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

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| In The Matter of the Petition For Correction of Assessment of | ) | D E T E R M I N A T I O N |
| | ) | No. 89-252 |
| . . . | ) | Registration No. . . . |
| | ) | . . . /Audit No. . . . |

[1] MISCELLANEOUS: CORPORATE ENTITY -- LIABILITY FOR TAX -- LEGAL EXISTENCE. Corporation exists for state tax purposes when articles of incorporation filed, corporation entered into contracts and tiled tax returns. Fact that certain statutory requirements were not met, and corporation may not have been a legal entity for other purposes not dispositive.

[2] MISCELLANEOUS: CORPORATION -- ALTER EGO. In order to show that a partnership and corporation were "alter egos" and therefore not actually two separate entities, the affairs of both must be so intertwined that they exist as one, and to regard them as separate would "aide in the consummation of a fraud or wrong on others. . . " J.I. Case Credit Corp. v. State, 64 Wn.2d 470 (1964).

[3] RCW 82.04.050, MISCELLANEOUS: CONSIDERATION -- WHAT CONSTITUTES -- RETAIL SALES. A construction company is not required to realize a monetary profit on its activities in order for its activities to be taxable. It is enough that it served as a means for its incorporators to avoid personal liability for the construction.

[4] RULE 170: CONSTRUCTION -- ACTING AS TRUSTEE FOR BUYER. A transfer between a contractor and a buyer is not the "mechanical performance of the obligation" of a trust, it is a retail sale under

> the law of the state of Washington. Senfour Investment Company v. King County, 66 Wn.2d 67, 401 P.2d 319 (1965).

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 CONFERENCE: March 9, 1989

NATURE OF ACTION:

Taxpayer protests the assessment of retailing business and occupation tax and retail sales tax on amounts paid to it as a general contractor.

FACTS AND ISSUES:

Hesselholt, A.L.J. -- Taxpayer was incorporated by members of the . . . (partnership) on June 5, 1985. The partnership filed the articles of incorporation for the partnership, but no meeting of the initial Board of Directors was held, no initial annual report was filed with the Secretary of State, no stock shares were issued, and no officers of the corporation were elected. The corporation was formed by the members of the partnership to construct a self-storage facility, and has conducted no business since the facility was completed. The partners chose the corporate form to protect themselves from individual liability during the construction of the facility.

The partnership owned the land and obtained the loan for construction. The taxpayer contracted with the subcontractors in its own name. It obtained a contractor's license. Periodic progress reports and billings were submitted to the partnership by two of the partners serving as contractors. As the payments came due, the partnership would apply to the bank for a draw on the construction loan. The partnership requested that the payments be made in the name of the partnership, rather than the construction company.

The taxpayer's records were audited for the period April 1, 1985, through December 31, 1987 by the Department of Revenue. The auditor assessed Retailing business and occupation tax and retail sales tax on amounts received for the construction, and allowed a credit for the sales tax paid on materials. The

auditor took the position that the construction company was acting as a general contractor, since RCW 82.04.050 and WAC 458-20-170 provide that persons performing construction on the land of another are making retail sales as general contractors and subject to the retail sales tax and Retailing B&O tax.

The taxpayer makes the following arguments to support its belief that it is not subject to such tax:

> 1. Because the corporation did not comply with all the requirements of the statute, there is no real corporate entity and therefore the partnership was constructing on land that it owned, and acting as a speculative builder.
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> 2. The corporation and partnership are alter egos, therefore there is no separate tax liability of the corporation.
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> 3. The construction company received no valuable consideration for its services, as it was a mere conduit for the payment of the construction costs.
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> 4. The transaction was casual and isolated, because the construction company was not engaged in business when the activity took place.
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> 5. The partnership was a speculative builder and exempt from the sales tax, because it owned the land and constructed the improvements on it.
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> 6. The corporation was acting as a trustee for the partnership and transferred its non-beneficial interest to the partnership. As there was no valuable consideration, no tax is due.

