

Cite as Det. No. 19-0246, 40 WTD 255 (2021)

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. 19-0246
)	
)	
...)	Registration No. ...
)	

WAC 458-20-172; RCW 82.04.050(2)(d): RETAIL SALES TAX; RETAILING B&O TAX – JANITORIAL SERVICES – MAINTENANCE AND RESTORATION SERVICES – APARTMENT CLEANOUTS. “Janitorial services,” for purposes of WAC 458-20-172 and RCW 82.04.050(2)(d), are services regularly and normally performed by commercial janitor services businesses. Maintenance and restoration services provided during apartment cleanouts 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.

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.

L. Roinila, T.R.O. – A company that provides maintenance and restoration services during apartment cleanouts argues that these services prove tantamount to janitorial services and, thus, are not subject to retail sales tax. Petition denied.¹

ISSUE

Whether, under RCW 82.04.050(2)(d) and WAC 458-20-172, a company engaged in performing general maintenance and repair services associated with apartment cleanouts is providing janitorial services.

FINDINGS OF FACT

... (Taxpayer) is a ... limited liability company that, among other things, performs a host of services on behalf of residential apartment complexes, including cleanouts, painting, pressure washing, window washing and routine janitorial services.

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

The Department of Revenue’s (Department) Taxpayer Account Administration Division (TAA) conducted a review of Taxpayer’s account for the period January 1, 2014, through December 31, 2017. During the course of this review, TAA discovered that, while some of Taxpayer’s business activities over the period at issue qualified as janitorial services, a majority of its services did not. Instead, TAA concluded that the bulk of Taxpayer’s business activities represented construction and maintenance activities. More specifically, and of particular relevance to this case, TAA further learned that Taxpayer’s construction and maintenance activities also included [performing] apartment cleanouts.²

Upon learning that the Taxpayer had reported its income over the examination period under the service and other business and occupation (B&O) tax classification, TAA reclassified that portion of Taxpayer’s income derived from its performance of construction and maintenance services from that classification to the retailing B&O tax classification. In addition, TAA assessed retail sales tax against the same income amounts. Finally, TAA assessed penalties and interest against the Taxpayer and issued an assessment of \$³

Disagreeing with TAA’s conclusions, the Taxpayer petitioned us in timely fashion [for] review. In support of its petition, Taxpayer asserts that, particularly in the early stages of its business operations, it provided routine janitorial services. Furthermore, Taxpayer argues, any ancillary services that it provided at all times here relevant were “few and far between.”⁴ We address these contentions below.

ANALYSIS

In Washington, “there is levied and collected from every person that has a substantial nexus with this state a [B&O] tax for the act or privilege of engaging in business activities.” RCW 82.04.220. The B&O tax measure is “the application of rates against value of products, gross proceeds of sales, or gross income of the business, as the case may be.” *Id.* The applicable rate is determined by the type of activity in which a taxpayer engages. *See generally* Chapter 82.04 RCW.

A taxpayer’s B&O tax classification is determined by the nature of the business activity it conducts, not by labels or terms that a taxpayer may choose to employ in its business records. Contradictory labels or terms are not relevant if they do not accurately represent the actual nature of the business activity being taxed. [*See*] Det. No. 17-0231, 37 WTD 088 (2018).

Income from any business activity that is not expressly classified in Chapter 82.04 RCW is taxed under the “catch all” Service and Other Business Activities B&O Tax Classification. RCW 82.04.290(2). This tax is measured by the gross income of the business. RCW 82.04.290(2)(a).

Washington law also imposes retail sales tax on every “retail sale” in this state, unless a specific exemption applies. RCW 82.08.020; RCW 82.04.050. The term “retail sale” is further defined by

² Residential landlords perform apartment cleanouts after an existing tenant departs and before a new tenant takes possession. Cleanouts typically include removing and hauling debris and restorative services.

