

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Correction of)	<u>D E T E R M I N A T I O N</u>
Assessment of)	
)	No. 97-198
)	
...)	Registration No. . . .
)	FY. . . /Audit No. . . .
)	

RULE 118, 166; RCW 82.04.050, 82.04.390, 67.28.260: RETAIL SALES TAX -- B&O TAX -- HOTEL-MOTEL TAX -- TIMESHARE -- FEE OWNERSHIP. Charges by a timeshare operator are subject to retail sales tax, B&O tax, and hotel-motel tax in situations where the members do not acquire the attributes of ownership in the real estate.

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.

NATURE OF ACTION:

A timeshare operator appeals the assessment of retailing business and occupation (B&O) tax, retail sales tax, and hotel tax on the value of lodging provided to its members.¹

FACTS:

Pree, A.L.J. -- The taxpayer operates a network of timeshare resorts. Through the purchase of vacation points², individuals (members) gain the right to use the various facilities on a floating basis.

¹ Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410

² The taxpayer explains that points are an internal accounting system that represent the value of staying at resorts particular times of the year. The trust agreement defines points as:

That is, they are not bound to a certain use period each year at a particular location. They can use their points at various resort locations operated by the taxpayer. They may also use their points at other facilities with which the taxpayer has reciprocal agreements. Facilities are located in Washington as well as in other states and countries. The vacation points are a one-time purchase which may be sold or otherwise transferred as the purchasing member wishes. To retain the use of the vacation points, each member must pay annual maintenance fees.

The Audit Division of the Department of Revenue (Department) examined the taxpayer's books and records for the periods January 1, 1992 through March 31, 1995. As a result of the audit, the Department issued an assessment. The taxpayer paid a portion of the tax plus interest, and protested the balance of the assessment as well as the prospective instructions included with the assessment, which rescinded instructions written in a previous audit.

The Audit Division reviewed several documents, including the . . . Owner Agreement, . . . Trust Agreement, Warranty Deed Estate for Years, the Restated Bylaws of the . . . Owners Association, and the . . . Extension Program Purchase Agreement. The Audit Division determined that the taxpayer was acting as an agent of the trust, which held legal title to the properties.

Assessment Schedules 3 and 4 asserted tax on “unreported retail income from the providing of lodging at your [Washington] facility.” The Audit Division arrived at the taxable amounts by multiplying the points utilized by the “operating assessment rate per point.” Based upon information provided by the taxpayer, this was the Audit Division’s attempt to best measure the fair rental value of the Washington property. Only the points used to stay at the Washington facility were subject to tax.

The taxpayer contends that through a trust arrangement, the members own the properties that they use. The trust agreement provides:

. . . the owners of the [. . .] interests have agreed that Trustee [taxpayer] shall hold the right, title, and/or interest in the properties for the period of time during which the owners have the interest in the properties for the protection of that interest and to preserve the apartments for the [. . .] program.

The taxpayer explains that trust is established for the benefit of the owners. As remainderment, upon expiration of the trust, the owners acquire interests in the property as tenants-in-common. As beneficial owners of the properties, the taxpayer contends, the members occupy and use the properties. By agreement, each of the members is responsible for a share of the operating costs of the properties including taxes, assessments, cleaning, utilities, maintenance and repair. The taxpayer explains that these are expenses normally incurred by owners. The members must use or transfer their points each year. They may not carry unused points into a later year.

. . . the value placed upon the nightly occupancy of a [. . .] Apartment pursuant to the terms of a [. . .] owner agreement, which value is based upon the size and location of the [. . .] apartment, and the season in which the apartment is to be occupied.

As new members joined, the taxpayer acquired, built, and placed additional properties into the trust. While the taxpayer could trace³ individual members' monies originally used to transfer the property into the trust, most members⁴ did not receive anything identifying any particular property to them individually. They shared the right to use the property with all members during the term of the trust.

