

In the Matter of the Petition) D E T E R M I N A T I O N
For Correction of Assessment of)
) No. 87-42
)
 . . .) Registration No. . . .
) Tax Assessment No. . . .
)

- [1] **Rule 107, RCW 82.32.070 and RCW 82.08.050:** RETAIL SALES TAX -- PAYMENT -- DOCUMENTATION. A copy of a check to a seller reciting payment for sales tax for a tax quarter is, by itself, insufficient evidence of sales tax actually paid. Corroborating evidence in the form of seller invoices, contracts, or billing receipts are necessary, or the taxpayer will be barred from questioning the assessment.
- [2] **Rule 107, RCW 82.32.070 and RCW 82.08.050:** RETAIL SALES TAX -- PAYMENT -- DOCUMENTATION. The law provides a conclusive presumption that the selling price quoted does not include the retail sales tax. Only when seller documentation establishes that the tax has been separately stated and charged, and that such amount has been remitted to the seller by the buyer, will the buyer be deemed to have paid the tax. Lack of such documentation will bar the taxpayer from questioning the assessment.
- [3] **Rule 170:** RETAIL SALES TAX -- SPECULATIVE BUILDER - - NO PROFIT -- FORECLOSURE -- DEPRESSED ECONOMY. There is no provision in the law for a speculative builder's exemption from the retail sales tax merely because the building which has been constructed is not resold as planned, because the investment does not yield a profit, or because the project is an entire loss because of bank foreclosure. As an administrative agency, the Department of Revenue is empowered only to uphold the law which has been enacted by the legislature, and accordingly is

unable to grant exemptions for which the statutes do not provide. Likewise, there is no authority in the law for exemption from tax because a business has provided employment through depressed economic times.

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: October 30, 1986

NATURE OF ACTION:

Petition protesting assessment of use tax on amounts paid to construction company for construction of speculative homes.

FACTS AND ISSUES:

Burroughs, A.L.J.--The Department of Revenue examined the business records of . . . [taxpayer] for the period of January 27, 1984 to December 31, 1985. As a result of this audit, the Department issued the above-referenced tax assessment on June 17, 1986 assessing excise tax liability in the amount of . . . and interest due in the amount of . . ., for a total sum of . . . The assessment has not been paid.

The taxpayer is a partnership which was formed to construct houses for sale to the public. The taxpayer's representative in the hearing related that, even though he was one of the partners, he had never been involved in the building of houses before. He related that the timing of beginning such projects hadn't been good, as the partnership was formed in 1984, and the recession had not been foreseen.

The taxpayer-partnership purchased property--a tract--and put in utilities for four lots. The taxpayer then had four houses constructed on the lots by a construction firm with which one of the partners was affiliated. The bank eventually took back the last house; the first three were sold at a loss.

The taxpayer's representative explained in the hearing that the taxpayer consisted of three partners: the first was a contractor who was involved with the firm who did the construction work for the taxpayer (he is no longer in business as such); the second was the partner who was to

supply the financial backing for the projects (who has now declared bankruptcy); and he himself, who was to help manage and put in utilities, oversee operations and governmental red tape.

Testimony was offered by the taxpayer's representative that financially, all the partners are now miserable, and that he himself, who used to be an urban planner for the government, was down to a couple of hundred dollars.

TAXPAYER'S EXCEPTIONS:

The petition submitted by the taxpayer dated July 7, 1986 outlines the taxpayer's objections as follows:

. . . There are several reasons for this appeal. These include:

(1) No credits for previous payments were indicated in your analysis. These payments are evidenced by the attached copies of checks for taxes paid [the construcion firm] by [the taxpayer].

(2) Some tax was paid at the time of purchase which was not shown in your analysis. Also some purchases were thought to include taxes.

(3) We did not have the opportunity to re-sell one of the houses. It was taken back by the lender in foreclosure and we gained absolutely no benefit. We lost everything including the land that had been contributed to the project. We do not feel that taxes on this house should be included as it never was a re-sale or legally sold by us.

As you know, the building industry in Washington State has suffered through a severe depression for the past six years. Many in the industry kept going as long as they could and in so doing kept a lot of people in the state employed. For our efforts we were severely crippled financially and may never recoup. Your recent assessment only adds insult to injury.

We ask your reconsideration of our situation with some understanding of what we've gone through and the unrewarded contribution we have made to the employment of the State of Washington. A great many

highly skilled quality builders will never build another house because of the severe economic circumstances of the past six years of which the government played a significant part. We humbly request some consideration on your part now, for us to again become a useful employer in the State of Washington housing industry.

DISCUSSION:

WAC 458-20-170 concerns the taxability of the construction of structures upon real property. It provides in pertinent part as follows:

As used herein the term "speculative builder" means one who constructs buildings for sale or rental upon real estate owned by him. The attributes of ownership of real estate for purposes of this rule include but are not limited to the following: 1. The intentions of the parties in the transaction under which the land was acquired; 2. the person who paid for the land; 3. the person who paid for improvements to the land; 4. the manner in which all parties, including financiers, dealt with the land. The term "sells" or "contracts to sell" include any agreement whereby an immediate right to possession or title to the property vests in the purchaser.

