Cite as Det No. 08-0222, 28 WTD 89 (2009)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

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. 08-0222
. . .	)	Registration No. . . .
	)	Document No. . . .
	)	Audit No. . . .
	)	Docket No. . . .

RULE 170; RCW 82.04.030, RCW 82.04.050: JOINT VENTURE – CUSTOM CONSTRUCTION. The taxpayers created joint ventures with various landowners in five of the seven agreements at issue, because those arrangements meet the five elements of a joint venture established by common law. The other two projects at issue are not joint ventures, because the contracts provided demonstrate a lack of intent to form a joint undertaking between the parties. In these two projects, the taxpayers are subject to retail sales tax because they built homes on land owned by their consumers.

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.

Jensen, A.L.J. – Single family home builders appeal two assessments of retail sales tax and retailing business and occupation (B&O) tax claiming that they acted as speculative builders on certain transactions, as opposed to prime contractors. The taxpayers claim that in these transactions they acted as joint venturers with the landowners to build a single home that would be sold to a third party. We find that the taxpayers acted as joint venturers in five of the seven agreements in question. . . . Because the assessment only included retail sales tax and retailing B&O tax on [taxable amounts] received by the taxpayers, we uphold the assessment.[1]

[1] Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410. Nonprecedential portions of this determination have been deleted.

ISSUES

1. Did the taxpayers form valid joint ventures with various landowners sufficient to be taxed as speculative builders pursuant to WAC 458-20-170 (Rule 170)?

2. Even if the taxpayers formed valid joint ventures with various landowners, was the property held by the landowners, and not the joint ventures, so as to make the taxpayers' construction services provided on that land taxable as speculative builders under Rule 170(2)(f)?

FINDINGS OF FACT

[Taxpayer I] was a general partnership based [in] Washington in the business of building single family homes as either a speculative builder or custom home builder. Taxpayer operated in . . . Washington from June 20, 2003, through July 31, 2005. Effective August 1, 2005, Taxpayer I dissolved and all of its assets were contributed to [Taxpayer II]. Taxpayer II is a corporation that performs the same business activities as Taxpayer I. Both entities are registered with the Department of Revenue (Department).

The Department's Audit Division (Audit) audited both taxpayers; Taxpayer I for the period of June 20, 2003, through July 31, 2005, and Taxpayer II for the period of August 1, 2005, through March 31, 2006. During the audit periods, both Taxpayer I and Taxpayer II would enter into various agreements with landowners whereby the taxpayers agreed to build a single family home, and the landowners provided the land and obtained the financing for the project. After looking at the documentation provided by the taxpayer, Audit concluded that certain projects treated by both Taxpayers I and II as speculative construction projects were actually custom construction projects because the taxpayers had not entered into valid joint ventures with the landowners on whose land the homes were built.

On August 22, 2007, Audit assessed Taxpayer I $. . ., which included $. . . in retail sales tax, $. . . in retailing B&O tax, an adjustment to Taxpayer I's small business credit of $. . ., and $. . . in interest. Audit assessed Taxpayer II $. . ., which included $. . . in retail sales tax, $. . . in retailing B&O tax, $. . . in interest, and $. . . in a 5% assessment penalty. Audit computed the amounts of retail sales tax and retailing B&O tax based on construction draws Taxpayers I and II received by the alleged joint ventures. Taxpayers I and II used these construction draws to pay for their construction services provided for the alleged joint ventures.

Taxpayers I and II appeal the portion of these assessments related to seven purported joint venture agreements. Taxpayer I provides an alleged joint venture agreement for a project to build a home referred to as [Home I]. The project represents the bulk of the assessment against Taxpayer I. Taxpayer II provides six alleged joint venture agreements for projects to build homes referred to as: [Home II, Home III, Home IV, Home V, Home VI, and Home VII] In each of these projects Taxpayers I and II claim that they acted as speculative builders because they had entered into valid joint ventures with the landowners.

During the audit period Taxpayer I constructed five homes that it treated as speculative construction. Audit claims that in only one of these projects should Taxpayer I not be treated as a speculative builder: [Home I].

