

Cite as Det. No. 92-317, 12 WTD 485 (1992).

BEFORE THE INTERPRETATION AND APPEALS DIVISION
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 of)	
)	No. 92-317
)	
. . .)	Unregistered
)	REAL ESTATE EXCISE TAX
)	

- [1] REAL ESTATE EXCISE TAX -- STAMP TAX -- BANKRUPTCY. The real estate excise tax is a stamp tax as that term is used in the Bankruptcy Code because the amount of the tax is determined by the selling price and payment of the tax is a prerequisite for filing a document of transfer. Citing: In Re Jacoby-Bender, Inc., 40 BR 10 (ED NY, 1984), aff'd 758 F.2d 840 (2nd Cir., 1985).
- [2] REAL ESTATE EXCISE TAX -- BANKRUPTCY -- WAC 458-61-230 --11 U.S.C. 1146(c) -- UNDER A CONFIRMED PLAN. A transfer of real property made by a bankrupt after filing its petition under Chapter 11 of the Bankruptcy Code and prior to the confirmation of the plan of reorganization will be treated as occurring under the plan when the sale of the property is essential to the completion of the plan. Citing: Jacoby-Bender, Inc., supra; In Re Smoss Enterprises Corp., 54 BR 950 (ED NY, 1985); and In Re Permar Provisions, Inc., 79 BR 530 (ED NY, 1987).
- [3] REAL ESTATE EXCISE TAX -- BANKRUPTCY -- 11 U.S.C. 1146(c). Where a bankrupt has filed a petition under Chapter 11 of the Bankruptcy Code and there is no confirmed plan of reorganization at the time of a transfer of real property, the County Treasurer should collect the real estate excise tax prior to accepting the documents of transfer. The amount paid will be refunded upon confirmation of the plan and filing of a request for refund. Citing: In Re Jacoby-Bender, Inc., 34 BR 60 (ED NY, 1983).

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: . . .

NATURE OF ACTION:

Taxpayer transferred title to real property after filing its petition for reorganization under Chapter 11 of the Bankruptcy Code, but prior to the confirmation of the plan of reorganization. The taxpayer was required by County officials to pay real estate excise tax on the transfer. The taxpayer requests a refund on the theory that the Bankruptcy Code prohibits the imposition of the real estate excise tax.

FACTS:

Coffman, A.L.J. -- The taxpayer is a limited partnership which filed a petition in the U.S. Bankruptcy Court under Chapter 11 [in November 1989]. The taxpayer's sole asset at the time it filed was an uncompleted . . . complex. The taxpayer completed the complex and obtained the permission of the Bankruptcy Court to sell the property [in February 1991]. The sale of the . . . complex closed [in March 1991]. The Real Estate Excise Tax (REET) affidavit and warranty deed were filed on the same day. The affidavit contained a claimed exemption under WAC 458-61-230 which was denied and REET, in the amount of \$. . . , was paid under protest. The plan of reorganization was filed with the Bankruptcy Court [in March 1991] and approved [79 days after the sale closed].

ISSUE:

Does 11 U.S.C. 1146(c) prohibit the State of Washington from collecting REET from a bankrupt when the sale is made after the filing of the Chapter 11 petition and prior to the confirmation of the plan of reorganization?

DISCUSSION:

Absent the filing of the petition in bankruptcy REET applies to the sale. It is clear to us that all the requirements for REET exist. Thus, the only issue is whether the Bankruptcy Code prohibits the imposition of REET in this particular case.

11 U.S.C. 1146(c) states:

The issuance, transfer or exchange of a security, or the making or delivery of an instrument of transfer

under a plan confirmed under section 1129 of this title, may not be taxed under any law imposing a stamp tax or similar tax.

Section 1129 specifies the requirements of a confirmed plan of reorganization. 11 U.S.C. 1146(c) raises two questions which must be resolved before concluding that the taxpayer is entitled to a refund. First, is REET a "stamp tax or similar tax?" Second, does this statute exempt transactions which occur prior to confirmation of the plan of reorganization?

