NO. 90965-2

SUPREME COURT OF THE STATE OF WASHINGTON

BRAVERN RESIDENTIAL II, LLC,

Petitioner,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Respondent.

ANSWER TO PETITION FOR REVIEW

ROBERT W. FERGUSON
Attorney General

Charles Zalesky, WSBA No. 37777
Assistant Attorneys General
Revenue Division, OID No. 91027
P.O. Box 40123
Olympia, WA 98504-0123
(360) 753-5528

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Regulations

Administrative Materials

I. INTRODUCTION

In Washington, construction services are taxable as a retail sale when performed upon land owned by someone other than the construction company. RCW 82.04.050(2)(b). This is so even if the contractor has an ownership interest in the entity that owns the land. *Dep't of Revenue v. Nord Nw. Corp.*, 164 Wn. App. 215, 230, 264 P.3d 259 (2011). In contrast, no sale occurs when a construction contractor builds on its own land. *Rigby v. State*, 49 Wn.2d 707, 306 P.2d 216 (1957). In that circumstance, the contractor does not charge itself for its own construction services, and it is liable for retail sales tax only on its purchases of materials and contract labor used in the project. A contractor that builds on its own land is referred to as a "speculative builder."

Bravern Residential II LLC ("Bravern II") paid a construction contractor, PCL Construction, over $121 million to construct a high-rise apartment building known as "Tower 4" on land Bravern II owns in Bellevue, Washington. PCL Construction was a one percent minority member of Bravern II during the time it constructed Tower 4, and it received payment for its construction services in the form of a credit to its Bravern II capital account.

Bravern II does not qualify as a speculative builder because it did not actually construct Tower 4; PCL Construction did. Bravern II and PCL are separate entities and, as the Court of Appeals explained, Bravern II "cannot be treated as the entity performing the construction services that PCL actually performed." *Bravern Residential II, LLC v. Dep't of*

Revenue, ___ Wn. App. ___, 334 P.3d 1182, 1187 (2014). Because the undisputed evidence established that PCL Construction performed the construction activity for consideration on land Bravern II owned, Bravern II owed retail sales tax on the entire contract price as a matter of law.

The Court of Appeals correctly applied unambiguous statutes, existing case law, and established administrative rules to the undisputed facts of this case. Its decision does not raise any issue of substantial public importance requiring this Court's review. Accordingly, this Court should deny Bravern II's petition.

II. IDENTITY OF RESPONDENT

Respondent is the State of Washington, Department of Revenue.

III. COUNTERSTATEMENT OF THE ISSUE

Construction services are taxable as a retail sale when performed upon land owned by someone other than the construction company. RCW 82.04.050(2)(b). This appeal presents the following issue:

> Did the trial court (and the Court of Appeals) correctly conclude that Bravern II owed retail sales tax on amounts it paid to PCL Construction to built Tower 4 on land owned by Bravern II?

IV. COUNTERSTATEMENT OF THE CASE

A. PCL Construction Constructs Tower 4 On Land Owned By Bravern II For Valuable Consideration.

Bravern II is a Washington limited liability company formed in May 2007. CP 43. During its first year of existence, Bravern II was a single-member limited liability company owned and managed by Bravern

Residential Mezz II, LLC ("BRM"). In April 2008, PCL Construction was admitted as a member of Bravern II. PCL Construction is a licensed Washington construction contractor. CP 109 at ¶ 30(a).

To become a member of Bravern II, PCL Construction agreed to make an initial capital contribution of $100 in exchange for a one percent ownership interest in Bravern II. CP 59 at ¶ 2.1; CP 60 at ¶2.2.1. BRM retained the remaining 99 percent interest. *Id.* BRM also retained control over the management of Bravern II. CP 68 at ¶ 5.1.1.

