

Cite as Det. No. 14-0319, 34 WTD 182 (2015)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

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| 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. 14-0319 |
| ... |) | |
| |) | Registration No. . . . |
| |) | |

[1] RULE 172; RCW 82.04.050(2)(d): RETAIL SALES TAX; RETAILING B&O TAX – JANITORIAL SERVICES – WATER DAMAGE CARPET RESTORATION – DECK CLEANING “Janitorial services,” for purposes of Rule 172 and RCW 82.04.050(2)(d), are services regularly and normally performed by commercial janitor services businesses. Water damage carpet restoration jobs resulting from flooding or some other unforeseen cause, and deck cleaning, are “special clean up jobs,” are not performed in the course of a “regular” and “normal” janitorial service, and are therefore properly characterized as retail-taxable.

[2] RCW 82.32A.020(2); ETA 3065.2009: WAIVER OF ASSESSMENT – ORAL INSTRUCTIONS. The Department lacks authority to waive assessment of taxes, penalties, and interest, based on oral instructions. RCW 82.32A.020 only provides authority to waive taxes based upon reliance on specific, official written advice or written reporting instructions from the Department.

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.

Eckholm, A.L.J. – A business performing carpet cleaning and related services for multi-family housing complexes, protests an assessment of retailing business and occupation (B&O) tax and retail sales tax on income from carpet cleaning for water damage, carpet repair, and deck cleaning, asserting the services constitute janitorial services excluded from the definition of “retail sale” pursuant to RCW 82.04.050(2)(d) and WAC 458-20-172. The petition is denied.¹

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

ISSUES

1. Whether carpet cleaning for water damage, carpet repair, and deck cleaning, are janitorial services excluded from the definition of “retail sale” pursuant to RCW 82.04.050(2)(d) and WAC 458-20-172.
2. Whether reliance on . . . oral advice from a Department representative regarding the proper reporting tax classification provides a basis for waiving assessments of tax, penalties, and interest, pursuant to RCW 82.32A.020(2).

FINDINGS OF FACT

[Taxpayer] provides carpet cleaning and other services for multi-family housing complexes, including carpet patching and stretching, carpet installation, water and fire damage repairs, equipment rental, painting, and deck washing. The taxpayer’s records were reviewed by the Department of Revenue (Department), Audit Division, for the period of January 1, 2009 through December 31, 2012. The auditor reclassified the taxpayer’s income from carpet cleaning and repair resulting from water damage, other carpet repairs, and deck washing, from the services and other activities B&O classification to the retail sales tax and retailing B&O tax classification, resulting in an assessment in the total amount of \$. . . , the majority of which is retail sales tax.²

The taxpayer appealed the assessment, asserting the reclassified services constitute janitorial services excluded from the definition of “retail sale” pursuant to RCW 82.04.050(2)(d) and WAC 458-20-172 (Rule 172).³ The taxpayer asserts janitorial services are those regularly and normally provided by janitorial companies, and if carpet cleaning services can be considered janitorial services, then the services regularly and normally provided by carpet cleaning companies should be considered janitorial services. The taxpayer stated almost all carpet cleaning companies within its industry regularly and normally perform the same services they do and do not treat the services as retail sales.⁴

At the hearing, the taxpayer described its services more specifically. Regarding the carpet cleaning and repairs resulting from water damage, the taxpayer explained the water damage should not be considered the result of a “flood,” as that term is used in Rule 172. The taxpayer indicated the water damage in the apartments is commonly caused by sink overflow or rain intrusion, and the water extraction is limited to the carpet and pad in order to return the carpet to its original state. The taxpayer stated it utilizes drying equipment suitable for small-scale damage and if the water damage is substantial, it recommends to the building owner [that] it contact a more specialized service provider. Regarding other carpet repairs, the taxpayer indicated these are minor repairs, such as patching a cigarette burn in the carpet or tucking the carpet back into a metal transition strip, in order to return the carpet to its original state. Regarding the deck washing, the taxpayer stated it does not use high-powered pressure washers to clean the decks, and this is a service regularly provided by janitorial companies. The taxpayer

² Document 201401796, issued August 9, 2013, included assessments of retail sales tax of \$. . . , retailing B&O tax of \$. . . , a credit of service and other activities B&O tax of \$. . . , use tax and/or deferred sales tax of \$. . . , interest of \$. . . , and an assessment penalty of \$. . . , for a total amount of \$. . . .