The "Joint Venture Agreement" provided for [Home I] provides that . . . the fee owners of the real property must contribute their interest in the land and obtain financing in the amount of $. . . for the project. Under the agreement, Taxpayer I was responsible for providing general contractor services to build the home. The agreement indicates that Taxpayer I "shall build the house at its cost and shall be entitled to no fee or overhead cost associated with said work, but shall only be entitled to a share of profits as joint-venturer as further described herein." Proceeds from the sale of the property were distributed according to section 4 of the agreement, which provides the following order of priority: (1) costs of closing the transaction, including real estate agent commissions, escrow charges, and taxes; (2) the [fee owners of the real property] are reimbursed for the construction financing; (3) Taxpayer I is paid for any un-reimbursed costs that it incurred in advancing extra funds for the project; and (4) the balance of the sale proceeds are divided equally between the [fee owners of the real property] and Taxpayer I. This section also provides that the parties are equally responsible for payment of any deficient amounts. The agreement also indicates that the closing statement will indicate both parties as sellers of the property, and that the joint venture terminates upon closing of the sale of the home. There is no date to this agreement, but its stated effective date is . . ., 2003.

Audit claims that the project at [Home I] was not a joint venture because the land upon which the home was built was owned by one of Taxpayer I's partners . . . . No documentation has been provided to indicate that the land was ever owned or sold by the joint venture. The proceeds obtained by the bank to finance this project were also apparently obtained in the name of [one of the fee owners of the real property], and not in the name of the joint venture.

With respect to the projects completed by Taxpayer II during the audit period, Audit concluded that 13 projects originally reported by Taxpayer II as speculative construction projects were taxable as custom construction projects. Taxpayer II now provides alleged joint venture agreements for six of those projects, and claims that it should be taxed as a speculative builder on these projects.

The agreements provided for the [Home II and Home III projects] are almost identical to the terms of the [Home I] agreement. The agreement for the [Home II] project is between Taxpayer II and . . . the fee owners of the property. The [fee owners of the property] were required to obtain financing for this project in the amount of $. . . . The stated effective date of this agreement is . . ., 2005. The agreement for the [Home III] project is between Taxpayer II and . . . the fee owners of that property. The [fee owners of the property] were required to obtain financing for this project in the amount of $. . . . The stated effective date of this agreement is . . ., 2005.

Audit again asserts that these two projects are not joint ventures because the property in both cases was not owned by the joint ventures, but by the [fee owners of the property] as individuals. With respect to the [Home II project], Audit also points out that the real estate settlement documents show [the fee owners of the property] as the sellers of the property, not the joint venture as required under the agreement.

With respect to the [Home III project], Audit also points out that the funds for this project were handled by Taxpayer II, rather than the joint venture, and that the suppliers and subcontractor used dealt exclusively with Taxpayer II, who was the only party liable for payment for the materials and labor provided by these third parties.. Taxpayer II also indicated to Audit that it did not separately keep accounting records for the joint venture for this project.

The agreement Taxpayer II provides for the [Home IV] project is different. That agreement is simply entitled "Agreement," and does not describe the land upon which the project is completed other than a hand written . . . notation written at the top of the agreement. This agreement is between [an individual and an LLC] who are collectively referred to as the "owner," and [the fee owners of the property] and Taxpayer II, who are collectively referred to as the "contractor." The agreement provides that the owner and Taxpayer II "will attempt to locate property on which to construct a single family home or some other agreed upon project." Once the parties locate the property, the agreement provides that the owner shall purchase the property, and that "title to the Property shall be solely in the name of Owner." The owner is also responsible for obtaining financing.

As with the other projects, Taxpayer II's role under this agreement was to build the home on property acquired by the owner. The agreement also requires Taxpayer II to obtain the necessary "drawings, specifications, engineering, and permits" for the project. The agreement generally requires much more consent from both parties before critical actions are taken then the previous agreements. For example, Taxpayer II cannot hire subcontractors or suppliers without receiving approval from the owner. This agreement also requires both parties to enter into a separate construction agreement before actual construction begins.

Under this agreement, the owner, not Taxpayer II, is generally responsible for paying the costs of construction. At closing, the owner and Taxpayer II are first reimbursed for any expenses they incurred under the agreement. If the sale proceeds are insufficient to meet the expenses, both parties must contribute additional funds till the expenses are paid in full. After the expenses are paid, the owner and Taxpayer II share any profits or losses equally. Before closing, Taxpayer II has the right to record a deed of trust to secure its interest in the property. Finally, in the event that the property is not sold within a specified time frame, the agreement allows either party to purchase the property from the joint venture. No evidence has been provided whether a deed of trust was ever created or if either party actually purchased the residence.

