

The following is a proposed draft Washington Tax Decision that is provided to the public for discussion purposes only. It has not been approved as a final Washington Tax Decision and cannot be relied upon as precedential under RCW 82.32.410

Cite as Det. No. 22-0030, Annual WTD Page (Year)

BEFORE THE ADMINISTRATIVE REVIEW AND HEARINGS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition for Refund of) D E T E R M I N A T I O N
)
) No. 22-0030
...)
) Registration No. . . .
)

WAC 458-61A-203; RCW 82.45.010(3)(f): REAL ESTATE EXCISE TAX – DISSOLUTION OF MARRIAGE – TRANSFERS PURSUANT TO A RIGHT OF FIRST REFUSAL. When a former spouse exercises a right of first refusal under a sale agreement incorporated into a Decree of Dissolution to purchase a portion of real property from the other former spouse, real estate excise tax applies to the purchase.

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.

Sattelberg, T.R.O. – An owner of real estate protests the Department’s assessment of real estate excise tax (“REET”). The owner argues that the Department improperly denied his prior REET refund request because the real property at issue was transferred as part of an excluded marital dissolution. We deny the petition.¹

ISSUE

Whether a transfer of real property is excluded from REET, under RCW 82.45.010(3)(f) and WAC 458-61A-203, when the property was transferred under a right of first refusal as part of a sale agreement that was referenced in the marriage dissolution’s Decree of Dissolution.

FINDINGS OF FACT

On . . . , 1994, . . . (“Taxpayer”) and . . . (“Wife”) were married, and over the course of the marriage, had one child and adopted four more. In 2005, the couple purchased real property at . . .

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

(“Property”). The couple separated in 2011, leading to a later amicable dissolution of the marriage in 2013.

Instead of shuffling the children between two households, Taxpayer and Wife chose to keep the children in the family home, and took turns as the household parent both during and after the dissolution. In order to help memorialize and maintain this arrangement for a period of five years, as well as arrange for the sale of the Property at the end of that period, the parties entered into an agreement on . . . , 2012, titled Sale of Property Agreement (“Sale Agreement”). The Sale Agreement contains these pertinent sections:

1. Agreement to Sell. . . . [Property] shall be sold on or about September 1, 2017.

The process shall be as follows

2. Date of Sale/Listing for Sale. The parties shall agree on a listing agent and list price for the . . . [Property] on or before August 1, 2017

10. Title, Possession Pending Sale in September 2017.

a. Pending sale, the parties shall remain as co-owners and tenants in common on the property . . .

13. Right of First Refusal. . . . [Taxpayer] shall have right of first refusal to buy . . . [Wife] out of her 30% interest in . . . [Property], or “purchase” . . . [Property] from the marital community as set forth below – . . . [Taxpayer] shall have until September 1, 2017 (but no sooner than) to cash . . . [Wife] out for her 30% community interest in . . . [Property], pay off the debt described above, and actually complete the transaction to “purchase” . . . [Property]. If . . . [Taxpayer] elects not to cash . . . [Wife] out of . . . [Property], . . . [Wife] shall have until October 1, 2017 (but no sooner than September 1, 2017) the right to cash . . . [Taxpayer] out of his 70% community interest in . . . [Property], pay off the debt described above, and actually complete the transaction to “purchase” . . . [Property].

(Bolding and underlining in original, italics added.)

The Decree of Dissolution,² one of the documents that formally dissolves a marriage, references the Sale Agreement as follows:

. . . [Property] Residence. The parties shall jointly own . . . [Property] as joint tenants with right of survivorship for 5 years pursuant to the Sale Agreement signed on October 26, 2012.

Until . . . [Property] is sold or refinanced, . . . [Taxpayer] shall be responsible for all Mortgages, Insurances and property taxes. He shall also be entitled to claim all deductions on his Federal Income tax return(s).

² The . . . County Superior Court Clerk’s Office shows that Taxpayer’s dissolution case, . . . , was completed as of . . . , 2013.

Pending sale/refinance, both parties shall have a right of possession (50/50 – per parenting plan) and shall equally split all utility costs.

