

Cite as Det. No. 87-237, 3 WTD 369 (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 Refund and Correction of Assessment	)	
of Real Estate Excise Tax	)	No. 87-237
	)	
...	)	Affidavit No. ...
	)	Real Estate Excise Tax Audit
	)	

- [1] **REAL ESTATE EXCISE TAX:** WAC 458-61-550 -- SALE -- NOMINEE. The real estate excise tax applies to the "sale" of property, as that term is used in RCW 82.45.100, to a nominee on behalf of a third party.
  
- [2] **REAL ESTATE EXCISE TAX:** WAC 458-61-210 -- EXCLUSION -- UNDERLYING OBLIGATION -- ASSUMPTION -- REFINANCE DISTINGUISHED. The exclusion from a "sale" for an assumption in RCW 82.45.010 does not apply if the grantee refinances the balance owing on the underlying obligation.
  
- [3] **REAL ESTATE EXCISE TAX:** RCW 82.45.030 -- TAX MEASURE -- "SELLING PRICE." Amounts paid by the purchaser to the seller for escrow, revenue stamps, filing fees, property taxes and L.I.D.s, do not constitute added consideration upon which the real estate excise tax applies. Amounts paid by the buyer to a broker/seller as commission and for real estate excise taxes do constitute added consideration upon which the real estate excise tax applies. Decision to include amounts paid for real estate excise tax to have prospective application only.
  
- [4] **REAL ESTATE EXCISE TAX:** RCW 82.45.100 (2) -- EVASION PENALTY. Evasion penalty upheld where purchaser's closing costs included an amount for real estate excise taxes which were due, but the grantor's excise tax affidavit claimed the transfer was exempt as a transfer by a nominee to a third party.

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 7, 1986

#### NATURE OF ACTION:

The taxpayer petitions for a cancellation of an assessment for real estate excise tax, penalties and interest.

#### FACTS AND ISSUES:

Frankel, A.L.J.--At issue is the sale of a home by [the taxpayer, a real estate broker] to Mr. and Mrs. . . . (hereinafter S) in December of 1985. The taxpayer had acquired the home from Mr. and Mrs. . . . (hereinafter H). Mr. and Mrs. H had placed their home on the market in March of 1983 and had tried to sell it through a series of brokers. Their asking price was close to the assessed value of \$173,000. A balloon payment was due on the underlying obligation in September or October of 1985. In the spring of 1985, Mr and Mrs. H moved to California and the taxpayer made an agreement with them for the sale of their home. The agreement provided that the taxpayer would list their home for at least six months. If the home did not sell during the listing period, Mr. and Mrs. H would transfer the home to the taxpayer for an assumption of the underlying indebtedness only.

During the listing period, Mr. and Mrs. S expressed an interest in purchasing the H's home, but were unable to assume or refinance the underlying obligation. The taxpayer agreed to assume the debt on the H's home and then refinance to allow S to purchase the home. As part of the purchase price, the S's transferred their home to the taxpayer, subject to the underlying encumbrance which the taxpayer agreed to assume until it could sell that home. In addition, S gave the taxpayer a new Deed of Trust for \$115,000. The deed states it is subject and subordinate to the underlying debt that was assumed and refinanced by the taxpayer in the same amount.

The taxpayer transferred the H home to S by Quit Claim Deed on December 12, 1985. The deed states the transfer is to a third party. No real estate excise taxes were paid on the transaction. On the real estate excise tax affidavit (No. . . . ), the taxpayer claimed an exemption for a transfer by a nominee to a third party.<sup>1</sup> The deed in which the H home was transferred to the taxpayer is dated December 5, 1985, and states the property was conveyed to the taxpayer as nominee for a third party. No real estate taxes were paid on that transaction either. On the real estate excise

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<sup>1</sup>The taxpayer had first claimed an exemption for exchange of property, referring to WAC 458-61-370. That was crossed out and "See WAC 458-61-550" was added.

tax affidavit (No. . . . ), the taxpayer claimed an exemption for assumption of indebtedness, referring to WAC 458-61-210<sup>2</sup>.

