

Cite as Det. No. 12-0157, 33 WTD 516 (2014)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Correction of) D E T E R M I N A T I O N
Assessment of)
)
 No. 12-0157
)
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 Registration No.
)

[1] RCW 82.04.290(2)(b); ETA 3036.2009: SERVICE AND OTHER ACTIVITIES B&O TAX – PEST CONTROL FUMIGATION OF CARGO CONTAINERS. Revenue from pest control fumigation of tangible personal property, as opposed to fumigation of buildings or other structures, is taxable under the service and other activities business and occupation (B&O) tax classification.

[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 taxpayer in the business of fumigating shipping cargo containers and their contents for extermination and pest control purposes appeals an assessment reclassifying its gross income from the retailing B&O tax classification to the services and other activities tax classification. We affirm the assessment.¹

ISSUES

1. Whether the fumigation of shipping cargo containers is a retail sale under RCW 82.04.050(2)(d).
2. Whether the taxpayer has established that the Department provided written tax reporting instructions upon which it relied necessitating the waiver of a tax assessment under RCW 82.32A.020(2).

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

FINDINGS OF FACT

[Taxpayer] provides extermination and pest control services in Washington. The taxpayer fumigates shipping cargo containers once the cargo container is transported off the ship and set on a truck chassis.

As early as 1979, and most recently in 1992, the taxpayer was instructed by the Department of Revenue (Department) that revenue from its cargo container fumigation services is classified under the service and other activities B&O tax classification. The taxpayer appealed an assessment issued in 1991 for service and other activities B&O tax and use tax. In that appeal, the taxpayer asserted that tax reporting information regarding his fumigation services provided by the Department in 1979 was confusing and misleading and that, in any event, the revenue from fumigating containers was exempt from tax because the containers were used in interstate commerce. The Department's Appeals Division issued an unpublished determination to the taxpayer in resolution of that appeal.² The unpublished determination provided, in pertinent part:

The second issue concerns the correct tax classification for fumigating ships and cargo containers. When the taxpayer made inquiries of the Department of Revenue in the late 1970's with respect to the application of taxes to pest control services, the taxpayer was supplied with a copy of ETB 265.04.172.³ The ETB provides, in pertinent part:

. . . when pest control work is performed in connection with a building or structure the Sales Tax applies to the charge made for the services performed. The income from this source is taxable under the Retailing classification of the Business Tax. Resale certificates may be given when purchasing supplies such as fumigants, baits, and poisons which are resold in performing pest control operations in buildings or other structures. "Buildings or other structures" is defined in Rule 170 to mean "everything artificially built up or composed of parts joined together in some definite manner and attached to real property."

Where the pest control services are not performed in connection with a building or other structure the income from the work is taxable under the Service classification of the Business Tax. The Sales Tax is not applicable to charges made to customers for performing the service. The Sales or Use Tax does apply to purchases by the pest control operator of bait, poisons, fumigants and other such supplies used in performing pest control work not connected with a building or structure. [Emphasis added.]

ETB 265 properly sets forth the tax classifications that apply to pest control services and how to differentiate between the classifications. It is noted that the July 27, 1979, letter to the taxpayer covered this distinction.

² Det. No. 92-348 (unpublished), issued December 7, 1992.

³ In 2009, the Department cancelled and reissued ETB 265.04.172 (ETB 265) as Excise Tax Advisory 3036.2009 as part of a new numbering system. Except for editing as to form, ETA 3036 is substantially the same as ETB 265.

Ocean going ships and cargo containers used thereon clearly are not buildings or other structures built up and attached to real property. Thus, it follows that any pest control and fumigation services rendered thereto would be classified as activities subject to tax under the Service and Other Business Activities classification of the B&O tax. RCW 82.04.290 provides, in pertinent part:

Upon every person engaging within this state in any business activity other than or in addition to those enumerated in . . . (citations deleted) . . . This section includes, among others, and without limiting the scope hereof . . . persons engaged in the business of rendering any type of service which does not constitute a "sale at retail" or a "sale at wholesale." [Emphasis added.]

The taxpayer is engaged in the business of providing pest control and fumigation services within this state to ocean going ships and cargo containers. The fact that those services are rendered in Washington gives rise to a Washington tax liability. It is not material that the goods contained on the ships and in the containers are bound for destinations other than Washington and thus will engage in interstate commerce.⁴ In this case the taxpayer is being correctly taxed based on a service it has rendered wholly inside of this state.

