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DIVISION II, COURT OF APPEALS
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON

BRAVERN RESIDENTIAL II, LLC

Petitioner

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Respondent

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

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER AND INTRODUCTION

The Department of Revenue's ("DOR") published determinations and its Construction Guide specifically provide that a joint venture between a developer and a contractor qualifies as a "speculative builder" when the "joint venture entity owns the land" and the contractor-member "performs services as a member of the joint venture." CP 488. A joint venture that qualifies as a speculative builder is not subject to sales tax on the value of the construction services performed by the contractor-member in its capacity as a member. The critical feature of a speculative builder is that the contractor-member must perform its construction services as a capital contribution for which there is no absolute right to payment.

Petitioner Bravern Residential II, LLC ("Bravern II") carefully structured itself in reliance on these DOR guidelines and Washington law. Indeed, for years, DOR recognized identically structured joint venture LLCs — including Bravern II's sister project — as "speculative builders." Bravern II had no reason to believe it would be treated differently and it shouldn't have been treated differently. But it was.

DOR did a complete about-face after Bravern II had proceeded with its development project. DOR claimed its prior interpretation of the law was wrong, it refused to treat Bravern II as a "speculative builder,"

and it took the position that sales tax was owed on the value of the construction services performed by Bravern II's contractor-member, PCL.

DOR, however, couldn't simply ignore its own published determinations without some rationale, so it first tried to promulgate new guidelines through a public stakeholder process. When that process failed, DOR asked the legislature to enact a wholly new statute that gave it discretion to retroactively impose taxes on certain joint ventures structured to qualify as "speculative builders." The legislature did so, but it was careful to specifically carve-out and, in effect, "grandfather" or exempt those already created joint ventures, like Bravern II, that had been structured in reliance on DOR's prior published determinations and public guidelines regarding existing law. *See* RCW 82.32.655 & .660.

That didn't matter to DOR, and, inexplicably, was disregarded by the courts below too. Notwithstanding the legislature's reticence to penalize existing entities like Bravern II, the Court of Appeals affirmed the trial court's conclusion that Bravern II was not a "speculative builder" because it did not both own the land and do the work. According to the Court of Appeals, despite the fact that PCL performed its construction services solely in its capacity as a member of Bravern II, "PCL and Bravern are separate entities," and, thus, Bravern II "cannot be treated as the entity performing the construction services." *Bravern Residential II,*

LLC v. Dep't of Revenue, — Wn. App. —, 334 P.3d 1182, at ¶ 20 (2014); *id.* at ¶ 21 ("Bravern was not a speculative builder because its member PCL was constructing on property Bravern owned.").

The Court of Appeals' opinion warrants review because, besides being wrong, it will undermine the viability of developer-contractor joint ventures as an attractive vehicle for Washington real estate development projects. The issue is not whether the joint venture and its contractor-member are separate legal entities; of course they are — every joint venture member retains a separate existence from that of the joint venture itself. Instead, the issue is whether the contractor acts as a separate entity, or as a member of the joint venture, when it performs its construction services. If the latter, then the joint venture both owns the land and performs the work — thus qualifying as a speculative builder. The Court of Appeals' opinion erroneously ignores that critical inquiry, and would disqualify from speculative builder status any joint venture in which the contractor-member is not the owner of the land — even where, as here, the contractor-member provided its services strictly as a capital contribution to the joint venture and had no absolute right to payment for the services.

II. COURT OF APPEALS DECISION

Bravern II petitions this Court to review the September 23, 2014 opinion issued by Division 2 of the Court of Appeals ("the Decision").

The Decision affirmed the trial court's summary judgment dismissal of Bravern II's tax refund action on the grounds that Bravern II was not a "speculative builder." A copy of the Decision is attached as Appendix A.

III. ISSUES PRESENTED FOR REVIEW

1. Can a joint venture qualify as a speculative builder where a contractor performs services on land owned by the joint venture if the contractor does so solely in its capacity as a member of the venture?

2. Are the construction services provided by a member of a joint venture properly characterized as a capital contribution to the venture where the member has no "absolute" right to payment for the services?

3. Unless specifically permitted by RCW 82.32.655 & .660, can DOR and/or the courts use a "substance over form" analysis to deny tax benefits to a joint venture properly structured as a speculative builder?

IV. STATEMENT OF THE CASE

A. Bravern II Is Structured To Qualify As A Speculative Builder.

Bravern II is a joint venture between Bravern Residential Mezz II, LLC ("BRM") and PCL Construction Services, Inc. ("PCL"), formed to build a residential condominium tower known as Signature Residences at The Bravern, Tower 4. CP 627. Tower 4 is part of a larger complex known as The Bravern, located in downtown Bellevue. The other buildings in the complex were also built by joint ventures, The Bravern,

LLC ("The Bravern") and Bravern Residential I, LLC ("Bravern I"), with the same organizational structure as Bravern II. CP 310-312.

The Bravern, Bravern I, and Bravern II used the same structure that had "been developed and used over the last several years for multi-million dollar construction projects by a number of Washington's largest construction companies" and property developers. CP 392. For many years, DOR routinely issued rulings confirming that this type of joint venture qualified as a "speculative builder." CP 317-23; CP 391 ("a number of requests ... were received and approved by the Department in past years"). In fact, PCL, specifically sought out membership in Bravern II because of PCL's experience with similarly structured joint ventures that had received favorable DOR rulings dating back to 1999. CP 335-336.

Under the parties' Operating Agreement, BRM transferred title to the land to Bravern II. CP 338; CP 350. For its part, PCL provided construction services to the project. Both members received credits to their capital accounts equal to the value of their contributions. CP 278-79; CP 352. PCL had no guaranteed right to be paid. CP 354. Rather, BRM, Bravern II's managing partner, could make discretionary distributions from available cash to PCL to reduce PCL's capital account. CP 297-98; CP 353-54. 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 respective capital account balances. CP 367. Conversely, had the project failed, PCL would have lost its entire unreturned investment. *Id.*; CP 354.

B. DOR Refuses To Treat Bravern II As A Speculative Builder.

On August 24, 2007, Bravern II's sister joint venture, The Bravern, received a letter ruling confirming that The Bravern — like identically structured LLCs before it — would be treated and taxed as a speculative builder. CP 398-400; CP 317-323. Bravern II submitted a request for a similar ruling just three days later. CP 403-410. Bravern II, however, was the victim of bad timing. In the spring of 2007 (at the height of the construction boom), DOR became concerned about a perceived increase in requests for such letter rulings, and began to devise ways to change course. *See* CP 391-393; CP 387-389.

