

Cite as Det. No. 01-047, 21 WTD 189 (2002)

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. 01-047
...)	
)	Registration No. . . .
)	FY. . . /Audit No. . . .
)	Docket No. . . .

RULE 172; RCW 82.04.050(2)(d): RETAIL SALES TAX; RETAILING B&O TAX – JANITORIAL SERVICES – CLEANING AWNINGS. “Janitorial services,” for purposes of Rule 172 and RCW 82.04.050(2)(d), are services regularly and normally performed by commercial janitor service businesses. For the most part, janitorial services are activities performed inside buildings. The cleaning of awnings is distinguishable from the activities of cleaning rugs, draperies, and upholstery in-place, which Rule 172 specifically lists as “janitorial services,” in that the latter are performed inside buildings, whereas awning cleaning is an activity performed on the exterior of buildings.

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:

Awning cleaner and repairer protests classification of awning cleaning portion of business as retailing activity, contending it constitutes janitorial service taxable as a service activity.¹

BACKGROUND FACTS AND APPEAL:

Prusia, A.L.J. -- The taxpayer, . . . , operated in Washington as a sole proprietorship He incorporated the business The business activities of both the sole proprietorship and the corporation have been cleaning, repairing, and resurfacing awnings attached to exterior walls of buildings.

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

The awnings the taxpayer cleans, repairs, and resurfaces are typically a vinyl or open-weave fabric attached to a metal frame that is bolted onto a building. The taxpayer performs all its awning services with the awnings in place, without removal from their frames. The taxpayer uses carpet cleaning equipment and other equipment to clean the awnings.

...

The Audit Division of the Department of Revenue (Department) reviewed the taxpayer's books and records for the period July 1, 1995 through June 30, 1999 ("audit period"). On August 2, 2000, the Audit Division issued the assessment referenced above. The assessment gave a credit of \$. . . for income reported under the service Business and Occupation (B&O) tax classification, on the basis the income should have been reported under the retailing B&O classification. It assessed retailing B&O tax of \$. . ., retail sales tax of \$. . ., plus interest of \$. . ., for a total of \$. . . The audit report accompanying the assessment explained that revenue from the taxpayer's awning cleaning and repairing activities were retail sales and subject to the retailing B&O tax and retail sales tax.

The taxpayer petitioned for correction of the assessment. The petition alleged the Audit Division erred in determining the taxpayer's cleaning activities constituted retail sales, and should instead have determined that the cleaning of awnings was a "janitorial service" subject to service and other activities B&O tax. The petition further contended that if the Department rules against the taxpayer on the issue of whether the cleaning of awnings is a "janitorial service," it should do so on a prospective basis only, for reasons set out below.

...

ISSUES:

1. Did the taxpayer's activity of washing awnings constitute a retail activity?
2. If the Audit Division's reclassification of the awning washing activity from service to retailing was correct, should the reclassification be on a prospective basis only?
3. ...

ADDITIONAL FACTS; DISCUSSION:

A. Classification of awning cleaning activity

1. Additional facts and contentions relating to classification of activities

The taxpayer specializes in awnings only. He is aware of only a few other companies in the . . . area that specialize in awning maintenance and repair. Most awning companies only make and install awnings. He believes a number of janitorial services in the area do awning cleaning. He

submitted a page from the 2000 U.S. West Dex Yellow Pages, showing listings under the heading “Janitor Service”; one ad lists “Awnings – Cleaning & Repair” in its list of services. Prior to hearing, the taxpayer phoned half a dozen companies that advertise under the Yellow Pages “Janitor Service” heading, asking if they washed awnings, and three responded they did. The taxpayer considers janitorial service companies his principal competitors.

The taxpayer argues RCW 82.04.050(2)(d) and WAC 458-20-172 (Rule 172) specifically exclude “janitorial services” from the definition of “sale at retail” or “retail sale,” and the taxpayer’s cleaning of awnings falls within the statute’s and rule’s definition of “janitorial services.” He amplifies this argument in considerable detail. We summarize his arguments as follows:

