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**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

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GARY STOWE and DOUGLAS TAYLOR, d/b/a TS DESIGN,

Appellants,

v.

STATE OF WASHINGTON DEPARTMENT OF REVENUE,

Respondent.

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**BRIEF OF RESPONDENT**

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ROBERT M. MCKENNA  
Attorney General

CHARLES ZALESKY  
WSBA No. 37777  
LIANNE S. MALLOY  
WSBA No. 15028  
Assistant Attorneys General  
7141 CLEANWATER STREET SW  
PO BOX 40123  
OLYMPIA, WA 98513  
(360) 753-5528

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## I. INTRODUCTION

This is an excise tax case relating to the assessment of retailing B&O tax and retail sales tax on amounts received by appellants Gary Stowe and Douglas Taylor, doing business as TS Design,<sup>1</sup> from constructing a single family home. The central question in this case is whether TS Design constructed the home at issue as a “prime contractor” or as a “speculative builder.” The answer to this question turns on who owned the land during the construction of the home.

A person that constructs a building on “real property of or for consumers” is engaged in making a “retail sale” and must pay retailing B&O tax, and must collect and remit retail sales tax, on the gross amount derived from the construction activity. RCW 82.04.050(2)(b). Such a person is commonly referred to as a “prime contractor.” *See* WAC 458-20-170(1)(a).<sup>2</sup> By contrast, a person that constructs a building on land that he or she owns is not engaged in an activity meeting the definition of a “retail sale.” A person that constructs a building for sale or rent upon land that he or she owns is commonly referred to as a “speculative builder.” *See* WAC 458-20-170(2)(a).

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<sup>1</sup> Stowe and Taylor operated TS Design as a partnership. A partnership is a “person” for purposes of Washington’s excise tax laws. RCW 82.04.030. Therefore, appellants in this case will hereinafter collectively be referred to as TS Design.

<sup>2</sup> A copy of Rule 170 is attached to this brief as Appendix A.

A speculative builder enjoys two important tax advantages over a prime contractor. First, a speculative builder is not required to pay B&O tax on amounts attributable to the construction project even though the value of the underlying real property is increased. Second, the speculative builder is not required to collect or pay retail sales tax on the value of his or her construction services. TS Design attempts to attain these tax advantages on the construction of the home at issue even though it concedes it did not own the land upon which the home was constructed. However, TS Design contends it constructed the home as part of an oral joint venture with the land owner and that the land belonged to the joint venture. From this initial premise, TS Design argues that the joint venture should be taxed as a speculative builder.

The Department, on the other hand, submits that even if an oral joint venture existed, the undisputed evidence shows that the owner of the land never transferred the land to the joint venture. Therefore, the construction project did not take place on land owned by the joint venture, and the joint venture did not qualify as a speculative builder. Rather, TS Design performed the construction services on land owned by another and those services clearly qualify as a "retail sale" under the plain language of RCW 82.04.050(2)(b). The trial court agreed and granted summary judgment to the Department. This appeal followed.

For the reasons set forth herein, this Court should affirm the trial court's order granting summary judgment to the Department.

## **II. COUNTERSTATEMENT OF THE ISSUE**

There are certain legal requirements for the sale or transfer of real property from a partner or venturer to a partnership or joint venture. RCW 25.05.065 sets out the specific rules for determining when property (including real property) is considered to be acquired by a partnership. In addition, RCW 64.04.010 mandates that “[e]very conveyance of real estate, or any interest therein, . . . shall be by deed.” In light of the undisputed evidence showing that these legal requirements were not met, did the trial court correctly conclude that the Department properly taxed TS Design as a prime contractor and not as a speculative builder on the construction of the home at issue?

## **III. COUNTERSTATEMENT OF THE CASE**

In November 2000, Douglas Taylor and Gary Stowe decided to go into business as construction contractors. CP at 108, ln. 11 to CP at 109, ln. 3. They did not draft or execute a formal partnership agreement, but the pair operated for several years under the name “TS Design.” CP at 109, ln. 11 to CP at 110, ln. 10; CP at 166 ls. 13-24. TS Design was dissolved in 2003 when Gary Stowe left to pursue other employment. CP at 110, ls. 11-22; CP at 165, ln. 15 to CP at 166, ln. 8.

Shortly after forming TS Design, Taylor and Stowe met with Gary Stowe's uncle, Bryan Stowe, to discuss the newly-formed business and to follow up on an offer Bryan had made to help his nephew get started in the construction business. CP at 114, ln. 14 to CP at 115, ln. 5. Bryan Stowe owned several businesses, including the High Cedars golf course in Orting, Washington. CP at 70, ls. 5-16. The golf course, in turn, owned Staatz Bulb Farms, Inc., which owned some undeveloped land adjacent to the golf course. CP at 72, ls. 4-25. The land had been subdivided into lots, and Bryan Stowe agreed to let TS Design build a home on one of the lots. CP at 79, ln. 23 to CP at 80, ln. 8. The agreement was not reduced to writing. CP at 237, ¶ 4. As described by Taylor:

The agreement was that we picked out a lot and we went and picked out a house plan that would fit on that lot. We would build a house, Bryan would finance the house, and he would give us a monthly draw to be able to live on while we built that house. And then when the house sold, we would split the profits.

CP at 122, ls. 12-17.<sup>3</sup>

TS Design picked a lot and started constructing the home in early 2001. CP at 111, ln. 22 to CP at 112, ln. 1. The home was completed approximately nine months later. *Id.* Bryan Stowe (either directly or though High Cedars golf course) financed the construction, but TS Design

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<sup>3</sup> It appears that the profits from the project were not split between TS Design and Bryan Stowe. Rather, according to Douglas Taylor, TS Design retained all of the approximately \$33,000 profit from the sale of the home. CP at 238, ¶10.

performed the actual construction services. CP at 117, ls. 15-22; CP at 122, ls. 10-19. Near the end of the construction project, the home was offered for sale. Gerald and Lauren Hilterbrant, who lived in the neighborhood, offered to buy the home for \$360,000. CP at 150, ln. 23 to CP at 151, ln. 15. The offer was accepted, and the sale closed in early December 2001. CP at 240-243.

On December 5, 2001, the Hilterbrants took title to the property through a warranty deed. CP at 56. Bryan Stowe signed the warranty deed as President of Staatz Bulb Farms, Inc. and “Staatz Bulb Farms, Inc.” is listed as the grantor of the property. *Id.*

At or shortly after the closing of the real estate transaction, the proceeds from the sale were distributed. The records relating to the distribution are incomplete. However, according to Douglas Taylor, the project resulted in a profit of approximately \$33,000, which TS Design kept to use as “seed money” for its next project. CP at 238, ¶10.

TS Design did not collect and remit retail sales tax, and did not report and pay retailing B&O tax, on amounts it received from constructing the home. Rather, TS Design treated itself as a speculative builder even though the business did not actually own the real property upon which the home was built.