DOR recognized that its existing guidance was "insufficient" to deny requests submitted by properly structured joint ventures like Bravern II. CP 388. DOR therefore decided it would continue to approve requests for similar letter rulings while it initiated a "stakeholder process" intended to "develop additional guidance" that could be used to support denials in the future. *Id.*; CP 395-396; CP 331-332; CP 414. DOR did this because it recognized that taxpayers had "relied on the Department's past treatment in setting up and arranging for financing in these deals." CP 325.

After three meetings, DOR abandoned the stakeholder process and never adopted additional guidance. On September 25, 2008, DOR advised stakeholders it would "rely on [existing] published determinations" to deny speculative builder status to joint ventures like Bravern II, CP 439 — even though, internally, DOR recognized there was no Washington law to support its position. CP 457, 460.

C. The Court Of Appeals Affirms The Trial Court's Dismissal Of Bravern II's Tax Refund Action.

Meanwhile, Bravern II filed an administrative appeal of DOR's denial of its ruling request, which was denied on April 10, 2010. CP 4. Because Washington law provides no mechanism for obtaining direct judicial review of the denial of a ruling request, *Booker Auction Co. v. Dep't of Revenue*, 158 Wn. App. 84, 88-89, 241 P.3d 439 (2010), Bravern II paid $107,842.10 in tax on a discretionary distribution made to its member PCL, and brought a refund action to obtain review of DOR's refusal to treat Bravern II as a speculative builder. CP 4. On cross-motions for summary judgment, the trial court dismissed Bravern II's refund action without explaining the basis for its ruling. CP 654.

The Court of Appeals affirmed in a published opinion. *Bravern Residential II, LLC v. Dep't of Revenue*, — Wn. App. —, 334 P.3d 1182 (2014). The court held that Bravern II was not a speculative builder

because Bravern II and PLC were "separate entities" under a "plain reading" of WAC 458-20-170(2)(a) & (f). *Id.* at ¶¶ 19-23. The court further held that DOR's published tax determinations and Construction Guide were "consistent" with its analysis. *Id.* at ¶ 25. And, although the court did not address the applicability of RCW 82.32.655, it nevertheless found it proper to base its decision on what it viewed to be the "substance" of the transaction over the "form" of the operating agreement. *Id.* at ¶ 27.

V. ARGUMENT

The Decision involves issues of substantial public importance, RAP 13.4(b)(4), the resolution of which will determine whether and how developers and contractors can continue to utilize LLCs and other joint venture entities to qualify as "speculative builders" for purposes of undertaking significant real estate development projects.

A. A Joint Venture Is A "Speculative Builder" If Its Contractor-Member Performs Construction Services On Land Owned By The Venture So Long As It Does So In Its Capacity As A Member Of The Venture.

When a person purchases construction services from a prime contractor, it owes sales tax on the amount charged for those services. RCW 82.08.020(1); WAC 458-20-170(1)(a). But when a person performs construction services on land it owns, the person is not a "consumer" of the services and, thus, is not subject to sales tax on those self-performed

construction services. RCW 82.04.050(b) & .190(4). DOR calls such a person a "speculative builder." WAC 458-20-170(2)(a) ("the term 'speculative builder' means one who constructs buildings for sale or rental on real estate owned by him"). Although "speculative builders" do not pay sales tax on the value of the construction services they perform, they do owe sales tax on the amounts paid to subcontractors and for construction materials. WAC 458-20-170(2)(e).

Up until now, it was common for developers and contractors to form joint ventures — often times structured as an LLC — so that the venture would qualify as a speculative builder. RCW 82.04.030 (joint ventures are separately-taxable "persons" for Washington tax purposes). The tax benefit realized by such joint ventures incentivized developers and contractors to pool their resources and undertake significant Washington real estate development projects that otherwise might not be possible under a traditional pay-for services model. The tax benefit of this structure does not come without risk. As discussed below, to properly qualify as a speculative builder, the contractor must perform its services for the joint venture strictly in its capacity as a member of the venture. That means the contractor is not guaranteed payment for its services; the services are treated as a capital contribution, and the return of capital is ultimately tied to the financial success (or failure) of the venture itself.

The Decision sounds the death-knell for many existing and future joint venture construction projects. The Court of Appeals rejected Bravern II's status as a "speculative builder" primarily on the grounds that Bravern II and PCL are "separate legal entities" and, thus, Bravern II did not both own the land and perform the work. *Bravern II*, 334 P.3d 1182, at ¶¶ 19-22. Under the court's simplistic (and erroneous) analysis, because "Washington law treats a member of an LLC as a separate person from the LLC entity itself," and the parties' operating agreement required PCL, not Bravern II, to do the work, Bravern II "cannot be treated as the entity performing the construction services that PCL actually performed." *Id.* In short, it simply didn't matter that PCL was performing its services for Bravern II strictly in its capacity as a member of the joint venture.

The Court of Appeals' analysis ignores long-standing Washington law, and DOR's own published guidelines — both of which the parties relied upon when structuring Bravern II. While an LLC is a legal entity distinct from its members, *see* RCW 25.15.070(2)(c), it is equally true that the *only* way an LLC can act is "through its members or managers." *Dickens v. Alliance Analytical Labs., LLC*, 127 Wn. App. 433, 440, 111 P.3d 889 (2005). Thus, the mere fact that PCL performed the services and Bravern II owned the land does not, as the Court of Appeals held, *per se* disqualify Bravern II from speculative builder status; if PCL performed

the services in its capacity as a member of Bravern II, then those services are deemed to have been performed by Bravern II itself.[1]

This basic principle — which was the basis for structuring Bravern II — is well-established in DOR's prior published determinations, which, by statute, are precedent. RCW 82.32.410. Before it reversed course, DOR uniformly recognized 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 the rest of the work on the project." Det. No. 08-0222, 28 WTD 89, 97 (2009).[2] Thus, DOR has upheld "speculative builder" status in many cases where, like here, the contractor-member of a joint venture performed construction services on land owned by a co-venturer or the joint venture itself. *Id.*; Det. No. 99-176, 19 WTD 456 (2000); Det. No. 94-154, 15 WTD 46

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[1] For this reason too, the Court of Appeals' reliance on WAC 458-20-170(2)(f) is misplaced. The rule provides that contractors are not speculative builders merely by virtue of the fact that they performed construction on land owned by "corporate officers, share-holders, partners, owners, co-venturers, etc." The rule presumes the contractor performed its services in its separate capacity for pay, and does not address situations where the contractor acted in its capacity as a member of a joint venture. As DOR's published determinations show, the rule does not preclude a joint venture from achieving speculative builder status without considering the capacity in which the contractor-member performed the services.

