Cite as Det. No. 98-160E, 18 WTD 194 (1999)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition	)	F I N A L
For Correction of Assessment of	)	D E T E R M I N A T I O N
	)	
	)	No. 98-160E
. . .	)	
	)	Registration No. . . .
	)	FY. . ./Audit No. . . .

[1] RULE 156 - B&O TAX - RETAIL SALES TAX - ESCROW - ESCROW AGENT. Rule 156 adopts the RCW 18.44.010 statutory definition of "escrow" and "escrow agent" found in the Escrow Agent Registration Act, and this statutory definition is necessarily subject to further interpretation given it by courts and, because it is ambiguous, by the longstanding interpretations given to it by the agency charged with its administration and enforcement.

[2] RULE 156 - B&O TAX - RETAIL SALES TAX - ESCROW - ESCROW AGENT - DEFINITION. Generally, an escrow agent is an objective, expert "third party" who acts as a stakeholder for both the buyer and seller in a transaction and who is charged by the instructions of the principal parties with receiving the necessary legal instruments, funds, or properties and upon the occurrence of a specified event or performance of a prescribed condition, delivering the items to the parties entitled to receive them.

[3] RULE 156 - B&O TAX - RETAIL SALES TAX - ESCROW - FACTORS. When a taxpayer is not registered as an escrow agent under RCW 18.44.010, the Department will find that the taxpayer is engaging in escrow business activities when the following conditions exist:

(a) Delivery of Instruments is conditional and based upon binding and enforceable underlying contracts,
(b) Parties intended and agreed to form an escrow, and
(c) Closing Instructions and deliveries into escrow are irrevocable.

Headnotes are provided as a convenience for the reader and are not in any way a part of the decision or in any way to be used in construing or interpreting this Determination.

NATURE OF ACTION:

A vessel documentation company, which "closes" boat purchase transactions on behalf of brokers, dealers, sellers, buyers, and lending institutions, protests the Department's finding that it is providing escrow services.[1]

FACTS:

Bauer, A.L.J. -- Taxpayer, through one of its divisions, provides "vessel documentation services". In doing so, it claims to act as a trustee, and not an escrow agent, for both buyers and sellers.

Taxpayer has provided a statement of the services which it offers its clients (see Appendix A), which services include “documentation services” and “closing services.” The former account for approximately two-thirds of Taxpayer’s total revenue, and the latter account for the remaining one-third. Taxpayer's Customer Information Brochure (undated) describes its services generally as falling into three categories: "Marine Documentation", "State Titling", and "Vessel Registration" (see Appendix B for a more complete listing of services).

Taxpayer's brochure neither describes Taxpayer as an escrow agent, nor represents that it provides escrow services. Taxpayer states funds conveyance between the buyer and seller has historically been provided by all documentation companies as a free courtesy accommodation, and that it follows the same practice. Taxpayer contends none of its revenue is derived from this source.

The Audit Division of the Department of Revenue (Department) audited Taxpayer's business records for the period January 1, 1990 through March 31, 1994. As a result, Document No. FY. . ./Audit No. . . . was issued on December 16, 1994 in the total amount of $. . ., which amount included interest accrued up until the assessment date. The assessed amount resulted from the Department's finding Taxpayer to be an "escrow agent", which finding was based on Taxpayer's self-described "transfers of ownership", "lien clearance and satisfactions", and "trust and closing services". "Trust and closing services", according to Taxpayer, were provided to its clients for no extra charge. As a result of this finding, the Department reclassified the gross income from service to retailing business and occupation (B&O) tax and assessed retail sales tax on Taxpayer's total charges to its customers. Taxpayer timely objected to the assessment based on the finding that it was engaging in escrow services. It requested, and has received, executive-level review because the issue is one of first impression and has industry-wide impact.

Taxpayer is normally hired by buyers of vessels at the behest of the banks that will be financing these purchases. Once it is hired to represent the buyer, Taxpayer contacts the Seller to advise of its involvement in the sale.

