

Cite as 4 WTD 415 (1987)

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

In the Matter of the Petition )	<u>D</u> <u>E</u> <u>T</u> <u>E</u> <u>R</u> <u>M</u> <u>I</u> <u>N</u> <u>A</u> <u>T</u> <u>I</u> <u>O</u>
<u>N</u>	
For Correction of Assessment of)	
)	No. 88-3
)	
. . . )	Registration No. . . .
)	Tax Assessment No. . . .
.	
)	

[1] **RCW 82.04.4281:** B&O TAX -- DEDUCTIONS --  
INVESTMENTS -- INTEREST-- REAL ESTATE CONTRACTS.  
The interest on a real estate contract is not a  
deduction as an investment under the statute.  
O'Leary v. Dept. of Revenue, 105 Wn.2d 679 (1986).

[2] **RCW 82.04.440:** B&O TAX -- MULTIPLE ACTIVITIES.  
A taxpayer engaged in more than one taxable business  
activity shall be taxed on each activity.

TAXPAYER REPRESENTED BY: . . .  
. . .

HEARING CONDUCTED BY: Gregory I. Potegal, Administrative Law  
Judge

DATE OF HEARING: February 2, 1986

NATURE OF ACTION:

Taxpayer petitions for correction of assessment imposing  
business and occupation tax liability on interest income  
derived from real estate contracts.

FACTS:

Hesselholt, A.L.J. -- The Department of Revenue conducted an  
audit of the records of . . . (taxpayer), for the period

January 1, 1981 through March 31, 1985. The Department assessed business and occupation taxes on interest income from real estate contracts held by taxpayer, and assessed a tax due of \$ . . . , plus interest of \$ . . . , for a total of \$ . . . . Taxpayer protested the assessment by note dated November 7, 1985, and the telephone conference hearing was held February 2, 1986.

The real estate contracts involved here consist of eight properties, purchased between 1968 and 1977, and sold between 1974 and 1979. The interest income for the audit period totalled \$ . . . , and averaged slightly over \$ . . . per year.

Taxpayer owns a restaurant. He has held real estate properties separate from that business for a number of years. He argues that the real estate contracts are not part of his business; he is in the restaurant business, not the real estate business, and the interest received has nothing to do with his restaurant business, and thus is not subject to the state's business and occupation taxes.

#### ISSUE:

Is taxpayer subject to business and occupation taxes on the interest income on real estate contracts?

#### DISCUSSION:

RCW 82.04.220 imposes a tax for the privilege of engaging in business activities in Washington. Business is defined as "all activities engaged in with the object of gain, benefit, or advantage to the taxpayer. . . ." RCW 82.04.140. Although gross proceeds from the sale of real estate are exempted from the B&O tax, interest from real estate transactions is specifically not exempted from the tax. RCW 82.04.390. RCW 82.04.4281 allows a deduction for "amounts derived by persons . . . from investments or the use of money as such. . . ."

[1] In O'Leary v. Dept. of Revenue, 105 Wn.2d 679, 717 P.2d 273 (1986), the Washington Supreme Court held that interest received by the vendor of a real estate contract was not a qualifying investment under RCW 82.04.4281. The Court went on to say that "whether an investment is 'incidental' to the main purposes of a business is an appropriate means of distinguishing those investments whose income should be . . . deducted under RCW 82.04.4281.

Taxpayer owns a restaurant and argues that that is his business. However, taxpayer also acquires and sells real estate. Some of the real estate parcels are apartments that were rented out and later sold; others, according to taxpayer, were held for appreciation. These activities cannot be said to merely "incidental." Taxpayer is engaged in the business of acquiring and selling real estate under RCW 82.04.140, in addition to his restaurant business.

[2] The tax statutes clearly provide that a person involved in more than one activity shall be taxed on each activity. RCW 82.04.440. Taxpayer is subject to the business and occupation tax on the interest income generated from his sale of real estate contracts.

#### DECISION AND DISPOSITION:

The taxpayer's petition for correction of assessment is denied.

DATED this 12th day of January 1988.