[2] DOR's precedential published tax determinations are available online at: http://taxpedia.dor.wa.gov/.

(1995); Det. No. 90-74, 9 WTD 143 (1990). And, as noted above, DOR repeatedly did so for joint venture transactions structured identically to Bravern II—including its sister project, The Bravern. *See* CP 317-323.

Indeed, when Bravern II was created, DOR's published guidelines for the construction industry (the "Construction Guide") specifically confirmed that "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." CP 488. The Decision's superficial focus on the parties' status as "separate legal entities" is not, contrary to the Court of Appeals' suggestion, "consistent" with the Guide's focus on whether the contractor performed its services in its capacity as a member of the joint venture. The Guide is a correct statement of the law; the Decision is not.[3]

[3] *Dep't of Revenue v. Nord NW. Corp.*, 164 Wn. App. 215, 264 P.3d 259 (2011), cited in the Decision, is inapposite. Unlike here, the issue there was whether the *contractor*, Nord, was a speculative builder notwithstanding the fact that the contactor had entered into general construction contracts *and* received "absolute" payments for its services. *Id.* at 225-26. The Court correctly concluded Nord was not a speculative builder. Critically, *Nord* did not consider or decide whether the LLCs could be considered "speculative builders" under a joint venture analysis, or whether Nord's services could be treated as a capital contribution. Indeed, no such argument was or could have been made in that case.

Unless reversed, the Decision will categorically disqualify from speculative builder status any and all joint ventures in which the contractor-member does not own the land — for, in all such cases, it can be said that the contractor is a "separate legal entity" from the joint venture itself. This Court should accept review and confirm that a joint venture can qualify as a speculative builder where one co-venturer performs construction services on land owned by the joint venture. In such cases, the critical question is not whether the joint venture and its members are separate legal entities, but whether the contractor-member performed its services as a capital contribution solely in its capacity as a member of the venture. The answer to that question, as DOR itself has repeatedly recognized, and the Court of Appeals likewise ignored, turns on whether the member has an "absolute" right to payment for those services.

B. A Contractor Acts In Its Capacity As A Member Of A Joint Venture If Its Services Are Treated As A Capital Contribution For Which It Has No Absolute Right To Payment.

Bravern II was carefully structured to ensure that PCL provided its services strictly in its capacity as a member of the joint venture, not as a separate entity. PCL's construction services were treated as capital contributions and, as such, its capital account in the joint venture was increased to reflect the value of those services as they were provided. By the same token, PCL received no guaranteed pay for its services. Rather,

as discussed below, its capital account was periodically paid down through discretionary distributions. Under settled Washington law, neither the contributions nor distributions were taxable events. WAC 458-20-106; *also* Det. No. 88-155, 5 WTD 179 (1988) ("when a joint venturer/member transfers a capital asset to a joint venture in exchange for an interest in that joint venture, the transfer will be deemed nontaxable").

Not all transfers between a joint venture and its members are non-taxable. DOR's published tax determinations recognize that if a member has an "absolute" right to be paid for its services, the services cannot be considered capital contributions to the venture. Det. No. 01-140, 22 WTD 26 (2003); Det. No. 99-176, 19 WTD 456 (2000); Det. No. 99-108, 19 WTD 143 (2000); Det. No. 90-74, 9 WTD 143 (1990); Excise Tax Advisory 3136 (2009) (*formerly* Excise Tax Bulletin 073.08.106). DOR's Construction Guide says the same thing. CP 488 (no speculative builder status if the "member is guaranteed a fixed amount as compensation for construction services"). In short, this test distinguishes between services provided by a member acting as a mere contractor (an absolute right to payment) versus services provided by a member as a capital contribution to the joint venture (with no absolute right to payment). *Id.*

The Decision improperly characterizes this test as an "independent rule" contrived by DOR — one that it didn't even have to consider given

its holding that the parties were "separate legal entities." *Bravern II*, 334 P.3d 1182, at ¶ 23 (DOR interpretations "immaterial because they cannot contradict the plain language of WAC 458-20-170(2), upon which we base our conclusion"). But, for the reasons explained above, Bravern II and PCL are not separate entities for speculative builder status if PCL provided its services as a capital contribution to Bravern II — which, in turn, depends entirely on whether or how it would be compensated for the value of those services. Put simply, for purposes of speculative builder status, the prohibition against a member having an "absolute" right to payment is not an "independent rule." *It is the rule.*

This Court should accept review and hold that a joint venture qualifies as a speculative builder where its member performs construction services solely as a means of capital contribution, and with no "absolute" right to payment. Bravern II satisfied this test — as did other joint venture entities that likewise structured themselves in careful reliance on DOR's published determinations and Construction Guide. Each month, the value of PCL's services resulted in a corresponding increase to its capital account. CP 278-79; CP 352. BRM thereafter could make distributions from available cash to pay down that account. CP 297-98; CP 353. It is undisputed, however, that BRM's decision to make any such distribution was entirely discretionary. *Id.*; CP 354 (¶ 3.5: "No Member shall be

entitled to any guaranteed payment from the Company"). Had BRM been unwilling or unable to make periodic distributions, PCL would have lost its entire unreturned investment. *Id.*; CP 354. Because BRM was under no legal obligation to make distributions to PCL, and PCL could not compel BRM to do so, PCL had no "absolute" right to payment.

C. A Member Of A Joint Venture Can Provide Construction Services To The Venture As A Form Of Capital Contribution.

Bravern II qualified as a speculative builder under the retail sales tax statutes and WAC 458-20-170 because it did not purchase construction services from PCL; Bravern II never argued that PCL's services were non-taxable solely by virtue of WAC 458-20-106 ("Rule 106"). Nevertheless, the Decision holds that the value of PCL's construction services could not be treated as capital contributions to Bravern II — even if there was no "absolute" right to payment — because services are not "capital assets" within the meaning of Rule 106. *Bravern II*, 334 P.3d 1182, at ¶¶ 29-32. This Court should accept review to dispel the Court of Appeals' erroneous suggestion that a member of a joint venture cannot provide services to the venture as a form of capital contribution.

It is a basic tenet of partnership law that capital contributions can come in the form of labor or services, just as they can come from property or money. *Simpson v. Thorslund*, 151 Wn. App. 276, 280, 211 P.3d 469

(2009) ("Simpson contributed only his labor to TCI as capital."). This is also true for LLCs like Bravern II. RCW 25.15.190 ("[t]he contribution of a member to a limited liability company may be made in ... services rendered"). Perhaps most important for present purposes, as discussed above, DOR itself has uniformly recognized that it is permissible for a co-venturer to contribute its services as capital to a joint venture structured as a speculative builder, including LLCs structured identically to Bravern II. CP 317-23; CP 391 ("a number of requests for investment treatment were received and approved by the Department in past years").