In 2004, the Department of Revenue selected TS Design for audit. The audit covered the October 2000 through September 2003 reporting periods. CP at 185, ¶ 5; CP at 187-191. The audit resulted in several adjustments, including an adjustment for retail sales tax and retailing B&O tax owed on construction of the home at issue in this appeal and a credit for retail sales tax erroneously paid on the purchase of materials and subcontractor labor. CP at 188-189 (discussing Audit Schedules 4A, 4B, and 6 relating to the “Hilterbrant House”). According to the audit supervisor, “additional retail sales and retailing B&O taxes were due on [the] house Taxpayer constructed that was later sold to the Hilterbrants. Audit determined the house was not built as speculative construction because neither the Taxpayer nor the joint venture owned the lot the house was built upon.” CP at 185, ¶ 5.

The audit resulted in a tax assessment of \$45,065. *Id.* Much, but not all, of the tax assessment related to retail sales tax and retailing B&O tax owed on the construction of the “Hilterbrant House.” *Id.*

TS Design filed an administrative appeal with the Department’s Appeals Division, asserting that it was engaged in speculative building as part of a joint venture with Bryan Stowe and Staatz Bulb Farms. The Administrative Law Judge (ALJ) that decided the appeal disagreed and upheld the audit staff’s finding that TS Design was not a speculative

builder with respect to the construction of the "Hilterbrant House." CP at 12.<sup>4</sup> According to the ALJ, TS Design "failed to show it built the home[] as a joint venturer on land owned by the joint venture." *Id.*

TS Design paid the tax assessment and timely appealed to the Thurston County Superior Court, asking the Superior Court to set aside the Department's administrative ruling and to order a refund of the amount in dispute. CP at 3-6. The Department moved for summary judgment, asserting that even if there was a joint venture between TS Design, Bryan Stowe, and Staatz Bulb Farms, the undisputed evidence shows that the purported joint venture did not own the real property upon which the house was built. CP at 199 (issue # 1); CP at 200-208. The Department also asked for summary judgment as to the amount of the assessment, asserting that TS Design had not preserved adequate books and records to prove that the amount of the assessment was incorrect. CP at 199 (issue # 2); CP at 208-210.<sup>5</sup>

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<sup>4</sup> The Appeals Division granted the appeal petition on an unrelated issue. *Id.*

<sup>5</sup> Because of the lack of records, Audit computed the tax assessment based on the gross sales price of the home less the cost of the lot. CP at 8. The Audit Division determined that TS Design had only paid Staatz Bulb Farms \$75,000 for the lot at the close of the sale of the home to the Hilterbrants. CP at 8; CP at 185, ¶ 6. *See also* CP at 244 (check from TS Design to Staatz Bulb Farms for \$75,000). TS Design asserted that it had paid \$90,000 for the lot and that the assessment overstated the amount owed because the Department had only subtracted \$75,000 from the gross sales price.

The trial court granted the Department's motion as to the first issue, but denied the motion as to the second. CP at 287-289.<sup>6</sup> Shortly thereafter the parties agreed to a stipulated Order and Judgment that resolved the remaining issue in the case.<sup>7</sup> TS Design then brought this appeal from the Order Granting Department of Revenue's Motion for Summary Judgment.

#### IV. STANDARD OF REVIEW

The Court of Appeals reviews a grant of summary judgment de novo, using the same standard used by the lower court in ruling on the motion for summary judgment. *Seiber v. Poulsbo Marine Center, Inc.*, 136 Wn. App. 731, 736, 150 P.3d 633 (2007). "Summary judgment is appropriate only if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issues of material fact, and the moving party is entitled to judgment as a matter of law." *Homestreet, Inc. v. Dep't of Revenue*, 139 Wn. App. 827, 838, 162 P.3d 458 (2007) (citing CR 56(c)).

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<sup>6</sup> A copy of the trial court's Order is attached to this brief as Appendix B.

<sup>7</sup> The Department agreed to recalculate the amount of the assessment by subtracting from the gross sales price of the home the full \$90,000 that TS Design claims it paid for the lot. The trial court entered a stipulated Order and Judgment consistent with that agreement. TS Design did not include a copy of the stipulated Order and Judgment as part of the Clerk's Papers, but it did attach a copy to the Amended Notice of Appeal that it filed on October 24, 2007.

In determining whether a genuine issue of material fact exists, all reasonable inferences must be drawn in favor of the party opposing the motion. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). However, “[t]he party opposing a motion for summary judgment may not rely on speculation, argumentative assertions that unresolved factual issues remain, or in having its affidavits considered at face value.” *Seiber v. Poulsbo Marine Center, Inc.*, 136 Wn. App. at 736 (citing *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986)). Rather, the non-moving party must “set forth specific facts that sufficiently rebut the moving party’s contentions and disclose that a genuine issue as to a material fact exists.” *Id.* at 736-37.

When the material facts in an excise tax refund case are undisputed and the only issues to be resolved are legal in nature, the appellate court reviews the legal conclusions de novo. *Simpson Inv. Co. v. Dep’t of Revenue*, 141 Wn.2d 139, 148, 3 P.3d 741 (2000).

## V. ARGUMENT

### A. **There Is An Important Distinction In Washington Law Between A “Prime Contractor” And A “Speculative Builder.”**

Washington imposes a retail sales tax on each retail sale taking place within this state. RCW 82.08.020. In addition, Washington imposes a gross receipts tax on the gross proceeds derived from the business of making retail sales within this state. RCW 82.04.250(1).

The term “retail sale” is defined in RCW 82.04.050 and includes the sale of or charge made for labor and services rendered in respect to constructing buildings or other structures upon “real property of or for consumers.” RCW 82.04.050(2)(b). The term “consumer” is defined in RCW 82.04.190 and includes “[a]ny person who is an owner, lessee or has the right of possession to . . . real property which is being constructed, repaired, decorated, improved, or otherwise altered by a person engaged in business.” RCW 82.04.190(4). When construed together, these provisions direct that a person that constructs a building on land owned, leased, or possessed by another is engaged in making retail sales and must pay retailing B&O tax, and must collect and remit retail sales tax, on the gross amount derived from the construction activity. Such a person is

commonly referred to as a “prime contractor.” See WAC 458-20-170(1)(a).<sup>8</sup>

By contrast, a person that constructs a building on land that he or she owns is not engaged in an activity meeting the definition of a “retail sale.” This is because the person is not considered to be the “consumer” of his or her own construction services, but is considered to be the “consumer” of the materials and subcontractor labor used in the construction project. *Riley Pleas, Inc. v. State*, 88 Wn.2d 933, 936, 568 P.2d 780 (1977). A person that constructs buildings for sale or rent upon land that he or she owns is commonly referred to as a “speculative builder.” See WAC 458-20-170(2)(a).

As noted above, a speculative builder enjoys two important tax advantages over a prime contractor. First, a speculative builder is not required to pay B&O tax on the amount attributed to the construction project even though the value of the real property is increased. This is because a speculative builder does not normally charge himself for his own construction services, and amounts derived from the sale of real property are exempt from the B&O tax. RCW 82.04.390. See also WAC

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<sup>8</sup> While a prime contractor is required to collect and remit retail sales tax on the amount it charges for the construction, the contractor is not required to pay retail sales tax on materials and subcontractor labor that it purchases and uses in the construction project. RCW 82.04.050(1)(b); *Riley Pleas Inc. v. State*, 88 Wn.2d 933, 934, 568 P.2d 780 (1977).

