

Cite as Det. No. 20-0281, 41 WTD 181 (2022)

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

In the Matter of the Petition for Refund of	)	<u>D E T E R M I N A T I O N</u>
	)	
	)	No. 20-0281
	)	
...	)	Registration No. . . .
	)	

WAC 458-61A-208; RCW 82.45.010(3)(j): REAL ESTATE EXCISE TAX – TRANSFERS PURSUANT TO EXECUTION OF A JUDGMENT – RECEIVERS. Real estate excise tax applies to sales by receivers appointed by a court to give effect to the court’s judgment.

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. (successor to Margolis, T.R.O.) – A former owner of real estate protests the Department’s denial of a refund request of real estate excise tax (“REET”) paid. The former owner argues that the Department should allow its claimed exclusion from REET for a sale made by a receiver. We deny the petition.<sup>1</sup>

ISSUE

Whether the Department properly disallowed a REET exclusion for a sale made by a receiver under RCW 82.45.010(3)(j) and WAC 458-61A-208(5)(c).

FINDINGS OF FACT

. . . (“Taxpayer”) owned [real property] in . . . Washington. Taxpayer took out two loans from . . . Bank, and issued two promissory notes to the bank, securing them by a Deed of Trust in the . . . real property.<sup>2</sup>

In 2015, Taxpayer defaulted on the notes, and the . . . Bank sued Taxpayer in . . . County Superior Court.<sup>3</sup> . . . Bank’s complaint claimed that Taxpayer had breached its promissory notes, and . . . Bank requested a judicial foreclosure as one cause of action and the appointment of a general receiver as another. Complaint for Breach of Promissory Notes, Judicial Foreclosure, and the Appointment of a General Receiver dated . . . 2015. The complaint included these sections:

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

<sup>2</sup> Taxpayer also issued a Commercial Security Agreement regarding any of its tangible and intangible property.

<sup>3</sup> The complaint was assigned case no. . . .

## . . . CAUSE OF ACTION: RECEIVERSHIP

. . .

25. RCW 7.60.025(1)(a) provides in relevant part that a receiver may be appointed “[o]n application of any party, when the party is determined to have a probable right to or interest in property that is subject of the action and in the possession of an adverse party or when the property or its revenue-producing potential is in danger of being lost or materially injured or impaired.”
26. RCW 7.60.025(1)(b) provides for provisional appointment of a receiver after commencement of any judicial action to foreclose upon any lien against the real or personal property and either the property or its revenue producing potential is in danger of being lost or materially injured or impaired, or appointment of a receiver is reasonably necessary to effectuate or enforce an assignment of rents or other revenues from the property.

. . .

28. Pursuant to the terms of the Deed of Trust and applicable statutes, the Bank is entitled to an Order appointing a General Receiver to take possession of, collect rents from, preserve, develop, manage, market and sell the Property.

## . . . CAUSE OF ACTION: JUDICIAL FORECLOSURE

. . .

- B. that the Deed of Trust be foreclosed, and the Property be sold by the sheriff of . . . County, Washington in the manner provided by law for foreclosures and in accordance with the practice of this Court;
- . . .
- L. that pursuant to RCW 61.12.070, the decree provides that the balance due on the mortgage, and costs which may remain unsatisfied after the sale of the Property, shall be satisfied from any property of the mortgage debtor, [Taxpayer].

*Id.*

The Court appointed . . . [Individual] as the general receiver (“Receiver”) on . . . 2015. In its Agreed Order Appointing a General Receiver, the Court included these provisions:

- A. Pursuant to RCW 7.60.025, . . . (the “Receiver”) is appointed as the General Receiver with respect to the Receivership Property.

- B. Unless and until otherwise ordered by the Court, the Receiver shall be a General Receiver with all powers granted pursuant to RCW 7.60.005 et. seq. Immediately upon entry of this Order, the Receiver shall have the right, and by this Order is given the right, to take exclusive control over the Receivership Property to the full extent provided for in RCW 7.60.060 et. seq., with the duty to preserve and protect the Receivership Property during the pendency of this proceeding and through the sale of the Receivership Property.

...

- D. Any sale of the Receivership Property shall be subject to further approval of this Court. The notice for any sale of property pursuant to RCW 7.60.260 shall be shortened to fifteen days inclusive of mailing and limited to all parties requesting special notice of this proceeding, the parties herein and any party that has a filed lien against the Receivership Property. The ultimate sale of the Receivership Property shall be made free and clear of security interests and of all rights of redemption, with any such liens and security interests encumbering the Receivership Property attaching with the same order, priority and validity to the proceeds of such sale (net of reasonable expenses incurred in the disposition of the Receivership Property) as they did to the Receivership Property immediately before conveyance.

