers limited access to some on-demand content at no additional charge. The Board concludes that Sirius XM's subscription internet streaming service was exempt from retail sales tax because the amount Sirius XM charged its internet radio subscribers was not a "specific charge" for providing access to "a library of programs at any time" within the meaning of RCW 82.08.0208(5)(b) and WAC 458-20-15503(509).

¹ WAC 456-09-545.

STATEMENT OF UNDISPUTED FACTS AND PROCEDURE

1. During the 2014 through 2017 tax period, Sirius XM provided subscription radio broadcast services to subscribers throughout the United States, including in Washington.²

2. Sirius XM has been the sole provider of satellite radio service in the United States since 2008.³ Sirius XM owns and operates a fleet of satellites in orbit around the earth, which it uses to transmit its service on a continuous basis.⁴

3. Sirius XM provides “linear programming services.”⁵ As with ordinary radio programming, Sirius XM’s programming consists of a continuous broadcast of audio programming, the contents of which are selected and determined by the provider (here, Sirius XM) rather than individual listeners.⁶

4. Sirius XM’s programming originates from its studios in New York and Washington D.C., and, to a lesser extent, from smaller studios in other venues across the country.⁷

5. Sirius XM’s music channels are produced, programmed, hosted, and operated as individual radio stations, each with a distinct format and branding.⁸

6. Sirius XM’s sports channels offer live play-by-play sports programming from major leagues and colleges.⁹

7. Sirius XM also offers a variety of talk and entertainment, comedy, and news channels.¹⁰

² Declaration of George White (White Decl.) at ¶ 6.

³ *Id.* at ¶¶ 2-3.

⁴ *Id.* at ¶ 16.

⁵ *Id.* at ¶ 4.

⁶ *Id.*

⁷ A7-5.

⁸ A2-4; White Decl., at ¶ 9.

⁹ A7-3; White Decl., at ¶ 3.

¹⁰ White Decl., at ¶ 13.

8. Most of Sirius XM's channels are transmitted 24 hours per day, seven days a week, and 365 days a year. Some channels transmit live play-by-play sports programming only while games are played.¹¹

9. Sirius XM's services are sold on a subscription basis, typically monthly or annually.¹² Sirius offers different "packages," which vary based on the channel line-up and broadcast platform.¹³

10. Sirius XM's subscription satellite radio service broadcasts more than 150 channels of audio programming through two proprietary satellite radio systems.

11. In 2006, Sirius XM introduced a subscription internet radio service.¹⁴

12. When it debuted, Sirius XM's internet radio service was limited to simulcasting the same audio programming Sirius XM transmitted via satellite.¹⁵

13. Sirius XM's internet radio service has evolved over time, with the addition of internet-only channels and features not available on its satellite service.¹⁶

14. In 2012, Sirius XM added an "on demand" feature to its internet radio service.¹⁷

15. The on-demand feature allowed subscribers to listen to previously broadcast programs "on demand" for a limited amount of time.¹⁸

16. In the annual report it filed with the SEC for 2012, Sirius XM informed investors:

In 2012, we launched SiriusXM On Demand. SiriusXM On Demand offers our Internet subscribers listening on our online media player and on smartphones the ability to choose their favorite episodes from a catalog of more than 300 shows and over 3,000 hours of content to listen to whenever they want. SiriusXM On Demand is offered to our Internet subscribers at no extra charge and offers selections from recent shows; selections from our vault of programming; updated content on a daily basis; regularly updated feature content; and easy navigation through the content.¹⁹

¹¹ *Id.* at ¶ 5.

¹² *Id.* at ¶ 13.

¹³ *Id.* at ¶ 15.

¹⁴ *Id.* at ¶ 17, 18.

¹⁵ *Id.* at ¶18; R9-3.

¹⁶ Ex. A2-4 (Sirius XM 10-K for 2012, at 2); R10-4.

¹⁷ *Id.* at 21; White Decl., at ¶ 21.

¹⁸ R10-4; R12-1; R9-3.

¹⁹ White Decl., at ¶ 21; Ex. A2-5.

