

Cite as 4 WTD 165 (1987)

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

In the Matter of the Petition)	<u>D E T E R M I N A T I O N</u>
For Correction of Assessment of)	
)	No. 87-319
)	
)	Registration No. . . .
. . .)	Tax Assessment Nos. . . .
)	
)	
and)	
)	
. . .)	Registration No. . . .
)	Tax Assessment No. . . .

- [1] **RULE 105 AND RCW 82.04.140:** B&O TAX -- ENGAGING IN BUSINESS -- JOINT OPERATING ACCOUNT. A taxable business is an activity or enterprise for gain, benefit, or advantage. A person engaging in business is generally one who is (1) recognized by the public as engaging in business, (2) one who receives the gross income and incurs the liabilities of the business, and/or (3) one who acts as an employer. Use of a joint account by three professional corporations for accounting purposes only does not give rise to separate business tax.
- [2] **RULE 105:** B&O TAX -- EMPLOYER/EMPLOYEE -- DETERMINATION. A joint operating account used by three professional corporations to pay for shared employees is not a separate entity for B&O purposes merely because the corporations obtained a federal I.D. number for payroll and reporting to state and federal agencies. The key question in determining who is the actual employer is who controls or has the right to control the activities of the employees.
- [3] **RULE 105 AND RCW 82.04.140:** JOINT VENTURE -- B&O TAX -- ENGAGING IN BUSINESS -- JOINT OPERATING -- ACCOUNT -- DISTINGUISHED. The essential elements of a joint venture include (1) a contract, (2) a common purpose, (3) a community interest, (4) an equal right of control, and (5) a sharing of profits and losses. The use of a joint operating account by three professional corporations for

centralized accounting was not found to be a joint venture where there was no sharing of profits and losses.

[4] **RULE 105 AND RULE 211:** RETAIL SALES TAX AND RETAILING
B&O -- ENGAGING IN BUSINESS -- EQUIPMENT LEASE --
PARTNERSHIP/LESSOR. Where three individual professionals
established a lease between themselves as individuals and
their three professional corporations, the three were
engaging in business and liable for Retailing B&O.
Retail sales tax was due on the lease payments.

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: May 28, 1987

NATURE OF ACTION:

A petition for a correction of an assessment of Service B&O on amounts paid into a joint operating account by three professional corporations and of Retailing B&O and retail sales tax on amounts paid to a leasehold account for the lease of equipment.

FACTS AND ISSUES:

Frankel, A.L.J. -- . . . are three [professionals] working out of the same building and sharing some equipment and employees. Each is separately incorporated. Each corporation has registered with the Department and allegedly paid B&O tax on 100% of its gross receipts.

For their convenience in paying rent and salaries of shared employees, the three corporations created a joint operating checking account. They each put money into the account to pay their share of the expenses. The account names the three [professionals] and identifies it as their joint operating account.

The endodontist's records were examined for the period January 1, 1979 through June 30, 1986. The auditor concluded that their joint account was a separate "person" as defined by RCW 82.04.030. He assessed Service B&O on the operating fund (hereinafter the taxpayer) and use tax on consumables which had been purchased without payment of the retail sales tax. Because the taxpayer had been unregistered, delinquent penalties were added to the assessment. Assessment Nos. . . . and . . . for the total amount found due, \$. . . , were issued on December 4, 1986. The

assessments were addressed to the three [professionals] "joint venture."

The [professionals] agree to the assessment of use tax, but protest the assessment of Service B&O on the operating fund. They contend that the three corporations have already paid B&O taxes on 100% of their gross receipts. They contend that their operating fund is not a separate business, but only a bookkeeping mechanism for the convenience of the three corporations. The taxpayer also relied on Crown Zellerbach Corp. v. State, (1954) and Davenport, Inc. v. Department of Revenue, 6 Wn. App. 581 (1972) for support that the legislative policy behind the Revenue Act is to impose actual liability for payment of B&O tax only once as to a particular product or particular revenue.

Also at issue is rental income paid to a leasehold account by the three professional corporations. The [professionals] stated the account was established to obtain funds to purchase dental equipment and for leasehold improvements to the office building. They stated the bank took a security interest in the improvements and their personal guarantees, and that they each had furnished the bank a financial statement from their own personal service corporations when they applied for the loan.

The auditor concluded they had established a partnership for the purpose of purchasing the equipment and leasing it to the three corporations. He relied in part on the evidence that the taxpayer had filed a federal partnership return for reporting the income from the equipment rental. This business was separately registered by the Department and Retailing and retail sales tax was assessed on the amounts received by the "partnership" for the lease of the equipment. Because the business had not been registered and reporting the tax due, penalties were added to the assessment. The total amount assessed was \$ (. . .).

The [professionals] protest this assessment on grounds they are not a partnership and are not renting the equipment to themselves. They also stated sales tax was paid on the equipment at the time of the initial purchase. The petitions protesting the assessments were consolidated for purposes of appeal.