DISCUSSION:

I. Corporate Entity.

[1] RCW 23A.12.040 provides as follows:

> Upon the filing of the articles of incorporation, the corporate existence shall begin, and the certificate of incorporation shall be conclusive evidence that all conditions precedent required to be performed by the incorporators have been complied with and that the corporation has been incorporated

> under this title, except as against this state in a proceeding to cancel or revoke the certificate of incorporation or for involuntary dissolution of the corporation.

Taxpayer states that certain activities that are required of corporations were not performed. However, the corporation did file both state and federal tax returns, and the contracts for the building of the storage facility were taken in the name of the corporation. There is no current Washington case law on the consequences of failure to perform all required activities of a corporation. RCW 23A.44.100 provides that

> (1) All persons who assume to act as a corporation without authority so to do shall be jointly and severally liable for all debts and liabilities incurred or arising as a result thereof.

Under this section, if the corporation was not a legal entity under the laws of the state of Washington, then the partnership members, who attempted to act as a corporation, would be jointly and severally liable for the debts of the "corporation." Thus, whether or not the corporation existed as a separate legal corporation, it existed as an entity doing business under a corporate name, and the tax consequences do not change.

II. Corporation and Partnership as Alter Egos.

[2] Taxpayer argues that the corporation and partnership acted as "alter egos" of one another, and that the corporation should not be regarded as a separately existing entity. In Molander v. Raugust-Mathwig, Inc., 44 Wn.App. 53, 59 (Div. III, 1986), the Washington Court of Appeals, in a case regarding the personal liability of an individual involved in promoting two construction projects that were terminated, stated

> Doing business as an association or a corporation is not illegal and complexity in business relationships alone is not a basis for imposing liability. The doctrine of corporate disregard will not be applied in the absence of proof that (1) the corporate form was intentionally used to violate or evade a duty, and (2) disregard is required to prevent an unjust loss to an injured party . . . Few people are aware of the organizational intricacies of businesses with which they are dealing and unless

> there is an agreement to be personally liable, absent fraud or a similar basis, personal liability cannot be imposed just because a person seeks to insulate himself by doing business through a corporate entity.

(Citations omitted.)

In this case, there is no showing that the corporate form was used to violate or evade a duty. In fact, the partners sought to insulate themselves from personal liability should anything go wrong in the construction of the facility, which is a sound business reason for forming a corporation. Nor is disregard of the corporate form necessary to prevent injury to a third party. There is no injury to any party involved.

In J. I. Case Credit Corp. v. State, 64 Wn.2d 470 (1964), cited by taxpayer, the court stated that

> The decisions in this state defining when the courts will "pierce the veil" to look through the corporate organization and determine identity of responsibility are not so clearly harmonious as to render the law easy of application. The purport of the cases is that all of the elements of sameness just noted are insufficient in themselves to enable a court to declare two corporations to be identical in responsibility, but there must be such a commingling of property rights or interests as to render it apparent that they are intended to function as one, and, further, to regard them as separate would aid in the consummation of a fraud or wrong upon others
> . . .

J.I. Case, at 475. (Citations omitted.)

There has been no showing that the affairs of the corporation and partnership were so intertwined that they existed as one--the corporation apparently kept separate books, and filed separate tax returns. We find that the corporation was not the "alter ego" of the partnership so as to avoid its tax liability.

III. The Construction Company received no valuable consideration for its services.

[3] Taxpayer argues that the construction company received no valuable consideration for its services, and so no retail sale took place between the construction company and the partnership. Taxpayer argues that the construction company was a mere conduit for payment of the construction costs.