1. On page 7 of the Department’s June 2000 Tax Facts, in an article entitled “Retail Sale or Service Activity? Blind and Drapery Cleaning,” the Department states: “The in-place cleaning of blinds and draperies is considered a janitorial service.” The article goes on to state that a different tax treatment applies if the blinds are removed for cleaning. The taxpayer is unaware of any valid distinction between cleaning a blind and cleaning an awning.
2. The definition of “janitorial services” is not limited to the cleaning of interior surfaces, and does not exclude the cleaning of awnings. RCW 82.04.050(2)(d) specifically includes “wall and window washing” within the definition of janitorial services, without limitation as to whether they are interior or exterior walls and windows. Rule 172 specifically says that the term “janitorial services” includes “the washing of interior and exterior windows.” Rule 172 does say that the term “janitorial services” does not include the cleaning of exterior walls, but it does not say the term excludes the cleaning of awnings.
3. The statute and rule state the term “janitorial services” includes activities performed ordinarily, or regularly and normally, by commercial janitor service businesses. The Yellow Pages advertisements, and the taxpayer’s telephone survey, show commercial janitor service businesses regularly and normally clean awnings.
4. The Washington Supreme Court held in *Pringle v. Washington*, 77 Wn.2d 569, 464 P.2d 245 (1970), that in interpreting the definition of “janitorial services,” the Department may not amend or change the enactments of the legislature. Given the evidence the taxpayer has presented that the cleaning of awnings is regularly and normally performed by commercial janitor service businesses, the Department would be impermissibly amending the statute were it to rule that the taxpayer’s cleaning of awnings is not a “janitorial service.”
5. The statute and Rule 172 define “janitorial service” as including the cleaning in place of upholstery. “Upholstery” is a term that includes hangings and draperies. *Random House Dictionary of the English Language*, page 170. Arguably, an awning is a “hanging,” therefore is “upholstery,” and therefore is expressly included in Rule 172’s definition of

“janitorial services.” Even if it is not, the statute clearly provides that the definition of “janitorial services” includes but is not limited to the specified services.

We consulted the 1999 U S West Yellow Pages for . . . , and take administrative notice of the ads under “Janitor Services” and “Awnings and Canopies.” A number of companies have ads under “Janitor Services.” Only one lists the cleaning and repairing of awnings among its services. That company is listed as “. . .,” and gives an internet address beginning_ What appears to be the same company has an ad under the heading “Awnings & Canopies,” where its name is listed as “. . . .” Under the heading “Awnings & Canopies,” [several] companies (including the taxpayer) indicate they perform awning cleaning or maintenance. Only one, . . . , also has an ad under the “Janitor Services” heading, where it lists a number of services.

2. Relevant statutes, rules, and Department instructions

All retail sales in the state of Washington are subject to retail sales tax, unless there is a specific exemption. RCW 82.08.020 and 82.04.050. The term “sale at retail” or “retail sale” includes:

The sale of or charge made for labor and services rendered in respect to the cleaning, fumigating, razing or moving of existing buildings or structures, but shall not include the charge made for janitorial services; and for purposes of this section the term “janitorial services” shall mean those cleaning and caretaking services ordinarily performed by commercial janitor services businesses including, but not limited to, wall and window washing, floor cleaning and waxing, and the cleaning in place of rugs, drapes and upholstery. The term “janitorial services” does not include painting, papering, repairing, furnace or septic tank cleaning, snow removal or sandblasting.

RCW 82.04.050(2)(d).

WAC 458-20-172 (Rule 172) is the Department’s administrative rule addressing the taxation of janitorial services and other services described in RCW 82.04.050(2)(d). Rule 172 states that persons engaging in performing contracts for cleaning buildings or structures must collect the retail sales tax upon the full contract price, but the retail sales tax is not applicable to charges made for janitorial services. Rule 172 defines “janitorial services” as follows:

The term “janitorial services” includes activities performed regularly and normally by commercial janitor service businesses. Generally, these activities include the washing of interior and exterior window surfaces, floor cleaning and waxing, the cleaning of interior walls and woodwork, the cleaning in place of rugs, drapes and upholstery, dusting, disposal of trash, and cleaning and sanitizing bathroom fixtures. The term “janitorial services” does not include, among others, cleaning the exterior walls of buildings, the cleaning of septic tanks, special clean up jobs required by construction, fires, floods, etc., painting, papering, repairing, furnace or chimney cleaning, snow removal, sandblasting, or the cleaning of plant or industrial machinery or fixtures.

As the taxpayer points out, the Department's June 2000 Tax Facts publication contained an article on whether the in-place cleaning of blinds and draperies is a "janitorial service." That article stated, in part:

The in-place cleaning of blinds and draperies is considered a janitorial service. Janitorial services are specifically excluded from the definition of retail sale. Consequently, sales tax does not apply to charges for blind cleaning if the blinds are cleaned where they hang. Persons performing such janitorial services, however, owe B&O tax under the service and other activities classification.

A different tax treatment applies if the blinds are removed for cleaning.

