Cite as Det. No. 99-108, 19 WTD 143 (2000)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petitions For Corrections of Assessments and Refunds of	)	D E T E R M I N A T I O N
	)	No. 99-108
. . .	)	Registration No. . . . FY. . . /Audit No. . . .
. . .	)	Registration No. . . . FY. . . /Audit No. . . .
. . .	)	Registration No. . . . FY. . . /Audit No. . . .
. . .	)	Registration No. . . .

[1] RCW 82.04.030: B&O TAX -- JOINT VENTURE. Where two or more persons associate to carry out a single business enterprise for mutual profit and meet required common law elements, they have formed a joint venture. A joint venture is a "person" for Washington tax purposes.

[2] RULE 194; RCW 82.04.460; RCW 82.04.290: SERVICE B&O TAX – APPORTIONMENT. A joint venture may apportion its gross revenues where it maintains places of business both within and without Washington that contribute to the rendition of service within Washington.

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.

NATURE OF ACTION:

Several related corporations protest their respective tax assessments and claim refunds of business and occupation (B&O) taxes pertaining to publishing . . . directories that are distributed within the state of Washington. Additionally, a joint venture comprised of these related corporations seeks a ruling that it is a valid joint venture and it too seeks refunds for those same activities.[1]

FACTS:

De Luca, A.L.J. – . . . (Joint Venture) was formed pursuant to an express written agreement dated January 1, 1991, but signed March 1, 1991. The agreement is entitled . . . (Agreement). The caption and body of the Agreement reference it as the "Joint Enterprise Directory Publishing Agreement." The parties to the Agreement are . . . (. . . Company) and . . . Service Corporation (Service). . . . Company provides . . . service to its subscribers. . . . Company publish[es] and distribute[s] listings of its . . . service . . . to each subscriber. Service is an affiliate of . . . Company that specializes in compiling and creating . . . directories. . . . . (Sales) is a subsidiary of Service that specializes in soliciting sales of advertising for . . . directories. . . . (Publishing) is also a subsidiary of Service that specializes in publishing . . . directories. The representatives of . . . Company, Service, Sales, and Publishing respectively signed the Agreement. . . . Company, Service, Sales, and Publishing will be collectively referred to as "members." They along with Joint Venture will be collectively referred to as "taxpayers." Joint Venture is separately registered with the Department of Revenue (the Department) and claims it has paid service B&O taxes and filed monthly excise tax returns since 1991 on 100% of its revenues as Washington revenues from directory advertising without apportioning those revenues. Joint Venture also files federal income [tax] returns for partnerships under its own name. All of the taxpayers have their headquarters outside Washington.

Pursuant to the Agreement, each member of Joint Venture contributes specific services to the enterprise. . . . Company provides Sales with a list of all business . . . subscribers . . . . Sales' employees solicit advertising to be placed in the directories from that list. The advertising agreements with the business customers are in the name of . . . Company. Sales' employees work with the business customers in designing a particular ad for each customer that appears in the directories.

Publishing prepares the advertising copy and rewrites and revises the copy whenever necessary. . . . Company supplies Publishing with computer tapes containing subscriber lists to be inserted into the . . . directories. Publishing then compiles the alphabetical . . . listings . . . . Upon completing the advertising copy and compiling the . . . listings, Publishing forwards the materials to an out-of-state printer who is retained by Service. The printer prints the directories outside Washington. Service arranges for the directories to be distributed in Washington.

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

Under the Agreement, the members mutually agree to the design and determine the content of the directories. The members also determine the number of directories for each annual issue. The members mutually agree on the advertising rates. Any member may reject advertising contracts from any advertiser whose credit it deems questionable.

Joint Venture's net revenues, after accounting for costs in accordance with terms of the Agreement, are distributed monthly to each of the Joint Venture members in accordance with the respective percentage share held by each member. Except as specifically provided in the Agreement, each member bears the costs associated with its responsibilities. Nonetheless, the members do share some common expenses.

