

Cite as 1 WTD 145 (1986)

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

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 Refund of)	
)	No. 86-246
. . .)	
)	Re: REAL ESTATE EXCISE TAX
)	

[1] **REAL ESTATE EXCISE TAX:** REFUND -- RESCISSION -- WAC 458-61-100(4)(a) -- WAC 456-61-590. Taxpayer granted a refund of excise taxes paid where contract for sale provided that if the purchaser did not pay contract balance in full within two years of sale, seller would re-purchase property for the original purchase price. Sale was rescinded and refund due when both seller and purchaser were restored to their original positions.

[2] RCW 82.45.010 -- RCW 82.32.060 -- REFUND -- LIMITATION OF ACTIONS. RCW 82.45.010 does not allow the Department to refund real estate excise tax more than four years after the original sale. The time for a refund presents a question of nonclaim rather than a statute of limitations. Taxpayer's request for a refund for taxes paid in 1981 not untimely because he first wrote the Department for a refund and conference in 1983.

[3] ADMINISTRATIVE LAW AND PROCEDURE -- TAXATION -- OVERPAYMENTS -- RECOVERY. Where a right is granted to recover an overpayment of taxes, the right must be exercised in the manner provided by statute, as the Department does not have the authority to refund taxes except under express statutory authority.

These 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: August 12, 1986

NATURE OF ACTION:

Taxpayer petitions for refund of real estate excise tax paid on grounds the sale was rescinded.

FACTS AND ISSUES:

Anne Frankel, Administrative Law Judge -- The taxpayer sold a parcel of real estate located in . . . for \$94,000 in April of 1981 (first sale). The contract stated:

"Purchaser agrees to pay contract balance in full not later than April 1, 1983. If purchaser does not pay contract balance in full on or before April 1, 1983, seller agrees to purchase property back from purchaser for a purchase price of \$94,000.00."

The taxpayer paid real estate excise tax on that sale in the amount of \$940.00.

The purchasers were unable to pay the purchase price in full. In March of 1983, the taxpayer paid them \$2,783.49, which the closing statement indicates was the amount they had paid toward the principal, and received a quitclaim deed in lieu of foreclosure. The taxpayer filed the quit claim deed and paid \$1,005.80 in real estate excise tax on the property.

The taxpayer resold the property in June of 1983 (second sale). The taxpayer did not pay real estate excise tax on that sale claiming the transaction was a trade-in on the prior sale. On June 24, 1983, the Department sent the taxpayer a notice inquiring about the taxability of the transaction.

The taxpayer responded to that notice by letter dated July 2, 1983. In that letter, the taxpayer explained that he had developed the area in which the property at issue was located. When the builder of the home was unable to keep up the payments, the taxpayer took over the liabilities on the home and the development. His letter stated that he had sold the property for \$94,500.00 and paid excise tax at that time. He added that he had agreed in the contract to buy the property back of \$94,500 in two years and that in that period had lost approximately \$10,000. He stated that when he went down to

put the property back in his name, he was informed he had to pay the excise tax again.

The taxpayer's letter closed by stating that he refused to pay the excise tax the third time and that he believed the Department should recommend that the county treasurer refund one of the excise taxes he had paid along with interest.

On July 21, 1983, the Department responded to his letter. The letter noted it was "unfortunate" that the taxpayer had lost money on the property but that the Department could not exempt the tax for that reason. The letter did not address the request for a refund for excise tax and interest paid on the first sale. The letter notified the taxpayer that a total tax assessment of \$912.71 Real Estate Excise Tax and delinquent interest penalties was due, based upon the county assessed value of the property of \$85,300. The Department advised the taxpayer to respond within 20 days or a Tax Warrant would be issued against him for the unpaid tax and penalty.

On July 27, 1983 the taxpayer sent a letter to the Department for a correction of the assessment. His petition was received by the property tax division on July 28, 1983. The letter stated:

I hereby petition the Department of Revenue to correct the amount of the assessment ot (sic) zero.

