

FILED
SUPREME COURT
STATE OF WASHINGTON
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No. 102223-9

SUPREME COURT OF THE STATE OF WASHINGTON

ANTIO, LLC, AZUREA, LLC, BACK BOWL I, LLC,
CANDICA, LLC, CERASTES-WTB, LLC, GCG
EXCALIBUR, LLC, LINDIA, LLC, OAK HARBOR
CAPITAL, LLC, OAK HARBOR CAPITAL II, LLC, OAK
HARBOR CAPITAL III, LLC, OAK HARBOR CAPITAL IV,
LLC, OAK HARBOR CAPITAL VI, LLC, OAK HARBOR
CAPITAL VII, LLC, OAK HARBOR CAPITAL X, LLC,
OAK HARBOR CAPITAL XI, LLC, and VANDA, LLC,

Petitioners,

v.

WASHINGTON STATE DEPARTMENT OF REVENUE,

Respondent.

**AMICI CURIAE THE PRIVATE INVESTOR
COALITION, INC.; FAMILY OFFICE
EXCHANGE LLC; AND POLICY AND
TAXATION GROUP'S STATEMENT OF
ADDITIONAL AUTHORITIES**

[Counsel Listed on Following Page]

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Family Office Exchange LLC; and
Policy and Taxation Group*

Amicus Curiae The Private Investor Coalition, Inc.; Family Office Exchange LLC; and Policy and Taxation Group (collectively, the Coalition) hereby submit this Statement of Additional Authorities in accordance with RAP 10.8 (eff. Sept. 1, 2022) with respect to the Department’s reliance on Excise Tax Bulletin (“ETB”) 571.04/146/109 at pages 8 and 9 of the Department’s Answer to Amicus Curiae Briefs.

The Department asserts that the Coalition ignored the Department’s historical interpretation of RCW 82.04.220 as applying to exclude the receipt of passive investment income by persons not otherwise engaged in a business endeavor, relying on ETB 571.

However, ETB 571 was:

- 1) converted to Excise Tax Advisory (“ETA”) 571.04.146/109 on July 1, 1998; and
- 2) cancelled on June 30, 2002, by ETA 2003-5s (October 9, 2003) (attached as Appendix A).¹ ETA 2003-5s was

¹ Found at Department’s website at <https://taxpedia.dor.wa.gov/documents/historical%20eta/2003-5s%20r09.pdf> (last accessed October 18, 2023).

subsequently reissued under a new numbering system as ETA 3002.2009 (February 2, 2009), but ETB 571 remains cancelled.²

The result is that ETB 571 is cancelled with the legend in red “THIS ADVISORY HAS BEEN REPEALED EFFECTIVE JUNE 30, 2002” (attached as Appendix B).³

The Department never issued a replacement for ETB 571 in which it concludes that individuals with passive investments are not engaged in business. Instead of ignoring the Department’s interpretations of RCW 82.04.220, the Coalition relied on later Department authorities for the conclusion that the Department may consider such individuals to be engaged in business and without the deduction for investment income. *See* Coalition’s Memorandum at 15-16.

² Found at Department’s website at <https://taxpedia.dor.wa.gov/documents/historical%20eta/3002%2009-19.pdf> (last accessed October 18, 2023).

³ Found at Department’s website at <https://taxpedia.dor.wa.gov/documents/historical%20eta/571-r02.pdf> (last accessed October 18, 2023).

This document contains 276 words, in compliance with
RAP 18.17(b), and complies with the applicable word-count
limits set forth in RAP 10.8(c).

RESPECTFULLY SUBMITTED this 23rd day of
October 2023.



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CERTIFICATE OF SERVICE

On October 23, 2023, I caused to be served upon the below named counsel of record, at the address stated below, via the method of service indicated, a true and correct copy of the foregoing document.

<p>Charles Zalesky, WSBA 37777 Heidi A. Irvin, WSBA 17500 P.O. Box 40123 Olympia, WA 98504-0123 chuck.zalesky@atg.wa.gov heidi.irvin@atg.wa.gov REVOLyEF@atg.wa.gov</p>	<p><input checked="" type="checkbox"/> Via the Appellate Court Web Portal <input type="checkbox"/> Via hand delivery <input type="checkbox"/> Via U.S. Mail, 1st Class, Postage Prepaid <input type="checkbox"/> Via Overnight Delivery <input type="checkbox"/> Via Facsimile <input type="checkbox"/> Via Email</p>
<p>John M. Colvin, WSBA No. 20930 Jason A. Harn, WSBA No. 54017 Colvin + Hallett, P.S. 719 Second Avenue, Suite 711 Seattle, WA 98104 jcolvin@colvinhallettlaw.com Jharn@colvinhallettlaw.com</p>	<p><input checked="" type="checkbox"/> Via the Appellate Court Web Portal <input type="checkbox"/> Via hand delivery <input type="checkbox"/> Via U.S. Mail, 1st Class, Postage Prepaid <input type="checkbox"/> Via Overnight Delivery <input type="checkbox"/> Via Facsimile <input type="checkbox"/> Via Email</p>

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

EXECUTED at Seattle, Washington, on October 23, 2023.



