

Cite as Det No. 08-0212E, 28 WTD 35 (2009)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For)	<u>F I N A L E X E C</u>
Refund/Correction of Assessment of)	<u> L E V E L D E T E R M I N A T I O N</u>
)	
)	No. 08-0212E
...)	Registration No. . . .
)	Appeal of Letter Ruling . . .
)	Docket No. . . .

- [1] RCW 82.45.010(3): REET – DEED OF TRUST. Transfers made pursuant to a deed of trust are specifically exempt from the definition of the term “sale” for purposes of determining the imposition of REET.

- [2] Rule 208(4): REET – DEED OF TRUST – FORECLOSURE. REET does not apply to the foreclosure sale of real property by the trustee under the terms of a deed of trust.

- [3] RCW 82.45.010(3): REET – DEED OF TRUST – LIEN PRIORITY. The statutory REET exemption applies to any transfer made pursuant to a deed of trust, regardless of the relative lien priority of the deed of trust at the time of foreclosure.

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.

Weaver, A.L.J. (as successor to Prusia, A.L.J) – Taxpayer appeals a ruling that Real Estate Excise Tax (REET) applies to conveyances of real property made pursuant to non-judicial foreclosures of second lien deeds of trust. We grant taxpayer’s petition and hold that non-judicial foreclosures of second lien deeds of trust are exempt from real estate excise taxation, because the resultant transfers do not fit within the statutory definition of a “sale” of real property.

ISSUE

Does the transfer of property resulting from the non-judicial foreclosure of a second lien deed of trust constitute a “sale” of real property subject to REET for purposes of RCW 82.45.010, *et seq.*?¹

FINDINGS OF FACT

[Taxpayer] is a company engaged in the business of buying various types of existing debt obligations. Many of the notes purchased by taxpayer are secured against real property with deeds of trust. In the course of taxpayer’s business, it is sometimes required to initiate a non-judicial foreclosure on real property subject to a deed of trust.² These non-judicial foreclosures include foreclosure proceedings on second lien deeds of trust, which are expressly subordinate to other senior first lien deed of trusts.³ The procedure for foreclosing on deeds of trust is set forth in the Deeds of Trust Act. (RCW 61.24.080 *et seq.*).

When a borrower defaults on a debt obligation that is secured by a deed of trust on real property, taxpayer will instruct the trustee appointed in the deed of trust to institute and conduct a public non-judicial foreclosure sale. Following the trustee’s sale, the trustee will issue a trustee’s deed to the highest bidder.⁴ At issue is whether REET is owed when title is transferred by the trustee’s deed after a non-judicial deed of trust foreclosure sale.

The mechanics of a non-judicial, deed of trust foreclosure sale are statutory in nature. For example, RCW 61.24.080 governs the trustee’s distribution of proceeds from a foreclosure sale. *See* 18 Wash. Prac., Real Estate § 20.16 (2d ed. 2007). A hierarchy is established for the distribution of such proceeds. *See id.* First, the trustee is paid for the expenses of the sale. RCW 61.24.080(1). Then, the trustee applies the proceeds to the obligation secured by the particular deed of trust being foreclosed. RCW 61.24.080(2). After the trustee has paid the first and second items, it then deposits the surplus, if there is a surplus, with the clerk of the superior court in the county in which the sale took place. RCW 61.24.080(3). The funds deposited with the clerk are thereafter available to satisfy liens against the land that were extinguished by the sale.⁵ RCW 61.24.080(3).

Taxpayer contacted the Department of Revenue, Taxpayer Information and Education (TI&E) Division, requesting a ruling whether REET is owed on a transfer of property made pursuant to a second lien deed of trust foreclosure. In a letter ruling dated June 7, 2007, the TI&E Division

¹ Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410.

² *See generally* RCW 61.24.010.

³ *See* RCW 61.24.040.

⁴ Typically, the highest bidder will be the lender, who will subsequently sell the property to a third-party in order to recover on its debt.

⁵ *See generally Wilson v. Henkle*, 45 Wn. App. 162, 724, P.2d 1069 (1986) (surplus funds may be used to satisfy judgment lien). Those funds are not accessible without a court order.

stated that, in non-judicial foreclosures of second lien deeds of trust, REET is owed on the remaining value of any senior lien, plus any amount received in excess of the amount due and owing on the second lien deed of trust being foreclosed.

The TI&E Division's ruling contains the following example:

In a non-judicial foreclosure on a second deed of trust, the bid at the trustee's sale is \$53,000. The amount owing on the second lien is \$50,000; the amount owing on the first deed of trust is \$150,000. REET is due on \$153,000 (the amount of the remaining first lien, plus the \$3,000 in excess of the debt on the second lien).

Taxpayer timely appealed this ruling and its request for this matter to be treated as an Executive Level Appeal was granted by the department.

