Cite as Det. No. 85-282A, 1 WTD 19 (1986)

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

In The Matter of the Petition For Refund of	)	F I N A L D E T E R M I N A T I O N
	)	No. 85-282A[1]
. . .	)	Real Estate Excise Tax

[1] REAL ESTATE EXCISE TAX - JOINT VENTURES - PARTNERSHIPS - WAC 458-61-570.

Joint ventures, unlike partnerships, are not entities separate from their participants, and are not capable of owning or taking title to real property. Thus, sales of joint adventurers' property interests are not governed by the special rule for partnerships.

[2] REAL ESTATE EXCISE TAX - TENANTS IN COMMON - TAXABILITY OF SALE OF JOINT ADVENTURERS' INTERESTS.

Joint adventurers hold real property interests as tenants-in-common, subject to real estate excise tax upon the individual sale and conveyance of such interests.

[3] REAL ESTATE EXCISE TAX - SELLER DEFINED - TERM "SELLER" NOT CONTROLLING OF TAX LIABILITY.

The statutory definition of "seller" at RCW 82.45.020 to include a "joint venture" is not dispositive of the legal question whether a joint venture can own or take title to real property.

TAXPAYER REPRESENTED BY: . . .

[1] The reconsideration determination, 85-282B, is published at 6 WTD 1 (1986).

HEARING CONDUCTED BY DIRECTOR'S DESIGNEES:

Garry G. Fujita, Chief of Interpretation and Appeals
Edward L. Faker, Senior Administrative Law Judge

DATE AND PLACE OF HEARING: May 7, 1986; Olympia, Washington

NATURE OF ACTION:

Real estate excise tax was paid by the taxpayers in the amount of $8,202.70 upon their transfer of certain real property held in a joint venture of which the taxpayers were member-venturers. The transfer was accomplished by a purchase and sale agreement, accompanied by a quit claim deed duly recorded in King County on July 20, 1984. The taxpayers sought refund of the tax paid.

Determination No. 85-282 was issued on November 18, 1985 after an original appeal hearing conducted by teleconference on June 4, 1985. The Determination sustained the tax and denied the refund request. The taxpayers have appealed to the Director.

FACTS AND ISSUES:

Faker, Sr. A.L.J.--The facts of this case are not in material dispute. They are fully reported in Determination 85-282 and will not be restated here except as necessary for perspective of the issues presented.

There are two related issues:

1. Are joint ventures treated the same as partnerships when considering the tax liability attendant to transferring joint venture property to a member of the venture?

2. If so, are transfers of joint venture property from one joint adventurer to another, for consideration, subject to real estate excise tax?

The taxpayers' petition to the Director restates the determinative issue of this case as follows:

> . . . whether the assignment of a 50% interest in a joint venture to the holder of the remaining 50% joint venture interest causes imposition of the real estate excise tax, when the sole asset of the joint venture is real property.

TAXPAYERS' EXCEPTIONS:

The taxpayers' petition recaps the operative facts and restates their arguments as follows:

> The Taxpayer and Smith were 50-50 partners in a joint venture known as the . . . Group. The . . . Group's only asset was real property situated in Redmond, Washington (the "Redmond Real Property"). The Redmond Real Property was

acquired in the name of the ". . . Group, a joint venture consisting of [Taxpayer and Smith]." The property was subsequently mortgaged by and in the name of the joint venture.

In 1984, the Taxpayer and Smith disassociated their business relationships with each other under somewhat acrimonious circumstances, including the . . . Group joint venture. Pursuant to a Purchase and Sale Agreement dated July 20, 1984, the Taxpayer assigned his 50% joint venture interest to Smith. The stated consideration was $621,416.93. The assignment of the joint venture interest of the Taxpayer to Smith was accompanied by a quit claim deed of any interest the Taxpayer held in the Redmond Real Property. The delivery of the quit claim deed was required by Smith's attorney out of the concern that a title insurance company at some point in the future might require further documentation of the relinquishment of the Taxpayer's interest in the joint venture. To record the deed, it was necessary to file a real estate excise tax affidavit and pay tax on the stated consideration. From the outset, the Taxpayer indicated that the real estate excise tax was not due, but that it was being paid at the request of the grantee. The excise tax affidavit specifically stated:

> Grantor believes transfer is exempt as an assignment of partnership interest, but is paying the tax at the request of the grantee.

In short, the excise tax was paid to accommodate the request of Smith and it was fully intended and expected that the excise tax would be refunded upon submission of a proper application for refund to the Department of Revenue.

