

Cite as Det. No. 04-0106, 23 WTD 344 (2004)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Correction of Assessment of)	<u>D E T E R M I N A T I O N</u>
)	
)	No. 04-0106
)	
...)	Registration No. . . .
)	REET Assessment
)	REET Audit No. . . .
)	Docket No. . . .

- [1] WAC 458-61-410; WAC 48-61-650: REET -- GIFT OF INTEREST IN REAL ESTATE. The real estate excise tax (REET) does not apply to the transfer of real property which results in a tenancy in common when no consideration other than love and affection is present in the transfer.

- [2] WAC 458-61-410; RCW 30.22.090: REET -- TRANSFER OF INTEREST IN REAL ESTATE – PAYMENTS FROM JOINT ACCOUNT OF GRANTOR AND GRANTEE. If no money is paid directly to the grantor for a transfer of real property, but payments on indebtedness on the property are made from a joint bank account of the grantor and grantee, the grantor receives consideration to the extent funds belonging to the grantee are used to pay the indebtedness. A grantor who claims the funds in the joint account are solely the grantor's, and the grantee has limited authority to sign checks, has the burden of establishing that claim.

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.

Prusia, A.L.J. – Husband and wife (Taxpayers) who transferred an undivided interest in real property to the husband's younger brother request cancellation of an assessment of Real Estate Excise Tax (REET) on the value of the interest transferred. Taxpayers assert the transfer was without consideration, other than love and affection, and they continue to make the payments on the mortgage. REET was assessed because payments on the mortgage are made from a bank account on which the transferee is a signer. We find that love and affection was the only consideration for the transfer. We conclude that REET does not apply to the transfer, grant the petition, and cancel the REET assessment.¹

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

ISSUE

Have Taxpayers proven that love and affection was the only consideration for the transfer, thereby exempting the transfer from the imposition of REET?

FINDINGS OF FACT

This is an appeal of a REET assessment on the . . . transfer of an undivided one-half interest in real property in . . . County, from . . . (grantors) to . . . (grantee). The Special Programs Division of the Department of Revenue issued the assessment on November 3, 2003. The assessment was for \$. . . state tax, \$. . . local tax, \$. . . delinquent penalty (20% of taxes assessed), and \$. . . assessment penalty (5% of taxes assessed). Special Programs based the assessment on a value for the transferred interest of \$

The grantors (Taxpayers) appeal the assessment of REET and associated penalties. Taxpayers state that the transfer was a gift to [grantor's] younger brother [grantee], and they have received nothing from [grantee] in return for the transfer of the interest. Taxpayers own several gas stations/mini marts and the underlying real estate, and employ members of their families in the stations. They employed [grantee] to manage the [Business], which is located on the property in question. They pay [grantee] a salary for managing the business. Other than the salary, we have no evidence of an enforceable contract or consideration passing from the grantee to the grantors. Taxpayers gave [grantee] an interest in the land because they appreciated his efforts in helping them succeed and wanted to help him and his family advance also. Based on the evidence before us, we find that the transfer of the property interest was not a part of his promised compensation, nor was it payment of any debt Taxpayers owed [grantee]. This is a very close-knit family, and they help one another out when they are able.

At the time of the transfer of the half interest, Taxpayers completed and filed a REET affidavit in which they claimed an exemption from REET under WAC 458-61-410(B), with the explanation that the transfer was a gift, and the grantors continued to pay on the debt. They filed a supplemental statement stating that there was a debt on the property of \$. . . , but they continued to make all payments on the debt.

The Special Programs Division issued the assessment based on the fact that the grantee, [grantee], is a signer on the bank account from which payments on the mortgage are made.

Taxpayers explain that [grantee] is a signer on the bank account because he manages the business. All amounts deposited in the bank account are receipts of the business. [Grantee] has no right to withdraw any money in the account for his personal use. [Grantee] does not deposit any of his own funds into the bank account.