458-20-170(2)(c). Thus, a contractor that performs construction on his or her own land is not liable for B&O tax when the improved real property is sold, while a contractor that performs construction for a consumer is liable for retailing B&O tax on the gross amount charged to the consumer.

The second tax advantage relates to the measure of the retail sales tax. A prime contractor is required to collect retail sales tax on the full “selling price” charged to the consumer for the construction. RCW 82.08.020(1). *See also* RCW 82.08.010(1) (defining “selling price”). Thus, the measure of the tax includes the value of the construction services performed by the prime contractor. By contrast, a speculative builder pays retail sales tax on the purchase of the materials and subcontractor labor, but is not required to charge or collect retail sales tax on the sale of the improved real property. *Rigby v. State*, 49 Wn.2d 707, 710-11, 306 P.2d 216 (1957). Thus, the measure of the tax does not include the value of the construction services performed by the speculative builder.

The distinction between a “prime contractor” and a “speculative builder” is at the heart of this case. TS Design contends that the trial court erred when it concluded that TS Design was acting as a prime contractor, not a speculative builder, with respect to the home constructed and

ultimately sold to the Hilterbrants. *See* Appellants' Br. at 2. TS Design is mistaken.

**B. The Undisputed Evidence Established That Neither TS Design Nor The Purported Joint Venture Owned The Land Upon Which The Home Was Built.**

TS Design concedes that it never owned the land upon which the home at issue was built. CP at 129, ls. 8-10 (admission by Taylor); CP at 172, ls. 17-25 (admission by Gary Stowe). Instead, TS Design contends the home was constructed as part of an oral joint venture with the land owner, and that the land owner orally conveyed the land to the joint venture. CP at 131, ls. 13-22. From this initial premise, TS Design argues that the joint venture qualified as a speculative builder.

The evidence supporting TS Design's claim that an oral joint venture existed is, for the most part, self-serving and subject to reasonable dispute. However, for purposes of summary judgment, the Department "presume[d] that a joint venture was formed between [TS Design] and Staatz Bulb Farm and/or Bryan Stowe." CP at 196, fn. 1. Therefore, the issue presented on summary judgment centered on whether the purported joint venture qualified as a speculative builder. To qualify as a speculative builder, the joint venture must have constructed the home on land that it owned.

**1. Applicable partnership law dictates that the purported joint venture did not own the land.**

A joint venture is similar to a partnership but is limited to a particular transaction or project. *Pietz v. Indermuehle*, 89 Wn. App. 503, 510, 949 P.2d 449 (1998). To form a joint venture there must be an express or implied agreement to carry out a single enterprise, and the venturers must have a common purpose, community of interest in the enterprise, and equal right of control. *Ballo v. James S. Black Co.*, 39 Wn. App. 21, 27-28, 692 P.2d 182 (1984); *Goeres v. Ortquist*, 34 Wn. App. 19, 20-21, 658 P.2d 1277, *review denied*, 99 Wn.2d 1017 (1983).

Because a joint venture is in the nature of a partnership, the Washington Supreme Court has noted that “[t]he relations of the parties in each of such associations are so similar that their rights, duties, and liabilities are generally tested by the same rules.” *Barrington v. Murry*, 35 Wn.2d 744, 752, 215 P.2d 433 (1950) (quoting *Paulson v. McMillan*, 8 Wn.2d 295, 111 P.2d 983 (1941)). *See also, Malnar v. Carlson*, 128 Wn.2d 521, 523 n.1, 910 P.2d 455 (1996). Applying partnership law to the facts of this case, it is clear that the purported joint venture never acquired the land upon which the home was built.

Under the Washington Revised Uniform Partnership Act, a partnership is considered “an entity distinct from its partners.” RCW

25.05.050(1). As a result, a partnership can own land and other property in its own right. RCW 25.05.060. Moreover, RCW 25.05.065 sets out specific rules for determining when property is acquired by the partnership and, hence, becomes partnership property. These provisions are designed, at least in part, so that “partners and third parties dealing with partnerships will be able to rely on the record to determine whether property is owned by the partnership.” Revised Uniform Partnership Act § 204, comment 4, 6 U.L.A. 98 (2001).

RCW 25.05.065(1) provides that property is partnership property if acquired in the name of the partnership, or acquired in the name of one or more partners “with an indication in the instrument transferring title to the property of the person’s capacity as a partner or of the existence of a partnership, whether or not there is an indication of the name of the partnership.” RCW 25.05.065(3) goes on to provide a rebuttable presumption that property is partnership property “if purchased with partnership assets . . . .” None of these provisions have been met with respect to the land at issue in this appeal. It is undisputed that the purported joint venture did not acquire the land in its own name. Nor was the land acquired in the name of one or more of the venturers “with an indication in the instrument transferring title to the property of the person’s capacity as a [venturer] or of the existence of [the joint venture].”

Finally, the land was not acquired with joint venture assets. Instead, at all times relevant the land remained titled to Staatz Bulb Farms. CP at 90, ln. 16 to CP at 92, ln. 16; CP at 56. Thus, the purported joint venture never acquired, and did not own, the land upon which the home was built.

**2. The owner of the land never transferred it to the purported joint venture by written deed as required by RCW 64.04.010.**

In addition to the partnership principles discussed above, it is also significant that the owner of the land at issue never transferred it to the purported joint venture by written deed. RCW 64.04.010 provides in relevant part that “[e]very conveyance of real estate, or any interest therein, and every contract creating or evidencing any encumbrance upon real estate, shall be by deed.” RCW 64.04.020 goes on to provide that “[e]very deed shall be in writing, signed by the party bound thereby, and acknowledged by the party before some person authorized by this act to take acknowledgments of deeds.”

RCW 64.04.010 and RCW 64.04.020 make up the Washington statute of frauds relating to real estate. The territorial legislature originally enacted these provisions in 1854 and they have remained an integral part of Washington law ever since. *See* Territorial Laws of 1854, p. 402. “The original purpose of the real estate statute of frauds was to provide proof that the alleged agreement was made.” *Richardson v. Cox*, 108 Wn. App.

881, 890, 26 P.3d 970 (2001), *review denied*, 146 Wn.2d 1020 (2002). In addition, the real estate statute of frauds “serves a cautionary function, by bringing home the significance of the conveyance, which would prevent impulsive action” and helps “to prevent the fraud that may arise from the uncertainty inherent in oral contractual undertakings.” *Id.*

TS Design correctly points out that the Washington statute of frauds does not apply where parties embark on a joint venture to invest in real estate and share in the profits. Appellants’ Br. at 12. As pointed out in *Malnar v. Carlson*, 128 Wn.2d 521, 910 P.2d 455 (1996):

In Washington an oral agreement of partners for the purpose of buying and selling real estate, whereby lands are purchased and held in the name of one partner for profit and resale, is not within the statute of frauds. Such agreements are not contracts for the sale or transfer of interests in land and need not be in writing.

*Id.* at 533. Thus, the general rule in Washington is that a partnership or joint venture formed for the purpose of buying and selling real estate for profit does not need to be in writing. *Id.* See also *Froiseth v. Nowlin*, 156 Wash. 314, 287 P. 55 (1930); *Davis v. Alexander*, 25 Wn.2d 458, 171 P.2d 167 (1946).