Following the submission of the request for refund, Mr.(. . .),[2] Coordinator for the Real Estate Excise Tax Division, denied the refund application. Mr. (. . .) conclusion was based on his perception that the Taxpayer and Smith owned the Redmond Real Property as joint tenants, and that the joint venture was dissolved by reason of the assignment of the joint venture interest. Specifically, Mr. (. . .) stated:

> It appears in your sale, both you and Mr. Smith individually own joint tenancies in the property. Your joint venture agreement was dissolved by your sale of one-half interest in the property to Mr. Smith. We therefore consider that the real estate excise tax was correctly applied to your sale and deny your request for refund.

Based upon Mr. (. . .) denial, the Taxpayer filed a request for refund pursuant to WAC 458-20-100. The Taxpayer's April 25, 1985 memorandum was submitted in support of that petition for refund. That memorandum demonstrated that the theories relied upon by Mr. (. . .) were incorrect as a matter of law.

[2]The references in the taxpayers' petition to named agents of the Department have been deleted.

The Taxpayer's petition for refund was considered by Administrative Law Judge (ALJ). Like Mr. (. . .), Administrative Law Judge (ALJ) denied the Taxpayer's claim for refund. However, (ALJ) relied upon entirely different analysis in coming to that conclusion. Relying upon statements made by commentators contained in the Washington Real Property Deskbook and Washington Community Property Deskbook, (ALJ) concluded that title to the Redmond Real Property was not held by the . . . Group joint venture, but instead was held by the Taxpayer and Smith as tenants in common. In distinguishing a joint venture from a partnership, (ALJ) concluded that WAC 458-61-570 was inapplicable to the assignment of the Taxpayer's 50% joint venture interest to Smith.

Prior to demonstrating the erroneous legal conclusions drawn by (ALJ), several aspects of Determination No. 85-282 should be noted. First, at page 11 of the determination, two examples of the method of conveying real property to a joint venture are discussed. The second example given represents the manner in which the . . . Group joint venture acquired title to the Redmond Real Property. The commentary quoted to support the Administrative Law Judge's conclusion acknowledges the validity of such a conveyance:

> . . . in Example 2 the title would vest in the joint venture and therefore this usage is not recommended. Title insurers have, however, sometimes insured such a vesting
>
> . . .

Thus, the authority cited by the Administrative Law Judge in support of her conclusion actually supports the result urged by the Taxpayer in this case. Further, the Administrative Law Judge comments in the first paragraph on page 12 of her Determination that the deeds of trust delivered by the joint venture were given in the individual capacities of the Taxpayer and Smith. This is incorrect, and a review of the deeds of trust delivered by the joint venture with respect to the Redmond Real Property, which are attached to the Taxpayer's original memorandum, clearly show that the deeds of trust were delivered in the name of the joint venture.

The Taxpayer feels that the analysis set forth by the Administrative Law Judge is without support and is contrary to Washington law. The analysis of the Administrative Law Judge is also inconsistent with that offered by the Coordinator of the Real Estate Excise Tax Division. As shown in the analysis which follows, both common sense and the law of the State of Washington support the Taxpayer's position that a joint venture interest is for virtually all purposes treated the same as a partnership interest under Washington law and that, as a result, WAC 458-61-570 supports the Taxpayer's claim that the instant transaction was exempt from the real estate excise tax.

. . .

Statutory Authority. The real estate excise tax scheme set forth in RCW 82.45 et seq. specifically recognizes that joint ventures are entities capable of conveying title to real property. RCW 82.45.020 defines the term "seller" for purposes of imposition of the tax. That statute specifically states that the term "seller" includes a "joint venture."

If the analysis of the Administrative Law Judge is correct, i.e., that the members of a joint venture own joint venture real property as tenants in common, and that a joint venture cannot hold title to real property, there is an inconsistency in RCW 82.45.020. We submit that the state legislature understood that a joint venture could hold and convey title to real property, and provided for the imposition of the real estate excise tax upon the conveyance of real property by a joint venture.

Case Law. Washington case law is legion that a joint venture is to be treated as a partnership in resolving questions pertaining to joint venture. While it is true that there are no statutory provisions pertaining to joint ventures comparable to the Uniform Partnership Act, codified at RCW 25.04. et seq., this does not mean that the principles set forth in the Uniform Partnership Act should not be applied in resolving questions pertaining to joint ventures. In fact, on every occasion when the issue has been before the appellate courts of this state involving the resolution of a joint venture dispute in a business context (as opposed to family law or negligent automobile liability cases), the courts have consistently applied the law of partnerships to joint ventures. See Rayonier, Inc. v. Polson, 400 F.2d 909 (9th Cir. 1968); Carboneau v. Peterson, 1 Wn.2d 347 (1939); Refrigeration Engineering Co. v. McKay, 4 Wn. App. 963 (1976).

