



PREPROPOSAL STATEMENT OF INQUIRY

CR-101 (June 2004)
(Implements RCW 34.05.310)
Do NOT use for expedited rule making

Agency: Department of Revenue

Subject of possible rule making: WAC 458-61A-208 Foreclosure—Deeds in lieu of foreclosure—Sales pursuant to court order.

Statutes authorizing the agency to adopt rules on this subject: RCW 82.45.150, 82.32.300, and 82.01.060.

Reasons why rules on this subject may be needed and what they might accomplish:

The Department proposes to update WAC 458-61A-208 to:

1. Reflect recent decision at the Washington State Court of Appeals (*Department of Revenue v. FDIC*, 190 Wash.App. 150 (2015)) holding that a sale by a receiver in a receivership proceeding did not qualify for an exemption from real estate excise tax (“REET”) as a sale made “upon execution of a judgment” (the exemption is in RCW 82.45.010(3)(j)).
2. Amend examples and order of rule to increase clarity on department policy.

Identify other federal and state agencies that regulate this subject and the process coordinating the rule with these agencies: None.

Process for developing new rule (check all that apply):

- Negotiated rule making
- Pilot rule making
- Agency study
- Other (describe) Parties interested in this rule making may contact the individual listed below. The public may also participate by providing written comments throughout this rule making or giving oral testimony at the public meeting or public hearing.

How interested parties can participate in the decision to adopt the new rule and formulation of the proposed rule before publication:

A preliminary draft of possible rule changes is available via the Department’s online at dor.wa.gov .

Written comments may be submitted by mail and should be directed to David Hesford at either of the following addresses: email: DavidH@dor.wa.gov, or mailing address: David Hesford, ITA Division, PO Box 47453, Olympia, WA 98504-7453.

Written and oral comments will be accepted at the public meeting.

Public meeting location:

Capital Plaza Building
4th Floor Executive Conference Rm.
1025 Union Avenue SE
Olympia, Washington

Assistance for persons with disabilities:

Contact Julie King (360) 704-5717 or Renee Cosare (360) 725-7514 no later than 10 days before the meeting date. For Hearing Impaired please contact us via the Washington Relay Operator at (800) 833-6384.

Call in option can be provided upon request no later than 3 days before the meeting date.

Date: June 16, 2016 **Time:** 10:00 A.M.

Date May 17, 2016
Name Kevin Dixon
Signature 
Title Rules Coordinator

CODE REVISER USE ONLY
<div style="border: 1px solid black; padding: 5px;"> <p style="text-align: center;">OFFICE OF THE CODE REVISER STATE OF WASHINGTON FILED</p> <p>DATE: May 17, 2016 TIME: 9:08 AM</p> <p>WSR 16-11-081</p> </div>

AMENDATORY SECTION (Amending WSR 14-09-053, filed 4/15/14, effective 5/16/14)

WAC 458-61A-208 ((Foreclosure—)) **Transfers pursuant to deeds of trust, foreclosure proceedings, executions of a judgment, deeds in lieu of foreclosure((—Sales pursuant to court order)), and contract forfeiture.** (1) **Introduction.** The real estate excise tax does not apply to any transfer or conveyance made pursuant to:

- (a) A deed of trust in a foreclosure proceeding;
- (b) An order of sale by a court in any mortgage, deed of trust, or lien foreclosure proceeding ((or upon));
- (c) An execution of a judgment as provided in chapters 6.17 and 6.21 RCW;
- (d) A deed in lieu of foreclosure to satisfy a mortgage or deed of trust; or
- (e) A cancellation or forfeiture of a vendee's interest in a contract for the sale of real property.

(2) **Examples.** This rule contains examples that, while not exhaustive, illustrate some of the circumstances in which a transfer may or may not qualify for this exemption. These examples should be used only as a general guide. The taxability of each transaction must be determined after a review of all the facts and circumstances.

(3) **Deed of trust.** The real estate excise tax does not apply to the foreclosure sale of real property by the trustee under the terms of a deed of trust, whether to the beneficiary listed on that deed or to a third party.

(4) **Court-ordered sale in a foreclosure proceeding.**

(a) **Application to foreclosure proceedings only.** The real estate excise tax does not apply to an order or sale by a court in any mortgage, deed of trust, or lien foreclosure proceeding. RCW 82.45.010 (3)(j). This exemption does not apply to court-ordered sales in proceedings other than a mortgage, deed of trust, or lien foreclosure proceeding (such as a sale negotiated in a receivership proceeding; see subsection (5)(c) of this section) (generally, any type of negotiated sale is taxable unless an exemption applies, and the exemption here does not apply to negotiated sales outside of mortgage, deed of trust, or lien foreclosure proceedings).

