

Cite as Det. No. 17-0021, 36 WTD 563 (2017)

BEFORE THE ADMINISTRATIVE REVIEW AND HEARINGS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition for Refund of) D E T E R M I N A T I O N
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 No. 17-0021
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 Registration No. . . .
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[1] WAC 458-61A-301; RCW 82.45.100, RCW 1.12.070: REET – REFUNDS – NON-CLAIM STATUTE – TIMELINESS OF CLAIMS – DATE OF SALE EXCLUDED. A REET refund request must be filed within four years of the date of sale. The date of sale is to be excluded when computing the time within which a REET refund request must be filed to be timely.

[2] WAC 458-61A-101; RCW 82.45.010, RCW 82.45.020, RCW 82.45.060: REET – SELLING PRICE – TRUE AND FAIR VALUE – PRESUMPTION – ARM’S LENGTH TRANSACTION – UNRELATED PARTIES – VALUABLE CONSIDERATION. When real estate is sold by a seller to an unrelated buyer, and the property is being leased on favorable terms at the time of the sale, the seller may not later rebut the presumption that the price actually paid for the property was its fair value by producing an after-the-fact appraisal of the property as if it were empty. Under those circumstances, the appraisal mischaracterizes the nature of the property on the date of sale and is not sufficient evidence to overcome the presumption that the actual sale price of the property was its “true and fair value” and the correct measure of the REET.

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, T.R.O. – Taxpayer sold an office building and paid real estate excise tax (REET) on the total consideration paid. Taxpayer now petitions for a partial refund of the REET, claiming that the amount it paid exceeded the property’s “true and fair value.” We conclude that Taxpayer’s initial REET Refund Request was timely filed, but that it failed to rebut the presumption that the total consideration actually paid was the property’s true and fair value. We deny Taxpayer’s petition.¹

¹ Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410.

ISSUES

1. Whether, under RCW 82.45.100(5) and WAC 458-61A-301(12), a taxpayer's REET Refund Request was timely filed.
2. Whether, under RCW 82.45.030(1), a taxpayer has rebutted the presumption that the total consideration received for the sale of an office building was its true and fair value.

FINDINGS OF FACT

On December 15, 2011, . . .² (Taxpayer) sold certain commercial property known as . . . and identified by . . . County Assessor's Parcel Numbers . . . and . . . (the Property) to . . . (Buyer) for \$ Pursuant to Article 2, Section 2.1 of the Purchase and Sale Agreement (PSA), Taxpayer and Buyer agreed that the sales price allocated to real property was \$. . . , after deducting \$. . . in personal property value from the total price.

On December 15, 2011, Taxpayer filed a REET Affidavit with the . . . County Recorder's Office. The REET Affidavit was executed, under penalty of perjury, by both Taxpayer and Buyer. The REET Affidavit attests that the following information was true:

- The Property was transferred from Taxpayer to Buyer by Special Warranty Deed
- The Special Warranty Deed was dated December 15, 2011.
- The Gross Selling Price was \$. . .
- The Personal Property deduction was \$
- The Taxable Selling Price was \$
- The State portion of the REET due was \$
- The Local portion of the REET due was \$
- After fees, the total REET due was \$

On December 15, 2011, Taxpayer paid \$. . . in REET on the Property, based on the Property's fair market value of \$. . . , as stated in the Affidavit.

On December 15, 2015, Taxpayer's representative mailed a REET Refund Request to the . . . County Treasurer. Taxpayer provided a Certified Mail Receipt from the United States Postal Service postmarked on December 15, 2015. The Refund Request sought a refund of \$. . . for the following reasons:

The taxable selling price of \$. . . initially recorded by the parties is in excess of the "true and fair" value of the real estate at the time of purchase due in part to a sale-lease back provision for the majority tenant at rents far exceeding market as part of the purchase and sale agreement between the parties. The "true and fair" value does not exceed \$. . . as evidenced by an independent fee simple appraisal submitted as part of this application for refund.

See REET Refund Request.

² Taxpayer was acquired by . . . on August 8, 2013.

The . . . County Recorder's Office forwarded the REET Refund Request to the Department of Revenue (Department) via Federal Express, on December 29, 2015. On January 4, 2016, the Department's Miscellaneous Tax Section denied Taxpayer's REET Refund Request. The denial letter read, as follows:

Your request is past statute. RCW 82.45.100(5) notes that "No assessment or refund may be made by the Department more than four years after the date of sale . . ." The date of sale was December 15, 2011, therefore the statute of limitations for requesting refund expired on December 14, 2015. Your request was received by the . . . County Recorder on December 28, 2015.