#### Agreed Order Appointing a General Receiver.

The Receiver had the [real property] commercially listed for sale, and a potential third-party buyer quickly appeared. The Receiver motioned the Court for permission to sell the [property], and the Court entered such an order on . . . 2015. The order states:

1. The Receiver is authorized to sell the Property for the highest offer price of \$ . . . , or more, in \$ . . . increments.

...

3. *The price* for the sale of the Property is fair and reasonable and *represents fair market value* under the circumstances.

...

11. The sale approved herein shall be deemed a sale made pursuant to a Court order. Accordingly, the sale shall be exempt from payment of Washington State Real Estate Excise Tax pursuant to RCW 82.45.010(3)(i) and WAC [458-]61A-208(1).

Order Approving Receiver's Motion to Sell Real Property . . . [Property] Free and Clear of Liens, dated . . . 2015 (emphasis added).

[Following the Order], the Receiver issued a Receiver's Deed to the buyer. The deed states:

FOR VALUE RECEIVED, [Receiver] for [Taxpayer], solely in his capacity as a court appointed receiver in the action entitled, . . . Bank v. . . . [Taxpayer], Superior Court of the State of Washington, . . . County, . . . ("Grantor"), conveys and quitclaims to . . . ("Grantee"), all that certain real property commonly known as . . . [Property], State of Washington, legally described on Exhibit A attached hereto and by this reference incorporated herein (the "Property").

Receiver's Deed dated . . . 2015.

The Receiver filed a REET Affidavit ("Affidavit") that day, showing a gross selling price of \$. . . . On the Affidavit, the Receiver claimed exemption from REET under WAC 458-61A-208(1), writing in the reason for the exclusion as "Foreclosure." REET Affidavit.

The Department's then-Special Programs Division ("Special Programs") notified Taxpayer that it was auditing the transfer. Special Programs requested documentation regarding the sale, which Taxpayer provided. After reviewing the documentation, and the recently issued *Dep't of Revenue v. Federal Deposit Insurance Corporation (FDIC)*, 190 Wn. App. 150, 359 P.3d 913 (2015), Special Programs denied Taxpayer's exclusion. On November 4, 2015, Special Programs issued Taxpayer a REET assessment totaling \$. . . . After being notified that a portion of the selling price was for tangible personal property, Special Programs adjusted the REET assessment down to \$. . . on November 12, 2015.

Taxpayer paid the assessment and timely petitioned for refund. Special Programs denied the refund request on December 16, 2015. Taxpayer then timely sought review of the refund denial, arguing that RCW 82.45.010(3)(i) and WAC 458-61A-208(1) state that transfers effectuated by an order of sale by a court in a judicial foreclosure action are not subject to REET. Taxpayer cited to Det. No. 11-0227, 31 WTD 57 (2012), highlighting that the Department had a published case holding that sales in judicial foreclosure actions were not subject to REET. Taxpayer also distinguished this case from *FDIC* because there was no foreclosure in *FDIC*, and there was in this case.

## ANALYSIS

REET is imposed on each sale of real property in this state. RCW 82.45.060. The term "sale" includes "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). The amount of REET is based on the "selling price," which is defined as the "true and fair value of the property conveyed." RCW 82.45.030(1).

Certain exclusions exist from the definition of "sale;" one of which is for "any transfer or conveyance made pursuant to a deed of trust or an order of sale by the court in any mortgage, deed of trust, or lien foreclosure proceeding or upon execution of a judgment, or deed in lieu of foreclosure to satisfy a mortgage or deed of trust." RCW 82.45.010(3)(j).<sup>4</sup>

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<sup>4</sup> Prior to SESH 1117, which was passed in the 2014 regular session, the exclusion here in RCW 82.45.010(3)(j) was found in subsection (i).

At the time of the transfer here, the version of WAC 458-61A-208, the Department's regulation addressing and interpreting the exclusion found in RCW 82.45.010(3)(j), did not mention receivers or discuss their REET implications.

