Cite as Det. No. 03-0031, 22 WTD 214 (2003)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Refund of	)	D E T E R M I N A T I O N
	)	
	)	No. 03-0031
	)	
. . .	)	Registration No. . . .
	)	REET Refund
	)	Docket No. . . .

[1] RCW 82.45.010(1): REAL ESTATE EXCISE TAX (REET) – DATE OF SALE – CONTINGENT SALES PRICE. The date of sale for REET purposes occurs on the transfer of ownership of real property. When the sales price of real property is not fixed on the date ownership is transferred, the date of sale is still the date ownership of real property is transferred, not the date the sales price becomes fixed.

[2] RCW 82.45.100(5): REAL ESTATE EXCISE TAX (REET) - REFUNDS – FOUR YEAR LIMITATION. The nonclaim statute for REET refunds is four years from the date of sale.

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.

Chartoff, A.L.J. – Taxpayer seeks a refund of a portion of real estate excise tax (REET) paid in 1996 attributable to a contingent note received as consideration. The contingent note became worthless three years after the sale. The Department of Revenue (DOR) finds that Taxpayer's 2002 claim is barred by the statute of limitations and denies his petition for refund.[1]

ISSUES

On a sale of real estate where the sales price is contingent on events to occur after the closing date of the sale, does the statute of limitations for refund of REET run:

a. From the closing date of the sale; or
b. From the date the contingency either occurs or lapses thereby fixing the sales price?

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

FINDINGS OF FACT

Taxpayer was the owner of a parcel of commercial real estate. Taxpayer entered into a contract to sell the parcel to Buyer who intended to construct a gas station and convenience store on the parcel. The parties agreed that the value of the parcel was contingent on whether Buyer would be able to acquire a liquor license. Therefore, the parties structured the sale so that the purchase price would be discounted if Buyer was unsuccessful in obtaining a liquor license.

Buyer gave Taxpayer, as consideration for the sale, $ . . . consisting of cash, a note and deed of trust in the face amount of $ . . . , and a second note and deed of trust in the face amount of $ . . . (hereinafter, the "contingent note"). The contingent note imposed no interest and was payable only if Buyer was granted a liquor license within three years of the sale.[2] Buyer pledged to use its best efforts to acquire the liquor license, and both parties believed from their discussions with the liquor control board that Buyer would be able to obtain a liquor license.

Taxpayer did not intend for the face amount of the contingent note to be included in the sales price for purposes of REET. However, the escrow agent handling the sale informed Taxpayer, after speaking with the . . . County Treasurer's Office, that the face value of the contingent note had to be included in the sales price for purposes of calculating the REET. Accordingly, REET was calculated based on the face value of the two notes, plus the cash received.

The sale closed and title transferred to Buyer on March 5, 1996. Taxpayer paid REET at closing. Ultimately Buyer was unable to obtain a liquor license, and the contingent note became null and void on March 5, 1999, three years from the date of sale.

On April 30, 2002, Taxpayer filed a petition for refund of the portion of the REET attributable to the contingent note. The county treasurer forwarded the refund request to the Special Programs Division of the DOR for refund determination. The Special Programs Division held that the refund request was barred by the statute of limitations. On August 12, 2002, Taxpayer filed this appeal with our office.

ANALYSIS

RCW 82.45.060 imposes REET upon each sale of real property. REET is calculated as a percentage of the sales price and is "due and payable immediately at the time of sale." RCW 82.45.060; RCW 82.45.100(1).

[1] A "sale" for purposes of REET is defined as "any conveyance, grant, assignment, quitclaim, or transfer of ownership of or title to real property . . . for valuable consideration." RCW 82.45.010(1).

[2] The note was payable in full if Buyer received an unrestricted liquor license. If Buyer received a restricted liquor license, 50% of the note would be payable, and the remainder would be forgiven. Finally, if Buyer was unable to secure a liquor license within three years, the entire balance of the note would be forgiven.

