Cite as 10 WTD 159

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

In The Matter of the Petition For Correction of Assessment of . . .	)	D E T E R M I N A T I O N No. 90-372 REAL ESTATE EXCISE TAX Registration No. . . .

[1] RCW 82.45.010 AND WAC 458-61-660: REAL ESTATE EXCISE TAX--SALES OF STANDING TIMBER--WHAT CONSTITUTES. The sale of the right to enter onto the land and cut timber is a sale of real estate and subject to the real estate excise tax when the title to the timber passes prior to its severance from the land. Accord: AGO 51-53-234

[2] RCW 82.45.100: REAL ESTATE EXCISE TAX--PENALTIES--RETROACTIVE EFFECT. The imposition of the penalty imposed on transactions that occurred before the effective date of the penalty is not a retroactive application of the penalty. The mere fact that some of the actions required for its application happened before the effective date of the penalty does not render the penalty retroactive when it is only applied to taxes unpaid after the effective date of the act. Accord: statutory construction: State v. Scheffel, 82 Wn.2d 872 (1973).

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 AND PLACE OF CONFERENCE: . . .
Seattle, Washington

NATURE OF ACTION:

Taxpayer protests the assessment of real estate excise tax on sales of standing timber, and the assessment of penalties on contracts executed before the adoption of the law imposing them.

FACTS AND ISSUES:

Hesselholt, A.L.J. -- . . . (Taxpayer) was assessed real estate excise tax on sales of timber during the years 1983 through 1989 under 113 separate contracts. The two assessments assert $ . . . in tax and $ . . . in penalties for a total of $ . . . . Taxpayer argues three issues: (1) the sale of standing timber is not subject to the real estate excise tax; (2) the sale of logs under "scale sale contracts" or "lump sum contracts" is not subject to the tax; and (3) no penalties should be imposed on contracts occurring before . . . 1988, which is the effective date of the enactment of the tax statute. Finally, taxpayer explains that it did not know which tax to pay on these transactions, and that this appeal was intended to determine which tax it should be paying.

TAXPAYER'S EXCEPTIONS:

1. REET does not apply to lump sum contract sales.

Taxpayer argues as follows:

> As its name implies, the real estate excise tax is intended to be a tax imposed on the sale of real property. Confusion has arisen from RCW 82.45.010, which defines a taxable sale to include "any ... transfer of the ownership of or title to real property, including standing timber ...." As applied to timber and log contracts, the statutory language could have at least three different meanings:
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> (1) At one extreme, RCW 82.45.010 might impose REET on any contract for the sale of logs whenever the contract is signed before the trees are cut, without any regard to the terms of the contract.
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> (2) Alternatively, RCW 82.45.010 might limit REET to sales of standing trees included within a sale of the underlying realty, thereby clarifying the legislature's intent that the entire price paid for the land is subject to the REET and that the portion attributable to the value of the standing timber should not be deducted when calculating the tax.
>
> (3) Or, the Legislature may have intended the tax to be based on some other criterion. For example, REET may apply to any sale of timber that would be considered a transfer of an interest in real property under Washington's commercial laws.
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> * * *
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> The preamble to this regulation [WAC 458-61-660] suggests that the point of title passage is the critical issue.

> If title passes while the trees are still standing, it must be a sale of "standing timber." But the following four subsections [of the rule] make it clear that the Department is not using title as the critical determinant. Subsection (3) imposes REET when title passes after the trees have been cut if the buyer is the one cutting the trees. At the same time, subsection (4) states that REET does not apply if the timber owner hires the harvester who cuts the timber and transports the logs to the eventual buyer. Thus, this regulation actually imposes REET based on the identity of the person who hires the timber harvester. The apparent reason for using the harvester as the determining factor will be explained in the following subsection. . . .
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> . . . [T]the Department's current practice is to not impose REET on any contract where title and risk of loss pass after the trees have been cut, no matter who hires the timber harvester. . . RCW 82.45.010 does not mention transfer of title and risk of loss as criteria, nor does it suggest that who hires the timber harvester can determine when a transaction is taxable.

