

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Refund of)	<u>D E T E R M I N A T I O N</u>
)	
)	No. 97-232
)	
...)	Real Estate Excise Tax
)	
)	

RULE 420; RCW 82.45.010: REET -- EMINENT DOMAIN -- IMMINENT.
The sale of real estate to a city is subject to real estate excise tax unless there is a threat of the exercise of eminent domain. To be a threat, use of the power must be imminent. There must be some evidence demonstrating resolve to use the power, such as specific authorization to use eminent domain for the property purchased, or a showing that the acquisition of the specific property is inevitable under a pre-adopted plan. Having the general power to use eminent domain alone, does not create the threat.

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:

Taxpayers request a refund of real estate excise tax paid on the sale of their home to a city.¹

FACTS:

Pree, A.L.J. -- The taxpayers owned their home since 1946. The house is located on 5.7 acres a city in Washington (the City). In 1997, the City's parks and land planner approached the taxpayers and asked if they would be willing to sell the property to the City. The property would become a park, meeting a future need of the City.

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

The taxpayers told him they would sell it for \$X. The City countered, and offered to pay \$Y. The taxpayers responded that they would not sell it for less than \$Z. The City Council passed a resolution authorizing the purchase for \$Z. The purchase was subject to a favorable recommendation from the Parks and Recreation Board (the Board) after the Board conducted a public meeting to determine community acceptance of the site for a neighborhood park. The Board met and recommended the purchase.

The minutes of the Board meeting indicate that an area for a neighborhood park would have been purchased in 1999. There was not any park located in that portion of the City. According to the taxpayers, the property had been identified several years before as a possible future park site.

The City's comprehensive plan for parks dated October 1996, stated that 4-5 neighborhood parks would be needed by the year 200X. Ideally, each neighborhood park would be 5 acres in size and be located in different sectors of the City. A 1994 map identified areas for each planned park site with dots at specific locations encircled by a shaded area 2,000 feet in radius. The taxpayers' property was not located in any shaded area.

The City never threatened to condemn the property and acquire it by eminent domain. In January 1997, the City purchased the property from the taxpayers. The taxpayers paid real estate excise tax (REET) on the transfer. In April of 1997, they petitioned for refund of the REET contending that it was transferred under the threat of the exercise of eminent domain.

The Miscellaneous Tax Section (MTS) of the Special Programs Division of the Department of Revenue (Department) reviewed the taxpayer's petition. MTS determined that the transfer did not occur under the imminent threat of eminent domain. It appeared that the taxpayers merely agreed to sell their property to the City. MTS denied the refund request. The taxpayers petitioned to the Appeals Division.

ISSUE:

Was the property transferred under the threat of the exercise of eminent domain by the City?

DISCUSSION:

REET is imposed upon the sale of real property. RCW 82.45.060. Various exceptions or exclusions from the definition of sale exist in RCW 82.45.010(3). Prior to July 1, 1993, sales by or to any municipal corporation of the state, such as cities, were excepted from the definition of sale. The words "or to" were dropped from the statute in 1993. See, Laws 1993 1st special session, C. 25 s. 502. Since then, that exception applied only to sales by, not to, cities. See, RCW 82.45.010(3)(m). Because the taxpayers sold their property to a city, the tax would apply unless another exception exists applicable to their situation.

Subsection (3)(g) of RCW 82.45.010 excludes from the definition of sale for REET purposes, transfers by appropriation or decree in condemnation proceedings brought by the state or its

municipal corporations such as the City. The Department's Rule, WAC 458-61-420 (Rule 420) provides in subsection (1)(c) that REET does not apply to:

(c) Transfers to the United States, the state of Washington or any political subdivision thereof, or a municipal corporation, either under threat of the exercise of eminent domain or as a result of the actual exercise of eminent domain.

(i) The threat of exercise of eminent domain by a government or political subdivision must be imminent in order to exempt a transfer from the real estate excise tax. To be imminent, the power must not only be available for immediate use, but the appropriate situation to allow for its use must also be in place. If the government or political subdivision does not yet have the authority to exercise eminent domain at the time of the transfer, the transfer cannot be exempt under the threat of eminent domain.

(ii) Example 1. A school district wishes to purchase land for a new school. The election has been held to authorize the use of public funds for the purchase and the general area has been chosen. The district has been granted authority to use eminent domain to obtain the land if required. So long as the land transferred to the district is in the authorized area and will be used for building the school, the transfer will be exempt from the real estate excise tax because it was made "under threat of eminent domain."

(iii) Example 2. A state agency is authorized by statute to use powers of eminent domain as required to obtain oceanfront property to build parks. It may not simply condemn all oceanfront property under its powers. The state must act in accordance with a plan or other documentation outlining the reasons for acquiring specific areas in order to exempt a transfer made to the agency from real estate excise tax as having been made under the threat of exercise of eminent domain. The plan shall be made available to the department upon request.

This Rule was last amended in 1994, following the change in the statute. Purchases by cities were not exempt unless they were "transfers by appropriation or decree in condemnation proceedings." Rule 420 was revised to exempt only transfers under the threat of the exercise of eminent domain. Other transfers to cities are taxable.

Use of the power of eminent domain must be imminent. In the taxpayers' circumstances, we do not consider the exercise of eminent domain by the city imminent. The city merely contacted the taxpayers, made an offer, negotiated a price, authorized the purchase, and purchased the property. The City's actions appear to be the normal method that it would use to acquire property. There is no indication that the City would have used eminent domain to acquire the taxpayer's property.

The taxpayers states that the transfer is analogous to the examples in Rule 420, which provide for exemption. The taxpayers' facts are very different. The City's authority to use the power of eminent domain to acquire this type of property was not as specific as that in the example. The plan did not identify the taxpayers' specific property or outline the specific reasons for acquiring that property. Example 1 is different because there was no specific authorization to use eminent domain, and, as in example 2, the location of the taxpayers' property was outside of the designated area.

The taxpayers also states that the City council had the authority to exercise its power immediately if it chose to do so. Every city and town in Washington has that power. See, RCW 8.12.030. Because they have the general power available , under the taxpayers' reasoning, any acquisition by a city would qualify. Such an interpretation would negate the 1993 statutory amendment for virtually all transfers to cities.

The City's use of eminent domain was not imminent. The City did not demonstrate resolve to acquire the property by eminent domain if necessary. The authorization to purchase the taxpayers' property did not include a reference to use the power if necessary. The City did not authorize the use of eminent domain to acquire this specific property. The specific property was not an integral part of a plan set in motion, which would require use of the power if the taxpayer did not agree to sell. In fact, the taxpayers' property, while it apparently was suitable as a neighborhood park, was not even within the shaded area for the proposed new park. There is no indication that the city had a track record of using this power in similar situations in the past. Other properties could have been suitable. They may have become available by 200X.

There is no evidence in these circumstances that use of eminent domain was imminent. We find that the taxpayers' property was not under the threat of the exercise of eminent domain. The sale to the City was not a transfer exempt from the real estate excise tax..

DECISION AND DISPOSITION:

We deny the taxpayers' petition for refund.

Dated this 24th day of November 1997.