

Cite as Det. No. 16-0202, 39 WTD 026 (2020)

BEFORE THE ADMINISTRATIVE REVIEW AND HEARINGS 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. 16-0202
)	
...)	Registration No. ...
)	

RCW 82.04.050; RCW 82.04.290(2): RETAIL SALES TAX — RETAILING B&O TAX — SERVICE AND OTHER ACTIVITIES B&O TAX — DOG WASTE PICK UP SERVICES. Dog waste pick up services are not retail services subject to retail sales tax or retailing B&O tax, when the activity is limited to removal of the waste from the surface of real property. Such services instead fall under the service and other activities B&O tax classification. However, activities that involve services to buildings or other structures on real property for consumers, or the cleaning of tangible personal property for consumers, may be retail sales subject to retail sales tax and retailing B&O tax.

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.

LaMarche, T.R.O. – A business that provides dog waste pick up services to its residential customers’ petitions for review of a Department assessment of retail sales tax, arguing that the services it provides are not subject to retail sales tax. We grant the petition.¹

ISSUE

Under RCW 82.08.020, RCW 82.04.050, and WAC 458-20-172, are dog waste pick up services subject to retail sales tax, when the activity is restricted to removal of dog waste from the surface of real property, and does not involve buildings or other structures located on real property, or the cleaning of tangible personal property of or for consumers?

FINDINGS OF FACT

... (Taxpayer) is a Washington limited liability company that provides dog waste pick up services to its residential customers in Washington State. Taxpayer’s services for its residential customers, generally performed on a weekly basis, consist of cleaning up dog waste from customer’s yards, then placing the waste into double bags that are placed into the customer’s waste receptacle, or placed in a pre-determined location.

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

The Audit Division of the Department (Audit) audited Taxpayer's business activities for the period of January 1, 2012, through December 31, 2014 (Audit Period). The Auditor's Detail of Differences and Instructions to Taxpayer stated that Taxpayer had incorrectly reported its income under the service and other activities business and occupation (B&O) tax classification, because the Taxpayer's cleaning and removal of pet waste were retailing activities, not retail sales tax-exempt janitorial services.

Audit reclassified Taxpayer's income from the service and other activities B&O tax classification to the retailing B&O tax classification, and issued an assessment for Audit Period, Document No. . . . , on December 21, 2015. The total of the assessment is \$. . . , which consists of a \$. . . service and other activities B&O small business credit, \$. . . in retail sales tax, \$. . . in retailing B&O tax, a credit of \$. . . in service and other activities B&O tax, \$. . . in interest, and a 5% assessment penalty of \$ Taxpayer did not pay the assessment, but timely filed a petition for review.

ANALYSIS

Washington imposes the B&O tax on the privilege of engaging in business in this state. RCW 82.04.220. Depending on the nature of the business activity being conducted, the tax is levied upon the value of products, the gross proceeds of sales, or the gross income of the business. *Id.* Business activities other than or in addition to those that are specifically enumerated elsewhere in Chapter 82.04 RCW, or RCW 82.04.290(1) or (3), are taxed under the service and other activities B&O tax classification at a rate of 1.5 percent of their gross income. RCW 82.04.290(2).

Washington imposes a retail sales tax on sales in this state of tangible personal property and sales of services defined as retail sales, unless such sales are excluded or exempt from retail sales tax. RCW 82.08.020; RCW 82.04.050.

RCW 82.04.050(2) defines "sale at retail" or "retail sale" in relevant part to include the following:

(d) The cleaning, . . . of existing buildings or structures, . . . but does not include the charge made for janitorial services; and for purposes of this section the term "janitorial services" means those cleaning and caretaking services ordinarily performed by commercial janitor service businesses including, but not limited to, wall and window washing, floor cleaning and waxing, and the cleaning in place of rugs, drapes and upholstery. . . .

RCW 82.04.050(2)(d) (emphasis added).

