

Cite as Det. No. 88-169, 5 WTD 257 (1988)

**THIS DETERMINATION HAS BEEN OVERRULED OR MODIFIED IN WHOLE OR PART BY DET. NO. 93-269ER, 14 WTD 153 (1995).**

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

In the Matter of the Petition	)	<u>D E T E R M I N A T I O N</u>
For Correction of Assessment of	)	
	)	No. 88-169
	)	
...	)	Registration No. ...
	)	
	)	
	)	

- [1] **RULES 109, RCW 82.04.390 AND RCW 82.04.4281:** B&O TAX -- INTEREST -- REAL ESTATE CONTRACTS -- LOANS -- ETB 505.04.109. Interest received from real estate contracts is subject to Service B&O tax. A real estate contract, even if assigned to a taxpayer as repayment of a loan, does not qualify as an "investment" for purposes of RCW 82.04.4281. Sellen Construction and O'Leary cases cited. Detlefsen v. Dept. of Revenue, Board of Tax Appeals Docket No. 84-38 cited.
- [2] **RULE 106, RCW 82.04.390 AND RCW 82.04.4281:** B&O TAX -- INTEREST -- SALES IN LIQUIDATION OF BUSINESS -- PROPERTY HELD FOR LEASE -- CASUAL AND ISOLATED SALES. Interest from sales of quarry property and used equipment made as part of the liquidation of a taxpayer's business found subject to B&O tax. The sales were not casual and isolated sales as there were several sales involved over a period of time to more than one party; the taxpayer's business had included buying and selling property for quarry sites; and some of the sales included equipment that the taxpayer had leased.
- [3] **RULE 102 AND RCW 82.04.470:** RETAIL SALES TAX -- SALES FOR RESALE -- NATURE OF TRANSACTION SHOWING SALES WERE WHOLESALE -- RESALE CERTIFICATE. Where taxpayer sold used equipment to two businesses registered in this state as dealers selling equipment and retained possession of the equipment until the dealers sold the equipment to third parties, the nature of the transaction supported a finding the sales were wholesale. The fact that the taxpayer only had a resale certificate at the time of the sale from one of the

dealers, and the certificate was more than four years old, was not controlling.

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 HEARING: August 18, 1987

#### NATURE OF ACTION:

The taxpayer, a construction company, protests the assessment of retail sales tax on sales of equipment which it contends were sales for resale and the assessment of Service B&O on interest received from contract sales of property and used equipment.

#### FACTS AND ISSUES:

Frankel, A.L.J. -- The taxpayer's records were examined for the period January 1, 1982 through December 31, 1985. The audit disclosed taxes and interest owing in the amount of \$ . . . . Assessment No. . . . in that amount was issued on November 18, 1986.

The first assessment at issue is the Service B&O assessed on unreported interest income. (Schedule II). The auditor relied on WAC 458-20-109 and RCW 82.04.390, copies of which were provided to the taxpayer.

The taxpayer protests the assessment contending the income from five of the sales is income from investments or the use of money as such and exempt under RCW 82.04.4281. The taxpayer contends the income from the remaining sales is exempt as income from casual or isolated sales made as part of the liquidation of the taxpayer's business.

The second assessment at issue is retail sales tax assessed on the sales of capital assets. The taxpayer contends the sales were for re-sale and that no retail sales tax was due.

#### DISCUSSION:

[1] Interest Income ---

RCW 82.04.390 provides that the B&O tax does not apply to the gross proceeds derived from the sale of real estate. The exemption does not apply, however, to amounts received as interest from real estate transactions.<sup>1</sup> The taxpayer relies on RCW 82.04.4281 which provides a deduction for amounts derived by persons, other than those engaging in banking, loan, security, or other financial

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<sup>1</sup> RCW 82.04.390 provides that the B&O tax does not apply to:

. . . gross proceeds derived from the sale of real estate. This however, shall not be construed to allow a deduction of amounts received as commissions from the sale of real estate, nor as fees, handling charges, discounts, interest or similar financial charges resulting from, or relating to, real estate transactions. (Emphasis added.)

businesses, from investments or the use of money as such. The taxpayer contends the interest from the following transactions is exempt under RCW 82.04.4281 as income from passive investments:

- 1) [Contract A] (\$545) - The taxpayer stated this interest income is from a loan which was in the form of a bond and not from the sale of property. The loan was made when the [Association] building was being built. The association ran out of money and asked its members for a loan;
- 2) [Contract B] (\$1959) - This was a development in the . . . area. Money was loaned to a limited partnership in 1975. The taxpayer stated he had no involvement with the property and was not a partner in the property. The interest is received as repayment of the loan;
- 3) [Contract C] (\$1,033) - The taxpayer stated this contract was part of the [Contract B] Development and was assigned to him in lieu of interest owing on his loan to the partnership;
- 4) [Contract D] (\$5,376 received in 1982) - This was raw land bought by a corporation in which [the taxpayer] was a stockholder. The land was later sold on a real estate contract. The corporation was liquidated and the taxpayer received the contract;
- 5) [Contract E] (\$12,167) - The taxpayer stated he and another person bought property in the . . . area which was sold on contract. He stated it was not quarry property and was purchased as an investment.

