

Cite as Det. No. 87-209, 3 WTD 253 (1987)

THIS DETERMINATION HAS BEEN OVERRULED OR MODIFIED IN WHOLE OR PART BY DET. NO. 92-264, 12 WTD 443 (1992).

BEFORE THE INTERPRETATION AND APPEALS SECTION
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 Correction of Assessment of)	
)	No. 87-209
)	
)	Not Registered
...)	Real Estate Excise Tax
)	Assessment - Audit No. . . .
)	

[1] **REAL ESTATE EXCISE TAX:** RCW 82.45.010 -- WAC 458-61-210 -- ASSUMPTION -- THIRD PARTY GRANTEE. The exclusion from the term "sale" in RCW 82.45.010 for an assumption by a grantee of the balance owing on an obligation which is secured by a mortgage, is not limited to a transfer back to the original seller or mortgagee, but applies as well to a third party grantee where the purpose of the transfer is to avoid foreclosure.

[2] **REAL ESTATE EXCISE TAX:** WAC 458-61-210 -- ASSUMPTION -- REFINANCE DISTINGUISHED. The exemption provided by WAC 458-61-210(b) does not apply if the grantee refinances the balance owing on the underlying obligation rather than assuming the obligation by becoming personally and principally liable for it.

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: October 9, 1986

NATURE OF ACTION:

The taxpayer protests the assessment of real estate excise tax, contending the transfer was exempt as the only consideration was the grantee's payment of the amount owing on the underlying indebtedness.

FACTS AND ISSUES:

Frankel, A.L.J.--At issue is the transfer of commercial property by . . . (hereinafter referred to as the grantor or taxpayer) to . . . (hereinafter referred to as the grantee).

The property was transferred to the grantee by quit claim deed on August 1, 1985. At the time of the transfer, taxes were delinquent for the previous three years and three monthly installments were owing to . . . Bank. The bank was threatening foreclosure.

The terms of the transfer were that the taxpayer/grantor would pay the 1983 delinquent taxes, a portion of the 1984 delinquent taxes and one of the delinquent installments. The grantee agreed to pay the remainder of the 1984 delinquent taxes, all of the delinquent taxes for 1985 and the remaining two delinquent monthly installments. The "sales price" was stated as the loan balance owing to [the bank]. Both the grantor and grantee submitted affidavits stating that no additional consideration of any kind was paid by the grantee to the grantor or any other person or entity as a result of the conveyance of the real property.

The underlying loan at [the bank] was a commercial type loan and contained a due on sale clause. The grantee refinanced the property and paid off the loan to [the bank] on October 15, 1985.

The taxpayer's attorney stated the quit claim deed was effectively delivered to the grantee on August 1, the same date the property was turned over to the grantee. The attorney stated he held the Deed in his file, though, until he could clear title to the property. A portion of the property was vested in the taxpayer's former partners and he needed to obtain quit claim deeds from them. When those Deeds were obtained and recorded, he recorded the taxpayer's Deed on October 9, 1985. The taxpayer's attorney also prepared and filed a real estate excise tax affidavit, claiming no excise tax was due because the sales price was equal to the mortgage balance owing, and no other consideration was paid.

The Property Tax division sent the taxpayer a real estate excise tax inquiry in February of 1986, questioning the reason for the exemption. The revenue officer stated that an examination of the county records showed that a mortgage/deed of trust for \$. . . was issued as part of the sales price. The revenue officer asked the taxpayer to pay taxes and interest of \$. . . or to send copies of records supporting the original claim for tax exemption.

The taxpayer's attorney then sent the revenue officer a letter explaining the terms and reasons for the transfer. The Department upheld the real estate excise tax assessment, contending there had been no "assumption" of the existing mortgage/deed of trust with [the bank]. Because the

grantee paid off the [the bank] loan by taking out a new loan, the Department found the transaction taxable.

Issue:

Whether the exclusion from the term "sale" in RCW 82.45.010 for an assumption is inapplicable if the grantee refinances the balance owing on the underlying obligation, even if no additional consideration is paid to the grantor.