17. Sirius XM’s competitors included providers of cable, satellite, and internet television services that offer music channels as part of subscription internet television packages.²⁰

18. During the 2014 through 2017 tax period, Sirius XM expanded the catalog of on-demand programming and personalization features available through its subscription internet radio service as it faced increased competition from other providers of radio and other audio services.²¹

19. In its annual report for 2014, Sirius XM informed its investors:

We offer two innovative Internet-based products, Sirius XM On Demand and MySXM. Sirius XM On Demand offers our Internet radio subscribers listening on our online media player and on smartphones the ability to choose their favorite episodes from a catalog of content to listen to whenever they want. My SXM permits subscribers listening on our Internet radio service to personalize our existing commercial-free music and comedy channels to create a more tailored listening experience. Channel-specific sliders allow users to create over 100 variations of each of more than 50 channels by adjusting characteristics like library depth, familiarity, music style, tempo, region, and multiple other channel-specific attributes. Sirius XM On Demand and MySXM are offered to our Internet radio subscribers at no extra charge.

We are re-engineering and redesigning our Internet radio streaming platform. The new Sirius XM Internet Radio will offer listeners enhanced programming discovery and the ability to connect with content currently playing across our commercial-free music, sports, comedy, news, talk and entertainment channels or available through Sirius XM On Demand. The new platform is expected to be progressively rolled out starting in the first quarter of 2015.²²

20. Sirius XM marketed its internet streaming service as a “Listening Outside the Car” feature that “Includes 5,000+ hours of On Demand shows, performances and interviews.”²³

21. Sirius XM informed customers they could “Choose your favorite episodes from our catalog and listen whenever you want on your computer, iPhone, iPad, iPod touch, or

²⁰ A2-9.

²¹ A2-12, 14, 28; A5-7.

²² A5-4.

²³ R12-3.

compatible Android device. . . . You can also store episodes for a limited time to compatible smartphones and tablets and listen offline. Plus you can go back in time up to 5 hours with Start Now and listen to previously broadcast programming.”²⁴

22. During the 2014 through 2017 tax years, subscribers could obtain access to Sirius XM’s internet radio service in one of three ways:

- (1) as part of its “all access” package for one nonitemized price,
- (2) as an optional add-on to a lower-tier package for an additional charge, or
- (3) on a stand-alone basis, i.e., without satellite radio access.²⁵

23. In 2014, for example, the “all access package” provided access to more than 150 channels, transmitted via satellite radio and internet streaming, including access to Sirius XM On Demand, for \$19.99 per month. The “mostly music package” provided access to 80 music channels transmitted via satellite radio for \$10.99 per month. A subscriber could add the internet streaming service for an additional \$5 per month.²⁶ The internet radio service was available as a stand-alone product for \$14.99 per month.²⁷

24. During the 2014 through 2017 tax years, approximately 90 percent of Sirius XM’s Washington internet radio subscribers received the service as part of a bundled offering with satellite radio service for one non-itemized price.²⁸ About 8 percent of Sirius XM’s subscribers purchased the internet radio service as an optional add-on service. Only 2 percent purchased the internet radio service as a stand-alone service.

25. Sirius XM charged its subscribers a fee for its internet radio service, but it made no separate charge for the on-demand feature.²⁹

26. The Sirius XM on-demand feature was an integral component of the Sirius XM internet radio service.

27. The Sirius XM on-demand feature was not available as a separate add-on or a la carte feature.³⁰

²⁴ R12-1.

²⁵ *Id.* at ¶19; R9-3.

²⁶ R6-1.

²⁷ R2-6.

²⁸ White Decl., at ¶ 20.

²⁹ *Id.* at ¶21.

³⁰ R9-6.

28. Sirius XM did not increase the price of the packages that included internet radio service when it added on-demand functionality in 2012.³¹

29. Sirius XM continued to provide the on-demand service to internet radio subscribers at no extra charge throughout the 2014 through 2017 tax years.³²

30. Sirius XM's on demand feature carried several restrictions because of the royalty structure under which Sirius XM operates for its music services.³³

31. Sirius XM and other providers of music services must pay royalties to copyright holders for the use of copyrighted music works and sound recordings.³⁴ The royalty amount varies depending on the type of use and the specific rights defined under copyright law.³⁵

32. The highest royalties are paid for full "reproductions" of copyrighted sound recordings.³⁶ This applies to music services that allow customers full interactive functionality—the ability to pick and choose any song by name, rewind and fast forward, and replay the song at any time. Providers of on-demand access to specific tracks or artists must obtain a direct license from the copyright holder.