³ Appeal petition at page 2.

⁴ *Id.*

described the water pressure it employs as falling between that of a garden hose and a commercial grade pressure washer. The taxpayer indicated the water damage carpet cleaning and repair services are provided on an on-call basis, and, generally, the minor carpet repairs and deck cleaning services are provided as part of apartment turnover or lease renewal services.

The taxpayer also indicated when they started the business 19 years ago, they consulted the Department by telephone and were told carpet cleaning services are only retail sales if they are altering or modifying the original carpeting. The taxpayer also stated approximately ten years ago, a Department representative made a presentation at a class provided by the taxpayer's supplier and the representative stated it is not a retail sale if the service is limited to returning the carpet to its original state at installation. The taxpayer did not recall the names of the Department representatives or specific dates of the communications.

ANALYSIS

Washington imposes a retail sales tax on each retail sale in this state. RCW 82.08.020. 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).

Washington also imposes a B&O tax "for the act or privilege of engaging in business" in this state. RCW 82.04.220. Washington's B&O tax applies to various tax classifications, including making sales at retail pursuant to RCW 82.04.250, making wholesale sales under RCW 82.04.270, and providing services pursuant to RCW 82.04.290. Persons engaged in any business activities that are not specifically included in a tax classification under chapter 82.04 RCW, are taxable under the service and other business activities B&O tax classification. RCW 82.04.290(2).

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 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.

The statutory definition of “janitorial services” states at the outset that such services are “cleaning and caretaking services ordinarily performed by commercial janitor service businesses.” RCW 82.04.050(2)(d). Rule 172 echoes this emphasis on the janitorial “cleaning and caretaking” function by providing that janitorial services include activities “performed regularly and normally by commercial janitor service businesses.” Rule 172. The activities listed in the statute and rule as examples of “janitorial services” are those that are normally and regularly provided as part of a caretaking function, i.e., floor and window cleaning, the cleaning in place of rugs, dusting, trash disposal, and cleaning bathroom fixtures. RCW 82.04.050(2)(d); Rule 172. The activities specifically excluded from “janitorial services” are those that are not normally and regularly performed by janitorial service, i.e., cleaning exterior building walls, cleaning septic tanks, special clean up jobs, snow removal, sandblasting, and the cleaning of furnaces, chimneys, and industrial machinery or fixtures. *Id.*

The Department has issued several determinations holding that cleaning services that are not performed regularly and normally by commercial janitorial services are not encompassed within the definition of “janitorial services” provided in RCW 82.04.050(2)(d) and Rule 172. *See* Det. No. 12-0348, 33 WTD 101 (2014) (water damage clean up jobs resulting from flooding or other unforeseen causes are “special clean up jobs,” not regularly and normally performed in the course of janitorial services); Det. No. 07-227, 27 WTD 154, 156-157 (2008) (cleaning kitchen exhaust systems is periodic maintenance, not regularly performed janitorial services); Det. No. 01-196, 22 WTD 56, 59 (2003) (cleaning of newly constructed homes that transform the condition of the homes, rather than maintain the existing condition of the homes, are not the normal duties of a janitorial service); Det. No. 01-047, 21 WTD 189, 193-194 (2002) (cleaning exterior awnings is not considered the type of light cleaning and maintenance that is performed regularly by janitors); Det. No. 99-174, 19 WTD 172, 175 (2000) (specialized cleaning of tennis courts is a special clean-up job not regularly or normally performed by commercial janitorial services).

The Department’s analysis and holding in 33 WTD 101 as to whether emergency water damage, flood, and fire damage restoration services constitute janitorial services, is directly applicable in this appeal:

In this case, Taxpayer only performed “flood and water damage cleanup services” after customers had experienced flooding. Taxpayer’s “flood and water damage cleanup services” jobs are neither regular nor normal janitorial services, but are carpet maintenance necessitated by an accident or emergency. Emergency flood damage cleaning using specialized equipment is not a cleaning service ordinarily performed by a commercial janitorial service. Here, the taxpayer’s own description of its services emphasizes the specialized nature of the equipment required to do the job. The fact that a cleaning of a rug in place occurs at the end of the process does not make the activity as a whole a janitorial service ordinarily performed by a commercial janitorial business.

