



RULE-MAKING ORDER

CR-103P (May 2009)
(Implements RCW 34.05.360)

Agency: Department of Revenue

Permanent Rule Only

Effective date of rule:

Permanent Rules

31 days after filing.

Other (specify) (If less than 31 days after filing, a specific finding under RCW 34.05.380(3) is required and should be stated below)

Any other findings required by other provisions of law as precondition to adoption or effectiveness of rule?

Yes No If Yes, explain:

Purpose: Second Engrossed Substitute House Bill 1117 (ESHB 1117), effective on June 12, 2014, provides a new REET exemption for transfers pursuant to a transfer on death deed and substantiation requirements to claim that exemption, as well as a change to the affidavit requirements for transfer on death deed transfers. WAC 458-61A-202 and WAC 458-61A-303 need to be amended to reflect this new exemption and accompanying substantiation and affidavit requirements for transfers pursuant to transfer on death deeds. Amending these rules to reflect the new transfer on death deed provisions in ESHB 1117 will provide taxpayers, practitioners, and counties with guidance on how to treat filings and recordings related to these transfers.

Citation of existing rules affected by this order:

Amended: **WAC 458-61A-202, Inheritance or devise; WAC 458-61A-303, Affidavit**

Statutory authority for adoption:

RCW 82.45.150, 82.32.300 and 82.01.060(2)

Other authority :

PERMANENT RULE (Including Expedited Rule Making)

Adopted under notice filed as WSR **14-22-060** on October 31, 2014.

Describe any changes other than editing from proposed to adopted version:

There are no changes between the proposed version of the rule and the adopted version of the rule.

If a preliminary cost-benefit analysis was prepared under RCW 34.05.328, a final cost-benefit analysis is available by contacting: **A cost-benefit analysis was not prepared.**

Name: phone ()

Address: e-mail

Date adopted: December 29, 2014

NAME

Dylan Waits

SIGNATURE

TITLE

Rules Coordinator

CODE REVISER USE ONLY

OFFICE OF THE CODE REVISER
STATE OF WASHINGTON
FILED

DATE: December 29, 2014

TIME: 11:49 AM

WSR 15-02-018

**Note: If any category is left blank, it will be calculated as zero.
No descriptive text.**

Count by whole WAC sections only, from the WAC number through the history note.
A section may be counted in more than one category.

The number of sections adopted in order to comply with:

Federal statute:	New	Amended	Repealed
Federal rules or standards:	New	Amended	Repealed
Recently enacted state statutes:	New	Amended 2	Repealed

The number of sections adopted at the request of a nongovernmental entity:

New	Amended	Repealed
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The number of sections adopted in the agency's own initiative:

New	Amended 2	Repealed
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The number of sections adopted in order to clarify, streamline, or reform agency procedures:

New	Amended	Repealed
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The number of sections adopted using:

Negotiated rule making:	New	Amended	Repealed
Pilot rule making:	New	Amended	Repealed
Other alternative rule making:	New	Amended	Repealed

AMENDATORY SECTION (Amending WSR 14-06-060, filed 2/28/14, effective 3/31/14)

WAC 458-61A-202 Inheritance or devise. (1) **Introduction.** Transfers of real property by inheritance or devise are not subject to the real estate excise tax. For the purpose of this exemption, it does not matter whether the real property transferred was encumbered by underlying debt at the time it was inherited or devised.

(2) **Nonpro rata distributions.** A nonpro rata distribution is one in which the transfer of real property to the heirs or devisees may not be in proportion to their interests. For example, Aunt Mary wills her entire estate equally to her three nieces. The estate consists of her primary residence, a cottage at the ocean, and significant cash assets, among other things. Rather than take title to the two parcels of real estate in all three names, the estate may be distributed by deeding the primary residence to Meg, the oceanfront property to Beth, and the majority of the cash assets to Jo. Such distribution by a personal representative of a probated estate or by the trustee of a trust is not subject to the real estate excise tax if the transfer is authorized under the nonintervention powers of a personal representative under RCW 11.68.090 or under the nonpro rata distribution powers of a trustee under RCW 11.98.070(15), if no consideration is given to the personal representative or the trustee for the transfer. For the purpose of this section, consideration does not include the indebtedness balance of any real property that is encumbered by a security lien.

(3) **Subsequent transfers.** A transfer of property from an heir to a third party is subject to the real estate excise tax. Examples:

(a) Steve inherits real property from his mother's estate. He sells the property to his son for \$50,000. The transfer of the property from the estate to Steve is exempt from real estate excise tax. The subsequent sale of the property to his son is a taxable event, and tax is due based upon the full sales price of \$50,000.