Normally, purchasers of real estate pay real estate excise tax (REET) when they acquire real estate. See Chapter 82.45 RCW. Members did not pay REET when they acquired their time share interest. The affidavit form for REET showed -0- consideration, and the attached cover letter from the taxpayer explained: ". . . since there actually is no consideration as it is going into our trust." The taxpayer, as trustee, was named as insured when the property vested in the trust. The taxpayer and the association were named insureds on the liability insurance policy.

The Audit Division's position is that the members did not own the property. The taxpayer, as agent of the trust, was liable for any taxes incurred when members used their points to stay at the Washington facility.

The assessment taxed the members' points utilized to stay at the Washington facility as a retail sale. When members opted to use their points for the Washington facility, the taxpayer furnished lodging or granted a similar license to use the property. Unlike the taxpayer, the Audit Division does not consider the members to be using their own property.

The taxpayer contends that as trust beneficiaries under the timeshare arrangement, the members owned the property. Relying on that contention, the taxpayer states that there is simply no authority for taxing the timeshare members for using their own property.

ISSUE:

Is providing lodging under the taxpayer's timeshare trust arrangement a retail sale where points are purchased as consideration for the right to use timeshare properties?

DISCUSSION:

Proceeds from the sale of real estate are not subject to either B&O tax or retail sales tax. RCW 82.04.390. Retail sales tax is imposed on the sale of tangible personal property and certain services that are defined in RCW 82.04.050 as a "retail sale." RCW 82.040.050 includes in the definition of retail sale:

³ The taxpayer provided the lender a list of new members showing the points sold to finance a specific unit.

⁴ According to the taxpayer, one state requires members be provided a certificate of escrow identifying specific property while Washington does not have such a requirement. Therefore, Washington members were not provided a certificate of escrow identifying the specific property.

(f) The sale of and charge made for the furnishing of lodging and all other services by a hotel, rooming house, tourist court, motel, trailer camp, and the granting of any similar license to use real property, as distinguished from the renting or leasing of real property, and it shall be presumed that the occupancy of real property for a continuous period of one month or more constitutes a rental or lease of real property and not a mere license to use or enjoy the same;

An additional tax may be imposed under RCW 67.28.260 on:

. . . the sale of or charge made for the furnishing of lodging by a hotel, rooming house, tourist court, motel, trailer camp, and the granting of any similar license to use real property, as distinguished from the renting or leasing of real property. For the purposes of this tax, it shall be presumed that the occupancy of real property for a continuous period of one month or more constitutes a rental or lease of real property and not a mere license to use or to enjoy the same.

The taxpayer states that ownership is not determined by who holds legal title in the real estate. We must go beyond the form of title held by the trust and consider whether through their beneficial interests, members obtained interest sufficient to be considered owners of the Washington property.

Individuals purchasing points from the taxpayer did not receive a deed. Rather they received rights to use property controlled by the taxpayer through the trusts or reciprocal agreements. The members received an intangible right or personal property; they did not receive real property.

We have not yet addressed the issue of whether the sale of timeshare interests are sales of real estate or licenses to use the real estate. To do so, we must understand the nature of the interest purchased. Timeshare offerings may be classified as either fee interests, which transfer an interest in real estate, or as non-fee interests, which transfer only the right to use the property for certain time periods. Wendy S. Pearson and C. Patrick Hogeboom III, comment, *Washington's Timeshare Act: Consumer Panacea?*, 21 Gonz. L. Rev. 243, 246 (1985/6).

In a property tax case, The Board of Tax Appeals considered the issue of whether a residence sold on a timeshare basis should be valued based upon the sale of various shares of the property or as a single family residence. Westerman v. Burke, BTA Docket No. 30993 (1987). To analyze the timeshare interest, the Board relied in part on a definition in *The Appraisal of Real Estate*, (8th ed. 1986) at 542:

“[T]imesharing, or interval ownership, . . . is a variation of the condominium. Timesharing is the sale of limited ownership interests in residential apartments or hotel rooms. The ownership is described as limited because a purchaser receives a deed conveying title to the unit for a specific part of a year.” Of the two variations of timeshare plans normally offered - ownership of real property or the right to use real property - this case involves ownership.

