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

In the Matter of the Petition for Refund of tax of)	<u>D E T E R M I N A T I O N</u>
)	
)	No. 22-0098
)	
...)	Registration No. . . .
)	

RCW 82.45.010(3), RCW 82.45.030(2); WAC 458-61A-101, WAC 458-61A-201. REAL ESTATE EXCISE TAX – CONTROLLING INTEREST TRANSFER – GIFT OF MEMBERSHIP INTERESTS WITH EXISTING DEBT – MEASURE OF TAX. Where existing debt on the property is assumed, the transfer is not a gift. Instead, such a transfer is a sale. In the case of a controlling interest transfer, the selling price is the true and fair value of the real property owned by the entity and is determined without reference to the consideration received by the transferor.

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.

Lewis, T.R.O. – Taxpayer protests the disallowance of a claimed real estate excise tax (“REET”) exemption for gifts of membership interests that amount to a controlling interest transfer.^[1] We deny Taxpayer’s petition with respect to the gift exemption, because the transfers included a proportionate amount of entity debt, and the transfer of such debt constitutes consideration.²

ISSUE

Whether, under RCW 82.45.010(3), RCW 82.45.030(2), WAC 458-61A-101, and WAC 458-61A-201, a controlling interest transfer of membership interests in an entity owning real estate with underlying debt is eligible for the gift exemption for the equity portion of such transfers.

[¹ The use of the term “exemption” in this determination was meant to express that a transfer of an interest in real property that qualifies as a gift is not subject to real estate excise tax because it is excluded from the definition of the sale of real property under RCW 82.45.010(3).]

² Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410.

FINDINGS OF FACT

. . . [Taxpayer] owns a parcel of real property located at Prior to the transfer at issue, on July 18, 2020, Taxpayer had a debt of \$. . . , outstanding on the property.

Prior to the transfer at issue, Taxpayer's members were [a living trust ("Trust")] with a 92.5% ownership interest and . . . [husband] and his wife, . . . , with a 7.5% ownership interest. The trustors of the [Trust] were . . . and After . . . passed away on June 5, 2020, . . . became the sole trustor. On July 18, 2020, . . . instructed the co-trustees, . . . and . . . , to distribute the [Trust's] interest in Taxpayer, in equal shares of 30.8333% each, to . . . , . . . , and These three transfers of 30.8333%, comprising a total interest of 92.5% in Taxpayer, constitute the controlling interest transfer at issue.

On October 14, 2020, the [Trust] completed a "Real Estate Excise Tax Affidavit - Controlling Interest Transfer Return" ("REET Return") and a "Real Estate Excise Tax Supplemental Statement" ("Statement"). The REET Return recorded that the [Trust] transferred its 92.5% ownership interest in Taxpayer to . . . , . . . , and The REET Return also recorded the payment of \$. . . of REET on a value transferred of \$. . . , which was 92.5% of Taxpayer's outstanding debt at the time of transfer.³

The Statement accompanying the filing of the REET Return reported the property had a fair market value of \$ The Statement explained that the parties had claimed a portion of the property value (all but the outstanding debt) was a gift and exempt from REET under WAC 458-61A-201. Consistent with Taxpayer's reading of WAC 458-61A-201, Taxpayer paid REET on \$. . . of the property value, which was calculated as 92.5% of the . . . outstanding debt; the remaining \$. . . in property value was reported as being a REET-exempt gift.

On June 23, 2021, a representative of the Department's Audit Division spoke with . . . , trustee for the [Trust], regarding the controlling interest transfer REET Return filed with the Department. The Audit Division advised Taxpayer that the gift exemption does not apply in situations where a controlling interest is transferred where the property is subject to any underlying debt.

On October 7, 2021, the Department issued an audit report and a [tax] assessment.⁴ The assessment recorded the additional tax that Audit found due on the transfer.⁵ Audit assessed REET upon \$. . . , which was the difference between the . . . property's value on the King County tax rolls, as of the transfer date, and the \$. . . reported on the controlling interest transfer REET Return.

Audit disallowed the claimed REET gift exemption, concluding that Taxpayer misread WAC 458-61A-201(3), the basis for the exemption. . . . [WAC 458-61A-201(3)] provides:

³ The . . . payment consisted of \$. . . in REET and \$. . . in late-payment penalty. The late-payment penalty was paid because the transfer occurred during July 2020, and the REET Return was filed and paid during October 2020.