DISCUSSION:

[1] RCW 82.04.140 defines "business" to include "activities engaged in with the object to gain, benefit, or advantage to the taxpayer or to another person or class directly or indirectly." WAC 458-20-105 defines persons engaging in business as:

A person engaging in business is generally one who holds himself out to the public as engaging in business either in respect to dealing in real or personal property or in respect to the rendition of services; one to whom gross

income of the business inures; one upon whom liability for losses lies or who bears the expenses of conducting a business; one, generally, acting in an independent capacity, whether or not subject to immediate control and supervision by a superior, or one who acts as an employer and has employees subject to his control and supervision.
(Emphasis added.)

In this case, the joint operating account was provided solely for centralized accounting for paying the payroll and expenses of the individual professional corporations. The account was established for bookkeeping convenience; i.e., instead of each corporation writing separate checks for its share of third-party expenses, they each deposit enough in the shared account and one check is written to pay each of the expenses.

The joint account was identified as an operating account and named the three [professionals]. The gross income of the business did not inure to the account, nor did the account bear the expenses of conducting a business. The patient receipts inured to each individual professional corporation and the liabilities for the shared expenses and employees were the liabilities of the individual corporations.

[2] The taxpayer is not the "employer" merely because its federal I.D. number is used for payroll and for reporting to state and federal agencies. The key question in determining who is the actual employer is who controls or has the right to control the activities of the employees. 1 WTD 103 (1986). The element of control includes the right to hire, fire, and supervise the work of the individual employees. In this case, the [professionals] stated they each have the right to hire, fire, and supervise the employees and each professional corporation is solely liable for its share of the employee and other third-party costs.

[3] The operating account does not have the elements of a joint venture to be a separate person "doing business" for purposes of the B&O tax. Four essential elements of a joint venture are (1) a contract, (2) a common purpose, (3) a community interest, and (4) an equal right to a voice accompanied by an equal right of control. Carboneau v. Peterson, 1 Wn.2d 347 (1939). Additionally, there must be a sharing of profits and losses in order for there to be a joint venture. See, e.g., Refrigeration Engineering Co. v. McKay, 4 Wn. App. 963 (1971); 46 Am. Jur. 2d Joint Ventures + 13 (1969). These additional elements are clearly lacking.

As we do not find the joint operating account is a "business" as defined in RCW 82.04.140, it need not be registered as a separate entity and is not liable for Service business tax. For the audit period at issue, the assessments against the "joint venture" shall be amended to reflect only the use tax owing for the supplies. The assessments shall include interest. RCW 82.32.050. Because the

[professionals] who are liable for the tax were registered and filing returns, though, the assessment of penalties shall be deleted. RCW 82.32.100. For future reporting periods, each endodontist should remit his share of any use tax due with his excise tax returns.

[4] Lease Payments - The individual [professionals] established a lease between themselves as individuals and their three professional corporations that render endodontic service to patients. We find this transaction has the necessary elements of a joint venture, as the three will share any losses or gains from the joint purchase. A joint undertaking of a business nature, for material gain or profits, is a joint adventure even though limited to a single transaction. Poutre v. Saunders, 19 Wn.2d 561, 568 (1943).

A retail sales tax is imposed on each retail sale in this state, including successive retail sales of the same property. RCW 82.08.020. The term "retail sale" includes the renting or leasing of tangible personal property to consumers. RCW 82.04.050(4). If a person purchases property, uses it, and then leases the property to another or executes a sale/leaseback, the retail sales tax applies to the initial retail purchase and the subsequent lease payments. Pursuant to the above statutes, the two transactions are separate and independent taxable events. The retail sales tax is a tax on the transaction, not on the property or the person. Black v. State, 67 Wn.2d 97, 99 (1965). (Emphasis added.)

The retail sales tax does not apply upon sales of tangible personal property to persons who purchase the property solely to rent or lease. WAC 458-20-211. In the present case, therefore, if the taxpayer's records show that the individual [professionals] paid sales tax on the equipment when purchased and that they did not use the equipment between the time of the purchase and the lease to the corporations, the taxpayer shall be entitled to a credit for the retail sales tax paid.

DECISION AND DISPOSITION:

The taxpayer's petition is granted as to the assessment of Service B&O on the joint operating account. Assessment Nos. . . . and . . . shall be amended to reflect only the use tax and interest owing. The amended assessments shall be due on the due date provided thereon.

The taxpayer's petition is denied as to the assessment of retail sales tax and Retailing B&O tax in Assessment No. . . . The taxpayer shall receive a credit for retail sales tax paid if documented as provided herein. The evidence should be presented to the Audit Section prior to the new due date if it wishes a correction of the assessment or within the statutory time limit

imposed by RCW 82.32.060 (four years) if it wishes to petition for a refund.

DATED this 30th day of September 1987.