In addition, RCW 82.45.030 notes that "If property has been conveyed in an arm's length transaction between unrelated persons for a valuable consideration, a rebuttable presumption exists that the selling price is equal to the total consideration paid . . ." You have not overcome the presumption with an appraisal completed after the sale took place and no indication that the values presented were in any way used to establish the real property values for this sale (for instance, with 1060 allocations by both the buyer and seller agreeing to those values for income tax purposes).

REET Refund Denial letter, dated January 4, 2016. Taxpayer filed a timely petition for refund with the Department's Administrative Review and Hearings Division.

Taxpayer's REET Refund Request was based on an appraisal. Taxpayer's representatives hired . . . (Appraiser), in 2013, to perform the appraisal "retrospectively as of December 15, 2011." Appraiser sent the Appraisal to Taxpayer's representatives on December 31, 2013. The Appraisal concludes that the "fair market value" of fee simple interest of the Property was \$. . . , as of its December 15, 2011, sale date for the intended use of assisting Taxpayer's representatives in support of a [REET] appeal. *See 2013 Appraisal*, p. 3.

By its own terms, the appraisal is not suitable for any use other than in support of Taxpayer's [REET] appeal. *See 2013 Appraisal*, p. 16. The appraisal is also, by its own terms, an . . . estimate of the market value of the fee simple estate in the Property absent consideration of existing lease encumbrances as of the sale date, December 15, 2011. *Id.* Taxpayer's representatives specifically instructed the Appraiser to estimate a fee simple value of the Property without regard to the existing leases. Instead of evaluating the actual leases in place, the Appraiser "presumes . . . that [the Property] is leased at rents that reflect a market rate." *Id.*

The Appraisal describes the reason for its estimated "fair market value" of the Property being lower than the amount actually paid for the Property, in pertinent part, as follows:

In 2011 the property was . . . put on the market. Several offers were received and [Buyer] acquired the [Property] for \$. . . with an additional \$. . . allocated to personal property. As part of the sale transaction, [Taxpayer] entered into a 12 year lease with [Buyer]. As we discuss later in this report, the lease rent rate that [Taxpayer] will pay reflects a rent that is slightly above market. This resulted in a higher purchase price by [Buyer] than our value estimate if unencumbered with tenant leases.

2013 Appraisal, p. 14.

The 2013 Appraisal, in reaching a value for this petition for refund, valued the property using market rents and disregarding the favorable value of the 12-year lease that was actually in effect at the time of sale. Valuing the property in this way, the 2013 Appraisal placed its “true and fair value” at \$. . . – \$. . . less than the \$. . . that Taxpayer claimed on its REET Affidavit. Taxpayer suggests that this value – based on its . . . estimate of market value leases rates, instead of the value of the actual lease in place at the time of sale – is a better measure of the “true and fair value” of the Property for purposes of determining REET. Taxpayer therefore requests a refund of the REET paid on its alleged overpayment of REET.

ANALYSIS

I. Taxpayer’s REET Refund Request Was Timely Filed.

RCW Chapter 82.45 imposes an excise tax on real estate sales. RCW 82.45.100 sets forth the time period for REET refund requests:

- (5) No assessment or refund may be made by the department more than four years after the date of sale except upon a showing of:
- (a) Fraud or misrepresentation of a material fact by the taxpayer;
 - (b) A failure by the taxpayer to record documentation of a sale or otherwise report the sale to the county treasurer; or
 - (c) A failure of the transferor or transferee to report the sale under RCW 82.45.090(2).

RCW 82.45.100(5) (emphasis added). The Department has held that the plain language of RCW 82.45.100 is that REET refund requests must be filed four years from the date of sale. *See Det. No. 00-068, 19 WTD 1018 (2000).* RCW 82.45.150 requires the Department to effectively administer . . . REET by promulgating rules. RCW 82.45.150.