On February 6, 1986, the Department sent the taxpayer a real estate inquiry, contending the transfer of the H home to S appeared to be an exchange of real property with S. The Department assessed tax and delinquent penalties of \$1,907.74 based on a county-assessed value for the property of \$173,000. The taxpayer protested the assessment.

After further review of the information provided by the taxpayer and of the county records, the Department concluded a taxable sale took place and that the taxpayer had attempted to evade paying the tax due on the sale. The revenue officer issued a revised tax assessment on a sale price of \$152,000, the amount stated as the sale price on the purchaser's closing statement dated November 22, 1985. The evidence indicated that the taxpayer gave the S's \$37,000 in exchange credit for their home that was transferred to the taxpayer and took the Deed of Trust for \$115,000 for the remainder of the \$152,000 "sale price."

The revised assessment included \$1,626.40 in taxes, a \$97.58 delinquent penalty, and \$814.20 evasion penalty for a total of \$2,538.18. The assessment was due May 30, 1986.

The taxpayer protested the assessment of taxes and penalties on two grounds: (1) the transfer was structured as a tax-free transfer for assumption of indebtedness and (2) it only acted as an agent or nominee for S. In the alternative, the taxpayer protests the imposition of the evasion penalty if the assessment of taxes is upheld. It contends the evasion penalty is not warranted.

#### DISCUSSION:

[1] The taxpayer contends it took title from the H's as nominee for the S's and transferred the title to the S's using the exclusion of nominee title. The taxpayer relies on WAC 458-61-550, the administrative rule which deals with the transfer of property to and by a nominee. During the time at issue, the rule provided:<sup>3</sup>

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<sup>2</sup>On this affidavit, the taxpayer had also referred to WAC 458-61-550, but that reference was crossed out. The optional question as to whether the grantee was acting as a nominee for a third party was not answered.

<sup>3</sup>Effective September 5, 1986, Rule 550 was amended to read:

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;

**WAC 458-61-550 Nominee.** When a nominee has received title to or interest in real property on behalf of a third party, the real estate excise tax does not apply to the subsequent transfer of the property from the nominee to the third party, provided both (1) the proper 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.

As Rule 550 clearly states, taking title as a nominee for a third party does not exclude both transfers from the real estate excise tax. The real estate excise tax applies to the initial transaction to a nominee, unless the transfer to the third party is excluded from the definition of "sale," as that term is used in Chapter 82.45 (the Chapter imposing the excise tax on real estate sales). In the present case, however, the transfer to the S's was a taxable sale.

[2] On the excise tax affidavit for the initial transaction<sup>4</sup> in which the H's home was transferred to the taxpayer, the taxpayer claimed an exemption on the basis the transfer was for assumption of indebtedness only. That affidavit does not state the taxpayer was taking the property as nominee for a third party. RCW 82.45.010 provides that the "assumption by a grantee of the balance owing on an obligation which is secured by a mortgage" is excluded from the definition of the term "sale" for real estate excise tax purposes.

WAC 458-61-210 (Rule 210) is the Department's rule dealing with assignments of property. During the period at issue, Rule 210 provided<sup>5</sup>:

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- (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.

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<sup>4</sup>Although we refer to the "initial transaction" as the transfer of the property from the H's to the taxpayer, the Deed states the transfer was on December 5, 1985. The Quit Claim Deed, transferring the property from the taxpayer to S, is dated December 2, 1985.

<sup>5</sup>Rule 210 was amended effective September 8, 1986. Part (b) now provides that the real estate excise tax does not apply to:

(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. The Department did not assess tax on the transfer of the home by the H's to the taxpayer. If that transfer was for assumption of the underlying indebtedness only, the transfer fell within the assumption exclusion.

The transfer to the S's, though, was not an "assumption." Although the stated purchase price was for the amounts of indebtedness owing,<sup>6</sup> a refinance is not excluded from the definition of a sale in RCW 82.45.010. To find no excise tax was due on the transfer of the property by the taxpayer to the S's, we would have to find that the legislature intended the payment or refinancing of the underlying indebtedness is included in the meaning of an "assumption" of the balance owing.