Audit claims that this agreement does not establish a joint venture because Taxpayer II is reimbursed for all its costs before it shares in the profits and losses. Audit also claims that various facts surrounding this transaction indicate that it is not a joint venture. For example, the owner obtained the construction financing in its own name, and draws on that loan were obtained by Taxpayer II, not the joint venture. The cost breakdown shown on the bank draw requests include a collection of retail sales tax on the entire project amount, which might indicate that the parties viewed this transaction as a custom construction project. Also, Audit claims that

Taxpayer II indicated to Audit that it did not separately keep accounting records for this project. Finally, Audit claims that suppliers for this project dealt with Taxpayer II, not the joint venture.

Taxpayer II provided the other three agreements to Audit during the Audit period. The agreement for [Home V] is similar to the first three agreements. The parties to this agreement are Taxpayer II and . . . the owner of the property in question. . . . The agreement required [the owner of the property in question] to obtain $. . . in financing for this project. The stated effective date of this agreement was . . ., 2005.

Taxpayer II also submits a letter from [the owner of the property in question] for this project. The letter is dated . . ., 2007, and provides, in part:

> My name is . . . and I was a party to the "Agreement to Build and Sell Residence," with [Taxpayer II] dated . . ., 2006. Although Section 4 of the agreement did not discuss loss sharing, it was always my understanding that any losses would be shared in the same manner as the division of profits, 50% to me and 50% to [Taxpayer II].

The final two agreements are different than any of the other previous agreements. These agreements are entitled "Agreement to Build and Sell Residence." The [Home IV] project agreement is dated . . . 2006, and is between Taxpayer II and . . . . The agreement was signed by [the] vice president of Taxpayer II on , 2006, and by [the other party to the agreement] on . . ., 2006. The legal description of the property is attached in a separate document referred to in the agreement as "exhibit A" and is dated . . ., 2006.

The [Home VII] project agreement is dated, 2006, and is between Taxpayer II and . . . . The agreement was signed by [the vice president of Taxpayer II] and [the other party to the agreement] that same date. The legal description of the property is also attached in a separate "exhibit A" and is also dated . . ., 2006.

These two agreements provide that the owners must purchase the property described in exhibit A, and employ Taxpayer II to construct a single family residence upon the property. Title to the property must only be in the owner's name. Taxpayer is responsible for building the home and for arranging the marketing of the property. Both parties must agree to the listing price and selling price of the property, and the agreements give either party the right to purchase the property if the property is not sold within 180 days from completion.

Section 5 of these agreements explains how the parties must divide profits and losses. It provides:

> Upon the sale of the property, the net proceeds, which shall be the amount or proceeds from the sale in excess of the construction loan, standard closing costs, and commissions, shall be payable fifty percent (50%) to Owner and fifty percent (50%) to [Taxpayer II], and this provision of this Agreement shall constitute escrow instructions from Owner to any escrow in which the sale is being closed that the said proceeds shall be so disbursed from escrow. To secure payment of said amount of sale proceeds to [Taxpayer II],

> Owner will sign and the parties will record a Deed of Trust in the form attached hereto as Exhibit "C" against the title to the said real property which shall be second in priority only to the construction loan described herein.

Finally, both agreements contain a section 10, which provides that "[t]he parties agree that this Agreement is in no manner intended to create a partnership, nor should it be read to do so."

These two agreements are almost identical, except for section 2. Section 2 of the agreement for the (Home VI] project provides that the owner and Taxpayer II will enter into a separate construction contract, and then describes Taxpayer II's responsibility to construct the home. Section 2 of the agreement for the [Home VII] project explains that the owner is obligated to obtain sufficient financing to pay for the project. The section also explains that "[Taxpayer II] shall in no manner be considered or deemed a co-borrower on such loans, and Owner agrees to so advise Lender, and indemnify and hold [Taxpayer II] harmless from any such claim by Lender."