When PCL Construction became a one percent minority member of Bravern II, the LLC operating agreement was amended to reflect the rights and obligations of the two members. CP 53. That amended agreement specified that PCL Construction would contribute construction services and materials to the LLC pursuant to a "Services Addendum" executed at the same time as the operating agreement. CP 62 at ¶ 2.2.4. The Services Addendum required PCL Construction to "fully perform and manage all of the work" pertaining to the "construction of Bravern Residential Tower 4 in Bellevue, Washington." CP 90 at ¶ 4(a). Tower 4 was a planned high-rise apartment building being constructed as part of a larger development known as "The Bravern Development." *See* CP 90 at ¶ 2; CP 110-11 at ¶ 31. PCL Construction built Tower 4 on land owned by Bravern II. CP 49.

During the course of its construction work, PCL Construction submitted monthly progress billing statements to Bravern II. CP 118-145 (28 billing statements covering March 2008 through July 2010). After the

project architect reviewed and approved the monthly billing statements, PCL Construction received a credit to its Bravern II capital account equal to the amount billed. CP 104 at ¶ 23(c). Over the course of the project, PCL Construction received payments from Bravern II in the form of a credit to its capital account in excess of $121 million. *See* CP 145 (July 2010 billing statement showing "cumulative" contributed services of $121,022,756). PCL also received monthly cash distributions from its capital account. CP 63 at ¶ 3.2. The distributions were designed to prevent PCL Construction's capital account balance from exceeding one percent of the total capital of all members.

Limiting PCL Construction's capital interest in Bravern II through monthly cash distributions was important for two reasons. First, if PCL's capital account balance exceeded one percent for more than twenty days, PCL would have been entitled to an "accrued preferred return" on the excess amount at the rate of "prime plus 2.5%." CP 63-64 at ¶ 3.3. Second, if PCL's capital account balance exceeded two percent for more than fifteen days, PCL could exercise a "put" option requiring the other member (BRM) to purchase PCL's entire interest in Bravern II at a specified price. CP 74 at ¶ 8.4.1. These provisions required Bravern II to closely monitor PCL Construction's capital account balance and to make cash distributions to PCL within twenty days from the date PCL's capital account was credited.

PCL Construction completed construction of Tower 4 in March 2010. CP 147. A few months later PCL Construction assigned its interest

in Bravern II to BRM. CP 158. After that date, PCL Construction had no ownership interest in Bravern II and received no income or profit from the lease of apartments in Tower 4.

B. Procedural History.

In August 2007 (several months before PCL Construction became a member of Bravern II), BRM, PCL Construction, and Bravern II submitted a joint letter ruling request to the Department of Revenue. CP 211. The three taxpayers submitted the request under WAC 458-20-100(2)(b), which provides that taxpayers "may request an opinion on future reporting instructions and tax liability" from the Department. The letter ruling request explained the general facts of the planned Tower 4 construction project and asked the Department to conclude that PCL Construction would be "classified as a member of the joint venture performing speculative building and not as a prime contractor." CP 213.

The Department issued its ruling a few months later, holding that PCL Construction would not qualify as a speculative builder under the facts described in the ruling request letter. CP 221. Instead, the Department concluded that "PCL is a prime contractor" and must collect retail sales tax on the amount it charged for its services. CP 223.[1]

---

[1] Bravern II states that the Department of Revenue had "routinely" and "repeatedly" issued letter rulings confirming that LLCs structured similarly to Bravern II qualified as a speculative builder. Pet. at 5, 12. The statement is false. The record reflects that the Department only issued two erroneous letter rulings to similarly structured LLCs. *See* CP 384-85. Neither of those erroneous letter rulings was issued to "The Bravern LLC," as Bravern II claims. Pet. at 6, 12; *See* CP 563 (letter ruling issued to The Bravern LLC, denying its request to be treated as a speculative builder).

The three taxpayers (BRM, PCL Construction, and Bravern II) filed an administrative appeal of the letter ruling. In April 2009, the Department's Appeals Division denied the taxpayers' appeal and upheld the letter ruling. CP 225.