However, the general rule expressed above does not extend to the sale or transfer of real estate from one partner to another, or between a partner and the partnership. Rather, RCW 64.04.010 and RCW 64.04.020

require a written deed in order to convey real estate, even where the conveyance involves members of a partnership. *See Brewer v. Cropp*, 10 Wash. 136, 38 P. 866 (1894) (written agreement required to convey real estate from the partnership to one of the partners.); *King v. Northern Pac. R. Co.*, 27 Wn.2d 250, 261, 177 P.2d 714 (1947) (doctrine of equitable conversion did not “change or affect the requirement of our statute that a conveyance of real estate or any interest therein must be by deed.”). Simply put, the statute of frauds is not negated merely because an alleged conveyance of real estate involves parties to a partnership or joint venture.

Both *Brewer* and *King* involved an alleged sale of real estate from a partnership or joint venture to a partner or venturer (*i.e.*, from the business to the business-owner). As a result, neither case is exactly on point with this case, which involves an alleged sale of real estate from a venturer to a joint venture. But the rule of law is the same. That rule, as expressed by the Washington Supreme Court in *Froiseth v. Nowlin*, is that “[a]n agreement between two or more persons for the joint acquisition of real property from a third person *and not contemplating any sale or conveyance between the parties* is not a contract for the sale of land within the meaning of the statute of frauds.” *Froiseth v. Nowlin*, 156 Wash. at 317 (emphasis added) (quoting 27 C.J. *Statute of Frauds* § 205 at 221 (1922)). *See also Davis v. Alexander*, 25 Wn.2d at 465 (same). By the

same token, an agreement between two or more persons *that does contemplate the sale or conveyance of real property between the parties* is a contract for the sale of land within the meaning of the statute of frauds. Thus, Washington law clearly distinguishes between an oral agreement to form a partnership or joint venture to acquire land and an oral agreement to convey land between parties to the business venture. The Washington statute of frauds relating to real estate does not apply to the first situation, but does to the second.

The rule that the statute of frauds applies to the sale or conveyance of real estate between parties to a partnership or joint venture is also followed by the majority of state and federal courts that have considered the issue. For instance, in *Quimby v. Myers*, 179 Vt. 611, 895 A.2d 128 (2005), the Vermont Supreme Court rejected the claim that the statute of frauds did not apply to an alleged oral partnership agreement whereby one of the partners (Myers) purportedly contributed a sixty-acre lot to the partnership. The plaintiff in the case (Quimby) asserted that he and Myers were equal partners in the alleged partnership and, as a result, the lot should be divided equally between them upon dissolution of the partnership. Myers countered by asserting that “Quimby was not entitled to a division of the real property as a partnership asset because she had not transferred the property to Quimby or the partnership in writing.” 895

A.2d at 130. After analyzing several cases from other jurisdictions, the court in *Quimby* concluded that “[i]t is well settled that a writing is required to transfer real property, already owned by one partner, to another partner or to the partnership.” 895 A.2d at 131. The court went on to hold that since the undisputed evidence showed that Myers had not conveyed the real property to the partnership in writing, the statute of frauds barred Quimby’s claim to an interest in Myers’s real property. 895 A.2d at 132.

*Backus Plywood Corp. v. Commercial Decal, Inc.*, 317 F.2d 339 (2<sup>nd</sup> Cir. 1963), *cert. denied*, 375 U.S. 879 (1963), is also instructive. In *Backus Plywood*, the Second Circuit was faced with an alleged oral joint venture whereby the parties purportedly agreed to form a new corporation that would, among other things, lease “buildings and improvements” from one of the alleged co-venturers for a period of five years.<sup>9</sup> The court, in rejecting plaintiff’s breach of contract claim, adhered to the majority rule that the statute of frauds applies to the conveyance of real estate between parties to a partnership or joint venture:

Passing the dubious question of whether the alleged agreement constituted a joint venture . . . , it is clear that the principle of the cases cited [by plaintiff] applies only to joint ventures to make purchases from or transact business with *third parties*. In such situations it is held that the fact

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<sup>9</sup> At the time New York Real Property Law § 259 provided that “[a] contract for the leasing for a longer period than one year, or for the sale, of any real property, or an interest therein, is void, unless the contract, or some note or memorandum thereof, . . . is in writing . . . .” *Id.* at 342 n.4.

that the agreement contemplates future purchases by the venturers from third parties does not bring it within the statute of frauds. But the label 'joint venture' will not remove the bar of the statute when, as here, the very essence of the asserted venture is a sale from one 'venturer' to the other.

*Id.* at 342-43 (citations and footnote omitted). The court went on to point out that "[a]ny other rule would, of course, virtually emasculate the statute in this area." *Id.* at 343.<sup>10</sup>

Washington follows the majority rule that the statute of frauds applies to the sale or transfer of real property between parties to a partnership or joint venture. *Brewer v. Cropp*, 10 Wash. at 138; *King v. Northern Pac. R. Co.*, 7 Wn.2d at 261-62. As a result, TS Design's claim of an oral transfer of the land from Staatz Bulb Farms to the purported joint venture is deficient as a matter of law.

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<sup>10</sup> The majority rule expressed in *Quimby* and *Backus Plywood* has also been followed in a number of other state and federal cases. *See, e.g., Gunsorek v. Heartland Bank*, 124 Ohio App. 3d 735, 744-45, 707 N.E.2d 557, 563 (1997), *appeal not allowed*, 81 Ohio St.3d 1526 (1998) (holding that "when the essential component of a partnership agreement is the conveyance of real property from one partner to another (either directly or through the partnership), and the alleged breach of said agreement is the failure of the partner to convey such property, the Statute of Frauds is implicated."); *East Piedmont 120 Assocs. v. Sheppard*, 209 Ga. App. 664, 666, 434 S.E.2d 101, 103 (1993) (observing that "[t]he evidentiary and cautionary purposes of the statute [of frauds] . . . are implicated when a promise to convey an interest in land is made in the context of a partnership or joint venture agreement just as they are when such a promise is made in any other context."); *Ludwig v. Walter*, 75 N.C. App. 584, 586, 331 S.E.2d 177, 179 (1985) (applying the "general rule . . . that land owned individually by one who enters into a partnership cannot become a partnership asset absent some written agreement sufficient to satisfy the Statute of Frauds."); *Dobbs v. Vornado, Inc.*, 576 F. Supp. 1072 (E.D.N.Y. 1983) (holding that statute of frauds applied to a partly oral joint venture agreement that contemplated the transfer of an interest in real property by one of the venturers to the joint venture.). *But see Turley v. Ethington*, 213 Ariz. 640, 146 P.3d 1282 (Ariz. Ct. App. 2006) (expressing minority rule).

**3. The “Attributes of Ownership” set out in Rule 170(2)(a) do not apply.**

The undisputed evidence shows that Staatz Bulb Farms never transferred legal title to the land to either TS Design or to the purported joint venture. However, TS Design argues for the first time on appeal that the joint venture may still qualify as a speculative builder if, after applying the four non-exclusive “attributes of ownership” set out in Rule 170(2)(a), it is determined that the venture owned the land. *See* Appellants’ Br. at 9-10.<sup>11</sup> This Court should refuse to consider TS Design’s newly raised argument. Moreover, a proper application of the “attributes of ownership” does not support TS Design’s claim that the joint venture owned the land.