The Court of Appeals' reliance on *Budget Rent-A-Car v. Dep't of Revenue*, 81 Wn.2d 171, 500 P.2d 764 (1972), is misplaced in any event. There, the court defined the term "capital asset" only as it was used in the portion of a former version of Rule 106 that addressed a "casual or isolated ... [s]ale of a capital asset by a manufacturer, wholesaler or retailer." *Id.* at 176 ("But the term 'capital asset' *as used there* ..."(emphasis added)); *see former* WAC 458-20-106 (eff. 7/1/1970). The Court did not define the term as used in the separate portion of the former (or current) version of Rule 106 that addresses transfers of capital that result in an adjustment of the interests

in a joint venture or other business.[4] By their very nature, such transfers cannot be limited to "device[s] or article[s]," *Budget*, 81 Wn.2d at 176, but must include cash, stock and the value of services.

D. Washington Courts Cannot Disregard The Form Of A Joint Venture Properly Structured As A Speculative Builder Unless Specifically Authorized By RCW 82.32.655 & .660.

RCW 82.32.655 allows DOR to disregard certain enumerated "tax avoidance transactions," including "[a]rrangements that are, in *form*, a joint venture … between a construction contractor and the owner … of a construction project but that are, in *substance*, substantially guaranteed payments for the purchase of construction services[.]" RCW 82.32.655(3)(a) (emphasis added). Prior to the statute's enactment in 2010, Washington courts did not allow this kind of "substance over form" analysis. *See* Final Bill Report, 2 ESSB 6143 (2010) ("Washington courts have not used the economic substance doctrine to interpret tax statutes"); *see Estep v. King County*, 66 Wn.2d 76, 401 P.2d 332 (1965) (refusing to treat two non-taxable transactions as a single taxable one). Thus, as a

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[4] That portion of Rule 106 provides in relevant part: "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(5).

matter of basic statutory construction, unless specifically authorized by RCW 82.32.655, Washington courts still cannot use such an analysis.

Yet that is precisely what the Court of Appeals did here. By its plain terms, RCW 82.32.655 does not apply to Bravern II because it was created "before May 1, 2010 … in conformance with … a determination published under the authority of RCW 82.32.410, or other document made available by the department to the general public," RCW 82.32.660(1) — namely, the published determinations and Construction Guide cited above. Even though it purported to eschew any reliance on the statute, *Bravern II*, 334 P.3d 1182, at ¶ 28 ("we need not address this issue"), on the question of whether PCL had an absolute right to payment, using language nearly identical to RCW 82.32.655, the court reasoned that it could ignore "the form of the operating agreement" because it believed that "*in substance* the agreement ensured that PCL would receive full compensation for its construction services[.]" *Id.* at ¶ 27 (emphasis in original).

The Decision warrants review on this basis too. RCW 82.32.655 is a new, and narrow, exception to the rule that taxpayers may structure transactions to lessen their tax burden. *Estep*, 66 Wn.2d at 77 ("The legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which the law permits, cannot be doubted." (quotation marks and citation omitted)). Where, as here, the

legislature specifically exempted a particular transaction from the statute's reach, courts may not ignore that legislative intent and disregard the transaction under the guise of a "substance over form" analysis. Indeed, the legislature would not have enacted RCW 82.32.655 if courts already had authority to ignore the "form" of joint ventures properly structured as speculative builders under existing DOR guidelines. If anything, the fact that DOR lobbied the legislature to enact RCW 82.32.655 proves that Bravern II qualified as a speculative builder under DOR's existing guidelines. After all, if DOR could refuse to treat similar joint ventures as speculative builders under its own precedent, why enact the statute at all?

VI. CONCLUSION

Bravern II respectfully requests this Court to accept review and hold that Bravern II is a properly structured speculative builder.

RESPECTFULLY SUBMITTED this 23rd day of October, 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 October 23, 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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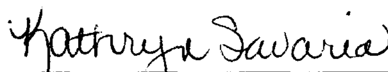

Kathryn Savaria

APPENDIX A

Only the Westlaw citation is currently available.

Court of Appeals of Washington,
Division 2.
BRAVERN RESIDENTIAL, II, LLC, Appellant
v.
STATE of Washington, DEPARTMENT OF REVENUE, Respondent.

No. 44730–4–II.
Sept. 23, 2014.

Background: Limited liability company (LLC) taxpayer brought refund action against Department of Revenue for retail sales and business and occupation taxes payable on construction services performed by one of its members on property owned by taxpayer. The Superior Court, Thurston County, Gary R. Tabor, J., granted summary judgment in favor of Department. Taxpayer appealed.

Holdings: The Court of Appeals, Maxa, J., held that:
(1) LLC was not speculative builder exempt from taxes;
(2) capital account credits provided to member were subject to taxation; and
(3) capital asset transfer exemption was inapplicable.

Affirmed.

West Headnotes

[1] Taxation 371 ⚷3695

371 Taxation
371IX Sales, Use, Service, and Gross Receipts Taxes
371IX(G) Levy and Assessment
371k3695 k. Judicial Review and Relief Against Assessments. Most Cited Cases
Whether a party is entitled to a tax refund is a question of law reviewed de novo.

[2] Appeal and Error 30 ⚷893(1)

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) k. In General. Most Cited Cases
Interpretation of statutes and regulations are questions of law reviewed de novo.

[3] Licenses 238 ⚷11(5)

238 Licenses
238I For Occupations and Privileges
238k10 Subjects of License or Tax
238k11 Occupations and Employments in General
238k11(5) k. Contractors. Most Cited Cases

Taxation 371 ⚷3646

371 Taxation
371IX Sales, Use, Service, and Gross Receipts Taxes
371IX(C) Transactions Taxable in General
371k3646 k. Retail Sales; Sales Not for Resale. Most Cited Cases
A speculative builder is not required to pay retail sales and business and occupation taxes on the value of its construction services performed on its own property because it is not engaged in a retail sale. WAC 458–20–170(2)(b).

[4] Administrative Law and Procedure 15A ⚷412.1

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(C) Rules, Regulations, and Other Policymaking

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15Ak412 Construction
15Ak412.1 k. In General. Most Cited Cases

When interpreting a regulation, the Court of Appeals follow the same rules the Court uses to interpret a statute.

[5] Administrative Law and Procedure 15A ⚷ 412.1

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(C) Rules, Regulations, and Other Policymaking
15Ak412 Construction
15Ak412.1 k. In General. Most Cited Cases

As with statutory interpretation, where a regulation is clear and unambiguous, a court must give effect to that plain meaning.