 Jessica Flesner

Appendix A



Excise Tax Advisory

Excise Tax Advisories (ETAs) are interpretive statements issued by the Department of Revenue under authority of RCW 34.05.230. ETAs explain the Department's policy regarding how tax law applies to a specific issue or specific set of facts. They are advisory for taxpayers; however, the Department is bound by these advisories until superseded by Court action, Legislative action, rule adoption, or an amendment to or cancellation of the ETA.

Number: 2003-5s

Issue Date: October 9, 2003

**This ETA is cancelled effective February 2, 2009 and reissued under the 3000 series.
See ETA 3001 for a cross-reference to the new series.**

Cancellation of Excise Tax Advisories

This advisory identifies Excise Tax Advisories (ETAs) that have been cancelled. These advisories have been cancelled for a number of reasons. In some cases a particular advisory may have been superseded by legislation, may no longer be correct because of a court decision, or may no longer be necessary because of specific inclusion in a subsequent rule revision.

This advisory is the fifth supplement to ETA 2003. ETA 2003 and previous supplements to ETA 2003 should not be discarded. ETA 2003 and its supplements provide a history of all of the advisories that have been cancelled.

Advisories cancelled September 30, 2003:

ETA	Title	Reason for cancellation
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Advisories numbered as 2 plus three digits (e.g. 2002.16.179) are advisories issued on or after July 2, 1998.

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Legislation & Policy Division
P O Box 47467
Olympia, WA 98504-7467

173.04.103	Seed Furnished Under Grower Contracts.	These advisories have been cancelled because the information was incorporated in WAC 458-20-210 (Sales of tangible personal property for farming—Sales of agricultural products by farmers). ETA 173—See subsection (4)(c)(v)(c), Examples. ETA 190—See subsection (5)(c), Raising cattle for wholesale sale. ETA 237—See subsection (6)(h), Beef and dairy cattle. ETA 406—See subsection (6)(i), Livestock for breeding purposes. ETA 559—See subsection (4)(h), "Fruit bin rentals" by fruit packers.
190.04.210	Feeding and Fattening Cattle and the Agricultural Products Exemption.	
237.08.125	Sales Tax Exemption for Sales of Cattle and Milk Cows.	
406.08.125	Sales of Quarter Horses	
559.08.214	Sales and Rentals of Fruit Bins.	

Advisory cancelled August 20, 2003:

ETA	Title	Reason for cancellation
90-001	A Statement of Purpose and Intent With Respect to Issues Involving Employee Placement Businesses and Their Clients	This document was issued in 1990 to announce the Department's position on the taxability of businesses that recruit and procure employees to do work for other businesses. The Washington State Supreme Court's ruling in <i>City of Tacoma vs. The William Rogers Company, Inc.</i> and ETA 2016 (Temporary staffing companies) should be followed when determining the tax-reporting responsibilities of these businesses.

Advisory cancelled June 26, 2003:

316.08.193	Sales to Nonresidents	This document is no longer needed as the subject matter is addressed in ETA 2014.
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Advisory cancelled May 19, 2003:

445.04.243	Litter Tax on Food and Beverages	This document explains that the litter tax does not apply to sales of food and beverages by retailers that are solely for consumption indoors on the seller's premises. This information is no longer needed because chapter 120, Laws of 2003, revised RCW 82.19.050 to provide a specific exemption for these sales.
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Advisories cancelled May 15, 2003:

063.04.231	Transfer and Loading Stations	These documents provide tax-reporting information regarding the internal distributions B&O tax, which was repealed effective July 1, 1998. This information is no longer needed.
065.04.231	Transfers from Tank Farms to Bulk Plants	
151.04.231	Wholesaling Functions Tax on Distributions Between Retail Stores	
359.04.231	Inventory Transfers to Branches Prior to Opening	

Advisories cancelled April 21, 2003:

064.04.208	Intercompany Loans of Gasoline, Oil, and Similar Products	These documents explain the application of the accommodation sale exemption to intercompany loans/exchange agreements for fungible products.
428.04.103.208	Exchange Agreements Involving Inventory	These documents are no longer needed because this issue is addressed in the latest revision of WAC 458-20-208 (Exemptions for adjustments of new motor vehicle inventory between new car dealers and accommodation sales).

Advisory cancelled September 26, 2002:

552.99.29A	Leasehold Excise Tax – Exemption for public employees – Condition of employment.	ETA 552 explains how the leasehold excise tax exemption provided by RCW 82.29A.130(5) for leasehold interests in public employee housing applies when a public employer may not, as a condition of employment, require an employee to reside in a public residence. This information is no longer needed because this issue is addressed in the latest revision of WAC 458-29A-400 (Leasehold excise tax—Exemptions).
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Advisories cancelled June 30, 2002:

165.04.109	Interest received on funds procured for affiliated companies	ETA 165 explains the Department’s position on interest received for loans made to affiliated companies when the business making the loans has procured these funds from a third-party lending source.
571.04.169	Taxability of investment income	ETA 571 provides guidance on the B&O tax deduction provided by RCW 82.04.4281, which provides a deduction for amounts received from investments or the use of money as such for taxpayers not engaged in banking, loan, security, or other financial business. These documents are cancelled because the information is out-of-date. They fail to recognize that chapter 150, Laws of 2002 (HB 2641), made substantial changes to the B&O tax deduction provided for certain investment income by RCW 82.04.4281.

