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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. 16-0234
)	
...)	Registration No. . . .
)	

[1] RCW 82.04.050; RCW 82.04.290: RETAIL SALES – COLLECTION AND DISPOSAL OF DOG WASTE. The activity is not a retail activity as defined in RCW 82.04.050 and the income derived is taxable under the service and other B&O tax classification.

[2] RCW 82.32A.020 – RIGHT TO RELY ON WRITTEN REPORTING INSTRUCTIONS ISSUED BY THE DEPARTMENT OF REVENUE. Taxpayer has a right to rely on the written instructions received from the Department of Revenue.

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.

Lewis, A.L.J. – A business that collects and disposes of dog waste protests the reclassification of its income from the service and other activities business and occupation (“B&O”) tax classification to the retailing B&O tax classification and retail sales tax classifications. We grant Taxpayer’s petition.¹

ISSUES:

1. Whether the income derived from the collection and disposal of dog waste is a retail activity requiring the payment of retailing B&O tax and collection of retail sales tax under the provisions of RCW 82.04.250 and RCW 82.04.050 or a service activity requiring payment of the service and other activities B&O tax under the provisions of RCW 82.04.290(2)(a)?
2. Whether, under the provisions of RCW 82.32A.020(2), Taxpayer has the right to rely on the written reporting instructions received from the Department?

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

FINDINGS OF FACT:

Taxpayer derives income from operating a dog waste disposal service. . . . Taxpayer offers its customers a dog waste collection and pick-up service to dog owners living in condos, apartments, homes, and on boats. Taxpayer provides its customers with a waterproof tray that contains grass sod. Generally, the Taxpayer's customers keep the trays on a deck or in a garage. Taxpayer collects the soiled sod and replaces it with new grass on a regularly scheduled basis.² Taxpayer offers replacement of the sod on a bi-weekly, weekly, or monthly schedule.³

Since inception of the business during 2009, Taxpayer reported its income under the service and other activities B&O tax classification. During November 2014, Taxpayer requested the Department's Taxpayer Information & Education ("TI&E") Division issue a ruling on the proper tax classification that it should report its income under. On December 8, 2014, TI&E replied that Taxpayer should report its income under the retailing and retail sales tax classification:

The business activities of providing the pod, sod, replacement sod, and the removal of the soiled sod are classified under the "retailing classification" of the Business and Occupation (sic) and are subject to collect (sic) of retail sales tax from your customers. Based on the information you provided in your email and a review of your website, including your company's service agreement, you are providing essentially a cleaning service by going into your customer's homes or yards and removing the soiled sod. The specialized cleaning service falls outside routine janitorial services.

The reasoning underlying the ruling was that in general, cleaning activities are taxable as a retail sale. However, the definition of retail sales excludes "janitorial services" and subjects the income to the catch-all B&O tax classification service and other. Here, TI&E determined that Taxpayer provided a "specialized cleaning service," which did not qualify for the retail sales tax exemption as a janitorial service.

Taxpayer disagreed with TI&E's ruling and requested a reconsideration of the ruling on January 16, 2015. Subsequently, the Department's Taxpayer Account Administration ("TAA") Division reviewed Taxpayer's February 2015 and March 2015 tax returns. TAA noticed that Taxpayer had changed its tax reporting classification from the service and other activities B&O tax classification to the retailing B&O and retail sales tax classifications.

On June 2, 2015, TAA informed Taxpayer that the income earned for the period January 1, 2011, through December 2014, would be reclassified from the service and other activities tax classification to the retailing B&O and retail sales tax classification. On June 29, 2015, Taxpayer responded to TAA's request for income information.

On September 29, 2015, the Department issued a \$. . . assessment.⁴ Taxpayer filed a petition requesting correction of the assessment with the [Administrative Review and Hearings] Division.

² The customers have the choice of both the size of the tray and the frequency of sod replacement. The customer chooses either a single (2' X 3' or 4') or double size (2' X 8' or 4' X 4') tray.

³ The old sod is removed for composting.

⁴ The \$. . . assessment consisted of \$. . . tax, \$. . . interest, and \$. . . assessment penalty.

Taxpayer's petition raised two reasons why the assessment should be corrected. The first reason offered was that the tax reported under the service and other activities B&O tax classification should be accepted until new reporting instructions were received. Taxpayer's second reason for relief was that the actions taken by the Department were excessive.

ANALYSIS:

Persons making retail sales in Washington are subject to Retailing B&O tax measured by the gross proceeds of sales. RCW 82.04.250. In addition, persons making retail sale must collect and remit retail sales tax, unless a specific exclusion or exemption applies. RCW 82.08.020 and RCW 82.08.050.

Persons engaged in business activities other than or in addition an activity taxed explicitly under RCW 82.04.290(1) or (3), or elsewhere in chapter 83.04 RCW, are subject to the catch-all Service & Other Activities B&O tax classification. RCW 82.04.290(2) and WAC 458-20-224 (Rule 224).

RCW 82.04.050(2) states that:

The term "sale at retail" or "retail sale" includes the sale of or charge made for tangible personal property consumed and/or for labor and services rendered in respect to the following:

(a) The installing, repairing, cleaning, altering, imprinting, or improving of tangible personal property of or for consumers, . . .

(d) The cleaning, fumigating, razing, or moving 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. The term "janitorial services" does not include painting, papering, repairing, furnace or septic tank cleaning, snow removal or sandblasting;

The reclassification of Taxpayer's income was based on TAA's reading of WAC 458-20-172 ("Rule 172"), which is the Department's administrative rule that addresses the taxation of janitorial services. In general, the income derived from providing "janitorial services" is subject to the service and other B&O tax – not the retailing B&O and retail sales tax classifications. 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.

(Emphasis added).

Here, TAA concluded that the collection and disposal of dog waste performed by Taxpayer is a specialized cleaning service that falls outside the definition of “routine janitorial services”.

We disagree with this analysis. Taxpayer does not clean tangible personal property of or for consumers (a retail sale under RCW 82.04.050(2)(a)). Nor does it clean existing building or other structures (a retail sale under RCW 82.04.050(2)(d)). Instead, taxpayer delivers its own tangible personal property (a tray and sod) to the customer’s site, and then removes and replaces the soiled sod on a regularly scheduled basis. This activity is not a “retail sale” as defined in RCW 82.04.050. Since Taxpayer’s activity is not a retail sale in the first instance, the question whether it qualifies for exclusion as a “janitorial service” is irrelevant.

Because Taxpayer’s business activity is not taxed explicitly under RCW 82.04.290(1) or (3), or elsewhere in chapter 82.04 RCW, Taxpayer is subject to the catch-all Service & Other Activities B&O tax classification. RCW 82.04.290(2) and Rule 224. Accordingly, we remand the issue back to TAA for an adjustment consistent with this decision. In addition the warrant penalties should be cancelled.

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 reporting 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 he 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. The matter will be remanded to TAA for an adjustment consistent with this decision.

Dated this 26th day of July 2016.