Cite as Det. No. 90-231A, 12 WTD 305 (1990).

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

In the Matter of the Petition For Correction of Assessment and Refund of	)	F I N A L D E T E R M I N A T I O N
	)	No. 90-231A
. . .	)	Registration No. . . .
	)	. . ./Audit No. . . .

[1] RULE 156: ESCROW AGENTS -- ESCROW FEES -- TRUSTEE'S FEES -- DEEDS OF TRUST -- SERVICE AND RETAILING B&O TAX -- RETAIL SALES TAX. Amounts received by an escrow company from activities relating to deeds of trust are generally subject to the retailing classification of the B&O tax and are subject to retail sales tax unless the escrow company is named trustee on the deed of trust and derives its fees from services rendered in that capacity.

[2] RULE 156: ESCROW AGENTS -- ESCROW FEES -- TRUSTEE'S FEES -- DEEDS OF TRUST -- COLLECTION CONTRACTS -- SERVICE AND RETAILING B&O TAX -- RETAIL SALES TAX. Amounts received by an escrow company from activities relating to deeds of trust are generally subject to the retailing classification and are subject to retail sales tax unless such activities involve collection contracts that do not involve an escrow.

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 AND PLACE OF HEARING: . . .

NATURE OF ACTION:

Escrow company appeals to the Director for a reversal of Det. No. 90-231, which upheld the assessment of retail sales tax and retailing business and occupation tax on receipts that escrow company contends did not derive from escrow activities.

FACTS:

Roys, Sr. A.L.J. -- The issue is whether retail sales tax and retailing business and occupation (B&O) tax were properly assessed on taxpayer's receipts from certain activities relating to real estate transactions that involved deeds of trust. The audit period was from January 1, 1985 through January 31, 1989. The Department assessed taxpayer retail sales tax of $ . . . and retailing B&O tax of $ . . . , plus interest. (Taxpayer was also assessed use tax, but that portion of the assessment is not at issue.) The assessment has not been paid.

Taxpayer provides services to clients with respect to sales of real estate. These sales are sometimes accomplished through real estate contracts and sometimes through deeds of trust. Taxpayer had been paying sales tax on receipts from both types of transactions by "factoring out" the amount of the sales tax from the amount collected.

In approximately April 1989, taxpayer was informed by an "outside source" (i.e., not by the Department of Revenue) that its receipts from real estate transactions that involved deeds of trust should not have been reported under the retailing classification, but instead should have been reported under the service classification of the B&O tax.

Taxpayer subsequently contacted a Department of Revenue Taxpayer Service Representative (TSR), whom taxpayer identified. The TSR apparently agreed that taxpayer's receipts relating to deeds of trust were subject to tax under the service classification and instructed taxpayer to prepare amended returns reflecting the change in tax classification. Taxpayer claims it spent $2,000 to program its computer to identify the accounts and amounts affected. [In April 1989], taxpayer filed amended returns, which reported its receipts from transactions involving deeds of trust under the service classification. Based on these amended returns, taxpayer claimed a refund of retail sales tax and retailing B&O tax.

Apparently, in attempting to process the amended returns, the TSR spoke with a Department auditor. The auditor arranged for the audit of taxpayer that resulted in the assessment at issue. The bulk of the assessment represents additional retail sales tax due because taxpayer was not separately stating sales tax to its customers, but instead was factoring out the amount of the sales tax from the gross price. The audit instructed taxpayer that it was no longer to factor out the sales tax but was instead to separately state the tax from the charges. Further, the

auditor's detail of differences and instructions to taxpayer, [of August 1989] states:

> [T]he fees received from services received [sic] on "notes and deeds of trusts" [sic] are "escrow fees" subject to the Retailing and Retail Sales Tax classifications.

Thus, taxpayer's refund request was not granted, and the additional retail sales tax and retailing B&O tax set forth above were assessed.

Taxpayer provided documentation regarding its activities with respect to deeds of trust. The documents are entitled "escrow instructions." Under these instructions, taxpayer is appointed and designated as the "escrow agent." The deeds of trust list a title insurance company as the trustee. As escrow agent, taxpayer is:

> authorized and instructed to deliver the above documents [a promissory note and sale agreement/contract] to the Purchaser when all of the terms, conditions and requirements set out in the above documents have been fulfilled and complied with and the Purchaser has paid to [taxpayer] as escrow holder, for the Sellers [sic] order in the manner required and at the times prescribed in the above referred documents [a specified sum at specified dates].

