

Cite as 3 WTD 465 (1987)

BEFORE THE INTERPRETATION AND APPEALS SECTION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition)	<u>D</u> <u>E</u> <u>T</u> <u>E</u> <u>R</u> <u>M</u> <u>I</u> <u>N</u> <u>A</u> <u>T</u> <u>I</u> <u>O</u>
<u>N</u>	
For Correction of Assessment of)	
)	No. 87-262
)	
. . .)	Real Estate Excise Tax
)	Affidavit No. . . .
)	

[1] **REAL ESTATE EXCISE TAX:** WAC 458-61-550 -- SALE -- NOMINEE -- THIRD PARTY PRINCIPAL -- PARTNERSHIP IN PROCESS OF FORMATION. A transfer by a nominee to a third party principal was not subject to the real estate excise tax, even though the third party principal was a limited partnership in the process of formation at the time of the initial transfer, where the following requirements were met:

- (1) the proper tax was paid on the initial transaction;
- (2) the affidavit for the initial transaction disclosed that the grantee was acting as a nominee for a third party;
- (3) the funds used to acquire the property were partnership funds; and
- (4) the nominee did not own any beneficial interest in the property in its own right.

(Senfour Investment Co., Inc. v. King County,
cited.)

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.

TAXPAYER REPRESENTED BY: . . .

DATE OF HEARING: February 10, 1987

NATURE OF ACTION:

The taxpayer protests the assessment of real estate excise tax, contending the transfer was without consideration as a transfer by a nominee to its principal.

FACTS AND ISSUES:

Frankel, A.L.J. -- This appeal concerns the purchase of the . . . real property. The taxpayer, a real estate development company, took title to the property on September 11, 1985. The property was transferred by Statutory Warranty Deed. The deed stated the taxpayer took title as "nominee for a partnership to be formed."

The taxpayer stated the property was conveyed to a "nominee" because the process of creating the limited partnership was not completed at the time the sale was required to close. The total consideration for the property was paid by the taxpayer, which at that time had agreed to be the sole general partner in the limited partnership.

The only limited partner was the president of the taxpayer corporation. He explained the course of events concerning the purchase as follows:

As defined in the Option to Purchase Agreement dated March 24, 1984, this property was to be purchased by . . . Development Company and/or Assigns. It was always our intent that title of this property vest in a limited partnership.

At the time of closing September 11, 1985, (deed recorded September 17, 1985), the . . . Certificate and Agreement of Limited Partnership was still being reviewed and examined for final execution and filing with the Secretary of State. Since we were obligated to close the transaction, [taxpayer] Company took title to this real property as nominee

for a partnership to be formed. The terms of this purchase were all cash on closing.

After the formation (September 30, 1985) and filing (October 16, 1985) of the . . . Certificate and Agreement of limited partnership, title to the property was transferred from [taxpayer] to the partnership on November 4, 1985 (recorded November 6, 1985). This transfer took place for no consideration.

The taxpayer provided copies of the deeds and Certificate and Agreement of the Limited Partnership which support its statement of the facts.

The Department assessed tax in the amount of \$. . . plus delinquent penalties of \$. . . on the transfer by the taxpayer to the partnership. The revenue officer stated that the nominee exemption only applies if the third party is an entity at the time of the original transfer.

The taxpayer protests the assessment for the following reasons:

- 1) No statute or regulation required that the third party principal be in legal existence at the time of the first conveyance;
- 2) The purpose of the nominee rule was to avoid an inequitable double taxation in a situation where the parties intend the property to be conveyed to an entity not yet formally organized, but for reasons related to the required closing date, loan commitment expiration dates, or other obligations the transfer of title may not be delayed; and
- 3) The second transfer to the limited partnership was not taxable because it was not a sale for valuable consideration.

DISCUSSION:

- 1) The real estate excise tax is imposed on sales of real property. The term "sale" includes transfer of real property "for a valuable consideration." RCW 82.45.010. If the second transfer was without consideration, no real estate excise tax applies.

The taxpayer took title as nominee for the limited partnership which was in the process of formation at the time. It contends its subsequent transfer of title to the partnership was exempt from real estate excise tax because:

- 1) The proper tax was paid on the initial transaction; and
- 2) the affidavit for the initial transaction disclosed that the grantee was acting as a nominee for a third party.

The taxpayer stated it received no consideration from the limited partnership in connection with the second transfer.

WAC 458-61-550 is the administrative rule which deals with the transfer of property to and by a nominee. During the time at issue, the rule provided¹:

When a nominee has received title to or interest in real property on behalf of a third party, the real

¹Effective September 5, 1986, Rule 550 was amended. The amended rule states:

When a nominee has received title to or interest in real property on behalf of a third party principal, the real estate excise tax does not apply to the subsequent transfer of the property from the nominee to the third party, provided that:

- (1) The proper tax was paid on the initial transaction;
- (2) A notarized statement, as provided in WAC 458-61-150, is attached to the affidavit for the second transaction. Such notarized statement must be dated on or prior to the first transaction;
- (3) The third party principal was in legal existence at the time of the initial transaction;
- (4) The funds used by the nominee to initially acquire the property were provided by the third party principal; and
- (5) The subsequent transfer from the nominee to the third party principal is not for a greater consideration than that of the initial acquisition.

estate excise tax does not apply to the subsequent transfer of the property from the nominee to the third party, provided both (1) the property tax was paid on the initial transaction, and (2) either the affidavit for the initial transaction disclosed that the grantee was acting as a nominee for a third party, or a notarized statement which explains the nominee relationship is attached to the affidavit for the second transaction. Such notarized statement must be dated on or prior to the first transaction.

In Senfour Investment Co., Inc. v. King County, 66 Wn.2d 67 (1965), a trustee took title for a corporate beneficiary that was in the process of formation at the time set for closing the sale. The court held the trustee's transfer of title to the corporation after it came into existence was not a sale for purposes of the real estate excise tax. The court found the transfer was "simply the mechanical performance of the obligation of the admitted trust." 66 Wn.2d at 69-70. We believe Senfour is apposite.

As the taxpayer took title as nominee for the partnership which was in the process of formation and the funds were provided as general partner for the limited partnership, the transfer of title to the partnership after the final execution and filing of the Certificate and Agreement was not subject to the real estate tax. The taxpayer took title only because the legal processes necessary to form the limited partnership were not complete at the closing date. It did not own a beneficial interest in the property in its own right, but held the property for the benefit of the partnership during the interim period. As soon as the partnership agreement was executed and filed, it conveyed the property to the partnership. As Senfour stated, "[s]uch a conveyance is not a sale for a valuable consideration as required by the statute."

DECISION AND DISPOSITION:

The taxpayer's petition is granted.

DATED this 7th day of August 1987.