33. The lowest royalties are paid for "performances" and "ephemeral copies" (i.e., temporary server copies) of copyrighted materials. This applies to "non-interactive Internet services" that mainly provide linear radio-like programming with only limited programming available on an archived or time-shifted basis.³⁷

34. Sirius XM's internet streaming service is a "non-interactive" digital music service for purposes of federal copyright law.³⁸ This means that the service does not enable a member of the public to select a particular sound recording or receive a program specially created for the recipient.³⁹ Instead, the service provides a pre-programmed or semi-random combination of tracks. Providers of non-interactive digital music services are considered similar to providers of

³¹ White Decl., at ¶¶ 23, 24. A3-1 (price of packages before on-demand), A4-1 (price of packages after on-demand).

³² White Decl., at ¶ 26.

³³ *Id.* at ¶ 27.

³⁴ A6-8; *See* 17 U.S.C. § 114(d) (2006).

³⁵ A5-8.

³⁶ White Decl., at ¶ 29.

³⁷ *Id.* at ¶¶ 29-30; 17 U.S.C. § 114(d)(2).

³⁸ A6-9.

³⁹ *See Arista Records, LLC v. Launch Media, Inc.*, 578 F.3d 148 (2d Cir. 2009) (finding that an internet radio streaming service's personalization features that adapted to user preferences did not make the service interactive because the user could not select specific songs or predict what would be played).

a traditional radio service for copyright purposes and may operate under a statutory license for “public performances” issued by the Copyright Royalty Board.

35. Under its statutory license, Sirius XM was not authorized to give its customers full interactive functionality—the ability to pick and choose songs by name and title, the ability to rewind and fast-forward, and the ability to play a song as many times as the customer would like, which would require a license for reproduction of sound recordings and musical works. Instead, Sirius XM’s on demand music content was limited to archived programming previously broadcast on a linear basis—typically in five-hour blocks (so that individual titles are not searchable) made available to subscribers for a limited period of time (typically two weeks).⁴⁰

36. During the tax period at issue, approximately 80 percent of the channels available through Sirius XM’s internet streaming service were the same as those transmitted via satellite; the rest were internet-only channels. The internet-only channels, like the satellite radio channels, featured live, linear programming.

37. For royalty and business purposes, Sirius XM tracked the amount of time customers spent listening to internet radio. The listenership data distinguished time spent listening to linear programming (live channels) and archived programming (on demand). During the 2014 through 2017 tax years, between 93 and 95 percent of internet radio listenership hours was for live linear programming, as opposed to on-demand programming.⁴¹

Audit and Administrative Review Hearing.

38. The Department audited Sirius XM for the period January 1, 2014, through December 31, 2017.

39. On its state excise tax returns, Sirius XM reported all its subscription revenues under the “service and other activities” B&O tax classification.

40. Sirius XM did not charge or collect retail sales tax on any of its subscription revenues from Washington subscribers.

⁴⁰ White Decl., at ¶ 32.

⁴¹ *Id.* at ¶ 33. Sirius XM also tracked the amount of royalties paid for programming carried on its live channels as opposed to on-demand programming. Less than one percent of the total royalties Sirius XM paid during the 2014 through 2017 period was for on-demand programming. But there is no evidence of the proportion of on-demand content subject to royalties. Many of the internet-only channels featured talk radio, sports, news, or entertainment. Thus, the amount of music royalties Sirius XM paid for the on-demand programming is not necessarily probative of the importance of the on-demand programming relative to the regular, scheduled programming.

41. The auditor determined that Sirius XM’s subscription satellite radio service is exempt from retail sales tax under RCW 82.08.0208(5)(a) (“sales of audio or video programming by a radio or television broadcaster”). But the auditor determined that the on-demand component takes its internet radio streaming service outside the exemption under RCW 82.08.0208(5)(b) (“programming... that allows the buyer to access a library of programs at any time for a specific charge for that service”).