“The former, the fee simple plan actually transfers real estate ownership to the unit buyer by deed.”

The Board considered the property in Westerman an interval ownership. The purchasers received deeds conveying title for a specific part of a year. The owner sold fee simple ownership in the property in one week segments.

The Board adopted the analysis from a Florida decision, Spanish River Resort Corp. v. Walker, 497 So.2d 1299, 1302 (Fla. App. 4 Dist. 1986) which upheld an assessment based upon timeshare ownership:

The interval owner . . . has all of the “sticks” which constitute the “bundle of rights” that is fee ownership of real estate: the complete right to use (or not to use) the property during the period of ownership; the right to exclude others during that period, and the right to mortgage, lease, sell bequeath or give away the timeshare estate. Every timeshare period is a unique ownership, even if it is located in part within the same physical space as the other timeshare estates in the same apartment. *In short, it is a parcel of real estate.*

These rights determine whether the purchasers acquired a license to use the property or an ownership interest. Another aspect of the rights of ownership, discussed in Spanish River, would be title insurance. Transfers of ownership interests are generally subject to real estate excise tax. See Chapter 82.45 RCW. Owners of property could be subject to tort liability from those injured on their property. See, Daniel T. Engle, Comment, *Time Sharing Condominiums*, 45 Missouri Law Review 423 (1980). We could also analyze the impact of a Federal tax lien (would a lien against one owner cause the sale of all co-ownership interests or just the rights).

None of these characteristics of ownership are evident under the taxpayer’s timeshare arrangement. Members obtained an intangible right, points, which could be exchanged for a right to use property. Until the members “used” their annual point allotment, they did not have any specific right to any specific real property at any particular time.

Generally, a member did not use the property for a continuous period of one month or more. The short periods of use creates a statutory presumption that the taxpayer charged the members for the furnishing of lodging or similar license to use the property rather than a rental or lease of the property. RCW 82.04.260 and RCW 67.28.260.

If the parties involved were treating these timeshare interests or memberships as real estate transactions, each transaction would be evidenced by a deed with title insurance. Real estate excise tax would have been paid as measured by the consideration paid by each member for their respective interests. Under the taxpayer’s timeshare trust arrangement, the individual members were not listed as insureds on the title insurance policies, nor did they pay real estate excise tax.

When new members joined, old members did not lose or transfer a share of their ownership interest in the Washington real estate. Rather, the new members would compete with the old members for

the right to use the property. Ideally, the proceeds of the sale would be used to acquire additional real estate, which would be available in smaller shares for all members to use. A member's interest, a limited right to use points to stay at an expanding set of properties, is not an interest in real estate.

Even the members remainder interest is somewhat amorphous. While the owners were entitled to remainder interests upon expiration of the estate for years, under the . . . Extension Program Purchase Agreement, it appears that the members pay the taxpayer separately to obtain a remainder interest. Generally⁵, members did not receive any reference to specific property in which they obtained a remainder interest.

When members used their points for the right to stay at a particular property, they merely obtained a license to use or enjoy the property. The charge for furnishing lodging, or the granting of any similar license, is a retail sale. RCW 82.04.050(1)(f). The charge is also subject to the hotel-motel tax. RCW 67.28.260. The value of the points expended to stay at the Washington property constitutes consideration, included in the definition of sale, by which the tax is measured.

We find that the members were not owners of the Washington real estate. Under the taxpayer's timeshare arrangement, members did not obtain the "sticks" in the "bundle of rights" referred to in Spanish River, *supra*. Members paid valuable consideration, points, to the taxpayer for a license to use the property. Unless a member stayed over thirty days, each transaction constituted a retail sale subject to the various taxes.

DECISION AND DISPOSITION:

We deny the taxpayer's petition.

DATED this 30th day of September, 1997.

⁵ Members of that one state received certificates of escrow identifying their property.