Audit bases its denial of speculative builder status for these last three projects on similar grounds to its previous denials. Audit first notes that Taxpayer II did not keep separate accounting records for each of these projects, and that the banks and suppliers that dealt with the landowners and Taxpayer II did not treat these parties as joint ventures. Only the landowners were treated as borrowers, and Taxpayer II was treated as the contractor. Audit also indicates that if the construction loan funds were insufficient to complete the project, Taxpayer II would bill the landowner for the additional costs. Those costs could then be recouped by the landowners at closing before funds were evenly distributed between the parties.

Audit also argues that even if these seven projects can be construed as joint ventures, the parties are subject to tax as sellers of the property and not as speculative builders because pursuant to Rule 170(2)(f) the parties built homes on land owned by a co-venturer, not the separate joint venture entity.

ANALYSIS

In general, a company that constructs, repairs, or improves new or existing buildings for consumers is required to collect retail sales tax from its consumers and pay retailing business and occupation (B&O) tax. RCW 82.04.050(2)(b). Washington law distinguishes between speculative builders, or those that build on land owned by the builder, and prime contractors, or those that construct buildings or structures on real property "of or for consumers." Rule 170. While speculative builders pay retail sales tax on materials they purchase and on all work performed by their subcontractors, prime contractors do not pay retail sales tax on such purchases, but must collect retail sales tax from their consumers on the "full contract price." Rule 170(4).

During the audit periods, Taxpayers I and II would build both speculative homes and custom homes, where it acted as a prime contractor. At issue in this case are seven projects where the taxpayers claim that they acted as speculative builders because they had entered into a joint venture with the landowner to build the home.

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 case, at no time relevant in this appeal was a joint venture registered with the Department in any of the seven projects in dispute. However, the Department will not disregard a joint venture if one member of the joint venture is already registered and reports the tax liabilities of the joint venture on its own excise tax return. Det. No. 87-93, 2 WTD 411 (1987). In this case, even if the purported joint ventures did not register with the Department, Taxpayers I and II were registered with the Department.

Title 82 RCW does not define "joint venture." Therefore, the Department has consistently considered the common and ordinary definition of the term. "Joint venture" is defined as: "[a] business undertaking by two or more persons engaged in a single defined project. The necessary elements are: (1) an express or implied agreement; (2) a common purpose that the group intends to carry out; (3) shared profits and losses; and (4) each member's equal voice in controlling the project." *Black's Law Dictionar*y 843 (7^{th} ed. 1999).

A joint venture is in the nature of a partnership, and the rights, duties, and liabilities of the parties are generally tested by the same rules. *Barrington v. Murry*, 35 Wn.2d 744, 752, 215 P.2d 433 (1950); *Paulson v. McMillan*, 8 Wn.2d 295, 111 P.2d 983 (1941). All partners are jointly and severally liable for everything chargeable to the partnership. RCW 25.04.150. Similarly, joint venturers are each liable for everything chargeable to the joint venture. However, joint venturers can perform different functions in the joint venture. 35 Wn.2d at 752.

For parties to be considered a joint venture, they must meet the common law test for joint ventures.[2] Its essential elements are: (1) a contract, express or implied; (2) a common purpose; (3) a community of interest; and (4) an equal right to a voice, accompanied by an equal right to control of the agencies used in the performance. *Carboneau v. Peterson*, 1 Wn.2d 347, 374, 95 P.2d 1043 (1939). The Department refers to these as the "*Carboneau*" requirements. Det. No 88-155, 5 WTD 179 (1988); Det. No. 98-8, 17 WTD 236 (1998).

The Washington State Supreme Court in *Carboneau* goes on to explain these elements. First, there must be an agreement to enter into an undertaking having the other elements. A contract binds the parties who enter into it and, when made, obligates them to perform it, and failure of

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[2] The Department has historically employed either a four or five part test to determine if a joint venture exists. Whether the Department uses the four or five part test "may be in the ease of applying the test to particular facts and circumstances." Det. No. 98-214, 19 WTD 201 (2000); Det. No. 99-176, 19 WTD 456 (2000). The five part test was announced by the Department in 1987 in Det. No. 87-93. The elements of that test include: (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 co-venturers. Det. No. 87-93 at 416.