Soon thereafter, Bravern II filed a "consumer use tax return" for the month of June 2009 and paid retail sales tax for that month in the amount of $107,842. CP 177. After paying the sales tax it self-reported for the June 2009 tax period, Bravern II filed a refund action in superior court under RCW 82.32.180, claiming that it did not owe the tax. CP 7 at ¶ 16. The superior court granted the Department's motion for summary judgment and denied Bravern II's cross-motion. CP 654. Bravern II appealed. The Court of Appeals affirmed the trial court, concluding that Bravern II "was not a contractor and performed no construction services." *Bravern Residential II,* 334 P.3d at 1187. Instead, Bravern II was the consumer of the construction services and owed the tax at issue.

V. REASONS WHY THE COURT SHOULD DENY REVIEW

The Court of Appeals correctly applied the controlling Washington excise tax statutes pertaining to retail construction services when it held that Bravern II owes the retail sales tax at issue. The Court also correctly rejected Bravern II's arguments that the Department's "Construction Tax Guide" and its published excise tax determinations create a retail sales tax exemption for "construction joint ventures."

Contrary to Bravern II's arguments, this case does not present an issue of substantial public importance supporting review under RAP

13.4(b)(4). Rather, it involves an issue that is of interest to a single taxpayer that hopes to avoid paying tax on the construction of a multi-million dollar high-rise apartment building. But Bravern II points to no statutory authority supporting its claim that amounts it paid to PCL Construction are exempt from retail sales tax. And this Court has ruled on numerous occasions that tax exemptions and tax deductions must be created by the legislature and when, as here, "there is no provision explicitly and clearly authorizing" the claimed exemption "it must be denied." *Corporation of Catholic Archbishop of Seattle v. Johnston*, 89 Wn.2d 505, 510, 573 P.2d 793 (1978); *see also Tesoro Refining & Marketing Co. v. Dep't of Revenue*, 173 Wn.2d 551, 558, 269 P.3d 1013 (2012); *Budget Rent-A-Car v. Dep't of Revenue*, 81 Wn.2d 171, 176, 500 P.2d 764 (1972). The opportunity to reiterate this established law does not provide a basis for review under RAP 13.4(b).

Moreover, the Court of Appeals decision does not "undermine the viability of developer-contractor joint ventures," as Bravern II claims. *See* Pet. at 3. Instead, the Court of Appeals decision maintains the *status quo*. If a construction contractor and land owner form a true joint venture involving the contribution of land and construction services in exchange for a split of any future profits, the Department has (and will) treat the venture as a speculative builder. By contrast, if the contractor receives a fixed payment in exchange for its services, a retail sale occurs. In this case, PCL received fixed payment for its construction services in the form of a valuable credit to its Bravern II capital account. As the Department,

the trial court, and the Court of Appeals held, that is a retail sale under the plain language of the controlling statutes.

A. The Court Of Appeals Correctly Determined That Bravern II Is Not Entitled To A Refund Of The Retail Sales Tax It Paid.

1. Retail sales tax is owed on retail construction services.

The Court of Appeals correctly summarized the statutory framework pertaining to retail construction services. *Bravern Residential II,* 334 P.3d at 1186. Washington imposes retail sales tax on each retail sale in this state, RCW 82.08.020, and imposes business and occupation (B&O) tax on the gross proceeds derived from the business of making retail sales. RCW 82.04.250(1). Both taxes apply to "retail sales" as defined in RCW 82.04.050.