[6] Administrative Law and Procedure 15A ⚷ 412.1

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(C) Rules, Regulations, and Other Policymaking
15Ak412 Construction
15Ak412.1 k. In General. Most Cited Cases

In ascertaining a regulation's plain meaning, courts consider the context in which the regulation appears, related regulations and statutes, and the statutory scheme of which the regulation is a part.

[7] Administrative Law and Procedure 15A ⚷ 412.1

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(C) Rules, Regulations, and Other Policymaking
15Ak412 Construction
15Ak412.1 k. In General. Most Cited Cases

Courts interpret a regulation in a manner that gives effect to all its language without rendering any part superfluous.

[8] Administrative Law and Procedure 15A ⚷ 431

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(C) Rules, Regulations, and Other Policymaking
15Ak428 Administrative Construction of Statutes
15Ak431 k. Deference to Agency in General. Most Cited Cases

While the ultimate authority for determining a statute's meaning remains with the court, considerable deference will be given to the interpretation made by the agency charged with enforcing the statute.

[9] Taxation 371 ⚷3638

371 Taxation
371IX Sales, Use, Service, and Gross Receipts Taxes
371IX(C) Transactions Taxable in General
371k3637 Subjects and Exemptions in General
371k3638 k. In General. Most Cited Cases

A tax applies unless the legislature has expressed a clear intent to provide an exemption.

[10] Taxation 371 ⚷3638

371 Taxation
371IX Sales, Use, Service, and Gross Receipts Taxes
371IX(C) Transactions Taxable in General
371k3637 Subjects and Exemptions in General

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371k3638 k. In General. Most Cited Cases

Tax exemptions may not be created by implication.

[11] Taxation 371 ⚿3638

371 Taxation
371IX Sales, Use, Service, and Gross Receipts Taxes
371IX(C) Transactions Taxable in General
371k3637 Subjects and Exemptions in General
371k3638 k. In General. Most Cited Cases

Courts construe tax exemptions narrowly.

[12] Corporations and Business Organizations 101 ⚿3633

101 Corporations and Business Organizations
101XV Unincorporated Business Organizations
101XV(E) Limited Liability Companies
101k3632 Members, Owners, and Shareholders
101k3633 k. In General; Rights and Liabilities. Most Cited Cases

Licenses 238 ⚿11(5)

238 Licenses
238I For Occupations and Privileges
238k10 Subjects of License or Tax
238k11 Occupations and Employments in General
238k11(5) k. Contractors. Most Cited Cases

Taxation 371 ⚿3658

371 Taxation
371IX Sales, Use, Service, and Gross Receipts Taxes
371IX(C) Transactions Taxable in General
371k3658 k. Services Taxable. Most Cited Cases

Limited liability company (LLC) property owner did not constitute a speculative builder, and therefore was subject to retail sales and business and occupation taxes on construction services performed by one of the members of the LLC on property owned by the LLC, where the member, acting as a separate entity, and not the property owner, performed the construction services. WAC 458–20–170(2).

[13] Corporations and Business Organizations 101 ⚿3610

101 Corporations and Business Organizations
101XV Unincorporated Business Organizations
101XV(E) Limited Liability Companies
101k3610 k. In General; Nature and Status. Most Cited Cases

The law treats a member of a limited liability company (LLC) as a separate person from the LLC entity itself. West's RCWA 25.15.070(2)(c).

[14] Corporations and Business Organizations 101 ⚿3628

101 Corporations and Business Organizations
101XV Unincorporated Business Organizations
101XV(E) Limited Liability Companies
101k3627 Capital and Stock; Contributions
101k3628 k. In General. Most Cited Cases

Licenses 238 ⚿11(5)

238 Licenses
238I For Occupations and Privileges
238k10 Subjects of License or Tax
238k11 Occupations and Employments in General
238k11(5) k. Contractors. Most Cited Cases

Taxation 371 ⚿3643

371 Taxation
371IX Sales, Use, Service, and Gross Receipts Taxes

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371IX(C) Transactions Taxable in General
371k3643 k. Consideration or Profit. Most Cited Cases

Taxation 371 ⚷3658

371 Taxation
371IX Sales, Use, Service, and Gross Receipts Taxes
371IX(C) Transactions Taxable in General
371k3658 k. Services Taxable. Most Cited Cases

Credits to capital account of member of limited liability company (LLC) for construction services performed on property owned by LLC were subject to retail sales and business and occupation taxes, where member received LLC capital account credits in exchange for its construction services, and these credits constituted the "value proceeding or accruing" from the sale of those services. West's RCWA 82.04.090, 82.08.010(1)(a).

[15] Corporations and Business Organizations 101 ⚷3651

101 Corporations and Business Organizations
101XV Unincorporated Business Organizations
101XV(E) Limited Liability Companies
101k3649 Powers, Duties, Rights, and Liabilities of Company
101k3651 k. Property, Funds, and Conveyances. Most Cited Cases

Licenses 238 ⚷19(3)

238 Licenses
238I For Occupations and Privileges
238k19 Exemptions
238k19(3) k. Occupations and Privileges in General. Most Cited Cases

Taxation 371 ⚷3647

371 Taxation
371IX Sales, Use, Service, and Gross Receipts Taxes
371IX(C) Transactions Taxable in General
371k3647 k. Casual or Isolated Sales. Most Cited Cases

Taxation 371 ⚷3658

371 Taxation
371IX Sales, Use, Service, and Gross Receipts Taxes
371IX(C) Transactions Taxable in General
371k3658 k. Services Taxable. Most Cited Cases

Asset transferred to limited liability company (LLC), the construction services of one its members, did not constitute a capital asset, and therefore exemption from retail sales and business and occupation taxes for transfers of capital assets did not apply to exempt LLC from retail sales and business and occupation taxes related to construction services performed by member on property owned by LLC. WAC 458–20–106.

Scott M. Edwards, Daniel A. Kittle, Lane Powell PC, Seattle, WA, for Appellant.

Rosann Fitzpatrick, Washington Attorney General, Charles E. Zalesky, Attorney General of Washington, Olympia, WA, for Respondent.

MAXA, J.

¶ 1 Bravern Residential II, LLC (Bravern) appeals the trial court's summary judgment order dismissing its refund action against the Department of Revenue (Department) for retail sales and business and occupation (B & O) taxes payable on construction services performed by one of its members, PCL Construction Services, Inc., (PCL) on property Bravern owned. Under WAC 458–20–170(2), a "speculative builder"—a contractor that builds on property it owns—is not subject to retail sales and B & O taxes on its construction services. Bravern argues that because PCL was one of its members, Bravern should be considered the entity performing construction services and treated as a speculative builder. Bravern also argues that because PCL received only credits to its capital account in ex-

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change for its construction services, the tax exemption in WAC 458–20–106 for the transfer of capital assets applies.