“The appellate court may refuse to review any claim of error which was not raised in the trial court.” RAP 2.5(a). *See also Washburn v. Beatt Equip. Co.*, 120 Wn.2d 246, 290, 840 P.2d 860 (1992)(“Arguments or theories not presented to the trial court will generally not be considered on appeal.”). When contesting the Department’s motion for summary judgment in this case, TS Design never mentioned the attributes of ownership listed in Rule 170(2)(a) and never suggested to the trial court that Rule 170(2)(a) was material to the outcome of the motion. *See* CP at

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<sup>11</sup> TS Design did not make this argument below in response to the Department’s Motion for Summary Judgment. *See* CP at 228-236.

228-236. For this reason, TS Design should be precluded from asserting that the trial court erred by not addressing Rule 170(2)(a).

But even if this Court does consider this new argument, proper application of Rule 170(2)(a) does not support TS Design's claim that the purported joint venture owned the land. Rule 170(2)(a) provides as follows:

(a) As used herein the term "speculative builder" means one who constructs buildings for sale or rental upon real estate owned by him. The attributes of ownership of real estate for purposes of this rule include but are not limited to the following: (i) The intentions of the parties in the transaction under which the land was acquired; (ii) the person who paid for the land; (iii) the person who paid for improvements to the land; (iv) the manner in which all parties, including financiers, dealt with the land. The term "sells" or "contracts to sell" includes any agreement whereby an immediate right to possession or title to the property vests in the purchaser.

WAC 458-20-170(2)(a). The first sentence of Rule 170(2)(a) defines the term "speculative builder" as "one who constructs buildings for sale or rental upon real estate *owned by him.*" (Emphasis added). The second sentence sets out various factors used to determine whether a person that is constructing a building is actually the owner of the real property at the time the construction services are rendered.

Although not intuitively obvious, the purpose for the second sentence of Rule 170(2)(a) is to help distinguish actual ownership of land from a mortgage interest. Washington follows the rule that “a deed that contains or is accompanied by an agreement that it shall be canceled or the land reconveyed upon payment of a debt is a mortgage.” *Bank of Am. v. Prestance Corp.*, 160 Wn.2d 560, 562 n.1, 160 P.3d 17 (2007) (quoting 18 William B. Stoebuck & John W. Weaver, *Wash. Practice: Real Estate: Transactions* § 20.2 (2d ed. 2004)). *See also Gossett v. Farmers Ins. Co. of Wash.*, 133 Wn.2d 954, 966, 948 P.2d 1264 (1997) (if a “deed is conveyed with the intent of the parties being to create a debtor-creditor relationship, then the deed may be declared to create an equitable mortgage.”). As a result, when a construction contractor has taken legal title to real property prior to starting a construction project on that land, it is important to look beyond the face of the deed to determine whether the contractor received ownership of the land or merely a mortgage interest. Likewise, when a construction contractor transfers legal title to real property prior to starting a construction project on the land, it is important to look beyond the face of the deed to determine whether the contractor transferred ownership or merely a mortgage interest.

Because a deed might not convey legal title to land, the Department of Revenue looks to certain “attributes of ownership” to determine whether the person holding legal title is truly the owner of the land or merely a mortgage holder. The Department first articulated its position on this subject through former Excise Tax Bulletin (ETB) 275.<sup>12</sup> That ETB, issued in September 1966, explained that “[d]eeds, though absolute on their face, may be mortgages, depending upon the surrounding circumstances.” *Id.* As a result, a landowner who deeds a lot to a construction contractor for the purpose of securing financing for the construction project remains the owner of the land. The contractor in this scenario holds only an equitable mortgage interest.

Former ETB 275 was followed a few years later by Rule 170. As pointed out above, Rule 170(2)(a) set out several non-exclusive “attributes of ownership” used to ascertain whether the person holding legal title to real property is truly the owner of the property. If, after applying the attributes of ownership, it is determined that the title holder is not truly the owner of the property during the time the construction takes place, the title holder is not a speculative builder.

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<sup>12</sup> A copy of ETB 275 is attached to this brief as Appendix C. The Department converted the ETB to an Excise Tax Advisory (ETA) on July 1, 1998, and repealed it on June 30, 2000. See ETA 275.08.170 (available on-line at <<http://www.dor.wa.gov/docs/rules/eta/275.pdf>>).

Rule 170(2)(a) should be applied in a manner that is consistent with Washington law relating to the transfer of real property. RCW 25.05.065 and RCW 64.04.010 are the controlling statutes with respect to the transfer of real property from a partner to a partnership. Rule 170(2)(a) cannot trump those statutory provisions. For Rule 170(2)(a) to be of any force or effect, it must be read in light of the equitable doctrine that a deed conveyed with the intent to create a debtor-creditor relationship may be declared to create an equitable mortgage. *Bank of Am. v. Prestance Corp.*, 160 Wn.2d at 562 n.1; *Gossett v. Farmers Ins. Co. of Wash.*, 133 Wn.2d at 966. In other words, the factors listed in Rule 170(2)(a) are relevant only insofar as they help distinguish actual ownership from an equitable mortgage interest. The rule does not, and cannot, create an ownership interest in land where such ownership interest is not recognized by Washington law.

As noted above, the attributes of ownership listed in Rule 170(2)(a) are relevant and useful in determining whether a person **receiving legal title** to real property prior to the start of a construction project is truly the owner of the property. That is not the circumstance presented in this case since the purported joint venture never received legal title to the land. Instead, TS Design is asking the Court to apply Rule 170(2)(a) in a manner that would allow a person that **has not**

received legal title to be treated as the owner of real property. Applying the administrative rule in the manner suggested by TS Design could result in a transfer of ownership of real property in a manner that is contrary to the requirements of RCW 25.05.065 and RCW 64.04.010. Moreover, applying Rule 170(2)(a) in the manner suggested by TS Design would violate the well established principle that interpretive rules must be consistent with the statutes they interpret. *Campbell v. Dep't. of Soc. & Health Servs.*, 150 Wn.2d 881, 892, 83 P.3d 999 (2004).

In this case, the purported joint venture never received legal title to the land upon which the home was constructed. As a result, there is no need to apply the attributes of ownership set out in Rule 170(2)(a) to determine whether the joint venture truly owned the land or held only an equitable mortgage interest in it. The joint venture held no interest (legal or equitable) recognized under Washington law, and Rule 170(2)(a) cannot change that fact.