Documentation provided by Taxpayers shows that the business, [Business], has been registered with DOR since 1997. Taxpayers are its sole shareholders and the only officers and directors.

The property is mortgaged. Taxpayers entered into the current mortgage in March 2002, signing a promissory note for \$. . . and a deed of trust. Taxpayers are the sole obligors on the loan. [Grantee] is not named on the note or the mortgage. At the same time, Taxpayers entered into a business loan agreement and hazardous substance agreement with the bank, and the corporation signed a commercial guarantee to pay the indebtedness of Taxpayers. All payments on the loan have been made from a . . . account of the corporation, [Business]. [Grantee] is an authorized signer on the account.

The signature card indicates that he has authority to sign checks only, and does not have authority to designate additional authorized persons on the account or delete authorized persons from the account or obligate the business to contracts or agreements with the bank. W-2s issued by [Business] to [grantee] for 1999 through 2003 show the corporation paid him a salary in the following total amounts for the respective years: \$. . . ; \$. . . ; \$. . . ; \$ Copies of pay stubs from each year show him as an employee paid monthly.

ANALYSIS

RCW 82.45.060 imposes an excise tax (REET) upon each sale of real property, at a specified percentage of the selling price. The tax is the seller's obligation. RCW 82.45.080. As required by RCW 82.45.150, the Department has prescribed a REET affidavit form to be completed and filed by the seller.

REET is payable at the time of sale, and if not paid within one month bears interest from the time of sale to the time of payment. RCW 82.45.100. A delinquency penalty also is assessed if the tax is not timely paid. RCW 82.45.100(2); WAC 458-61-090. On any assessment, an additional assessment penalty of 5% is added. RCW 82.32.090(2).

RCW 82.45.010 defines "sale" as having its ordinary meaning and including any transfer of ownership in or title to real property, or any interest therein, for "a valuable consideration." RCW 82.45.030(3) states that "consideration" includes "money or anything of value, paid or delivered or contracted to be paid or delivered in return for the sale."

Several exclusions from the definition of "sale" are set out in RCW 82.45.010(3). One statutory exclusion is "A transfer by gift, devise, or inheritance." RCW 82.45.010(3)(a). Chapter 82.45 RCW does not define gift. "Words in a statute are given their ordinary and common meaning absent a contrary statutory definition." *John H. Sellen Constr. Co. v. Department of Rev.*, 87 Wn.2d 878, 882, 558 P.2d 1342 (1976). "Washington courts use WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY in the absence of other authority." *State v. Glas*, 106 Wn.App.895, 27 P.3d 216 (2001), citing *In re Personal Restraint of Well*, 133 Wn.2d 433, 438, 946 P.2d 750 (1997). WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 956 (1993) defines gift as "something that is voluntarily transferred by one person to another without compensation."

WAC 458-61-410 further explains the gift exclusion:

Gifts. (1) In general. Transfers of real property as gifts are not subject to the real estate excise tax provided that the transfer is without consideration or that love and affection is the only consideration.

(2) **Consideration.** When any consideration other than love and affection is present in the transfer, the transaction is taxable to the extent of the consideration present. Consideration includes the indebtedness balance of any real property transferred which is encumbered by a lien securing an indebtedness. See WAC 458-61-030(3) for the full definition of "consideration."

(a) Examples. Mother, A, conveys lakefront cabin valued at \$200,000 to daughter, B. The tax consequences will vary dependent on whether B tenders consideration and the amount and the extent of A's equity. Consider:

(i) Example 1. No consideration given by B and A owns property outright. This is a gift by A to B of \$200,000 and exempt from the real estate excise tax.

(ii) Example 2. No payment given to A by B. A has \$175,000 equity and an underlying mortgage of \$25,000. The \$175,000 in equity is a gift, but the real estate excise tax applies to the \$25,000 owing on the mortgage.