Taxpayer then argues that WAC 458-61-660 was adopted in response to amendments to RCW 62A.2-107. According to taxpayer:

> Prior to June 30, 1982, any timber contract that RCW 62A.2-107 would consider a contract for the sale of personal property was not subject to REET. Any contract that RCW 62A.2-107 would consider to be a contract for the sale of real property was taxed.
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> RCW 62A.2-107, as originally enacted, stated:
>
> > (1) A contract for the sale of timber, minerals or the like ... to be removed from realty is a contract for the sale of goods within this Article if they are to be severed by the seller ....
>
> (Emphasis added.) Under this statute, it did not matter whether the timber was still standing when the contract was signed. If the contract required the landowner to sever the timber, the contract was considered a sale of goods, not a contract transferring an interest in real property. By applying this definition to the REET, the Department caused Chapter 82.45 RCW to correspond with the commercial law definition of "real property."[1]

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[1]One should note that Washington's commercial law definition of "real property" has never coincided with the definition of "real

> In 1982 Washington changed its commercial law. Washington Laws 1981, ch. 41, § 3, which became effective June 30, 1982, amended RCW 62A.2-107(1) & (2). The amendment dropped timber contracts out of subsection (1) and amended subsection (2) to read:
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> > A contract for the sale apart from the land of growing crops or other things attached to realty and capable of severance without material harm thereto but not described in subsection (1) or of timber to be cut is a contract for the sale of goods within this Article whether the subject matter is to be

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property" used for ad valorem tax purposes. For example, Washington Laws 1925, ex. sess., ch. 130, § 4 defined "real property" to include "the land itself ... and ... all standing timber growing thereon, except standing timber owned separately from the ownership of the land upon which the same may stand or be growing." Likewise, Washington Laws 1925, ex. sess., ch. 130, § 5 defined "personal property" to include "all standing timber held or owned separately from the ownership of the land on which it may stand." These statutes are currently encoded, respectively, as RCW 84.04.090 & .080.

At common law, the right to take the profits from the land, including the right to use the surface of the soil to grow and harvest trees in perpetuity or for a number of years, was known as a profit a' prendre, which was recognized as a real property interest. RCW 62A.2-105 & 2-107 also recognize a profit a' prendre to be an interest in real property. Thus, Washington commercial law would consider a contract transferring a profit a' prendre to be the transfer of an interest in realty but, for ad valorem tax purposes, Washington would consider the profit a' prendre in the hands of the recipient to be personal property.

This statutory schizophrenia has caused the Washington Supreme Court to make contradictory statements regarding the effect of tax foreclosure sales on timber transaction that could have been recognized as profit a' prendre contracts. Compare France v. Deep River Logging Co., 79 Wash. 336, 344, 40 P. 361 (1914) (a perpetual right to enter and harvest timber was treated as a real property interest) with Leuthold v. Davis, 56 Wn.2d 710, 713, 355 P.2d 6 (1960) (a perpetual right to enter land and remove timber was treated as personal property). See also Layman v. Ledgett, 89 Wn.2d 906, 577 P.2d 970 (1978), where the Washington Supreme Court recognized that a 40 year right to cut timber should be recognized as a profit a' prendre when determining the effect of a tax sale on the underlying fee interest. [Taxpayer's footnote.]

> severed by the buyer or by the seller even though it forms part of the realty at the time of contracting, and the parties can by identification effect a present sale before severance.

(Emphasis added.) Thus, this change increased the types of transactions that are considered to be personal property sales.

Prior to the 1982 amendments to RCW 62A.2-107, the Department of Revenue apparently did not have an administrative regulation defining the standards to be used for applying REET; [t]he Department simply relied on RCW 62A.2-107 as it the[n] existed. The Department adopted WAC 458-61-660 by Order PT 82-5 on July 21, 1982, just 21 days after the current version of RCW 62A.2-107 became effective. Thus, adoption of WAC 458-61-660 appears to be as an obvious attempt to "capture" the previous definition of real property and prevent the scope of the tax from changing consistent with the legislature's change to the general definition of "real property." Ironically, the Department did not realize it was attempting to capture a definition that had already changed from the original.