I have paid the 1% excise tax on the property twice already and refuse to paid (sic) it the third time.

I will be looking forward to the conference. I plan to be out of state between August 6th and August 22nd so it would be appreciated if the conferance (sic) date could either fefore (sic) the 5th or after the 22nd of August.

The taxpayer received no response to his letter or request for a conference. He assumed that the Department agreed that no further excise tax was due on that property. The matter lay dormant until December 31, 1985 when the Department sent him a letter regarding the 1983 excise tax assessment. The letter stated that the Department had reviewed the taxpayer's file which showed that he had requested a conference on the tax assessment and that the conference was never held. The Department scheduled a conference for January 17, 1986.

After the conference, the Department reviewed all information available regarding the transaction and concluded the transaction was subject to real estate excise tax. The letter upholding the assessment noted the real estate excise tax affidavit for the second sale claimed that the transaction was a trade-in on the prior sale with the first purchasers. The Department did not find any transfer that qualified the sale as a trade-in under WAC 458-61-670(1) (letter of January 21, 1986).

On January 31, 1986 the taxpayer again wrote the department requesting a refund of excise tax paid on the first sale. This letter specifies the amount and date the taxes were paid. The refunds were administratively denied on February 24, 1986. The excise tax coordinator determined that the request for a refund of tax paid in April 1981 was untimely. The request for a refund to the tax paid in 1983 was also denied on grounds the contract called for a re-purchase of the property. The excise tax coordinator considered this a separate transaction and taxable under RCW 82.45.010.

The taxpayer appealed the administrative denial of his refund applications. He contends the original sale was rescinded and that WAC 458-61-590 provides the real estate excise tax does not apply where the vendee transfers back the property to the vendor and the parties are restored to their original positions. The taxpayer believes the statute of limitations does not bar relief as

- 1) the taxpayer's right to a refund of taxes paid on the original transfer did not arise until March 29, 1983; and
- 2) the taxpayer's letter of July 2, 1983 was a petition for refund.

The taxpayer also contends that even if a refund were barred by the statute of limitations, he should have a right to set-off the taxes previously paid in error against his current liabilities.

DISCUSSION:

[1] Rescission -- Chapter 82.45 RCW imposes an excise tax on each sale of real property. The term "sale" includes any conveyance, grant, assignment, quitclaim, or transfer of the ownership of or title to real property for a valuable consideration, including any contract for such conveyances.

RCW 82.45.010. The term does not include a cancellation or forfeiture of a vendee's interest in a contract for the sale of real property, where no consideration passes otherwise. Id. The Real Estate Excise Tax, as many of the this state's taxes, is a tax on a transaction. There is no provision for a reduction in the tax because a seller sustains expenses or other losses in reclaiming his property.

In the present case, the first purchasers' interest in the property was not cancelled or forfeited when they issued the quitclaim deed in lieu of forfeiture. As noted above, the transaction is viewed as a "non-sale" under RCW 82.45.010 only if "no consideration passes otherwise." In this case, the closing statement indicates the taxpayer paid the first purchasers \$2,783.49 to meet the agreed "purchase" price.

Chapter 458-61 of the Washington Administrative Code contains the rules established by the Department for the administration of the real estate excise tax. WAC 458-61-100 states the only transactions for which the department is authorized to issue tax refunds. The taxpayer contends it is entitled to a refund under subsection (a) which provides:

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.

WAC 458-61-590 also provides that

The real estate excise tax does not apply to the transfer back of property from vendee to vendor. The tax paid on the original transfer is not refundable unless both parties are restored to their original positions.

The first purchase agreement provided that if the purchaser did not pay the contract balance in full within two years, the seller would purchase the property back for the amount of the original purchase price. The taxpayer contends that this language amounts to a provision for a rescission, i.e., provides that both parties are to be restored to their original positions.

The word "rescind" is a legal term which means:

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.) (Black's Law Dictionary 1471 (4th edition 1968))

Under Washington law, a rescission can occur when there is a mutual consent to rescind the contract. Woodruff v. McClellan, 95 Wn.2d 394, 397 (1980).