The Legislature expressly included construction services in the statutory definition of a retail sale. Specifically, RCW 82.04.050(2)(b) provides that a retail sale includes "the sale of or charge made for tangible personal property consumed and/or for labor and services rendered in respect to . . . [t]he constructing, repairing, . . . or improving of new or existing buildings or other structures under, upon, or above real property of or for *consumers*." RCW 82.04.050(2)(b) (emphasis added). The term "consumer" includes "[a]ny person who is an owner, lessee or has the right of possession to . . . real property which is being constructed, repaired, decorated, improved, or otherwise altered by a person engaged in business." RCW 82.04.190(4). Applied together, these provisions provide that a person performing construction services on real property

owned, leased, or possessed *by another person* is engaged in making retail sales. *Rigby v. State*, 49 Wn.2d 707, 709-10, 306 P.2d 216 (1957). The seller (i.e., the construction contractor) owes retailing B&O tax measured by the gross proceeds of the retail sale, RCW 82.04.250(1), and must collect retail sales tax from the consumer on the amount charged. RCW 82.08.020(1)(c). The B&O tax and retail sales tax apply even when the contractor and the consumer are affiliated entities. *Nord Nw. Corp.*, 164 Wn. App. at 229-30. A person performing construction services on land owned, leased, or possessed by another is commonly referred to as a "prime contractor." *See* WAC 458-20-170(1)(a).

In contrast, a person constructing buildings or other structures on land *it owns* is not engaged in an activity fitting within the definition of a retail sale. *Rigby*, 49 Wn.2d at 710. This is because a builder is not the "consumer" of construction services it provides to itself. *White-Leasure Development Co. v. Dep't of Revenue*, 2001 WL 1807636 (Wash. Bd. Tax. App. 2001). A person constructing buildings on land it owns is referred to as a "speculative builder." *See* WAC 458-20-170(2)(a).

A speculative builder enjoys two significant tax advantages. First, a speculative builder is not required to pay B&O tax on the value of its construction services since it does not actually charge itself for those services. Second, a speculative builder pays retail sales tax only on its purchase of building materials and contract labor, not on the total value of the construction activity. *Riley Pleas, Inc. v. State*, 88 Wn.2d 933, 935, 568 P.2d 780 (1977). In short, because a speculative builder does not

charge itself for its own services, it is not required to pay B&O tax or collect retail sales tax on the value of those services.

The tax advantages enjoyed by a speculative builder flow from the plain language of the controlling statutes. To obtain these tax advantages the contractor *must* own the land. *See Nord Nw. Corp.*, 164 Wn. App. at 228 ("the builder must be the bona fide owner of the real property to qualify as a speculative builder"). A partner or LLC member that performs construction services for consideration on land owned by the partnership or LLC does not fit within this narrow gap and is taxed as a prime contractor, just as the Legislature intended when it enacted RCW 82.04.050(2)(b). *Id.* at 229.

2. Bravern II owes the retail sales tax because it was the consumer of the construction services performed by PCL Construction.

To qualify as a speculative builder, the builder must own the land upon which the construction is performed. Here, there is no dispute that PCL Construction did not own the land upon which Tower 4 was built. Bravern II owned the land. CP 49. It is also undisputed that PCL Construction actually performed the construction services in exchange for consideration. This is verified from the express terms of the operating agreement, CP 53-114, and also through the course of dealing between PCL Construction and Bravern II.

After PCL Construction began constructing Tower 4 in early 2008, it submitted monthly progress billing statements to Bravern II. CP 118-145. Each billing statement set out the value of the construction services

PCL Construction performed for that month. The project architect reviewed these monthly progress billing statements to substantiate the accuracy of the charges. PCL Construction then received a credit to its Bravern II capital account equal to the amount of the verified charges. From this course of dealing, it is evident that PCL Construction billed Bravern II, and was paid by Bravern II, on a monthly basis for the construction activity it performed for Bravern II.

PCL Construction received consideration for its construction activity in the form of a credit to its Bravern II capital account rather than through direct cash payments. That, however, does not make the services exempt from retail sales tax. To the contrary, the term "selling price" is defined in the Washington retail sales tax code to include the total amount of consideration received by the seller "including cash, *credit*, *property*, and services, for which tangible personal property . . . or anything else defined as a 'retail sale' under RCW 82.04.050 [is] sold, leased, or rented, . . . whether received in money or otherwise." RCW 82.08.010(1)(a). Thus, the Legislature broadly defined "selling price" to include everything of value "whether received in money or otherwise" taken in exchange for the property or services sold.

