BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Correction of Reporting Instructions for	)	D E T E R M I N A T I O N
	)	No. 99-032
. . .	)	Registration 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 long-standing 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.

[OVERRULES 12 WTD 165 in part]

[4] RULE 197(2): - INTEREST INCOME – CONTRACTUAL RIGHT TO INTEREST BY 1031 EXCHANGER. Interest income earned while in an account

that contractually belongs to the 1031 exchanger is not income taxable to the taxpayer, a 1031 facilitator.

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:

Real estate Section 1031 exchange facilitator appeals determination that it is taxable as an escrow company and that interest earned by the client is taxable to the facilitator.[1]

FACTS:

Munger, A.L.J. -- . . . the taxpayer, is a company that acts as a real estate exchange facilitator under Section 1031 of the Internal Revenue Code. In that capacity, the taxpayer acts on behalf of a person who wishes to sell real estate (the exchanger) without being subject to the capital gains tax. The taxpayer, as a facilitator, finds replacement property for the exchanger after first selling the exchanger's property. The funds from the first sale are held in an interest bearing account at a bank per the Deferred Exchange Agreement until they are used to purchase the replacement property for the exchanger. Federal regulations limit the amount of time the funds can be held without replacement property being purchased. If the funds are held too long, the exchanger may be subject to the capital gains taxes it seeks to avoid.

The exchanger, per the federal IRS code, may not have control over its funds while the purchase of the replacement property is still pending and still avoid the capital gains taxes. However, once the replacement property has been purchased (or if the deal falls through) any remaining funds and interest not used to purchase the replacement property are returned to the exchanger. The sale of the exchanged property and purchase of replacement property go through an escrow closing. The taxpayer does not act as an escrow service in the traditional sense of handling closings with a buyer, seller and lender. It only acts on behalf of the exchanger.

The taxpayer, as a facilitator, never takes title to any of the properties during this process. The taxpayer's contractual liability is to the exchanger. The interest earned while the exchanger's funds are in the bank account is reported as taxable income under the Internal Revenue Code to the exchanger. Per the "Summary of Duties and Fee Agreement" entered into between the taxpayer and its exchanger clients, all interest earned belongs to the exchanger. The taxpayer charges fees for this facilitation service, and it is this income, as well as the interest earned in the accounts, that is in question.

The Department of Revenue's (Department) Taxpayer Information and Education Section (TI&E), by letter dated January 4, 1995, determined that the taxpayer's activities as an exchange facilitator

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

constituted an escrow service performed by a non-attorney. As such, the taxpayer's fees would be subject to the retail sales tax and its income taxable under the retailing classification of the business and occupation (B&O) tax. The taxpayer contends that its activities are not an escrow service and, therefore, not subject to the retail sales tax or the retail classification of the B&O tax.

The taxpayer has also objected to his client's interest income being taxable to him. Although the TI&E letter of January 4, 1995 does not directly address interest, it does refer to a prior published determination of the Department indicating that the interest may be taxable income of a Section 1031 exchange facilitator.

ISSUES:

A. Are the activities of a Section 1031 exchange facilitator categorized as escrow services for the purposes of the retail sales and B&O taxes?

B. Is interest income earned on the exchanger's funds while in the facilitator's account taxable to the facilitator?

DISCUSSION:

A. Section 1031 facilitator as escrow agent issue:

[1] Under RCW 82.04.050(3)(b), the fees charged for escrow services are retail sales. The Escrow Agent Registration Act defines "escrow" and "escrow agent" in RCW 18.44.010 as follows:

> (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, promissor, obligee, obligor, lessee, lessor, bailee, bailor, or any agent or employee thereof.
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> (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.