**4. Even if the attributes of ownership apply in this case, those attributes do not support TS Design's claim that the joint venture owned the land.**

Finally, even if this Court were to apply Rule 170(2)(a) in the manner suggested by TS Design, the purported joint venture still fails to meet the four factors. Specifically:

- Staatz Bulb Farms acquired the land many years before TS Design was formed and many years before the construction of the Hilterbrant home. CP at 72. With respect to the intention of the parties in the transaction under which Staatz Bulb Farms acquired the land, there is no evidence that anyone intended the land to be owned by the purported joint venture. Thus, the first attribute of ownership does not support TS Design's claim.
- There is no evidence that the purported joint venture paid for the land prior to the completion of the construction project. *See* CP at 238, ¶ 10 (admission that Staatz Bulb Farms never received payment for the land until the construction project was completed). Rather, the undisputed evidence demonstrates that up through the completion of the construction project it was Staatz Bulb Farms, not the purported joint venture, that paid for the land upon which the home was constructed. The second attribute of ownership does not support TS Design's claim.
- High Cedars golf course, not the purported joint venture, paid for the improvements to the land. CP at 38-54. The third attribute of ownership does not support TS Design's claim.
- At the time the home was being constructed, there is no evidence that the parties dealt with the land as if it was owned by the purported joint venture. TS Design has presented no evidence that the joint venture paid property taxes on the land, held itself out to third parties as the owner of the land, or otherwise assumed any burdens of ownership. Likewise, there is no evidence that Staatz Bulb Farms gave up any benefits or burdens of ownership. The fourth attribute of ownership does not support TS Design's claim.

To qualify as a speculative builder, the purported joint venture must have owned the underlying real property at the time the construction took place. As a result, the attributes of ownership relate to the manner in which the parties dealt with the land prior to and during construction.

Facts and circumstances arising after construction is complete are of little

value. For example, it is immaterial that Staatz Bulb Farms received payment for the land at the close of the sale of the home to the Hilterbrants. *See* Appellants' Br. at 14-15 (suggesting that payment for the lot at closing of the Hilterbrant sale is relevant for purposes of the second and third attributes of ownership). As the owner of the land, Staatz Bulb Farms was entitled to payment for its land when it was ultimately sold. Payment for the land at closing of the Hilterbrant sale does nothing to support TS Design's claim that the joint venture owned the land during construction.

Likewise, the fact that TS Design mistakenly paid retail sales tax on the purchase of building materials and subcontractor labor does not support its claim that the purported joint venture owned the land. *See* Appellants' Br. at 15 (suggesting that payment of retail sales tax "at source to subcontractors and material vendors" is relevant for purposes of the third attribute of ownership).<sup>13</sup> The partners in TS Design may have thought they were doing business as speculative builders with respect to the construction project. But the partners' subjective belief does not preclude the Department of Revenue from applying the law and correctly computing TS Design's excise tax liability. Rule 170(2)(a) looks at the

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<sup>13</sup> The Department gave TS Design a credit for the retail sales tax it mistakenly paid on the purchase of the building materials and subcontractor labor. CP at 189 (discussing Audit Schedules 6). Thus, TS Design's mistake was harmless in terms of the amount of retail sales tax ultimately owed.

manner in which the parties dealt with the land, not the manner in which the parties report or pay retail sales tax on the construction project. TS Design's mistaken payment of retail sales tax "at source to subcontractors and material vendors" is not a material fact in determining who owned the land during construction of the home.

The material facts relating to the manner in which the parties dealt with the land prior to and during construction do not support TS Design's claim that the purported joint venture owned the land. Thus, even if the attributes of ownership set out in Rule 170(2)(a) apply in this case, it is clear that Staatz Bulb Farms owned the land throughout the construction of the home. TS Design's claim to the contrary is simply not supported by any material evidence and is insufficient to defeat the Department's motion for summary judgment. *Seiber v. Poulsbo Marine Center*, 136 Wn. App. 731, 736-37, 150 P.3d 633 (2007).

**C. Because Staatz Bulb Farms Owned The Land, TS Design Was Taxable As A Seller Of Construction Services, Not As A Speculative Builder.**

The undisputed evidence in this case clearly shows that Staatz Bulb Farms never transferred legal ownership of the land to the purported joint venture. Therefore, the land owner (Staatz Bulb Farms) was the consumer of the construction services performed by TS Design. *See* RCW 82.04.190(4) (the term "consumer" includes "[a]ny person who is an

owner . . . in real property which is being constructed . . . improved, or otherwise altered by a person engaged in business.”). TS Design was the “seller” of the construction services, RCW 82.08.010(2), and those services qualified as a “retail sale.” RCW 82.04.050(2)(b).

As the seller of the retail construction services, TS Design owed retailing B&O tax and uncollected retail sales tax on amounts received from the construction project. RCW 82.04.220 & 82.04.250(1) (imposing B&O tax on persons engaged in making retail sales); RCW 82.08.020(1) (imposing retail sales tax); RCW 82.08.050(3) (making seller liable for uncollected retail sales tax). *See also, AARO Med. Supplies v. Department of Revenue*, 132 Wn. App. 709, 716, 132 P.3d 1143 (2006) (the seller must remit the sales tax to the Department regardless of whether or not he has collected it from the buyer). Therefore, the Department properly assessed the taxes at issue in this appeal, and the trial court correctly upheld that assessment.

**D. TS Design Seeks The Tax Advantages Of A Speculative Builder Without Complying With The Formalities Required To Qualify As A Speculative Builder.**

As a general rule, a taxpayer is not permitted to repudiate the form of a transaction even if the transaction was structured poorly or results in unintended tax consequences. *Roe Company v. Department of Revenue*, 113 Wn.2d 561, 569 n.3, 782 P.2d 986 (1989). *See generally*,

*Commissioner of Internal Rev. v. Dehydrating & Milling Co.*, 417 U.S. 134, 149, 94 S.Ct. 2129, 40 L.Ed.2d 717 (1974) (“This Court has observed repeatedly that, while a taxpayer is free to organize his affairs as he chooses, nevertheless, once having done so, he must accept the tax consequences of his choice, whether contemplated or not.”). In this case, the form of the transaction was a construction project performed by TS Design on land owned by Staatz Bulb Farms. The land was never transferred to TS Design or to the purported joint venture. As a result, TS Design is taxable as a seller of construction services, not as a speculative builder.

The parties to the construction project had control over the form and structure of the project. It is their lack of attention to the formalities required to structure the project as speculative construction that dictates the tax consequences. This Court should reject TS Design’s efforts to obtain the tax advantages of a speculative builder without following the formalities required to qualify as a speculative builder. Because TS Design did not own the land upon which the home at issue was built, it does not qualify as a speculative builder as a matter of law.

## VI. CONCLUSION

For the reasons set forth above, the Department respectfully requests that the trial court's Order Granting Department of Revenue's Motion for Summary Judgment be affirmed on appeal. The trial court correctly concluded that TS Design constructed the home at issue on land owned by another and, therefore, was taxable as a seller of construction services, not as a speculative builder.

Respectfully submitted this 18<sup>th</sup> day of January, 2008.

ROBERT M. MCKENNA  
Attorney General



CHARLES ZALESKY, WSBA No. 37777  
LIANNE S. MALLOY, WSBA No. 15028  
Assistant Attorneys General  
Attorneys for Respondent

**APPENDIX A**

458-20-169 << 458-20-170 >> 458-20-17001

#### **WAC 458-20-170**

#### **Constructing and repairing of new or existing buildings or other structures upon real property.**

##### **(1) Definitions.** As used herein:

(a) The term "prime contractor" means a person engaged in the business of performing for consumers, the constructing, repairing, decorating or improving of new or existing buildings or other structures under, upon or above real property, either for the entire work or for a specific portion thereof. The term includes persons who rent or lease equipment to property owners for use in respect to constructing, repairing, etc., buildings or structures upon such property, when the equipment is operated by the lessor.