Any necessary repairs and maintenance, pursuant to the Sale Agreement, shall be paid by . . . [Taxpayer].

The parties shall comply with all terms and provisions of the Sale Agreement signed on . . . , 2012.

The parties were able to settle on the terms of the dissolution, including other property distribution and the parenting arrangement, without going to trial. The marriage was dissolved in 2013, which included the . . . County Superior Court signing off on the agreed-to Decree of Dissolution, which references the Sale Agreement, mentioned above.

In January of 2017, Taxpayer exercised his right of first refusal under the Sale Agreement, paying Wife \$. . . for her 30 percent community interest in Property. Wife quit claim deeded her interest in Property to Taxpayer, and Taxpayer refinanced the debt on Property at the same time. As the seller, Wife paid \$. . . in REET on the transfer.

On February 21, 2017, Taxpayer requested the Department refund the REET paid as part of the transfer of Property. The Department denied the refund request by letter dated May 9, 2017. The denial letter stated that the documentation Taxpayer submitted supporting the refund request was insufficient to grant the refund. The letter noted that Taxpayer had four years from the date the tax was paid to appeal the denial.

On December 29, 2020, Taxpayer filed for refund with the Department. The Department referred Taxpayer to . . . County on January 6, 2021, where Taxpayer later filed for refund. . . . County transferred the refund request to the Department, which considered it a timely administrative review.

Taxpayer argues that the 2017 transfer of Property should not be subject to REET because it was made as part of the marital dissolution proceeding. In support of its argument, Taxpayer provided the dissolution documents, including the Decree of Dissolution and the Sale Agreement. Taxpayer provided the quit claim deed, refinance paperwork, and was fully cooperative providing an explanation of the circumstances that led to the transfer of Property.

Audit responds that the Sale Agreement does not award real property to one party under the terms of the dissolution, as contemplated by RCW 82.45.010(3)(f) and WAC 458-61A-203. Instead, Audit claims, the transfer here was a regular sale between two unmarried persons, as the marriage between Taxpayer and Wife was dissolved in 2013, but the sale took place in 2017.

Audit also argues that Taxpayer is not the proper party to claim a refund of REET paid because Taxpayer was the buyer of the Property, and it is sellers of real property that are customarily obligated to pay REET. Audit states that Taxpayer has not provided documentation sufficient to show that he paid the REET owing, and is therefore not entitled to a refund.

ANALYSIS

Washington imposes REET on “each sale of real property” in this state. RCW 82.45.060. “Sale” is defined as “any conveyance, grant, assignment, quitclaim, or transfer of the ownership of or title to real property . . . for a valuable consideration” RCW 82.45.010(1). Certain assignments of real property are excluded from the definition of “sale,” including:

The assignment of property or interest in property from one spouse or one domestic partner to the other spouse or other domestic partner in accordance with the terms of a decree of dissolution of marriage or state registered domestic partnership or in fulfillment of a property settlement agreement.

RCW 82.45.010(3)(f) (emphasis added).

The Department has provided further guidance regarding the RCW 82.45.010(3)(f) exclusion in WAC 458-61A-203, in pertinent part, as follows:

(2) **Court decree.** The real estate excise tax does not apply to any transfer, conveyance, or assignment of property or interest in property from one spouse or domestic partner to the other *in fulfillment of a settlement agreement incident to a decree of dissolution . . .*

(4) **Former spouses or domestic partners.** Transfers of real property between ex-spouses or former domestic partners that are *independent of any settlement agreement incident to their decree of dissolution* or decree of invalidity are subject to the real estate excise tax, unless otherwise exempt under this chapter.

(Emphasis added.)

The issue in this case is whether the transfer was “in accordance with the terms of a decree of dissolution of marriage” under RCW 82.45.010(3)(f) and “in fulfillment of a settlement agreement incident to a decree of dissolution” under WAC 458-61A-203(2). In order to resolve this question, we look to the law of domestic relations in Washington as well as how tax exclusions in Washington are construed.

Domestic relations in Washington are governed by title 26 RCW, with marriage dissolution found in chapter 26.09 RCW.³ Decrees of dissolution, the official document that dissolves a marriage in Washington, “shall not be awarded to one of the parties, but shall provide that it affects the status previously existing between the parties in the manner decreed.” RCW 26.09.010(6).