(iii) Example 3. No consideration is given by B. A has \$175,000 equity and an underlying mortgage of \$25,000, on which A continues to make the payments. This is a gift by A to B of the \$175,000 and the payments on the underlying debt. It is exempt from the real estate excise tax.

(iv) Example 4. B gives A \$10,000 and A owns property outright. A has made a gift of \$190,000 in equity and real estate excise tax applies only to the \$10,000 paid by B for the property.

(v) Example 5. B gives A \$10,000 and A has \$175,000 in equity and an underlying mortgage of \$25,000. A has made a gift of \$165,000 in equity, but the real estate excise tax applies only to \$35,000: The \$10,000 paid by B to A for the property and the \$25,000 remaining on the mortgage.

(3) **Documentation.** Completion of the real estate excise tax affidavit is required for transfers by gift.

(a) A supplemental statement (see WAC 458-61-150) shall be signed by both grantor and grantee and attached to the real estate excise tax affidavit. The statement shall attest to the existence or absence of underlying debt on the property transfers made by gift.

See also WAC 458-61-650, which states in pertinent part:

Tenants in common and joint tenants. (1) The real estate excise tax does not apply to the transfer of real property which results in the creation of a tenancy in common when no consideration passes otherwise. Gifts are generally exempt from the real estate excise tax. Cite WAC 458-61-410, Gifts, on the real estate affidavit to claim an exemption from the real estate excise tax for such a transfer.

(a) Example 1. A owns a parcel of property outright. A creates a tenancy in common with B. B gives no consideration for the creation. A has given a gift of equity in the property to B and the real estate excise tax does not apply.

(b) Example 2. A owns a home with an underlying mortgage. A creates a tenancy in common with B. B gives no consideration for the creation, but agrees to and makes partial payments on the mortgage. A has given a gift of the equity owned, but has received a relief of debt from B to the extent B makes payments on the mortgage. Real estate excise tax applies to the relief of debt received by A. See also, WAC 458-61-410, Gifts.

Under the above rules and examples, if no money is directly paid to the transferor for transfer of real property, but payments on any indebtedness on the property are made from a joint account of the transferor and the transferee, the grantor receives relief from indebtedness to the extent funds belonging to the grantee are used to pay the indebtedness. This is because funds on deposit in a joint account belong to the depositors in proportion to the net funds owned by each depositor on deposit in the account. RCW 30.22.090(2).

A person claiming a tax exemption or exception has the burden of proving he or she qualifies for the exemption or exception. *Group Health Cooperative of Puget Sound, Inc. v. State Tax Commission*, 72 Wn.2d 422, 433 P.2d 201 (1967); Det. No. 89- 268, 7 WTD 359 (1989).

We find that the transfer from Taxpayers to [grantee] was without consideration other than love and affection. Taxpayers credibly stated that [grantee] was not paid or promised any money for the transfer. There is no evidence to the contrary. Taxpayers have shown that [grantee] was paid a salary for his services, and the amount of the salary does not appear to be out of line for salaries paid to that level of manager.² There is no evidence that the transfer was a form of compensation for his services. Taxpayers have shown that all payments on the mortgage have been made from a bank account of their business, and that they are the sole owners of the business. They have shown that [grantee] had limited authority to sign checks drawn on the account. They credibly stated that none of the funds in the account were owned by [grantee].

We conclude that REET does not apply to the September 4, 2002 transfer from Taxpayers to [grantee], based on the facts before us. WAC 458-61-410(1). The assessment of REET on the transfer should be canceled.

DECISION AND DISPOSITION

Taxpayer's petition for correction of REET assessment is granted. The REET assessment issued against [grantor] in Audit No. . . . , on a transfer of a real property interest from them to [grantee] on . . . , is canceled.

Dated this 13th day of May 2004.

² According to the U.S. Department of Labor's Occupational Outlook Handbook, the median salary in 2002 for . . . salaried supervisors was \$25,000. <http://www.bls.gov/oco/ocos025.htm>,