The Department promulgated WAC 458-61A-301(12) to set procedures for the administration of requests for the refund of REET. WAC 458-61A-301(12) reads, in pertinent part, as follows:

- (12) **Refunds.**
- (a) **Introduction.** Under certain circumstances, taxpayers (or their authorized representatives) may request a refund of real estate excise tax paid. The request must be filed within four years of the date of sale, and must be accompanied by supporting documents.
 - (b) **Claims for refunds.** Any person having paid the real estate excise tax in error may apply for a refund of the amount overpaid by submitting a completed refund request form.
 - (c) **Forms and documentation.** Refund request forms are available from the department or the county. The completed form along with supporting documentation is submitted to the county office where the tax was originally paid. If the tax was originally paid directly to the department, you may apply for a refund using the forms and procedures provided at the department's web site at dor.wa.gov

WAC 458-61A-301(12)(a)-(c) (emphasis added).

In this case, the date of sale of the Property is December 15, 2011. Taxpayer's representative mailed Taxpayer's REET Refund Request to the . . . County Treasurer's Office on December 15, 2015, and has established that postmarked date by providing a Certified Mail Receipt from the United States Postal Service. The first question presented in this matter is whether Taxpayer timely filed its REET Refund Request.

RCW 1.12.070 is the general statutory rule of construction relating to the filing of claims. It reads, in pertinent part, as follows:

Except as otherwise specifically provided by law hereafter:

(1) Any report, claim, tax return, statement or other document required to be filed with, . . . the state or to any political subdivision thereof, which is (a) transmitted through the United States mail . . . , shall be deemed filed and received by the state or political subdivision on the date shown by the post office . . . cancellation mark . . .

(2)(a) If any report, claim, tax return, statement, remittance, or other document is sent by United States registered mail, certified mail or certificate of mailing, a record authenticated by the United States post office of such registration, certification or certificate shall be considered competent evidence that the report, claim, tax return, statement, remittance or other document was delivered to the addressee, and the date of registration, certification or certificate shall be deemed the postmarked date,

RCW 1.12.070 (emphasis added). Given Taxpayer's presentation of the Certified Mail receipt, it is undisputed that Taxpayer filed its REET Refund Request on December 15, 2015, when it posted the REET Refund Request in the United States mail. Given that evidence, the question of the timeliness of Taxpayer's filing depends upon whether a December 15, 2015, filing date is "more than four years after the date of sale." RCW 82.45.100(5).

RCW 1.12.040 is the general statutory rule of construction relating to the computation of time. It reads, as follows:

The time within which an act is to be done, as herein provided, shall be computed by excluding the first day, and including the last, unless the last is a holiday, Saturday, or Sunday, and then it is also excluded.

RCW 1.12.040. Under that general authority, the four-year non-claim statute for REET refund requests would begin running on the day after the date of sale. We are unaware of any specific REET statute that would supersede the application of RCW 1.12.070 and RCW 1.12.040.³ Therefore, in this case, the four-year claim window would run from December 16, 2011, through December 15, 2015.

³ We note that the REET refund statute uses the phrase "more than four years after the date of sale" and the Department's REET rule uses the phrase "within four years of the date of sale. Compare RCW 82.04.100(5) with WAC 458-61A-301(12)(a). However, for the reasons given in the *Kovacs v. Dep't of Labor & Indus.* 186 Wn.2d 95, 375 P.3d 669 (2016), discussed, *infra*, we do not find that this disparate language has any material effect on the outcome of this case.

The Supreme Court of Washington, in *Kovacs v. Dep't of Labor & Indus.*, 186 Wn.2d 95, 375 P.3d 669 (2016), addressed this exact issue in the context of the timely filing of a workers' compensation claim. In *Kovacs*, Mr. Kovacs injured his back on September 29, 2011. *Kovacs*, 186 Wn.2d at 96. Mr. Kovacs filed his application for workers' compensation benefits on September 29, 2012. *Id.* at 97. The relevant statute of limitation for workers' compensation claims says, in relevant part: "No application shall be valid or claim thereunder enforceable unless filed within one year *after* the day upon which the injury occurred." *Id.* at 98 (citing RCW 51.28.050). The Court, in *Kovacs*, held that the workers' compensation statute language did not plainly state that the statute of limitations began running on the day of the injury, so the general rule of statutory construction, RCW 1.12.040 applied to the timeliness calculation. *See id.* The Court then held that the claim was timely filed.

In this case, RCW 82.45.100 states that no REET refund can be made "more than four years after the date of sale." RCW 82.45.100(5). WAC 458-61A-301 clarifies that a claimant has the right to request a REET refund as long as that request is filed "within four years of the date of sale." WAC 458-61A-301(12)(a). Under the authorities cited above, and in particular RCW 1.12.040, we hold that the time within which a REET refund request must be filed is to be computed by excluding the date of sale. Therefore, we hold that Taxpayer's REET refund request was timely filed when it was postmarked on December 15, 2015, precisely four years after the date of the sale of the Property.