The receipt of an ownership interest in a business in exchange for property or services is generally considered a taxable "sale" of the property or services conveyed. *See Christensen v. Skagit Cnty.*, 66 Wn.2d 95, 98, 401 P.2d 335 (1965) (taxable sale occurred when owner of land conveyed it to a corporation in exchange for stock). Moreover, an interest

in an LLC is personal property and has value. *See* RCW 25.15.245(1) (interest in an LLC is personal property). Thus, PCL Construction received consideration not only in the form of a "credit," which is sufficient under RCW 82.08.010(1)(a) to create a taxable sale, but also in the form of "property" actually received.

As the Court of Appeals noted, an LLC and its members are separate persons. *Bravern Residential II,* 334 P.3d at 1187. "This concept is reflected in RCW 25.15.070(2)(c), which provides that an LLC is a separate legal entity." *Id.* Because an LLC is a distinct entity from its owners, an owner performing construction services for the business entity, on land owned by the business entity, in exchange for consideration such as an ownership interest in the business or other valuable credits, is performing retail construction and must charge and collect retail sales tax on the selling price. *See* RCW 82.08.020(1)(c) (imposing retail sales tax on services "included within the RCW 82.04.050 definition of retail sale"). If the contractor does not collect and remit to the Department the sales tax owed by the consumer of the construction services, the contractor and the consumer are jointly liable for the tax. *See* RCW 82.08.050(10).

PCL Construction performed construction services on land owned by Bravern II in exchange for capital credits totaling over $121 million. As the consumer of the construction services, Bravern II owed retail sales tax measured by the selling price, as the Court of Appeals correctly held.

3. WAC 458-20-106 does not apply and does not create a tax exemption for contributed services.

Bravern II unsuccessfully argued below, and continues to argue before this Court, that the credit PCL Construction received each month equal to the value of its contributed construction services was exempt from tax under WAC 458-20-106 (Rule 106).[2] *See Bravern Residential II,* 334 P.3d at 1189; Pet. at 14. There is no merit to Bravern II's argument.

As this Court has previously explained, Rule 106 pertains to the retail sales tax exemption for "casual and isolated sales" codified at RCW 82.08.0251. *See Budget Rent-A-Car*, 81 Wn. 2d at 176. That code section provides in relevant part that retail sales tax "shall not apply to casual and isolated sales of property or services, unless made by a person who is engaged in business activity taxable under" the Washington B&O tax or public utility tax. A casual or isolated sale is "a sale made by a person who is not engaged in the business of selling the type of property involved." RCW 82.04.040(2).

PCL Construction is in the business of selling construction services. CP 109 at ¶ 30(a). Consequently, the tax exemption for casual and isolated sales does not apply, and Rule 106 does not apply. That rule cannot expand a tax deduction or tax exemption beyond what is provided by statute or required by the constitution. *Budget Rent-A-Car*, 81 Wn.2d at 176; *see generally, Coast Pac. Trading, Inc. v. Dep't of Revenue*, 105 Wn.2d 912, 917-18, 719 P.2d 541 (1986).

---

[2] A copy of Rule 106 is attached as Appendix A.

Moreover, by its very terms Rule 106 does not apply here. Rule 106 explains that "retail sales tax applies to all casual or isolated retail sales made by a person who is engaged in . . . business activity" subject to Washington tax. WAC 458-20-106 (5th paragraph). Only persons "not engaged in any business activity" are exempt from sales tax on casual or isolated sales. *Id.* Because PCL Construction is engaged in business as a construction contactor, it is not exempt.