¶ 2 We hold that (1) Bravern was not a speculative builder under WAC 458–20–170(2)(b) because PCL acting as a separate entity, and not Bravern, performed the construction services; and (2) the exemption in WAC 458–20–106 for transfers of capital assets is inapplicable because the asset transferred to Bravern—PCL's construction services—was not a *capital* asset. Accordingly, we affirm the trial court's summary judgment dismissal of Bravern's tax refund action.

FACTS

¶ 3 Bravern is a limited liability company (LLC) formed in 2007 for the purpose of building a residential condominium tower known as Signature Residences at The Bravern, Tower 4 on land Bravern owned in Bellevue. Bravern had two members: Bravern Residential Mezz II, LLC (BRM), a real estate development company, and PCL, a real estate construction company. BRM had a 99 percent ownership interest in Bravern, and PCL had a one percent ownership interest. BRM was the managing member and retained control over Bravern's management.

¶ 4 The Bravern LLC operating agreement obligated BRM to transfer title to land for the development to Bravern and obligated PCL to contribute construction services and materials pursuant to an attached "services addendum." Clerk's Papers (CP) at 60. The services addendum provided that PCL would perform and manage all of the work related to the construction of Tower 4 in exchange for credits to its Bravern capital account. These capital account credits would equal PCL's cost of work and service overhead, not to exceed $116,226,428. In order to obtain the credits, the services addendum authorized PCL to submit periodic statements to Bravern setting forth the value of PCL's activities.

¶ 5 The operating agreement contemplated regular capital account distributions from Bravern to PCL. If PCL's capital account exceeded one percent of the total capital contributions to Bravern, then Bravern was allowed to make a distribution from PCL's capital account to PCL in an amount necessary to cause PCL's capital account to return to one percent. Although Bravern technically had discretion in making these distributions, the operating agreement penalized Bravern and BRM if Bravern did not make monthly capital account distributions to PCL. The operating agreement provided that if PCL's capital account balance exceeded one percent of Bravern's total unreturned capital for more than 20 days, the excess would accrue at a preferred return rate of "prime plus 2.5% per annum." CP at 63. In addition, if PCL's capital account exceeded two percent for more than 15 days, PCL could require BRM to purchase PCL's entire interest in Bravern at a specified price unless PCL received a capital account distribution within 30 days. Bravern had the funds to make capital account distributions to PCL because the operating agreement required BRM to contribute cash to Bravern when necessary to enable Bravern to pay its expenses.

¶ 6 After construction began on Tower 4, PCL submitted to Bravern monthly statements showing the value of its construction services. That value then was credited to PCL's capital account. The value of these services totaled over $121 million by the end of the project. PCL then received monthly capital account distributions from Bravern for the construction activity associated with each billing statement. Bravern never allowed PCL's capital account to exceed one percent of Bravern's total capital contributions, so application of the preferred return clause was never triggered. A few months after completing construction, PCL assigned its interest in Bravern to BRM. PCL never received any distribution of profits from Bravern.

¶ 7 In August 2007, Bravern requested confirmation from the Department that Bravern would be treated as a "speculative builder" under WAC 458–20–170(2)(a), which would allow it to avoid paying retail sales or B & O taxes on PCL's con-

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struction services. In February 2008, the Department issued a letter ruling denying Bravern's request, determining that Bravern was not a speculative builder. Bravern appealed the Department's denial of its ruling request to the Department's Appeals Division. The Appeals Division denied the appeal and upheld the Department's reasoning in its ruling denying speculative builder status to Brav- ern.

¶ 8 Because there is no mechanism for direct judicial review of the Department's denial of a ruling request,[FN1] Bravern paid $107,842.10 in taxes on $1,135,180 in services PCL provided for the month of June 2009. [FN2] Bravern then filed an action in superior court for a refund of those taxes. [FN3] Bravern moved for summary judgment, arguing that because PCL was a member of Bravern, Bravern had constructed Tower 4 on its own land and therefore was a speculative builder in accordance with the Department's published construction guidelines for joint ventures. The Department also moved for summary judgment, arguing that Bravern was required to pay taxes on the services PCL performed because PCL had constructed Tower 4 on Bravern's property, and therefore was engaged in making a retail sale. The Department further argued that Bravern was not a speculative builder because PCL received compensation for its services independent of any right to Bravern's profits. Alternatively, the Department argued that Bravern was not entitled to a refund because RCW 82.32.655 specifically prohibited the type of tax avoidance transactions in which Bravern was engaged.

¶ 9 The trial court granted the Department's summary judgment motion and denied Bravern's motion. Bravern appeals.

ANALYSIS

A. STANDARD OF REVIEW

[1] ¶ 10 We review a trial court's order granting summary judgment de novo. *In re the Estate of Bracken,* 175 Wash.2d 549, 562, 290 P.3d 99 (2012). Summary judgment is appropriate where, viewing the evidence in the light most favorable to the nonmoving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Loeffelholz v. Univ. of Wash.,* 175 Wash.2d 264, 271, 285 P.3d 854 (2012) . Here, the parties do not dispute the material facts. Accordingly, the issue before us is whether the trial court correctly determined that Bravern was not entitled to a tax refund, a question of law we review de novo. *Bracken,* 175 Wash.2d at 562, 290 P.3d 99 .

[2] ¶ 11 To establish that a taxpayer is entitled to a refund, the taxpayer must prove that the tax paid was incorrect and prove the correct amount of tax. RCW 82.32.180. In order to determine whether the tax paid here was correct, we must interpret the applicable statutes and Department regulations regarding speculative builders, which are questions of law we review de novo. *Skinner v. Civil Serv. Comm'n,* 168 Wash.2d 845, 849, 232 P.3d 558 (2010).

B. REQUIREMENTS FOR "SPECULATIVE BUILDER" STATUS

1. Statutory Framework

¶ 12 The State of Washington imposes a tax on the selling price of retail sales in the state, payable by the purchaser. Former RCW 82.08.020(1) (2010); RCW 82.08.050(1). Washington also imposes a B & O tax on the gross proceeds of retail sales in the state, payable by the business owner. Former RCW 82.04.250(1) (2010). For both taxes, a "retail sale" includes tangible personal property consumed and services rendered in constructing buildings on real property for consumers. Former RCW 82.04.050(2)(b) (2010); former RCW 82.08.010(1)(a) (2010), *recodified as* RCW 82.08.010(1)(a)(i); *Dep't of Revenue v. Nord Nw. Corp.,* 164 Wash.App. 215, 224, 264 P.3d 259 (2011), *review denied,* 173 Wash.2d 1019, 272 P.3d 247 (2012).