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 an additional requirement that joint ventures share profits and losses. *Knisely v. Burke Contract Accessories, Inc*., 2 Wn. App. 533, 468 P.2d 717 (1970). However, the parties need not expressly agree to share losses. Where the parties engage in a joint enterprise and there is an agreement to share profits, the law will presume that they also agreed to share losses. *Eagle Star Inc. Co. v. Bean*, 134 F.2d 755 (9th Cir. 1943); *Stipcich v. Marinovich*, 13 Wn.2d 155, 124 P.2d 215 (1942).

In this case, Taxpayers I and II claim that the seven agreements provided evidence seven separate joint ventures under the *Carboneau* requirements, plus the sharing of profits and losses. With respect to the agreements used for the projects referred to as [Home I, Home II, Home III, and Home V], we find that a valid joint venture exists under the *Carboneau* factors. Those agreements are substantially similar and certainly satisfy the requirement for an express contract. They also establish a common purpose among the parties to construct a single family home that will be sold to some third party. Each party maintains a mutual benefit and sustains a mutual responsibility even though each has separate roles under the joint venture. Those agreements also require the parties to share in the joint venture's profits and losses.

The agreement used for the [Home IV] project also establishes a joint venture under the *Carboneau* requirements. It is an agreement where both parties jointly and severally agree to an undertaking. The purpose of that undertaking is to locate property, build a house there, and sell it to a third party with the profits to be distributed evenly after closing. The agreement also entitles each party to a mutual benefit, accompanied with mutual responsibility. Finally, the parties have an equal right to management and control under this agreement. The agreement provides that anytime a critical decision is made, each party must consent to the decision.

While these first five agreements establish joint ventures, we find that the agreements used for the [Home VI and Home VII] projects do not meet the *Carboneau* requirements for joint ventures. These contracts do not appear to create a joint undertaking between Taxpayer II and the landowners. First of all, these agreements expressly provide that "[t]he parties agree that this agreement is in no manner intended to create a partnership, nor should it be read to do so." Even though a joint venture is distinct from a partnership, the language shows that the parties did not intend a joint undertaking. Similarly, in explaining the relationship between the parties, these agreements use terminology inconsistent with a joint venture, such as "owner will employ contractor." . . . Overall, these "Agreement[s] to Build and Sell Residence" appear to create an agreement where the landowners agrees to employ the taxpayers to build a home on their own land, not a joint venture.

Audit argues that none of these projects were joint ventures because Taxpayer I and II and the landowners did not act as joint ventures when dealing with suppliers, banks, or subcontractors. Audit also points out that Taxpayer I and II did not keep separate accounting records for the alleged joint ventures. Also, in one project, Audit points out that Taxpayer II made bank draw requests showing that it was to collect retail sales tax on the entire project amount, consistent with acting as a prime contractor for tax purposes. However, no evidence was provided that Taxpayer actually collected retail sales tax on the entire project amount.

These factors do not disqualify the taxpayers' projects as joint ventures under the *Carboneau* requirements. In *Carboneau,* the Washington State Supreme Court stated:

> [I]t follows that each party must have an equal right to control over the agencies used. This, of course, does not mean that each has the right to interfere at will with the driver to whom the duty of operating an automobile has previously been intrusted. It does mean, however, that each has an equal right to general supervision over the instrumentality, equal authority in directing how the instrumentality is to be used in the performance of the enterprise, and likewise, equal responsibility for the manner of such performance.

1 Wn.2d at 376.

The Department has also previously ruled that co-venturers can perform different functions. *See* Det. No. 99-176; *citing Barrington*, 35 Wn.2d at 752. That determination also explains that parties can still act as co-venturers in situations where one party holds legal title to property in their own name, obtains the requisite financing, and leaves the other party to do the rest of the work on the project. *Id.* at 460. In that case, Audit also argued that a joint venture did not exist where the accounting used was not done as a joint venture. In finding that a joint venture nonetheless existed, the Department noted that "the contractors and their co-venturers trusted and relied on each other to perform their respective tasks such as purchasing materials and labor, sharing information about their costs, and paying the invoices." *Id.* This case is no different. Even though the taxpayers and the landowners did not represent themselves to third parties as "joint ventures," they, nonetheless, acted as joint venturers in performing separate functions beneficial to the joint venture. . . .

DECISION AND DISPOSITION

Taxpayer's petition is denied.

Dated this 19th day of August 2008.

(Note: 28 WTD 89 originally included two pages that were published in error. These pages have been redacted).