“In entering a decree of dissolution of marriage . . . the court shall determine the marital . . . status of the parties . . . [and] make provision for the disposition of property and liabilities of the parties” RCW 26.09.050(1). In disposing of marital property and liabilities, “the court shall . . . make such disposition of the property and the liabilities of the parties, either community or separate, as

³ Decrees of dissolution also dissolve domestic partnerships, which are not at issue here. RCW 26.09.010(6); RCW 26.09.050(1).

shall appear just and equitable considering all relevant factors . . .” RCW 26.09.080. “A decree of dissolution of marriage . . . is final when entered, subject to the right of appeal.” RCW 26.09.150(1).

Most dissolutions in Washington do not result in trials before a court, but are instead settled by the parties.⁴ Settlement involves the parties reaching agreement between themselves, often with the help of mediators, arbitrators, or attorneys.⁵ Procedurally, this involves the parties drawing up the documents necessary to complete the dissolution, including the Decree of Dissolution, signing them, and presenting them to the court as agreed-to documents with the consent of the parties.⁶ If the court is satisfied with the terms presented, it will sign off on the documents as presented, thereby dissolving the marriage and ending the civil lawsuit.

Taxpayer, here, is claiming an exclusion from REET. We note that in Washington, tax benefits and all other deductions, exemptions, and credits, must be strictly construed, though fairly, and in keeping with the ordinary meaning of their language, against the taxpayer. *See, e.g., Budget Rent-a-Car, Inc. v. Dep’t of Revenue*, 81 Wn.2d 171, 174-75, 500 P.2d 764 (1972) (citing *Yakima Fruit Growers Ass’n v. Henneford*, 187 Wash. 252, 258, 60 P.2d 62 (1936)); *Group Health Coop. v. Tax Comm’n*, 72 Wn.2d 422, 429, 433 P.2d 201 (1967); Det. No. 07-0034E, 26 WTD 212 (2007). “The burden of showing qualification for the tax benefit afforded . . . rests with the taxpayer.” *Group Health*, 72 Wn.2d at 429.

The exclusion Taxpayer is claiming here is one of several exclusions from the definition of “sale” where a court is involved. In RCW 82.45.010(3)(e), there is an exclusion from “sale” for the “partition of property . . . as the result of court decree.” In RCW 82.45.010(3)(j), another exclusion from “sale” is available for any “transfer or conveyance made pursuant to . . . an order of sale by the court in any mortgage, deed of trust, or lien foreclosure proceeding . . .” These exclusions are very similar to the one at hand, where the transfer of property is excluded from “sale” as the result of a legal proceeding.⁷

⁴ 21 Wash. Prac., Fam. And Community Prop. L. § 52:1. Once a finding of fault by a court was no longer necessary to obtain a dissolution in Washington, parties began the widespread adoption of settling in dissolution proceedings. 21 Wash. Prac., Fam. And Community Prop. L. § 52:2.

⁵ 21 Wash. Prac., Fam. And Community Prop. L. § 52:1.

⁶ 21 Wash. Prac., Fam. And Community Prop. L. § 52:4.

⁷ As noted above, REET is imposed on “each sale of real property” in Washington. RCW 82.45.060. The amount of REET is based upon the “selling price” of the property, with “selling price” being defined as the “true and fair value of the property conveyed.” RCW 82.45.060; RCW 82.45.030(1). Washington courts have long defined “true and fair value,” or fair market value, as “the amount of money which a purchaser willing, but not obliged, to buy the property would pay an owner willing, but not obligated, to sell it.” *See Donaldson v. Greenwood*, 40 Wn.2d 238, 252, 242 P.2d 1038 (1952); *see also* WAC 458-61A-101(2)(c) (“True and fair value” means market value, which is the amount of money that a willing, but unobliged, buyer would pay a willing, but unobligated, owner for real property, taking into consideration all reasonable, possible uses of the property”). As this language shows, the consent of both the buying and selling parties is key to the definition of “true and fair value,” and therefore “selling price.” This consent is absent in a legal proceeding, where courts “make such disposition of the property and the liabilities of the parties, either community or separate, as shall appear just and equitable considering all relevant factors . . .” RCW 26.09.080. These exclusions from the definition of “sale” recognize that transfers made by courts are not at the consent of the transferor or transferee.

