

Cite as 5 WTD 117 (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 Real Estate)	
Excise Tax Assessment of)	No. 88-38
)	
)	Affidavit No. . . .
. . .)	Real Estate Excise
)	Tax Audit No. . .
.	

[1] **REAL ESTATE EXCISE TAX, RCW 82.45.030:** WAC 458-61-650 -- TENANTS IN COMMON -- "SELLING PRICE" -- TRANSFER OF ONE CO-BORROWER'S INTEREST IN PROPERTY TO OTHER CO-BORROWER. Where taxpayer and another person borrowed funds to construct a building on land which they jointly owned, and the taxpayer subsequently sold his interest in the property to the co-borrower for cash and assumption of the indebtedness owing, real estate excise tax was due on the transfer. The "selling price" included the cash paid and the taxpayer's share of the underlying indebtedness assumed by the grantee. AGO 65-66 No. 64 and AGO 63-64 No. 18 cited.

[2] **REAL ESTATE EXCISE TAX, RCW 82.45.100:** INTEREST ON UNPAID TAXES. If real estate excise tax is not paid within thirty days of the time of sale, the taxes owing shall bear interest from the time of sale until the date of payment.

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: . . .

DATE OF HEARING: January 12, 1988

NATURE OF ACTION:

The taxpayer protests the assessment of real estate excise tax and the delinquent penalty added to the assessment.

FACTS:

Frankel, A.L.J. -- On June 10, 1987, the property tax division sent . . . (hereinafter referred to as the taxpayer) notice that \$1,805.41 in tax plus a delinquent penalty of \$216.65 was due. The assessment was on the taxpayer's transfer of real property to . . . (hereinafter referred to as Mr. and Mrs "B"). On the real estate excise tax affidavit, the taxpayer had claimed the transfer was exempt as a "transfer denoting dissolution of partnership."

The Department assessed tax on the county assessed value of \$168,730. The Department relied on WAC 458-61-570. The taxpayer protested the assessment. The taxpayer stated that he and Mr. "B" entered into a partnership in January of 1986 for the specific purpose of purchasing land and constructing a fourplex combination condominium and office structure. (affidavit page 1). The next month they received approval for a construction loan for \$120,000. The commitment letter names Mr. "B" and the taxpayer as co-borrowers.

The taxpayer and Mr. "B" terminated their relationship on July 31, 1986 by a written agreement. The terms of the agreement were as follows:

1. [Mr. "B"] will pay [taxpayer] the sum of \$19,500.00 for his interest in the property payable \$15,000.00 cash at this time and \$4,500.00 on October 1, 1986.
2. [Taxpayer] will at this time convey his interest in said property to [Mr. "B"] and wife by Statutory Warranty Deed.
3. [Mr. "B"] agrees to assume the mortgage balance and pay any debts incurred in the construction of the property up to \$20,000.00.
4. Each of the parties will share any construction debts exceeding \$20,000.00

The taxpayer stated that he and Mr. "B" subsequently amended the original agreement. They entered into a Release Agreement in October of 1986 which relieved Mr. "B" of the twenty thousand dollar construction debt and the final payment of \$4,500. The taxpayer stated the actual amount received for the property was \$15,000 plus relief from his "share" of the construction debt, \$60,000.

During the hearing the taxpayer and his attorney stated that the property in question was held solely in the taxpayer's name. The taxpayer subsequently provided a copy of the deed showing that the property had been purchased in 1985 from a third party and that the taxpayer and Mr. and Mrs. "B" each had an undivided one-half interest in the property. Real estate excise tax was paid on the initial transaction.

The taxpayer originally protested the measure of the tax, contending the assessment should be based on \$75,000 (\$15,000 plus one-half of the construction debt). After obtaining the deed showing the property was held by the taxpayer and the "B's," the taxpayer changed his position. He contends:

It is our position that these two facts change the situation such that (1) the initial change of transaction should be treated as that of a real partnership in which the real estate excise tax was initially paid and that upon the dissolution of this partnership and the distribution of the property to the parties no real estate excise tax should be paid or due from [the taxpayer]. And, (2) in-as-much as the . . . County Treasurer has filed this deed as real estate excise tax exempt the county and the state are estopped from collecting any type of real estate excise tax from [the taxpayer] at this time and furthermore that he has detrimentally relied on this filing and he should not be liable for any late penalties or interests fees. (Letter from taxpayer's attorney, January 26, 1988.)

DISCUSSION:

[1] The real estate excise tax is to be paid by the seller on each sale of real property. RCW 82.45.080. The tax is paid on the "selling price" which is defined in RCW 82.45.030 as

. . . the consideration, including money or anything of value, paid or delivered or contracted to be paid or delivered in return for the transfer of the real

property or estate or interest in real property, and shall include the amount of any lien, mortgage, contract indebtedness, or other incumbrance, either given to secure the purchase price, or any part thereof, or remaining unpaid on such property at the time of sale.

Although the taxpayer stated he and Mr. "B" entered into a partnership in 1986 for the specific purpose of purchasing land and constructing the building at issue on it, they executed no partnership agreement. The deed transferring the property to the taxpayer and Mr. and Mrs. "B" states the transfer was to "[the taxpayer], a single person as to an undivided one-half interest and [Mr. and Mrs. "B"] husband and wife as to an undivided one-half interest." Holding property in common does not of itself establish a partnership, whether such co-owners do or do not share any profits made by use of the property. RCW 25.04.070.

