

Cite as 2 WTD 207 (1986)

BEFORE THE INTERPRETATION AND APPEALS SECTION  
DEPARTMENT OF REVENUE  
STATE OF WASHINGTON

In the Matter of the Petition ) D E T E R M I N A  
T I O N  
For Refund of )  
 ) No. 87-43  
 )  
 . . . ) Unregistered  
 ) Real Estate Excise  
Tax )  
 )

**[1] REET AND WAC 458-61-100(4)(a):** REAL ESTATE EXCISE TAX -- REFUND -- RECISION -- BREACH OF CONTRACT -- DEFAULT ON MORTGAGE -- RESALE. There are no provisions in the law which reduce the original tax measure when a buyer defaults on his contract obligation and the seller sustains expenses or other losses in reclaiming his property, or which excuse the tax on the subsequent resale of the property. Only when a sale is rescinded may the Department issue a taxpayer a refund.

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: . . .  
. . .

DATE OF HEARING: May 1, 1986

NATURE OF ACTION:

Because of a buyer's default on a real estate contract and a mortgage, the taxpayer was required to resell, at a loss, two pieces of property and

pay the real estate excise tax again on the subsequent sales.

# FACTS AND ISSUES:

Burroughs, A.L.J.--The taxpayer and his wife have best outlined the facts of this case in their letter dated January 29, 1986 as follows:

We would like to appeal under RCW 82.32.170 a denial of excise tax refund, on the following two parcels:

## (1) Lot 1 at . . .

On April 14, 1982 we sold for \$315,000 (\$100,000 down - 10 year pay out on 30 yr amortization). Excise tax paid of \$3,150. With \$214,562.15 still being owed to us, buyer relinquished home back to us after being in arrears 7 months and leaving house and yard in a badly deteriorated condition.

On November 14, 1985 we sold house for \$200,000. This being \$14,562.15 below the principal balance due us on first sale. Excise tax paid of \$2,640.

## (2) Lot 2 at . . .

On July 1, 1982 we sold this vacant land to be developed into 7 choice lots for \$235,000 (50,000 down on a 3 year contract). With \$183,021.47 still owed to us and monthly payments in arrears with no development done lot #2 was relinquished. Excise tax Pd. 7/1/82 \$2,515.50.

On November 13, 1986 we resold this property for \$155,000 (over \$28,000 below amount owed on original contract). Excise tax pd. 11/13/85 \$2,046.

We think it unjust to pay excise tax twice on the same property that has previously been paid. We wanted the first sale to be valid but had no control. You will notice that we never did receive what the original sale was, even when the first down payments are added onto the final sale . . .

Therefore we request a refund of:

Lot 1     \$2,640.00     second excise paid on  
same amount

Lot 2 \$2,046.00 second excise paid on  
same amount

Review of the taxpayer's file reveals that Lot 1 was the taxpayer's home and that Lot 2 was an adjoining six-acre parcel. The same buyer purchased both parcels with the intent of subdividing the acreage adjoining the house, but did not carry out either his payment obligations or the intended subdivision. The house was regained after a trustee sale on October 25, 1985, the acreage having already been deeded back to the taxpayer in July of that year for nonpayment under the real estate contract.

At the hearing and in documentation supplied after the hearing, the taxpayer emphasized that he had had many expenses plus time lost from work in connection with these multiple sales, and it was an extreme burden to have to take the property and house back and resell them. Included in additional expenses of more than \$40,000 were taxes and sewer fees not paid by the initial buyer; yard and house repairs; additional mortgage payments; legal fees; travel and phone expenses; title insurance, real estate commissions, revenue stamps, escrow fees--all paid a second time. In addition, the sales prices the second time totalled approximately \$45,000 less than the first time. Considering these expenses, losses, and the payment of real estate excise taxes twice on both parcels, the taxpayer calculates a total loss of \$100,285.71.

#### TAXPAYER'S EXCEPTIONS:

The taxpayer claims that the legislature could not have intended that the real estate excise tax be imposed twice in such circumstances.

#### DISCUSSION:

RCW 82.45.060 provides that an excise tax be imposed upon each sale of real property based on the property's "selling price." RCW 82.45.030 defines "selling price" as follows:

As used in this chapter, the term "selling price" means the consideration, including money or anything of value, paid or delivered or contracted to be paid or delivered in return for the transfer of the real property or estate or interest in real property, and shall include the amount of any lien, mortgage, contract indebtedness, or other incumbrance, either given to secure the purchase price, or any part thereof, or remaining unpaid on such property at the time of sale.

[1] Thus, the legislature has prescribed one measure of the Real Estate Excise Tax to be "the consideration . . . contracted to be paid or delivered in return for the transfer of the real property." Whether the seller has made a profit, sustained a loss on the sale, or even received that payment which was promised is therefore irrelevant. The Washington Real Estate Excise Tax, like many of this state's taxes, is a tax on a transaction. This is to be distinguished from an income tax, in which the measure of the tax is based on the actual profit or loss shown by a taxpayer. Accordingly, there is no provision in the law which reduces the original measure when the buyer later defaults on his contract obligation, or the seller sustains expenses or other losses in reclaiming his property. Similarly, there is no provision in the law to excuse payment of the tax on a subsequent resale of the property.

Only when a sale is rescinded may the Department issue a taxpayer a refund. WAC 458-61-100(4)(a) provides as follows:

The authority of the department to issue tax refunds under this chapter is limited to the following:

(a) Transactions that are completely rescinded with both parties restored to their original positions. In such case monies paid by the purchaser are not retained by the seller; . . .

The word "rescind" is a legal term defined by Black's Law Dictionary (Revised Fourth Edition, 1968) as follows:

To abrogate, annul, avoid, or cancel a contract; particularly, nullifying a contract by the act of a party. . . . To declare a contract void in its inception and to put an end to it as though it never were . . . not merely to terminate it and release parties from further obligations to each other but to abrogate it from the beginning and restore parties to relative positions which they would have occupied had no contract ever been made. . . . (Citations omitted.)

Under Washington law, rescission, if not by court order, can only occur when there is a mutual consent to rescind the contract, or a demand to rescind by one side with acquiescence by the other, a material breach by one party with a claim of rescission by the other or other circumstances not material here. Woodruff v. McClellan, 95 Wn.2d 394 (1980). In addition,

A mere expression by the injured party of recognition of the fact that a vital breach has occurred and an assertion of his own discharge thereby is no part of an "agreement to rescind"; it is not an offer to rescind, nor is it the acceptance of such an offer. Furthermore, it is not an "election" between remedies, the very existence and character of which he can not know until advised by a competent lawyer.

When the injured party asserts his own freedom from the duty to perform further, he is merely trying to avoid further loss from the other's wrong--something that the law often requires of him whether he is willing or not. There are other methods by which he may reasonably endeavor to avoid or reduce injury; . . . In doing these things, he is trying to avoid harms and losses; he is not offering a "rescission" or "waiving" his rights or "electing" a remedy. 5 Corbin on Contracts, Section 1237, 00. 962, 963.

(Snowflake Laundry Co. v. MacDowell, 52 Wn.2d 662, 671 (1958).)

Although in this case there was a vital breach on the part of the buyer which justified the seller-taxpayer's retaking of the properties by legal means, it is clear that in neither case was there a

rescission of either original sale or a restoration of both parties to their original positions. Thus, the Department, as an administrative agency, is simply without authority to issue a tax refund under WAC 458-61-400(4)(a).

DECISION AND DISPOSITION:

For the reasons stated above, the taxpayer's petition for refund is denied.

DATED this 10th day of February 1987.