In its appeal petition, taxpayer states that trustees cannot obtain financial documents relating to liens other than the lien secured by the deed of trust for which it is trustee. Taxpayer asserts that such documents are not public and cannot be freely obtained without written authorization of the debtor facing foreclosure. Taxpayer further asserts that the TI&E ruling imposes an unfair burden on trustees to determine the validity, priority, and amount due on other liens, which not only exceeds the trustee's duty under the Deeds of Trust Act, but also puts the trustee in the position of making decisions properly determined by a court of law. Taxpayer is also concerned that the TI&E ruling would put trustees in a position to unwittingly provide false information on Excise Tax Affidavits, despite a good faith effort to ascertain reliable information about liens other than the one secured by the deed of trust being foreclosed.

ANALYSIS

I. Transfers or Conveyances of Real Property Made Pursuant to a Deed of Trust Foreclosure are Specifically Exempted from the Definition of a "Sale" of Real Property.

[1] In Washington, an excise tax is imposed on every "sale of real estate." RCW 82.45.060. Payment of the tax levied is the obligation of the seller. RCW 82.45.080. A "sale" is broadly and inclusively defined by RCW 82.45.010 as "any conveyance, grant, assignment, quitclaim, or transfer of the ownership of or title to real property, . . . or any estate or interest therein for a valuable consideration." RCW 82.45.010.

After establishing the broad and inclusive definition of a "sale" of real property, RCW 82.45.010 then provides a list of specific exceptions to that general definition. *Id.* One of those specific exceptions is the following:

(3) The term "sale" shall not include:

(i) Any transfer or conveyance made pursuant to a deed of trust or an order of sale by the court in any mortgage, deed of trust, or lien foreclosure proceeding or

upon execution of a judgment, or deed in lieu of foreclosure to satisfy a mortgage or deed of trust.

RCW 82.45.010(3)(i) (emphasis added). The legislature specifically excluded transfers or conveyances made pursuant to a deed of trust from the definition of a “sale” of property subject to REET. Taxpayer’s position is that this full statutory exclusion governs all deed of trust foreclosure sales and therefore REET does not apply to second lien deed of trust foreclosure sales.

II. Regulatory Guidance on the Statutory Exemption for Transfers Made Pursuant to the Foreclosure of a Deed of Trust.

[2] The administrative code provisions interpreting the REET statutes (RCW 82.45 *et seq.*) support the taxpayer’s interpretation that a full REET exclusion applies to transfers made pursuant to deed of trust foreclosures.⁶ WAC 458-61A-208(4) specifies:

(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.

WAC 458-61A-208(4) (“Rule 208(4)”) (emphasis added). This regulatory deed of trust foreclosure exception provision supports taxpayer’s interpretation of RCW 82.45.010(3)(i). Rule 208(4) unambiguously states that REET does not apply to deed of trust foreclosure sales.

III. The Priority of the Deed of Trust is Irrelevant for Purposes of the REET Exclusion.

[3] In its ruling, the TI&E Division stated that in second lien deed of trust foreclosure sales, the trustee is responsible for paying REET on the remaining value of the lien secured by a first lien deed of trust. Taxpayer argues that there is a full REET exclusion for all deed of trust foreclosure sales, regardless of the relative lien priority of the particular deed of trust being foreclosed. Taxpayer’s argument is more persuasive.

The full REET exception applies to “any transfer made pursuant to a deed of trust.” *See* RCW 82.45.010(3) (emphasis added). No distinction is made between first or second lien deeds of trust. When a statute does not distinguish between first and second lien deeds of trust, Washington Courts will presume that the legislature intended the liens to be treated in a like manner. *See In re Upton*, 102 Wn. App. 220, 224, 6 P.3d 1231, 1234 (2000) (holding that both first and second lien deeds of trust have priority over a debtor’s homestead interest). There is no statutory authority for second lien deed of trust foreclosures to be treated any differently than first lien deed of trust foreclosures. Both are equally exempt from REET.

⁶ The full REET exclusion also applies when a deed of trust is foreclosed judicially. *See* WAC 458-61A-208(1) (stating “[t]he real estate excise tax does not apply to any transfer or conveyance made pursuant to an order of sale by a court in any mortgage or lien foreclosure proceeding or upon execution of a judgment.”).

The regulations likewise make no distinction between foreclosures on first or second lien deeds of trust. WAC 458-61A-208(4). There is no authority to support the position that a second lien deed of trust foreclosure sale is subject to REET. REET simply does not apply to any deed of trust foreclosure.

DECISION AND DISPOSITION

We grant taxpayer's petition. A non-judicial foreclosure on a second lien deed of trust does not result in a "sale" of real property for purposes of real estate excise taxation.

Dated this 11th day of August 2008.