During the term of the agreement, taxpayer is responsible for collecting payments from buyer, remitting the payments to seller, and crediting the proper amounts of such payments to principal and interest. If a default occurs for which the duties of a trustee are required (as described in RCW 61.24), the deed of trust is returned to the trustee.

Taxpayer also provided documentation regarding its activities with respect to real estate contracts, which taxpayer acknowledges entail retailing activities. The only "significant" difference between taxpayer's responsibilities with respect to real estate contracts and its activities with respect to deeds of trust is that the former activities require taxpayer to deliver to the purchaser a fulfillment warranty deed and notice of real estate contract (rather than the promissory note used in the deed of trust transactions) with the sale agreement/contract when certain conditions are met.

The "escrow instructions" relating to both types of transactions repeatedly refer to the transactions as an "escrow." The documents relating to both transactions show that taxpayer is

holding the documents in escrow and appoint taxpayer as the "escrow agent/holder" in the transaction. The instructions under both types of transactions define the "escrow agent's" responsibilities as follows:

> Your only responsibility or obligation under this escrow shall be to hold and deliver documents, issue receipts, and to account for and transmit money which has been voluntarily paid.

Further, the fees taxpayer receives under the "escrow instructions" provided for both types of transactions include an acceptance fee "for the establishment of this escrow" and an annual fee due "each anniversary month of this escrow." In addition, taxpayer, as "escrow agent," is entitled to retain any interest earned on amounts deposited pursuant to the escrow arrangement as "an additional escrow fee for services rendered." Thus, all charges are characterized as escrow charges -- none of the charges is listed as "trustee's fees." Finally, the instructions under both types of transactions provide:

> CLOSED or CLOSE shall mean the finalization and termination of this escrow when all of the terms and conditions have been met and performed by the Parties and all of the required payments have been paid and the documents have been delivered.

In addition to the closing described above, the escrow instructions provide that if the balance due on an obligation underlying the property becomes equal to the amount due under the escrow, the purchaser shall have the option to:

> either close this escrow and assume, or take the property subject to, as the case may be, the underlying obligation(s), or in the alternative, to have this escrow changed to a collection agreement between the Purchaser and [taxpayer], with payment terms identical to the terms of the said underlying obligation(s). In either case the Sellers [sic] interest in this escrow shall terminate.

Det. No. 90-231 referred taxpayer's file back to the Audit Division. To the extent taxpayer could show that it was receiving fees for acting as a trustee on a deed of trust and could show that it was listed as the trustee on the deed, it was to report its income under the service classification of the B&O tax and was to receive a refund of the retail sales tax and retailing B&O tax paid. Otherwise, that determination concluded, taxpayer's activities were properly classified as retail sales. Prior to taxpayer's file being reviewed by the Audit Division,

taxpayer petitioned for Director level review of the determination.

TAXPAYER'S EXCEPTIONS:

Taxpayer does not contest that, to the extent it engages in retailing activities, it erred in "factoring out" retail sales tax from its receipts. However, taxpayer contends that our prior determination was in error because "taxpayer not only 'received information to the effect that amounts received as trustee should not have been subjected to the retail sales tax,...', but was instructed by [the TSR whom taxpayer identified] to prepare amended returns reflecting the change." Taxpayer further contends that, contrary to the finding of our prior determination, it prepared amended returns and requested a refund or credit prior to the commencement of the audit that resulted in the assessment at issue.

With respect to the substantive issues, taxpayer contends it was a trustee on notes and deeds of trust and that ETB 288.04.156 mandates that its receipts be reported under the service classification. Taxpayer argues that the title insurance company that is listed as the trustee on the deed of trust only assumes that role when taxpayer is no longer in possession of the deed:

> [T]he trustee function of the title insurance company is not operational while the taxpayer has physical custody of the Deed of Trust, and . . . the taxpayer is the trustee of the deed of trust during the time when it is collecting payments. In fact, the title insurance company may not regain custody until the note is retired or a judgement [sic] and order are entered directing the taxpayer to deliver the deed of trust to another party in the event of a default proceeding.

Alternatively, taxpayer argues that if it is not a trustee, its receipts nonetheless did not derive from engaging in an "escrow business." Taxpayer explains that the primary difference between transactions involving real estate contracts (which taxpayer accepts are "escrow" activities) and those involving deeds of trust "is in who is the title holder":

> With a note and deed of trust the title passes to the buyer upon closing. The taxpayer is not holding the title to be transferred to the buyer upon the final payment. With the real estate contract, the title remains in the seller and is transferred to the buyer when the final payment is made.