* * *

[I]n 1951 when REET was enacted, Washington commercial law would have recognized timber contracts requiring the logs to be severed from the land to be contracts for the sale of goods, not transfers of interests in real property. Consequently, if the Washington Legislature had intended Washington commercial law to provide the standards for applying REET, in 1951 [taxpayer]'s contracts would not have been subject to this tax.

If the Department is right in its belief that the Legislature intended Washington commercial law to provide a bright line test for determining when REET applies, [taxpayer]'s contract's cannot be taxable. This is true whether the Legislature intended the 1951 commercial law to set an unalterable standard or whether the Legislature intended the application of REET to vary with changes in the commercial law. In either case, if the Legislature intended "real property, including standing timber" to mean the same thing as the commercial law definition of real property, none of [taxpayer]'s contracts during the years 1983 through 1989 would be taxable.[2] Both the

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[2]As previously explained, the ad valorem property tax definition of "real property" encompasses less than the commercial law definition. It does not include a profit a' prendre. See RCW

> scale sale contracts and the lump sum contracts required the trees to be immediately removed from the land. Under Washington commercial law as it existed in 1951 and under Washington commercial law as it has existed since 1982, these sales are not sales of an interest in real property.
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> If one is willing to assume that the Legislature intended "real property, including standing timber" to mean any transaction that commercial law would recognize as a transfer of a real property interest, then there might be some justification for using the Department's definition during the years 1967 through 1982. However, even if that definition could be justified for those fifteen years, it cannot be justified for the years 1951 through 1967 and from 1982 through 1989. Any bright line test the Department may suggest by analogy to other Washington law demonstrates that [taxpayer]'s transactions should not be taxable. We therefore request that both [taxpayer] assessments be dismissed and that a determination be entered finding that [taxpayer] is not liable for any real estate excise taxes on these transactions.

2. REET does not apply to the sale of logs under "scale sale" contracts.

Taxpayer points out that the real estate excise tax was imposed on 17 "scale sale" contracts. These contracts provide that the risk of loss passes to the buyer only after the logs have been removed from the land and scaled. Taxpayer argues that the definition of "sale" cannot apply to a "transaction where title and risk of loss to logs only passes from [the] seller to [the] buyer after the logs have been removed from the land. "

3. The REET penalty statute should not apply retroactively to contracts entered into before the effective date of the statute. Taxpayer argues that RCW 82.45.100(2), imposing a twenty percent late payment penalty when the real estate excise tax is not paid within 20 days of the sale of real property, was effective March 24, 1988, and cannot be construed to apply to transactions occurring before the effective date of the tax.

DISCUSSION:

1. Real Estate Excise Tax on Lump-Sum Contracts.

84.04.080. If the Legislature intended "real property, including standing timber" to be equal to the ad valorem property tax definition of real property, REET would only apply when timber was sold in conjunction with a sale of the underlying land. [Taxpayer's footnote.]

RCW 82.45.010 provides that, for purposes of the real estate excise tax,

> the term "sale" shall have its ordinary meaning and shall include any conveyance, grant, assignment, quitclaim, or transfer of the ownership of or title to real property, including standing timber. . . .

WAC 458-61-660 provides, in relevant part:

> The application of the real estate excise tax to the sale of timber is based upon whether or not the ownership of the timber transferred while the timber was standing.

The regulation goes on to provide four examples and their taxability.

The 1980 legislature enacted a new section to 28A.45 (Laws of 1980, Chapter 154, §5)[3], which authorized the Department of Revenue to adopt rules for the administration of the real estate excise tax. This section was amended by the 1981 legislature, giving it an effective date of September 1, 1981.[4] Prior to that time, the tax had been a local tax, administered by the counties, with the Department's role being strictly advisory. In 1975, the Department provided a compilation of the Attorney General Opinions on the real estate excise tax to the counties to aid in their administration of the tax.

The WACs relative to the real estate excise tax were all filed on July 21, 1982; there is no particular significance to the fact that WAC 458-61-660 was filed on that date. The WACs were developed from the statutes and the Attorney General Opinions regarding the real estate excise tax; there is no indication that the Uniform Commercial Code was ever considered by the Department.

