

STATE OF WASHINGTON.  
Board, of Tax Appeals.

RUSSELL H. KEYES dba  
R. K. INVESTMENTS

Appellant

Docket No. 31630 Appellant

Re: Excise Tax Appeal

vs.

ORDER

STATE OF WASHINGTON,  
DEPARTMENT OF REVENUE

FINAL DECISION

Respondent

This matter came before the Board of Tax Appeals for informal hearing on September 24, 1986. Present, was the appellant, Russell H. Keyes. The respondent, Department of Revenue, was represented by Anne Frankel, Administrative Law Judge.

FACTUAL INFORMATION.

The appellant, along with a partner purchased through mortgage arrangements an approximate 400 slip marina, Newport Yacht Basin in the 1970's. Their stated intention was "an investment in rental properties". However, the appellant believed the property required substantial upgrade before a profitable operation could be realized. The lending institution holding the original note was willing to finance the upgrade but with the requirement that a portion of the original mortgage be paid immediately and the balance in a set time. In order to generate the funds needed to meet the stated requirements, the appellant conceived the innovative idea of converting his interest in the marina to "condominiums". Instead of renting moorage slips, marina customers could buy the slips they occupied and share the ownership of the common areas. The down payments would not be retained by the appellant but would be transferred to the lender to meet its demands.

Prior to the time of the conversion, the appellant and his partner divided their interests with the appellant retaining approximately 200 slips which he offered for conversion. The bulk of the sale of 150 slips was made at the time of conversion. No sales have been consummated in the past two years.

The sales were accomplished by means of real estate contracts and, as noted, the down payments were turned over to the lending institution. The monthly payments, including principal and interest, were retained by the appellant in a trust fund

established within his organization. He did not want to carry these contracts but was forced to because neither the lender nor anyone else would. The Department of Revenue viewed this arrangement as a business activity and applied a Business and Occupation tax as permitted by RCW 82.04. to the interest received from the installment contract sales.

#### ISSUES AND CONTENTIONS.

Though a number of issues were raised, there is only one central to this case, "Is the State correct in assessing a Business and Occupation tax to the interest resulting from transactions conducted by the appellant?"

The appellant contends that he is neither in the business of selling real estate nor in the business of financial operations. In the former, he states that he Purchased the marina as an investment without any intention of immediate resale for profit and that his pattern of investment activities supports his contention. He was forced to resort to a sale situation in order to satisfy his cash requirements and to meet certain permit deadlines. As to the collection of the real estate contracts, the appellant claims that he was simply a conduit to facilitate the financial transactions between the buyer of the slips and the savings institution, American Savings Bank (American). He contends; . . . we acted as a collector for the funds for the bank . . . .and that the interest which was paid to us which was transferred to American Federal Savings and Loan was merely a business transaction . . . ". He was supported by American, who writes, "Because of the complexity of sales and or leases, the developer . . . was asked to collect the Proceeds from the sales or leases and forward them to us in the form of one payment".

The appellant further contends that even if the transactions he Performed could be considered "business" it was simply a one time sale necessitated by circumstances and not by design. Therefore, it would be an isolated sale under the terms of RCW 82.04.040 which in pertinent part states:

"`Casual or isolated sale' means a sale made by a person who is not engaged in the business of selling the type of property involved."

As a consequence he protests no tax is owed as WAC 458-20-106 states in pertinent part:

"The business and occupation tax does not apply to casual or isolated sales."

The despondent does not disagree with the facts Presented but only with the contention that the transactions conducted by the appellant do not constitute business activity, and consequently, that there should not be a tax assessed against the interest income handled. In Presenting her case, she references several areas within RCW 82.04 (RCW 82.04.040; 080; 140; 290; 390; and 4281) that support the state's case. She further contends that the interest received from the sales is "gross income of the business", not "investment income".

#### DISCUSSION AND ANALYSIS.

The issue as seen by the appellant and so stated was simply that his transactions were for the convenience of the borrowers (the moorage slip buyers) and the lending institution. He was not in the "business" of selling real estate nor handling money. The respondent believed that the appellant wanted the decision of the Department of Revenue set aside because, "the assessment of tax is tax abuse . . .".

The appellant did present to this Board that if in fact his transactions under the tax codes were considered "business" that the codes were unfair and requested that "maybe you'll make a special dispensation". On this point this Board is not empowered with the authority to revise or change statutes. Like any judicial review process it is our responsibility to interpret the intent of the code and to ensure that it is applied evenly and fairly to all parties involved. It is not for us to judge whether a law or statute is fair or just but rather to determine if it is being applied fairly and justly. In this respect therefore, we cannot satisfy the appellant's request to "make things happen" but we can acquiesce to his desire for "fair treatment".

Whether the law is right or wrong in the eyes of the appellant, it is all encompassing. As the respondent noted, RCW 82.04.140 defines "business" to include "all activities engaged in with the object of gain, benefit or advantage to the taxpayer . . . directly or indirectly". While it is true it was not the original intent of the appellant to sell his real estate, he did so as a gain, benefit or advantage. And though he strongly objected to performing the middleman responsibility for the financial aspect of the sales, he did so in order to facilitate those sales. Again, the sales providing a gain to himself. Whether by forced circumstances or by conscious decision, the appellant engaged in a very innovative method to obtain a profit while improving his properties. And though it might appear to the appellant that these transactions have no relationship to his usual business activities they are nonetheless covered by the Revised Code of Washington (RCW).

The appellant further contends that even if these transactions are considered, that they are exempted by virtue of the fact that the sales were casual or isolated and were part of his business as an investor. Again the Code is clear. RCW 82.04.040 limits casual or isolated sale. Perhaps one slip sold could be considered an isolated sale; however, 150 cannot. As to the investment question, the interpretation shows that the interest realized was from the sales which were part of the gross income of the business and not "investment income" as defined in RCW 82.04.010. Also though RCW 82.04.390 does allow for the exemption of "gross proceeds derived from the sale of real estate", it specifically does not allow deduction for "interest or similar financial charges resulting from, or relating to, real estate transactions".

As the structure and format of the business reviewed in this case are somewhat unique and innovative, cases that could be offered as comparables are limited. The respondent should be commended for the thoroughness of her research in discovering previous decisions to support her position through points that were germane. As noted by the appellant, parts of the cases had no applicability to the issue before this Board. This fact was duly noted in our decision process.

#### CONCLUSION.

This Board, in response to the appellant's direction to be fair and impartial as we always strive to be, listened attentively to the oral presentations, read all correspondence, reviewed the tapes of the hearing and researched the laws and codes. It is our conclusion, though the appellant had no intention of selling real estate or being involved in financial transactions in order to make his investment profitable, it was an option that was open to him. Having selected that alternative, his transactions clearly came under the authority of Chapter 82.04, Business and Occupation Tax of the RCW. Though the appellant may believe that this type of taxation is arbitrary and capricious, as noted earlier, it is not within the power of this Board to make that determination; that is the responsibility of the Legislature. Ours is to determine if the law has been fairly and correctly applied in this situation. We believe that it has.

#### DECISION.

This Board affirms the decision of the Department of Revenue in its Final Determination 85-257A.

DATED at Olympia, Washington  
This 5 day of November, 1986

STATE OF WASHINGTON BOARD OF TAX APPEALS