The taxpayer relies on John H. Sellen Constr. Co. v. Dept. of Revenue, 87 Wn.2d 878 (1976) and O'Leary v. Dept. of Revenue, 105 Wn.2d 679 (1986). In Sellen, the court held that the income from incidental investments of surplus funds by businesses that were not similar to banking, loan, or security businesses was deductible as income from investments or the use of money as such. In O'Leary, the court upheld the assessment of B&O tax on the interest received from the sale of 17 of the 23 apartment complexes owned by the taxpayer. The court found the real estate contracts held by the taxpayer, an investment partnership, were neither incidental investments nor made from surplus income of the partnership. O'Leary at 682.

After Sellen was issued, the Department issued an excise tax bulletin summarizing the case. (ETB 505.04.109, . . . ). ETB 505, inter alia, provides no B&O tax deduction is permitted for interest or similar financial charges relating to real estate transactions.

ETB 505 cites RCW 82.04.390. RCW 82.04.390 in its present form was adopted by the legislature subsequent to the adoption of RCW 82.04.4281. The legislature is presumed to have contemplated and taken into consideration all the pertinent law in force at the time in relation to the enactment of a new, or an amendment to, an existing statute. The legislature on at least two occasions, at the time of enactment of RCW 82.04.390 and again in 1970 when it amended RCW 82.04.4281, had the opportunity to consider the relationship between the two statutes but left both standing. Thus, we believe that the legislature intended that interest earned by a taxpayer selling real estate on contract

is taxable and not exempt under RCW 82.04.4281.

As the Board of Tax appeals concluded in Donald F. Detlefsen v. State, Docket No. 84-38 (1985):

. . . interest income is a financing charge, it occurs by allowing payments to be made over an extended period of time and as a result, a fee or interest is realized; this does not meet the test of an investment.

In the present case, the taxpayer stated the interest received from [Contract A] and [Contract B] was not from the sales of property but from loans. We agree that this interest is deductible as incidental investment of surplus funds. Loaning money was not a regular part of the taxpayer's business practice, and making two loans does not make the taxpayer in the "financial business." See ETB 368.04.224. (ETB 505 . . . , quotes this bulletin, noting it was endorsed by the court in Sellen.)

The interest from the remaining contract sales, however, is taxable. Even if the taxpayer did not make the actual sales of the [Contract C] or [Contract D] contracts, the contracts were assigned to the taxpayer. The taxpayer now has all of the rights of the contract vendor and also the tax liabilities. This is similar to the situation where a lease is assigned. In such a case, the one who acquires the right of the lessor is responsible for collecting retail sales tax and for paying Retailing B&O on the lease payment. No exception is made because a contract is assigned to pay off a loan or received as part of a corporate dissolution.

[2] The taxpayer contends the remainder of the interest is from the liquidation of its business and that the liquidation of a business is a casual or isolated sale. At issue is the interest from the sales of the . . . , the . . . property and equipment that had been used in the business. A casual or isolated sale is defined by RCW 82.04.040 as a sale made by a person who is not engaged in the business of selling the type of property involved. The business and occupation tax does not apply to casual or isolated sales. WAC 458-20-106 (Rule 106).

"Casual" means something occurring without regularity and "occasional" connotes a lack of continuity. Thus in determining whether sales are casual or isolated, one factor is whether the sales were made on a regular and continuous basis. Rule 106 states that any sales which are routine and continuous must be considered to be an integral part of the business operation and not casual or isolated sales. Sales do not have to be made frequently, however, but only as part of the business activity to be taxable; and for tax purposes, business is a broad and virtually all-encompassing commercial activity. Budget Rent-A-Car v. Dept. of Revenue, 81 Wn.2d 171 (1972). In Budget Rent-A-Car, the Court held that sales of the automobiles used in the taxpayer's leasing business, even though such outright sales were not part of the taxpayer's primary business activity, were sales made by a person "engaged in the business of selling the type of property involved."

Ordinarily, when a person sells his entire business outright to a single purchaser, the sale is isolated or occasional, since the regular course of his business is not selling businesses. 68 Am. Jur.2d SALES AND USE TAXES § § 122-23 Casual, Isolated, or Occasional Sales (1973). See, e.g., Three Lions Supper Club Ltd. v. Wisconsin Dept. of Revenue, 72 Wis. 546, 241 N.W.2d 190 (1976) (sale of restaurant business was occasional sale and was not "final act" of operation of retail

business).

The fact that a sale is a liquidation or sale of the seller's entire business does not, per se, mean that the sale is an occasional sale. A sale in which a seller liquidates a business to use the proceeds to purchase another similar business or liquidates part of his business to replace used or obsolete equipment to continue in business might not be "casual or isolated." A series of sales in liquidation of a business might also be considered in the ordinary course of business rather than as casual and isolated.

