

Cite as Det. No. 87-290, 4 WTD 71 (1987)

**THIS DETERMINATION HAS BEEN OVERRULED OR MODIFIED IN WHOLE OR PART BY DET. NO. 92-264, 12 WTD 443 (1992).**

BEFORE THE INTERPRETATION AND APPEALS SECTION  
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 Real Estate	)	
Excise Tax	)	No. 87-290
	)	
	)	Not Registered
...	)	Real Estate Excise Tax
	)	Affidavit No. ...
	)	Audit No. ...

[1] **REAL ESTATE EXCISE TAX:** WAC 458-61-210 -- EXCLUSION -- ASSUMPTION -- REFINANCE DISTINGUISHED. The exemption provided by WAC 458-61-210(b) does not apply if the grantee refinances the balance owing on the underlying obligation rather than assuming the obligation by becoming personally and principally liable for it.

[2] **REAL ESTATE EXCISE TAX:** RCW 82.45.030 -- WAC 458-61-410 -- EXCLUSION -- GIFTS -- ENCUMBERED PROPERTY. A transfer of encumbered property is not a "gift" without consideration where the grantee assumes the amount of the encumbrances.

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:

The taxpayer protests the assessment of real estate excise tax, contending the transfer was exempt as the only consideration was the grantee's payment of the amount owing on the underlying indebtedness.

FACTS AND ISSUES:

Frankel, A.L.J. -- At issue is the transfer of property by ... (hereinafter referred to as the grantor) to ... (hereinafter referred to as the grantee). The grantors paid no real estate excise tax at the

time of the sale. On the real estate excise tax affidavit, they explained that an exemption was claimed as "no proceeds to seller. Payoff of underlying indebtedness only. No consideration/no sale - RCW 28.45.010."

On June 2, 1987, the Department sent a real estate excise tax inquiry to the grantor after examining the county records showing the grantee took a new deed of trust/mortgage on the same date the transfer took place, ( . . . ). The Department stated that a total of \$725.07 in tax and penalty was owing unless the sellers provided written verification from the holder of their mortgage/deed of trust showing their liability was assumed by the Grantee. The grantors did not respond to the inquiry and the Department sent a revised assessment for \$731.72 in tax and penalties.

The underlying mortgage was not assumed by the grantee, but was refinanced. The taxpayer contends, however, that the transfer was without consideration and that no excise tax is due.

#### DISCUSSION:

[1] At issue is the exclusion from the term "sale" in RCW 82.45.010 for a transfer for "the assumption by a grantee of the balance owing on an obligation which is secured by a mortgage . . . where no consideration passes otherwise." (Emphasis added.) The Department has limited the exclusion to cases in which the only consideration is the assumption of the grantor's mortgage by the grantee.

A copy of Determination 87-209, \_\_WTD\_\_ (1987), explaining this position is attached. In the present case, the exclusion does not apply because the underlying mortgage was refinanced rather than assumed.

[2] The taxpayers also contend the transfer is exempt as a gift. Transfers of real property as gifts are not subject to the real estate excise tax. WAC 458-61-410. We do not agree, though, that a transfer of encumbered property is a "gift", whether the transfer is between related or unrelated parties.

Black's Law Dictionary defines a gift as "a voluntary transfer of personal property without consideration . . . [a] parting by owner without pecuniary consideration . . . [a] voluntary conveyance of land, or transfer of goods, from one person to another, made gratuitously, and not upon and consideration of blood or money." (Citations omitted.)

A release of indebtedness is consideration to the grantor. Where encumbered property is transferred, the amount realized by the grantor includes the amount of the encumbrances on the property plus any personal obligation of the grantor that is assumed by the grantee. Crane v. Comm'r 331 US 1 (1947). See also Comm'r v. Tufts, 103 S.Ct. 1826 (1983) (transfer of property subject to nonrecourse note by a partnership resulted in gain in the amount of the note even though the amount of the note exceeded the fair market value of the property transferred.)

If property worth \$200,000 with a balance owing of \$50,000 was transferred for no consideration other than the grantee's payment of the loan balance, real estate excise tax would be due on

\$50,000. Thus, one could make a gift of the equity in property and not pay tax on that amount. The taxable "selling price," however, does include the amount of any lien, mortgage contract, indebtedness, or other encumbrance remaining unpaid at the time of sale. RCW 82.45.030.

The tax assessment was issued on June 25, 1987 and due by July 15, 1987. The grantors and grantees were advised that the grantor's failure to remit the real estate excise tax by the due date would result in the Department filing a lien under the authority of RCW 82.45.070.

As the assessment was not paid or appealed within 20 days of the notice of assessment, the lien was filed.

#### DECISION AND DISPOSITION:

The taxpayer's petition is denied.

DATED this 26th day of August 1987.