

Cite 9 WTD 245 (1990)

BEFORE THE INTERPRETATION AND APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition) D E T E R M I N A T I O
N
For Correction of Assessment of)
)
) No. 90-117
)
) Registration No. . . .
) . . ./Audit No. . . .
)

[1] RCW 82.45.060 and WAC 458-61-060: REAL ESTATE
EXCISE TAX -- POLLUTION CONTROL TAX CREDITS -- REAL
ESTATE -- WHAT CONSTITUTES. The sale of
certificates evidencing pollution control tax
credits issued pursuant to RCW 82.34 is not subject
to the real estate excise tax as the certificates
are not real estate within the meaning of RCW
82.45.060(1). FID

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: December 21, 1988.

NATURE OF ACTION:

Taxpayer petitions for correction of assessment of real estate
excise tax on the sale of pollution control tax credits in
connection with the sale of a pulp and paper mill.

FACTS:

Heller, A.L.J. (successor to Potegal, A.L.J.) -- [The taxpayer] purchased a pulp and paper mill located in . . . , Washington ("the Mill") from [the ABC Corporation]. As a part of this purchase, the taxpayer acquired certain pollution control tax credit certificates then held by [ABC Corporation].

In accordance with the terms of the contract of sale, the total purchase price was allocated among the various assets acquired by the taxpayer. Of the \$. . . purchase price, \$. . . was allocated to the tax credit certificates.

At closing, the taxpayer filed a real estate excise tax affidavit with the . . . County Auditor reflecting a taxable sales price for the real property of \$ After closing, a revaluation of the real and personal property was performed and as a result, the taxpayer submitted to the Department of Revenue ("Department") an amended real estate excise tax affidavit which included a claim for refund of excise tax paid in the amount of \$ The Department approved the taxpayer's claim for refund but determined that the taxpayer had improperly treated the \$. . . allocated to the pollution control tax credit certificates as exempt from the real estate excise tax. The Department concluded that the pollution control credit certificates represent a past amount expended as an improvement to real property, the sale of which is subject to the excise tax.

TAXPAYER'S EXCEPTIONS

The taxpayer disagrees with the Department's characterization of the pollution control tax credit certificates as real property subject to the real estate excise tax. In its petition, the taxpayer argues that the tax credit certificates are not improvements to real property, but instead represent the right to use tax credits to offset and defray the cost of constructing a pollution control facility. In the taxpayer's view, the certificates constitute nontaxable intangible personal property. According to the taxpayer:

Such intangible rights are personal property, and cannot be treated as real estate when transferred. Consequently, [the taxpayer's] purchase of the tax credit certificates cannot be treated as a transfer of taxable real property. (Brackets supplied.)

DISCUSSION

Chapter 82.34 RCW provides an exemption from tax for certain expenditures made in connection with the acquisition of a "pollution control facility". The statute is intended to provide a financial incentive to businesses to invest in equipment which will limit the amount of pollution released into the environment. A taxpayer who meets the requirements of the statute may apply for a certificate which entitles the taxpayer to claim an exemption from any sales and use taxes on amounts paid for acquisition of the pollution control facility. RCW 82.43.050(1). In lieu of claiming the sales/use tax exemption, the holder of the certificate may elect to take a tax credit, in the total amount of the exemption, against any future taxes to be paid pursuant to RCW Chapters 82.04, 82.12, and 82.16. RCW 82.34.050(2).

The Washington Supreme Court has held that pollution control tax credits, and the certificates evidencing their existence, may be transferred along with the pollution control facility and utilized to offset a tax liability of the new owner. Publishers Forest Products Co. v. State, 81 Wn.2d 814, 815 (1973). The taxpayer argues that there is nothing in Washington law to suggest that transfers of such credits should be treated as transfers of real property for purposes of the real estate excise tax. We agree.

Washington law imposes an excise tax upon each sale of real property within the state. RCW 82.45.060. According to RCW 82.45.060(1), "real estate" means real property and includes used mobile and floating homes. This definition provides little assistance in determining whether the certificates at issue constitute taxable real estate. Chapter 458-61 WAC, the administrative rules which implement the real estate excise tax, define real estate as:

. . . real property, including improvements the title to which is held separately from the title to the land to which the improvements are affixed, the term also includes used mobile homes and used floating homes.

WAC 458-61-060(11). This rule adds improvements to real property to the statutory definition. Except for the inclusion of used mobile and floating homes, this definition appears to be nothing more than a restatement of the common law definition of real property. Black's Law Dictionary recites the common law definition of real property as follows:

Land, and generally whatever is erected or growing upon or fixed to land. Also rights issuing out of, annexed to, and exercisable within or about land.

1096 (5th ed. 1979). Clearly, the certificates at issue are not land in any sense of the word, nor are they anything erected or growing upon or fixed to land. On the other hand, the certificates do represent rights. The common law definition contemplates that in order for rights to be considered real property, they must have a special relationship to land. Although the sales/use tax may have been incurred in connection with improvements to real property, the right to claim a credit against a future tax liability does not "issue out of" land. The certificates are representative of rights arising out of the past payment of sales or use tax.

By contrast, personal property includes "everything that is the subject of ownership not coming under the denomination of real estate, land or any interest in land." Id. The term personal property denotes: "goods, chattels, money, notes, bonds, stocks, choses in action generally, including intangible personal property." Id. Intangible personal property is "property which cannot be touched, because it has no physical existence, such as claims, interests, and rights." Id.

The certificates under consideration more appropriately fall within the definition of intangible personal property. They are rights conferred by the legislature as an inducement for taxpayers to take action to further a particular legislative purpose. The relationship of these rights to real property is only incidental. The holder of the certificates may use the tax credits they represent to offset a tax liability which bears no relationship to the real property upon which the pollution control facility was constructed. Furthermore, we cannot overlook the fact that taxing transfers of this type would have the effect of mitigating the benefits conferred by the statute. We find that the certificates do not represent an improvement to real property subject to tax when transferred.

DECISION AND DISPOSITION

The taxpayer's petition for correction of assessment is granted.

The assessment is hereby cancelled.

DATED this 14th day of March 1990.