Here, Taxpayer's activities consist of the removal of dog waste from the surface of real property. Audit does not assert that Taxpayer cleans the dog waste inside of or on the external surfaces of "existing buildings or structures." Nor does Audit assert that Taxpayer cleans the dog waste from tangible personal property of or for consumers. Instead, Audit asserts that cleaning services are generally subject to retail sales tax under RCW 82.04.050(2)(d), and that Taxpayer's activities do not qualify for the janitorial exception under that subsection. We disagree with Audit's assertion that RCW 82.04.050(2)(d) applies to Taxpayer's activities under the facts here.

RCW 82.04.050(2)(d) includes the cleaning of “existing buildings or structures” in the definition of a retail sale. Here, the service Taxpayer provides is to pick up dog waste from the surface of real property, presumably its customers’ yards, which does not require Taxpayer to clean “existing buildings or structures.” RCW 82.04.050(2)(d) is plain on its face, and does not impose sales tax activities that do not entail cleaning of existing buildings and structures. Because Taxpayer’s business activity does not fall within RCW 82.04.050(2)(d) in the first instance, the janitorial services exclusion is not relevant. Instead, Taxpayer’s disputed activities are “business activities other than or in addition to those that are specifically enumerated elsewhere in Chapter 82.04 RCW, or RCW 82.04.290(1) or (3)” and are therefore taxable under the service and other activities B&O tax classification. RCW 82.04.290(2).

One could argue that Taxpayer’s activities fall within the category of landscaping services under RCW 82.04.050(3)(d), which defines a retail sale to include “[l]andscape maintenance and horticultural services.” The related rule, WAC 458-20-226 (Rule 226), elaborates and states that retail landscape and horticultural services include:

- (a) Grading, filling, leveling, planting, seeding, sodding, removing, cutting, trimming, pruning, mulching, aerating, applying chemicals, watering, and fertilizing to establish, promote, or control the growth of trees, shrubs, flowers, grass, ground cover and other flora for ornamentation or other nonagricultural purposes.
- (b) The sale or rental of landscaping materials and the construction of sprinkling systems, walks, pools, fences, trellises, rockeries, and retaining walls.
- (c) Cultivating fruits, flowers, and vegetables for consumers other than farmers.
- (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 does not include tree trimming performed for public and private electric utilities or at the direction of electric utilities to keep power lines, distribution lines, or equipment free of tree branches or brush.

Although Taxpayer’s waste pick-up activities may involve an outside yard, they do not otherwise resemble any of the typical landscaping or horticultural activities under RCW 82.04.050(3)(e) and Rule 226, which consist mainly of the maintenance of vegetation, sales of landscaping materials, or construction of certain types of landscape-related structures.

Because Taxpayer’s disputed activities are not taxable under Chapter 82.04 RCW, or RCW 82.04.290(1) or (3), they are taxable under the service and other activities B&O tax classification. RCW 82.04.290(2). Accordingly, we grant the petition, and remand to the operating division for corresponding adjustments consistent with our discussion and decision herein.

In making this decision, we note that Taxpayer has followed the Department’s instructions by paying retailing B&O tax on its gross income and collecting and remitting retail sales tax from its customers. Consistent with this decision, Taxpayer is instructed as of the date of this decision to stop paying retailing B&O tax and collecting retail sales tax from its customers, and to begin to

pay service and other activities B&O tax on its gross income. Taxpayer will not be liable for additional service and other activities B&O tax for periods during which it was complying with the Department's instructions to pay retailing B&O tax. RCW 82.32A.020(2).

Because retail sales tax are trust funds collected from customers any retail sales tax collected and not remitted to Department as of the date of this decision must be either paid to the Department or returned to the customer. If Taxpayer chooses to refund previously collected retail sales tax to its customers, it may apply for a refund of the taxes as provided under WAC 458-20-229(4).

DECISION AND DISPOSITION

Taxpayer's petition is granted.

Dated this 15th day of June 2016.