

Cite as Det. No. 95-085, 16 WTD 25 (1995)

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. 95-085
)	
. . .)	Registration No. . . .
)	FY. . ./Audit No. . . .
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)	

RULE 171: B&O TAX -- RETAIL SALES TAX -- PUBLIC ROAD CONSTRUCTION -- HOUSING DEVELOPMENTS. The construction of streets as part of a housing development will be considered public road construction if it is reasonably certain that the streets will be dedicated to a public body. Otherwise, such construction will be treated as a retail sale.

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.

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NATURE OF ACTION:

Developer challenges Department's disallowance of public road construction status for streets built within its development.¹

FACTS:

Dressel, A.L.J. -- Taxpayer is a residential developer. Its books and records were examined by the Department of Revenue (Department) for the period January 1, 1990 through December 31, 1992. As a result, a tax assessment was issued. Taxpayer appeals portions of the assessment.

¹ Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410.

Taxpayer created a housing development in a city in Washington. Taxpayer hired contractors to construct roads and develop plats. Rather than construct "normal" plats, Taxpayer used an option under city rules known as "P.U.D.'s". Under this option, lot size can be smaller than that of "normal" plats, and a common area can be built. The road width of this development is smaller than that required by the city for roads dedicated for public use. However, the paved road, in combination with the width of easements for public utilities, does leave an area meeting or nearly meeting the required width for the city's public roads. At the hearing of this matter, Taxpayer testified that, for public dedication purposes, the width of the streets is adequate. While the street right of way per se may be narrower than required by city regulations, combined with the easement for utilities, the total width would meet city street standards.

Taxpayer stated that it had not approached the city about dedicating development streets but that the homeowner's association had. According to Taxpayer, the city had never ruled on that application. Taxpayer was asked at the hearing of this tax appeal if it was "reasonably certain" that the city would accept dedication of the streets. Taxpayer would not say that it was "reasonably certain". Taxpayer added that it believed the city was also seeking assurance that the pavement installed was thick enough to meet city standards.

The Department's Audit Division decided that it was not "reasonably certain" that the development's streets would be dedicated to the city. Accordingly, it assessed deferred retail sales tax against Taxpayer on the contract price for construction of the streets. In doing so, the Audit Division said that it examined documents, including the filed plats and "financing papers." It concluded that those indicated that the roads in the development were to remain private. Taxpayer, on the other hand, stated that the "documents" do allow for dedication of the streets to the city.

Taxpayer also raised several factual issues with regard to audit schedules II and III. At the hearing it conceded liability with respect to the tax assessed on schedule III, but said that it would provide documentation to support the reduction of tax on schedule II. As of the date this determination is written, it has not done so. Taxpayer's petition, therefore, is denied as to schedules II and III.

ISSUE:

Is it reasonably certain that roads in a new housing development will be dedicated to a public body, so that their construction may be B&O tax-classified as Public Road Construction?

DISCUSSION:

[1] Excise Tax Bulletin 372.04.171 (ETB 171) provides, in relevant part, as follows:

(1) Where the roads and bridges are constructed entirely on private land, the construction is defined as a retail sale under RCW 82.04.050 and the retail sales tax is applicable to the full contract price

Excise Tax Bulletin 202.12.171 provides, in relevant part, as follows:

RCW 82.04.050 exempts from "sale at retail" contracts for the building of "publicly owned" streets. See ETB 255.04.171. The Commission holds that where there is a reasonable certainty that streets and roads will be dedicated to the public body as a result of the platting of an area by an investment builder, such contracts may be classified as "public road construction." However, if the roads and streets are not finally dedicated to the public body within a reasonable period of time after the work is completed the investment builder will be held liable for deferred sales tax on the cost of the work.

(Underlining ours.)

Not even Taxpayer was willing to say it was "reasonably certain" that the subject streets will be dedicated to the city. It was hopeful, of course, that that would happen, but it was less than certain that it would occur. No evidence has been presented in this case that anybody else is "reasonably certain" that the dedication will occur. Moreover, the evidence shows that the streets fall short of city standards in one important particular, street right-of-way width, and, perhaps another, pavement thickness. Approval by the city would appear to require a special exception to standards, at least with respect to right-of-way width. We have no indication that such an exception is forthcoming or likely to be forthcoming. This physical shortcoming of the development roads,² together with the failure

² There may be an additional physical shortcoming of the roads, as suggested by taxpayer's testimony that the city has called into question the thickness of the pavement.

of anybody to testify that he or she is "reasonably certain" they will be dedicated, leads us to conclude that it is not "reasonably certain" that they will be so dedicated.

As a consequence, the streets are taxable as retail construction per ETB 372. They do not qualify as public road construction under ETB 202. As suggested by the Audit Division, if, ultimately, the streets are dedicated to the city, Taxpayer may apply for a sales tax refund at that time, subject to the applicable statute of limitations, RCW 82.32.060.

DECISION AND DISPOSITION:

Taxpayer's petition is denied.

DATED this 25th day of April, 1995.