Cite as Det. No. 96-135, 16 WTD 112 (1996)

BEFORE THE INTERPRETATION AND APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Correction of Assessment of	)	D E T E R M I N A T I O N
	)	No. 96-135
. . .	)	Registration No. . . .
	)	FY. . ./Audit No. . . .

1. MISCELLANEOUS: STATUTORY CONSTRUCTION. The Governor's partial veto of a bill is part of the legislative process and must be considered in determining the legislative intent.

1. RULE 226: VALIDITY OF RULES. The Department will not entertain challenges to its administrative rules through an administrative appeal under WAC 458-20-100.

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:

The taxpayer protests the Department's denial of a credit for retail sales tax paid on tree trimming services related to power line safety during the period July 1, 1993 through June 30, 1995.[1]

FACTS:

Coffman, A.L.J. -- The taxpayer is a public utility. During the period July 1, 1993 through June 30, 1995, the taxpayer paid retail sales tax on tree trimming services relating to its power lines. Effective July 1, 1995, tree trimming services performed for electric utilities was specifically excluded from the definition of a retail sale. The taxpayer, believing the exclusion applied retroactively, took a credit on its June 1995 excise tax return for the retail sales tax previously paid.

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

The Department reviewed the June 1995 excise tax return and denied the requested credit and issued the above-referenced tax assessment. The taxpayer filed a timely appeal.

ISSUES:

1. Whether the amendment to RCW 82.08.050 specifically excluding tree trimming services for an electric utility applies retroactively.

1. Whether the Department correctly interpreted the 1993 amendment to RCW 82.04.050 when it stated that tree and brush clearing near power lines was included in the term "Landscape maintenance and horticultural services".

DISCUSSION:

Prior to July 1, 1993, tree trimming services for an electric utility were not considered to be retail sales. WAC 458-20-226 (Rule 226).[2] However, effective July 1, 1993, the definition of a retail sale was amended to add:

Landscape maintenance and horticultural services but excluding horticultural services provided to farmers.

RCW 82.04.050(3)(e). The Department interpreted this language to include:

(d) All tree trimming other than for farmers or persons engaged in silviculture. This includes all trimming for size, shape, aesthetics, removal of diseased branches, and removal of limbs because they are too close to structures. It also includes tree trimming performed for public and private utilities to keep power lines free of tree branches. The department of revenue has considered trimming of trees for public or private utilities to be a landscape maintenance activity and not subject to retail sales tax for periods prior to July 1, 1993.

Rule 226(2)(d).

Substitute Senate Bill 5129 (SSB 5129) passed the legislature in 1995 and amended the definition of retail sale to specifically exclude tree trimming and brush clearing by or for electric utilities. RCW 82.04.050(3)(e). The Governor signed the bill, but vetoed the portion that stated:

In 1993, the legislature extended retail sales taxes to discretionary spending on landscape maintenance and horticultural services. The legislature did not intend to extend, nor did it believe it was extending, retail sales taxes to pruning, trimming, repairing, removing, and clearing of trees and brush near electric distribution or transmission lines or equipment by, or the direction of, an electric utility. The latter activities generally require nondiscretionary expenditures by electric utilities in the interests of public safety and minimizing unplanned interruptions.

The legislature finds that the department of revenue misinterpreted the intent of the legislature by adopting a rule extending retail sales taxes to pruning, trimming, repairing, removing, and clearing of trees and brush near electric distribution or transmission lines or equipment, performed by, or at the direction of, an electric utility.

It is therefore the intent of section 2 of this act to clarify that these activities are not subject to the sales tax.

In the Governor's explanation of his partial veto, he stated:

I believe that the Department of Revenue had no alternative authority but to include the activity in the sales tax base through its rule. . . .

As a result, section 2 of Substitute Senate Bill No. 5129 serves as a substantive change in the law with application from July 1, 1995 forward. The presence of section 1, however, creates ambiguity and may encourage those who have paid sales tax on tree trimming near utility lines since the 1993 law change to believe they are entitled to refunds. Administering such claims and potentially litigating this issue would lead to an unnecessary expenditure of state funds and resources.

The taxpayer argues that we should ignore the Governor's veto message accompanying SSB 5129 and Rule 226 and find that the term "landscape maintenance and horticultural services" does not include tree trimming by electric utilities. But the taxpayer agrees that tree trimming for other purposes is included within the definition.

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[2] As in effect for the period July 1, 1993 through June 30, 1995.

[1] The Governor's partial veto is part of the legislative process and must be considered when determining legislative intent. Shelton Hotel Company, Inc. v Jack E. Bates, 4 Wn.2d 498, 506, 104 P.2d 478 (1940); State v. Brasel, 28 Wn.App. 303, 309, 623 P.2d 696 (1981). When he vetoed the legislative intent statement in SSB 5129, the Governor clearly intended that the change to the law apply prospectively only.

Further, the statute must be interpreted as if the vetoed portion never existed. Shelton Hotel Company, Inc., supra, at 506. Therefore, SSB 5129 only changed RCW 82.04.050(3)(e) by adding the exclusion for electric utilities. It is a universally accepted maxim of statutory construction that the legislature does not engage in useless acts. JJR, Inc. v. The City of Seattle, 126 Wn.2d 1, 10, 891 P.2d 720 (1995). The addition of an exception to a taxing statute is unnecessary, unless the thing excluded would otherwise be included.

[2] Rule 226 was adopted after the Department completed the processes required by the Administrative Procedures Act (APA), Chapter 34.05 RCW. These processes are designed to seek input from interested parties concerning proposed rules that may affect them. If an interested party is dissatisfied with an adopted rule, the rule may be challenged in court. RCW 34.05.510-.598. We are aware of no court challenges to Rule 226.

RCW 82.32.300 states that the Department's rules "have the same force and effect" as a statute unless found invalid by a court of record. The Department may not repeal a portion of its regulation through any process not sanctioned by the APA. See, RCW 34.05.010(15), (17). An appeal of an individual taxpayer under WAC 458-20-100 is not an APA procedure. RCW 82.32.160 and Det. No. 92-219ER, 13 WTD 119 (1993) . Therefore, we can not entertain challenges to regulations that have been properly adopted. Det. No. 87-218, 3 WTD 295 (1987).

Therefore, tree trimming by electric utilities was a retail sale between July 1, 1993 and June 30, 1995.

DECISION AND DISPOSITION:

Taxpayer's petition is denied.

DATED this 23rd day of August, 1996.