No. 44730-4-II

DIVISION II, COURT OF APPEALS
OF THE STATE OF WASHINGTON

BRAVERN RESIDENTIAL II, LLC,

Plaintiff-Appellant

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Defendant-Respondent

ON APPEAL FROM THURSTON COUNTY SUPERIOR COURT
(Hon. Gary R. Tabor)

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

COURT RULES

I. INTRODUCTION

Bravern II did everything right in this case. It structured itself as a "speculative builder" in conformity with and reliance on Washington statutes and rules, DOR's published tax determinations and DOR's Construction Guide. These authorities were uniform in applying a long-standing principle of Washington tax law that joint ventures do not owe retail sales tax on the value of construction services performed by a member of the venture as a contribution to capital. Indeed, for years, DOR repeatedly recognized identically structured LLCs—including Bravern II's sister project, The Bravern—as "speculative builders." Bravern II had no reason to believe it would be treated differently.

But it was. DOR claimed its prior understanding of the law was wrong, and it refused to treat Bravern II as a "speculative builder." DOR knew, however, that it couldn't simply ignore its own determinations without some rationale, so it first tried to promulgate new guidelines through a public stakeholder process. When that process failed, DOR next asked the legislature to enact a wholly new law that gave it discretion to retroactively impose taxes on certain joint ventures. The legislature did so, but it was careful to carve-out those joint ventures, like Bravern II, that had been structured in reliance on DOR's prior public statements.

Bravern II's adherence to that existing precedent compels reversal. Where, as here, the speculative builder is a joint venture, it is permissible and common for one member of the venture to provide the land and one—the contractor member—to provide construction services. The real issue is whether the contractor member provides the services as a capital contribution in its capacity as a member of the joint venture, as opposed to providing the services as a mere contractor with an "absolute" right to payment. On that key issue, the record is equally clear. PCL had no absolute right to payment. While Bravern II had discretion to periodically pay down PCL's capital account, it had no obligation to do so and, thus, PCL ultimately stood to profit or lose on the Bravern II project commensurate with its proportionate share of ownership—as would any joint venturer.

II. ARGUMENT

A. A Joint Venture Like Bravern II Qualifies As A "Speculative Builder" Because It Both Owns The Land And Performs The Construction Services Through One Of Its Members.

Everyone agrees that a taxpayer does not owe retail sales tax when it constructs buildings on its own land. DOR Br. at 12-13 (read together, RCW 82.04.050 and RCW 82.04.190 require the seller of construction services to collect sales tax only for services sold to a "consumer," *i.e.*, a separate person); *Rigby v. State*, 49 Wn.2d 707, 709-10, 306 P.2d 216

(1957); WAC 458-20-170(2)(a) (a speculative builder means "one who constructs buildings for sale or rental upon real estate owned by him"). When that is the case, the taxpayer is considered a "speculative builder," and it owes retail sales tax only on the purchase of building materials and subcontracted labor—but not on the value of its own labor and services. *Id.* at 13-14; *Klickitat Cty v. Jenner*, 15 Wn.2d 373, 382, 130 P.2d 880 (1942); WAC 458-20-170(2)(e).

The DOR argues that Bravern II was not a "speculative builder" because it owned the land but did not perform the construction work or, stated conversely, PCL did the work but did not own the land. DOR Br. at 14-19. According to DOR, owner and builder must be one-and-the-same entity. This simplistic analysis is wrong, and ignores the DOR's own Construction Guide, published tax determinations, and Construction JV Rulings. Those authorities hold that where the taxpayer is a joint venture, owner and builder are considered one-and-the-same—if the construction work is done by a member of the joint venture as a contribution to capital, rather than as a mere contractor performing services for guaranteed pay.

The Construction Guide notes that, "formation of a joint venture is a common way to accomplish the development of real estate," and often, "the members of the joint venture include a person that owns property (landowner member) and a general contractor (contractor member)." CP

488; DOR Br., Appendix C. Thus, the "contractor member" does not need to own the land for the joint venture to qualify as a "speculative builder." Rather, and contrary to DOR's entire premise, "when a joint venture owns the land and the contractor performs construction services as a member of the joint venture (versus a separate entity), the joint venture is a speculative builder," and "the work performed by the contractor is a contribution to the capital of the joint venture." *Id.*

The DOR begrudgingly concedes, as it must, that the Construction Guide is "a correct statement of the law." DOR Br. at 33. Indeed, the DOR's published tax determinations (upon which the Guide is based) have long recognized that a joint venture qualifies as a "speculative builder" when the construction services are performed by one member of the venture in its capacity as a co-venturer, even though the joint venture itself or a separate co-venturer owns the land. *See, e.g.,* Det. No. 08-0222, 28 WTD 89, 97 (2009) ("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 the rest of the work on the project); Det. No. 99-176, 19 WTD 456 (2000) (same).