The members previously showed their intent to create a joint venture. In April 1988, they submitted a request for letter ruling to the Department's Taxpayer and Information Education (TI&E) section. The ruling request identified the parties to the proposed joint venture and provided a draft contract that detailed the relative rights and responsibilities of each of the joint venturers in the performance of the proposed joint venture's business. The letter requested a written ruling confirming the tax treatment of the proposed joint venture. TI&E replied by agreeing with the request letter "…as to the tax liability of the proposed joint venture and the members thereof." In concluding, TI&E stated that all revenues received by the joint venture would constitute advertising revenues and would be taxable under the service B&O tax classification. TI&E then announced that B&O tax is due from only the proposed joint venture. TI&E continued by stating "none of the joint venture members will be subject to any B&O tax with respect to distributions to them of the receipts of the joint venture." As noted above, the members actually entered into the present written Agreement on March 1, 1991. The present Agreement is substantively the same as the earlier proposed joint venture agreement described in the 1988 TI&E ruling request.

[In] 1993, the Department issued Det. No. . . . . Service and . . . Company were the parties in that action. Service and . . . Company protested assessments of service B&O tax and use tax. The audit period was January 1, 1985 through September 30, 1989. They sought to have their incomes apportioned for service B&O tax purposes, and a ruling that they had formed a joint venture pursuant to a "Directory Publishing Agreement" dated August 5, 1985. The Department in Det. No. . . . granted relief on the use tax issue, which is not currently before us, and allowed apportionment of service income for those taxpayers who performed services both within and without Washington.

However, the Department denied the request that they had formed a joint venture.
The Department in Det. No. . . . found the members did not have intent to form a joint venture. Instead, it found the members had a "purely contractual relationship" because, in part, . . . Company granted Service the right to sell directory advertising and to compile and print the . . . directories in return for a percentage of the advertising receipts. Moreover, the Department found that the members did not have a joint venture because the August 5, 1985 Direct Publishing Agreement did not allow for a sharing of profits and losses.

Det. No. . . . did not address either the present Agreement or the proposed agreement that was submitted to TI&E in 1988. It addressed only the August 5, 1985 Directory Publishing Agreement.

In the present matter, the Department's Audit Division again rejected the members' argument that they had formed a joint venture with the present Agreement. The Audit Division found "there was no contractual provision to share bottom line profit and losses as required by Det. No. . . . ." Consequently, the Audit Division assessed B&O taxes against each of the individual members of the joint venture. Specifically, the Audit Division assessed Service . . . in service B&O tax and interest on advertising revenue earned for the audit period October 1, 1989 through September 30, 1993. We note no tax was assessed for the years 1989 and 1990. *See* Document FY. . . /Audit No. . . . . Service not only protests this tax assessment, but it also seeks a refund of . . . in B&O tax paid in 1991.

The Audit Division assessed Sales . . . in service B&O tax and interest on commission income earned during the period from October 1, 1989 through September 30, 1993. No tax was assessed for the years 1989, 1990, and 1991. *See* Document No. FY. . . /Audit No. . . . . Sales not only protests the tax assessment, but it also seeks a refund of . . . in B&O tax for taxes paid in 1991.

The Audit Division assessed Publishing . . . in B&O tax and interest for printing, publishing, etc. for the period October 1, 1989 through September 30, 1993. No tax was assessed for the years 1989, 1990, and 1991. *See* Document No. FY. . . /Audit No. . . . . Publishing not only protests the tax assessment, but it also seeks a refund of . . . in B&O tax paid in 1991.

Service, Sales, and Publishing are seeking refunds for B&O taxes they paid in 1991 because Joint Venture also paid B&O taxes during 1991 on the gross receipts it earned and later distributed to the members.