The Department does not require the seller to refund the amount of interest and taxes paid, only the amount of principal, in order for the parties to be considered restored to their original position. The interest is viewed as the seller's payment for the loss of the use of money he might otherwise have had. Even though the first purchasers' contract did not use the word rescission, we agree with the taxpayer that the language indicated a mutual consent to rescind the contract if the purchasers could not pay the contract price. Without this language, the seller could have proceeded under Chapter 61.30 (Real Estate Contract Forfeitures) when the purchasers were unable to make the contract payments. We find the taxpayer is entitled to a refund of the excise taxes paid on the first transaction, as provided by WAC 458-61-100(a) and 458-61-590.

[2] Limitations of Actions -- RCW 82.45.100 provides that the Real Estate Excise Tax is due and payable immediately at the time of sale and that

(3) No assessment or refund may be made by the department more than four years after the date of sale except upon a showing of fraud or of misrepresentation of a material fact by the taxpayer or a failure by the taxpayer to record documentation of a sale or otherwise report the sale to the county treasurer.

The limitation is the same as that provided in chapter 82.32 RCW, the general administrative provisions. See RCW 82.32.060 (no refund or credit shall be made for taxes paid more than four years prior to the beginning of the calendar year in which the refund application is made or examination of records is completed).

The Department considered the taxpayer's request for refund of the tax paid in April of 1981 as untimely. We believe, however, that the taxpayer's letter of July 2, 1983 should be considered a petition for a refund. In that letter, the taxpayer stated that he believed he was entitled to a refund of one of the excise taxes he had paid. In his letter of July 27, 1983, he also noted that he had paid excise tax twice on the property and refused to pay it a third time. He requested a conference at that time. Because the Department delayed in granting a conference until 1986, the appeal should not be considered untimely. See Conversions and Surveys, Inc. v. Department of Revenue, 11 Wn.App. 127, 521 P.2d 1203 (1974).

The taxpayer also contends RCW 82.45.100 is a statute of limitations which did not begin to run until 1983. A statute of limitations is

A statute prescribing limitations to the right of action on certain described causes of action; that is, declaring that no suit shall be maintained on such causes of action unless brought within specified period after the right accrued.

Black's Law Dictionary 1077 (4th ed. 1968). In this case, the taxpayer did not have a right to a refund under WAC 458-61-590 until the parties were restored to their original positions. That occurred in 1983, two years after the original sale.

In Guy F. Atkinson Co. v. State, 66 Wn.2d 570, 572 (1965), the court held that the time for a refund allowed by RCW 82.32.060 presented a question of nonclaim rather than a statute of limitations question. The court stated RCW 82.32.060 is procedural, imposing a limitation addressed to the power to make a refund and conditions under which a refund may be made. Id. We view RCW 82.45.100 also as imposing a procedural requirement for a refund.

[3] The Department does not have the authority to refund taxes except under express statutory authority. Id. at 575, citing 3 Cooley, Taxation 2506 (4th ed.). "Since a right has been granted to [the taxpayer] to recover an overpayment of tax, the right must be exercised in the manner provided by the statute." Id. citing 51 Am. Jur. Taxation § 1168.

We believe the language of RCW 82.45.100 would not allow the department to make a refund in cases where the rescission takes place more than four years after the date of the

original sale. Thus, if the taxpayer had first requested a refund in 1986, we would agree that the refund were barred by RCW 82.45.100. Because we construe the taxpayer's letter in 1983 as a request for a refund, however, we do not find the refund must be denied on grounds the request was untimely.

DECISION AND DISPOSITION:

The taxpayer is entitled to a refund plus applicable interest of the excise taxes paid on . . . County Real Estate Excise Tax affidavits . . . and The refund shall be issued as a credit toward the excise taxes presently owing by the taxpayer from his regular excise tax audit.

DATED this 10th day of September 1986.