Taxpayer therefore contends that because title has already passed prior to taxpayer's involvement in the transaction, our prior determination erred in holding that it is "possible to hold a deed of trust in escrow, pending performance of the obligations of the purchaser under the purchase agreement." Taxpayer concludes that in order for an escrow to exist:

> [T]he initial and subsequent activity must be related to effecting and closing a transaction. . . . All [taxpayer] does on the deed of trust accounts is collect payments which do not involve an escrow. With a deed of trust the sale of real property has been finalized and closed before [taxpayer] assists the seller in collecting payments. It is purely a collection contract as provided for in Rule 156.

ISSUES:

1. Whether taxpayer was the "trustee" of the deeds of trust, as that term is used in ETB 288.04.156.

2. If taxpayer was not the "trustee" of the deeds of trust, whether taxpayer's receipts derived from an "escrow" business.

3. Whether the Department is estopped from collecting retail sales tax and retailing B&O tax because of the information given to taxpayer by the TSR.

DISCUSSION:

"Retail sale" includes the "charge made for . . . professional services including amounts designated as interest, rents, fees, admission, and other service emoluments however designated, received by persons engaging in . . . escrow businesses." RCW 82.04.050(3). Thus, escrow businesses are subject to retail sales tax and retailing B&O tax on such charges. RCW 82.04.250, .08.020; WAC 458-20-156 (Rule 156). Rule 156 provides that the gross receipts of an escrow business include all escrow fees and service charges received by "escrow agents." Rule 156 includes the definitions of escrow contained in Ch. 18.44, the Escrow Agents Registration Act. Escrow means:

> any transaction wherein any person or persons, for the purpose of effecting and closing the sale, purchase, exchange, transfer, encumbrance, or lease of real or personal property to another person or persons, delivers any written instrument, money, evidence of title to real or personal property, or other thing of value to a third person to be held by such third person until the happening of a specified event or the

> performance of a prescribed condition or conditions, when it is then to be delivered by such third person, in compliance with instructions under which he is to act, to a grantee, grantor, promisee, promisor, obligee, obligor, lessee, lessor, bailee, bailor, or any agent or employee thereof.

RCW 18.44.010(3).

Escrow agents are defined in Rule 156 to include any corporation "engaged in the business of performing for compensation the duties of the third person referred to in the foregoing definition."

[1] Taxpayer's first argument is that it was acting as "trustee" on deeds of trust and that ETB 288 provides that a trustee's receipts do not derive from retail sales.

The narrow issue addressed in ETB 288 is whether fees collected by a title insurance company when acting as a "trustee" on deeds of trust are subject to retail sales tax. In ruling that such fees are not subject to retail sales tax, the ETB assumed that "the trustee performed no real service until such an event as a reconveyance or foreclosure occurred." This assumption is consistent with the statutory duties of a trustee. RCW 61.24.040, .080, .110. A trustee has no other duties.

In contrast to the situation described in the ETB, taxpayer took an active role in the transaction prior to reconveyance or foreclosure. During the term of the agreement, taxpayer was responsible for collecting payments from buyer, remitting the payments to seller, and crediting the proper amounts of such payments to principal and interest. If a default occurred for which the duties of a trustee were required (as described in RCW 61.24), the deed of trust was returned to the trustee.

In short, the ETB addresses the taxation of the "trustee" of a deed of trust, as those duties are described in RCW 61.24. The ETB does not state that all services relating to deeds of trust are subject to tax under the service classification. As we stated in our prior determination, to the extent taxpayer can prove that it was receiving fees for acting as trustee on deeds of trust (as defined in RCW 61.24) and was listed as trustee on deeds of trust, taxpayer is entitled to a refund or credit of the retailing B&O tax and retail sales tax paid and should report its receipts under the service classification of the B&O tax. To the extent taxpayer is not listed as the trustee on the deed of trust and it performs services other than those required of the trustee, the ETB is not controlling.

[2] Taxpayer next contents that, even if it is not a "trustee" on deeds of trust, its receipts are properly taxed under the service classification. Taxpayer argues that because title to the property has already passed before taxpayer is involved in the transaction, the transaction is not an escrow transaction.