In providing its services to buyers and sellers, Taxpayer uses forms entitled "Buyer Trust Instructions" and "Seller Trust Instructions". On these respective forms, there are spaces where a

[1] Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410

buyer's, or a seller's, funds are debited and credited. These forms, over the signature line of the buyer and seller, respectively provide as follows:

> Buyer shall hand, or cause to be delivered, unto [Taxpayer] (Trustee) all items designated in the above trust statement as buyer trust credits. Trustee is thereafter authorized, upon conveyance of Seller's interest in the above stated vessel, to debit Buyer's account and to disburse said credit items accordingly. Buyer acknowledges that if an existing lien is to be paid off from disbursement proceeds then title transfer may be delayed pending the lienholder's subsequent issuance of a release of interest.

("Buyer Trust Instructions," emphasis added.)

> Buyer acknowledges that _____, Lienholder will not be paid directly from the distribution of Buyer's trust funds at closing and further authorizes Trustee to disburse all funds directly to Seller. Buyer understands that title will not be conveyed until Seller has obtained Lienholder's release of interest and title of subject vessel.

("Addendum to Buyer Trust Instructions," signed only by Buyer.)

> Borrower hereby authorizes [Taxpayer]to pay-off, on borrower's behalf, the balance of the above-stated loan. Borrower further authorizes and requests that Lender provide exclusively to [Taxpayer], immediately upon pay-off, the above stated title documents and evidence of lien satisfaction and any other evidence of lien satisfaction as may be required to remove any related title encumbrance to the above stated vessel.

("Authorization for Pay-Off")

> Seller shall hand, or cause to be delivered, unto [Taxpayer] (Trustee) all releases and instruments required to provide Buyer with a free and clear title to the above stated vessel. Trustee is thereafter authorized, upon receipt of Seller's credit items, to convey said releases and instruments to Buyer, to debit Seller's account, and to disburse said credit items accordingly.

["Seller Trust Instructions," emphasis added.]

Each of these forms also contain virtually identical disclaimers:

> It is understood and agreed that Trustee is under no obligation and has no duties whatsoever in connection with any agreements or contracts made between Buyer and Seller or Dealers, or between Buyer and any other party. Buyer acknowledges that Trustee is not an insurer or guarantor of title and does not certify or warrant an abstract thereof. It is further agreed that if for any reason Buyer becomes involved in litigation with Seller, Dealers, or any other

> party, and Trustee is named as `Party Defendant', then Buyer shall hold Trustee harmless thereof and reimburse Trustee for all costs and reasonable attorney's fees incurred.

["Buyer Trust Instructions," emphasis added.]

Taxpayer concedes it owes a fiduciary duty to both buyer and seller, individually, in handling their funds and documents. Taxpayer indicates it considers itself also to have an unwritten contractual relationship with, and a fiduciary duty toward, the financial institution lending the funds to protect its security interest.

In the course of the Audit, the Department concluded Taxpayer was performing escrow services, reasoning:

> Transfers of ownership; lien clearance and satisfactions; and trust and closing services are activities that fall under the definition of escrow services. "Escrow" means any transaction . . . [the remainder of this paragraph quoted the "escrow" definition contained in WAC 458-20-156 (Rule 156).]
>
> In determining the amounts to be reclassified, it was estimated that one-third of [Taxpayer's] gross receipts were attributable to the escrow services. . . .

[Auditor's Detail of Differences and Instructions to Taxpayers dated August 24, 1994.]

The Auditor's Verification Comments read:

> [T]axpayer contends that [it] is not performing escrow services but is acting as a purchaser's agent at the time of closing. There is no evidence of an agency agreement between [Taxpayer] and the purchaser. Instead, a "buyer trust instructions" is completed and signed.
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> . . .
>
> [Taxpayer's attorney] referred to the definition of "escrow" from the Department of Licensing's publication of "Real Estate Practice in Washington," . . . "an `escrow' is created when a contract exists between the parties and the instruments, funds, or properties have been delivered to the escrow agent with irrevocable instructions as to his duties. At that point, neither party may unilaterally cancel the escrow and demand return of the items in escrow.
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> [Taxpayer's attorney] stated that [Taxpayer] is not, at any time, obligated by mandatory or irrevocable instructions from either the purchaser or seller and that [Taxpayer], purchaser, and seller remain free to call off the transaction at any time for any reason whatsoever. [Taxpayer's attorney] concluded that since [Taxpayer] is not given irrevocable instructions, then [Taxpayer] does not fit the definition of "escrow".