(b) The word "subcontractor" means a person engaged in the business of performing a similar service for persons other than consumers, either for the entire work or for a specific portion thereof. The term includes persons who rent or lease equipment to prime contractors or subcontractors for use in respect to constructing, repairing, etc., when such equipment is operated by the lessor. When equipment or other tangible personal property is rented without an operator to contractors, subcontractors or others, the transaction is a sale at retail (see RCW 82.04.040 and 82.04.050).

(c) The terms "prime contractor" and "subcontractor" include persons performing labor and services in respect to the moving of earth or clearing of land, cleaning, fumigating, razing, or moving of existing buildings or structures even though such services may not be done in connection with a contract involving the constructing, repairing, or altering of a new or existing building or structure. The terms also include persons constructing streets, roads, highways, etc., owned by the state of Washington.

(d) The term "buildings or other structures" means everything artificially built up or composed of parts joined together in some definite manner and attached to real property. It includes not only buildings in the general and ordinary sense, but also tanks, fences, conduits, culverts, railroad tracks, tunnels, overhead and underground transmission systems, monuments, retaining walls, piling and privately owned bridges, trestles, parking lots, and pavements for foot or vehicular traffic, etc.

(e) The term "constructing, repairing, decorating or improving of new or existing buildings or other structures," in addition to its ordinary meaning, includes: The installing or attaching of any article of tangible personal property in or to real property, whether or not such personal property becomes a part of the realty by virtue of installation; the clearing of land and the moving of earth; and the construction of streets, roads, highways, etc., owned by the state of Washington. The term includes the sale of or charge made for all service activities rendered in respect to such constructing, repairing, etc., regardless of whether or not such services are otherwise defined as "sale" by RCW 82.04.040 or "sales at retail" by RCW 82.04.050. Hence, for example, such service charges as engineering fees, architectural fees or supervisory fees are within the term when the services are included within a contract for the construction of a building or structure. The fact that the charge for such services may be shown separately in bid, contract or specifications does not establish the charge as a separate item in computing tax liability.

##### **(2) Speculative builders.**

(a) As used herein the term "speculative builder" means one who constructs buildings for sale or rental upon real estate owned by him. The attributes of ownership of real estate for purposes of this rule include but are not limited to the following: (i) The intentions of the parties in the transaction under which the land was acquired; (ii) the person who paid for the land; (iii) the person who paid for improvements to the land; (iv) the manner in which all parties, including financiers, dealt with the land. The terms "sells" or "contracts to sell" include any agreement whereby an immediate right to possession or title to the property vests in the purchaser.

(b) Where an owner of real estate sells it to a builder who constructs, repairs, decorates, or improves new or existing buildings or other structures thereon, and the builder thereafter resells the improved property back to the owner, the builder will not be considered a speculative builder. In such a case that portion of the resale attributable to the construction, repairs, decorations, or improvements by the builder, shall not be considered a sale of real estate and shall be fully subject to retailing business and occupation tax and retail sales tax. It is intended by this provision to prevent the avoidance of tax liability on construction labor and services by utilizing the mechanism of real property transfers. (RCW 82.04.050 (2)(c).)

(c) Amounts derived from the sale of real estate are exempt from the business and occupation tax. (RCW 82.04.390.) Consequently, the proceeds of sales by legitimate speculative builders of completed buildings are not subject to such tax. Neither does the sales tax apply to such sales, since such a sale involves no charge made for construction for a consumer, but the price paid is for the sale of real estate.

(d) However, when a speculative builder sells or contracts to sell property upon which he is presently constructing a building, all construction done subsequent to the date of such sale or contract constitutes a retail sale and that portion of

the sales price allocable to construction done after the agreement shall be taxed accordingly. Consequently, the builder must pay business and occupation tax under the retailing classification on that part of the sales price attributable to construction done subsequent to the agreement, and shall also collect sales tax from the buyer on such allocable part of the sales price.

(e) Speculative builders must pay sales tax upon all materials purchased by them and on all charges made by their subcontractors. Deductions for such tax paid with respect to materials used or charges made for that part of the construction done after the contract to sell the building should be claimed by the speculative builder on his tax returns in accordance with WAC 458-20-102, under the subheading PURCHASES FOR DUAL PURPOSES.

(f) 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."

**(3) Business and occupation tax.**

(a) Prime contractors are taxable under the retailing classification, and subcontractors under the wholesaling classification upon the gross contract price.

(b) Where no gross contract price is stated in any contract or agreement between the builder and the property owner, then the measure of business and occupation tax is the total amount of construction costs, including any charges for licenses, fees, permits, etc., required for the construction and paid by the builder.

**(4) Retail sales tax.**

(a) Prime contractors are required to collect from consumers the retail sales tax measured by the full contract price. Where no gross contract price is stated, the measure of sales tax is the total amount of construction costs including any charges for licenses, fees, permits, etc., required for construction and paid by the builder.

(b) The retail sales tax does not apply to charges made for janitorial services nor for the mere leveling of land used in commercial farming or agriculture. The tax does apply, however, in respect to contracts for cleaning septic tanks or the exterior walls of buildings, as well as to earth moving, land clearing and the razing or moving of structures, whether or not such services are performed as incidents of a contract to construct, repair, decorate, or improve buildings or structures.

(c) Sales to prime contractors and subcontractors of materials such as concrete, tie rods, lumber, finish hardware, etc., which become part of the structure being built or improved are sales for resale and are not subject to the retail sales tax. Sales of form lumber to such contractors are sales for resale provided that such lumber is used or to be used first by such persons for the molding of concrete in a single contract, project or job and the form lumber is thereafter incorporated into the product of that same contract project or job as an ingredient or component thereof. Sales of form lumber not so incorporated as an ingredient or component are sales at retail.

(d) The retail sales tax applies upon sales and rentals to prime contractors and subcontractors of tools, machinery and equipment, and consumable supplies, such as hand and machine tools, cranes, air compressors, bulldozers, lubricating oil, sandpaper and form lumber which are primarily for use by the contractor rather than for resale as a component part of the finished structure.

(e) The retail sales tax applies upon sales to speculative builders of all tangible personal property, including building materials, tools, equipment and consumable supplies and upon sales of labor, services and materials to speculative builders by independent contractors.

**(5) Use tax.**

The use tax applies generally to the use by prime contractors and subcontractors of tools, machinery, equipment and consumable supplies acquired by them primarily for their own use and upon which the retail sales tax has not been paid. This includes equipment and supplies purchased in a foreign state for use or consumption in performing contracts in this state. The use tax applies generally to the use by speculative builders of all tangible personal property, including building materials, purchased or acquired by them without payment of the retail sales tax (see also WAC 458-20-178).

[Statutory Authority: RCW 82.32.300, 87-19-007 (Order ET 87-5), § 458-20-170, filed 9/8/87; 83-07-033 (Order ET 83-16), § 458-20-170, filed 3/15/83; Order ET 71-1, § 458-20-170, filed 7/22/71; Order ET 70-3, § 458-20-170 (Rule 170), filed 5/29/70, effective 7/1/70.]