42. Because Sirius XM sold some subscription packages that combined its satellite radio and internet radio services for one non-itemized price, the auditor categorized them as bundled transactions subject to retailing B&O and retail sales tax on the total charge. In the absence of accounting records categorizing income by package and state, the auditor also assessed taxes on an estimated amount of unreported retailing revenues.⁴² At the conclusion of the audit, the Department issued an assessment totaling \$14,853,807, comprised mainly of retail sales tax.⁴³

43. Sirius XM filed a petition for administrative review with the Department’s Administrative Review and Hearings Division. Sirius XM provided detailed accounting records for the individual components of its income.⁴⁴

44. The books and records Sirius XM kept in the regular course of business allocated the bundled all-access purchase price among the packages’ three components—“select,” “premier,” and “internet.” The revenue allocation was based on the relative value of the three components and their stand-alone pricing. During the tax years at issue, Sirius XM allocated between \$2 to \$2.50 of the total all-access package cost to “internet.”⁴⁵

45. Based on the records provided, the auditor revised the assessment, assessing retail sales tax only on Sirius XM’s revenues from internet streaming services provided in packages or as stand-alone items.

46. The Department issued a revised assessment in the amount of \$770,205, comprised of \$668,228 in tax, \$77,547 in interest, and \$24,429 in penalties.

⁴² R3-2.

⁴³ R2-15.

⁴⁴ R4-7.

⁴⁵ R2-10, 27.

47. In Determination No. 21-1085, the Department determined that Sirius XM’s subscription internet radio services are not exempt under RCW 82.08.0208.

48. Sirius XM filed a timely appeal to the Board, electing an informal appeal.⁴⁶

49. The Department converted the appeal to a formal appeal.

APPLICABLE LAW AND ANALYSIS

Summary Judgment Standard. Summary judgment is appropriate where “the written record shows that, viewing the evidence in a light most favorable to the nonmoving party, [1] there is no genuine issue as to any material fact and that [2] a party is entitled to judgment as a matter of law”⁴⁷ A tax assessment issued by the Department is presumed correct and the person challenging the assessment has the burden of proving that it is incorrect.⁴⁸ Both parties have moved for summary judgment, and the Board agrees that this appeal is properly resolved as a matter of law based on the undisputed facts.

B&O and Retail Sales Taxes. Washington imposes the B&O tax on every person engaging in the business activities in the state. RCW 82.04.220(1). The tax applies at different rates based on the type of business activity. Persons engaging in “service and other” activities must pay B&O tax at the rate of 1.5 percent of their gross income. RCW 82.04.290(2). Persons engaged in the business of making retail sales, as that term is defined in RCW 82.04.050, must pay retailing B&O tax at the rate of 0.471 percent of their retailing receipts. RCW 82.04.250(1). Retail sellers must also charge and collect retail sales tax from the buyer and remit the tax to the Department. A seller is personally liable to the state for the retail sales tax owed by the buyer. RCW 82.08.050(3).

The statutory definition of “retail sale” includes sales to consumers of “digital goods.” RCW 82.4.050(8)(a). *Digital goods* means “...sounds, images, data, facts, or information, or any combination thereof, transferred electronically, including but not limited to, specified digital products and other products transferred electronically not included within the definition of

⁴⁶ A24.

⁴⁷ WAC 456-09-545; *see also* CR 56(c).

⁴⁸ *Bothell-Everett P-12, Inc. v. Dep’t of Revenue*, BTA Docket No. 14-060 (2016), at 5.

specified digital products.” RCW 82.04.192(6)(a). Internet radio streaming services fall within the definition of “digital good” because they consist of sounds transferred electronically. Thus, unless an exemption applies, Sirius XM’s sales of subscription internet radio services are digital goods subject to retailing B&O tax and retail sale tax.

