

Cite as Det. No. 13-0193, 33 WTD 344 (2014)

BEFORE THE APPEALS DIVISION  
DEPARTMENT OF REVENUE  
STATE OF WASHINGTON

In the Matter of the Petition For Refund of	)	<u>D E T E R M I N A T I O N</u>
	)	
...	)	No. 13-0193
	)	
	)	Registration No. . . .
	)	

[1] RCW 82.45.030; RCW 82.45.060; WAC 458-61A-101(4): REAL ESTATE EXCISE TAX (REET) – MEASURE OF THE TAX – SELLING PRICE – TOTAL CONSIDERATION PAID OR CONTRACTED TO BE PAID. The measure of REET is the true and fair value of the property conveyed, represented by the selling price. If property has been conveyed in an arm’s length transaction, a rebuttable presumption exists that the selling price is equal to the total consideration paid or contracted to be paid to the transferor. The total consideration paid includes money or anything of value paid in return for the sale, including the amount of any lien, mortgage, contract indebtedness, or other incumbrance, given for the transfer of the property. Where a promissory note is given in partial consideration for the transfer, the amount of the note is used to determine the selling price, and not the note’s cash equivalency value.

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.

Eckholm, A.L.J. – The taxpayer appeals the denial of a petition for refund of real estate excise tax (REET), asserting that the selling price for measuring REET should be reduced to reflect the cash equivalency value of the amount of a promissory note given as partial consideration for the transfer. Appeal petition denied.<sup>1</sup>

ISSUE

In determining the selling price for measuring REET, pursuant to RCW 82.45.030, is the amount of a promissory note given as partial consideration for the transfer assigned a cash equivalency value?

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

## FINDINGS OF FACT

On April 25, 2008, the estate and trust of [the deceased] sold a shopping center in . . . Washington . . . , to [a buyer] in exchange for \$. . . in cash and a promissory note in the amount of \$. . . . The seller filed a REET Affidavit with the Department of Revenue (Department), and remitted REET of \$. . . , based on a sales price of \$. . . . The promissory note and the accompanying deed of trust were subsequently assigned to [the Taxpayer]

As successor to the seller, the taxpayer filed a petition for refund of overpayment of REET based, according to the taxpayer, on a computational error in determining the measure of REET, pursuant to WAC 458-61A-301(12)(d)(viii). The taxpayer indicated that the error resulted from the seller's failure to take into account the fact that the sale was a seller-financed transaction with below-market terms, and that the consideration for the transfer identified in the REET affidavit failed to incorporate a cash equivalent value for the promissory note. The taxpayer submitted a letter of opinion from a real estate appraiser that converted the value of the promissory note to a cash equivalent amount. The appraiser's letter provides:

We previously appraised the above asset for the Estate of [the deceased] in mid-2007. This . . . retail property was constructed in 1964, and was 48.7% leased at that time. Due to the long term lease to the [tenant] (17 years remaining at that time), it was not possible to demolish the buildings for a redevelopment. Additionally, conventional mortgage financing was not available from a bank or life company due to the . . . tenant and excess vacancy, pushing the financing to a private lender (often referred to as a hard money lender).

With a 5-year term, and a 25 year amortization, a private lender will charge 10% to 12%, with a typical rate of 11%, plus 2 to 4 points origination fee, with a typical rate of 3%.

Based on the proposed seller financing at 6.5% the annual payments will be \$. . . . Based on a market rate of about 11.0%, the cash equivalent mortgage debt at this market rate would be \$. . . , plus the \$. . . equity for a cash equivalent price of \$. . . . Finally, the buyer saves an additional 3 percent of the \$. . . mortgage in origination fees, for an additional advantage of below market seller financing of \$. . . .<sup>2</sup>

The appraiser computed an adjusted sales price of \$. . . , and the taxpayer requested a refund of REET in the amount of \$. . . , based on the adjusted sales price. The Department's Special Programs Division denied the petition for refund, indicating that REET was correctly paid on a sales price of \$. . . , and there was no overpayment of tax based on an error of computation. The Special Programs Division also noted that the county assessed value at the time of the sale was

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<sup>2</sup> Letter from [a real estate appraiser], dated October 5, 2012. In regards to the appraiser's reference to a prior property appraisal, the taxpayer indicated at the hearing that the appraisal was performed for estate tax purposes over a year prior to the transfer and that, by its reference, the taxpayer did not intend to provide the appraisal to establish the true and fair value of the property.

more than the sales price upon which REET was paid. The taxpayer appealed the denial of the refund, asserting that:

The measure of the real estate excise tax is “the selling price.” RCW 82.45.060. “Selling price” means the true and fair value of the property conveyed. RCW 82.45.030(1). The Department of Revenue treats “true and fair value” as equivalent to “market value.” *See, e.g.,* WAC 458-61A-102(19). If property is conveyed in an arm’s length transaction between unrelated persons for a valuable consideration, as in the case of the sale of [the property], there is a rebuttable presumption that the selling price (market value) equals the total consideration paid or contracted to be paid to the seller. RCW 82.45.030(1). “Total consideration paid or contracted to be paid” includes money or anything of value. RCW 82.45.030(3). The seller of [the property], for example, received a combination of money and a promissory note. The value of the note must be determined in arriving at the total consideration. [The appraiser] concluded that the note was worth \$. . . , using well accepted cash equivalency analysis. . . .<sup>3</sup>

The Department’s Special Programs Division declined to provide a response to the appeal petition.