The existence of an escrow does not hinge on the escrow agent holding title. Many documents, and even money, can be held in escrow. Rule 156. Thus, the fact that title has already passed prior to taxpayer's involvement in the transaction does not preclude the existence of an escrow. Nor does the fact that title has passed prevent the transaction from "effecting and closing a sale, purchase, exchange, transfer, encumbrance, or lease of real or personal property." Taxpayer's own documents recognize this. Those documents define closing as simply "the finalization and termination of the escrow when all of the terms and conditions have been met and performed by the Parties and all of the required payments have been paid and the documents have been delivered." Thus, although title has already passed, taxpayer is still involved in "effecting and closing" the transaction once all the required payments have been made.

Taxpayer is an escrow business registered with the Department of Licensing pursuant to RCW 18.44. As a licensed escrow business, taxpayer is required to be bonded and is required to maintain separate escrow fund accounts for its clients. RCW 18.44.050, .070. The taxpayer's representative noted that the "escrow officer shall be responsible for the custody, safety and correctness of entries of all required escrow records," and that "the taxpayer is subject to various requirements as to bonding and insurance." Letter of [August 1990]. Clearly one reason parties use a licensed escrow agent to collect payments on sales of real estate is that the escrow agent is subject to the provisions of Chapter 18.44.

Taxpayer's final substantive argument is that its escrow agreements are really "collection contracts." Rule 156 provides:

> The gross income from collection contracts which do not involve an escrow as above defined is subject to tax under the classification service and other activities.

As discussed above, taxpayer's agreements do involve an escrow. Therefore, while the escrow agreements are in effect, taxpayer's agreements clearly cannot be "collection contracts which do not involve an escrow."[1]

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[1]Where taxpayer's services continue after the termination of the escrow, its receipts may qualify as receipts from "collection

[3] Finally, taxpayer argues that it relied on advice from the Department in reclassifying its income from the retailing classification to the service classification of the B&O tax. In other words, taxpayer argues that the Department is estopped from assessing retail sales tax and retailing B&O tax on taxpayer's receipts from activities involving deeds of trust.

To create an estoppel, three elements must be present: (1) an admission, statement, or act inconsistent with the claim afterwards asserted; (2) action by the other party on the faith of such admission, statement, or act; and (3) injury to such other party resulting from allowing the first party to contradict or repudiate such admission, statement, or act. Harbor Air Service, Inc. v. Board of Tax Appeals, 88 Wn.2d 359, 366-67, 560 P.2d 1145 (1977).

Taxpayer first contacted the TSR in approximately April 1989. It is not entirely clear whether the TSR was given sufficient information to make an independent judgment as to whether taxpayer was acting as a trustee. In fact, it is quite possible that taxpayer simply represented that it was acting as trustee on deeds of trust and that the TSR simply confirmed that income from acting as a trustee on a deed of trust is subject to the service classification. In that case, the TSR's advice was correct but was based on an inaccurate presentation of the facts. Even if the TSR were given sufficient and accurate facts and the TSR gave taxpayer incorrect information, estoppel does not apply with respect to the audit period. For estoppel to apply, taxpayer would have had to rely on the TSR's statements. Because the TSR's statements were made after the close of the audit period, taxpayer could not have relied on those statements during the audit period.

If the taxpayer reported its income under the service category after April 1, 1989, we would agree that income should not be reclassified through August 31, 1989, the date the taxpayer was instructed by the Audit Division that its fees received on notes and deeds of trusts are "escrow fees."

DECISION AND DISPOSITION:

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contracts which do not involve an escrow." Specifically, taxpayer's escrow agreements provide that if the balance due on an obligation underlying the property becomes equal to the amount due under the escrow, the purchaser has the option to have the escrow changed to a collection agreement between the purchaser and taxpayer. Because the escrow agreement and the seller's interest in that agreement will have terminated at that time, these receipts may qualify for the service classification.

The taxpayer's petition is denied.

The taxpayer is entitled to a refund or credit of retailing B&O tax and retail sales tax if it is able to prove that its receipts derived from either (1) services performed as trustee on deeds of trust where taxpayer was listed as trustee; or (2) services performed under collection contracts that do not involve escrow agreements (i.e., where the escrow agreement has terminated and the purchaser elects to create a collection agreement between purchaser and taxpayer). Such receipts would be subject to Service B&O. If the taxpayer has such evidence, it should be presented to the auditor prior to the due date or within the refund period provided by RCW 82.32.

DATED this 27th day of July 1992.