II. Taxpayer's After-Acquired Appraisal Does Not Overcome the Presumption that the Actual Selling Price was the Property's "True and Fair Value" and the Correct Measure of REET.

Having decided that Taxpayer's REET Refund Request was timely filed, we now address whether Taxpayer's Appraisal is sufficient evidence to amend the presumption that the value listed in the REET Affidavit filed on the date of sale is "true and fair value" of the Property.

Washington's REET is imposed on the "sale of real property" measured by its "selling price." RCW 82.45.060. RCW 82.45.010 defines the term "sale" for REET, as follows:

As used in this [REET] chapter, the term "sale" has its ordinary meaning and includes any conveyance . . . 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(1) (emphasis added). RCW 82.45.020(1) defines "selling price," for purposes of REET, as follows:

As used in this chapter, the term "selling price" means the true and fair value of the property conveyed. If property has been conveyed in an arm's length transaction between unrelated persons for a valuable consideration, a rebuttable presumption exists that the selling price is equal to the total consideration paid . . .

Thus, the "sale of real property" for REET purposes includes not only the transfer of ownership of or title to the physical land and structure, but also includes any "interest" or "estate" in that

property. WAC 458-61A-101(2)(c) defines “true and fair value” as “market value, which is the amount of money that a willing, but unobligated, buyer would pay a willing, but unobligated, owner for real property, taking into consideration all reasonable, possible uses of the property.”

If a sale was an arm’s length transaction between unrelated parties, the amount actually paid for a property is presumptively its “true and fair value,” and thus the correct tax measure. In this case, Taxpayer and Buyer were unrelated and dealt with each other at arm’s length. The parties agreed that the Property’s true and fair value as of the date of the sale – taking into account Taxpayer’s continued tenancy in the Property on specified rental terms – was \$. . . and ultimately entered into a Purchase and Sale Agreement for that amount. Accordingly, the weight of the evidence at this point strongly supports the conclusion that the Property’s true and fair value was equal to the consideration paid.

Taxpayer, however, seeks to rebut the RCW 82.45.020(1) presumption that the amount paid equaled the property’s “true and fair value.” To this end, Taxpayer presents (a) an . . . appraisal based upon the presumption that the actual sale value of the Property does not present the “true and fair” value of the Property, because Taxpayer’s continued tenancy in the Property was for rental rates that were higher than the “market value” of similar rental properties.

RCW 82.45.032 defines the term "real property," in relevant part, as:

"Real estate" or "real property" means any interest, estate, or beneficial interest in land or anything affixed to land, . . .

RCW 82.45.032(1) (emphasis added). This definition essentially equals the “leased fee estate” of the interests in the property that Taxpayer sold – i.e., the value of the commercial building encumbered by actual tenant leases.⁴

The 2013 Appraisal noted that the property’s 2011 purchase and sale had been a purchase and sale of the leased fee interest in the property, which included the value of the existing lease encumbrances.⁵ The 2013 Appraisal, on the other hand, valued the property, without considering the value of the actual existing leases, but by presuming that the Property would be leased at hypothetical market rental rates.⁶

⁴ A “leased fee estate” is defined as: “An ownership interest held by a landlord with the rights of use and occupancy conveyed by lease to others. The rights of the lessor (the leased fee owner) and the leased fee are specified by contract terms contained with the lease.” THE DICTIONARY OF REAL ESTATE APPRAISAL 204 (3d ed., The Appraisal Institute 1993).

⁵ The 2013 Appraisal, p. 16, “Ownership History,” stated: “[Buyer] acquired the subject [Property] for \$. . . with an additional \$. . . allocated to personal property. As part of the sale transaction [Taxpayer] entered into a 12 year lease with [Buyer] . . . the lease rate that [Taxpayer] will pay reflects a rent that is slightly above market. This resulted in a higher purchase price by [Buyer] than our value estimate if unencumbered by tenant leases.”

⁶ The 2013 Appraisal, p. 16, “Hypothetical Condition,” stated: “[T]he client has indicated that a fee simple value of the subject [Property] is required without regard to the existing lease encumbrances. We are providing a fee simple value for the subject property which presumes, in the case of the Income Approach, that it is leased at rents that reflect a market rate.”