DISCUSSION:

[1] The real estate excise tax is to be paid by the seller on each sale of real property. RCW 82.45.080. As used in chapter 82.45 RCW, however, the term "sale" does not include all transfers of property for consideration. RCW 82.45.010. At issue is the exclusion from the term for a grantee's assumption of the mortgage balance owing, where no consideration passes otherwise.

RCW 82.45.150 provides that the Department shall, by rule, provide for the effective administration of the Real Estate Excise tax laws. WAC 458-61-210 (Rule 210) is the administrative rule dealing with assignments.

During the period at issue, Rule 210 provided:

(1) The real estate excise tax does not apply to the following types of purchaser's assignments, provided that no consideration passes to the grantor:

...

(b) Assumption by a grantee of the balance owing on an obligation which is secured by a mortgage, deed of trust or real estate contract; . . .

...

The real estate excise tax affidavit is required for each of the above. If the transfer is to a third party other than the current lienholder, the grantor must furnish a notarized statement signed by both the grantor and grantee that no additional consideration of any kind is being paid by the grantee to the grantor or to any party other than current lienholders.

As Rule 210 notes, the exclusion is not limited to a transfer back to the original seller or mortgagee. The exclusion applies as well to a third party grantee where the purpose of the transfer is to avoid foreclosure. See AGO 55-57 No. 141 and AGO 57-58 No. 95.

In this case, the evidence shows that the purpose of the transfer was to avoid foreclosure and that the "selling price" was limited to the loan balance owing on an obligation that was secured by a mortgage or deed of trust. Nevertheless, we find that the exclusion for an assumption is not applicable.

[2] Black's Law Dictionary defines "assumption" as:

The act or agreement of assuming or taking upon one's self; the undertaking or adoption of a debt or obligation primarily resting upon another, as where the purchaser of real estate "assumes" a mortgage resting upon it, in which case he adopts the mortgage debt as his own and becomes personally liable for its payment.

4th Rev. Ed. at 157 (citations omitted).

In the present case, the grantors assigned their rights in the property to the grantee on August 1 when they executed the quit claim deed. The grantee signed an agreement binding himself to pay the debt the grantors had incurred to [the bank] and for taxes owing. The grantee did not "assume" the mortgage, but refinanced it instead.

We believe an assumption differs from payment of the balance owing, as is done when the balance owing is refinanced. When an assumption occurs, the closing agent often obtains a beneficiary's statement from the existing lender and an assumption agreement which sets out the interest rate, amount of the monthly payments, the unpaid balance, and other assumption agreement terms. In some cases, the lender has the right to charge a transfer fee and/or increase the interest rate. See, Miller v. Pacific First Federal, 86 Wn.2d 401 (1976).

A general rule of statutory construction is that the primary objective is to carry out the intent of the legislature. To find no excise tax was due on the present transaction, we would have to find that the legislature intended no excise tax to be due upon the assignment or payment of the balance owing on an obligation secured by a mortgage where no consideration passes otherwise.

During the 1987 session, the Legislature passed EHB 435. Section 8 of that Act would have excluded from the term "sale" in RCW 82.45.020 "a transfer where no consideration passes to the vendor other than relief from a debt for which the property transferred has been used as a security." Clearly, the legislature would not have found the added language necessary if it believed that RCW 82.45.010 already excluded refinancing assumed mortgages from the definition of a "sale." Although the legislation would have excluded refinances after the effective date of the act, the Governor vetoed Section 8, finding such an amendment against the State's interest. (See Attachment A.)

Rule 210 was amended effective September 8, 1986. Part (b) now provides that the real estate excise tax does not apply to:

. . . Assumption by a grantee of the balance owing on an existing obligation which is secured by a mortgage, deed of trust or real estate contract where the grantee has become personally and principally liable for the mortgage or contractual obligation whether or not a novation has occurred.

The rule was amended in part to clarify the Department's position that the grantee must become personally and principally liable for the underlying obligation. Because the taxpayer did not have the benefit of the amended rule, no evasion penalty was assessed in this case. We agree

that this is not a case where the taxpayer intentionally evaded payment, but rather a case where the taxpayer had a good faith belief that the transaction was entitled to exemption.

DECISION AND DISPOSITION:

The taxpayer's petition is denied.

DATED this 19th day of June 1987.

NOTE: See hardcopy for Attachment A.