Rule 106 goes on to provide six examples involving the transfer of capital assets to or by a business, including the transfer "of capital assets to a partnership or joint venture in exchange for an interest in the . . . venture." WAC 458-20-106, example 5.[3] However, the Rule neither states nor implies that providing *services* to a partnership or joint venture in exchange for an interest in the partnership or venture is exempt from tax. This is consistent with the purpose of the Rule 106 examples, which explain that a change in the "mere form of ownership of property" does not result in a taxable sale. *See* DOR Determination No. 93-240, 13 WTD 369 at p. 16 (1994). The examples provided in Rule 106 recognize that "sales tax should not . . . be imposed to impede business reorganizations when the ownership of a business remains essentially the same and the change was merely one of form." *Id.* No similar justification exists for excluding from the definition of a "sale" the contribution of *services* to a

[3] A capital asset is "[a] long-term asset used in the operation of a business or used to produce goods or services, such as equipment, land, or industrial plant." Black's Law Dictionary 126 (8th ed. 2004).

business in exchange for an ownership interest in the business. Services are not "property" or "capital assets," and the contribution of services does not result in a change in the "mere form of ownership of property."

The Court of Appeals correctly rejected Bravern II's efforts to expand Rule 106 to provide a tax exemption that is not supported by the plain language of the rule or by RCW 82.08.0251. The rule does not (and cannot) permit a seller of retail construction services to avoid tax simply by contributing those services to a partnership or joint venture in exchange for a capital interest in that partnership or venture.

4. The Court of Appeals correctly rejected Bravern II's claim that the Department's Construction Tax Guide and administrative decisions create a sales tax exemption for joint ventures.

Throughout this appeal Bravern II has relied extensively on the Department's Construction Tax Guide and published administrative decisions as support for its refund claim. Pet. at 13-14. Bravern II takes portions of the Tax Guide and Department decisions out of context in an effort to claim a tax exemption that is devoid of any statutory support. These arguments do not raise an issue for review under RAP 13.4(b). Moreover, the Court of Appeals correctly rejected Bravern II's overly broad reading of these administrative materials.

The Department's Tax Guide and related administrative decisions explain, among other things, that a bona fide joint venture can qualify as a speculative builder if the venture owns the land *and* performs the construction. "To be treated as a speculative builder, a joint venture entity

must actually exist and the joint venture entity must own the land and perform the construction itself." *Bravern Residential II,* 334 P.3d at 1188 (quoting Guide). This is a correct statement of the law. *See Nord Nw. Corp.*, 164 Wn. App. at 215.

The Tax Guide also explains that when a member of a joint venture is "guaranteed a fixed amount as compensation for construction services independent of any right to profit or gain," the member is taxable as a prime contractor, not as a speculative builder. *Bravern Residential II,* 334 P.3d at 1188. This statement is also consistent with the law. A fixed amount of compensation can include cash, credits, or other valuable property. RCW 82.08.010(1)(a). In this case, PCL Construction received a fixed amount of compensation in the form of a credit to its Bravern II capital account. In addition, as the Court of Appeals points out, the Bravern II operating agreement "was structured so that Bravern [II] essentially had no choice but to make regular cash distributions to PCL" equal to the value of the services PCL contributed. *Id.* at 1189. Thus, not only did PCL Construction receive a monthly credit to its Bravern II capital account in exchange for its sale of construction services, it converted those credits into cash payments on a regular basis.

The Tax Guide also points out, at least implicitly, that when a contractor contributes construction services to a joint venture for no consideration other than the right to share in future profit, the contractor is not treated as a separate entity selling its services to the venture. *Bravern Residential II,* 334 P.3d at 1188. This is consistent with

published Department tax determinations. *See, e.g.,* DOR Determination No. 99-176, 19 WTD 456 (2000) (when a true joint venture is created between a contractor and a land owner, with the contractor receiving nothing of value other than the right to a 50-50 split of future profits, the contractor is acting as a "member" of the venture, not as a separate entity). It is also consistent with federal tax law, which does not treat the receipts of a mere profits interest in a partnership as a taxable event at the time of receipt. *Campbell v. Commissioner*, 943 F.2d 815, 820-22 (8th Cir. 1991); Rev. Proc, 93-27, 1993-2 C.B. 343 (1993). However, the receipt of a *capital interest* in exchange for services (as occurred in this case) is taxable. *Campbell*, 943 F.2d at 822.[4]