[1] A stamp tax has the following characteristics:

1. The amount of tax is usually determined by the consideration recited in the document.
2. The taxes must be paid prior to recording the document.

See: In Re Jacoby-Bender, Inc., 40 BR 10 (ED NY, 1984), aff'd 758 F.2d 840 (2nd Cir., 1985). (Jacoby-Bender 2.)

The amount of the tax is determined by the selling price which must be reported on a Real Estate Excise Tax Affidavit. RCW 82.45.120. Thus, the first condition is met. RCW 82.45.090 requires the county treasurer to collect REET upon the filing of the documents of transfer. RCW 82.45.090 states: "No instrument of sale or conveyance evidencing a sale subject to the tax shall be accepted by the county auditor for filing or recording until the tax shall have been paid and the stamp affixed thereto; in case the tax is not due on the transfer, the instrument shall not be so accepted until suitable notation of such fact has been made on the instrument by the treasurer." Thus, the second condition has been met. Therefore, REET is a "stamp tax or similar tax."

[2] WAC 458-61-230 is the Department's rule concerning transfers by a trustee in bankruptcy. This rule states:

A conveyance of real property by a trustee in bankruptcy is subject to the real estate excise tax whether made by a trustee conducting the business of the bankrupt or by a trustee liquidating the bankrupt's estate. However, such a conveyance is not taxable when made under a post petition chapter 11 plan or chapter 12 plan per 11 USC 1146 or 11 USC 1231 respectively.

(Emphasis added.)

We note that a debtor in possession, such as occurred in this case, is treated as a trustee for bankruptcy purposes. 11 U.S.C. 1107(a). It is clear from the highlighted portion of the rule that if the sale of the property had occurred after the

confirmation of the plan of reorganization, REET would not have been due. However, the transfer in this case was made prior to the confirmation of the plan by the Bankruptcy Court.

The real property was the only asset of the taxpayer. Its sale was essential to the completion of any plan. The Bankruptcy Court had previously authorized the taxpayer to secure financing so that the . . . complex could be completed and sold. The Bankruptcy Court approved the sale of the property prior to the filing of the plan of reorganization knowing that the sale would result in significant assets to the estate. The confirmed plan of reorganization includes specific provision for the sale of the . . . complex and refers to the Court's prior order approving the sale.

In Jacoby-Bender, Inc. 2, the Court held that the sale was part of a confirmed plan when the sale was essential to the completion of the plan. This conclusion was reinforced by similar rulings in In Re Smoss Enterprises Corp., 54 BR 950 (ED NY, 1985) and In Re Permar Provisions, Inc., 79 BR 530 (ED NY, 1987).

[3] We find no conflict with the Bankruptcy Code in the requirement to collect REET when the transaction occurs prior to the confirmation of the plan of reorganization. At the time the conveyance was recorded and REET paid the plan of reorganization had not been approved. There was no guarantee that it would be approved, therefore the County correctly required REET to be paid. However, after the plan of reorganization was confirmed REET should have been refunded. See: In Re Jacoby-Bender, Inc., 34 BR 60 (ED NY, 1983) where the Court refused to issue an order requiring the acceptance of a deed without payment of a similar real estate transfer tax and tacitly approved the collection of the tax. The Court stated at 62:

Congress was well aware that many chapter 11 debtors would fail in their efforts to gain confirmations of reorganization plans. It would be difficult to believe that Congress would allow a debtor the advantage of such an exemption merely upon its filing and formation of a plan that provided for a sale or transfer of property. Although the contemplated sale in the instant case may go well beyond mere preparatory steps, it is not exempt from taxation under section 1146(c) prior to confirmation of the plan.

(Parenthetical phrase omitted.)

The same Court ruled the sale exempt from the real estate transfer tax after the plan of reorganization was confirmed. Jacoby-Binder 2, supra.

DECISION AND DISPOSITION:

The taxpayer's petition is granted. Refund shall be made on excise tax paid Said amount shall be paid into the Bankruptcy Court for the benefit of the taxpayer.

DATED this 16th day of November 1992.