By letter dated August 30, 1994, the Washington Department of Licensing (DOL)[2] advised Taxpayer that:

> ...the key phraseology in the escrow definition, which may apply to your situation is as follows:
>
> > `Escrow' means any transaction wherein any person...for the purpose of effecting and closing the sale, purchase, exchange, [or] transfer...of real or personal property...delivers [to any third person] any...money...to be held by such third person until the happening of a specified event or the performance of a prescribed condition...[pursuant to instructions].
>
> RCW 18.44.010(3), -.020. If your client is holding the purchaser's money, until the title is released by the secured party, your client is probably engaged in the practice of escrow. It is the responsibility of the seller or escrow agent to obtain the release of interest on the title and forward the assignment of title to the appropriate filing office.
>
> Nothing prevents the buyer's agent from directly forwarding part of the purchase money to the secured party with the consent of the seller, if the purchaser is concerned about the seller's integrity. What your client cannot do without first registering as an escrow agent is to hold the purchase money, ostensibly in trust, until the seller obtains the release of title from the secured party. See RCW 18.44.010(3); 020, supra.

By letter dated January 30, 1995, DOL further advised Taxpayer that its August 30, 1994 letter:

> ...suggests that your activities may fall within the definition "escrow" set forth in RCW 18.44.010(3), if the release of the funds you hold for a buyer is contingent upon the seller's release of title. However, you also advise that you do not act under the instructions of both parties as a neutral "third party" stakeholder. Rather, you act solely for the boat purchaser as an accommodation. Under these circumstances, it would not appear that you are engaging in escrow activities as defined in RCW 18.44.010(3).

However, because it has since been determined that Taxpayer deals, as a matter of course, with both parties to the transactions at issue, it is clear this latter DOL correspondence is based on incomplete information and is therefore not applicable to Taxpayer's situation.

ISSUES:

[2.] The Washington Department of Licensing, prior to August 1, 1995, had authority for the registration and regulation of Washington's escrow agents. That responsibility has now shifted to the Washington Department of Financial Institutions.

1. Does RCW 18.44.020(3) exclude Taxpayer from the definition of "escrow agent"?

2. Is Taxpayer engaging in escrow business activities because it engages in "transfers of ownership", "lien clearance and satisfactions", and "trust and closing services"?

DISCUSSION:

Under the Revenue Act, escrow services are retail sales subject to retailing B&O and retail sales tax. RCW 82.04.050(3)(b). If Taxpayer provides escrow services, then the Department's assessment would be correct.

Taxpayer first contends it is excluded from the definition of "escrow agent" by RCW 18.44.020(3), which provides that:

> ...the registration and licensing requirements of this chapter shall not apply to:
>
> ...Any company, broker, or agent subject to the jurisdiction of the director while performing acts in the course of or incidental to sales or purchases of real or personal property handled or negotiated by such company, broker, or agent: Provided, however, That no compensation is received for escrow services.

DOL addressed this issue in the negative in its letter to Taxpayer dated January 30, 1995:

> In response to your [Taxpayer's] question as to whether RCW 18.44.020(3) would offer an exemption, if indeed it is determined that your activities constitute a true "escrow" within the meaning of RCW 18.85.010[3] . . . the answer would be "no". RCW 18.44.020(3) is an exemption intended only for licensees under the Director's jurisdiction who close transactions which they themselves have negotiated without charging an escrow fee. . . .

We, too, hold this exemption does not apply to Taxpayer. Taxpayer is not otherwise under the DOL's jurisdiction, e.g., a real estate brokerage, nor does it negotiate the boat sales in which it becomes involved.

Taxpayer secondly argues it does not provide escrow services and is not an escrow agent under Washington law.

The Escrow Agent Registration Act defines "escrow" and "escrow agent" in RCW 18.44.010 as follows":

[3] This is apparently a typographical error, and should have read 18.44.010.

> (3) "Escrow" means any transaction wherein any person or persons, for the purpose of effecting and closing the sale, purchase, exchange, transfer, encumbrance, or lease of real or personal property to another person or persons, delivers any written instrument, money, evidence of title to real or personal property, or other thing of value to a third person to be held by such third person until the happening of a specified event or the performance of a prescribed condition or conditions, when it is then to be delivered by such third person, in compliance with instructions under which he is to act, to a grantee, grantor, promisee, promisor, obligee, obligor, lessee, lessor, bailee, bailor, or any agent or employee thereof.
>
> (4) "Escrow agent" means any sole proprietorship, firm, association, partnership, or corporation engaged in the business of performing for compensation the duties of the third person referred to in RCW 18.44.010(3) above.