3. Discussion – classification issue

The taxpayer argues that the Department treats analogous services as "janitorial services," and therefore must conclude that the cleaning of awnings is a "janitorial service." He argues the Department has acknowledged that the cleaning of blinds in-place is a "janitorial service," and that there is no valid distinction between cleaning a blind and cleaning an awning. He argues the cleaning of awnings cannot validly be distinguished from the cleaning of rugs, drapes, and upholstery in-place, which Rule 172 specifically lists as "janitorial services." He argues the fact that the awnings are on the outside of the building, whereas the analogous articles are on the inside, does not distinguish awnings from the other articles, because Rule 172 expressly recognizes that the cleaning of the exterior surfaces of windows is a "janitorial service." The taxpayer further argues that the evidence he has provided establishes that commercial janitor service businesses regularly and normally clean awnings.

The statute and rule are clear, and the line they draw is between cleaning and caretaking services ordinarily performed by commercial janitor services businesses (i.e., activities performed regularly and normally by commercial janitor service businesses), and other cleaning of buildings and structures.

What are regular and normal janitorial activities? *Webster's II New College Dictionary* 592 (1995), defines "janitor" as "[o]ne who attends to maintenance, cleaning, and repairs in a building." *Webster's Third New International Dictionary* 1209 (1993), defines "janitor" as "one that keeps the premises of an apartment, office, or other building clean and free of refuse, tends the heating system, and makes minor repairs." *VGM's Career Encyclopedia* 203 (Fourth Edition 1997), describes the job of a janitor as follows:

Janitors, or building custodians, clean and maintain many types of buildings, including offices, hotels, stores, homes, apartments, and hospitals.

Janitors have a variety of duties, depending on their employer and the extent of their responsibilities. Some janitors are responsible only for cleaning while others have maintenance responsibilities as well. Some typical janitorial duties include mopping floors, vacuuming carpets, emptying garbage cans, dusting, cleaning bathrooms, making

beds, and dusting furniture. Light maintenance work may include changing light bulbs, painting, carpentry, and repairing leaky faucets.

The U. S. Department of Labor's *Occupational Outlook Handbook* 324 (1994-95 Edition) describes the working conditions of janitors as follows, in pertinent part: "Janitors and cleaners usually work inside heated, well-lighted buildings. However, sometimes they work outdoors sweeping walkways, mowing lawns, or shoveling snow."

The above definitions and descriptions indicate the regular and normal tasks of janitors are, with few exceptions, inside activities.² The few outside activities identified as ones janitors regularly perform -- keeping the entryways and walkways around the building clear, and other tidying up around the building -- are light cleaning that must be performed regularly and frequently, and are natural extensions of activities janitors perform inside. That is consistent with Rule 172's listings. The only outside activity Rule 172 lists as a "janitorial service" is the cleaning of the exterior surfaces of windows. There is an obvious reason why janitors might regularly and normally clean both surfaces of a window. The interior surface of a window does not appear clean if the exterior surface is dirty. Windows are unique in that regard.

[1] In light of the above definitions and descriptions, we cannot agree with the taxpayer's argument based on analogy. We conclude the fact that the cleaning of awnings is an activity performed on the exterior of buildings distinguishes it from the listed "janitorial services" of cleaning drapes, upholstery, and rugs in-place. That fact also distinguishes it from the in-place cleaning of blinds, which the above-referenced Tax Facts article indicates is considered a janitorial service.

Interior versus exterior is not a bright line test for purposes of the statute or rule. We don't mean to suggest that the cleaning of the exterior surfaces of windows is the only outside cleaning that could possibly be treated as a "janitorial service" under Rule 172. We note that in Det. No. 90-124, 9 WTD 259 (1990), the Department concluded that janitorial services which included picking up litter and keeping entryways and adjacent sidewalks clean by sweeping (or shoveling snow) were exempt from retail sales tax. However, the inside versus outside distinction closely approximates one of the boundaries between "janitorial services" and other cleaning and maintenance services.³

Having rejected the analogous activities argument, we consider the evidence as to whether commercial janitor service businesses in fact regularly and normally perform awning cleaning. The Yellow Pages advertisements, and the taxpayer's anecdotal evidence of responses to his telephone inquiries, are the only evidence we have in that regard. Based on the Yellow Pages ads, we cannot find that commercial janitor service companies regularly and normally clean

² Some states expressly limit their sales tax exclusion to "interior cleaning and maintenance." See, *Newman v. Director, Division of Taxation*, 14 N.J. Tax 313, 1994 N.J. Tax LEXIS 15 (1994); *C.H. Heist Corp. v. State Tax Comm'n*, 414 N.Y.S.2d 751 (N.Y. App. Div. 1979).