Additionally, Joint Venture filed protective refund claims for 1991 in the amount of . . . for 1992 in the amount of . . ., for 1993 in the amount of . . ., and for 1994 in the amount of . . . . These four refund claims total . . . .

TAXPAYERS' EXCEPTIONS:

The taxpayers raise several arguments pertaining to their ten consolidated petitions (the three assessments and seven refund claims at issue). The taxpayers contend they formed a valid joint venture pursuant to their January 1, 1991 Agreement. As noted, Joint Venture is separately registered with the Department. They argue if the Audit Division is correct that they have not formed a legitimate joint venture then the excise taxes that Joint Venture has paid for the years 1991 through 1994, inclusive, should be fully refunded pursuant to RCW 82.32.060. They reason that in such a case Joint Venture would not be a person doing business in Washington and therefore is not subject to tax.

Alternatively, the taxpayers argue if Joint Venture is a valid joint venture it is entitled to apportion its revenues pursuant to RCW 82.04.460 and WAC 458-20-194 (Rule 194) because Joint Venture renders services taxable under RCW 82.04.290 and maintains places of business both within and without this state that contribute to the rendition of such services. Therefore, Joint Venture contends if it is a valid joint venture, it is entitled to an apportioned refund of service B&O tax because it claims it has paid taxes on 100% of its revenues as Washington revenues without apportioning the income.

If Joint Venture is a valid joint venture, the members Service, Sales, and Publishing assert that their respective gross revenues are exempt from B&O tax because the revenues are nontaxable distributions from their joint venture to them as individual venturers. Consequently, those three members argue the respective tax assessments against them should be reversed. They also contend each one of them is entitled to its respective refund request for 1991 because they erroneously paid B&O tax when Joint Venture also paid B&O tax on the same gross income. They add that Joint Venture was the only entity required to pay B&O tax on that gross income.

The crux of the taxpayers arguments is that they formed a valid joint venture. They cite *Barrington v. Murry*, 35 Wn.2d 744, 752, 215 P.2d 433 (1950) to show that a joint venture is in the nature of a partnership. They also cite *Paulson v. County of Pierce*, 99 Wn.2d 645, 654, 664 P.2d 1202 (1983) for the four elements under Washington law that evidence a joint venture: "(1) a contract, express or implied; (2) a common purpose; (3) a community of interest; and (4) an equal right to a voice to control."

The taxpayers assert they meet all four elements. They further claim their revenue sharing is also in accord with the law of joint ventures. The taxpayers dispute the requirement referenced by the Audit Division that to be a joint venture there must be a contractual provision "to share bottom line profits and losses." The taxpayers state their research revealed no legal authority whatsoever to support the proposition that joint venturers must share bottom line profits and losses. The taxpayers cite legal authority to the contrary that the parties to a joint venture have the power "to agree upon their own terms as to the charges and credits to be made and allowed upon settlement of the accounts." *Weigardt v. Becken*, 21 Wn.2d 59, 64, 149 P.2d 929 (1944); citing Am. Jur. 704 §51. *See also Bane v. Dow*, 80 Wash. 631, 635, 142 P 23 (1914); 30 Am. Jur. *Joint Adventure*, § 41, p. 968 (1958); and 46 Am. Jur.2d *Joint Venture*, §43, p. 62 (1969).

Indeed, the taxpayers claim the law has always presumed that a joint venture would bear no expenses for itself, but rather the joint venturers would bear all the expenses as their respective contributions to the venture unless they specifically agree otherwise. Therefore, the taxpayers assert the division of joint venture profits is a division of the joint venture's gross revenues. Furthermore, the taxpayers state there is nothing unusual about a joint venture agreement requiring each participant to bear specific expenses of the enterprise as well as providing for the sharing of other expenses on an agreed basis.

