

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

In the Matter of the Petition)	<u>D E T E R M I N A T I O N</u>
For Ruling of Real Estate Excise)	
Tax Liability of)	No. 88-294
)	
. . .)	Unregistered
)	
)	

- [1] **REAL ESTATE EXCISE TAX:** WAC 458-61-550 -- SALE -- FORM OF TRANSACTION CONTROLS. Where contract vendors and vendees agreed to forfeit the original contract and then execute a new contract reinstating the original terms, real estate excise tax was due on the second sale even if the purpose of the transactions was to quiet title.

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.

FACTS AND ISSUES:

Frankel, A.L.J. -- Mr. [P] (hereinafter also referred to as the petitioner) set forth the background facts relating to the transaction at issue in a letter to the deputy prosecutor in the county where the property was located. He stated that in 1977, he and two others ([C] and [G]) purchased a 70 acre orchard from the . . . on real estate contract. [C] and [G] subsequently sold their interests to [F] and [S]. Real estate excise tax was paid on these transactions.

In 1986, Mr. [S] became insolvent and stopped paying his share of the payments due under the contract. Prior to filing bankruptcy, [S] quitclaimed his interest in the property to [P] and [F] without their knowledge or consent. (. . .). The sellers made demand for payment on the two remaining contract vendees ([P] and [F]).

Because there were numerous liens against the property as a result of judgments against [S], [P] and [F] asked the vendors to declare a forfeiture and then re-sell the property to them on a contract with the same terms and conditions as the original contract. They wanted to sell [S]' former interest to another party (. . .). [P] and [F] offered to pay the vendor's attorney for all legal fees and costs in order to clear title. The vendors agreed.

A Declaration of Forfeiture of the contract was filed April 24, 1987. On April 30, 1987, the [sellers] re-sold the property on real estate contract to the [P]s and [F]s. The contract states a purchase price of \$293,451.96 and acknowledges that \$13,565.94 of that amount already had been paid.

Mr. [P] sought a decision from the county prosecutor that no real estate excise tax was due on the declaration of forfeiture or the subsequent re-sale of the property. He stated that excise tax would be paid if they sold the [S]' former interest to another party, but that it would not be equitable to pay excise tax relating to the forfeiture of the original contract vendee's interest and subsequent retransfer to the remaining contract vendees. The matter was referred to the Department's Property Tax Division and to Taxpayer Information.

The Property Tax Division concluded that any deed given in lieu of forfeiture by the vendees to the vendors would extinguish the existing contract and the subsequent re-sale from [sellers] to [P] and [F] was a taxable transfer. (. . .).

The petitioner did not agree with the Department's decision and asked the Department to set forth the factual and legal basis justifying the tax (. . .). He contended the conclusion that the deed given in lieu of forfeiture from himself, [F], and [S] to [sellers] would extinguish the existing contract was incorrect. He said the sole reason for the transfer to the vendors was to clear title. In support, he provided a copy of an Agreement of March of 1987 which stated the purchasers' and sellers' intent.

In summary, the petitioner contended the transaction was not a taxable "sale" for the following reasons:

- (1) there is no consideration as required by WAC 458-61-030(12) which defines "sale" for purposes of excise tax as a "transfer for valuable consideration". Absent a "sale" there is no excise tax due. WAC 458-61-040.
- (2) the transaction in this case is clearly and unquestionably a transfer to the [sellers] and a transfer back to the contract vendees ([P] & [F]) to clear title, utilizing the [sellers] as a nominee on behalf of the third party principal. Such transfers are exempt from excise tax under WAC 458-61-550. (. . . .)

The Real Estate Excise Tax Coordinator reviewed the Agreement and the petitioner's correspondence, but found no reason to alter his earlier conclusion. Mr. [P] then requested the matter be transferred to this division for review and a predetermination of taxability.

A telephone conference was set for July 7, 1988, but the petitioner was out of the office on that date. This ruling is based on the facts and arguments relating to the transfers as set forth in the

petitioner's letters to the county prosecutor and to the Department of Revenue.

DISCUSSION:

[1] RCW 82.45.060 imposes the Real Estate Excise tax upon each sale of real property. The term "sale" is defined in RCW 82.45.010 which states, in part, that

. . . the term . . . shall have its ordinary meaning and shall include any conveyance, grant, assignment, quitclaim, or transfer of the ownership of or title to real property . . . or other contract under which possession of the property is given to the purchaser, . . . which title is retained by the vendor as security for the payment of the purchase price.

Thus, the real estate excises tax applies to any (1) transfer of real property (2) for a valuable consideration.

In this case, when the vendors went through the forfeiture procedure provided by RCW Chapter 61.30, they cancelled the vendees' rights under the original contract. Although the purchasers and sellers had an agreement that immediately following the declaration of forfeiture the purchasers would be allowed to reinstate their position pursuant to a new real estate contract with the same terms, the fact is the reinstatement was accompanied by the execution of a new contract. That is what the Agreement stated would be done and what was done. We agree with the Real Estate Excise Tax Coordinator that the execution of the new real estate contract was a taxable sale.

Clearly the transactions do not fall within the exemption provided by WAC 458-60-550, the administrative rule which deals with the transfer of property to and by a nominee. The 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 doe 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.

Black's dictionary defines a nominee as:

One designated to act for another as his representative in a rather limited sense. It is used sometimes to signify an agent or trustee. It has no connotation, however, other than that of acting for another, in representation of another, or as the grantee of another.

In this case, neither the Declaration of Forfeiture or the re-conveyance to the contract vendees involved a transfer to a nominee.

Even if the purpose of the two transfers was to clear title, the form of the transactions is controlling. A 1977 Attorney General Opinion noted that form is controlling because "the essence of the taxable transaction is form, and not economic substance. We are dealing with a statutorily defined taxable event, not an economic event." AGLO 1977 No. 6. That opinion acknowledged a gap in the real estate excise tax law which allowed a corporation owning real property to sell property to third persons without paying real estate excise tax. The corporation could create a subsidiary corporation, issue stock to itself in the subsidiary, transfer the realty to the subsidiary, and then sell stock in the subsidiary to third persons who could dissolve the corporation and acquire the property without paying the real estate excise tax. In some cases, therefore, because "form" rather than "substance" controls, the Department is unable to collect the real estate excise tax.

Real Estate Excise tax is due on the sale of property by contract. The tax is imposed on the selling price of the "consideration" for the transfer. RCW 82.45.030 and WAC 458-61-030(2).

In this case, the selling price was \$293,451.96. The sale closed on April 30, 1987. RCW 82.45.100 provides that the real estate excise tax

is due and payable immediately at the time of sale, and if not paid within thirty days thereafter shall bear interest at the rate of one percent per month from the time of sale until the date of payment.

Furthermore, Chapter 286, Laws of 1988, revised RCW 82.45.100 by adding a delinquent penalty. Payments more than ninety days past due are subject to 20% penalty.

DECISION AND DISPOSITION:

Real Estate Excise tax is due on the conveyance by real estate contract dated April 30, 1987, by the [sellers] to the [P]s/[F]s. If the tax has not been paid, interest and a 20% delinquent penalty also are due.

DATED this 28th day of July 1988.