In a previous assessment (1973-1977) the taxpayer was assessed tax on real estate contracts. A rock quarry business often requires the purchase and sale of real estate for use as quarry sites, and part of the taxpayer's business has been to purchase and sell property. One of the sales at issue is the sale of the . . . property which was a potential quarry site that had been leased to another party prior to the audit period and then sold. The taxpayer stated he had not used the . . . property as quarry property. Nevertheless, a business which includes selling real and personal property may not claim that the sale of such property is a casual and isolated sale.

The sale of the . . . , the taxpayer's primary asset, was sold in 1978. The taxpayer leased some of its leftover equipment after that time until the equipment was sold. Sales of inventory or of property that had been held for lease are not casual or isolated sales, even if part of the liquidation of a business.

We conclude the remaining sales were not "casual or isolated": (1) there were several sales involved over a period of time and to more than one party; (2) the taxpayer's business had included buying and selling property for quarry sites; and (3) some of the sales involved equipment that had been leased. These facts indicate the sales were in the regular course of business--not casual or isolated. Accordingly, the assessment of Service B&O on the interest from the remaining sales is sustained.

[3] Retail Sales tax on sale of capital assets -- (\$29,337). The sales at issue were sales of construction equipment in 1982 to [R Corp.] Sales, Inc. ("[R Corp.]") and [D Corp.] Equipment Sales ("[D Corp.]"). The taxpayer contends the equipment was sold in bulk exclusively for resale.

RCW 82.04.050 provides that retail sales do not include purchases of tangible personal property for resale in the regular course of business without intervening use. RCW 82.04.470 provides that:

Unless a seller has taken from the purchaser a resale certificate signed by, and bearing the name and address and registration number of the purchaser to the effect that the property was purchased for resale, or unless the nature of the transaction is clearly shown as a sale at wholesale by the books and records of the taxpayer in such other manner as the department of revenue shall by regulation provide the burden or proving that a sale of tangible personal property, . . . , was not a sale at retail shall be upon the person who made it.

In the present case, the taxpayer contends he met the statutory burden of proof.

The taxpayer stated that both [R Corp.] and [D Corp.] were dealers selling equipment at retail. He stated that one of the sales was to [R Corp.] alone and the other sales were to [R Corp.] and [D Corp.] together. He stated that [R Corp.] did not operate equipment and had an office in his home. After the sales were made, the taxpayer stated he retained possession of the equipment until [R Corp.] or [D Corp.] resold the equipment. He stated the sales agreements had release prices. Once the release price was paid, either the taxpayer arranged to have the equipment sent to the third party purchaser or it was released directly to the third party purchaser or an independent trucker. The taxpayer contends that the nature of the transactions shows the sales were at wholesale and eliminates any possibility of intervening use by [R Corp.] or [D Corp.].

The taxpayer states that the fact he had written sales agreements showed that he was not acting as [R Corp.]'s agent in making the sales. Also, he stated that they had litigation over the amount owing on the contract, and he won.

At the time of the sales, the taxpayer had a blanket resale certificate from [R Corp.] but it was dated 1972. WAC 458-20-102, the administrative rule which states the requirements for resale certificates, provides that blanket resale certificates must be renewed at intervals not to exceed four years. Subsequent to the audit, the taxpayer obtained another re-sale certificate from [R Corp.]. The re-sale certificate is signed by the treasurer of [R Corp.] and is dated October 1, 1986. The certificate, however, does not state either an effective date or an expiration date.

The taxpayer also obtained a resale certificate from [D Corp.]. The certificate provides on effective date of 1971. It is undated and signed by the attorney for the owner of [D Corp.]. The attorney's letter, dated December 12, 1986, stated that he had been unable to reach the owner. He stated that he had executed the resale certificate as his attorney because he believed the "affidavit" to be correctly based upon what the owner had told him and the information he had. This certificate does not contain [D Corp.]'s correct registration number.

The Department's records indicate that both [R Corp.] and [D Corp.] were registered with the state when the sales were made. . . . Neither [R Corp.] or [D Corp.] are presently in business. The taxpayer stated that Mr. [R Corp.] is deceased. Because the businesses are no longer active, and because the taxpayer and [R Corp.] had had a dispute over the amount owing on the equipment sales, the taxpayer stated he had problems getting additional evidence to support the wholesale nature of the sales.

We agree with the taxpayer that the nature of these transactions indicates that the sales were wholesale. This finding is supported by the re-sale certificates, even though the one from [R Corp.] in the taxpayer's records was out-of-date and the subsequently obtained certificate lacked an effective date. Both certificates were signed by, and bear the name and address and registration number of [R Corp.] and state that the property was purchased for resale. The fact that the taxpayer's primary business was construction and that the sales at issue are used equipment made to businesses registered in this state as sellers of equipment also supports the taxpayer's position. Accordingly, the retail sales tax assessment on the equipment sales is cancelled.

DECISION AND DISPOSITION:

The taxpayer's petition is granted as to the retail sales tax asserted on the sale of capital assets and as to the assessment of Service B&O on the interest received from the loans to [Contract A] and [Contract B]. (Schedule II). The interest received from the remaining contract sales of real property and equipment is sustained. An amended assessment shall be issued and due on the date provided thereon.

DATED this 30th day of March 1988.