Det. No. 92-348 (unpublished). The taxpayer representative in the 1992 appeal . . . was the same representative as in the present appeal.

In 2011, the Department's Taxpayer Account Administration Division (TAA) examined the taxpayer's books and records for the period January 1, 2007, through June 30, 2010. The taxpayer reported its income for fumigating shipping cargo containers and their contents under the retailing B&O tax classification. In reporting retail sales tax the taxpayer took deductions under WAC 458-20-174(3)(b): Sales of component parts of motor vehicles and trailers and charges for repairs. The TAA excise tax examiner reclassified the taxpayer's gross income from fumigation services from the retailing B&O tax classification to the service and other activities B&O tax classification and issued an assessment for: service and other activities B&O tax in the amount of \$. . . , use tax and deferred sales tax in the amount of \$. . . , interest in the amount of \$. . . , and credit for the retailing B&O tax the taxpayer paid, for a total amount of \$. . .⁵ The taxpayer appealed the assessment to the Department's Appeals Division.

In its appeal petition the taxpayer asserts that the assessment should be cancelled because its container fumigation services are retail sales and it relied on instructions from the Department to report these services as retail sales.

⁴ See WAC 458-20-193D.

⁵ Document No. 201117640, issued April 15, 2011. After the assessment was issued, the Excise Tax Examiner informed the taxpayer that if it substantiated that it paid retail sales tax on any of the purchases for which it was assessed use tax, the use tax assessment would be adjusted.

ANALYSIS

The state of Washington imposes a B&O tax on virtually all business activities conducted in Washington. RCW 82.04.220. The B&O tax is imposed for the privilege of engaging in business in Washington. *Id.* The measure of the B&O tax is determined by the classification of the activities. Chapter 82.04 RCW. 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), are taxed under the service and other activities B&O tax classification, including any type of service that does not constitute a retail sale. RCW 82.04.290(2)(b).

Under RCW 82.04.050(2)(d), the term “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 . . .” The term “fumigating” is not defined in the statute but we have previously defined it as including the elimination of pests, dust mites, germs and odors. Det. No. 03-0278, 23 WTD 249 (2004). The term “buildings or structures” is “... everything artificially built up or composed of parts joined together in some definite manner and attached to real property ...” WAC 458-20-170(1)(d). Excise Tax Advisory 3036.2009 (ETA 3036) provides guidance as to when extermination and pest control services are a retail sale under RCW 82.04.050(2)(d). When pest control services are not performed in connection with a building or other structure, provision of those services are not retail sales, and the revenue from those services is taxable under the service and other activities B&O tax classification. ETA 3036.

The taxpayer fumigates cargo containers for extermination and pest control purposes when the containers are on a truck chassis. As the taxpayer was instructed in 1992, the containers are not attached to real property, therefore, the taxpayer’s fumigation services are not retail sales under RCW 82.04.050(2)(d). TAA properly classified the revenue from cargo container fumigation under the service and other activities B&O tax classification.

In regards to the taxpayer’s reliance on Det. No. 03-0278, 23 WTD 249 (2004), we find that determination is not . . . authority in support of the taxpayer’s assertion. The taxpayer in 23 WTD 249 appealed a letter ruling issued by the Department’s Taxpayer Information and Education (TI&E) section that the taxpayer’s treating of homes with ozone generators to cleanse the indoor air and surfaces of homes were retail sales. The letter ruling was based on a comparison of the use of ozone for these activities with pest control services. In determining whether the taxpayer’s services were retail sales, 23 WTD 249 addressed whether the taxpayer’s services constitute fumigation of buildings or structures under RCW 82.04.050(2)(d), and specifically noted the appeal did not include the issue of whether ozone treatment constituted pest control services.⁶ Because the term “fumigated” is not defined in RCW 82.04.050(2)(d), 23 WTD 249 used the dictionary definition, citing Webster’s Third International Dictionary 920 (1993):⁷

⁶ 24 WTD 249 references in a footnote that pest control may be a by-product of ozone treatment based on the ozone generator manufacturer’s instruction that to prevent harm to plants, animals and humans, they should be removed from the area before ozone treatment.

⁷ When a statute fails to define a term, the regular dictionary definition provides the term’s ordinary meaning. *City of Spokane v. Dep’t of Revenue*, 145 Wn.2d 445, 454, 38 P.3d 1010 (2002).

b: to treat (as a house or a room) with a gas for the purpose of disinfecting or of destroying pests; ... e: to make an odor imperceptible in (as a room) esp. by permeation with aromatic fumes.

