

Cite as 11 WTD 285 (1991).

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 Correction of Assessment)	
of)	No. 91-316
)	
. . .)	Registration No. . . .
)	. . ./Audit No. . . .
)	

[1] RULE 156: B&O TAX -- RETAILING -- SERVICE -- ESCROW AGENTS -- ATTORNEYS -- SEPARATE BUSINESS. Attorneys performing escrow services are performing legal services and taxable under the service classification of the business and occupation tax. However, where the escrow services are performed by a completely separate department of a law firm, none of the services are performed by attorneys, and the client is specifically advised that the firm is acting as an independent escrow agent and not as attorneys, the services are escrow services and taxable under the retailing classification of the B&O tax and retail sales 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.

TAXPAYER REPRESENTED BY: . . .

NATURE OF ACTION:

Taxpayer protests the reclassification of escrow income from the retailing classification of the business and occupation tax to the service and other classification.

FACTS AND ISSUES:

Hesselholt, A.L.J. -- Taxpayer is a law firm. The taxpayer's books and records were audited by the Department of Revenue for the period January 1, 1987 through March 31, 1991. As a

result, an assessment was issued in the amount of \$. . . , which included taxes and interest. Taxpayer protested that part of the assessment which reclassified its escrow income from retailing business and occupation tax to the service and other classification.

The taxpayer has an escrow department which is run essentially as a separate business. The persons who run the escrow business are not attorneys, and the escrow department has a separate phone number, separate bank account, separate trust account, separate computer system and completely separate set of books. Those running the escrow department are limited practice officers under APR 12. The taxpayer holds the escrow department out to the public to perform escrow services. It is not separately licensed under the provisions of RCW 18.44.020.

The Audit Division reclassified the escrow income because under WAC 458-20-207 (Rule 207),

attorneys primarily render professional legal services and are not required to collect retail sales tax from clients and others paying for such services. This is so even though the legal services rendered by the attorney may include. . . escrow business activities which are "retail sales" under the law when performed by persons other than attorneys.

In the taxpayer's escrow instructions, the following language appears:

DECLARATION OF ESCROW SERVICES: Both Purchaser and Seller acknowledge by their signatures hereon, the following:

That [taxpayer], a law firm, is being retained as an independent escrow agent and not being retained to represent either Purchaser, Seller, or any party involved in this transaction. It is hereby agreed that [taxpayer] shall neither offer legal advice nor will legal advice be solicited.

I have not been referred by [taxpayer] to any named attorney or attorneys or discouraged from seeking advice of any attorney, but have been requested to seek legal counsel of my own choosing at my own expense if I have doubt concerning any aspect of this transaction.

Thus, the question presented is whether an escrow department that is part of a law firm, but run as a completely separate department, is subject to tax as an escrow business or as a legal business.

DISCUSSION:

RCW 82.04.050 includes within the definition of a retail sale charges made for professional services by persons engaging in the escrow business. (See RCW 82.04.050 (3)(b)). WAC 458-20-156 (Rule 156) provides that the gross receipts of escrow businesses are taxable under the retailing classification of the business and occupation tax, and subject to the retail sales tax on fees or premiums charged for escrow services. Attorneys, under WAC 458-20-138 (Rule 138), are subject to tax under the service and other classification of the B&O tax on the gross income of their businesses.

Business is defined as all activities engaged in for gain, advantage, or benefit. RCW 82.04.140. Taxpayers are taxable upon all business activities, and are subject to taxation on each business activity engaged in. RCW 82.04.220, RCW 82.04.150, RCW 82.04.140. The performance of escrow services is engaging in the practice of law. Washington Bar Association v. Great Western Union Federal Savings and Loan Association, 91 Wn.2d 48 (1978), Hagen and Van Camp, P.S. v. Kassler Escrow, Inc., 96 Wn.2d 443 (1981). However, after those cases were decided, the Supreme Court adopted APR 12, the Limited Practice Rule for Closing Officers, which allows lay persons to be admitted to limited legal practice as certified closing officers (escrow agents). Under RCW 18.44.010(4)¹, an escrow agent is "any sole proprietorship, firm, association, partnership, or corporation engaged in the business of performing for compensation" escrow services. Escrow agents are not required to be attorneys. The escrow department specifically informs all escrow clients that it is not acting as an attorney in performing escrow services, but is acting only as an independent escrow agent. The attorneys are not performing the escrow services. The billings to the escrow customers are not for any legal services, nor are they performed incidentally to any legal services. In this case, the taxpayer is operating two separate businesses, and should be taxed on each business separately.

¹Rule 156 uses the definitions of "escrow" and "escrow agent" contained in RCW 18.44.010.

DECISION AND DISPOSITION:

Taxpayer's petition is granted. The file shall be returned to the audit section, with instructions to reverse the reclassification of the escrow income.

DATED this 19th day November 1991.