Finally, the taxpayers insist that pursuant to RCW 82.32A.020 they are entitled to rely on TI&E's letter ruling from May 2, 1988. TI&E agreed that a proposed written agreement constituted a joint venture, that only the proposed joint venture would be liable for B&O tax on the advertising revenue, and that the individual venturers would not be subject to B&O tax on their distributions from the joint venture's gross receipts. We note again that the proposed agreement reviewed by TI&E was not a document considered in Det. No. . . . .

ISSUES:

1. Do the taxpayers have a valid joint venture agreement?

2. If the taxpayers have a valid joint venture agreement, may Joint Venture apportion its revenues for B&O tax purposes?

3. May the taxpayers rely on the TI&E letter that agreed they had formed a joint venture with only the joint venture liable for B&O tax on the advertising revenues?

DISCUSSION:

[1] A joint venture is a "person" for Washington tax purposes. RCW 82.04.030. Each person doing business in Washington must register with the Department. RCW 82.32.030. In the present matter, Joint Venture is registered in its own name with the Department to do business in Washington and has been filing excise tax returns and paying taxes since 1991. Title 82 RCW does not define "joint venture." Therefore we look to its common and ordinary definition.

"Joint adventure" is defined as "any association of persons to carry out a single business enterprise for profit, for which purpose they combine their property, money, effects, skill, and knowledge…." Black's Law Dictionary 837 (6th ed. 1990). Similarly, a "joint venture" is defined as:

> A legal entity in the nature of a partnership engaged in the joint undertaking of a particular transaction for mutual profit. [citation omitted]. An association of persons or companies jointly undertaking some commercial enterprise; generally all contribute assets and share risks. It requires a community of interest in the performance of the subject matter, a right to direct and govern the policy in connection therewith, and duty, which may be altered by agreement, to share both in profit and losses. [citation omitted].

Id. at 839.

A joint venture is in the nature of a partnership. *Barrington v. Murry*, 35 Wn.2d 744, 752, 215 P.2d 433 (1950). However, the venturers can perform different functions, as the Supreme Court in *Barrington* stated:

> It is, of course, unnecessary that every member of a partnership must be able and qualified to do every act required to further its general purpose. For example, one can undoubtedly be a partner in the business of manufacturing watches without being himself able to make a watch or the simplest part thereof.

Id. See also Refrigeration Engineering Co. v. McKay, 4 Wn. App. 963, 973-74, 486 P.2d 304 (1971).

By common law, the essential elements of a joint venture are (1) a contract, express or implied; (2) a common purpose; (3) a community of interest; (4) an equal right to a voice, accompanied by an equal right to control. *Carboneau v. Peterson*, 1 Wn.2d 347, 374, 95 P.2d 1043 (1939); *Paulson, supra*, 99 Wn.2d at 654. The Supreme Court in *Carboneau* explained those elements. First, a contract binds the parties who enter into it and, when made, obligates them to perform it, and failure of any of them to perform constitutes, in law, a breach of contract. Second, the purpose of the enterprise, whether it be for business, pleasure, or for some other objective, must be common to both, or all, parties, and not separate. Third, there must be a community in the performance of the purpose. This element is connected to the common purpose element, but is still a distinct factor. A community interest in a joint venture means an interest common to both parties, that is, a mixture or identity of interest in a venture in which each and all are reciprocally concerned and from which each and all derive a material benefit and sustain a mutual responsibility. Fourth, each of the parties must have an equal right in the management and conduct of the undertaking, and that each may equally govern upon the subject of how, when, and where the agreement shall be performed. 1 Wn.2d at 374-376

The courts have generally included the additional requirement of sharing profits and losses. However, parties can agree not to share losses:

> Additionally, there must be a sharing of profits and losses in order for there to be a joint venture. *Knisely v. Burke Contract Accessories, Inc.*, 2 Wn. App. 533, 468 P.2d 717 (1970). However, the parties need not expressly agree to share the losses. *Eagle Star Ins. Co. v. Bean*, 134 F.2d 755 (9th Cir. 1943); *See* 46 Am. Jur.2d Joint Ventures, §13 (1969).
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> In our case there was an agreement between McKay and Loveless to share in the profits of the shopping center, either by operating it for a profit or by selling their shares in the contemplated corporation. Where the parties engage in a joint enterprise and there is an agreement to share profits, the law will presume that they agreed to share losses also. *Stipcich v. Marinovich*, 13 Wn.2d 155, 124 P.2d 215 (1942). If joint venturers wish to have a contrary agreement as to sharing of losses, they can easily make an express agreement to that end.

