

Cite as Det. No. 99-138, 19 WTD 167 (2000)

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. 99-138
)	
...)	REET Assessment
)	
)	

[1] WAC 458-61-420; RCW 82.45.010 - REET - EXCLUSION - TRANSFER UNDER IMMINENT THREAT OF EMINENT DOMAIN. The threat of exercise of eminent domain must be imminent in order to exclude 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. Where the sale of property to a county took place approximately one month after the county sent the sellers a letter threatening to condemn their property and the county's statutory powers of eminent domain authorized the county to condemn the property, the threat of eminent domain was imminent, and the exclusion applies.

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:

Sellers of real property protest assessment of real estate excise tax (REET) on the sale because they contend that the sale was made under threat of eminent domain.¹

FACTS:

C. Pree, A.L.J. (successor to Rene, A.L.J.) -- The taxpayers were assessed REET with respect to their sale of property to King County on November 10, 1994. The County intended to use the property as a van pool distribution center. The sales price of the property was The assessment includes real estate tax of . . . , interest of . . . , and penalties of The assessment totaled

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

In filing the REET affidavit, the taxpayers claimed that the transaction was exempt from REET as a sale made “under threat of eminent domain.” At the time of sale, no condemnation ordinance had been passed.

On September 9, 1994, the County sent the following letter to the taxpayers:

[County] would like to acquire your property as part of a free market transaction **and there are reasonable grounds to believe that if the property is not sold voluntarily, it will be condemned.** You are entitled to just compensation for your property and **are not required to increase or reduce your sales price because the property may be condemned.**

[County] will agree to pay . . . per square foot for the property. Please adjust the sales price accordingly on the Purchase & Sale Agreement, execute and return to my office at your earliest convenience.

(Emphasis added.) After receipt of the letter, the taxpayers sold the property to . . . County. However, the Miscellaneous Tax Section assessed REET because it did not consider this statement sufficient to justify a belief that condemnation was “imminent.”

According to the County:

. . . County’s statutory powers of eminent domain authorize the County to condemn the property for use as a van pool distribution center. However, the owner agreed to sell after receiving notice that if the property was not sold voluntarily, there were reasonable grounds to believe that it would be condemned.

. . . [B]ecause of the volume of property acquired by . . . County in the course of its sewer and transit operations, in the normal case, a condemnation ordinance will not be passed unless the property owner refuses to sell even after receiving notice that the property will be condemned.

The taxpayers argue:

There are two compelling considerations leading to the decision of [the taxpayers] to sell their land to [County] at the price ultimately agreed upon. One of the factors was the avoidance of the Washington State excise tax due to the exempt status of [County] when it acquires property either by actual condemnation or threatened condemnation. [The taxpayers] wanted more money for the property. The price was affected by the exemption from excise tax and the obvious willingness of [County] to proceed to condemnation if that became necessary. To [the taxpayers] the threat of condemnation was imminent and real.

ISSUE:

Whether the taxpayers sold their property to the County under imminent threat of eminent domain.

DISCUSSION:

RCW 82.45.060 imposes REET with respect to sales of real property. RCW 82.45.010 defines the term sale to have its "ordinary meaning." However, RCW 82.45.010(3)(g) excludes from the definition of sale for REET purposes, "Transfers by appropriation or decree in condemnation proceedings brought by the United States, the state or any political subdivision thereof, or a municipal corporation."

WAC 458-61-420 is the administrative rule that explains the exemption for transfers under threat of the exercise of eminent domain. The rule provides in pertinent part as follows:

[T]he [real estate excise tax] does not apply to . . .

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.

The taxpayers argue:

[I]t is difficult to find anything in the referenced WAC [example 1], which does not literally apply to the present situation. If one were to substitute the word "[County]" for

the phrase “School District” and substitute “van pool” for the word “school”, it would be difficult to imagine a more precise match.

In Det. No. 97-232, 17 WTD 103 (1997), we applied the above rule and determined that the taxpayers in that determination did not qualify for the exemption. In that determination, a city’s parks and land planner approached the taxpayers in 1997 and asked if they would be willing to sell their property to the City. The property would become a park, meeting a future need of the City. A map identified areas in the city for planned parks; the taxpayer’s land was not located in any of these areas. (The City was planning to purchase property for a park in 1999.) The taxpayers told the planner they would sell their land 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 City never threatened to condemn the property and acquire it by eminent domain. 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 city purchased the property in January 1997.

In denying the taxpayer’s petition, we reasoned:

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 authorization to purchase the taxpayers’ property did not include a reference to use the power [of eminent domain] if necessary. . . .

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.

In contrast to the above determination, we find that the County’s exercise of eminent domain was imminent in this case. The sale took place on November 10, 1994. Approximately one month prior to the actual sale, the County sent the taxpayers a letter, which stated, “**there are reasonable grounds to believe that if the property is not sold voluntarily, it will be condemned. You . . . are not required to increase or reduce your sales price because the property may be condemned.**” (Emphasis added.) In contrast, in Det. No. 97-232 the City never mentioned the use of its exercise of eminent domain powers in acquiring the taxpayers’ property, and the City apparently had not planned to purchase property for parks for another two years.

Further, the County's statutory powers of eminent domain authorize the County to condemn the property for use as a van pool distribution center. In contrast, at the time the City in Det. No. 97-232 offered to purchase the taxpayers' property, the Board had not yet approved the purchase, and the taxpayers' property was not in the area previously approved for location of a park.

Thus, as required by the administrative rule, we find that the threat of exercise of eminent domain was imminent. The power was not only available for immediate use, but the appropriate situation to allow for its use was also in place. Thus, as the taxpayers argued, we find their situation to be similar to example one, set forth in the rule, in which the Department determined the transaction to be exempt from REET.

DECISION AND DISPOSITION:

The taxpayers' petition is granted.

Dated this 21st day of May 1999.