Cite as Det. No. 90-124, 9 WTD 259 (1990)

THIS DETERMINATION HAS BEEN OVERRULED OR MODIFIED IN WHOLE OR PART BY DET. NO. 93-269ER, 14 WTD 153 (1995).

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

In the Matter of the Petition	)	D E T E R M I N A T I O N
For Correction of Assessment of	)	
	)	No. 90-124
	)	
[Taxpayer A]	)	Registration No. . . .
	)	. . ./Audit No. . . .
[Taxpayer B]	)	Registration No. . . .
	)	. . ./Audit No. . . .
[Taxpayer C]	)	Registration No. . . .
	)	. . ./Audit No. . . .

[1] RCWS 82.04.220, 080, 090, 4281, RULE 109 and RULE 197: B&O TAX -- DEDUCTION -- INTEREST -- MONEY MANAGEMENT -- OBJECTIVE STANDARDS. Interest earned on loans to affiliates is not deductible under RCW 82.04.4281 where the loans are a regular and normal part of the taxpayers' business activities.

[2] RULE 172 and RCW 82.04.050(2)(c): USE TAX -- EXEMPTION -- JANITORIAL SERVICES -- SIDEWALK SWEEPING -- OBJECTIVE STANDARDS. Janitorial services for buildings which include picking up litter, sweeping or hosing dirt or debris from entryways and adjacent sidewalks or the removal of snow or ice from them by shoveling, sweeping or applying salt, sand or similar substances is exempt from the sales and use taxes.

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.

TAXPAYERS REPRESENTED BY: . . .
. . .
. . .

DATE OF TELEPHONE CONFERENCE: . . .

NATURE OF ACTION

Petition for correction of assessments of 1) service B&O tax upon amounts derived as interest income from loans to affiliated companies and 2) use tax on charges made for sidewalk cleaning by janitorial services.

FACTS

De Luca, A.L.J. (successor to Potegal, A.L.J.) -- Taxpayers' affiliated businesses generally can be described as property development and management. They own buildings and operate them for commercial and residential tenants. All taxpayers were audited for the period . . . through . . . .

Two of the three taxpayers, [A] and [B], made loans to their affiliates on a regular and recurrent basis. According to the audit report, because not all of the affiliates had established credit lines, the money was loaned as an alternative source of funds for purposes of land and property development. Interest was charged for these loans and booked as receivable. However, taxpayers stated in their petition and reiterated during their telephone conference that "[t]his intercompany interest was never paid, nor did [B] expect it to be paid at the time the allocations were made. The interest charge was made to determine company results after overhead allocation." Furthermore, they submitted that no effort was ever made to collect it.

In her report the auditor had made a reconciliation of the accrued interest by allowing a credit for interest which the taxpayers had entered earlier during the audit period and had written off as uncollectible.

The second matter involves janitorial services provided by the YMCA for the taxpayers [B] and [C]. In particular the matter concerns daily litter removal by picking up, sweeping or hosing of entry ways to taxpayers' properties and adjacent sidewalks. The YMCA did not charge taxpayers sales tax for these services, but the audit determined them to be taxable and assessed use tax.

ISSUES

1) Whether interest income accrued and entered as receivable by affiliated companies making regular and recurrent intercompany loans is subject to the service B&O tax.

2) Whether picking up litter, sweeping or hosing entryways and sidewalks adjacent to subject buildings is part of janitorial services and therefore exempt from the sales and use taxes.

TAXPAYERS' EXCEPTIONS

Taxpayers contend intercompany interest is not taxable because it was merely a bookkeeping entry which was intended solely to keep track of the performances of the different companies. During their conference taxpayers cited Weyerhaeuser v. Dept. of Revenue, 106 Wn.2d 557 (1986) as a

case which forbids the Department from imputing interest. There was also a reference to the allowable interest deduction due to the money managing system which they employ.

As for the sidewalk/use tax issue taxpayers argue that this service was normal janitorial work which is no different than floor cleaning or disposal of waste-can items within buildings.
The fact that it occurs outdoors should make no difference for tax purposes.

DISCUSSION

The B&O tax is levied for the act or privilege of engaging in business activities. The tax is measured, in this case, by the gross income of the business. RCW 82.04.220. "Gross income" means the value proceeding or accruing by reason of the transaction of the business engaged in and includes interest. RCW 82.04.080. "Value proceeding or accruing" means the consideration, whether money, credits, rights, or other property expressed in terms of money, actually received or accrued. RCW 82.04.090.

