

This WTD is withdrawn effective 03/17/2015 and is no longer in effect. See ETA 3133-2015

Cite as Det No. 11-0227, 31 WTD 57 (2012)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Refund of)	<u>D E T E R M I N A T I O N</u>
)	
)	No. 11-0227
...)	
)	Registration No. . . .
)	REET Letter Ruling
)	Docket No. . . .

RULE 458-61A-208(1); RCW 82.45.010(3); REAL ESTATE EXCISE TAX (REET) – JUDICIAL FORECLOSURE – COURT APPOINTED RECEIVER: Transfers of real estate facilitated by a court-appointed receiver that are effectuated pursuant to the terms of an order of sale by the court are transfers made pursuant to a judicial foreclosure proceeding and are not subject to REET. The fact that a court appoints a custodial receiver in a judicial foreclosure proceeding does not change the tax-exempt nature of a transfer ordered in that proceeding.

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.

Weaver, A.L.J. – Taxpayer appeals a ruling that Real Estate Excise Tax (REET) applies to transfers or conveyances of real property in circumstances where a receiver is appointed by the superior court in a judicial foreclosure. We grant taxpayer's petition and hold that the appointment of a receiver does not change the nature of a judicial foreclosure and that the transfer or conveyance of real property in such a circumstance is still effectuated by an order of sale by the court. Because transfers or conveyances made pursuant to an order of sale by a court in a lien foreclosure proceeding do not fit within the statutory definition of a "sale" of real property, the transfer at issue herein is not subject to REET.¹

ISSUE

¹ Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW

Whether, under RCW 82.45.010, the transfer of property resulting from a judicial foreclosure and court-ordered sale, where the court appointed a receiver to facilitate the sale, constitutes a “sale” of real property subject to REET.²

FINDINGS OF FACT

The real property at issue in this appeal is a parcel located [in] Washington (the “Property”). . . . The Property was owned by [an individual who] sought to build an apartment complex on the site of the Property and [had] secured a loan from [Taxpayer] in the approximate amount of \$ The loan was secured by the Property pursuant to a deed of trust dated . . . , and recorded on

[The individual] defaulted on the loan from Taxpayer . . . and an involuntary petition for bankruptcy was filed against him [T]he Bankruptcy Court ordered the Property be abandoned from [the individual’s] bankruptcy estate.

Following the abandonment of the Property from the bankruptcy estate, Taxpayer commenced a judicial foreclosure proceeding by filing a Complaint for Judicial Foreclosure . . . , (the “Judicial Foreclosure Action”). All of the lienholders with an interest in the Property were made parties to the Judicial Foreclosure Action.

Immediately after the commencement of the Judicial Foreclosure Action, Taxpayer petitioned the Court for the appointment of a custodial receiver to protect the property during the pendency of the Judicial Foreclosure Action. . . . [T]he Court entered an order Appointing Custodial Receiver, appointing [a firm] (the “Receiver”) as the custodial receiver of the Property. The Order Appointing Custodial Receiver conferred upon the Receiver the “authority to sell all or a portion of the Property free and clear of all liens and rights of redemption upon order of the Court.”

On . . . , the Receiver filed a motion with the Court to approve a sale of the Property. On . . . , the Court entered an Order of Sale of Property, “constitu[ting] a court order authorizing and directing the Receiver to enter and enforce the Real Estate Purchase and Sale Agreement, as amended, and to consummate the transaction contemplated thereby.” The sale proceeds were used to pay the expenses of the receivership, the costs of sale, and then were distributed to lien creditors including Taxpayer.

Before the sale of the Property closed, the Receiver requested a letter ruling from the Taxpayer Information and Education section of the Department of Revenue (TI&E) that the transfer was not subject to REET. On July 1, 2010, TI&E issued a letter ruling that the transfer was REET taxable, because there is no REET exclusion covering sales of a property “by a Receiver to a third party.” As a result of that letter ruling, the Receiver paid REET on the transfer and filed a petition for refund. On . . . , the Court in the Judicial Foreclosure Action issued an Order Granting

² Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410.

Receiver's Motion to Terminate Receivership. As a result of that Order, the Receiver assigned its rights to the potential refund at issue in this appeal to Taxpayer.

ANALYSIS

In Washington, an excise tax is imposed on every “sale of real estate.” RCW 82.45.060. Payment of the tax levied is the obligation of the seller. RCW 82.45.080. A “sale” is broadly and inclusively defined by RCW 82.45.010 as “any conveyance, grant, assignment, quitclaim, or transfer of the ownership of or title to real property, . . . or any estate or interest therein for a valuable consideration.” RCW 82.45.010.