¶ 13 A contractor constructing a building on real property owned by a consumer is a "prime con-

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tractor" under WAC 458–20–170(1)(a). A "consumer" includes a "person who is an owner, lessee or has the right of possession to or an easement in real property which is being constructed, repaired, decorated, improved, or otherwise altered by a person engaged in business." Former RCW 82.04.190(4) (2010). The prime contractor is a seller of services, and under former RCW 82.08.020(1)(c) the consumer property owner must pay retail sales tax on the amount charged for those services. Under former RCW 82.04.250(1) the prime contractor also must pay B & O taxes measured by the gross proceeds of the sale of its services.

[3] ¶ 14 In contrast, a contractor constructing a building on real property it owns is not required to pay retail sales or B & O taxes. WAC 458–20–170(2)(b). WAC 458–20–170(2)(a) calls such a person a "speculative builder." A speculative builder is not required to pay these taxes on the value of its construction services because it is not engaged in a retail sale. *See Nord,* 164 Wash.App. at 225, 264 P.3d 259. Although speculative builders are not required to pay retail sales tax on the value of their construction services, they "must pay sales tax upon all materials purchased by them and on all charges made by their subcontractors." WAC 458–20–170(2)(e).

2. Regulatory Interpretation

[4][5][6][7] ¶ 15 A determination of whether Bravern was a speculative builder requires interpretation of WAC 458–20–170. When interpreting a regulation, we follow the same rules we use to interpret a statute. *Tesoro Ref. & Mktg. Co. v. Dep't of Revenue,* 164 Wash.2d 310, 322, 189 P.3d 28 (2008). As with statutory interpretation, where a regulation is clear and unambiguous we must give effect to that plain meaning. *Overlake Hosp. Ass'n v. Dep't of Health,* 170 Wash.2d 43, 52, 239 P.3d 1095 (2010). In ascertaining a regulation's plain meaning, we also consider the context in which the regulation appears, related regulations and statutes, and the statutory scheme of which the regulation is a part. *TracFone Wireless, Inc. v. Dep't of Revenue,* 170 Wash.2d 273, 281, 242 P.3d 810 (2010). We also interpret a regulation in a manner that gives effect to all its language without rendering any part superfluous. *Grays Harbor Energy, LLC v. Grays Harbor County,* 175 Wash.App. 578, 585, 307 P.3d 754 (2013). If a statute is ambiguous, we may apply rules of statutory construction and look to other sources to discern legislative intent. *Overlake Hosp. Ass'n,* 170 Wash.2d at 52, 239 P.3d 1095.

[8] ¶ 16 "While 'the ultimate authority' for determining a statute's meaning remains with the court, considerable deference will be given to the interpretation made by the agency charged with enforcing the statute." *Nord,* 164 Wash.App. at 229, 264 P.3d 259 (quoting *S. Martinelli & Co. v. Dep't of Revenue,* 80 Wash.App. 930, 937, 912 P.2d 521 (1996)). "Our paramount concern is to ensure that the regulation is interpreted in a manner that is consistent with the underlying policy of the statute." *Overlake Hosp. Ass'n,* 170 Wash.2d at 52, 239 P.3d 1095.

[9][10][11] ¶ 17 Finally, we must find that a tax applies unless the legislature has expressed a clear intent to provide an exemption. *TracFone,* 170 Wash.2d at 296–97, 242 P.3d 810. Tax exemptions may not be created by implication. *TracFone,* 170 Wash.2d at 297, 242 P.3d 810. And we construe tax exemptions narrowly. *HomeStreet, Inc. v. Dep't of Revenue,* 166 Wash.2d 444, 455, 210 P.3d 297 (2009).

3. Bravern Did Not Perform Construction Services

[12] ¶ 18 WAC 458–20–170(2)(a) defines a speculative builder as "one who constructs buildings for sale or rental upon real estate owned by him." Bravern was not a contractor and performed no construction services. However, Bravern argues that because PCL was one of its members, the construction work PCL performed technically was performed by Bravern. Therefore, Bravern claims that it was "one who constructs buildings" as required for speculative builder status under WAC 458–20–170(2)(a). We disagree for three reasons.

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¶ 19 First, the Bravern operating documents show that PCL performed the construction work as a separate entity from Bravern. The operating agreement required PCL, not Bravern, to perform construction services. Further, the services addendum provided that PCL would receive compensation from Bravern in the form of capital account credits and capital account distributions for these construction services. These documents set up a thinly veiled sale of services. PCL submitted to Bravern monthly statements showing the value of construction services performed (progress billing statements). PCL then received monthly capital account distributions from Bravern (payment for those services) in return. If Bravern had been performing the work, PCL's only payment would have been through Bravern's profits on the project. But there is no indication that the capital account payments were tied to Bravern's profits, and PCL actually did not receive any profit distributions from the project.

[13] ¶ 20 Second, Washington law treats a member of an LLC as a separate person from the LLC entity itself. *Nord,* 164 Wash.App. at 230, 264 P.3d 259. This concept is reflected in RCW 25.15.070(2)(c), which provides that an LLC is a separate legal entity. Similarly, the court in *Nord* emphasized the "well established legal principle that a business entity is a distinct, separate 'person' from its owners." *Nord,* 164 Wash.App. at 230, 264 P.3d 259. Because PCL and Bravern are separate entities, Bravern cannot be treated as the entity performing the construction services that PCL actually performed.

¶ 21 Third, WAC 458–20–170(2)(f) provides that a joint venture performing construction on land owned by a co-venturer is not a speculative builder because it is constructing upon land. owned by others.[FN4] The present situation is different: PCL (the member) performed construction services on property owned by Bravern (the LLC). However, based on the principle stated above that the owners of an LLC are separate from the LLC entity, WAC 458–20–170(2)(f) must be applied to this situation as well. *See Nord,* 164 Wash.App. at 220, 229–30, 264 P.3d 259 (holding that an LLC member building on property owned by the LLC was not a speculative builder because the member and the LLC were separate entities). As a result, under the terms of WAC 458–20–170(2)(f) Bravern was not a speculative builder because its member PCL was constructing on property Bravern owned.

¶ 22 Based on a plain reading of WAC 458–20–170(2)(a) and (f), Bravern was not a speculative builder because one of its members as a separate entity, and not Bravern itself, performed the construction services on Bravern's property. [FN5] Accordingly, we hold that the trial court did not err in dismissing Bravern's tax refund action.