Refrigeration Engineering, *supra*, 4 Wn. App. at 974. *See also* Det. No. 88-155, 5 WTD 179, 191 (1988) (applying *Carboneau, supra*) and Det. No. 87-93, 2 WTD 411, 416 (1987).[2]

We agree with the taxpayers that Joint Venture meets all of the common law elements of a joint venture described in *Carboneau* and *Refrigeration Engineering.* There is an express contract entitled "Joint Enterprise Directory Publishing Agreement." That title reflects the intent of the parties to form a joint venture. By contrast, such intent was found lacking in Det. No. . . ., which reviewed a prior and different agreement.

The Agreement reflects the common purpose and community of interest in the members of Joint Venture by providing that the members ". . . for their mutual benefit desire, on the terms set forth herein, to jointly pursue, develop, maximize and share revenues from . . . directory."

The Agreement also provides the members an equal right to a voice and to control Joint Venture. For example, advertising rates are subject to approval by the members. The members agree to the design and content of the directories. They also decide the number of directories to print and how and when to distribute them. Moreover, the individual members have the right to reject advertising contracts from any advertiser whose credit they deem questionable.

Finally, there is a sharing of profits and losses among the taxpayers. Under their Agreement, [Company] receives . . . of Joint Venture's advertising revenue. Sales receives . . . of it. Service gets . . . of it, and Publishing receives . . . of it. Prior to distributing these respective shares, Joint Venture first reduces the revenues by the loss of revenue due to . . . and uncollectible billings. Additionally, there are some expenses shared by all of the members of Joint Venture. For example, when the members mutually agree to add pages or sections to the directories, as well as adding any . . . required pages and sections, they share the costs of those enhancements. If the revenues exceed such losses and expenses, the balance is distributed in accordance with the respective percentages.[3]

Like the taxpayer, we did not find a legal requirement that all members of the joint venture must share "bottom lines profits and losses." Indeed, it is up to the members to determine whether they wish to provide for such an arrangement. *Weigardt v. Becken, supra.* In addition to the other four requirements of a joint venture, only a sharing of profits is required. *Refrigeration*

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[2] The four requirements in *Carboneau,* plus a sharing of profits and losses, are compared to a five elements test announced by the Department in Det. No. 87-93 in determining the existence of a joint venture. Those five elements are (1) the joint venture was specifically formed to perform the contract work, (2) the formation of the joint venture occurred before any of the work required by the contract had been undertaken, (3) the contract work was in fact performed by the joint venture, (4) the funds were handled as a joint venture rather than as separate funds of any party to the joint venture agreement, and (5) there is a contribution of money, property and/or labor so that any profit or loss incurred by the joint venture is proportionately shared by all joint ventures. Whether the Department uses the *Carboneau* test, plus a sharing of profits and losses, or the five elements test may be in the ease of applying which test to particular facts and circumstances.

[3] We find the taxpayers also met the five elements test for a joint venture described in Det. No. 87-93, *supra,* and footnote 1.

Engineering, supra. However, we have shown above that the members of Joint Venture share not only profits, but also losses. The fact that the members did not decide to share all costs of the joint venture, but instead be individually liable for some of their respective costs does not detract from the formation of a joint venture. Long ago, the Washington Supreme Court declared:

> [A joint adventure] is not like a partnership where the entire cost of the business is to be reckoned before determining the profits; but rather an engagement in a common enterprise upon a profit-sharing basis in which each party furnishes a part of that which is necessary to the success of the venture. In such case, we believe the rule is as stated in 23 Cyc. 459:
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> > "No part of the expenses incurred by one party in the execution of his part of the common enterprise can be charged against the other parties; but should be deducted from his share of the profits."