The taxpayer construction company entered into contracts which caused a self-storage facility to be built upon the land owned by the partnership. For this service, the construction company received payment. The fact that the payment received by the construction company did not realize a profit on the transaction is immaterial. RCW 82.04.140 defines business as "all activities engaged in with the object of gain, benefit, or advantage to the taxpayer or to another person or class, directly or indirectly." The taxpayer engaged in business as a construction corporation to provide an advantage to the members of the partnership. It therefore engaged in business as it is defined under the laws of the state of Washington, and its activities are taxable as such.
Taxpayer argues that two prerequisites are necessary for a taxable transaction: an actual transfer of property and actual consideration paid or contracted to be paid in exchange for the ultimate transfer of the interest in the property. He cites State ex rel. Namer Inv. Corp. v. Williams, 73 Wn.2d 1 (1968) as authority for this assertion. The case does not apply in this instance. That case dealt with the real estate sales tax and its applicability to a lease-option of real estate.

RCW 82.04.050 provides, in relevant part, as follows:

> (2) The term "sale at retail" or "retail sale" shall include the sale of or charge made for tangible personal property consumed and/or for labor and services rendered in respect to the following: . . . (b) the constructing, repairing, decorating, or improving of new or existing buildings or other structures under, upon, or above real property of or for consumers, including the installing or attaching of any article of tangible personal property therein or thereto, whether or not such personal property becomes a part of the realty by virtue of installation, and shall also include the sale of services or charges made for the clearing of land and the moving of earth excepting the mere leveling of land used in commercial farming or agriculture. . .

The taxpayer had contracts with various entities to perform labor and or services, or to provide materials, for the construction of a self-storage facility on the land of the partnership. The work was done, and the facility constructed. The taxpayer contracted for such labor and or materials for the benefit of the partnership. When the building was complete, it belonged to the partnership, not the taxpayer. The taxpayer paid for the services rendered and the materials consumed. Therefore the payments to the taxpayer are considered a retail sale under the statute. RCW 82.08.020 imposes the retail sales tax on all retail sales in this state. Thus the retail sales tax is due on amounts paid to the construction company.

IV. Since the taxpayer was only involved in constructing the storage facility, it was a casual or isolated sale and no retail sales tax is due.

A casual or isolated sale is defined by RCW 82.04.040 and WAC 458-20-106 as a sale made by a person "who is not engaged in the business of selling the type of property involved." Taxpayer was formed for the purpose of constructing the self-storage facility. The business in which the taxpayer is engaged is exactly the transaction involved here. The fact that there has only been one transaction does not render the transaction casual or isolated.

V. The Partnership was acting as a Speculative Builder.

A speculative builder is one who constructs on property which it owns. The members of the partnership formed the corporation to build the facility on the property owned by the partnership. The corporation was used as the builder of the facility. WAC 458-20-170 provides that a corporation building on land owned by its stockholders or officers is not a speculative builder, but a general contractor. That is precisely what happened here. The members of the partnership chose to form a corporate entity to be responsible for the construction. The partnership chose not to build the facility itself. Thus it was not acting as a speculative builder.

VI. The Corporation was acting as Trustee for the Partnership.

[4] Taxpayer argues that "where property is transferred to one entity, but the purchase price is paid by another, the transferee is presumed to hold a purchase-money resulting

trust for the payor." With this we have no quarrel. Taxpayer then goes on to state that

> [taxpayer] did not own a beneficial interest in the property. As materials were purchased and incorporated into the real property held by the partnership, the property was transferred to the partnership. Such a conveyance is not a sale for valuable consideration, as required by the statute, but instead "merely the mechanical performance of the obligation of the admitted trust" Senfour Investment Company v. King County 66 Wn.2d 67, 401 P.2d 319 (1965).

Thus, taxpayer argues, "the corporation as trustee for the partnership transferred its non-beneficial interest to the partnership. As this was not a transfer for valuable consideration, no tax is due."

The Senfour case involved the transfer of real property between trustees to a corporation yet to be formed and the corporation. This is not the situation here. The corporation was used by the partnership as the entity to construct the facility. The members of the partnership chose this method in order to insulate themselves from personal liability, should accidents happen during the construction of the facility. The transfer between the taxpayer corporation and the partnership was not merely a "mechanical performance," it was a retail sale as the term is defined in Washington statutes.

DECISION AND DISPOSITION:

Taxpayer's petition is denied.

DATED this 9th day of May 1989.