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.

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... 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.

<sup>6</sup>The closing statement says the sales price was the balance only on present mortgages. See discussion of measure of tax, infer, and Attachment B.

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

The S's did not "assume" the mortgage. As the taxpayer's petition stated, the S's had "expressed an interest in taking over the indebtedness on the H's home but were unable to obtain permission from the lender to assume said loan." (Letter of June 3, 1986.)

During the 1987 session, the legislature passed EHB 435. Section 8 of that act would have excluded from the term "sale" in RCW 82.45.010 "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 amendment 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. ( . . . )

The assessment of tax and delinquent penalties on the transfer of the property by the taxpayer to the S's is upheld. The exclusion for the subsequent transfer of the property from a nominee to the third party does not apply because the real estate excise tax was not paid on the initial transaction. The exclusion for an assumption only does not apply because the underlying indebtedness was refinanced rather than "assumed" by the S's.

[3] Measure of Tax: The Department assessed the tax on \$152,000, because that amount was stated as the sale price on the purchaser's closing statement. The evidence, however, indicates that amount included some "closing costs" which we find did not constitute additional consideration upon which the real estate excise tax applies. ( . . . )

RCW 82.45.030 defines "selling price" for purposes of the real estate excise tax. The term means:

the consideration, including money or anything of value, paid or delivered or contracted to be paid or delivered in return for the transfer of the real property or estate or interest in real property, and shall include the amount of any lien, mortgage, contract indebtedness, or other incumbrance, either given to secure the purchase price, or any part thereof, or remaining unpaid on such property at the time of sale.

The term shall not include the amount of any outstanding lien or incumbrance in favor of the United States, the state, or a municipal corporation for the taxes, special benefits, or improvements.

Accordingly, the amounts included for property taxes and L.I.D.s (\$4,187.49 total) shall be excluded from the "selling price." We also find that the closing costs for escrow, revenue stamps, filing fees, and title insurance (\$1,552.44) are not part of the "selling price."

In the past, the Department has found the buyer's payment of real estate excise tax analogous to the exclusion from the definition of "selling price" for liens in favor of the government. Because

of this position, we will agree to exclude the buyer's payment for real estate excise tax from the "selling price."

The Department's present position, however, is that amounts included in closing costs for the buyer's agreement to pay the real estate excise tax constitutes additional consideration to the seller. Although the real estate excise tax, as the property tax, constitutes a lien upon the property sold (RCW 82.45.070), the real estate excise tax also is a personal debt against the seller. RCW 82.45.080. The relief of personal indebtedness is additional consideration. The taxpayer is advised that for future periods, the buyer's payment of real estate excise tax will be included as part of the taxable "selling price."

In this case, the seller was the broker. The brokerage "commission" clearly constitutes money paid to the seller for the transfer of the property and was part of the taxable selling price.

[4] Evasion Penalty: The Department added an evasion penalty, finding the taxpayer attempted to evade the proper tax on this sale. RCW 82.45.100(2) states:

(2) If upon examination of any affidavits or from other information obtained by the department or its agents it appears that all or a portion of the tax is unpaid, the department shall assess against the taxpayer the additional amount found to be due plus interest as provided in subsection (1) of this section. If the department finds that all or any part of the deficiency resulted from an intent to evade the tax payable under this chapter, a penalty of fifty percent of the additional tax found to be due shall be added.

The S's gave the taxpayers a new Deed of Trust for \$115,000 and transferred their family home to the taxpayer for "exchange credits" of \$37,000. That amount included \$1,479.21 for real estate excise tax. ( . . . ) The excise tax affidavit signed by the taxpayer, though, claimed an exemption pursuant to WAC 458.61.550. The evidence supports the revenue officer's conclusion that the taxpayer attempted to evade payment of the tax. The assessment is upheld.

#### DECISION AND DISPOSITION:

The taxpayer's petition is denied.

DATED this 15th day of July 1987.