

Cite as Det. No. 95-177, 15 WTD 157 (1996).

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 Correction of Assessment of	)	
	)	No. 95-177
	)	
. . .	)	Real Estate Excise Tax
	)	Assessment No. 9406-31
	)	(079573)
	)	

RULE 600; RCW 82.45.010; ETB 541.04/45/33.135: REAL ESTATE EXCISE TAX -- SALES OF STANDING TIMBER -- TITLE AND OWNERSHIP -- TRANSFER OF TITLE. When title or ownership to standing timber passes prior to the timber's severance from the land, the sale is subject to real estate excise tax. A landowner's retention of bare legal title to the timber does not otherwise alter the imposition of the tax.

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.

NATURE OF ACTION:

Landowner protests the assessment of real estate excise tax (REET) on the sale of standing timber.

FACTS:

Mahan, A.L.J. -- On August 11, 1993, the taxpayer, as landowner, entered into a Timber Sale Agreement. Under the terms of this agreement, the taxpayer agreed to sell to the buyer "all Merchantable Timber of the species hereinafter specified" on the taxpayer's land. As consideration, the buyer agreed to pay the lump sum of \$900,000. The agreement further provided that the buyer had until August of 1996 to remove the merchantable timber from the land and, after that date, all rights and interest in the timber would revert to the taxpayer. The taxpayer did not

record this agreement and did not pay REET on the sale of the timber.

Based on information contained in a Department of Natural Resources Forest Practices Application, the Department's Special Programs Division assessed REET on the transaction.

On appeal, the taxpayer contends that transfer of title language in the agreement brought the transaction outside the scope of the REET statutes and rules. In this regard, paragraph 7 of the agreement provides that "[t]itle to timber shall remain in Seller until the same is severed by Buyer, its successors or assigns." It further contends that an officer at a title company represented that such language was effective for the purpose of avoiding the REET. The title officer allegedly based his advice on a conversation that he had with an employee of the Department.<sup>1</sup>

#### ISSUE:

Whether REET is owed where language in a timber sale contract reserves title in the landowner until after severance of the timber.

#### DISCUSSION:

RCW 82.45.060 imposes the REET upon the "sale" of real property. RCW 82.45.010(1) defines the term "sale" to mean:

As used in this chapter the term "sale" shall have its ordinary meaning and shall include any conveyance, grant, assignment, quitclaim, or transfer of the ownership of or title to real property, including standing timber, or any estate or interest therein for a valuable consideration,  
. . . .

(Emphasis supplied.)

The amount of the tax is based on the selling price. The seller of the property is obligated to pay the tax. RCW 82.45.080.

With respect to the sale of standing timber, the Department adopted WAC 458-61-660 (Rule 660) in 1982. As with the statute, the rule provides that the tax is imposed if the ownership of the

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<sup>1</sup>In general, oral instructions alone do not provide the quantum of proof necessary to sustain an estoppel claim. See, e.g., Excise Tax Bulletin 419.32.99 (ETB 419). The taxpayer has presented no support for its contention and we do not further address it in this determination.

timber is transferred while the timber is still standing. Prior to a recent amendment, and during the period of the transaction at issue here, it read in pertinent part:

The application of the real estate excise tax to the sale of timber is based upon whether or not the ownership of the timber transferred while the timber was standing.

(1) The sale of standing timber is a taxable transaction.

(2) The seller's irrevocable agreement to sell timber and pass ownership to it as it is cut is a taxable transaction if the total amount of the sale is specified in the original contract.

(Emphasis supplied.)<sup>2</sup>

With respect to the liability of landowners for the sale of standing timber, the Department has also promulgated Excise Tax Bulletin 541.04/45/33.135 (ETB 541). It provides that the liability for the REET depends upon the transfer of ownership or title to timber while it is standing. In relevant part it provides:

There are a number of ways in which timber is sold, and the timing of the transfer of ownership and/or title to the timber determines which taxes are due and who is liable for paying them. The two most common sale arrangements and the taxes that apply in each situation are described below:

(1) Sale of Standing timber (stumpage sales): Title to the timber transfers to the buyer before harvesting takes place.

(Emphasis supplied.)

[1] In general, contracts of the type at issue here, also referred to as stumpage contracts or cutting rights contracts, have been found to involve a transfer of ownership or title. This is true even if the landowner retains bare legal title pending completion of the contract. See Det. No. 92-249ER, 13 WTD 138 (1993). As we explained in that determination:

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<sup>2</sup>We are bound to follow the rules adopted by the Department. Rules promulgated by the Department have the force and effect of law, unless declared invalid by the judgment of a court of record not appealed from. RCW 82.32.300.

In a contract for the sale of timber, the purchaser becomes the beneficial owner of the timber even though the purchaser has not paid the whole purchase price. The seller holds the title as trustee to be conveyed to the purchaser upon compliance with the terms of the contract.

Legal title does not have to be transferred in order for the timber buyer to be recognized as the owner of the timber. As explained in Wasser & Winters Co. v. Jefferson Cty., 84 Wn.2d 597, 599, 528 P.2d 471 (1974):

We have identified the chief incidents of ownership of property as the right to its possession, use and enjoyment and to sell or otherwise dispose of it according to the will of the owner. . . . the person assessed need not have a perfect and unencumbered title to the property but only that he should be vested with the apparent legal title, or with the possession coupled with such claims and evidence of ownership as will justify the assumption that he is the owner.

In this case, before the timber was severed from the land, all incidents of ownership were transferred to the buyer except for bare legal title. REET was due upon the transfer of such ownership rights.

This holding is also consistent with this state's Uniform Commercial Code (UCC), RCW 62A.1-101, et seq. Under most circumstances, a contract for the sale of timber is governed by the UCC. Syrov v. Alpine Resources, Inc., 122 Wn.2d 544, 549, 859 P.2d 51 (1993). Section 2-107 of the UCC, in relevant part, provides:

(2) A contract for the sale apart from the land . . . of timber to be cut is a contract for the sale of goods within this Article whether the subject matter is to be severed by the buyer or by the seller even though it forms part of the realty at the time of contracting, and the parties can by identification effect a present sale before severance.

(3) The provisions of this section are subject to any third party rights provided by law relating to realty records, and the contract for sale may be executed and recorded as a document transferring an interest in land and shall then constitute notice to third parties of the buyer's rights under the contract for sale.

RCW 62.2-107. Although the UCC is not determinative of what constitutes a transfer of real property for REET purposes (See Det. No. 90-372, 10 WTD 159 (1990)), we recognize that it

generally describes the rights of the parties to a timber sale contract.

The fact that a party retains legal title is not conclusive evidence that the party remained the owner of the property as well. Under the UCC, the reservation of title by the seller does not prohibit the vesting of title in the buyer, but only reserves a security interest in the property. RCW 62A.2-401 (the "retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest"); In re R & R Contracting, Inc., 4 B.R. 626, 632 (E.D. Wash. 1986).

Under the facts of this case, the taxpayer's reservation of a title interest had the effect of only a reservation of a security interest in the timber sold to the buyer. In all other respects the ownership of the standing timber was transferred prior to the severance of the timber from the land, and the landowner became liable for the REET at the time of the transfer.

#### DECISION AND DISPOSITION:

The taxpayer's petition is denied. This case is being remanded to the Special Programs Division, Miscellaneous Tax Section for computation of the amount owed in accordance with this Determination.

DATED this 31st day of August, 1995.