

Cite as Det. No. 91-228, 11 WTD 403 (1992).

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

In the Matter of the Petition)	<u>D E T E R M I N A T I O N</u>
For Refund of)	
)	No. 91-228
)	
. . .)	Registration No. . . .
)	. . ./Audit No. . . .
)	
)	

[1] RULE 109, RULE 101, RULE 118, RCW 82.04.150, & RCW 82.04.4281: B&O TAX -- REAL ESTATE CONTRACTS -- INTEREST FROM -- ENGAGING IN BUSINESS. A taxpayer whose contract sale of real property is subject to B & O tax on interest derived therefrom does not cut off his liability for same by simply declaring his retirement. Interest payments earned from sales of business property which continue beyond his cessation of conventional business operations are B & O taxable as well.

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.

TAXPAYER REPRESENTED BY: . . .

DATE OF HEARING: February 21, 1991

NATURE OF ACTION:

Petition for refund of B&O tax paid on interest income from real estate contracts.

FACTS AND ISSUES:

Dressel, A.L.J. -- . . . (taxpayer) was assessed \$. . . in state excise tax and interest by the Department of Revenue

(Department). He paid that amount but now requests its refund along with excise taxes he paid in previous years.

The taxpayer, before and during the audit period of January 1, 1986 through December 31, 1989, held several real estate contracts. They generated a significant amount of interest income. The taxpayer was registered with the Department during the audit period. At some point, he determined that he did not need to be registered and requested of the Department that his registration be cancelled. The request triggered an examination of his records which resulted in the above captioned tax audit.

This taxpayer was originally registered with the Department in 1944 when he was in the business of auto repairing. Subsequent to that, he became a "gyppo" logger as well as a miller of rough lumber. As part of this business, he purchased tracts of land, logged them, and then sold the land by real estate contract. These contracts called for monthly payments which included interest. At the hearing of this matter, the taxpayer stated that he intended that this income would finance his retirement. The vast majority of the income was from one contract for a large tract of business property

The taxpayer reports he retired from the logging business in 1979 and has not conducted any other business since that time. His sole source of income from 1979 to present has been these contracts. The only reason he remained registered with the Department after retirement was that an accountant advised him to keep the registration open in case he ever resumed his logging business.

The Department's auditor recognized that certain other real estate contracts purchased by the taxpayer as investments were exempt from B&O taxation as "incidental investments of surplus funds" under ETB 505.04.109. Income from those contracts was not taxed in the subject audit. The auditor, however, was unwilling to extend such exemption to the contracts at issue. He characterized them as "seller-financed real estate contracts". He cited Determination 89-146, 7 WTD 257 (1989) as authority for the proposition that a real estate contract creates interest income in exchange for a seller's agreement to defer immediate payment of the full purchase price. The auditor claimed that this was not an investment, the income from which was exempt from B&O tax under RCW 82.04.4292, because no money was loaned or invested. An agreement to delay the payment of money owed is different than an investment, according to the auditor. He concluded that inasmuch as the interest income did not qualify for the exemption of RCW 82.04.4292, it was subject to B&O tax under the Service and Other Activities classification.

The taxpayer disagrees with that position on a number of grounds. First of all, he says he was not engaging in business. Secondly, the major real estate contract of the several held by the taxpayer had nothing to do with any previous business of the taxpayer.¹ Thirdly, the real estate sales at issue are exempt of B&O tax as casual or isolated sales. Fourth, the taxpayer's are exempt investments under RCW 82.04.4281. Fifth, the taxpayer disagrees with the cases cited by the auditor in support of his assessment in that the taxpayers in 4 WTD 211 (1987), 5 WTD 257 (1988), and 7 WTD 257 (1989) were clearly engaging in business while he was not.

The issue is whether the taxpayer's receipt of interest from real estate contracts is a B&O taxable activity.

DISCUSSION:

[1] "Business' includes all activities engaged in with the object of gain, benefit, or advantage to the taxpayer or to another person or class, directly or indirectly." RCW 82.04.140. "Engaging in business' means commencing, conducting, or continuing in business. . ." RCW 82.04.150.

There is no doubt that until the taxpayer "retired" from logging in 1979 that he was engaging in business. He suggests that event terminated any liability he might have for the business and occupation (B&O) tax. We disagree.

Of the seven real estate contracts at issue here, six were entered during the period the taxpayer was active as a logger and miller. Indeed, he purchased those six properties, logged them, and sold them. It cannot be seriously questioned that the purchase and sale of these tracts of land at that time was part of his business. The "gross proceeds" from such sales, however, are exempt of the B&O tax as sales of real estate. RCW 82.04.390. Interest derived as a result of financing such sales on a real estate contract, however, is not similarly exempt. RCW 82.04.390. During the time he was otherwise engaged in business as a logger, the interest from these real estate contracts was B&O taxable.

After the taxpayer's retirement as a logger, he continued to engage in business vis-a-vis these continuing real estate contracts, regardless of whether he held himself out to the public as engaging in business. Indeed, it is not necessary that one hold him or herself out to the public as engaging in business

¹This, apparently, is the contract involving the large tract of business property

in order for that person to be subject to the state's B&O tax. ETB 19.04.194. ETB 68.04.109. Following the cessation of his logging operations, the taxpayer continued to defer full payment of the purchase prices of the several properties in exchange for interest income for such forbearance. His object was the obvious "gain, benefit, or advantage" of this additional income. His activity fits the statutory definition of "business". He continued to "engage in business" in that he continued deferral of the purchase prices and receipt of interest income past the cessation of his logging activities per se. Because he continued to engage in business as above described, he continued to be subject to the B&O tax. The taxpayer may not suddenly exempt himself from the B&O tax by declaring that he is no longer in the logging business and/or by announcing his retirement. The reality of his actual business activities must support such a statement.

Turning to the matter of the seventh and largest real estate contract², we first observe that it was entered in 1980, after the taxpayer ceased his logging operations. As described above and contrary to the position taken in his petition, the taxpayer was engaged in business at that time. He was in the business of deferring the receipt of the full purchase price of real property in exchange for the payment of interest. This seventh contract, then, was made while he was engaging in business. Moreover, it was of the same ilk as his other business activities of that time, the sale of real properties via real estate contract. It was, therefore, not a "casual or isolated sale". See WAC 458-20-106. Further, and also contrary to the taxpayer's contention, the sale of that property did have a relationship with his previous business dealings in that he received income, prior to 1979, from a tavern operated on the property in question as well as from a convenience store/gasoline station which the taxpayer operated for a time.

Finally, the taxpayer's contracts are not "investments or the use of money as such" under RCW 82.04.4281. His contract sales of the subject properties are ineligible for the tax exemption recited in this statute. "No money is loaned, and the activity does not qualify as investment of money". Determination 89-146, 7 WTD 257, 259 (1989). The taxpayer here does not advance (invest) money. Rather, he relinquishes the right to immediate payment. Clifford v. State, 78 Wn.2d 4, 8 (1970). "This does not meet the test of an investment": Detlefsen v. Department of Rev., Board of Tax Appeals (BTA) Docket No. 84-38 (1985).

²This contract was "largest" in terms of the interest income it produced.

The taxpayer continues to be engaged in business and subject to the B&O tax.

DECISION AND DISPOSITION:

The taxpayer's petition is denied.

DATED this 22nd day of August 1991.