⁴ The [tax] assessment consisted of \$. . . in REET, \$. . . in interest, and \$. . . in penalty.

⁵ WAC 458-61A-101(7) provides that while the seller of an interest in property is generally liable for the tax, an assessment can be made against the entity or the person or persons who transferred or acquired the controlling interest.

If the grantee agrees to assume payment of the grantor's debt on the property in return for the transfer, there is consideration, and the transfer is not exempt from tax. Real estate excise tax is due on the amount of debt assumed, in addition to any other form of payment made by the grantee to the grantor in return for the transfer. However, equity in the property can be gifted.

... [WAC 458-61A-201(3)].

Taxpayer disagreed with the assessment. On November 10, 2021, Taxpayer filed a petition requesting review of the assessment with the Department's Administrative Review and Hearings Division. Taxpayer maintained that under the provisions of WAC 458-61A-201(3) it only needs to pay tax on the amount of consideration. Taxpayer's petition explained:

The Property was subject to existing debt of \$. . . . By virtue of its ownership interest, the Trust was responsible to repay 92.5% of the existing debt. The transferees took title to [the property] subject to that debt, effectively assuming the obligation to repay the debt and relieving the Trust from its obligation to repay. The transfer relieved the Trust of \$. . . of debt; that debt relief constitutes consideration paid by the transferees. The calculation is $.925\% \times \$. . . = \$. . .$ That is the amount of consideration reported on Department of Revenue Form 84 0001B and the amount on which tax was paid pursuant to WAC 458-61A-201(3). No other consideration was paid. Excise tax is due only on the amount of consideration (the underlying debt assumed by the transferees) and not on the market value of the property.

Taxpayer's petition at 5.

Taxpayer's petition also explained that while not necessary for the REET gift exemption claim, Audit should be aware that the property was professionally appraised as of June 5, 2020, the date of . . . 's death. The appraisal determined that on June 5, 2020, the fair market value of the property was \$. . . .

Subsequently, Taxpayer provided the Department with a "Retrospective Appraisal" of [the property]. The appraisal determined the property had a fair market value of \$. . . after considering the property's value from three approaches: Income, Cost, and Sales. The Audit Division reviewed the Retrospective Appraisal and agreed with the fair market value, and agreed to make an adjustment to reflect the appraised value of the property transferred.

On January 5, 2022, the Audit Division responded to Taxpayer's petition:

The taxpayer's argument that the controlling interest transfer is a gift and therefore not subject to real estate excise tax is based on the example given in WAC 458-61A-101(11)(b) where Taki makes a gift of 50% of the corporation to her daughter Mieko and sells 33 1/3% to Sage. Because the 50% transfer is a gift, it is exempt. This example does not provide significant detail surrounding the circumstances of the transfer, but we must assume here the property owned by the corporation is not

subject to outstanding debt. WAC 458-61A-201 states, “A gift of real property is a transfer for which there is no consideration given in return for granting an interest in the property.” Later in WAC 458-61A-201 it reads, “If the grantee agrees to assume payment of the grantor’s debt on the property in return for the transfer, there is consideration, and the transfer is not exempt from tax.”

Audit Division response to Taxpayer’s petition at 7.

The Audit Division further explained:

When a controlling interest transfer occurs, the basis for the tax is determined according to WAC 458-61A-101(a) as the true and fair value of the property owned by the entity at the time of the transfer. This paragraph specifically states, “For purposes of the rule, ‘selling price’ means”

A specific statute or rule takes precedence over a general statute or rule. (Det. No. 00-094, 21 WTD 58 (2002)). In this situation it is not contested that there was a controlling interest transfer. As WAC 458-61A-101(11) states general REET exemptions apply to controlling interest transfers, but as WAC 458-20-201(2)(b) and (3) explain, the existence of consideration negates the transfer from qualifying for the gift exemption.

The taxpayer is relying on the general rule expressed in WAC 458-61A-201(3), “However, equity in the property can be gifted.” WAC 458-61A-201 provides guidance for the real estate excise tax gift exemption in general, but WAC 458-61A-101 contains the specific rules applied to controlling interest transfers. WAC 458-61A-101(4) defines the taxable selling price as the true and fair value of the real property owned by the entity without accounting for other factors considered in the more general rules.

