

Cite as 4 WTD 21 (1987)

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

In the Matter of the Petition) D E T E R M I N A T I
O N
for Refund or Correction of Real)
Estate Excise Tax Assessment of) No. 87-270
)
)
. . .) Registration No. . . .
Pierce County - Real
Estate)
)
Excise Tax Affidavit. .
.

[1] **RULE 170:** RCW 82.04.050 AND RCW 82.04.190 --RETAIL
SALES TAX -- RETAILING B&O -- CONSTRUCTION CONTRACT
-- SALE -- SPECULATIVE BUILDER -- RIGHT TO
POSSESSION -- ETB 449. When a speculative builder
sells or contracts to sell property upon which he is
presently constructing a building, all construction
done subsequent to the date of such sale or contract
constitutes a retail sale. The "sale" does not take
place when a purchase agreement is executed, but
when the purchasers have the "right of possession"
to the real property being constructed. (Riley
Pleas v. State and Rigby v. State cited.)

TAXPAYER REPRESENTED BY: . . .
. . .

DATE OF HEARING: June 16, 1987

NATURE OF ACTION

The taxpayer seeks a refund of all B&O taxes and excess sales tax remitted in connection with the construction of an apartment on grounds it was a speculative builder.

FACTS AND ISSUES

Frankel, A.L.J. -- The taxpayer is a real estate development company. It purchased the property at issue on August 3, 1984. Twelve days later, it contracted to build an apartment complex on the land and sell it to The contract provided that the purchaser would have the right to possession upon closing which was to occur when the construction was completed.

The purchase price of the property was first stated as \$1,365,411. By an addendum to the building contract and agreement of sale, dated November 1, 1984, the price was increased to \$1,382,411 plus sales tax. The purchase price was allocated as follows: land, \$196,000; building, \$990,411; and personal property, \$196,000.

Because the taxpayer had contracted to build and sell the building, it treated the transaction as a contract sale under WAC 458-20-170. The taxpayer contends it collected sales tax on the full contract amount from the purchaser. The taxpayer stated it reported the amount collected, but that it had paid sales tax at source on all materials and labor and claimed that amount as a credit on its excise tax returns.

Following completion, the taxpayer conveyed title to the property to . . . (the purchaser's assigns). On the excise tax affidavit (No. . . .), the taxpayer stated the date of sale was March 19, 1985 for a gross sales price of \$1,382,411. It subtracted the \$1,186,411 for improvements, alleging a taxable sale price of \$196,000.00, the amount representing the land only. It paid real estate excise tax of \$2,097.20 at the time of transfer. On the excise tax affidavit, it stated that sales tax had been paid on the improvements pursuant to RCW 82.08.

The county assessor's office sent a letter to the Department questioning the excise tax payment on the land value only. The Property Tax Division examined the county records regarding the sale, and concluded the taxpayer owed additional real estate excise tax and delinquent penalties in the total amount of \$14,471.84.

The letter to the taxpayer explained the additional assessment as follows:

Our examination of county records show that you were the owner of title on this property until March 20, 1985, at which time a statutory warranty deed was done to In addition, a construction permit

issued on August 31, 1984, shows that the multiple family dwelling was 100% complete on February 13, 1985. Based on the above information, you would be considered a speculative builder and would be subject to sales tax on all materials used in construction until such time as you are no longer in title to the land. At the time of the transfer, real estate excise tax would be due on the sales price. Since the building was 100% complete prior to its sale to . . . , the deduction of \$1,186,411.00 would not be valid, and real estate excise tax on \$1,382,411.00 is due. (Letter of April 18, 1986 from Property Tax Division.)

On November 6, 1986, the original assessment was adjusted upward to \$15,360.46.

The taxpayer contends that if the assessment of real estate excise tax is correct, the taxpayer was a speculative builder and entitled to a refund of all B&O taxes paid and all retail sales tax remitted in excess of that which was due. The taxpayer stated it collected \$92,540.06 and took a credit for \$72,202.41. It claims the difference of \$20,337.65 is the excess amount of retail sales tax paid. It stated it remitted state B&O tax of \$. . . and city B&O tax of \$ It seeks a refund of all of the B&O it now alleges was paid by mistake.

DISCUSSION

WAC 458-20-170 is the administrative rule dealing with the constructing and repairing of new or existing buildings upon real property. At the outset we agree with the taxpayer that it is either a prime contractor or a speculative builder and should not be subject to the tax liability of both classifications of builders.

A speculative builder is one who constructs buildings for sale or rental upon real estate owned by him. Amounts derived from the sale of real estate are exempt from the B&O tax. RCW 82.04.390. The taxpayer relied on the following language in Rule 170 and concluded that it owed retail sales tax and retailing B&O on the construction done after the date of the purchase agreement:

[w]hen a speculative builder sells or contracts to sell property upon which he is presently constructing a building, all construction done

subsequent to the date of such sale or contract constitutes a retail sale and that portion of the sales price allocable to construction done after the agreement shall be taxed accordingly. Consequently the builder must pay business and occupation tax under the retailing classification on that part of the sales price attributable to construction done subsequent to the agreement, and shall also collect sales tax from the buyer on such allocable part of the sales price.

The taxpayer now believes its initial conclusion was in error and that the "sale" did not take place until the building was complete and the sale was closed. The taxpayer relies on Riley Pleas v. State, 88 Wn.2d 933 (1977) and Rigby v. State, 49 Wn.2d 707 (1957). We agree that the two cases are apposite and support the taxpayer's position. See also ETB 449.12.170.

In Rigby, the court relied on RCW 82.04.050 and 82.04.190 to determine whether the transaction constituted a sale at retail. RCW 82.04.050 provides, inter alia, that the term "sale at retail" includes the charge for the constructing of new buildings upon real property for "consumers." RCW 82.04.190 defines a consumer as a person who has the "right of possession" to real property being constructed.

In the present case, the purchasers did not have the right to possession until closing; therefore the "sale" did not take place when the purchase agreement was executed. If the taxpayer's records support its position that it paid retail sales tax on all materials purchased and on all charges made by their subcontractors, no further retail sales tax was due. The taxpayer is entitled to a refund of the excess retail sales tax paid and the retailing B&O paid.

Real estate excise tax is due on the total purchase price. WAC 458-61-300. By the time the property was sold, the purchaser bought real estate consisting of a building and real property, not real property only. The tax was payable at the date of sale and interest is due on the amount owing at the rate of one percent per month until paid. RCW 82.45.100(1). The "date of sale" is the date the property was conveyed. WAC 458-61-030(15).

DECISION AND DISPOSITION

The real estate excise tax assessment is upheld. The taxpayer's petition is granted as to the request for a refund

of Retailing B&O and excess retail sales tax remitted, subject to verification by the Audit Division. The claim for the refund of city B&O must be made directly with the city. The taxpayer may elect to receive any refund due as a credit against the real estate excise tax assessment owing or pay the real estate excise tax and interest due and receive a refund of the B&O tax paid.

As the retail sales tax was paid by the purchaser and remitted by the taxpayer, the taxpayer must refund the excess amount collected to the purchaser and then provide evidence, as a cancelled check, that it did so. If that is done, and the taxpayer's records support its assertions that it reported excess retail sales tax on this contract, the Department shall issue a refund check to the taxpayer for the amount found due. In the alternative, the taxpayer may request that the refund be paid directly to the purchaser. The taxpayer should make the request in writing (to Taxpayer Accounts Receivable) and provide the purchaser's name and address.

DATED this 14th day of August 1987.