This too was recognized in the numerous rulings DOR issued to similar joint ventures approving "speculative builder" status. *See* CP 317-323 (Construction JV Ruling); CP 391 (DOR memo: "a number of

requests for investment treatment were received and approved by the Department in past years"). In those joint ventures, many of which were structured as limited liability companies, one member contributed the land and financing, and the other contributed construction services, as contributions to each member's respective capital accounts. CP 317-318. The fact that the contractor member did not own the land was no impediment. Indeed, even when DOR repudiated its long-standing approach to such joint ventures, and refused to approve Bravern II's status as a "speculative builder," it had nothing to do with the fact that Bravern II did not perform the work or, conversely, PCL did not own the land. CP 420-422. As discussed below, it was because DOR erroneously believed PCL had an "absolute" right to payment for its capital contributions. *Id.*

The decision in *Dep't of Revenue v. Nord NW. Corp.*, 164 Wn. App. 215, 264 P.3d 259 (2011), cited by DOR, is not to the contrary. There, Nord performed construction on land owned by LLCs, of which it was also a member. The court held that Nord was not a "speculative builder" because it did not legally or equitably own the land. But unlike *Nord*, the issue here is whether Bravern II, not PCL, is a "speculative builder." Critically, *Nord* did not consider or decide whether the LLC was a "speculative builder" under a joint venture analysis, or whether Nord's services should be treated as a capital contribution. That argument was

never made. Indeed, in *Nord*, the contactor could not make that argument because, unlike here, it had entered into construction contracts with the LLCs and received "absolute" payments for its services. *Id.* at 225-26.

In sum, this Court can easily reject DOR's superficial argument that Bravern II cannot be a "speculative builder" because it and PCL are separate entities, and/or that an LLC is distinct from its members. It simply does not matter when the taxpayer is a joint venture, as DOR has recognized in the past and continues to recognize today. *See* DOR Br., App. C (current Construction Guide). As explained in Bravern II's opening brief, what matters is whether (1) the joint venture exists; (2) the joint venture owns the land; and (3) a member of the joint venture performs construction on the land in its capacity as a co-venturer—not as a prime contractor. DOR concedes the first two elements and, for the reasons discussed below, cannot reasonably dispute the third.[1]

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[1] Without authority, DOR suggests in a footnote that an LLC cannot be a joint venture. DOR Br. at 3, n. 1. The Court can ignore this unsupported and passing argument. RAP 10.3(a)(6) & (b); *Holland v. City of Tacoma*, 90 Wn. App. 533, 538, 954 P.2d 290 (1998) ("Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration."). The suggestion is baseless in any event; DOR specifically recognized Bravern II as a joint venture in its administrative determination, *see* CP 442, and recognized identically structured LLCs as joint ventures in its Construction JV Rulings, *see* CP 317.

B. PCL Performed Construction Services In Its Capacity As A Member Of The Joint Venture Because The Value Of Its Services Resulted In An Increase To Its Capital Account For Which It Had No "Absolute" Right To Payment.

The third and final element necessary to qualify as a "speculative builder" is that no member of the joint venture can be "guaranteed a fixed amount of compensation for its services." This element is identified in the Construction Guide, *see* CP 488, and derived from DOR's published tax determinations ("WTDs") and tax advisories ("ETAs"), which frame the issue in terms of whether the member has an "absolute" right to payment "in any event." Det. No. 99-176, 19 WTD 456 (2000); Det. No. 90-74, 9 WTD 143 (1990); Det. No. 89-290, 8 WTD 1 (1989); Det. No. 87-254, 3 WTD 431 (1987); Excise Tax Advisory ("ETA") 3136 (2009) (*formerly* Excise Tax Bulletin 073.08.106) ("the determination ... is dependent on whether the payment to the contributing joint venturer is absolute or not").[2] This test is designed to distinguish between services provided by a member acting in the capacity of a mere prime contractor (with an