[1] AGO 51-53-234, dated February 5, 1952, was written in response to a request from several prosecuting attorneys regarding the applicability of the real estate excise tax on sales of standing timber. The opinion was summarized as follows:

> Subsequent to the effective date of chapter 19, Laws of Second Ex.Sess., 1951, which was September 6, 1951, all sales which accomplish the passing of title to standing timber prior to its severance are taxable under chapter 11 of the First Ex. Sess. of 1951. With reference to sales prior to September 6, 1951, sales of timber separate from the land requiring immediate severance, are not taxable as sales of real estate but all sales of

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[3]In 1981 Chapter 28A.45 RCW was recodified as RCW 82.45.

[4]See Laws of 1981 c. 167 §4.

> standing timber, not for immediate severance are taxable as sales of interest in real estate.

The AGO explains that the definition of sale originally adopted for the real estate excise tax covered the conveyance of "any estate or interest in real property for a valuable consideration," but did not specifically address the question as to whether the sale of timber separate from the land should be regarded as such an interest. The ad valorem (property) taxes defined standing timber owned separately from the land as personal property. In Elmonte Investment Company v. Schafer Bros. Logging Company, 192 Wash. 1 (----), the Washington Supreme Court held that

> . . . . a conveyance of standing timber, with the right of entry upon the land and removal of the timber therefrom in the future, whether the time of removal be measured by stated or reasonable time, is the conveyance of an interest in real property.

It also found that

> . . . Standing trees are real estate unless they have been sold with an intention of immediate severance from the soil. . . .

In Elmonte, the sale of timber where immediate removal was not required amounted to a sale of an interest in land. The AGO concluded that

> any sale of timber that passes title while the trees are still standing is a sale of an interest in real estate unless it is specifically required by the terms of the sale that the trees be immediately removed. Any such sale of an interest in land is taxable under the original provisions of chapter 11, Laws of First Ex. Sess. of 1951.

The AGO went on to explain that in the Second Extraordinary Session of 1951, the legislature amended the term "sale" (now in RCW 82.45.010) so that it then (and now) read

> . . . the term `sale' shall have its ordinary meaning and shall include any conveyance, grant, assignment, quit-claim or transfer or the ownership of or title to real property, including standing timber, or any estate or interest therein for a valuable consideration. . . (Emphasis supplied.)

The AGO continues

> The legislature, apparently aware of the uncertainty as to whether sales of standing timber should be included within the Real Estate Sales Tax undertook to remedy this

> deficiency. Thus it has specifically indicated that transfers of ownership of standing timber are real estate sales for the purposes of the statute. Taking this amendment then to mean what it says, it is our opinion that after the effective date of chapter 19, Laws of Second Ex. Sess. of 1951, which was September 6, 1951, all sales which will pass the title of unsevered timber are taxable irrespective of whether it is intended to sever the timber immediately or to leave it upon the land.

It was from this AGO and the statute that the WAC was drafted. There was no reference to the Uniform Commercial Code in the rule, and no evidence that it was ever considered. Attorney General opinions, though not controlling, are entitled to great weight in interpreting a statute. Elovich v. Nationwide Ins. Co., 104 Wn.2d 543, 550 (1985).

Additionally, the last antecedent rule of statutory construction provides that "where no contrary intention appears in a statute, relative and qualifying words and phrases, both grammatically and legally, refer to the last antecedent." Boeing v. Department of Licensing, 103 Wn.2d 581, 587 (1985). Thus, the phrase "including standing timber" applies to the term "real estate" in RCW 82.45.010. Further, if the taxpayer's interpretation of the statute were to be adopted, the inclusion of the phrase, "including standing timber" in the statute would be meaningless, since the sale of the underlying land would always be a sale of real property. Statutes are to be construed, wherever possible, so that "no clause, sentence or word shall be superfluous, void, or insignificant." UPS v. Department of Rev., 102 Wn.2d 355, 362-3 (1984).

Taxpayer's petition is denied on this issue.

2. REET does not apply to the sale of logs under "scale sale" contracts.

Excise Tax Bulletin 541.04/45/33.135 (ETB 541) provides that when the landowner retains title of timber until the cut logs are delivered to a mill and scaled, the landowner is legally the harvester, and

> as such, the landowner is liable for both the timber excise tax on the stumpage value of the timber, and the B&O tax on the total log selling price without any deductions for payments made to the logger. There is no REET tax due in this situation because it is not a sale of standing timber.