(b) Susan inherits real property from her father's estate. She decides to sell it to a friend on a real estate contract for \$100,000. Tax is due on the \$100,000.

(c) Sheri and her two sisters inherit their father's home, valued at \$180,000, in equal portions. Sheri wants sole ownership of the home but there are not "in-kind" assets of sufficient value to be distributed by the personal representative to her two sisters in a nonpro rata distribution. In order to take title directly from the personal representative, Sheri pays each of her sisters \$60,000, and they quitclaim their right to the property under the will. Tax is due on the total of \$120,000 paid for the property.

(4) **Community property or right of survivorship.** The transfer of real property to a surviving spouse or surviving domestic partner in accordance with a community property agreement or a survivorship clause is not subject to real estate excise tax.

(5) **Joint tenants.** The transfer of real property upon the death of a joint tenant to the remaining joint tenants under right of survivorship is not subject to the real estate excise tax.

(6) **Life estates and remainder interests.** The transfer of a life estate to the grantor with a remainder interest to another party is not a taxable transfer if no consideration passes. For example, Nate and Libby convey their property to their son, Rex, and retain a life estate. The transaction is not subject to real estate excise tax because Rex pays no consideration. Upon the deaths of Nate and Libby,

the title will vest in Rex and no real estate excise tax is due. However, if Nate and Libby convey their property to Rex, while retaining a life estate, and Rex pays any consideration for his future interest, the transaction is taxable. Tax is due on the total consideration paid.

(7) **Transfer on death deeds.** The transfer of real property pursuant to a transfer on death deed to the beneficiary(ies) named in the transfer on death deed occurs upon the death of the transferor and is generally not subject to the real estate excise tax. However, if the transfer of real property pursuant to a transfer on death deed satisfies a contractual obligation of the transferor owed to the beneficiary(ies) designated in the transfer on death deed, real estate excise tax is due on the transfer.

(8) **Documentation.** In order to claim this exemption, the following documentation must be provided:

(a) **Community property agreement.** If the property is being transferred under the terms of a community property agreement, copies of the recorded agreement and certified copy of the death certificate;

(b) **Trusts.** If property is being transferred under the terms of a trust instrument, a certified copy of the death certificate, and a copy of the trust instrument showing the authority of the grantor;

(c) **Probate.** In the case of a probated will, a certified copy of the letters testamentary, or in the case of intestate administration, a certified copy of the letters of administration, showing that the grantor is the court appointed executor/executrix or administrator;

(d) **Joint tenants with rights of survivorship and remainder interests.** A certified copy of the death certificate is recorded to perfect title;

(e) **Court order.** If the property is being transferred pursuant to a court order, a certified copy of the court order requiring the transfer of property, and confirming that the grantor is required to do so under the terms of the order;

(f) **Transfer on death deeds.** If the property is being transferred pursuant to a transfer on death deed, the beneficiary(ies) of the transfer on death deed must record a certified copy of the death certificate to perfect title.

(g) **Other.** If the community property interest of the decedent is being transferred to a surviving spouse or surviving domestic partner absent the documentation set forth in (a) through ((e)) (f) of this subsection, a certified copy of the death certificate and a signed affidavit from the surviving spouse or surviving domestic partner affirming that he or she is the sole and rightful heir of the property.

AMENDATORY SECTION (Amending WSR 14-06-060, filed 2/28/14, effective 3/31/14)

WAC 458-61A-303 Affidavit. (1) **Introduction.** This section explains when a real estate excise tax affidavit is required for the transfer of real property. See WAC 458-61A-101 for procedures pertaining to transfers and acquisitions of a controlling interest in an entity owning real property in the state of Washington.

(2) **Affidavit required.** In general, an affidavit must be filed when ownership or title to real property transfers as evidenced by conveyance, deed, grant, assignment, quitclaim, or any other document effectuating the transfer including, but not limited to, the following:

(a) Transfer establishing or separating community property, or in fulfillment of a settlement agreement incident to a dissolution of marriage, legal separation, or declaration of invalidity, or in fulfillment of a community property agreement under RCW 26.16.120;

(b) Transfer resulting from a court order;

(c) Transfer to secure a debt;

(d) Transfer of a taxable easement;

(e) A deed in lieu of foreclosure of a mortgage;

(f) A deed in lieu or declaration of forfeiture of a real estate contract;

(g) Transfer to an heir in the settlement of an estate;

(h) Transfer to or from the United States, the state of Washington, or any political subdivision or municipal corporation of this state;

(i) Transfer of development rights, water rights, or air rights;

(j) Transfer of leasehold improvements;

(k) Boundary line adjustments; ((~~o~~))

(l) Rerecording a document to correct a minor error, such as the legal description or spelling of a name; or

(m) Transfer pursuant to a previously recorded transfer on death deed when the beneficiary(ies) perfect title by recording a certified copy of the transferor's death certificate.