Appendix B



State of Washington
Department of Revenue

Excise Tax Advisory

Excise Tax Advisories (ETA) are interpretive statements issued by the Department of Revenue under authority of RCW 34.05.230. ETAs explain the Department's policy regarding how tax law applies to a specific issue or specific set of facts. They are advisory for taxpayers; however, the Department is bound by these advisories until superseded by Court action, Legislative action, rule adoption, or an amendment to or cancellation of the ETA.

NUMBER: 571.04.146/109

CONVERSION DATE: July 1, 1998

THIS ADVISORY HAS BEEN REPEALED EFFECTIVE JUNE 30, 2002.

TAXABILITY OF INVESTMENT INCOME

Issued: June 30, 1995

This bulletin is a clarification and not a change of the Department's position on the taxability of income from investments. RCW 82.04.4281 gives a deduction from the measure of the business and occupation (B&O) tax for amounts received from investments or the use of money as such for taxpayers not engaged in banking, loan, security, or other financial business. This bulletin explains how this deduction applies in some situations.

A two part inquiry is used to determine if the taxpayer is a "banking, loan, security, or other financial business". The first inquiry requires determining whether the primary purpose and objective of the taxpayer is to earn income through the utilization of significant cash outlays or whether these activities are merely "incidental" to the taxpayer's nonfinancial business activities. This inquiry is made by applying a percentage test. The Department conclusively presumes that the income is not from engaging in a financial business, but is incidental to the nonfinancial business activities, if the financial income is five percent or less of the annual gross receipts. The percentage of financial income will be computed by including all calendar or fiscal year financial income from "loans and investments or the use of money as such" in the numerator, whether taxable, exempt, or deductible, and including all calendar or fiscal year revenues as normally measured by the B&O tax, including all revenues otherwise exempt or deductible, in the denominator.

If the first inquiry results in five percent or less of financial income in each of the years, it is unnecessary to proceed to the second inquiry. The taxpayer will not be considered as engaging in a "financial business". If the percentage exceeds five percent in any of the years, it is necessary to proceed with the second inquiry, but only for those years in which the percentage exceeds five percent.

ETBS have been made Excise Tax Advisories, and have retained their old number. Advisories with a 2 (plus three digits) are new advisories, ETBs that have been revised and readopted after review under the Department's regulatory improvement program, or advisories that have been revised and/or readopted.

Please direct comments to:
Department of Revenue
Legislation & Policy Division
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Olympia, Washington 98504-7467
(360) 753-4161 eta@DOR.wa.gov

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The second inquiry for determining when a taxpayer's activities constitute a "financial business" involves whether the taxpayer's activities are similar to, or comparable to, those of "banking, loan, [or] security businesses", even though the taxpayer might not technically fall within one of those three categories. The factors which will be considered include, but are not limited to, the source of the income, frequency of investments, volume of investments, percentage of income from investments in relation to the total income of the business, and the relationship of the investment income to the other activities of the business.

For a business activity to be considered "similar" and "comparable" to "banking, loan, [or] security" businesses, the activity must be regular and recurrent. Indicia of regular and recurrent activities "similar or comparable" to those of a "banking, loan [or] security business" include, but are not limited to: (1) For a bank and loan business: the making of loans on a continuing basis. (2) For a securities business: (a) a diversified portfolio, (b) a need for expertise, whether from an internal or external source, in the selection and management of investments; and (c) trading activities.

"Investments or the use of money as such" encompasses not only investment activity, but also lending activity, or a combination of both lending and investment activities. However, businesses who sell merchandise on an installment basis and directly carry these accounts receivable are not considered as receiving the interest from investments or the use of money as such. The interest received from these transactions is directly related to the sale of the merchandise and the deduction for "investments or use of money as such" does not apply. This interest is not related to a banking, loan, security, or other financial business activity with respect to these transactions. (See WAC 458-20-109.)

SPECIAL APPLICATION TO SOLE PROPRIETORS/INDIVIDUALS:

It is the Department's position that an individual is not engaged in a banking, loan, security, or other financial business if the individual is not engaged in any business activity which would require the individual to register with the Department. If the only source of income by an individual is from investments or interest from loans or deposits, the individual is not considered to be engaged in a business activity and is not required to register with the Department, regardless of the amount of income or volume of investments or loans. If a sole proprietor is engaged in a business activity which requires registration, it is necessary to apply the two inquiries indicated above.

If an individual has made investments in the past and later starts a business, any continuing income from investments which were made prior to starting the business will not be taxable. This income may be excluded from the numerator and the denominator in computing the percentage discussed above. Changes in these investments will continue to not be taxable if the investments are unrelated to the sole proprietor's current taxable business activities.

PERKINS COIE LLP

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