

Cite as 5 WTD 303 (1988)

BEFORE THE INTERPRETATION AND APPEALS DIVISION
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 Correction of Assessment of)	
)	No. 88-179
)	
)	Real Estate Excise Tax
. . .)	No. . . .
)	
)	
)	

[1] **REAL ESTATE EXCISE TAX:** RCW 82.45.100 -- SALE -- EXECUTORY CONTRACT DISTINGUISHED. A sale does not take place for real estate excise tax purposes when an executory contract for the purchase and sale is signed. The sale takes place when the conditions are satisfied and the contract is executed by the buyer and seller.

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: . . .

NATURE OF ACTION:

The taxpayer protests the assessment of a delinquent penalty on a real estate excise tax assessment.

FACTS AND ISSUES:

Frankel, A.L.J. -- The taxpayer stated the relevant facts as follows:

1. On December 31, 1986, . . . , as sellers, entered into an executory real estate contract for the sale of a parcel of real estate in . . . County.

Conditions precedent to closing the sale included approval of a wrap-around arrangement from . . . Life Assurance Society of the United States and elimination of a number of defects in title. The latter included the recorded interests of prior purchasers from seller, whose interests had been forfeited, delinquent taxes and assessments, and a delinquency under the [Life Assurance Society] mortgage.

2. Delays were encountered securing delinquent tax and assessment information from the County Treasurer and negotiating satisfactory arrangements with [the Life Assurance Society]. In addition, negotiations with the title company relative to eliminating the interests of the previous purchasers were protracted.

3. As a consequence of the foregoing, the transaction was not in a condition to be closed and the buyer not contractually obligated to purchase until on or about March 31, 1987.

4. Part of the documentation pertaining to this transaction included a memorandum of contract executed by the parties on March 31, 1987, and recorded April 3, 1987, with the . . . County Auditor. That memorandum cites the date of the real estate contract as December 31, 1986.

5. A real estate excise tax affidavit reflecting the transaction identifies the date of sale as March 30, 1987, with the . . . County Auditor. That memorandum cites the date of the real estate contract as December 31, 1986.

6. On the basis of the contract date stated in the memorandum of real estate contract, . . . , Revenue Officer, determined that the "transaction date" was December 31, and that delinquent penalties were therefore owing. Negotiations with him through correspondence to date have resulted in no change in his position.

The Revenue Officer arrived at the date of sale of December 31, 1986 based on the Memorandum of Real Estate contract which stated that the real estate contract was dated December 31, 1986. He relied on WAC 458-61-030(15) which defines the date

of sale as the date shown on the instrument of conveyance or sale.

DISCUSSION:

RCW 82.45.100 provides that the real estate excise tax

is due and payable immediately at the time of sale, and if not paid within thirty days thereafter shall bear interest at the rate of one percent per month from the time of sale until the date of payment.

The term "sale" is defined in RCW 82.45.010 which states, in part, that

. . . the term . . . shall have its ordinary meaning and shall include any conveyance, grant, assignment, quitclaim, or transfer of the ownership of or title to real property . . . or other contract under which possession of the property is given to the purchaser, . . . which title is retained by the vendor as security for the payment of the purchase price.

The taxpayer contends the "transfer," "sale," "conveyance," and "transaction," did not occur until the conditions precedent had been satisfied in the later part of March, 1987 and the ownership of the property was conveyed. We agree.

A real estate purchase and sale agreement or earnest money agreement that contains conditions precedent requires the parties to exercise diligence and good faith to attempt to meet the conditions, but such agreements render the completion of the sale uncertain. Weaver v. Fairbanks, 10 Wn. App. 688 (1974). Until the conditions are satisfied or waived, the sale does not take place. Similarly, we believe that the executory contract signed in December was a contract to convey real property and required the parties to exercise diligence and good faith to meet the conditions, but the conveyance and sale for real estate excise tax purposes did not occur until the conditions were satisfied and the contract was executed.

Black's Law Dictionary defines executory as:

That which is yet to be executed or performed; that which remains to be carried into operation or effect; incomplete; depending upon a future performance or event. The opposite of executed.

An "executory contract to sell" is defined as "under which something remains to be done by either party before delivery and passing of title." (Black's Law Dictionary, Revised Fourth Ed, 1968, p. 680).

The contract in this case was executed by the seller on March 30, 1987 and by the buyer on March 31, 1987. Real estate excise tax was paid on April 3, 1987. As the tax was paid within thirty days after the contract was executed and the sale closed, no interest or delinquent penalty was owing.

DECISION AND DISPOSITION:

The taxpayer's petition is granted.

DATED this 6th day of April 1988.