In this case, Taxpayer transferred title to real property to Buyer on March 5, 1996. In exchange, Taxpayer received valuable consideration in the form of cash and two notes and deeds of trust. Therefore, the "time of sale" was March 5, 1996. [3] Taxpayer paid the REET at the time of sale. Taxpayer petitioned for a refund of the portion of the tax attributable to the contingent note on April 30, 2002, more than six years from the date of sale. The DOR does have the authority to issue REET refunds in certain circumstances. WAC 458-61-100. However, the DOR may not issue a refund more than four years from the date of sale, except in the limited circumstances stated in RCW 82.45.100(5):

> No assessment or refund may be made by the department more than four years after the date of sale except upon the showing of:
>
> (a) Fraud or misrepresentation of a material fact by the taxpayer;
> (b) A failure by the taxpayer to record documentation of a sale or otherwise report the sale to the county treasurer; or
> (c) A failure of the transferor or transferee to report the sale under RCW 82.45.090(2).

There is no evidence to suggest any of these exceptions apply to Taxpayer's case. Therefore, the DOR may not grant a refund in this case because the statute of limitations has run.

We have carefully considered each of Taxpayer's arguments, several of which we will specifically address. First, Taxpayer argues that this transaction was not a sale but an option agreement, and that the sale for purposes of REET did not occur until the date the option lapsed. It is true that REET does not apply to the grant of an option to purchase, and is instead imposed if and when the option is exercised. WAC 458-61-555. However, Taxpayer's transaction is not an option to purchase real estate.

An option to purchase real property is defined as follows:

> A contract by which an owner of realty enters an agreement with another allowing the latter to buy the property at a specified price within a specified time, or within a reasonable time in the future, but without imposing an obligation to purchase upon the person to whom it is given. BLACKS LAW DICTIONARY, 1121 (7th ed. 1999).

In Taxpayer's case, Buyer actually bought the parcel at the time of sale. The sale of the property was not contingent on Buyer exercising an option.

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[3] Taxpayer cites to RCW 82.45.010(3)(h) in arguing that the contingent note was not part of the real estate sale. RCW 82.45.010(3)(h) states that "The term 'sale' shall not include: . . . (h) A mortgage or other transfer of an interest in real property merely to secure a debt." Taxpayer argues that the contingent note and trust deed were an interest in real property given merely to secure a debt. We find that Taxpayer misreads the statute by ignoring the word "merely." The note was not *merely* to secure a debt. The note was in fact given in exchange for real property. Therefore, the exception stated in RCW 82.45.0101(3)(h) does not apply.

Second, Taxpayer argues that the tax should not be imposed until the sales price is fixed. This reading is contrary to the statute, which clearly requires tax to be determined and paid at the time of sale. RCW 82.45.100(1). The statute does anticipate that in some cases, the selling price will not be ascertained at the time of sale. In those cases, the statute provides alternative methods of calculating the REET. *See* RCW 82.45.030; WAC 458-61-030(10). Because Taxpayer's claim is barred by the statute of limitations, we will not address the computation of the REET in this case.

[2] Finally, Taxpayer argues that the . . . County Treasurer's office required him to pay REET on the full face value of the contingent note. Taxpayer's remedy in this case was to file for a refund within four years of the date of sale. We also note that the contract contingency expired three years from the date of sale giving Taxpayer another full year to file for refund prior to the running of the statute of limitations.

While the statute of limitations can have harsh consequences in certain cases, it does serve an important function. As the Board of Tax Appeals explains in BTA Docket No. 47497 (1996):

> The purpose of a statute of limitations is the policy of repose-- instilling a measure of certainty and finality into one's affairs. Without the certainty of closure, both government and citizens would be required to live with unending uncertainty. Limitations work in both directions--taxpayers have a limited period of time in which to reclaim taxes paid in error or in an excessive amount; the assessor has a limited time in which to correct underassessments which result in underpayment of taxes. Further remedy for the (Taxpayer), if any, must come from the Legislature which wrote the law.

We are mindful of Taxpayer's frustration with the law. However we do not have the authority to overrule a statute.

DECISION AND DISPOSITION

Taxpayer's petition for refund is denied.

Dated this 13th day of February 2003