[1] WAC 458-20-156 (Rule 156), construing the Washington Revenue Act, adopts the Escrow Agent Registration Act's statutory definition of "escrow" and "escrow agent".[4] This statutory definition is subject to the interpretation given it by courts.[5] Further, agency interpretation of a statute is given deference when a statute is ambiguous and the agency is charged with its administration and enforcement.[6]

In this case, Washington courts have been called upon repeatedly to interpret the RCW 18.44.010 definition of "escrow." Because the statutory definition is subject to a variety of possible interpretations, and is therefore ambiguous,[7] we find it appropriate to also look to the agency interpretations. Because DOL for many years was the enforcing agency governing the registration and business activities of the vast majority of escrow activities in this state, and because the Department of Financial Institutions (DFI) (the agency which now oversees escrow companies) has not yet withdrawn or amended the regulations or informational materials made available to escrow

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[4] The term "escrow" means any transaction wherein any person or persons, for the purpose of effecting and closing the sale, purchase, exchange, transfer, encumbrance, or lease of real or personal property to another person or persons, delivers any written instrument, money, evidence of title to real or personal property, or other thing of value to a third person to be held by such third person until the happening of a specified event or the performance of a prescribed condition or conditions, when it is then to be delivered by such third person, in compliance with instructions under which he is to act, to a grantee, grantor, promisee, promisor, obligee, obligor, lessee, lessor, bailee, bailor, or any agent or employee thereof.

"Escrow agent" means any sole proprietorship, firm association, partnership, or corporation engaged in the business of performing for compensation the duties of the third person referred to in the foregoing definition.

[5] Ino Ino, Inc. v. City of Bellevue, 132 Wn.2d 103, 137, 937 P.2d 154, opinion amended 943 P.2d 1358 (1997); State v. Crediford, 130 Wn.2d 747, 760, 927 P.2d 1129 (1997).

[6] Seattle Bldg. and Construction Trades Council v. Apprenticeship and Training Council, 129 Wn.2d 787, 799, 920 P.2d 581, reconsideration denied, certiorari denied Construction Industry Training Council of Washington v. Seattle Bldg. and Construction Trades Council, 117 S. Ct. 1693, 137 L.ED.2d 820 (1996). This is so especially when the legislature has silently acquiesced in such construction over a long period. In re Sehome Park Care Center, Inc., 127 Wn.2d 774, 780, 903 P.2d 443 (1995).

[7] In re Sehome Park Care Center, Inc., 127 Wn.2d 774. 778, 903 P.2d 443 (1995).

agents, we find that it is appropriate to examine not only case law concerning the RCW 18.44.010 definition of "escrow," but also any agency interpretations given to it by both DOL and DFI.

[2] Generally, an escrow agent is an objective, expert "third party" who acts as a stakeholder for both the buyer and seller. The escrow agent is charged, by the instructions of the principal parties to a transaction, with receiving the necessary legal instruments, funds, or properties and upon the occurrence of a specified event or performance of a prescribed condition, delivering the items to the parties entitled to receive them.[8]

DOL, which in 1985 administered the Escrow Agent Registration Act, advised in the materials it provided to escrow agents:

> In short, a professional escrow holder is more than simply a trustee who conducts an exchange of considerations in the contract. Escrow provides (1) a custodian who holds the funds and documents, and makes concurrent delivery to the appropriate parties when the terms of the transaction have been performed; (2) a clearing house for payment of all obligations and demands upon which the closing is contingent; (3) an expert who coordinates the interests of all parties to the transaction and ensures that all terms and conditions of the closing have been met; (4) an administrator who performs financial prorations and adjustments, obtains execution of necessary legal instruments, and settles accounts between the parties; and (5) a method which can be used, if desired, to achieve a binding contract between the parties during the period prior to closing.

(Real Estate Division, Department of Licensing, Real Estate Practice in Washington, "Closing Transactions in Escrow" 185 (2d ed. 1985).)

