Cite as Det. No. 92-204, 12 WTD 391 (1992)

THIS DETERMINATION HAS BEEN OVERRULED OR MODIFIED IN WHOLE OR PART BY DET. NO. 94-154, 15 WTD 46 (1995).

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

In the Matter of the Petition For Correction of Assessment of	)	D E T E R M I N A T I O N
	)	No. 92-204
. . .	)	Registration No. . . .
	)	. . ./Audit No. . . .

[1] RULE 170: SPECULATIVE BUILDERS -- USE TAX. Substantive ownership interest in land as a matter of record and notice to the whole world is the decisive factor to be determined under Rule 170. Actually acquiring title by deed clearly constitutes ownership under the rule. Housing construction on land owned by the taxpayer is subject to sales or use tax. Speculative builders must pay the tax upon all materials they purchase and on all charges made by their subcontractors. Accord: Reliable Builders, Inc. v. Department of Revenue, Docket No. 17074 (BTA 1978).

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:

The taxpayer protests an assessment of use tax and an audit finding that it is a speculative builder.

FACTS:

De Luca, A.L.J. -- The Department of Revenue audited the taxpayer for the period January 1, 1986 through June 30, 1990. The Department assessed the taxpayer $ . . . in retail sales tax and $ . . . in use tax plus interest, totalling $ . . . . The due date was [December 1990]. The taxpayer

timely paid the retail sales tax, but protests the use tax in Schedule III. The taxpayer filed its petition [in January 1991].

The taxpayer is a corporation which usually constructs roads and highways, but not houses. In 1986, the taxpayer purchased undeveloped land to subdivide and sell lots to builders. The taxpayer sold over 100 lots. Three lots are at issue. The facts are similar for the three lots. Each lot had a separate builder who constructed a house on it. The builders were unrelated to each other and are not the taxpayer's employees or shareholders.

Apparently, the three builders were unable to obtain construction loans from commercial lenders. Therefore, the taxpayer and each builder entered into written construction loan agreements where the taxpayer provided the financing. The parties also signed promissory notes and documents entitled "Agreement." The agreements allowed the builders to construct the houses upon land owned "free and clear" by the taxpayer. The taxpayer retained title in the properties until the houses were sold to third parties. During this time, the parties were prohibited from conveying or encumbrancing the properties except as agreed.

The agreements provide that the builders are independent contractors and were solely responsible for obtaining all permits. If the permits were unobtainable because of physical defects in the property, the agreements terminated and the builders "shall have no interest in the property." Further, if the builders failed to obtain occupancy permits within five months after closing the loans, the agreements terminated upon ten days notice if the default was not cured. Consequently, the builders would retain no interest in the properties.

The taxpayer was entitled to approximately $30,000 of the gross proceeds from the sale of each house. The builders were entitled to the difference between that sum and the gross sales price after repayment of the construction loans. The taxpayer and each builder agreed to split the seller's closing costs when they sold the properties to third parties.

Citing WAC 458-20-170, the Audit Division determined the taxpayer was a speculative builder who was constructing buildings for sale upon real estate owned by it. Audit assessed the taxpayer use tax based on the loan amounts it provided to the builders.

TAXPAYER'S EXCEPTIONS:

The taxpayer claims it was not a speculative builder and the assessment should be abated. It contends it transferred ownership of the real estate to the builders, who were the actual speculative builders. The taxpayer did not construct the homes. The builders did. All the taxpayer did was retain title to the lands and provide construction financing. The builders were responsible for obtaining all permits and were required to indemnify and hold harmless the taxpayer for all claims. The builders were also responsible for keeping in force worker's compensation insurance.

The taxpayer cites the four attributes of ownership contained in Rule 170. One is the intention of the parties in acquiring the land. Two is the person who paid for the land. Three is the person

who paid for the improvements. Four is the manner in which all parties, including financiers, dealt with the land.

The taxpayer concedes it alone acquired the land to subdivide and sell lots to new home builders. However, it claims it did not intend to build homes itself. Two, it admits it paid for the land and had title to it. However, taxpayer argues it constructively transferred the land to the builders for the fixed amounts from the gross sales proceeds. Three, it admits it loaned the construction funds, but claims the builders paid for the improvements. Four, although the taxpayer retained title to the land during construction, the taxpayer contends laborers and suppliers dealt with the builders as the owners.

Finally, the taxpayer claims each of the builders paid sales or use tax on their subcontracts and materials purchases. If the taxpayer is a speculative builder, the Department of Revenue should give the taxpayer credit sales or use tax paid.

ISSUE:

Did the taxpayer convey the lots to the builders as sales of real estate which would exempt it from paying use tax?

DISCUSSION:

It is true that amounts derived from the sale of real estate are exempt from sales tax. However, construction on real property is subject to tax. A speculative builder is "one who constructs buildings upon real estate owned by him." Although a speculative builder is not liable for sales taxes on the full contract price, speculative builders must pay sales tax upon all purchases by them and on all charges made by their subcontractors. Rule 170. Additionally, the rule expressly provides that the attributes of ownership are not limited to the four factors discussed above.

The taxpayer admits it alone purchased the property. It intended to subdivide the land and sell lots for housing construction. It loaned the money to build the houses. It claims subcontractors and materials suppliers dealt with the builders as the owners. However, other parties such as the county assessor, escrow companies and third party purchasers of the house dealt with the taxpayer as the owner. These factors alone provide a preponderance of evidence that the taxpayer was the owner of the properties.

More importantly, the taxpayer solely held title to the properties. It never conveyed by deed any interest in the land to the builders. When the properties were sold to third parties the taxpayer was the grantor of the deeds. In light of these facts, the taxpayer asserts it constructively transferred ownership to the builders. However, the agreement provided if the houses did not have occupancy permits after five months from the loan closings, the builders would retain no interest in the properties following ten days notice and failure to cure. Moreover, if the land was unsuitable for building permits, the builders would retain no interest in the properties. We do not need to determine what, if any, interests the builders had in the properties to resolve this appeal.

We note at all times the taxpayer retained record title and enough possessory interests in the properties to be an owner.

See Reliable Builders, Inc. v. Department of Revenue, Docket No. 17074 (1978) where the Board of Tax Appeals rejected an argument that record title should be disregarded in favor of an implied trust or agency in others. The Board held the substantive ownership interest in land was a matter of record and notice to the whole world. For tax purposes ". . . this is the decisive and sole factor to be considered herein. The actual acquisition of title by deed . . . clearly constitutes ownership under Rule 170."

As the owner of the real estate upon which the houses were built, the taxpayer is liable for sales or use tax by either one of two ways. One, the taxpayer would be liable for the tax on the full contract prices if the builders were prime contractors and the taxpayer was a consumer. Otherwise, the taxpayer is liable for the lesser amount of tax upon all materials purchased and on all charges made by its subcontractors if it was a speculative builder. Audit chose to treat the taxpayer as a speculative builder because the taxpayer owned the land until construction was completed and the properties were sold. A plausible argument could be made for the alternative assessment, but neither Audit nor the taxpayer raised it. Therefore, we will not disturb Audit's finding.

Finally, the Department cannot refund or credit to the taxpayer sales or use taxes, if any, which were paid by the builders to the Department or to other vendors. We note the Department gave the taxpayer the opportunity from at least June 5, 1992 to July 13, 1992 to provide conclusive records showing the taxes were paid by the subcontractors. The taxpayer failed to provide the records even weeks afterwards.

DECISION AND DISPOSITION:

The taxpayer's petition is denied.

DATED this 31st day of July 1992.