PCL Construction did not construct Tower 4 in exchange for a right to share in future profits of Bravern II. In fact, PCL Construction transferred its interest in Bravern II to the other member before Bravern II generated any profits from the lease of apartments. *Bravern Residential II,* 334 P.3d at 1185. Thus, whether a taxable retail sale occurs when a contractor receives a mere profits interest in a partnership or LLC in exchange for contributed services is not at issue in this case. PCL received a capital interest, which was valuable personal property and clearly fits within the statutory definition of the "selling price" subject to

[4] As pointed out in *Campbell*, when a service partner receives an interest in partnership *capital* in exchange for services, "the cases clearly hold that a taxable event has occurred. The receipt of the capital interest must be included in the service partner's income. . . . There is little, if any, dispute that such a transaction involves the recognition of income." *Id.* at 820.

retail sales tax. RCW 82.08.010(1)(a). The Court of Appeals did not err when it upheld the denial of Bravern II's refund claim.

B. The Court of Appeals Acted Well Within Its Authority To Invoke The "Substance Over Form" Doctrine In This Case.

Finally, Bravern II claims that the Court of Appeals was barred from invoking the "substance over form" doctrine as support for rejecting one of Bravern II's arguments. Pet. at 18-20. *See Bravern Residential II,* 334 P.3d at 1189 (rejecting Bravern II's assertion that payments made to PCL were not "guaranteed," noting that "in substance" the operating agreement "ensured that PCL would receive full compensation of its construction services"). This argument is without merit.

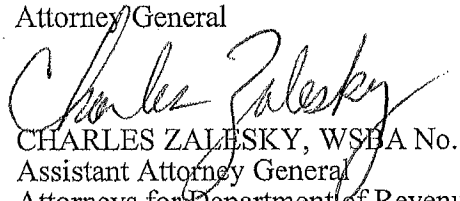
Washington courts have employed the substance over form doctrine for over a hundred years. *See Gordon v. Cummings*, 78 Wash. 515, 521, 139 P. 489 (1914) (courts must look to substance over form because to do otherwise "would meet the letter of the law but blast its spirit."). The doctrine has been applied in tax cases since at least 1971. *Time Oil Co. v. State*, 79 Wn.2d 143, 147, 483 P.2d 628 (1971); *Rho Co., Inc. v. Dep't of Revenue*, 113 Wn.2d 561, 568 n.3, 782 P.2d 986 (1989). Affirming the authority of courts to employ the doctrine when appropriate is not an issue of substantial public importance requiring review. This is especially true where, as here, the construction project qualified as taxable retail construction services under both the substance *and the form* of the LLC operating agreement.

VI. CONCLUSION

This case was about whether Bravern II could avoid paying retail sales tax on a multi-million dollar construction project. Under controlling excise tax statutes—namely RCW 82.04.050(2)(b), RCW 82.04.190(4), and RCW 82.08.010(1)(a)—the answer is no. Nothing in the Court of Appeals decision warrants further review. Accordingly, this Court should deny Bravern II's petition for review.

RESPECTFULLY SUBMITTED this 18th day of November, 2014.

ROBERT W. FERGUSON
Attorney General



CHARLES ZALESKY, WSBA No. 37777
Assistant Attorney General
Attorneys for Department of Revenue

PROOF OF SERVICE

I certify that I served a copy of this document, via email on the following:

Scott Edwards
Lane Powell
1420 Fifth Avenue, Suite 4100
Seattle, WA 98101-2338

EdwardsS@LanePowell.com
MitchellL@LanePowell.com
KittleD@lanepowell.com

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 18th day of November, 2014, at Tumwater, WA.

Candy Zilinskas

Candy Zilinskas, Legal Assistant

APPENDIX A

WAC 458-20-106

Casual or isolated sales—Business reorganizations.

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. Any sales which are routine and continuous must be considered to be an integral part of the business operation and are not casual or isolated sales.