When an escrow agent receives instructions and deposits of instruments or money from the parties to an escrow, he becomes an agent for both parties. An escrow holder thus has the fiduciary responsibilities imposed by his limited agency to deal evenly with both parties and to carry out the instructions given by both of them. An escrow holder is in a fiduciary relationship with all parties to the escrow, owes them the same duty of fidelity as an agent or trustee does his principal, and is liable to them for any damage which proximately results from his breach of the escrow instructions or from exceeding his authority thereunder.[9]

In the materials provided to escrow agents, DOL further advised that this fiduciary relationship to multiple parties of a single contract renders an escrow agent more than simply a trustee, who may

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[8] Real Estate Division, Department of Licensing, Real Estate Practice in Washington, "Closing Transactions in Escrow" 185 (2d ed. 1985).

[9] Delson Lumber Co. v. Washington Escrow Co., Inc. et al, 16 Wn. App. 546, 550, 558 P.2d 832 (1976).

similarly conduct an exchange of considerations in the contract, but works under the instructions only of the donor.[10]

An "escrow" is created when a contract exists between the parties and the instruments, funds, or properties have been delivered to the escrow agent with irrevocable instructions as to his duties. At that point, neither party may unilaterally cancel the escrow or demand return of the items in escrow.[11]

[3] Taking the above into consideration, we conclude that, when a taxpayer is not registered as an escrow agent under RCW 18.44.010, the Department will look to the following to establish whether the taxpayer is engaging in escrow business activities:

a. Delivery of Instruments Must be Conditional and Based upon Binding and Enforceable Underlying Contracts

It is essential to the existence of an escrow that the delivery of an instrument (including funds) by a depositary to a grantee be conditioned upon the performance of some act or the happening of some event. The grantor and grantee must not only be in agreement as to such condition, but it should also be communicated to the depositary, (i.e., the escrow agreement)[12] In the absence of a valid underlying contract between the buyer and seller, there is no basis for the condition upon which delivery of an instrument is based, and thus there is no escrow.[13]

Thus, the basis for the escrow must be a binding and enforceable underlying contract. Escrow agreements do not take the place of agreements for sale, but are vehicles for carrying them to completion.[14]

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[10] Real Estate Division, Department of Licensing, Real Estate Practice in Washington, "Closing Transactions in Escrow" 185 (2d ed. 1985).

[11] Bronx Investment Company v. National Bank of Commerce of Seattle, 47 Wash. 566, 571, 92 Pac. 380 (1907); Nelson v. Davis, 102 Wash. 313, 318, 172 Pac. 1178 (1918); Leichner v. Halling, 35 Wn.2d 903, 912, 216 P.2d 179 (1950). See also, Alan Tonnon, Washington Real Estate Law, "Closing and Escrow" 305 (Rockwell Publishing, 3d ed. 1995).

[12.] Lechner v. Halling, 35 Wn.2d 903, 912, 216 P.2d 179 (1950).

[13.] See Palmer v. Stanwood Land Co., 158 Wash. 487, 492-93, 291 Pac. 342 (1930), wherein a vendor's letter to a bank enclosing a deed to the vendee, with directions to deliver the deed to a broker on receipt of a specified sum, did not operate as an escrow agreement because there was no valid contract between the parties as to the subject matter of the instrument and delivery, and thus was subject to recall by the vendor. See also Nelson v. Davis, 102 Wash. 313, 317-18, 172 Pac. 1178 (1918), in which parties contemplating an exchange of properties executed deeds and left them with the agent as a matter of convenience pending final decision as to whether the original offer was accepted.

[14] Delson Lumber v. Washington Escrow, 16 Wn. App. 546, 550-51, 558 P.2d 832 (1976), citing non-Washington authority.