4. Department Construction Guidelines

¶ 23 Bravern argues that its claim to speculative builder status was supported by (1) the Department's construction guidelines, (2) previous Department determinations regarding speculative builders, and (3) previous letter rulings from the Department regarding other entities. These documents are immaterial because they cannot contradict the plain language of WAC 458–20–170(2), upon which we base our conclusion that Bravern was not a speculative builder. *See Overlake Hosp. Ass'n,* 170 Wash.2d at 52, 239 P.3d 1095. Therefore, we need not consider these arguments. However, because agency interpretations may be relevant in interpreting regulations, we will address the Department's construction guidelines.

¶ 24 The Department's construction guidelines upon which Bravern relies provide:

> If construction services are performed by a member [of a joint venture] as a separate entity on land owned by one of the other entities (the joint venture entity or landowner), the construction services are taxable as custom prime contracting. The contractor must collect retail sales tax on the full contract price (labor and materials) from the landowner. This is true even if the contractor is a

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member of the joint venture.

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. In this case, the work performed by the contractor is a contribution to the capital of the joint venture. The joint venture entity must pay retail sales tax or use tax on materials purchased or produced for incorporation into the real estate.

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.

...

Where a member is guaranteed a fixed amount as compensation for construction services independent of any right to profit or gain, such amount is taxable as custom prime contracting.

CP at 488.

¶ 25 The first three paragraphs of these guidelines are consistent with our analysis. If a member of a joint venture performs construction services as a separate entity rather than as a joint venture member, the transaction is taxable "even if the contractor is a member of the joint venture." CP at 488. The guidelines state that to qualify as a speculative builder, the joint venture must "perform the construction itself." CP at 488. We concluded above that Bravern was not a speculative builder because PCL was performing construction services as a separate entity from Bravern and because PCL, not Bravern, was performing the construction. The guidelines support this conclusion.

¶ 26 Further, the fourth quoted paragraph contains an independent rule: construction services are taxable if the member contractor is "guaranteed a fixed amount as compensation for construction services independent of any right to profit or gain." CP at 488. Here, Bravern relies on the operating agreement provision stating: "No Member shall be entitled to any guaranteed payment from the Company." CP at 64. But Bravern's operating agreement and services addendum provided that in exchange for PCL performing the construction work, PCL would receive a credit to its capital account in the amount of the cost of the work. Further, the agreement was structured so that Bravern essentially had no choice but to make regular cash distributions to PCL from that capital account as construction progressed and PCL did receive distributions totaling over $121 million. Finally, these payments clearly had no connection with any profits from the project, which would not even begin to accrue until construction was complete and PCL received full payment for its work.

¶ 27 Despite the form of the operating agreement—stating that no payments were guaranteed—there is no question that *in substance* the agreement ensured that PCL would receive full compensation for its construction services regardless of whether the project made any profit. As a result, the fourth paragraph of the construction guidelines also does not support a finding that Bravern was a speculative builder.

5. Application of RCW 82.32.655

¶ 28 As an alternative ground for denying the tax refund, the Department argues that RCW 82.32.655 specifically prohibits the type of "tax avoidance transactions" in which Bravern was engaged. Because we hold that Bravern is not a speculative builder and is required to pay B & O and sales taxes on PCL's construction services, we need not address this issue.

C. CAPITAL ACCOUNT CREDITS SUBJECT TO TAX

[14] ¶ 29 Bravern also claims that its transactions with PCL were not subject to B & O and retail sales taxes under WAC 458–20–106. Bravern argues that because PCL contributed services only in exchange for credits to its capital account, there was no "sale" of services and therefore the activity was not subject to tax.[FN6] We disagree.

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¶ 30 A contractor performing retail construction must pay B & O tax on the gross proceeds from the sale, which is the "value proceeding or accruing from the sale" of the construction services. RCW 82.04.070. This includes "the consideration, whether money, *credits,* rights, or other property expressed in terms of money, actually received or accrued." RCW 82.04.090 (emphasis added). Similarly, for retail sales tax the "sales price" means the "total amount of consideration ... including cash, *credit,* property, and services." Former RCW 82.08.010(1)(a) (emphasis added). Here, PCL received Bravern capital account credits in exchange for its construction services. Under the plain language of RCW 82.04.090, these credits constituted the "value proceeding or accruing" from the sale of those services, which under RCW 82.08.010(1)(a) constituted compensation for PCL's services. Therefore, these credits were subject to B & O tax and retail sales tax.

[15] ¶ 31 Bravern nevertheless argues that under WAC 458–20–106, PCL's capital account credits were non-taxable. WAC 458–20–106 provides that "[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." This includes 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.

¶ 32 But this regulation requires the transfer of "capital assets." WAC 458–20–106. Our Supreme Court has defined a "capital asset" for purposes of this regulation to be "something that is held only for use—a device or article kept, maintained, employed and utilized in the conduct and operation of the business." *Budget Rent–A–Car v. Dep't of Revenue,* 81 Wash.2d 171, 176, 500 P.2d 764 (1972) (emphasis omitted). PCL's compensation may have been in the form of a capital account credit, but the transfer subject to taxation was PCL's provision of construction services to Bravern. There is no indication that construction services constitute a capital asset for purposes of WAC 458–20–106. As a result, WAC 458–20–106 does not apply to the transfer of those construction services from PCL to Bravern.

¶ 33 We affirm.

We concur: HUNT, P.J., and LEE, J.

FN1. *Booker Auction Co. v. Dep't of Revenue,* 158 Wash.App. 84, 88–89, 241 P.3d 439 (2010).

FN2. It is unclear whether this amount was for retail sales taxes or B & O taxes, or both. If not a speculative builder, as the purchaser of services Bravern would be required to pay retail sales taxes. As the provider of services, PCL and not Bravern would have the obligation to pay B & O taxes.

FN3. Bravern's potential tax liability for the entire project was significantly higher.

FN4. WAC 458–20–170(2)(f) provides: "Persons, including corporations, partnerships, sole proprietorships, and joint ventures, among others, who perform construction upon land owned by their corporate officers, shareholders, partners, owners, co-venturers, etc., are constructing upon land owned by others and are taxable as sellers under this rule, not as 'speculative builders.' "

FN5. For the same reasons, PCL was not a speculative builder. Although PCL performed construction services, those services were performed on property owned by Bravern-a separate entity.

FN6. As noted above, Bravern would only have been obligated to pay retail sales tax

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on these transactions. PCL would have been obligated to pay B & O tax.

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