After establishing the broad and inclusive definition of a “sale” of real property, RCW 82.45.010 then provides a list of specific exceptions to that general definition. *Id.* One of those specific exceptions is the following:

(3) The term “sale” shall not include:

(i) Any transfer or conveyance made pursuant to a deed of trust or an order of sale by the court in any mortgage, deed of trust, or lien foreclosure proceeding or upon execution of a judgment, or deed in lieu of foreclosure to satisfy a mortgage or deed of trust.

RCW 82.45.010(3)(i) (emphasis added). The legislature specifically excluded transfers or conveyances made pursuant to an order of sale by the court in a deed of trust foreclosure proceeding from the definition of a “sale” of property subject to REET. Taxpayer’s position is that this full statutory exclusion governs the judicial foreclosure proceeding resulting in an order of sale at issue in this case and that REET therefore does not apply to the transfer of the property as a result of the order of sale in the judicial proceeding.

The administrative code provisions interpreting the REET statutes (RCW 82.45 *et seq.*) support the taxpayer’s interpretation that a full REET exclusion applies to transfers made pursuant to court ordered foreclosure sales. WAC 458-61A-208(1) specifies:

(1) **Introduction.** The real estate excise tax does not apply to any transfer or conveyance made pursuant to an order of sale by a court in any mortgage or lien foreclosure proceeding or upon execution of a judgment . . .

WAC 458-61A-208(1) (emphasis added). The Department has held that [nonjudicial] foreclosures are not subject to REET. *See* Det. No. 08-0212E, 28 WTD 35 (2009) n.2. (holding that foreclosures by the trustee under the terms of deed of trust are exempt from REET.). The fact that the deed of trust in this case was foreclosed judicially and the deed of trust in 28 WTD 35 was foreclosed by the trustee under the terms of the deed of trust ultimately makes no difference for purposes of taxation. *See* WAC 458-61A-208(1), (4). Both transfers fit within a specific regulatory exemption from REET taxation. *Id.* Therefore, as was the case in 28 WTD 35, the transfer in this matter is exempt from REET.

TI&E ruled that the transfer of the Property was subject to REET because the sale was “by the Receiver to a third party.” Taxpayer Services correctly points out that there is no specific

statutory or regulatory REET exemption addressing sales by a receiver. Taxpayer's position is that the Receiver appointed in this matter was an agent of the Court and that the "sale" of the Property was still pursuant to a judicial foreclosure and an order of sale by the court.

RCW 7.60.025 authorizes the superior court to appoint a receiver in certain circumstances. The statute provides, in pertinent part:

- (1) A receiver may be appointed by the superior court of this state in the following instances . . .
- (b) Provisionally, during the pendency of any action to foreclose upon any lien against or for forfeiture of any interest in real or personal property . . . on application of any person, when the interest in the property that is the subject of foreclosure or forfeiture of the person seeking the receiver's appointment is determined to be probable and . . .
 - (i) The property or its revenue-producing potential is in danger of being lost or materially injured or impaired . . .

RCW 7.60.025.

Here, the Court appointed the Receiver to protect the value of the Property which was the subject of a judicial foreclosure of the Taxpayer's lien. The appointment of the Receiver did not change the nature of the judicial proceeding. It was still a judicial foreclosure. Any powers granted to the Receiver were granted by the Court and any actions taken by the Receiver were therefore expressly authorized by court order.

Moreover, in this case, the Receiver did not actually sell the property. The Receiver was appointed by the Court to facilitate the sale of the property being foreclosed. The Receiver acted as a "custodial" agent of the Court, but it had no independent ability to sell the property without Court approval. The Order Appointing Custodial Receiver did grant the Receiver the "authority to sell all or a portion of the Property free and clear of all liens and rights of redemption," however, the actual sale was still contingent "upon order of the Court."

As contemplated by that Order, the Receiver did undertake efforts to "sell" the property. After finding a potential buyer of the property, the Receiver then moved the Court for an order of sale. The Court agreed with the Receiver's recommendations to sell the property, granted the Receiver's motion, and issued the order of sale. Therefore, in this case, the ultimate sale of the property was effectuated by an "order of sale by the court." That order of sale issued on . . .

The plain language of RCW 82.45.010(3) states that transfers effectuated by an order of sale by the court in a judicial foreclosure are not subject to REET. WAC 458-61A-208(1) reinforces that statutory exemption by reiterating that REET does not apply to transfers or conveyances made pursuant to an order of court in a mortgage foreclosure proceeding. The fact that the Court appointed a custodial receiver to manage the property and find a buyer does not change the fact that the ultimate sale was in the context of a judicial foreclosure and was effectuated by a court

order. The transfer of the Property in this matter was pursuant to an order of sale by a court in a lien foreclosure proceeding and is therefore not subject to REET.

DECISION AND DISPOSITION

We grant taxpayer's petition for refund of REET.

Dated this 21st day of July, 2011.