(b) **Reporting requirements.** Real estate excise tax affidavits which state claims for this tax exemption must cite the cause number of the foreclosure proceeding on the affidavit and the transfer document. In order to claim this exemption, a copy of the court decision must be available and provided to the county treasurer or the department ((upon)) on request.

~~((2) **Examples.** The following examples, while not exhaustive, illustrate some of the circumstances in which a transfer may or may not qualify for this exemption. These examples should be used only as a general guide. The taxability of each transaction must be determined after a review of all the facts and circumstances.~~

~~(a)) (c) **Examples.**~~

Example 1. Joan and Sam are friends. They decide to jointly purchase real property worth \$100,000 as tenants in common. One year later, they decide to end their co-ownership of the property. Joan and Sam cannot agree on how the property should be divided. They both obtain legal counsel and go to court to resolve the issue. The court orders that Sam will deed his interest in the real property to Joan and

Sam will be paid \$65,000 for his interest in the property. ~~((No))~~ Real estate excise tax is due on the transfer ((since)) because the transfer ((is pursuant to a court ordered sale.

~~(b))~~, while ordered by the court, is not ordered by the court in a mortgage, deed of trust, or lien foreclosure proceeding.

Example 2. Rather than ((going to trial)) end their co-ownership, Joan and Sam agree to ((a settlement during the course of their negotiations. The attorneys draft an agreeable settlement under which Sam will get the property and Joan will be paid \$75,000. The settlement agreement is presented to the court and the judge signs off on the agreement. Tax is due on the transfer because this is not a court ordered sale.

~~(3) Foreclosure and contract forfeiture.)~~ continue owning the property. After a few years, however, Joan and Sam fail to make payments on their mortgage and their lender forecloses. The court orders a sale of the property in a mortgage foreclosure proceeding. Real estate excise tax is not due on the transfer.

(5) Execution of a judgment.

(a) Sheriff's sale. The real estate excise tax does not apply to a transfer of real property made upon execution of a judgment under chapters 6.17 (dealing with executions of a judgment) and 6.21 RCW (dealing with sales made due to an execution of a judgment, known generally as sheriff's sales), which refers to a writ of execution by the court ordering a sale of real property by a county sheriff. A real estate excise tax affidavit must be filed with the county, and a copy of the writ of execution must be available and provided to the county treasurer or department on request.

(b) The real estate excise tax applies to a subsequent sale or assignment of the right of redemption and the certificate of purchase that result from the sheriff's sale. The taxable consideration includes any payment given or promised to be given. It also includes the amount of underlying encumbrance, the payment of which is necessary for the exercise of the right of redemption.

(c) Receivers. The real estate excise tax applies to a sale by a receiver appointed by a court to give effect to the court's judgment under RCW 7.60.025 (dealing with the appointment of receivers).

(d) Examples.

Example 3. Bill sells property to Sam on a contract. After one year, Sam stops making payments on the contract. Bill obtains a judgment against Sam for nonpayment, and the court issues a writ of execution to enforce the judgment. At the Sheriff's sale, Bill obtains a certificate of purchase. Sam obtains the right of redemption. Sam is unable to make payment to redeem the right of redemption during the redemption period. When the redemption period is over, Bill turns the certificate of purchase over to the Sheriff. The Sheriff issues a Sheriff's deed to Bill. No real estate tax is due on the issuance of the Sheriff's deed to Bill.

Example 4. Alternatively, at the Sheriff's sale, Bill obtains a certificate of purchase. Sam obtains the right of redemption. To exercise the right of redemption, the holder must remit \$50,000 to the Sheriff. Sam sells the right of redemption to Jerry for \$10,000. Real estate excise tax is due on \$60,000 for the transfer of the right of redemption from Sam to Jerry. Jerry exercises the right of redemption by paying \$50,000 to the Sheriff. The Sheriff issues a Sheriff's deed to Jerry. No real estate tax is due on the issuance of the Sheriff's deed to Jerry. Two affidavits should be completed and filed together: One for the taxable transfer between Sam and Jerry for the right of

redemption with tax paid, and a second one claiming the exemption from the Sheriff's sale to Jerry when the deed is presented.

(6) **Deed in lieu of foreclosure.** The real estate excise tax does not apply to the following transfers where no additional consideration passes:

(a) A transfer by deed in lieu of foreclosure to satisfy a mortgage or deed of trust; or

(b) A transfer from a contract purchaser to the contract holder in lieu of forfeiture of a contract of sale upon default of the underlying obligation(~~(+or)~~).