³ Another general boundary incorporated in the term "janitorial services" is that repair work performed is minor or light in nature. See, for example, the definition of "janitor" in *Webster's Third New International Dictionary*, and the description in *VGM's Career Encyclopedia*, set out above.

awnings. The results of the taxpayer's informal survey are not persuasive, because we do not know what the companies were asked, what they understood they were being asked, whether they in fact regularly and normally perform awning cleaning, what they mean by "cleaning," whether they break out any revenue from cleaning awnings as retail activity, and whether they are representative of commercial janitor service companies in the area.

We conclude that the cleaning of awnings is not an activity included in the term "janitorial services," and therefore charges for such cleaning are a "retail sale."

B. Taxpayer's assertion that any reclassification of revenue from cleaning of awnings should be on a prospective basis only

1. Additional facts and assertions

The taxpayer states he attempted to determine his tax obligations when he went into business, and reported his income from the cleaning of awnings as a Department employee had instructed him. [The taxpayer states t]hat when he went into business at the beginning of 1995, he telephoned the Department's Seattle or Renton office to ask how to report and pay taxes. He asked about sales tax, and explained what he would be doing. The person with whom he spoke asked him whether the awnings would be taken off and taken to a shop for cleaning, or would stay on the building. He explained they would stay on the building, and was told no sales tax would be due, that it was like carpet cleaning, where no sales tax was due if the carpets were cleaned in place. The taxpayer states that initially the Audit Division expressed the same view during the audit investigation that resulted in this assessment.

The taxpayer acknowledged in his petition that the Department is not legally bound by oral advice the Department may have given him regarding the classification of his awning cleaning activity. Nonetheless, the petition argues:

[I]f the Department is going to take a position that cleaning of awnings is not a janitorial service, such interpretation is so inconsistent with the Washington Supreme Court's Decision in Pringle and your Department's own article in its June 2000 Tax Facts, that, at most, the Department should require [the taxpayer] to collect and remit sales tax on a prospective only basis. Indeed, to require [the taxpayer] to remit uncollected sales tax when it in good faith believed that it was engaged in sales tax-exempt "janitorial services," would be most unfair and would cause undue hardship.

2. Discussion

The taxpayer concedes the Department is not legally bound by oral advice the Department may have given him regarding the classification of his awning cleaning activity, and does not request

that it limit any reclassification of the taxpayer's revenues on that basis.⁴ However, the petition asserts at least four reasons why the Department, if it reclassifies the revenues from the cleaning of awnings, should do so on a prospective basis only.

The first argument appears to be that the taxpayer was entitled to rely upon the article in Tax Facts, and a position that cleaning of awnings is not a janitorial service would amount to a change in interpretation that can only apply on a prospective basis. [The taxpayer claims] RCW 82.32A.020(2) provides that a taxpayer has the right to rely upon specific, official written advice and written reporting instructions from the Department to that taxpayer, and to have interest, penalties, and in some instances, tax deficiency assessments, waived where the taxpayer has so relied to their proven detriment. [The Taxpayer also claims] written advice also may form the basis for estoppel. However, as we discuss above, the cleaning of awnings is distinguishable from the cleaning activity discussed in the Tax Facts article. The Tax Facts article cannot be construed as advice or instructions that the cleaning of awnings is a janitorial service.

The second argument appears to be that the Department would be impermissibly amending the statute if it determined the activity was retailing, and therefore should limit its error to prospective application. Our response is that we do not accept the premise. In determining whether awning cleaning is an activity regularly and normally performed by commercial janitor service businesses, we have simply engaged in ordinary statutory interpretation, and applied the statute and rule to the facts before us.

The third and fourth arguments are that the Department should waive the retail sales tax due for past periods because the taxpayer believed in good faith he was engaged in exempt "janitorial services," and because paying the tax deficiency would cause a hardship. The Department's only authority to waive a tax deficiency is set out in RCW 82.32A.020(2). The Department has no authority to waive a tax deficiency based on either a taxpayer's good-faith belief it was reporting and paying correctly, or financial hardship.

In sum, there is no basis for granting the taxpayer's request that any reclassification of its revenues from the cleaning of awnings as retail sales be limited to prospective treatment.

...

DECISION AND DISPOSITION:

⁴ We note it is well settled that oral advice rarely gives rise to an estoppel. See, RCW 82.32A.020(2); Excise Tax Advisory 419.32.99 (ETA 419); Det. No. 97-196, 17 WTD 156 (1998); Det. No. 99-283, 20 WTD 25 (2001).

The petition for correction is denied on the issue of the classification of the taxpayer's receipts from the cleaning of awnings. The assessment correctly reclassified revenue from the repairing and cleaning of awnings attached to exterior walls of buildings as retail sales.

Dated this 16th day of April, 2001.