[2] The WTDs turn to dictionary definitions to define "absolute" in this context. *See* Det. No. 89-290, 8 WTD 1 (1989) (*citing* Black's Law Dictionary (5th ed. 1979)). It means "without relation to or dependence on other things or person." *Id.* As noted above, PCL had no "absolute" right to payment because it was wholly dependent upon BRM's discretion to periodically pay down its capital account or, ultimately, the financial success (*i.e.*, net income and profit) of the venture.

absolute right to payment) versus a member acting in the capacity as a true joint venturer (with no absolute right). *Id.*

PCL was not entitled to any "guaranteed" or "absolute" right to payment for the services it provided as a capital contribution to the joint venture. Each month, the value of the services PCL performed for the joint venture resulted in a commensurate increase in its capital account. CP 278-79; CP 352 (¶ 2.2.4). Thereafter, Bravern II's managing member (BRM) could make distributions to PCL to return PCL's capital account back to the initial ownership interest. CP 297-98; CP 353 (¶ 3.2). BRM's decision to return capital to PCL was entirely discretionary, and dependent upon the availability of cash. *Id.*; CP 354 (¶ 3.5: "No Member shall be entitled to any guaranteed payment from the Company"). Critically, DOR does not and cannot dispute that, unlike an ordinary contractor guaranteed payment for its services by a construction services contract, PCL had no right—"absolute" or otherwise—to compel payment from Bravern II.

Rather, DOR does the only thing it can do: it mischaracterizes the law. Contrary to what the WTDs, ETAs and Construction Guide actually say, DOR argues that—even if a member has no "absolute" right to payment—the joint venture is not a "speculative builder" to the extent it makes payments to a member that are not derived from "profits." DOR Br. 26-28, 30-31. Because the distributions to PCL came from available

cash and loans, not "profits" (which did not yet exist), DOR would ignore the discretionary nature of the payments and their function, *i.e.*, to periodically pay down PCL's growing capital account to reflect its initial percentage interest in the venture. There is no authority for DOR's claim that discretionary distributions must come from profits and, as discussed below, such a proposition is flatly contrary to Rule 106—which provides that payments from a joint venture to its member in exchange for a "proportional reduction" of the member's interest is "not taxable."[3]

And, even if it mattered, DOR is simply wrong when it claims that PCL's capital contributions and right to payment were not "tied" to profits. DOR Br. at 31. PCL's investment, and Bravern II's distributions to reduce that investment, were inextricably tied to Bravern II's success or failure. As PCL contributed services, its capital account grew beyond its initial percentage interest. CP 352 (¶ 2.2.4). Had BRM been unwilling or unable to pay down PCL's capital account, upon dissolution, PCL would have been entitled to share the profits with BRM "pro rata" in proportion to their capital account balances. CP 367 (¶ 10.4.5). Conversely, had the

[3] It is, of course, of no consequence that BRM and PCL did not agree to equal ownership interests in Bravern II. It is well-established that joint venturers may "agree upon the percentage of profits which participant is to receive by contract, and the contract will control." *Raines v. Walby*, 13 Wn. App. 712, 717, 537 P.2d 833 (1975).

project failed, PCL would have lost its entire unreturned investment. *Id.* (¶ 10.3.2); CP 354 (¶ 4.1.2). Even though Bravern II was able to pay down PCL's account on a monthly basis, there still was significant risk to PCL; the average monthly balance of PCL's capital account was more than $6.7 million. CP 629 (¶ 14). In the end, then, contrary to DOR's premise, because Bravern II's distributions were discretionary, PCL right to payment was "absolute" only in the event Bravern II was profitable.

DOR repeatedly cites WAC 458-20-170(2)(f) ("Rule 170(2)(f)") to support its erroneous "absolute" payment argument. DOR Br. at 24-28, 30, 34, 36-37. But Rule 170(2)(f) has nothing to do with the issue; it merely "sets out the well-established legal principle that a business entity is a distinct, separate 'person' from its owners." *Nord*, 164 Wn. App. at 230.[4] As discussed above, that maxim is no bar to "speculative builder" status where, as here, separate business entities act in their capacity as members of a single joint venture. Indeed, none of the published WTDs

[4] DOR's confusion regarding the applicability of Rule 170(2)(f) to this issue appears to stem from the unpublished determination made by DOR in Bravern II's case. In that determination, the Appeals Division stated that "[i]n construing [Rule 170(2)(f)] our determinations have looked to the manner in which the 'person' performing the construction services at issue is compensated, and specifically whether such payments may be characterized as 'absolute.'" CP 449. The Appeals Division then cited to the same WTDs cited by DOR on appeal which, as discussed above, do not actually cite—and have nothing to do with—Rule 170(2)(f).