(c) **Examples.**

Example 5. Sally sells real property to Frank. Frank obtains a \$150,000 loan from Easy Bank. The bank secures the loan with a deed of trust on the real property. Frank is unable to make the payments on the loan. Frank transfers the property back to Easy Bank by deed in lieu of foreclosure to satisfy the deed of trust. No real estate excise tax is due on the transfer.

Example 6. Mel sells real property to George. George obtains a \$100,000 loan from Zephyr Bank. The bank secures the loan with a deed of trust on the real property. George is unable to make the payments on the loan. George obtains a second loan of \$25,000 from Sam. Sam secures his loan with a second deed of trust on the real property. Sam's deed of trust is in junior position to Zephyr Bank's deed of trust. Later, George can't make payments to either the bank or Sam. At this time, George owes the bank \$95,000 and Sam \$23,000. George transfers the real property to Sam by deed in lieu of foreclosure to satisfy Sam's junior deed of trust. The debt to Zephyr Bank (the senior position debt) remains unpaid on the property at the time of transfer. The transfer is partially exempt and partially taxable. The deed in lieu of the junior position debt is exempt. The senior position debt to the bank that remains outstanding on the property at the time of the transfer meets the definition of consideration and is subject to tax. Tax would be due on \$95,000.

Example 7. Joe purchases a manufactured home and has it installed in a mobile home park. Joe signs a contract with the mobile home park owner to pay \$300 in monthly rent. If the rent is not paid, the contract states that the park owner has a lien against the manufactured home. Joe is injured and moves in with relatives in another state. Joe does not pay rent for six months. The park owner takes title to the mobile home under the authority of the rent contract, and puts it up for sale to recover his interest for back rent. The park owner sells the manufactured home to Mimi. No tax is due on the transfer to the park owner, since that transfer was to satisfy a lien on the property. Real estate excise tax is due on the sale to Mimi.

(7) **Contract forfeiture.** The real estate excise tax does not apply where no additional consideration passes in a transfer occurring through the cancellation or forfeiture of a vendee's interest in a contract for the sale of real property, regardless of whether the contract contains a forfeiture clause, such as a declaration of forfeiture made under the provisions of RCW 61.30.070.

~~((d) **Examples.** The following examples, while not exhaustive, illustrate some of the circumstances in which a transfer may or may not qualify for this exemption. These examples should be used only as a general guide. The taxability of each transaction must be determined after a review of all the facts and circumstances.~~

~~(i) Meg sells real property to Julie on a real estate contract. The contract price is \$65,000. Julie makes payments for one year and~~

then loses her job and can't make payments on the contract. Julie feels that she has some equity in the property, but she and Meg disagree on how to resolve the issue. Eventually, they come to an agreement. Meg will pay Julie \$1,500; Julie will sign a deed in lieu of forfeiture and transfer the property to Meg. At the time of the deed in lieu of forfeiture, the outstanding balance of the contract was \$61,000. Even though the transfer was by a deed in lieu of forfeiture, there is additional consideration passing (the \$1,500). The transfer is subject to tax. The taxable selling price is \$62,500, which is the total of the outstanding contract balance that was canceled plus the \$1,500 paid to Julie.

(ii) Sally sells real property to Frank. Frank obtains a \$150,000 loan from Easy Bank. The bank secures the loan with a deed of trust on the real property. Frank is unable to make the payments on the loan. Frank transfers the property back to Easy Bank by deed in lieu of foreclosure to satisfy the deed of trust. No real estate excise tax is due on the transfer.

(iii) Mel sells real property to George. George obtains a \$100,000 loan from Zephyr Bank. The bank secures the loan with a deed of trust on the real property. George is unable to make the payments on the loan. George obtains a second loan of \$25,000 from Sam. Sam secures his loan with a second deed of trust on the real property. Sam's deed of trust is in junior position to Zephyr Bank's deed of trust. Later, George can't make payments to either the bank or Sam. At this time, George owes the Bank \$95,000 and Sam \$23,000. George transfers the real property to Sam by deed in lieu of foreclosure to satisfy Sam's junior deed of trust. The debt to Zephyr Bank (the senior position debt) remains unpaid on the property at the time of transfer. The transfer is partially exempt and partially taxable. The deed in lieu of the junior position debt is exempt. The senior position debt to the bank that remains outstanding on the property at the time of the transfer meets the definition of consideration and is subject to tax. Tax would be due on \$95,000.