Bundled Transactions. A *bundled transaction* is a retail sale where two or more products that are “otherwise distinct and identifiable” are “sold for one nonitemized price.” RCW 82.08.190(1). But if the transaction includes a taxable service and a nontaxable service, the sale is not a bundled transaction if the taxable service is (a) essential to the use or receipt of, and provided exclusively in connection with, the nontaxable service, and (b) the nontaxable service is the “true object” of the transaction. RCW 82.08.190(4)(b). Alternatively, if the transaction includes taxable and nontaxable products and the purchase price or sale price of the taxable products is ten percent or less than that of the nontaxable product, the sale is not a bundled transaction. RCW 82.08.190(4)(c).

The bundled transaction statute specifically addresses transactions that include audio or video programming services:

(5) In the case of a bundled transaction that includes any of the following: Telecommunications service, ancillary service, internet access, or audio or video programming service:

(a) If the price is attributable to products that are taxable and products that are not taxable, the portion of the price attributable to the nontaxable products are subject to the tax imposed by RCW 82.08.020 unless the seller can identify by reasonable and verifiable standards the portion from its books and records that are kept in the regular course of business for other purposes including, but not limited to, nontax purposes[.]

Radio or Television Programming Services. RCW 82.08.0208(5)(a) provides a sales tax exemption for “sales of audio or television programming by a radio or television broadcaster.” For purposes of the exemption, “radio or television broadcaster” includes “satellite radio providers, satellite television providers, cable television providers, and providers of subscription internet television.” RCW 82.08.0208(5)(c). The exemption does not apply “in respect to programming that is sold on a pay-per-program basis or that allows the buyer to access a library of programs at any time for a specific charge for that service.” RCW 82.08.0208(5)(b)(i). Sales

of “subscription radio services” by a radio broadcaster are subject to service and other activities B&O tax, but not retail sales tax.⁴⁹

The Department adopted an administrative rule to implement the broadcaster exemption. WAC 458-20-15503(509) explains:

Audio or video programming. Income received from the sale of regular audio or video programming by a radio or television broadcaster is generally subject to service and other B&O tax and therefore not subject to retail sales tax. However, the sale of audio or video programming sold on a pay per program or subscription on-demand basis is generally subject to retail sales and use tax[.]

The Department’s rule distinguishes “regular” programming from “pay per program or subscription on-demand” programming as follows:

(b) **"Pay per program or subscription on-demand basis"** means programming that the buyer pays for on a per program basis or a service that allows the buyer to access a library of programs at any time for a specific charge.

(c) **"Regular programming"** is scheduled programming. The person watching cannot stop, pause, rewind, or otherwise control the broadcast of the scheduled programming, including the time that the scheduled program is broadcast.⁵⁰

The rule provides the following example of exempt and taxable programming services sold by a television broadcaster:

Example 31. XYZ sells video programming to customers using cable technology. XYZ does not pay a franchise fee.⁵¹ Customers of XYZ are charged a monthly subscription fee to receive video programming. Customers are charged additional fees to view selected movies. XYZ must charge and collect retail sales tax on the additional fees charged to view the selected movies, but not on the monthly subscription fee which would generally be subject to service and other activities B&O tax.⁵²

⁴⁹ RCW 82.04.257(2).

⁵⁰ WAC 458-20-15503(509).

⁵¹ Sales of audio or video programming on a pay-per-view or subscription on-demand basis are exempt from retail sales tax if the broadcaster pays franchise fees on its gross revenues under Title 47 U.S.C. § 542(a). RCW 82.02.0208. This applies only to television broadcasters, as radio broadcasters do not pay franchise fees under the federal statute.

⁵² WAC 458-20-15503(509).

There is no dispute that Sirius XM is a satellite radio provider or that its subscription satellite radio service qualifies as the exempt sale of regular programming. The Department also agrees that Sirius XM's internet radio service was exempt when it was limited to simulcasting the programming available via satellite radio. The parties dispute whether the on-demand feature converted Sirius XM's subscription internet radio service from the exempt sale of "regular" programming to the taxable sale of "on-demand" programming.

The resolution of this dispute turns on what the legislature intended when it used the phrase "for a specific charge for that service" in RCW 82.08.0208(5)(b). Is "that service" specific to the on-demand library, or does it mean a service that provides access to both on-demand programming and regular, scheduled programming?