DOR claims "reflect the Department's application of Rule 170(2)(f)" even cite the rule. Rather, consistent with the Construction Guide, these WTDs all hold that the taxpayer qualified as a "speculative builder" because, just like here, the joint venture's distributions were "not absolute payments." *See* Det. No. 99-176, 19 WTD 456 (2000); Det. No. 90-74, 9 WTD 143 (1990); Det. No. 89-290, 8 WTD 1 (1989); Det. No. 87-254, 3 WTD 431 (1987). These published determinations, not Rule 170(2)(f), control.[5]

C. Rule 106 Confirms That Bravern II's Distributions To PCL In Order To Reduce PCL's Capital Account Was A Nontaxable Transfer Of Capital Assets, Not A Payment For Services.

Because Bravern II was a "speculative builder," neither PCL's services, nor Bravern II's distributions, were taxable. Rather, as reflected in WAC 458-20-106 ("Rule 106"), they were properly treated as nontaxable transfers of capital assets. *See* Det. No. 88-155, 5 WTD 179 (1988) ("when a joint venturer/member transfers a capital asset to a joint

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[5] DOR's reliance on federal law is likewise misplaced. DOR Br. at 28-30. As DOR itself recognizes, federal income tax principles are not analogous to Washington tax law because the two operate under entirely different statutory schemes. *See Matter of Moody's Estate*, 25 Wn. App. 329, 334, 606 P.2d 285 (1980) ("Moody contends that we should be bound by federal interpretations of federal tax law. We do not agree."); *RWR Mgmt., Inc. v. Dep't of Revenue*, 2011 WL 3524330 (Wash. Bd. Tax. App. 2011) ("The federal deduction is irrelevant to state taxes, which operate under a different statutory scheme and definitions."). The Appeals Division did not reference, much less rely on, federal income tax principles when it denied Bravern II's request for "speculative builder" status on state law grounds. CP 441-454; CP 240-256.

venture in exchange for an interest in that joint venture, the transfer will be deemed nontaxable") (*citing* Rule 106). There is no merit to DOR's argument that Rule 106 only applies to "casual and isolated" events. DOR Br. at 20-23. Rule 106 addresses not only casual and isolated sales, but also—separately—certain inter-business transfers. Det. No. 92-029R, 12 WTD 345 (1992) ("Rule 106 addresses the application ... of the retail sales tax to casual and isolated sales and various business reorganization possibilities.") (emphasis added). Only the latter is relevant here.

In its section on "Retail Sales Tax," below and unrelated to earlier paragraphs addressing "casual and isolated sales," Rule 106 provides:

> 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. . . .
>
> (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.

WAC 458-20-106. On its face, Rule 106 does not limit transfers of capital assets to "casual and isolated" events and, indeed, DOR has applied this portion of the rule to reoccurring transfers. Det. No. 91-292, 11 WTD 483 (1992) (periodic transfer of equipment between subsidiaries nontaxable). Rule 106 plainly applies here: PCL's services were provided "in exchange

for an interest" in the joint venture (an increase in PCL's capital account), whereas Bravern II's discretionary distributions resulted in a "proportional reduction" of that interest (a decrease in PCL's capital account).[6] For this reason too, the trial court's judgment must be reversed.

D. DOR's Erroneous Determination That Bravern II Does Not Qualify As A "Speculative Builder" Cannot Be Salvaged By The Legislature's Enactment Of A Retroactive New Tax.

In the end, DOR is forced to rely on RCW 82.32.655 to defend the trial court's erroneous ruling. That statute was enacted in 2010 to change the law, giving DOR discretion to impose retail sales tax on certain joint ventures that, under existing law and DOR determinations, qualified as "speculative builders." After all, if DOR were not required to treat such ventures as "speculative builders" under existing law, why enact the statute at all? It is that existing law, however, that controls here because (1) RCW 82.32.655 does not apply where, prior to its enactment, the

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[6] There also is nothing to DOR's suggestion that the rule does not apply if a member contributes "services" in exchange for an interest in a partnership or joint venture. DOR Br. at 21-22. It is well-established at common law that capital contributions can come exclusively from labor, just as they can come from property or money. *See Simpson v. Thorslund*, 151 Wn. App. 276, 280, 211 P.3d 469 (2009) ("Simpson contributed only his labor to TCI as capital."); *Fields v. Andrus*, 20 Wn.2d 452, 454, 148 P.2d 313 (1944) ("The son contributed his labor to the partnership," which was "consideration for his interest therein"). Nothing in Rule 106 shows a different intent. On the contrary, DOR's Construction Guide accurately recognizes that "the work performed by the contractor is a contribution to the capital of the joint venture." CP 488; DOR Br., Appendix C.

taxpayer relied on DOR's published guidance, and (2) retroactive application of a "wholly new tax" would be unconstitutional. And, in any event, (3) by its own terms, RCW 82.32.655 does apply to Bravern II.