...
Rule 172 specifically states that “special clean up jobs required by . . . floods” are not janitorial services. . . .

33 WTD at 103 (emphasis added).

Water damage cleaning services provided in response to an accident or emergency are special clean-up jobs caused by floods, specifically excluded from the definition of “janitorial services” in Rule 172. 33 WTD at 104. Though the services performed by the taxpayer in 33 WTD 101 may have encompassed more extensive water damage and involved the use of industrial-grade drying equipment that may be more sophisticated than the equipment used by the taxpayer in the present appeal, the holding is controlling in this appeal. Because the taxpayer’s water damage services result from flooding or some other unforeseen cause necessitating clean up, they are “special clean up jobs,” and are not services provided regularly and normally by commercial janitorial services. *See* Rule 172; 33 WTD at 104; 27 WTD at 156-157; 21 WTD at 193-194; 19 WTD at 175.

Similarly, the taxpayer’s deck cleaning services are primarily provided as part of the cleaning following a tenant move-out and not as part of regularly performed cleaning services. Pressure washing of exterior areas of a building, such as the walls and surrounding sidewalks, are not janitorial services as defined by RCW 82.04.050(2)(d) and Rule 172. *See* Det. No. 00-067R, 20 WTD 356, 360 (2001). The taxpayer indicated it does not use high-pressure washing equipment; therefore, its deck washing should be considered a customary service provided by commercial janitorial services. Rule 172 does not distinguish services by the grade of equipment employed; the rule excludes “cleaning the exterior walls of buildings” from the definition of “janitorial services.” Rule 172. The taxpayer’s exterior apartment deck cleaning is similar to cleaning the exterior walls of a building; therefore, it is a service excluded from the definition of “janitorial services” set forth in Rule 172. In addition, these services are “special clean-up jobs,” not regularly and normally provided by janitorial services, which are also excluded from the definition of “janitorial services” in Rule 172.

The taxpayer’s water damage and carpet repair services, and deck cleaning services, are not “janitorial services” as defined by RCW 82.04.050(2)(d) and Rule 172. The taxpayer’s revenue from those services is subject to retail sales tax and retailing B&O tax. RCW 82.08.020; RCW 82.04.250.

The taxpayer also asserts it was provided oral instructions by Department representatives that its services are only classified as retail sales if they are altering or modifying the original carpeting. The taxpayer did not recall the names of the Department representatives or specific dates of the communications.

As persons doing business in Washington, taxpayers have certain responsibilities, some of which are outlined in RCW 82.32A.030, including the responsibility to “[k]now their tax reporting obligations, and when they are uncertain about their obligations, seek instructions from the department of revenue.” RCW 82.32A.030(2). In addition to the responsibilities listed in RCW 82.32A.030, certain taxpayer rights are stated in RCW 82.32A.020, including:

(2) The right to rely on specific, official written advice and written tax reporting instructions from the department of revenue 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;

...

(Emphasis added.) This right does not include the right to rely on oral advice. The Department has issued an advisory statement that explains the Department's position regarding oral instructions. Excise Tax Advisory 3065.2009 states, in part:

The Department of Revenue gives consideration, to the extent of discretion vested in it by law, where it can be shown that failure of a taxpayer to report correctly was due to written instructions from the department or any of its authorized agents. The Department cannot give consideration to claimed misinformation resulting from telephone conversations or personal consultations with a Department employee.

There are three reasons for this ruling:

- (1) There is no record of the facts which might have been presented to the agent for his consideration.
- (2) There is no record of instructions or information imparted by the agent, which may have been erroneous or incomplete.
- (3) There is no evidence that such instructions were completely understood or followed by the taxpayer.

...

Because the taxpayer has neither shown evidence of its reliance on written advice from the Department nor corroborated the alleged oral advice in determining its excise tax reporting responsibilities, the taxpayer has provided no basis for the Department to waive any portion of the assessment. The taxpayer's petition is denied.

DECISION AND DISPOSITION

The taxpayer's petition is denied.

Dated this 3rd day of October 2014.