

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

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| In the Matter of the Petition) | <u>D</u> <u>E</u> <u>T</u> <u>E</u> <u>R</u> <u>M</u> <u>I</u> <u>N</u> <u>A</u> <u>T</u> <u>I</u> <u>O</u> |
| <u>N</u> | |
| For Correction of Assessment of) | |
|) | No. 88-157 |
|) | |
| . . .) | Unregistered |
|) | Real Estate Excise Tax |
|) | |

- [1] **RCW 82.45.100, WAC 458-61-210, AND WAC 458-61-650:**
REAL ESTATE EXCISE TAX -- EXEMPTION -- ASSUMPTION OF
INDEBTEDNESS. In a real estate transaction where
the grantee assumes an existing mortgage, deed of
trust or real estate contract and no other
consideration is exchanged, the transfer is exempt
of the real estate excise tax. Here, there was
additional consideration in that the grantor
received other real property and a promissory note
as part of a partnership dissolution. The
exemption, therefore, is disallowed.
- [2] **RCW 82.45.100, WAC 458-61-210, AND WAC 458-61-650:**
REAL ESTATE EXCISE TAX -- EXEMPTION -- SALE --
TENANTS IN COMMON. The sale of an interest in real
property from one or more tenants in common to
remaining tenants or to a third party is subject to
the real estate excise tax.
- [3] **RCW 82.45.100, WAC 458-61-210, WAC 458-61-650, WAC
458-20-228, AND MISCELLANEOUS:** REAL ESTATE EXCISE
TAX -- DELINQUENT AMOUNTS -- INTEREST. The
Department has no duty to advise a taxpayer of a
wrongfully claimed exemption from the real estate
excise tax sooner than the four year statute of
limitations specified in RCW 82.45.100.

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: October 14, 1987

NATURE OF ACTION:

Claim of exemption from real estate excise tax based on grantee's assumption of indebtedness on the property conveyed.

FACTS AND ISSUES:

Dressel, A.L.J. -- [Smith] (taxpayer), his wife, . . . , and [Jones] owned a large piece of real estate in San Juan County. In connection therewith the parties were also involved in a partnership the purpose of which was apparently to subdivide and sell portions of the real estate. In the early part of 1985, the parties entered into an agreement which dissolved the partnership. Under the terms of that agreement, the [Smith]s quitclaimed all of their interest in the subject property to [Jones] who agreed to assume the existing indebtedness on the property in its entirety. Also under terms of the dissolution agreement, the [Smith]s received partnership real property located on Lopez Island plus a promissory note for \$200,000.

On the 1% real estate excise tax affidavit filed with the quitclaim deed in the San Juan County Treasurer's office, exemption from the real estate excise tax was claimed based on WAC 458-61-210 1(b). Attached to those documents was another affidavit signed by the three parties with the following recitation:

The real property listed in the attached real estate tax affidavit are properties that are presently held in the individual names of either [Mrs. Smith], or [Mr. Smith] or [Jones] or [Mr. Smith], [Mrs. Smith] and [Jones] as tenants in common.

This affidavit is being made for the sole purpose of disclosing that no additional consideration of any kind is being paid by the grantee to the grantor's or to any party other than the current secured lienholders of those properties listed in the affidavit. The grantee is assuming the balance

owing on the obligations which is secured by deeds of trust or real estate contracts against the properties that are listed in said excise tax affidavit.

On October 28, 1986 the Department of Revenue (Department) advised the taxpayer by letter that his claim of exemption was being disallowed for the reason that a sale between tenants in common does not qualify for exemption from the real estate excise tax. Delinquent tax in the amount of \$. . . plus interest of \$. . . for a total of \$. . . was demanded. In this action the taxpayer is appealing both items and, with respect to the interest, cites the Department's long delay in advising him that the exemption was being disallowed.

Whether this real property transaction is exempt of the real estate excise tax is the question to be answered herein.

DISCUSSION:

The administrative rule cited by the taxpayer as the basis for his claim of exemption, WAC 458-61-210, reads in its entirety:

Assignments--Purchasers. (1) The real estate excise tax does not apply to the following types of purchaser's assignments, provided that no consideration passes to the grantor:

- (a) Deed in lieu of foreclosure of mortgage or deed in lieu of forfeiture of a real estate contract;
- (b) Assumption by a grantee of the balance owing on an obligation which is secured by a mortgage, deed of trust or real estate contract; and
- (c) Cancellation or forfeiture of the vendee's interest in a contract of sale.