Audit Division response to Taxpayer’s petition at 8.

ANALYSIS

REET is imposed upon the sale of real property in Washington. RCW 82.45.060. “Real property” means any interest, estate, or beneficial interest in land or anything affixed to land, including the ownership interest or beneficial interest in any entity which itself owns land or anything affixed to land. RCW 82.45.032(1).

“Sale” is defined in RCW 82.45.010. It has its ordinary meaning (“includes any conveyance, grant, assignment, quitclaim, or transfer of the ownership of or title to real property”) and includes “the transfer or acquisition within any thirty-six month period of a *controlling interest* in any entity with an interest in real property located in this state for a valuable consideration.” RCW 82.45.010(1), (2) (emphasis added).

“Controlling interest” is defined in RCW 82.45.033. “In the case of any other corporation, or a partnership, association, trust, or other entity, fifty percent or more of the capital, profits, or beneficial interest in such corporation, partnership, association, trust, or other entity.” RCW 82.45.033. Here, Taxpayer is a limited liability company that owns real estate. When the [Trust] transferred 92.5% of the membership interests of Taxpayer, it transferred a “controlling interest” in Taxpayer. [The Property was subject to existing debt of \$. . . Taxpayer indicates that by virtue of its ownership interest, the Trust was responsible to repay 92.5% of the existing debt. The transferees took title to [the property] subject to that debt, effectively assuming the obligation to repay the debt and relieving the Trust from its obligation to repay. The transfer relieved the Trust of \$. . . of debt; that debt relief constitutes consideration paid by the transferees. Taxpayer’s petition at 8.] Consistent with RCW 82.45.010(2), this controlling interest transfer constitutes a “sale” and is subject to REET, absent an exemption.

The measure of REET on a “sale” is the “selling price.” RCW 82.45.060. “Selling price” varies, depending upon the type of transfer that occurred, the circumstances surrounding the transfer, and the information available. RCW 82.45.030. RCW 82.45.030 sets forth the definition of “selling price” as follows:

(1) As used in this chapter, *the term "selling price" means the true and fair value of the property conveyed.* If property has been conveyed in an arm’s length transaction between unrelated persons for a valuable consideration, a rebuttable presumption exists that the selling price is equal to the total consideration paid or contracted to be paid to the transferor, or to another for the transferor’s benefit.

(2) *If the sale is a transfer of a controlling interest in an entity with an interest in real property located in this state, the selling price shall be the true and fair value of the real property owned by the entity and located in this state.* If the true and fair value of the real property located in this state cannot reasonably be determined, the selling price shall be determined according to subsection (4) of this section.

(3) As used in this section, *“total consideration paid or contracted to be paid”* includes money or anything of value, paid or delivered or contracted to be paid or delivered in return for the sale, 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.*

Total consideration shall not include the amount of any outstanding lien or incumbrance in favor of the United States, the state, or a municipal corporation for taxes, special benefits, or improvements.

When a transfer or conveyance is made by deed in lieu of foreclosure to satisfy a deed of trust, total consideration shall not include the amount of any relocation assistance provided to the transferor.

(4) If the total consideration for the sale cannot be ascertained or the true and fair value of the property to be valued at the time of the sale cannot reasonably be determined, the market value assessment for the property maintained on the county property tax rolls at the time of the sale shall be used as the selling price.

RCW 82.45.030 (emphasis added). Thus, in the case of a [deeded] transfer of an interest in real property, the selling price is generally the total consideration paid or contracted to be paid for such interest received (depending upon the circumstances, it may be the assessor's value). *Id.* In contrast, in the case of a controlling interest transfer, the selling price is the true and fair value of the real property owned by the entity. The selling price is determined without reference to the consideration received by the transferor. *Id.*

The difference between these two measures determines the outcome in the matter at hand. Here, 92.5% of the membership interests in Taxpayer—a controlling interest—was transferred. Under RCW 82.45.030(2), the measure of tax, the selling price, is the entire true and fair value (100%) of the real property owned by Taxpayer and located in Washington. *See McFreeze Corp. v. Dep't of Revenue*, 102 Wn. App. 196, 200-01, 6 P.3d 1187 (2000) (“[T]he value taxed is not the consideration paid, but the value of the real estate owned by the entity.”). In contrast, if Taxpayer had transferred a 92.5% direct interest in real property (via conveyance, grant, assignment, quitclaim, or other ownership of or title to real property, etc.), under RCW 82.45.030(1), the measure of tax, the selling price, is generally the total consideration paid (although it may be the assessor's value).