When the value of leases actually in effect at the time of a property's sale deviate from the market rates, such leases will affect a property's value and selling price.⁷ "Market rent," on the other hand, is "the rental income that a property would most probably command in the open market, indicated by the current rents paid and asked for comparable space as of the date of the appraisal."⁸ The 2013 Appraisal, based on market rents, thus disregarded the value of the actual leases in effect as of the date of the sale. Using a "market rent" approach essentially valued the property as if it were empty and available to be rented at the commercial rental market rates in effect on the date of sale. This eliminated the value of the existing leases that in fact encumbered the property. Using "market value rents," the 2013 Appraisal established the Property's "Final Value Conclusion, as of December 15, 2011," to be \$

⁷ See Jason J. Krentler, SRR Global Financial Advisory Services, Purchase Accounting Valuation for Various Real Property Assets, 21 Complex Real Property – Tangible and Intangible Assets and Liabilities, *Favorable/Unfavorable Leasehold Analysis (Above- and Below-Market Leases)*, at <http://www.srr.com/article/purchase-accounting-valuation-various-real-property-assets> (last visited Jun 17, 2015):

Favorable/Unfavorable Leasehold Analysis (Above- and Below-Market Leases) - Beyond the value of the lease contracts in place, there are also potential assets or liabilities in the presence of lease contracts that deviate from the market. From the acquirer's perspective, above-market leases are considered an asset in that income is attributable to the contract beyond what would be available in the market. To the contrary, below-market lease contracts would be considered a liability via the income impairment throughout the term of the lease.

To determine whether or not in-place leases are favorable or unfavorable, contract leases and current listings of comparable properties are analyzed to determine a rental rate and expense structure typical of the market. If the contract lease rate deviates from the concluded market rate, the annual contract rent is subtracted from the annual market rent to determine the difference in annual cash flows for the remainder of the lease term. For above-market leases, it is reasonable to assume the tenant would decline any options to extend. For below-market leases, the remaining lease term is typically projected to include all defined, favorable option terms.

- Contracts with above-market rents have a positive Fair Value (i.e., an asset exists)
- Contracts with below-market rents have a negative Fair Value (i.e., a liability exists)

See also Wikipedia, Real Estate Appraisal, at https://en.wikipedia.org/wiki/Real_estate_appraisal (last visited Jul 1, 2015):

Types of ownership interest

The type of real estate "interest" that is being valued must also be known and stated in the report. Usually, for most sales, or mortgage financings, the fee simple interest is being valued. The fee simple interest is the most complete bundle of rights available. However, in many situations, and in many societies which do not follow English Common Law or the Napoleonic Code, some other interest may be more common. While there are many different possible interests in real estate, the three most common are:

- **Fee simple value** (known in the UK as freehold) – The most complete ownership in real estate, subject in common law countries to the powers reserved to the state (taxation, escheat, eminent domain, and police power).
- **Leased fee value** – This is simply the fee simple interest encumbered by a lease. If the lease is at market rent, then the leased fee value and the fee simple value are equal. However, if the tenant pays more or less than market, the residual owned by the leased fee holder, plus the market value of the tenancy, may be more or less than the fee simple value.
- **Leasehold value** – The interest held by a tenant. If the tenant pays market rent, then the leasehold has no market value. However, if the tenant pays less than market, the difference between the present value of what is paid and the present value of market rents would be a positive leasehold value. For example, a major chain retailer may be able to negotiate a below-market lease to serve as the anchor tenant for a shopping center. This leasehold value may be transferable to another anchor tenant, and if so the retail tenant has a positive interest in the real estate.

⁸ THE DICTIONARY OF REAL ESTATE APPRAISAL 221 (3d ed., The Appraisal Institute 1993), emphasis added.

The actual total consideration paid for the property, as encumbered by existing leases, was \$ When a commercial office property is sold by a seller to an unrelated buyer, and the property is encumbered by existing favorable leases, as was the case here, the seller may not later rebut the presumption that the price actually paid for a property was its fair value by producing an after-the-fact appraisal of the property as if it were empty. By doing so, Taxpayer is mischaracterizing the nature of the property as it was actually sold. Accordingly, we give little weight to the appraisal and hold that it does not provide evidence to overcome the presumption that the actual selling price of the property was its "true and fair value" and the correct measure of the REET.

DECISION AND DISPOSITION

Taxpayer's petition for refund is denied.

Dated this 27th day of January 2017.