One of the initial duties of an escrow agent is, therefore, to review the underlying earnest money or purchase/sale agreement to determine whether there is a valid agreement that can be closed. There must be an underlying enforceable contract between the parties before escrow can be opened. The agreement must also contain all the required terms of the underlying transaction. For example, if the sale involves seller financing, the appropriate forms (the note and deed of trust or real estate contract) must be mentioned in and attached to the contract. Otherwise, the sales agreement will be unenforceable, and therefore the escrow will be invalid.[15]

b. Parties Must Have Intended and Agreed to Form an Escrow

Washington case law holds:

> Whether an instrument placed with a third person is to be an escrow or a completely executed instrument depends upon the intention of the parties. If the evidence leaves any doubt upon the subject, the intention of the parties must be determined by the jury upon the whole evidence. A declaration by the depositor that he delivers the instrument as his deed, or that "he delivers [deposits] it as an escrow" is not conclusive, but is a mere matter of evidence to be weighed in connection with other circumstances of the case, in order to determine the real character of the transaction.

(Nelson v. Davis, 102 Wash. 313, 318, 172 Pac. 1178 (1918), citing 10 R. C. L. 626, emphasis added. See also 1 Washington Real Property Deskbook § 34.6 (1981).)
Even more specifically:

> ...Where a written instrument, importing a legal obligation, is deposited by a grantor with a third party, to be kept by the depositary until the grantee pays a stipulated sum, and then to be delivered over to the grantee, an escrow is created.... If the evidence reveals such a situation, the transaction will be treated as a deposit in escrow, regardless of whether the parties have employed that term.... Where they have employed it, however, as is the case here, that is a circumstance which must be taken into account, as the use of the word "escrow" by any of the parties indicates more clearly than any other their actual intention...

(Lechner v. Halling, 35 Wn.2d 903, 913, 216 P.2d 179 (1950), emphasis added, internal citations omitted.)

The parties must have intended and actually agreed to form an escrow. Either a joint escrow agreement, or separate but consistent escrow agreements, must have been reached between all parties.[16,17] DOL materials for escrow agents advise that neither the earnest money agreement

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[15] See, Alan Tonnon, Washington Real Estate Law, "Closing and Escrow" 305 (Rockwell Publishing, 3d ed. 1995).

[16] See Delson Lumber Co., Inc. v. Washington Escrow Co., Inc. et al, 16 Wn App. 546, 551, 558 P.2d 832 (1976)

between buyer and seller, nor the closing statement of account settlement prepared by the escrow agent, constitute escrow instructions.[18]

Even though it might be colloquially described as an "escrow", absent such specific agreement between the parties as to escrow instructions, the depositary's fiduciary duties are legally only those of an agent or trustee to a single principal.[19] Possession of the funds by the depositary has not passed beyond the depositor's control, and an escrow has therefore not been established.[20]

c. Closing Instructions and Deliveries into Escrow Must Be Irrevocable

DOL materials advised escrow agents that an "escrow" is created when a contract exists between the parties and the instruments, funds, or properties have been delivered to the escrow agent with irrevocable instructions as to his duties. At that point, neither party may unilaterally cancel the escrow and demand return of the items in escrow.[21] Closing instructions to the agent as to his

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[17] We note that WAC 308-128D-040, which concerns escrow records and escrow agent responsibilities, currently provides that agreed-upon instructions to the depositary by the principals are necessary in this state to establish an escrow:

> The escrow agent shall be responsible for the effecting and closing of escrow agreements between the principal parties. The agent shall as a minimum:
>
> (1) Prepare or accept an instrument of escrow instructions among each principal and the agent based upon a written agreement signed by the principals. The escrow instructions shall not be modified except by written agreement signed by the principals and accepted by the agent. . . .
>
> (3) Provide the services and perform all acts pursuant to the escrow instructions.

Therefore, despite any earlier case law to the contrary, escrow agreements between the escrow agent and those principals who the escrow agent will represent before an escrow is established should be in writing. We note, however, that breach of this one regulatory requirement, standing alone, would not be a bar to a finding that an escrow exists.

[18] 189 (2d ed. 1985); Audit Section, State of Washington Department of Licensing, Trust Account and Record Keeping Reference Manual 11, (3d ed., Apr. 1994); See also Fred B. Phillips, Jr., Washington Closing Officer's Guide, Issue No. 11, "Closing Agreements and Instructions" 52 (Butterworth Legal Publishers, Nov 1994).

[19] Miller v. Smith, 119 Wash. 163, 167, 205 Pac. 386 (1922).

[20] The Washington Supreme Court in Gray v. England, 69 Wn.2d 52, 57-58, 417 P.2d 157 (1966) found that a depositary under instructions from only one of the principals to a real estate contract nonetheless owed a fiduciary responsibility to a third party beneficiary. This duty, however, was found to exist under contractual principles, and not those of an escrow.