To the extent that taxpayer can show that its contracts did not pass title to the logs until after they had been removed from the land, the real estate excise tax will be deleted from the

assessment, and the B&O tax and timber excise tax will be assessed in its place.

3. The REET penalty statute should not apply retroactively to contracts entered into before the effective date of the statute. [2] Chapter 286, §5, Laws of 1988 added a delinquent penalty to RCW 82.45.100. It provides that

> (2) In addition to the interest described in subsection (1) of this section, if the payment of any tax is not received by the county treasurer within thirty days of the date due, there shall be assessed a penalty of five percent of the amount of the tax; if the tax is not received within sixty days of the date due, there shall be assessed a total penalty of ten percent of the amount of the tax; and if the tax is not received within ninety days of the date due, there shall be assessed a total penalty of twenty percent of the amount of the tax. The payment of the penalty described in this subsection shall be collectible from the seller only, and RCW 82.45.070 does not apply to the penalties described in this subsection.

Taxpayer argues that the above penalty statute cannot have retroactive effect and cites a variety of cases supporting its contention that if a statute imposes a new penalty or new liability, it will not be construed to apply retroactively, and that the legislative intent required for a statute to have retroactive application must be specific rather than implied. Taxpayer argues that applying the above penalty to transactions that occurred before the effective date of the penalty is giving it retroactive effect. Taxpayer cited a number of cases holding that statutes are presumed to have only prospective application, that statutes creating a new liability or new penalties will not be construed to apply retroactively, and that legislative intent for a statute to be applied retroactively must be specific, not implied.

The Department sent a letter to all county treasurers, stating, in part:

> Begin applying the delinquent penalty immediately, but its calculation should only include the period beginning March 24, 1988.

According to the instructions in the letter, when a contract was entered into before the effective date of the penalty but the tax was not paid in a timely fashion, the penalty would apply after March 24, 1988, so that if the tax was paid on March 27, 1988, there would be no penalty. If it was paid April 30, 1988, there would be a 5% penalty, because it was paid more than thirty days after the effective date of the legislation, even though the tax was more than sixty days past due.

In State v. Scheffel, 82 Wn.2d 872 (1973), the Washington Supreme Court found that convictions received before the effective date of the Habitual Traffic Offenders Act could be used in applying the act to revoke driving privileges. The defendants had argued that the act, as applied, was retrospective and therefore unconstitutional because "by relying upon convictions prior to the act's effective date it imposes a new penalty, unfairly alters one's situation to his disadvantage, punishes conduct innocent when it occurred, and constitutes an increase of previously imposed punishment. . . . " Scheffel, at 878. The court disagreed, finding that

> . . . Each of the defendants in the instant case had accrued two convictions prior to the effective date of the act. . . Upon the effective date of the act, they were on notice that if they accrued one more violation within the statutory period, they would be classified as habitual offenders. Each accrued another violation within the acts prohibition. But for the additional violation they would not be classified as habitual offenders. . .
>
> We find no vested right which has been impaired or taken away. The act does not impose any new duty, and it does not attach any disability on either of the defendants in respect to transactions. The defendants could have avoided the impact of the act by restraining themselves from breaking the law of this state.
>
> A statute is not retroactive merely because it relates to prior facts or transactions where it does not change their legal effect. It is not retroactive because some of the requisites for its actions are drawn from a time antecedent to its passage or because it fixes the status of a person for the purposes of its operation. . . . (Emphasis added.)

Scheffel, 82 Wn.2d at 878-9.

Here, taxpayer accrued the tax liability prior to the enactment of the statute imposing the penalty. Had taxpayer paid the tax liability at the time it accrued, it would have avoided the penalties later imposed. In fact, had it paid the taxes within thirty days of the effective date of the legislation, no penalty would have been imposed. The legal effect of taxpayer's transactions was not changed. The only change was that the continuing failure to remit the tax was subject to the penalty.

DECISION AND DISPOSITION:

Taxpayer's petition is granted in part and denied in part. The real estate excise tax on contracts for the "scale sales" of timber will be deleted from the assessment if supported by documentation.

DATED this the 29th day of October 1990.