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". This statutory definition is

subject to the interpretation given it by courts.[2] Further, agency interpretation of a statute is given deference when a statute is ambiguous and the agency is charged with its administration and enforcement.[3]

A prior published determination has already concluded that Section 1031 exchange facilitators are performing escrow services under the above definition of escrow. Det. No. 92-128, 12 WTD 165, 167 (1992) stated that:

> It would not only be contrary to the language of Rule 156 but also inconsistent with the theory behind it to find that the facilitator is not acting in an escrow capacity. Since the facilitator is acting in an escrow capacity, the fees are taxed as retail sales subject to retail sales tax.

Besides disagreeing with this prior determination, the taxpayer attempts to distinguish it by noting subsequent amendments to the federal regulations governing exchange facilitators. Facilitators are no longer required to take title to any of the property of the exchange. This, however, is irrelevant to the Rule 156 definition of "escrow," which does not require that an escrow agent ever take title to the property involved in the transaction.

We will, however, revisit this 1031/escrow issue, utilizing a detailed analysis of the term “escrow”, as it is used in Washington law.

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,[4] we find it appropriate to also look to the agency interpretations. Because the Washington Department of Licensing (DOL) for many years was the enforcing agency governing the registration and business activities of the vast majority of escrow businesses in this state, and because the Department of Financial Institutions (the new agency overseeing escrow companies) has not yet withdrawn or amended the regulations or informational materials made available to escrow 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 the Department of Licensing and the Department of Financial Institutions.

[2] Generally, an escrow agent is an objective, expert "third party" that acts as a stakeholder for both the buyer and seller. The escrow agent is charged, by the instructions of the principal parties to a

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[2] 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).

[3] 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).

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

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.[5]

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/she becomes an agent for both parties. An escrow holder, thus, has the fiduciary responsibilities imposed by his/her 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.[6]

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 similarly conduct an exchange of considerations in the contract but works under the instructions only of the donor.[7]

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

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

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

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.[8]

[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).[9] 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.[10]

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.[11]

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

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[8] 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).

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

[10] 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. Thus the deed 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 a final decision as to whether the original offer was accepted.

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

contract) must be mentioned in and attached to the contract. Otherwise, the sales agreement will be unenforceable, and, therefore, the escrow will be invalid.[12]

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.[13,14] DOL materials for escrow agents advise that neither the earnest money agreement

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

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

[14] 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:

between buyer and seller, nor the closing statement of account settlement prepared by the escrow agent, constitute escrow instructions.[15]

Even though it might be commonly 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.[16] Possession of the funds by the depositary has not passed beyond the depositor's control, and an escrow has, therefore, not been established.

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.[17] Closing instructions to the agent as to his duties must be irrevocable, rendering deposits to the depositary beyond the control of the depositors.[18]

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.[19]

> The escrow agent shall be responsible for the effecting and closing of escrow agreements between the principal parties. The agent shall as a minimum:
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> (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. . . .
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> (3) Provide the services and perform all acts pursuant to the escrow instructions.

[15] 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).

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

[17] 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).

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

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

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." . . .
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> 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.

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

In reviewing this case, we conclude that the taxpayer, while acting as a real estate exchange facilitator under Section 1031 of the Internal Revenue Code, was not acting as an escrow agent. Even though taxpayer, for IRS purposes, is not considered to be the exchanger's agent, it clearly does not play the role of a disinterested third party like an escrow agent. A Section 1031 facilitator is a unique, federally-defined entity that does not have all the necessary characteristics of an escrow agent. 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

Although the taxpayer did hold the exchanger's funds in a bank account "until the happening of a specified event or the performance of a prescribed condition", there was no third party to the "Deferred Exchange Agreement" as required in an escrow arrangement.[20] Additionally, when the 1031 property was bought or sold, traditional escrow services were used in the closings. Thus, the taxpayer, 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 taxpayer, the exchanger or the sellers of the new property, in these transactions, intended to form an escrow relationship. One indicator regarding the parties' intent was that there is no mention of the term "escrow" relating to the taxpayer's services in the taxpayer's standard form fee contract, and there are no written escrow instructions, as such, between the parties.