1. RCW 82.32.655 Does Not Apply Because Bravern II Was Structured In Conformity With DOR's Published Tax Determinations And Construction Guide.

Perhaps because it was rightly concerned over the constitutionality of a retroactive new tax (*see below*) or simple fairness, the legislature forbid DOR from applying RCW 82.32.655 to transactions initiated before May 1, 2010 that were undertaken in conformity with DOR's public statements. RCW 82.32.660. DOR suggests that RCW 82.32.660 does not apply because its denial of Bravern II's letter ruling request constituted "specific written instructions." DOR Br. at 47. But the statute is not limited to "specific written instructions"; it applies equally where a taxpayer structured its transaction in reliance on DOR's published tax determinations ("a determination published under the authority of RCW 8.32.410") or its Construction Guide ("other document made available by the department to the general public"). RCW 82.32.660(1)(a). Bravern II relied on both.

DOR does not dispute that, when Bravern II was formed in 2007 (*before* it requested or received a letter ruling from DOR on its tax status), published WTDs, ETAs and the Construction Guide all recognized that

joint ventures qualifying as "speculative builders" owed no tax on capital contributions and distributions received from and provided to members. *See* Det. No. 99-176, 19 WTD 456 (2000); Det. No. 87-254, 3 WTD 431 (1987); ETA 3136.2009; CP 487-88. Nor does DOR dispute that Bravern II was structured in conformity with these pre-RCW 82.32.655 published materials, as well as the Construction JV Rulings that were well-known in the industry. The analysis is therefore straightforward: if Bravern II qualified as a "speculative builder" when it was created, then RCW 82.32.660 prevents DOR (or a court) from utilizing RCW 82.32.650 to reach a different result. For all the reasons explained in its opening brief and above, Bravern II was a "speculative builder" when created.

DOR ultimately argues, as it must, that RCW 82.32.660 does not apply because Bravern II read these pre-RCW 82.32.655 publications "out of context." DOR Br. at 47. But it was these same publications that DOR relied on when it issued the Construction JV Rulings, which recognized joint ventures identical to Bravern II as "speculative builders." CP 317-23; CP 391 ("a number of requests for investment treatment were received and approved by the Department in past years"); CP 331 ("we have approved identical ones very recently"). Indeed, DOR internally conceded that it approved these requests because taxpayers had "relied on the Department's past treatment in setting up and arranging ... these deals."

CP 325. While DOR may have changed its interpretation of the law, the only thing that matters for purpose of RCW 82.32.660 is DOR's public position when Bravern II was created. At the time, DOR's public position was that identical joint ventures qualified as "speculative builders."

2. RCW 82.32.655 Cannot Apply To Bravern II Because The Constitution Forbids Retroactive New Taxes.

Had the legislature not enacted RCW 82.32.660 to carve-out joint ventures like Bravern II from RCW 82.32.655's reach, the Court still could not apply the statute retroactively. Citing *U.S. v. Carlton*, 512 U.S. 26 (1994), DOR argues that retroactive application of RCW 82.32.655 is permissible if it is "supported by a legitimate legislative purpose furthered by rational means." DOR Br. at 45. Wrong. In *Carlton*, the Supreme Court drew a distinction between retroactive statutes involving a "wholly new tax" and "amendments that bring about certain changes in operation of the tax laws." 512 U.S. at 34 (*citing U.S. v. Hemme*, 476 U.S. 558 (1986)). The deferential "rational basis" test applies to the latter, but not the former. *Id.*; *also id.* at 38 (O'Connor, concurring). Washington courts recognize the same distinction. *Bates v. McLeod*, 11 Wn.2d 648, 656, 120 P.2d 472 (1941) ("even when a tax has been imposed for the support of the general government, ... if it is novel in character, a retroactive application may be subject to constitutional objection") (emphasis added).