The real estate excise tax affidavit is required for each of the above. If the transfer is to a third party other than the current lienholder, the grantor must furnish a notarized statement signed by both the grantor and grantee that no additional consideration of any kind is being paid by the grantee to the grantor or to any party other than current lienholders.

(2) The real estate excise tax applies to transfers where the purchaser of real property assigns his/her interest in such property and receives valuable consideration for that interest. The measure of the real estate excise tax is the sum of the consideration paid or contracted to be paid to the grantor of such assignment plus the unpaid principal balance due on the assigned mortgage or real estate contract. (Note: The consideration passing to the assignor of such interest in real property nullifies the exemptions granted in subsection (1) of this section, because each of these exemptions is granted upon the condition that no consideration passes to the transferee of the interest of real property.) (Emphasis added.)

[1] Clearly, under the rule, exemption is not available in those transactions wherein consideration passes to the grantor. "Consideration" is defined at WAC 458-61-030(2) as:

"Consideration" shall mean money or anything of value, either tangible or intangible, paid or delivered or contracted to be paid or delivered or services performed or contracted to be performed in return for real property or estate or interest in real property.

. . .

In spite of the taxpayer's affidavits to the contrary, he has plainly received consideration in exchange for the property at issue. Real property on Lopez Island and \$200,000 in a promissory note are certainly items of value.

It is not known why the taxpayer took the position that no consideration passed to the grantor. He may have focused so hard on subsection 1(b) of WAC 458-61-210 that he simply overlooked the "no consideration" requirement in the earlier portion of section 1. It may be that he thought that because no cash was exchanged there was no consideration. It may be that the taxpayer thought it was permissible to view the two separate real estate transactions as gifts, separate in their own right, rather than an exchange of consideration. There is also some evidence indicating that the taxpayer received some professional advice to claim the exemption as he did. We do not find, however, that there was an intent to evade the real estate excise tax, so the 50% evasion penalty authorized under RCW 82.45.100 will not be imposed.

[2] The same result, i.e., no exemption, is reached when one analyzes the situation from another angle. "Tenancy in common" is "a form of ownership whereby each tenant (i.e., owner) holds an undivided interest in property. Black's Law Dictionary, 5th Edition (1979). That does appear to be the situation that existed between the parties prior to the dissolution of the partnership. WAC 458-61-650 is on point vis-a-vis this form of real property ownership. The rule reads:

Tenants in common. (1) The partition of real property by tenants in common by agreement or as the result of a court decree is not a taxable transaction.

(2) The sale of the interest in real property from one or more tenants in common to remaining tenants or to a third party is a taxable transaction. The taxable amount of the sale is the proportionate share of the market value of the property being sold.

A partition is where tenants in common agree that certain of them will be assigned certain particular tracts within the property that they own together. The transaction at issue was not such a division but was rather a sale in that the taxpayer quitclaimed all of his interest in the property to Mr. [Jones] for consideration. In accordance with the rule such a sale is a taxable transaction.

[3] Finally, the taxpayer complains about the Department not being diligent in advising him that he had wrongfully claimed the exemption. A considerable amount of interest accrued on the tax deficiency between the time of the real estate transaction and the point at which the taxpayer received the Department's official notice. The primary error here, however, was committed by the taxpayer, not by the Department. The burden is placed upon the taxpayer to correctly construe the applicable statutes and regulations. If he wishes to claim an exemption, he should first make sure that he is entitled to it. In claiming the exemption here, the taxpayer acted at his own risk. Although, ideally, the Department would have notified him sooner, there is no requirement in the law that they do so. RCW 82.45.100(3) states "No assessment or refund may be made by the Department more than four years after the date of sale. . . ." The Department's action was taken well within that time frame. Further, the assessment of

interest on delinquent tax at the rate of 1% per month is mandatory under subsection 1 of the same statute.

DECISION AND DISPOSITION:

The taxpayer's petition is hereby denied.

DATED this 16th day of March 1988.