[21] Real Estate Division, Department of Licensing, Real Estate Practice in Washington, "Closing Transactions in Escrow" 185 (2d ed. 1985); Bronx Inv. Co. v. National Bank of Commerce, 47 Wash. 566, 571, 92 Pac. 380 (1907).

duties must be irrevocable, rendering deposits to the depositary beyond the control of the depositors.[22]

Similarly, deliveries to the escrow agent must be complete and irrevocable, and depositors must have parted with all rights of possession or control over their deposits.[23]

The Washington Supreme Court has made it clear that, once a valid deposit has been made in accordance with an escrow contract of the parties to an agreement, neither party can revoke the escrow during the escrow period without the consent of the other. In the absence of a valid escrow agreement between the parties to the underlying purchase agreement, the deposit is revocable by the depositor, and the authority of the depositary to deliver the documents or money to the other party may be unilaterally withdrawn. Whether a depositary is acting as an escrow is a question of fact:

> The law of escrow agreements is well stated . . . as follows:
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> "Where the possession of the depositary is subject to the control of the depositor, an instrument cannot be said to be delivered, and it is not an escrow. While as will be seen, the depositor's right of possession may return if the specified event does not happen, or the conditions imposed are not performed, yet to constitute an instrument an escrow it is essential that the deposit of it should be in the meantime irrevocable; that is, that when the instrument is placed in the hands of the depositary, it should be intended to pass beyond the control of the depositor, and that he should actually part with all present or temporary right of possession and control over it. In case the deposit is made in furtherance of a contract between the parties, the contract must be so nearly complete that it remains only for the grantee or obligee or another person to perform the required condition, or for the event to happen, to have the instrument take effect according to its import." . . .
>
> Once deposited in escrow, an instrument passes beyond the control of the depositor, and he may not recall it.... Upon the performance of the condition named, the depositary must deliver it to the grantee. A deposit in escrow, therefore, amounts, by its terms, to a conditional delivery.... [T]here can be no escrow unless the delivery of the instrument by the depositary to the grantee or obligee is conditioned upon the performance of some act, or the happening of some event, ... and it is essential to the constitution of an escrow, not only that the grantor and the grantee are at one as to the conditions under which the deposit is to be made, but that such conditions should be communicated to the depositary.

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[22] See Fred B. Phillips, Jr., Washington Closing Officer's Guide, Issue No. 11, "Closing Agreements and Instructions" 52 (Butterworth Legal Publishers, Nov 1994).

[23] See, Alan Tonnon, Washington Real Estate Law, "Closing and Escrow" 305 (Rockwell Publishing, 3d ed. 1995).

(Lechner v. Halling, 35 Wn.2d 903, 912, 216 P.2d 179 (1950) (emphasis added, internal citations omitted).)

Conclusion

In reviewing this case, we conclude that Taxpayer was not an engaging in escrow agent activities even though it may have been involved in "transfers of ownership", "lien clearance and satisfactions", and "trust and closing services." In making this determination, we look to the following factors:

a. The Delivery of Instruments Must be Conditional and Based upon Binding and Enforceable Underlying Contracts

First, because no arguments have been advanced here to the contrary, for purposes of deciding this case it will be assumed that the underlying contracts between the sellers and purchasers of vessels were enforceable and in writing. We note, however, that Taxpayer does not normally have or maintain copies of these agreements, even though an escrow is a vehicle for carrying underlying agreements to completion. Further, both Buyer and Seller Trust Instructions contain specific disclaimers that Taxpayer, as Trustee, "is under no obligation and has no duties whatsoever in connection with any agreements or contracts made between Buyer, Seller. . . ", or any other parties to the transactions.