. . .

Persons, including corporations, partnerships, sole proprietorships, and joint ventures, among others who perform construction upon land owned by their corporate officers, shareholders, partners, owners, co-venturers, etc., are constructing upon land owned by others and are taxable as sellers under this rule, not as "speculative builders."

. . .

The retail sales tax applies upon sales to speculative builders of all tangible personal property, including building materials, tools, equipment and consumable supplies and upon sales of labor, services and materials to speculative builders by independent contractors.

. . .

The use tax applies generally to the use by speculative builders of all tangible personal property, including building materials, purchased or acquired by them without payment of the retail sales tax . . .

It is clear from the rule that the taxpayer, as speculative builder, properly owed the contractor who built the homes retail sales tax on their construction. The auditor determined that such tax had not been paid and thus assessed use tax.

The taxpayer has claimed that previous payments made had not been taken into account by the auditor. "Copies of checks for taxes paid to ... (the construction company)" were attached to the petition.

The copies of two checks thus presented in evidence (numbers 1084 and 1085) were both dated June 29, 1984 and were for \$. . . and \$. . . respectively. Notations on these checks indicate "1st Q sales tax" and "2nd Q sales tax."

Although such evidence might in part be probative of retail sales tax paid, it is insufficient in and of itself.

RCW 82.08.060 sets forth evidentiary requirements for the determination of sales tax paid:

The tax required by this chapter to be collected by the seller shall be stated separately from the selling price in any sales invoice or other instrument of sale. For purposes of determining the tax due from the buyer to the seller and from the seller to the department it shall be conclusively presumed that the selling price quoted in any price list, sales document, contract or other agreement between the parties does not include the tax imposed by this chapter . . . (Emphasis added.)

WAC 458-20-107 reiterates these requirements:

RCW 82.08.050 specifically requires that the retail sales tax must be stated separately from the selling price on any sales invoice or other instrument of sale, i.e., contracts, sales slips, and customer billing receipts. . . . This is required even though the seller and buyer may know and agree that

the price quoted is to include state and local taxes, including the retail sales tax. The law creates a "conclusive presumption" that, for purposes of collecting the tax and remitting it to the state, the selling price quoted does not include the retail sales tax. This presumption is not overcome or rebutted by any written or oral agreement between seller and buyer. (Emphasis added.)

RCW 82.32.070 further provides in pertinent part:

. . . Every person liable for any fee or tax imposed by chapters 82.04 through 82.28 RCW shall keep and preserve, for a period of five years, suitable records as may be necessary to determine the amount of any tax for which he may be liable, which records shall include copies of all federal income tax and state tax returns and reports made by him. All his books, records, invoices shall be open for examination at any time by the department of revenue.

. . . .

Any person who fails to comply with the requirements of this section shall be forever barred from questioning, in any court action or proceedings, the correctness of any assessment of taxes made by the department of revenue based upon any period for which such books, records, and invoices have not been so kept and preserved. (Emphasis supplied.)

[1] A copy of a check to a seller reciting payment for sales tax for a tax quarter is, by itself, insufficient evidence of sales tax actually paid. Corroborating evidence in the form of seller invoices, contracts, or billing receipts are necessary. The Audit Branch will be available to further review available documentation and, if appropriate, issue a credit for those amounts. If adequate documentation is not available to establish payment, the taxpayer will be barred from questioning the tax assessment.

The taxpayer has additionally claimed that some tax was paid at the time of purchase, and that some purchases were thought to include taxes.

[2] The law provides a conclusive presumption that the selling price quoted does not include the retail sales tax.

Only when seller documentation establishes that the tax has been separately stated and charged, and that such amount has been remitted to the seller by the buyer, will the buyer be deemed to have paid the tax. The Audit Branch will be available to review any such documentation that the taxpayer may offer to support its claim and issue a credit if appropriate. Again, failure to have kept adequate documentation will bar the taxpayer from further questioning the assessment.

The taxpayer has further argued that, because it did not have the opportunity to resell one of the houses due to the bank's foreclosure, and because the entire investment in the building and land were lost, payment of the tax should be excused.

[3] There is no provision in the law for a speculative builder's exemption from the retail sales tax merely because the building which has been constructed is not resold as planned, because the investment does not yield a profit, or because the project is an entire loss because of foreclosure. As an administrative agency, the Department of Revenue is empowered only to uphold the law which has been enacted by the legislature, and accordingly is unable to grant exemptions for which the statutes do not provide.

Likewise, there is no authority in the law for exemption from tax because a business has provided employment for others through depressed economic times.

Accordingly, we must deny the taxpayer's petition as to this issue.

DECISION AND DISPOSITION:

The taxpayer's petition for correction of assessment is denied with the following exception: The taxpayer has 30 days from the date of this Determination to submit documentation to the Audit Branch in support of its first two arguments. The Audit Branch will then issue a new assessment, payment of which will be due on the date set forth therein.

DATED this 10th day of February 1987.