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

Agreed upon escrow instructions must be binding on all three parties. In this case, any purchase or sale of exchange property, however, could be cancelled by the exchanger. There is no third party contractually involved that the taxpayer owes a duty to. The exchanger, if it does not follow through with all federally mandated steps of a 1031 exchange, risks the capital gains tax consequences associated with selling its original property, and not obtaining appropriate exchange property. The exchanger cannot be compelled to complete the transaction by the facilitator. Although for federal purposes, a 1031 facilitator is not the exchanger's agent, for state tax and analysis of escrow purposes, the taxpayer's role is more akin to that of the exchanger's agent than of a neutral, third party escrow service.

Det. No. 92-128, 12 WTD 165 (1992), to the extent that it is inconsistent with the above, is hereby overruled. The taxpayer's fee income received for Section 1031 facilitator services should not be taxed as retail sales. Its gross income from these services should be taxed under the "service and other" B&O tax classification.

B. Interest income issue.

[4] In Det. No. 92-128, 12 WTD 165, 169 (1992), the issue of the interest earned on the exchanger's funds while being held by the facilitator was addressed as follows:

> The transactions involving facilitator are peculiar, in that it is difficult to determine upon whose funds the interest is earned. Certainly, the funds are held by the

[20] RCW 18.44.010(3).

> facilitator only with the understanding that they will be used to purchase designated property. Otherwise, they will be returned to the original seller. They are not necessarily the property of the facilitator. Certainly, the financial institution paying the interest considers the amount paid as interest. However, it is not necessarily appropriate to consider the amount received by the facilitator interest. It may be a negotiated amount in lieu of a fee to act as a facilitator. All the facts and circumstances of a particular transaction need to be reviewed.
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> If the amount of the interest paid in the transaction is in lieu of an escrow fee, it would be classified as a retail sale, subject to retail sales tax. If it is interest, it should be analyzed under the guidelines in ETB 505 and if not exempt, but taxable as interest rather than in lieu of a facilitator's fee, taxed under the service classification.

In the present case, the critical initial question relates to who has earned the interest income. As the above determination states, all the circumstances of a particular transaction should be considered. Det. No. 92-128, supra, was based on facts where the facilitator retained the interest. If that were the case here, the question would only be whether that income should be taxed as a part of the facilitator's fees or as interest income, each taxed under the service classification of the B&O tax.

The taxpayer's "Summary of Duties and Fee Agreement" makes it clear that the client\exchanger is entitled to the interest earned and not the taxpayer\facilitator. Section 2.D. states in part that: "Exchanger shall receive interest of two and one half percent per annum. Such client interest shall, at the option of the Exchanger, be paid to Exchanger in cash upon closing…[or be]…applied to the purchase price of the Replacement Property…" and "Exchanger is aware that interest earned is taxable in year earned." The "Deferred Exchange Agreement" between the taxpayer, the exchanger and the bank also states that "Custom 1031 will prepare a 1099 for the Exchanger." Consequently, the interest earned on the exchanger's funds in the bank account is never income that the taxpayer is "legally entitled to receive" for the purposes of determining taxable income under WAC 458-20-197(2).[21] Given the circumstances in the taxpayer's case, the interest earned on an exchanger's funds should not be included in its gross income for B&O tax purposes.

DECISION AND DISPOSITION:

The taxpayer's petition is granted. This file is remanded to TI&E to allow taxpayer to report as B&O service & other income and not as retail sales. [22]

Dated this 24th day of February, 1999.

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[21] In the event the contractual terms between the taxpayer and the exchangers change, and the taxpayer becomes entitled to any of the interest earned on the exchanger's funds, then the taxpayer would be taxable on such income.

[22] The "service and other" B&O tax rate is set forth in RCW 82.04.290(2). For affected periods prior to July 1, 1998, the taxpayer should report under the "selected business services" B&O tax category under the former RCW 82.04.055.