The Department argues that "specific charge" refers to the service of providing access to both on-demand and regular programming and charging more for that service than for regular programming alone. The Department asserts that it is entitled to summary judgment because the undisputed evidence shows that Sirius XM charged more for the packages that included access to on-demand content than for those that only allowed access to regular programming.

Sirius XM argues that "a specific charge for that service" means a charge for receiving access to an on-demand library as a separate or premium service, as in Example 31 of the Department's rule. Sirius XM contends that it was not required to charge and collect retail sales tax from its internet subscribers because, unlike in the example, Sirius XM did not charge its customers any additional fees to access on-demand programming. Rather, the on-demand functionality was "thrown in" for free at no additional charge.

Sirius XM persuasively argues that the Department's interpretation of the "specific charge" requirement makes it superfluous. If the phrase "for a specific charge for that service" were deleted, the exclusion would apply to "programming that is sold on a pay per program basis or that allows the buyer to access a library of programs at any time." In other words, it would plainly mean what the Department argues it means. Adding the phrase, "for a specific charge for that service" would only create ambiguity where none existed. It is not reasonable to infer that the legislature added words that give no independent meaning and only create ambiguity.

Reading "a specific charge for that service" as applying to the service of providing access to a library of programs at any time gives independent meaning and purpose to all the words in the statute. The specific charge requirement distinguishes services where an on-demand feature

is offered at no additional charge from services where access to on-demand programming is sold as a separate or premium feature to subscribers of regular audio or video programming services.

Sirius XM points out that, in 2009, when the legislature enacted the broadcaster exemption, on-demand functionality was commonplace in the video broadcasting industry. Providers of subscription internet television provided access to on-demand video content at no extra charge so subscribers could view the same broadcast content at different times of day.⁵³ Sirius XM asserts that the statutory exclusion was designed to distinguish programming services that provided on-demand content to subscribers at no additional charge from those sold as a separate or premium service. Sirius XM argues that, because there is no “specific charge” for the on-demand component of its internet streaming service, the exclusion does not apply.

The Department argues that Example 31 should be strictly construed to avoid extending the broadcaster exemption beyond its clear scope. The Department tries to distinguish Example 31 on the grounds that it addresses (a) pay-per-program sales, not access to a library of programs, and (b) a television broadcaster, not a radio broadcaster. The Department points out that the statutory definition of “radio or television broadcaster” specifically includes “providers of subscription internet television,” but not subscription internet radio, and suggests the omission shows legislative intent to strictly limit the exemption to audio programming that is live-streamed, like traditional radio service.

The Department’s effort to distinguish Example 31 is not persuasive. It is true that the example does not address the meaning of “access to a library of programs” or what that service entails. But both the “pay per program” and “subscription on-demand” exclusions involve programming sold separately from regular programming, where the buyer can pick and choose specific programs for an additional fee. Sirius XM continued providing regular audio programming to its internet radio subscribers after adding the on-demand component at no additional charge. As in Example 31, the monthly subscription fee is subject to service B&O tax, not retail sales tax.

Although the definition of “radio or television broadcaster” does not specifically include providers of subscription internet radio, the Department recognizes that the exemption applies to Sirius XM’s online streaming of regular programming. The Department provides no rationale

⁵³ Exs. A14-10 (Verizon 2007 Form 10-K); A15-5 (Comcast 2008 Form 10-K, and A16-6 (DISH 2008 Form 10-K).

for applying the “subscription on demand” exclusion differently to internet audio programming sold by a radio broadcaster rather than a television broadcaster. Based on the undisputed evidence, the Board finds that the amount Sirius XM charged for internet radio service qualified as the exempt sale of regular programming, with incidental access to on demand programming.

Sirius XM’s internet streaming service allowed the buyer to access the same live, linear programming that was available via satellite, plus additional internet-only channels featuring live, linear programming, with only limited access to on-demand programming for no extra charge. Although Sirius XM promoted the on-demand feature as an important selling point in marketing its satellite radio and internet radio services, it is clear that the on-demand component was a limited and relatively insignificant part of Sirius XM’s programming services. During the tax period at issue, the overwhelming majority of the programming Sirius XM provided to its internet radio subscribers was regular programming. The on-demand component of its subscription internet radio service was strictly limited due to the constraints imposed by Sirius XM’s statutory license.