. . .

Prior Attorney General's Opinions. The conclusion of the Administrative Law Judge that venturers in a joint venture own joint venture real property as tenants in common, with the resultant conclusion that an assignment of a joint venture interest necessarily conveys an interest in real property, is reminiscent of the same analysis which was rejected in Attorney General Opinion 63-64, dated April 17, 1963. That Attorney General Opinion modified the conclusions drawn in an earlier Attorney General Opinion, AGO No. 51-53-289, dated April 22, 1952.

In the 1952 Attorney General's Opinion, the Attorney General's Office concluded that a partner had an individual interest in each asset owned by the partnership, justifying imposition of the real estate excise tax on the assignment of a partnership interest. That holding was specifically overruled in the 1963 Attorney General's Opinion. We submit that the analysis offered by the Administrative Law Judge in Determination No. 85-292 to deny the refund claim represents nothing other than the same analysis offered in the 1952 Attorney General's Opinion which was rejected in the 1963 opinion.

> Prior Administrative Interpretation and Common Sense. Any practicing real estate attorney in the State of Washington would, without hesitation, conclude that joint ventures should be treated in the same manner as partnerships for purposes of application of the real estate excise tax. This understanding is confirmed by the last published Guidelines for 1% Real Estate Excise Tax promulgated by the King County Division of Records and Elections dated December 1, 1976. That publication gives a series of illustrations of various types of transactions, and follows each with a description of whether the real estate excise tax is due or the transaction exempt. Under the category entitled "joint venture" appearing at page 14 of the Guidelines, the Guidelines simply state "see partnership page 16." Thus, the last published guidelines by the King County Division of Records and Election confirms that a joint venture should be treated on the same basis as a partnership in determining application of the real estate excise tax.

At the May 7, 1986 hearing the taxpayers emphasized the foregoing positions but added no new or different arguments. They stressed that there was conflict between the positions taken by the Department's Excise Tax Coordinator and those stated in Determination 85-282, to the extent that the taxpayers are now unsure of the Department's position and, thus, how to respond to it. The taxpayers fully recognize that WAC 458-61-570 provides that transfers of partnership property, upon dissolution of the partnership, are subject to real estate excise tax. However, this provision is inconsistent with prevailing opinions of the Attorney General's office and, seemingly, inconsistent with case law and real world treatments of partnership and joint venture property disbursements.

In conclusion, the taxpayers assert that there is no distinction between partnerships and joint ventures by definition, and no rational basis at law for treating them differently for real estate excise tax purposes. Moreover, the Department should amend WAC 458-61-570, resolve its seemingly inconsistent provisions, and administer the pertinent tax law uniformly.

DISCUSSION:

[1-2] We have discovered no case law expressly ruling that joint ventures are treated precisely like partnerships with regard to their ownership and/or transfers of real property interests in the real property assets of the joint venture. Neither have the taxpayers cited any such case law. Moreover, statutory law is silent on the question of conveyances of real property held for joint venture purposes. Our review of the case law references in the taxpayers' petition and Determination 85-282 confirms the conclusion of the Administrative Law Judge that the Courts' holdings do not encompass the nature of the property interests of joint ventures or their adventurer members. Rather, Determination 85-282 includes the authorities for the proposition that specific assets of a joint venture are owned by its members as tenants in common, unless held in trust. Joint ventures take title to real estate purchased by them as tenants in common and not as partners . . . See C.J.S. 48A - Joint Ventures § 32, p. 457. The taxpayers have presented no evidence or persuasive authority to overcome that conclusion. The leading case law rules that the taking of title and ownership interests in real property for joint venture purposes is controlled by the joint venture agreement itself. See Washington Pulp and Paper Co. v. Robinson, 153 Wash. 683 (1929), and Leslie v. Midgate Center, Inc., 72 Wn.2d 977 (1967) at 983. Clearly, the general law of

partnerships does not control such considerations as title, ownership, and members' interests in real property acquired and used by joint ventures. This, among other factors, is a very rational, legal basis for distinguishing between partnerships, where real property is held by tenants in partnership, and joint ventures, where real property is held by tenants in common. Again, the leading case law and common law tenets are that partnerships are created by operation of law whereas joint ventures derive from agreement between the adventurers, ex contractu. Also, a joint venture is not a legal entity separate from the participants in the venture as a partnership is. See C.J.S. 48A - Joint Ventures § 5, p. 401. Such distinctions, at least when it comes to the vesting of ownership interests and procedures for transferring such interests in real property of partnerships and joint ventures are both legal and logical. There are also key legal distinctions relating to the survivorship of partners' and adventurers' interests in real property. Generally, upon the demise or departure of a partner, the remaining partner(s) survive to all interests in the partnership real property. Heirs and devisees of the deceased partner survive to no real property interests. Conversely, because joint ventures hold real property interests as tenants in common, the remaining adventurer(s) do not survive to the real property interests of the deceased or departing adventurer. General partnership law does not prevail in such situations to determine the real property interests in joint venture cases, nor have the taxpayers referenced any authority that it should.