**APPENDIX B**

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STATE OF WASHINGTON  
THURSTON COUNTY SUPERIOR COURT

GARY STOWE and DOUGLAS  
TAYLOR, d/b/a TS DESIGN,

Plaintiffs,

v.

STATE OF WASHINGTON  
DEPARTMENT OF REVENUE,

Defendant.

NO. 06-2-01459-3

~~[PROPOSED]~~  
ORDER GRANTING  
DEPARTMENT OF  
REVENUE'S MOTION FOR  
SUMMARY JUDGMENT

[Clerk's Action Required]

THIS MATTER came before the court on August 17, 2007, on the motion of the Department of Revenue (DOR) for Summary Judgment. DOR is represented by Attorney General Robert M. McKenna by and through Assistant Attorney General, Lianne S. Malloy. Gary Stowe and Douglas Taylor, d/b/a TS Design (Taxpayer) is represented by attorney James Krueger. The Court has reviewed DOR's Motion and Memorandum for Summary Judgment, and the Declarations of Lianne Malloy and Evan Kipelidis. The Court has also reviewed Plaintiff's Response to Defendant's Motion, the Declaration of Douglas Taylor, and DOR's Reply. The Court having reviewed the file and listened to argument makes the following;

[PROPOSED] ORDER GRANTING  
DEPARTMENT OF REVENUE'S MOTION  
FOR SUMMARY JUDGMENT

ATTORNEY GENERAL OF WASHINGTON  
Revenue Division  
7141 Cleanwater Drive SW  
PO Box 40123  
Olympia, WA 98504-0123  
(360) 753-5528

*Ny*

**FINDINGS OF FACT**

1. For purposes of summary judgment, the Court presumes that Taxpayer and the landowner (Staatz Bulb Farms) formed a joint venture to build the house later sold to the Hilterbrants.

2. Taxpayer contributed its labor; Staatz Bulb Farm contributed the lot; and Bryan Stowe, or one of his corporations, financed construction of the Hilterbrant house.

3. The landowner never transferred ownership of the lot to the Taxpayer or the joint venture orally or in writing. Instead, the landowner retained ownership throughout construction until the property was sold to the Hilterbrants.

~~4. Taxpayer has not provided any documentary evidence showing that it paid more than \$75,000 for the Hilterbrant lot.~~

5. DOR assessed retail sales tax and retailing B&O tax on the Hilterbrant house, and Taxpayer disputes the amount of that assessment; and the following

**CONCLUSIONS OF LAW**

1. The Court has personal and subject matter jurisdiction.

2. Taxpayer is ~~required to pay retail sales tax and retailing B&O tax~~ on the Hilterbrant house because it was constructed on a lot neither the Taxpayer nor the joint venture owned. *See* RCW 82.04, RCW 82.08; *Rigby v. State*, 49 Wn.2d 707, 306 P.2d 216 (1957); *Riley Pleas*, 88 Wn.2d 933, 568 P.2d 780 (1977).

~~3. Taxpayer has not produced adequate documentary evidence rebutting the presumption that the lot was sold for \$75,000 and establishing the correct amount~~

~~of its tax assessment. See RCW 82.32.070; RCW 82.32.180. Taxpayer is not entitled to proceed to trial to show the amount that was paid for the lot.~~

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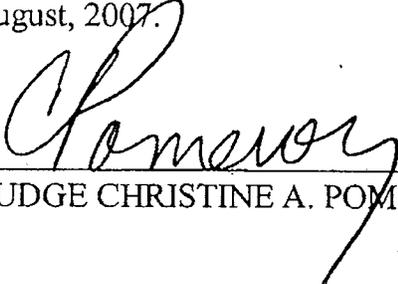
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NOW, THEREFORE IT IS HEREBY ORDERED, that DOR's motion for  
summary judgment is granted. Each party will be responsible for his or its own  
attorney fees and costs.

DATED this 17 day of August, 2007.

  
JUDGE CHRISTINE A. POMEROY

Presented by:

ROBERT M. MCKENNA  
Attorney General

  
LIANNE S. MALLOY  
WSBA #15028  
Assistant Attorney General

Approved as to form:

VANDEBERG JOHNSON &  
GANDARA

  
JAMES KRUEGER  
WSBA #3408  
Attorney at Law

CGM  


**APPENDIX C**

STATE OF WASHINGTON TAX COMMISSION  
EXCISE TAX BULLETIN

ETB 275.08.170

Issued September 30, 1966

DEEDING OF LAND TO CONTRACTOR BUILDING HOUSE FOR LANDOWNER

Where a landowner deeds a lot to a contractor who builds a house on the lot and then reconveys the land to the original owner, does the Sales Tax apply to the contract price of the house?

The taxpayer, a building contractor, built houses on land which were conveyed to him by the landowner for whom the house was built. The taxpayer mortgaged the land to a third party to secure financing. When the house was completed, the taxpayer reconveyed the land and house to the original landowner. The price paid to the taxpayer was the contract price of the house. Exemption from Sales Tax on the final transaction was claimed on the basis that the sale of the house and land was a sale of real property.

Rule 130 provides an exemption from Sales Tax on sales of real property. Rule 170 requires building contractors to collect from their customer, the landowner, the Sales Tax measured on the full contract price. However, a speculative builder, one who constructs buildings for sale or rental on land owned by him, is not required to collect Sales Tax on the sale of such a building and lot because he is selling real property.

Deeds, though absolute on their face, may be mortgages, depending upon the surrounding circumstances. Shepard v. Vincent, 38 Wash. 493; Rodda v. Needham, 78 Wash. 636. The primary reason the land was conveyed to the taxpayer was to secure financing. As the property was used for security purposes, the deed served as a mortgage between the landowner and the taxpayer-contractor. The use of the deed form was not determinative as RCW 64.04.010 requires that encumbrances on real property be in the form of a deed. In Washington a mortgage is a lien or security for the payment of money and does not pass title to the mortgagee. Therefore, the landowner remained the owner of the land, the taxpayer was not a speculative builder, and the Sales Tax applied to the contract price of the house.

FILED  
COURT OF APPEALS  
DIVISION II

08 JAN 23 AM 11:37

STATE OF WASHINGTON

BY \_\_\_\_\_  
DEPUTY

NO. 36748-3-II

**COURT OF APPEALS FOR DIVISION II  
STATE OF WASHINGTON**

GARY STOWE and DOUGLAS TAYLOR,  
d/b/a TS DESIGN,

Appellants,

v.

WASHINGTON STATE  
DEPARTMENT OF REVENUE,

Respondent.

CERTIFICATE  
OF SERVICE

I certify that I served a copy of the Brief of Respondent and this Certificate of Service, via ABC Legal Messenger Service upon the following:

James Krueger  
Lucy Clifthorne  
Vandeberg Johnson & Gandara, LLP  
1201 Pacific Ave., Suite 1900  
Tacoma, WA 98401-1315

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

DATED this 18 day of January, 2008, at Tumwater, Washington.

  
KRISTIN D. JENSEN, Legal Assistant  
(360) 586-9674