(3) **Affidavit not required.** The real estate excise tax affidavit is not required nor accepted for the following transactions including, but not limited to:

(a) Transfer of cemetery lots or graves;

(b) Transfer for assignment or release of security, stated on the face of the instrument:

(i) To secure or assign a debt; or

(ii) To provide or release collateral;

(c) A lease of real property that does not transfer lessee-owned improvements;

(d) A mortgage or deed of trust, satisfaction of mortgage, or reconveyance of a deed of trust;

(e) A seller's assignment of deed and contract;

(f) A fulfillment deed pursuant to a real estate contract;

(g) A community property agreement under RCW 26.16.120;

(h) Purchase of an option; ((~~o~~))

(i) An earnest money agreement;

(j) The recording of a transfer on death deed; or

(k) The revocation of a transfer on death deed.

(4) **Examples.**

(a) Lionel Construction has developed a group of new homes. It deeds a street to the homeowners' association upon completion of the development. This is done to clear title, which is an exempt transaction. The affidavit should cite the appropriate exemption rule, describe the exemption as "clearing title for street for homeowners' association," and have attached all department-required documentation.

(b) Webb Corporation transfers its interest in a parcel of real property to its wholly owned subsidiary, Watson Company. This is an exempt transaction because there is no change in beneficial ownership of the property. The affidavit must cite the appropriate exemption rule, describe the exemption as "transfer to wholly owned subsidiary; no change in beneficial ownership," and have attached all documentation required by the department.

(c) Amy records a transfer on death deed naming her two children as beneficiaries. No affidavit is required when Amy records the transfer on death deed and no real estate excise tax is due on the transfer. When Amy dies, the transfer on death deed transfers the property to her two children. This is an exempt transaction because the transfer was pursuant to a transfer on death deed, and there was no other consideration on the transfer. However, in order to perfect title, both of Amy's children must sign an affidavit claiming the appropriate exemption (WAC 458-61A-202) and record a certified copy of Amy's death certificate along with the signed affidavit at the county where Amy recorded the transfer on death deed.

(5) **Multiple buyers.** When the transfer of property is to two or more buyers, the affidavit must clearly state the relationship between them as joint tenants, tenants in common, partners, etc., and identify the form and proportion of interest each is acquiring.

(6) **Affidavit must be complete.**

(a) Taxpayers must provide complete and accurate information on the affidavit, as well as all documentation required by the department for claimed tax exemptions. Incomplete affidavits will not be accepted.

(b) An affidavit is incomplete if any required information is omitted or obviously incorrect, such as the use of a nominal selling price. A nominal selling price is an amount stated on the affidavit that is so low in comparison with the fair market value assessment stated on the property tax rolls that it would cause disbelief by a reasonable person. In the case of a nominal selling price, the county assessed value will be used as the selling price, unless there is an independent appraisal showing a greater value.

(7) **Documentation required when claiming an exemption.** Claims of exemption from the real estate excise tax must be specific and include the following:

(a) Current assessed values of parcels involved as of the date of sale; and

(b) Complete reasons for the exemption, including reference to the specific tax exemption in this chapter, citing the specific WAC section and subsection providing the exemption, as well as a brief description of the exemption.

(8) **Completion of affidavit.** The department will provide a real estate excise tax affidavit to be completed by the taxpayer and filed with the agent of the county where the property is located. Affidavits will be furnished by the department to the county agents and accessible to the public in one or more formats to be determined by the department. Alternative forms may be used, as long as they are in a format accepted by the department.

In most instances, the affidavit must be signed by the seller or the seller's agent and the buyer or the buyer's agent, under oath, certifying that all information on the affidavit is complete and correct. However, an affidavit given in connection with the grant of an easement or right of way to a utility company, public utility district or cooperative, or a governmental entity needs to be signed only on behalf of the entity purchasing the utility right of way or easement. In addition, an affidavit given in connection with the transfer of real property pursuant to a transfer on death deed need only be signed on behalf of the transferor by the designated beneficiary(ies) named in the transfer on death deed.

(9) **Duplicate affidavits.** To accommodate the requirement that the affidavit be signed by both the seller and buyer, or agents of each, identical affidavits may be submitted for a single transaction, one bearing the seller's or seller's agent's signature and one bearing the buyer's or buyer's agent's signature. Both affidavits must be complete and have identical information. The county agent will receipt one of the affidavits and attach the other affidavit to the receipted affidavit.

(10) **Retention of records.** The taxpayer must retain all records pertaining to the transaction for a period of at least four years from the date of sale.