In view of the limited functionality, content, and usage of the on-demand feature, Sirius XM’s internet radio service could not fairly be characterized as a service that “allows the buyer to access a library of programs at any time for a specific charge.” The amount Sirius XM charged its internet radio subscribers was for access to regular programming, with limited access to some on-demand programming for no additional charge. Sirius XM’s internet radio service qualified as an exempt programming service under RCW 82.08.0208(5) during the 2014 through 2017 tax years.⁵⁴

⁵⁴ Sirius XM alternatively argues that, even if the amount charged for its internet radio service was “a specific charge” for purposes of RCW 82.08.0208(5)(b), the charges would be exempt under the bundled transaction statute because the value of the on-demand component was de minimis. Sirius XM contends that the Department erred by failing to analyze the internet radio service, itself, as a bundled transaction, with taxable and nontaxable components. Because the on-demand feature is an integral component of the internet streaming service, not a separate and distinct service, the bundled transaction statute does not apply. See RCW 82.08.190(1)(a)(i), (2)(b) (defining *bundled transaction* as the retail sale of two or more “otherwise distinct and identifiable” products, defined as excluding a product “provided free of charge with the required purchase of another product”).

CONCLUSIONS OF LAW

1. The Board has jurisdiction to hear and decide this appeal under RCW 82.03.130(1)(a).
2. The Board's hearing on this appeal is de novo.
3. Summary judgment is appropriate in this case because the material facts are undisputed. This appeal presents a dispute over the proper interpretation and application of the statutory tax exemption for audio or video programming sold by a radio or television broadcaster under RCW 82.08.0208 and WAC 458-20-15503(509).
4. Based on the undisputed facts, the Board finds that Sirius XM's internet radio service qualified as an exempt sale of audio programming during the tax period at issue.
5. The on-demand and personalization features of Sirius XM's subscription internet radio service were an integral part of the programming service, not "distinct and identifiable" products for purposes of the bundled transaction statute. RCW 82.08.190(1)(a)(i).
6. The amount Sirius XM charged its customers for its subscription internet radio service during the tax period at issue was for access to regular programming, with incidental access to a library of programs at no additional charge.
7. During the 2014 through 2017 tax years, the enhanced functionality and personalization features of Sirius XM's internet radio service did not take it outside the scope of the exemption for sales of audio programming by a radio broadcaster under RCW 82.08.0208(5)(a) and WAC 458-20-15503(509).
8. The Department misapplied RCW 82.08.0208(5) and WAC 458-20-15503(509) in concluding that Sirius XM's subscription internet radio service was subject to retailing B&O and retail sales taxes.

DECISION

The Department's Determination No. 21-0185 is reversed, and the Taxpayer's appeal is granted.

ISSUED January 3, 2025.

BOARD OF TAX APPEALS



CLAIRE HESSELHOLT, Chair



ROSANN FITZPATRICK, Vice Chair



MATTHEW RANDAZZO, Member

Right of Reconsideration of a Final Decision

You may file a petition for reconsideration of this Final Decision.⁵⁵ The petition must be filed within 14 days of the date the Final Decision is issued.⁵⁶ You also must serve a copy of your petition on all other parties.⁵⁷

The petition must clearly state the specific grounds for relief.⁵⁸ It may not exceed 3,000 words (approximately 6 pages) and must be typed and double-spaced.⁵⁹ No new evidence or arguments may be raised unless the written decision is based on a fact or facts that the parties did not already have an opportunity to address.

Any party may submit a response to the petition within 10 days of the petition being served.⁶⁰ The Board will either accept or deny the petition within 30 days.⁶¹

Note that when an appeal is made to superior court, the appealing party is responsible for ordering and paying for a transcript of the Board's hearing.⁶²

⁵⁵ WAC 456-09-955.

⁵⁶ WAC 456-09-955(2).

⁵⁷ WAC 456-09-345.

⁵⁸ WAC 456-09-955(2).

⁵⁹ WAC 456-09-557(1)(a-b) and (2)(d).

⁶⁰ WAC 456-09-955(3).

⁶¹ WAC 456-09-955(4).

⁶² WAC 456-09-960.