In an opinion issued by the attorney general in 1965, the issue was the measure of the real estate excise tax where a number of vendees under an executory contract for the sale of real estate were jointly and severally liable for payment of the full purchase price, and one vendee transferred his proportional interest to the other vendees who paid him for his equity in the land and assumed his share of the contractual balance owing. In that case, the transferor was not released from his contractual obligation by the original vendor. The AGO concluded that the tax was to be measured by the amount paid for the vendee's equity in the land plus the proportional share of the transferring vendee remaining unpaid on the balance of the contract of sale at the time of the transfer to the remaining vendees. AGO 65-66 No. 64,

WAC 458-61-650 states that the sale of the interest in real property from one or more tenants in common to remaining tenants or to a third party is a taxable transaction. The measure of the tax is the consideration given and/or promised to be given plus the transferor's share of the debt remaining unpaid on the property.

In this case, the taxpayer and Mr. "B" were jointly and severally liable for the construction loan. We find the loan document and the deed indicate the taxpayer and the "B's" held the property as tenants in common. When the taxpayer sold his interest in the property to Mr. "B", real estate excise tax was due. The "selling price" was the taxpayer's share of the debt assumed (\$60,000) plus the consideration received (\$15,000). RCW 82.45.030 and WAC 458-61-650. The excise tax assessment was based on the county assessed value of the

property (\$168,000) and shall be reduced to reflect a selling price of \$75,000.

Although the taxpayer's attorney argued that no excise tax should be due in this case, he did not support this assertion with any authority.¹ WAC 458-61-570, the administrative rule which deals with nonfamily partnerships, states the real estate excise tax applies to the sale of partnership shares where title to real property is conveyed. In this case, title was conveyed and it was done by an agreement by the taxpayer and Mr. "B". We know of no rule, statute, or case that would support the taxpayer's present contention that no real estate excise tax was due.

In Deer Park Pine Industry v. Stevens County, 46 Wn.2d 852 (1955), the court held that no real estate tax was due on the transfer of corporate real estate to stockholders upon the voluntary dissolution of a solvent corporation except in a case where the stockholders had agreed to assume the liabilities of the liquidating corporation. In AGO 63-64 No. 18 (1963), the Deer Park opinion was applied to the dissolution of a general partnership. The AGO concluded that the real estate excise tax does not apply to the transfer of realty to the partners upon dissolution of the partnership where the rights of the partners are only those fixed by statute rather than by agreement.

In this case, the rights of the taxpayer and Mr. and Mrs. "B" upon dissolution were fixed by their agreement--not by statute. If we were to find that the "partnership" of the taxpayer and Mr. and Mrs. "B" purchased the property and took out the loan, the real estate excise tax would be due upon dissolution. Under the holding of Deer Park, followed in AGO No. 18, the tax would be due on the total amount of the debt assumed by Mr. "B" (\$120,000), plus the additional consideration given (\$15,000), for a total of \$135,000.

[2] Late payment penalty. The taxpayer first protested the assessment of the "delinquent penalty" of \$216.65 on grounds it was "unreasonable under the provisions of the RCW to assess

¹ During the hearing, he argued that WAC 458-61-210 dealing with assignments supported a finding that no tax applied. The rule and RCW 82.45.010 provided an exclusion from the term "sale" for real estate excise tax purposes only when there is an assumption of the underlying debt and no consideration passes otherwise. In this case, the taxpayer received \$15,000 in additional consideration. The transaction was a sale for real estate excise tax purposes.

a penalty on unpaid taxes where the taxpayer was not notified of such assessment in a timely manner." (Petition, July 9, 1987). The taxpayer did not cite a provision of the RCW which made the assessment "unreasonable." The taxpayer stated he had no part in drafting any of the sales, transfer or other documents associated with the closing and transfer of the property. He contends he had no indication he was responsible for paying excise taxes until he received notice in June of 1987 from the Department that real estate excise taxes were owing.

Chapter 82.45 RCW deals with the excise tax on real estate sales. RCW 82.45.100(1) provides that the tax is due 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." In this case, the taxes owing were not paid within thirty days of the transfer. An assessment of one percent per month was added to the taxes owing as required by the statute. Although denoted a "delinquent penalty," the assessment was in substance the interest mandated by Washington law.

We are unable to grant relief because the taxpayer stated he was unaware the taxes were due at the time of the transfer. RCW 82.45.150 requires the Department to conduct annual audits of transactions and affidavits filed under Chapter 82.45. The Department complied with this provision and notified the taxpayer of the taxes owing. Interest was properly added to the assessment.

The taxpayer's estoppel argument also lacks authority and merit. The real estate excise tax affidavit signed by the taxpayer stated that no excise tax was due because this was a "dissolution of partnership." The transfer, however, was a taxable sale. Furthermore, even if the county treasurer makes a mistake in not collecting excise taxes at the time of the transfer, the state is not estopped from collecting taxes due because of a mistake or oversight by one of its employees. See Kitsap-Mason Dairymen's Assoc. v. Tax Commission, 77 Wn.2d 812, 818 (1970). The legislature would not have required the Department to audit affidavits under Chapter 82.45 if the Department did not have the authority to collect taxes that should have been paid.

DECISION AND DISPOSITION:

The taxpayer's petition is granted in part and denied in part. The assessment shall be reduced to reflect taxes owing on a selling price of \$75,000 rather than \$168,000. Interest of one percent per month shall be added to the taxes owing.

DATED this 26th day of February 1988.

See hardcopy for attachment.