(iv) Joe purchases a manufactured home and has it installed in a mobile home park. Joe signs a contract with the mobile home park owner to pay \$300 in monthly rent. If the rent is not paid, the contract states that the park owner has a lien against the manufactured home. Joe is injured and moves in with relatives in another state. Joe does not pay rent for six months. The park owner, takes title to the mobile home under the authority of the rent contract, and puts it up for sale to recover his interest for back rent. The park owner sells the manufactured home to Mimi. No tax is due on the transfer to the park owner, since that transfer was to satisfy a lien on the property. Real estate excise tax is due on the sale to Mimi.

(4) **Deed of trust.** The real estate excise tax does not apply to the foreclosure sale of real property by the trustee under the terms of a deed of trust, whether to the beneficiary listed on that deed or to a third party.

(5)) **Example 8.** Meg sells real property to Julie on a real estate contract. The contract price is \$65,000. Julie makes payments for one year and then loses her job and can't make payments on the contract. Julie feels that she has \$1,500 in equity in the property. They agree that Meg will pay Julie \$1,500 for her equity in the property and Julie will sign a deed in lieu of forfeiture and transfer the property to Meg. At the time of the deed in lieu of forfeiture, the outstanding balance of the contract was \$61,000. Even though the transfer was by a deed in lieu of forfeiture, there is additional con-

sideration passing (the \$1,500). The transfer is subject to tax on the additional consideration of \$1,500.

(8) Assignment of indebtedness. A transfer from a servicing agent, who has acquired real property under this section, to the actual owner of the indebtedness that was foreclosed upon is not subject to real estate excise tax. In order to claim this exemption, a copy of the assignment of the indebtedness or a copy of the trustee's deed identifying the servicing agent as an agent for the actual owner must be available and provided to the county treasurer or the department ~~((upon))~~ on request.

~~((For example,))~~ Example 9. Gil sells real property to Max. Max obtains a \$125,000 loan from Zone Finance. The finance company secures the loan with a deed of trust on real property. Zone Finance sells the loan to Federal National Mortgage Association (Fannie Mae). The finance company becomes the servicing agent for the loan. Max can't make payments on the loan. Due to nonpayment on the debt, the Trustee (under the authority of the Deed of Trust) conducts a Trustee's sale of the real property. The Trustee transfers the property to the Zone Finance via a Trustee's Deed. No real estate excise tax is due on that transfer. Zone Finance Company transfers real property to Fannie Mae, the actual owner of the debt. No real estate excise tax is due on that transfer.

~~((6))~~ Sheriff's sale.

~~(a)~~ Introduction. The real estate excise tax does not apply to a transfer of real property made by a county sheriff pursuant to a court decree. A real estate excise tax affidavit must be filed with the county.

~~(b)~~ The real estate excise tax applies to a subsequent sale or assignment of the right of redemption and the certificate of purchase that result from the sheriff's sale. The taxable consideration includes any payment given or promised to be given. It also includes the amount of underlying encumbrance, the payment of which is necessary for the exercise of the right of redemption.

~~(c)~~ Examples.

~~(i)~~ Bill sells property to Sam on a contract. After one year, Sam stops making payments on the contract. Bill obtains a judgment against Sam for nonpayment. At the Sheriff's sale, Bill obtains a certificate of purchase. Sam obtains the right of redemption. Sam is unable to make payment to redeem the right of redemption during the redemption period. When the redemption period is over, Bill turns the certificate of purchase over to the Sheriff. The Sheriff issues a Sheriff's Deed to Bill. No real estate tax is due on the issuance of the Sheriff's deed to Bill.

~~(ii)~~ Alternatively, at the Sheriff's sale, Bill obtains a certificate of purchase. Sam obtains the right of redemption. To exercise the right of redemption, the holder must remit \$50,000 to the Sheriff. Sam sells the right of redemption to Jerry for \$10,000. Real estate excise tax is due on \$60,000 for the transfer of the right of redemption from Sam to Jerry. Jerry exercises the right of redemption by paying \$50,000 to the Sheriff. The Sheriff issues a Sheriff's Deed to Jerry. No real estate tax is due on the issuance of the Sheriff's deed to Jerry.

~~(7))~~ (9) Documentation. In addition to the documentation requirements set forth in subsections (1) and ~~((5))~~ (8) of this ~~((see- tion))~~ rule, a copy of the recorded original mortgage, deed of trust, contract of sale, or lien document must be available and provided to the county treasurer or the department ~~((upon))~~ on request.