Relying on the definition's inclusion of treating "a house or a room" for the purpose of "disinfecting" and "to make an odor imperceptible," 23 WTD 249 concluded:

The proposed activity fits this definition perfectly. The person in question intends to treat homes by permeating them with a gas (ozone) to disinfect them and to make odors in them imperceptible. We conclude that the proposed activity of using ozone to purify indoor air and clean indoor surfaces is fumigating.

As noted, RCW 82.04.050(2)(d) declares the activity of "fumigating" existing buildings or structures as a retail sale. Thus, any gross income received for treating homes, offices, or other building or structures with ozone to eliminate odors, germs, dust mites, molds, pests, etc. is subject to retail sales tax and retailing B&O tax. Likewise, any income received from treating RV's, boats, automobiles, trucks, etc. with ozone for similar purposes is also subject to retail sales tax and retailing B&O tax. *See* 82.04.050(2)(a).

The conclusion that taxpayer's proposed activity of treating homes with ozone is a retail sale is based on 23 WTD 249's application of RCW 82.04.050(2)(d), relating to fumigation of buildings and structures. In making the statement related to treating RV's, boats, automobiles, trucks, etc. with ozone, set forth in the quote above, 23 WTD 249 cites 82.04.050(2)(a), which defines a retail sale as including:

The installing, repairing, cleaning, altering, imprinting, or improving of tangible personal property of or for consumers, including charges made for the mere use of facilities in respect thereto, but excluding charges made for the use of self-service laundry facilities, and also excluding sales of laundry service to nonprofit health care facilities, and excluding services rendered in respect to live animals, birds and insects.

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

RCW 82.04.050(2)(a) pertains to tangible personal property. RCW 82.04.050(2)(a) does not include "fumigating" tangible personal property But for the last statement of its holding, 23 WTD 249 does not contain any discussion of how RCW 82.04.050(2)(a) encompasses the fumigation of RV's, cars and trucks with ozone for pest control purposes.⁸ Where a statement is made in a published determination regarding an issue not addressed in that appeal, the statement is dicta and does not constitute a holding on that issue. Det. No. 98-110, 18 WTD 26 (1999). . . . [T]o the extent 23 WTD 249 implies that treatment of tangible personal property with ozone for pest control purposes is a retail sale, it is overruled.⁹

⁸ 23 WTD 249 references the website of the manufacturer of ozone generators, which indicates that the ozone generators "produce high levels of pure ozone that are pumped into homes, buildings, cars, boats, RV's to cleanse indoor air and surfaces."

⁹ Treatment of tangible personal property with ozone to disinfect and remove odors[, other than for pest control purposes,] may be cleaning under RCW 82.04.050(2)(a), but that issue is not before us.

The taxpayer also asserts that during an audit in 2002, the auditor approved of its reporting fumigation services as retail sales. The 2002 audit report did not address the taxpayer's reporting of revenue from container fumigation services.¹⁰ The taxpayer has not provided any written instructions from the Department supporting its assertion. As provided in RCW 82.32A.020, a taxpayer has a 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;

RCW 82.32A.020(2) (emphasis added).

The taxpayer's right to rely on "specific, official written advice" does not include the right to rely on oral advice. *See* Excise Tax Advisory (ETA) 3065.2009 (the Department's advisory statement explaining the need for written instructions).

The taxpayer was actually provided written tax reporting instructions in the 1992 unpublished determination to report its revenue from container fumigation services under the services and other activities B&O tax classification.

In summary, we conclude that the taxpayer's revenue from fumigation of cargo containers falls under the services and other activities B&O classification and that the taxpayer has not shown that the Department previously instructed the taxpayer to treat its fumigation activities as retail sales. The taxpayer's petition is denied.

DECISION AND DISPOSITION

The taxpayer's petition is denied.

Dated this 14th day of June 2012.

¹⁰ Even if the taxpayer's improper reporting of its container fumigation revenue was overlooked, the Department is not barred from asserting a tax liability because an auditor failed to find an error during an earlier audit. *Dep't of Revenue v. Martin Air Conditioning*, 35 Wn. App. 678, 668 P.2d 1286 (1983); Det. No. 93-191, 13 WTD 344 (1994).