Bane v. Dow, supra, 80 Wash at 635.

Furthermore, we note under the Agreement, the distributions are not absolute payments that are payable to a member(s) in any event, regardless of whether or not the profits of the joint venture are adequate to meet the payments. This situation, therefore, is similar to the one described in Excise Tax Advisory 073.08.106 (ETA 73). The present situation also compares with the one in Det. No. 90-74, 9 WTD 143 (1990) where the Department held that payments by a partnership to a partner were nontaxable distributions of profit. They were not absolute payments to a partner for services rendered like those of a third party service provider. Det. No. 90-74 notes had the payments to the partner been absolute like those to a third party provider, they would have been taxable.

Because we have found the taxpayers created a valid joint venture, the advertising revenues earned by Joint Venture are subject to service B&O tax. Consequently, the distributions paid to Service, Sales, and Publishing are nontaxable income. Det. No. 90-74 and ETA 73. Therefore, the tax assessments against Service, Sales, and Publishing are reversed. Refunds claimed by Service, Sales, and Publishing for 1991 are granted subject to audit verification to determine if and when those three taxpayers were paying B&O taxes on their distributions at the same time Joint Venture was paying B&O tax on the gross revenues earned from advertising.

[2] The next issue is whether Joint Venture may apportion its gross revenues. The answer is yes, in accordance with RCW 82.04.460:

> Any person rendering services taxable under RCW 82.04.290 and maintaining places of business both within and without this state which contribute to the rendition of such services shall, for the purpose of computing tax liability under RCW 82.04.290, apportion to this state that portion of his gross income which is derived from services rendered within this state.

See also Rule 194. Without question, Joint Venture maintains places of business both within and without Washington that contribute to the rendition of services within Washington. Joint Venture's headquarters is in [another state]. It also has places of business in Washington. Previously, the Department ruled in Det. No. . . . that Service was entitled to apportion its income because Service and its subsidiaries, Sales and Publishing, primarily performed many of their services outside Washington while performing some services within Washington. Those same activities are now being performed by Joint Venture in the same places. We find the reasoning and authority pertaining to apportionment as discussed in Det. No. . . . to be persuasive.

Consequently, we grant Joint Venture's request for an apportioned refund of Service B&O tax for the years 1991, 1992, 1993, and 1994, subject to the Audit Division's verification. According to Joint Venture, it has paid service B&O tax to Washington on 100% of its gross revenues from advertising without apportioning those revenues. If this statement is true, Joint Venture is entitled to apportion its revenues, most likely on a cost of doing business basis as provided in RCW 82.04.460 and Det. No. 93-304. Because we have found Joint Venture is the proper taxpayer, the protective refund claims filed by Joint Venture . . . are denied.

[3] We do not reach the last issue whether the taxpayers have the right to rely on the TI&E letter because we have decided this matter on other grounds.

DECISION AND DISPOSITION:

The taxpayers' petitions are granted as follows. The tax assessments against Service, Sales, and Publishing are reversed. The refunds Service, Sales, and Publishing each seek for 1991 are granted to the extent that they paid B&O tax during the same time Joint Venture paid B&O tax on the same directory advertising revenues. Joint Venture is a valid joint venture effective March 1, 1991, the date the Agreement was signed by Joint Venture's members. Subject to audit verification, Joint Venture is entitled to partial refunds of B&O taxes paid for 1991, 1992, 1993, and 1994 based on cost apportionment of its gross income earned from directory advertising. The protective refund claims filed by Joint Venture are denied. Accordingly, we remand this matter to the Audit Division to make these adjustments.

Dated this 29th day of April, 1999.