Furthermore, persons who hold themselves out to the public as making sales at retail or wholesale are deemed to be engaged in the business of selling, and sales made by them of the type of property which they hold themselves out as selling, are not casual or isolated sales even though such sales are not made frequently.

In addition the sale at retail by a manufacturer or wholesaler of an article of merchandise manufactured or wholesaled by him is not a casual or isolated sale, even though he may make but one such retail sale.

Business and Occupation Tax

The business and occupation tax does not apply to casual or isolated sales.

Retail Sales Tax

The retail sales tax applies to all casual or isolated retail sales made by a person who is engaged in the business activity; that is, a person required to be registered under WAC 458-20-101. Persons not engaged in any business activity, that is, persons not required to be registered under WAC 458-20-101, are not required to collect the retail sales tax upon casual or isolated sales.

However, persons in business as selling agents who are authorized, engaged or employed to sell or call for bids on tangible personal property belonging to another, and so selling or calling, are deemed to be sellers, and shall collect the retail sales tax upon all retail sales made by them. The tax applies to all such sales even though the sales would have been casual or isolated sales if made directly by the owner of the property sold.

A transfer of capital assets to or by a business is deemed not taxable to the extent the transfer is accomplished through an adjustment of the beneficial interest in the business. The following examples are instances when the tax will not apply.

(1) Transfers of capital assets between a corporation and a wholly-owned subsidiary, or between wholly-owned subsidiaries of the same corporation.

(2) Transfers of capital assets by an individual or by a partnership to a corporation, or by a corporation to another corporation in exchange for capital stock therein.

(3) Transfers of capital assets by a corporation to its stockholders in exchange for surrender of capital stock.

(4) Transfers of capital assets pursuant to a reorganization under 26 U.S.C Section 368 of the Internal Revenue Code, when capital gain or ordinary income is not realized.

(5) Transfers of capital assets to a partnership or joint venture in exchange for an interest in the partnership or joint venture; or by a partnership or joint venture to its members in exchange for a proportional reduction of the transferee's interest in the partnership or joint venture.

(6) Transfer of an interest in a partnership by one partner to another; and transfers of interests in a partnership to third parties, when one or more of the original partners continues as a partner, or owner.

The burden is upon the taxpayer to establish the facts concerning the adjustment of the beneficial interest in the business when exemption is claimed.

Use Tax

The use tax applies upon the use of any property purchased at a casual retail sale without payment of the retail sales tax, unless exempt by law. Uses which are exempt from the use tax are set out in RCW 82.12.030.

Where there has been a transfer of the capital assets to or by a business, the use of such property is not deemed taxable to the extent the transfer was accomplished through an adjustment of the beneficial interest in the business, provided, the transferor previously paid sales or use tax on the property transferred. (See the exempt situations listed under the retail sales tax subdivision of this rule.)

[Statutory Authority: RCW 82.32.300. WSR 83-07-034 (Order ET 83-17), § 458-20-106, filed 3/15/83; Order ET 75-1, § 458-20-106, filed 5/2/75; Order ET 74-1, § 458-20-106, filed 5/7/74; Order ET 70-3, § 458-20-106 (Rule 106), filed 5/29/70, effective 7/1/70.]

OFFICE RECEPTIONIST, CLERK

To: Zilinskas, Candy (ATG)
Cc: Zalesky, Chuck (ATG)
Subject: RE: Bravern Residential II, LLC v. State of Wash., Dept. of Revenue, No. 90965-2 - FOR FILING

Received 11-18-2014

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Zilinskas, Candy (ATG) [mailto:CandyZ@ATG.WA.GOV]
Sent: Tuesday, November 18, 2014 2:47 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Zalesky, Chuck (ATG)
Subject: Bravern Residential II, LLC v. State of Wash., Dept. of Revenue, No. 90965-2 - FOR FILING

Please file the attached Answer to Petition for Review filed by Respondent. Thank you.