Here, Taxpayer and Wife amicably agreed to dissolve their marriage, arranged for parenting their children, and arranged for the disposition of their property and liabilities. These arrangements were adopted by the . . . County Superior Court. Since Taxpayer and Wife had acquired Property after they were married, Property was characterized as community property during the course of the marriage. *See* RCW 26.16.030. Because the court was dissolving the marriage, it needed to change the community property character of Property, which it did in the Decree of Dissolution, changing the character to joint tenants with right of survivorship for a five-year term⁸ *See* RCW 64.28.010.

Taxpayer's and Wife's joint tenancy terminated when Taxpayer purchased Wife's portion of Property after he exercised the Sale Agreement's right of first refusal to cash out Wife. Taxpayer and Wife's marriage was dissolved in 2013, meaning at the time Taxpayer exercised his right of first refusal, in 2017, he and Wife were no longer married. Taxpayer voluntarily exercised his right of first refusal, and Wife voluntarily agreed to sell her interest in Property. While the . . . [Decree of Dissolution required the parties to comply with all terms and provisions of the Sale Agreement], the court did not direct Taxpayer to exercise his right of first refusal at the end of the five-year period. Instead, the default option in the Sale Agreement was the sale of Property by an agreed-upon agent at an agreed-upon price.

With respect to the REET exclusion at issue here, the transfer under the right of first refusal was not the “*assignment of property or interest in property from one spouse . . . to the other spouse . . . in accordance with the terms of a decree of dissolution of marriage . . . or in fulfillment of a property settlement agreement.*” RCW 82.45.010(3)(f) (emphasis added). Where this particular arrangement fails to meet the statutory exclusion is in the word “assignment.” To “assign” means to “convey in full; to transfer.” Black's Law Dictionary (11th ed. 2019). While the court agreed to the terms of the settlement, and the . . . [Decree of Dissolution required the parties to comply with all terms and provisions of the Sale Agreement], the court did not transfer Property through the Sale Agreement itself. Instead, the court ordered a change of the Property's character from community property to a joint tenancy with right of survivorship in the Decree of Dissolution. This change, from community property to joint tenancy with a right of survivorship for a five year term . . . , constitutes a transfer and is exempt under RCW 82.45.010(3)(f), as it is an assignment of interests in the Property under the terms of a Decree of Dissolution. Taxpayer's subsequent purchase of the Property is entirely separate from the assignment of interests under the Decree of Dissolution. Thus, despite the right of first refusal being approved by the Court, Taxpayer's purchase is separate and apart from the Court's assignment of the Property under the terms of the Decree of Dissolution. Because Taxpayer's purchase is not an assignment under the terms of the Decree of Dissolution, the exclusion in RCW 82.45.010(3)(f) does not apply, and REET applies to Taxpayer's subsequent purchase of the property. Accordingly, we deny Taxpayer's petition for refund.⁹

⁸ While the Decree of Dissolution states that Taxpayer and Wife will be joint tenants with right of survivorship, and the Sale Agreement states that they will be tenants in common, that difference is not material to the outcome of this case.

⁹ Since we conclude the exclusion in RCW 82.45.010(3)(f) does not apply, we need not reach Audit's second contention, which was whether Taxpayer was the proper party to seek a REET refund.

We also note that we do not consider the transfer here to be “independent of any settlement agreement incident to their decree of dissolution” under WAC 458-61A-203(4). The Sale Agreement clearly contemplated Taxpayer exercising

DECISION AND DISPOSITION

We deny Taxpayer's petition for refund.

Dated this 11th day of February 2022.

DRAFT

a right of first refusal as one of the possible outcomes of the Sale Agreement, . . . [and the Decree of Dissolution required the parties to comply with all terms and provisions of the Sale Agreement]. Thus, this was not a subsequent transfer between Taxpayer and Wife completely outside of the scope of the dissolution proceeding.