RCW 82.45.010(3) lists several types of transfers that are excluded from the definition of “sale.” Relevant here, RCW 82.45.010(3) reads: “The term ‘sale’ does not include: (a) A transfer by gift, devise, or inheritance.”

“Gift” is not defined by statute; however, it is defined in WAC 458-61A-201, the Department's administrative rule that explains and applies the gift exemption. It reads as follows:

Generally, a gift of real property is not a sale, and is not subject to the real estate excise tax. A gift of real property is a transfer for which there is no consideration given in return for granting an interest in the property. *If consideration is given in return for the interest granted, then the transfer is not a gift, but a sale, and it is subject to the real estate excise tax to the extent of the consideration received.*

WAC 458-61A-201(1) (emphasis added). Relevant here, “consideration” includes the assumption of debt. WAC 458-61A-201(3). Thus, in the case of a transfer where existing debt on the property is assumed, WAC 458-61A-201 explains that the transfer is not a gift under RCW 82.45.010(3)(a). Instead, such a transfer is a sale.

The REET is imposed on sales of real property. RCW 82.45.060. Thus, in order to determine the amount of REET, we must first determine the measure of REET, the “selling price.” *Id.*; RCW 82.45.030.

WAC 458-61A-201 provides instruction in determining the “selling price” where a direct interest in real property has been transferred and debt has been assumed. WAC 458-61A-201 reads as follows:

(3) Assumption of debt. If the grantee agrees to assume payment of the grantor's debt on the property in return for the transfer, there is consideration, and the transfer is not exempt from tax. Real estate excise tax is due on the amount of debt assumed,

in addition to any other form of payment made by the grantee to the grantor in return for the transfer. However, equity in the property can be gifted.

WAC 458-61A-201(3). Taxpayer asserts this example applies to the facts at hand and determines the “selling price” to be the debt assumed. We disagree.

RCW 82.45.030(2) is clear: in the case of a controlling interest transfer, the selling price (measure of tax) is the true and fair value of the real property owned by the entity and located in Washington. There is no reference to consideration. If the true and fair value of the real property cannot be determined, the selling price is the tax assessor’s value. RCW 82.45.030(2), (4). *See also* WAC 458-61A-101(4) (“The measure of the tax is the ‘selling price.’ For the purpose of this rule, ‘selling price’ means the true and fair value of the real property owned by the entity at the time the controlling interest is transferred.”).

WAC 458-61A-201(3) concerns a [deeded] transfer of property and only provides meaningful guidance on the measure of tax where a [deeded] transfer of real property occurred. Only in the case of a [deeded] transfer, is the consideration paid relevant to determining the selling price (measure of tax). RCW 82.45.030(3).

Taxpayer asserts that WAC 458-61A-101(11) requires the application of WAC 458-61A-201(3) to controlling interest transfers. WAC 458-61A-101(11) reads:

(11) **Exemptions.** Because transfer and acquisition of a controlling interest in an entity that owns real estate in this state is statutorily defined as a “sale” of the real property owned by the entity, the exemptions of chapter 82.45 RCW and this chapter also apply to the sale of a controlling interest.

. . . This assertion confuses the exemption from tax with the measure of tax. There is no dispute that the gift exemption applies equally to [deeded] transfers of property and controlling interest transfers; this happens via statute by excluding “gifts” from the definition of “sale.” RCW 82.45.010(3)(a). However, the transfers at issue are not gifts because there was consideration tendered in the form of debt relief. WAC 458-61A-201(1). Thus, there was a “sale[,]” . . . and we must determine the measure of tax to determine the amount of REET imposed on the sale. RCW 82.45.010(2). Taxpayer’s assertion relates to the measure of the tax, not whether the transfer was exempt, and WAC 458-61A-101(11) only concerns the consistent application of exemptions between [deeded] transfers and controlling interest transfers.

As explained above, the selling price (measure of tax) for the “sale” of a controlling interest transfer is the true and fair value of the real property owned by the entity and located in Washington. RCW 82.45.030(2). Accordingly, we deny Taxpayer’s petition.

DECISION AND DISPOSITION

Taxpayer’s petition is denied.

Dated this 8th day of June 2022.