In accordance with the above referenced statutes, there is WAC 458-20-109, Rule 109, which states that persons who receive interest are taxable pursuant to the service B&O tax. There also is WAC 458-20-197, Rule 197, which provides that value proceeds or accrues to a taxpayer as of the time the taxpayer, in accordance with the system of accounting regularly employed, enters a charge against the debtor for the amount of consideration agreed upon.

RCW. 82.04.4281 does provide a business tax deduction to persons other than those engaging in banking or other financial businesses for amounts received from investments or use of money as such. However, the Washington Supreme Court has held that interest earned from loans made by persons in competition with financial businesses is taxable. Sellen Construction Co. v. Department of Rev., 87 Wn.2d 878 (1976).

[1] The Department has not abandoned or departed from its stated and published position, issued after Sellen, that no deduction is permitted with respect to regular and recurrent financial activities which are essentially in competition with financial businesses. ETB 505.04.109. Two-party loans of surplus funds which derive interest income are precisely such kinds of activities. A person cannot compete with a loan company or bank any more directly or obviously than by making interest-bearing loans as a regular part of its business. Final Det. 88-246, 6 WTD 89 (1988).

The fact that taxpayers did not actually collect the interest is not determinative. The loans were made and entered as receivable and the interest accrued. Only some, but not all of the interest was written off as uncollectible, which indicates that there was a purpose other than mere bookkeeping for the entry. In light of RCW 82.04.080, 82.04.090, Rules 109 and 197, taxpayers had gross income subject to the B&O tax.

Taxpayers' reliance on Weyerhaeuser, supra, is misplaced. That case held that the Department of Revenue could not impute interest for excise tax purpose against a wholesale installment contract which did not provide for interest. In contrast, here the taxpayers did charge interest at the outset of their loans.

Moreover, taxpayers in this matter do not have a money management system which conforms to the one discussed in Final Det. 86-309A, 4 WTD 341 (1987), where interest income was deductible. In that case, there was electronic accounting and banking of funds which was done on a daily basis and which used a daily targeted minimum or zero account balance method without incurring any legally enforceable rights or obligations between corporate entities supported by any written evidences of indebtedness.

For the foregoing reasons, we must reject the taxpayers' position on interest income in their petition.

We will now address the second issue of whether the exemption from the sales and use taxes for janitorial services includes cleaning entryways and sidewalks adjacent to the subject buildings.

WAC 458-20-172, Rule 172, applies to this issue:

> 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 rule continues by declaring "[t]he retail sales tax is not applicable to charges for janitorial services...." See also RCW 82.04.050(2)(c).

The audit report relied upon a prior determination in reaching its decision that sidewalk sweeping was subject to the sales or use tax. The facts of that case are readily distinguished from the ones before us. The prior case involved a mobile cleaning service which used high pressure washing techniques to clean the exterior parts of buildings and outside structures including sidewalks, walls, roofs, etc. In view of Rule 172, which expressly excludes the cleaning of exterior walls from janitorial services, as well as the taxpayer's use of high pressure apparatus to clean those walls and adjoining sidewalks, that determination reached the proper conclusion that those services were subject to the retail sales tax.

[2] In contrast, the present case involves not the cleaning of exterior walls or the use of high pressure washing techniques, but what we perceive to be the normal and customary janitorial services of hosing, sweeping or picking up litter, loose dirt or debris from entryways and sidewalks which are adjacent to the subject buildings.

Furthermore, at times when there is snow or ice on sidewalks or entryways it would also be a normal janitorial service to remove the matter by shoveling, sweeping or applying sand, salt or similar substances to improve traction for pedestrians. Such activities should not be confused with snow removal as referenced in Rule 172 which applies to the use of plows or other mechanized

methods to remove snow from streets, alleys or parking lots. Those types of services clearly are not janitorial in nature.

In conclusion, we hold that the sidewalk cleaning performed by the YMCA for the taxpayers was a janitorial service as defined in Rule 172 and therefore exempt from the sales and use tax.

DECISION AND DISPOSITION

Taxpayer [A's] petition for correction of assessment pertaining to intercompany interest is denied.

Taxpayer [B's] petition for correction of assessment pertaining to intercompany interest likewise is denied, but its petition for correction is granted for the matter of sidewalk cleaning. Taxpayer [C's] petition for correction likewise is granted for the matter of sidewalk cleaning. Both are remanded to the Audit Division for adjustment.

DATED this 20th day of March 1990