### ANALYSIS

Real estate excise tax (REET) is imposed upon the sale of real property in Washington. RCW 82.45.060. 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. The tax is the seller’s obligation and payable at the time of the sale. RCW 82.45.080; RCW 82.45.100.

The measure of REET is the selling price. RCW 82.45.060; WAC 458-61A-101(4). “Selling price” means:

[T]he true and fair value of the property conveyed. If property has been conveyed in an arm’s length transaction, a rebuttable presumption exists that the selling price is equal to the total consideration paid or contracted to be paid to the transferor, or to another for the transferor’s benefit.

RCW 82.45.030(1). “Total consideration paid or contracted to be paid” includes:

[M]oney or anything of value, paid or delivered or contracted to be paid or delivered in return for the sale, 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.

RCW 82.45.030(3) (emphasis added).

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<sup>3</sup> The taxpayer’s supplement to appeal petition at page 2, dated October 8, 2012.

Here, the property was conveyed in an arm's length transaction, therefore, the rebuttable presumption that the selling price is equal to the total consideration paid applies.<sup>4</sup> In asserting that the Department should convert the amount of the promissory note to a cash equivalent market value, the taxpayer essentially asks the Department to replace the term "amount" in the above statutory definition of "total consideration paid or contracted to be paid," with the term "market value." See RCW 82.45.030(3). There is no mention in RCW 82.45.030(3) of the need to determine a "market value" of the contract indebtedness. The plain language of the statute requires that the "amount" of the contract indebtedness be used in determining the consideration paid. The Department may not omit or add terms to a statute when interpreting or applying it. See *Millay v. Cam*, 135 Wn.2d 193, 203, 955 P.2d 791 (1998).

The taxpayer asserts that RCW 82.45.030(3) should be interpreted so as to arrive at a selling price representing the true and fair value or market value of the property, as stated in RCW 82.45.030(1), and that converting the promissory note to a cash equivalent more accurately reflects the true and fair value of the property. In support of the accepted use of the cash equivalency method in determining market value, the taxpayer cites to RCW 84.40.030(1), relating to the county assessor's valuation for property tax purposes, that provides, "[t]he appraisal shall also take into account: (a) In the use of sales by real estate contract as similar sales, the extent, if any, to which the stated selling price has been increased by reason of the down payment, interest rate, or other financing terms; . . . ." The taxpayer also cites case law from other jurisdictions regarding similar statutory provisions, in addition to a variety of appraisal publications regarding the accepted use of cash equivalency in determining market value.<sup>5</sup>

The cited authorities are inapplicable to the issue in this appeal because, as stated above, there is no requirement to determine the market value of the promissory note in computing the selling price and measure of REET. The fact that the legislature did not include within RCW 82.45.030(3) a requirement similar to that in RCW 84.40.030(1) to consider the effect of the financing terms on the selling price indicates the legislative intent to exclude such a requirement for REET purposes. See *United Parcel Serv., Inc. v. Dep't of Revenue*, 102 Wn.2d 355, 362, 687 P.2d 303 (1981) (where the legislature uses certain language in one instance but different, dissimilar language in another, a difference in legislative intent is presumed).

Determining the selling price for the transfer in this matter is not complicated. The Department's rule defining "consideration" provides the following example for determining the "total consideration paid or contracted to be paid" where a portion of the sales price is financed: "Lee purchases a home for \$250,000. He puts down \$50,000, and finances the balance of \$200,000. The full consideration paid for the house is \$250,000." WAC 458-61A-102(2). Similarly, here,

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<sup>4</sup> The taxpayer does not dispute that the rebuttable presumption in RCW 82.45.030(1) applies, and does not seek to establish the true and fair value of the property by alternative means, as contemplated by WAC 458-61A-102(19)(a), through a fair market appraisal of the property, or an allocation of assets made under section 1060 of the Internal Revenue Code.

<sup>5</sup> The taxpayer's supplement to appeal petition at pages 3-4.

the property was sold for \$. . . in cash and a \$. . . promissory note. The full consideration paid for the property was \$. . . , and the seller appropriately paid REET on this amount. The denial of the taxpayer's petition for refund is affirmed.

#### DECISION AND DISPOSITION

The taxpayer's appeal petition is denied.

Dated this 24<sup>th</sup> day of June 2013.