In the case before us here the taxpayers, for their own reasons, elected to walk away from the venture. Rather than sharing in the proceeds of the venture enterprise, which they were contractually entitled to do, they sold outright their undivided interest in the venture real property assets to their coventurer, for valuable consideration. That consideration was determined by the actual equity value they had in the real property as adjusted by their outstanding liability against the property. It did not relate to their anticipated share of venture proceeds in any way. Had the taxpayers not sold their interests in this manner, their coventurer could never convey title and ownership to any other person without violating the fiduciary trust covering joint venture property. That trust follows the property and would clearly impair title to it; C.J.S. 48A supra. Again, there is simply no legal authority for the proposition that such outright sales and conveyances between coventurers are not fully subject to real estate excise tax or real property conveyance taxes.

We are convinced, for the very reasons stated earlier, that the partnership provisions of WAC 458-61-570 do not, and should not, apply to real property transfers of joint ventures. Partnership interests in real property, by their very nature, are unique and require special treatment by rule. However, there is nothing special or unique about real property transfers between joint venturers. They are arm's length transactions which convey real property for valuable consideration. Thus, they are clearly within the general statutory provisions of chapter 82.45 RCW. There are no special exemptions or exclusions from real estate excise tax for sales of joint venturers' real property interests under the law or rules simply because they require no such special treatment. Conversely, there is a need for such special treatment of partnership interest transfers because, under the law, partnership interests are in the nature of personal property rights and are not vested real property interests.

We turn now to the other specific complaints and assertions by the taxpayers with respect to Determination 85-282. It is claimed that the authority cited from the Washington Real Property Deskbook, § 25.13 (1979) actually supports the taxpayer's position by concluding that title to real

property can vest in a joint venture and that insurers have sometimes insured such vesting. Determination 85-282 concludes and the Real Property Deskbook agrees that an attempt to vest title to real property in a joint venture is improper under the law. Joint ventures are not separate entities enabled by law to hold title to real property. If procedural errors are made or due care is not exercised in naming joint venturer grantees in property conveyances, title companies will insure the vesting anyway for purely competitive reasons. It is ill advised and the Deskbook so warns practitioners. The Determination's reference is no more or less than an agreement with the legal tenant that joint venturers cannot legally own real property as distinct entities. The reliance upon the Deskbook statement is neither dispositive nor determinative of the issue.

[3] Secondly, the taxpayers assert that legal authority is found in RCW 82.45.020 that joint ventures can be "sellers" of real property. The question is begged, if joint venturers cannot separately own real property how can they be "sellers" of it under the Real Estate Excise Tax chapter of the law? The answer is that the definitional sections of chapter 82.45 RCW are exclusively for the purpose of explaining when the real estate excise tax will apply to real property sales transactions. For purposes of this tax imposition it is immaterial that a joint venture may not be legally capable of owning real property. If it is shown as the seller on conveyance documents, the sale is nonetheless taxable. RCW 82.45.020 in defining the term "seller" for the exclusive purpose of real estate excise tax imposition does not deign to establish the legal rights and liabilities of the parties to a property sales transaction. In short, if there is a "sale" under RCW 82.45.010, for a "selling price" under RCW 82.45.030, then the tax is imposed under RCW 82.45.060. The definition of "seller" does not legally determine the owner of the property sold. Substance controls form.

Our review of this entire matter reveals that the inconsistencies in the laws and rules claimed by the taxpayers are nonexistent. While statutory sections or specific rules may be taken out of context to support seeming inconsistencies, the application of chapter 82.45 RCW and chapter 458-61 WAC in this case have resulted in the proper imposition of real estate excise tax to the property sale and conveyance in question here.

Finally, the question whether WAC 458-61-570 conflicts with Attorney General Opinions concerning the disposition of partnership property upon dissolution of a partnership is beyond the scope of our inquiry here. As explained, joint ventures do not hold real property assets in the same legal manner as partnerships and the provisions of Rule 570 are not applicable for joint adventurers' conveyances. Thus, whether the rule is or is not consistent with AGOs has no bearing on the taxpayers' liability here.

DECISION AND DISPOSITION:

Determination No. 85-282 is sustained and the taxpayers' refund request is denied.

DATED this 16th day of July 1986.