DOR's claim that RCW 82.32.655 is not a "new" tax also can be dismissed out-of-hand. Prior to its enactment, there was no Washington statute or rule that permitted DOR to "disregard" a joint venture on the grounds that it was designed for "tax avoidance," nor did Washington case law or DOR's determinations recognize such authority. Just the opposite: DOR felt compelled to initiate a stakeholder process because it recognized that its "currently published guidance does not clearly address the wide range distributions now being utilized in the limited liability context." CP 391-92; *also* CP 388 ("guidance we have on this matter is insufficient"). And, when DOR abandoned that process in favor of a legislative fix, it candidly noted in a brief to the governor that "legal support for our actions is well-established in federal law and the law of other states, but has not yet been fully tested in Washington." CP 460; *also* CP 457 ("I think [the] point is that there wasn't any case law in Washington state.").

Legislative history confirms the novel nature of RCW 82.32.655. *Cf. Barstad v. Stewart Title Guar. Co., Inc.*, 145 Wn.2d 528, 39 P.3d 984 (2002) (courts may examine legislative history to resolve issues regarding retroactivity). In discussing the then-current state of the law, like DOR's internal analysis, the final bill report for RCW 82.32.655 noted:

> The economic substance doctrine states that a transaction's tax benefits will not be allowed if the transaction does not have economic substance. This common law doctrine is an

> effort by the courts to enforce legislative intent in situations in which a literal reading of the statutory code would allow a taxpayer to circumvent this intent. The doctrine is used frequently at the federal level to determine whether tax shelters or strategies used to reduce tax liability are considered abusive by the Internal Revenue Service. Washington courts have not used the economic substance doctrine to interpret tax statutes ...

See Final Bill Report, 2 ESSB 6143 (emphasis added), available at http://apps.leg.wa.gov/billinfo/summary.aspx?bill=6143&year=2009. Put simply, Bravern II did exactly what it was entitled to do: it relied on a "literal reading" of existing law, DOR's interpretation of that law, and DOR's previous recognition of joint ventures identical to Bravern II as "speculative builders." RCW 82.32.655 does not amend existing tax law, nor does it codify existing agency or judicial construction of that law.[7] It authorizes a new tax that retroactively applies to transactions that were nontaxable at the time. While the legislature is free to impose this new tax prospectively, it cannot do so retroactively. *Bates*, 11 Wn.2d at 656.

[7] This Court can easily reject DOR's perfunctory suggestion that RCW 82.32.655 is not a "new" tax because the "retail sales tax at issue has been imposed in Washington since the 1930s." DOR Br. at 45. RCW 82.32.655 did not purport to amend, clarify or cure the retail sales tax; it gives DOR new and previously unrecognized authority to "disregard" certain lawful transactions and arrangements for purpose of any excise tax.

3. Even If RCW 82.32.655 Were Applied To Bravern II, DOR Could Not Disregard Its Status As A Speculative Builder Because It Is "In Substance" A Joint Venture.

Although this Court should never reach the issue, if it does, RCW 82.32.655 would not apply to Bravern II by its own terms. Simply put, Bravern II is not the kind of "sham" joint venture the statute was designed to reach. RCW 82.32.655(3)(a) permits DOR to disregard only those ventures that are "in substance" ordinary construction contracts, with "substantially guaranteed payments ... characterized by a failure of the parties' agreements to provide for the contractor to share substantial profits and bear significant risk of loss in the venture." As explained above and in the Opening Brief, the parties' Operating Agreement does not fail to provide for these things; it includes them: PCL was entitled to share profits relative to its proportional interest in the venture while, at the same time, it stood to lose its entire capital investment in the event of failure. CP 354-55, 366-67.

DOR focuses on those aspects of the Operating Agreement that, DOR claims, gave Bravern II an incentive to periodically pay down PCL's capital account and/or gave PCL the ability to exit the venture before profits were realized. DOR Br. at 42-44. But RCW 82.32.655 speaks in terms of what the parties' agreements require, not contingencies that may or may never occur. At bottom, the fact that Bravern II had discretion to

pay down PCL's capital account from time to time, and did so, is not tantamount to "substantially guaranteed payments." It simply adjusted PCL's right to receive a share the profits and risk of loss commensurate with the parties' initial allocation of percentage interest in the venture.

III. CONCLUSION

Bravern II respectfully requests that this Court reverse the trial court and remand with instructions to enter judgment in favor of Bravern II on its refund claim in the amount of $107,842.10 plus interest.

RESPECTFULLY SUBMITTED this 27th day of January, 2014.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury of the laws of the State of Washington, that on January 27, 2014, I caused to be served a copy of the foregoing on the following persons in the manner indicated below at the following addresses:

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