Second, Taxpayer's Addendum to the Buyer Trust Instructions advised buyers that lienholder would not be paid directly from trust funds, but that sellers would be paid directly and would then be responsible for extinguishing underlying liens. Titles were then not conveyed to buyers until sellers - not Taxpayer - obtained lienholder' releases. Because Taxpayer was not bound to either pay underlying lienholder or withhold funds from sellers until clear titles were obtained, Taxpayer did not hold funds "until the happening of a specified event or the performance of a prescribed condition".[24] Thus Taxpayer, as DOL stated in its August 30, 1994 letter, was not required to register as an escrow agent.

b. Parties Must Have Intended and Agreed to Form an Escrow

There was no evidence submitted that the buyers, sellers, or Taxpayer in each of these transactions intended to form an escrow relationship. One indicator regarding the parties' intent was that there is no mention of the term "escrow" in Taxpayer's brochure, and there are no written escrow instructions, as such, between the parties. Although Taxpayer concedes that it represents and operates under instructions from both parties in boat sales, there is no evidence that buyers and sellers together entered into written escrow agreements or formulated mutually-agreed-upon

[24] RCW 18.44.010(3).

instructions for Taxpayer to follow. Taxpayer submits that the parties were all orally advised from the outset that Taxpayer was not acting in the capacity of an escrow agent.

c. Closing Instructions and Deliveries into Escrow Must be Irrevocable.

Agreed-upon escrow instructions must be binding on all parties. In this case, however, both Buyer and Seller Trust Instructions by their very terms merely authorized, but did not require, the crediting and debiting of accounts and disbursement of funds, documents, and other credit items. Such permissive language is not in the nature of binding escrow instructions.

When only a buyer or only a seller agrees to use the services through the buyer's trust, Taxpayer is an agent for only that buyer or seller, and monies or documents clearly may be, and occasionally are, withdrawn. When, as in this case, in the same transaction a seller separately agrees through a seller's trust and the buyer through a buyer's trust, there is no escrow agreement binding all parties. Taxpayer is acting as a fiduciary for the buyer and seller, each individually. Although Taxpayer may owe a duty of fairness to the seller when operating as a fiduciary to the buyer, and vice versa, deposits by either are still revocable.

Additionally in this case, testimony and documentary evidence of past practices has established that parties were routinely permitted to unilaterally withdraw funds/documents before the exchanges between them were completed. This fact supports Taxpayer's contention that it was not under irrevocable instructions from either party, and that deposits were likewise not irrevocable.

DECISION AND DISPOSITION:

Taxpayer's petition for correction of assessment is granted.

Dated this 31st day of August, 1998.

APPENDIX A

Taxpayer has provided a statement of the following services which it offers its clients:

> [Taxpayer] is a vessel documentation company that also provides closing services:
>
> DOCUMENTATION SERVICES:
> Consultation on various aspects of documentation.
> Ownership verification with U.S. Coast Guard only.
> Lien search from Coast Guard records only.
> Preparation of all applications required to re-document the vessel.
> Submission of applications.
> Follow-up until issuance of the vessel's document.
>
> CLOSING SERVICES:
> Department of Revenue personal property tax search.
> Department of Revenue and Internal Revenue tax lien search.
> Consultation on Department of Revenue tax regulations.
> Collection and submission of use/sales taxes and state registration fees for buyer.
> Consultation of various aspects of State titling and registration.
> UCC filing search.
> Ownership verification with Department of Licensing.
> Legal owner verification with Department of Licensing.
> Preparation of all applications required to state title and register the vessel.
> Submission of all applications.
> Follow-up until issuance of the vessel's title and registration.
>
> Funds conveyance between the buyer and seller has historically been provided by all documentation companies as a free courtesy accommodation. We follow the same practice, therefore none of our revenue is derived from this source.

(Taxpayer's Statement as to services provided (Exhibit #1), dated November 11, 1994.)

APPENDIX B

Taxpayer's Customer Information Brochure (undated) describes its services generally as falling into three categories: "Marine Documentation", "State Titling", and "Vessel Registration". This brochure speaks only of "trust and closing services", not escrow services. It lists the services it offers as follows (emphasis added):

> Complete documentation services
> Preferred vessel mortgages
> Transfers of ownership

Lien clearance and satisfactions
Marking and homeport changes
Title searches nationwide
Trust and closing services
Registration services nationwide
Tax and filing fee estimates
Titling services nationwide
Charter boat registrations
Titling and registration consultation
Title reconstruction
Abstracts and certificates of title

It also describes itself as having:

Courteous and professional staff
Prompt and efficient service
Fully insured
Bonded notary public
Closing and conference facilities
Computerized document processing
Convenient location...
Plenty of available parking