³ This amount includes \$. . . in taxes, penalties of \$. . . , and, as of [date], interest in the amount, bringing the current total assessment to \$

⁴ Taxpayer Petition at 2.

statute and specifically includes the sale of, or charge made, for labor and services rendered in respect to:

The cleaning, fumigating, razing, or moving of existing building 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;

RCW 82.04.050(2)(d) (emphasis added). WAC 458-20-172 (Rule 172), the Department’s administrative rule addressing the taxation of janitorial and related services, provides additional clarification, stating in relevant part:

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 statute and rule thus [delineate] a line between cleaning and caretaking services ordinarily provided by commercial janitorial businesses, on the one hand, and other services associated with the cleaning of existing buildings and structures, on the other. Accordingly, the resolution of this case will depend in large measure on whether the Taxpayer engages in janitorial services when it performs its apartment cleanout activities or, alternatively, engages in something more.

We are further guided in this endeavor by Excise Tax Advisory 3209.2018 (ETA 3209.2018), where, in specifically addressing this distinction, the Department stated that, “as a general matter, janitorial services are those that involve light cleaning . . . performed regularly and normally, as opposed to sporadically.” *Id.* at 2. Non-routine or specialized services to clean or restore an existing building, in contrast, are not janitorial services and hence, fully subject to retail sales and retailing B&O tax. In addition, in a companion advisory addressing special clean up jobs required by construction, fires, floods, and other similar events, the Department wrote that “[s]pecial clean-up jobs are not considered ‘janitorial services’ even if they may include as part of the cleanup one or more activities that would otherwise fall within the definition of ‘janitorial services.’” ETA 3208.2018.

ETA 3208.2018 then provides a number of examples designed to highlight the distinction, the first of which appears particularly relevant to the issue at hand. Thus, in setting out a series of facts followed by a conclusion, the advisory provides as follows:

The Facts:

- ABC Cleaning Service (ABC) provides cleaning services to a construction company that builds and sells speculative residential homes.
- Services are provided initially upon completion of the construction of the home, and weekly cleanings are provided thereafter until the home is sold.
- Services for both the initial cleaning and the weekly cleanings consist of cleaning the entire home, including mopping and vacuuming floors, dusting walls, and cleaning bathrooms and kitchens fixtures. However, ABC's initial cleaning also requires substantial work to clear construction debris and to put the house in a sellable condition.

The Result:

• *Initial cleaning:*

- While ABC's initial cleanup includes some activities listed as typically "janitorial services" ordinarily performed by a commercial janitor service, in these circumstances, the initial cleanup is considered a special cleanup necessitated by the construction.
- The initial cleaning does not involve only light cleaning ordinarily performed by commercial janitor services, but rather is required only once due to construction and involves activities that are far more substantial and aimed at transforming the home into a not previously existing condition as the final part of the construction process.
- The initial cleanup is considered a special clean up job subject to the retailing B&O tax and retail sales tax.

• *Weekly cleaning:*

- The subsequent weekly cleanings are not performed due construction, flood, fire, or similar event or emergency and are performed regularly involving light cleaning ordinarily (regularly and normally) provided by commercial janitor service businesses.
- The weekly cleanings are "janitorial services" subject to the service and other B&O tax.

Id. at 3 (emphasis in original) (internal footnotes omitted). In the present case, we believe that the apartment cleanout services at issue prove far more akin to the services provided in initial construction cleanup just described. Although it is certainly true that an initial post-construction cleanup job of any given building or structure occurs only once, whereas apartment cleanouts can occur more frequently with respect to any given apartment, the former are nonetheless sporadic in nature and, accordingly, not routine. It is conceivable, for instance, that a tenant may occupy an apartment for many years. Likewise, while the Taxpayer no doubt does engage in some activities that might otherwise fall within the definition of "janitorial services" when it performs its apartment cleanouts, it also frequently must engage in "heavier" and more substantial cleaning and

restorative tasks of the type described in the ETA 3208.2018 example, above, to put the apartment in rentable condition. We therefore conclude that the Taxpayer's apartment cleanout services represent "special clean-up" jobs, and not "janitorial services," fully subject to Washington's retail sales and retailing B&O tax.

DECISION AND DISPOSITION

Taxpayer's petition is denied.

Dated this 17th day of September 2019.