In 2012, several years before the sale here, the Department had published Det. No. 11-0227, 31 WTD 57 (2012), a case addressing how REET applies to court-appointed receivers in judicial foreclosure actions. 31 WTD 57 held that because the receiver sold the property pursuant to a court order, the sale met the RCW 82.45.010(3)(j) exclusion. However, On March 17, 2015, approximately three months prior to the transfer at issue, the Department withdrew this WTD through what is now Excise Tax Advisory 3133.2019 ("ETA 3133"). Regarding this withdrawal, ETA 3133 states:

The determination did not adequately address the application of RCW 82.45.010(3)(j), which provides a REET exemption for transfers or conveyance "made pursuant to . . . an order of sale by the court in any mortgage, deed of trust, or lien foreclosure proceeding or upon execution of a judgment under Ch. 6.17 RCW," in the context of a receiver appointed during a judicial foreclosure action.

On September 14, 2015, a few months after the sale here, the Washington Court of Appeals issued *FDIC*. In *FDIC*, Cowlitz Bank loaned several entities approximately \$13 million, and received promissory notes and deeds of trust in return. *FDIC*, 190 Wn. App. at 154. The entities later defaulted on the loans, and Cowlitz Bank filed a complaint in Clark County Superior Court. *Id.* Cowlitz Bank and the entities later entered into a forbearance agreement whereby the entities agreed to a \$14.5 million stipulated judgment, and Cowlitz Bank agreed to not execute on the judgment or foreclose on the deeds before a certain date. *Id.* The Washington State Department of Financial Institutions later closed Cowlitz Bank, and the FDIC assumed responsibility for the bank's assets. *Id.* FDIC chose to motion the court to appoint a general receiver to "'give effect to the judgment and control, sell, and manage [the debtors'] assets.'" *Id.* at 155. A commissioner entered an order appointing a general receiver with authority under chapter 7.60 RCW. *Id.* The receiver later entered into an agreement to sell the real property to a third party, which the Superior Court approved. *Id.* at 156. The Superior Court held that REET did not apply on the transfer as it was a "'court-ordered sale.'" *Id.*

The Court of Appeals reversed. *Id.* at 164-165. The Court of Appeals first noted that a "seller" under RCW 82.45.020 is expressly defined to include a "receiver." *Id.* at 159. The Court of Appeals then paid very close attention to the language of former RCW 82.45.010(3)(i), with the case turning on the difference between "give effect to the judgment" in RCW 7.60.025(1)(c) and "execution of a judgment" under chapters 6.17 and 6.21 RCW. *Id.* at 161-162 (emphasis added.). The Court of Appeals held:

There is a difference between enforcement of a judgment by writ of execution under chapter 6.17 RCW and a receiver giving "effect to the judgment" under chapter 7.60 RCW. For instance, unlike an execution of a judgment under chapter 6.17 RCW, the privately negotiated sale of real estate by a receiver under chapter 7.60 RCW is not subject to a public auction and the sale results in a transfer of property that is not subject to redemption rights.

*Id.* at 162-163.<sup>5</sup>

In response to *FDIC*, on May 17, 2016, the Department filed a Preproposal Statement of Inquiry regarding WAC 458-61A-208 in WSR 16-11-081. The reasons the Department stated for amending WAC 458-61A-208 were to:

1. Reflect recent decision at the Washington State Court of Appeals (*Department of Revenue v. FDIC*, 190 Wash. App. 150 (2015)) holding that a sale by a receiver in a receivership proceeding did not qualify for an exemption from real estate excise tax as a sale made “upon execution of a judgment” (the exemption is in RCW 82.45.010(3)(j)).
2. Amend examples and order of rule to increase clarity on department policy.

WSR 16-11-081.

The Department subsequently made changes to WAC 458-61A-208, including these sections that address or discuss receivers:

(4)(a) **Application to foreclosure proceedings only.** The real estate excise tax does not apply to an order or sale by a court in any mortgage, deed of trust, or lien foreclosure proceeding. RCW 82.45.010(3)(j). This exemption does not apply to court-ordered sales in proceedings other than a mortgage, deed of trust, or lien foreclosure proceeding (*such as a sale negotiated in a receivership proceeding; see subsection (5)(c) of this section*) (*generally, any type of negotiated sale is taxable unless an exemption applies, and the exemption here does not apply to negotiated sales outside of mortgage, deed of trust, or lien foreclosure proceedings*).

...

(5)(c) **Receivers.** *The real estate excise tax applies to a sale by a receiver appointed by a court to give effect to the court’s judgment under RCW 7.60.025 (dealing with the appointment of receivers).*

WAC 458-61A-208 (bolding in original, italicized emphasis added).

While the current version of WAC 458-61A-208 was not in effect at the time of the sale here, it nonetheless applies. When a regulation is strictly interpretive, and does not reverse a previous interpretation, it applies retroactively. *See* Det. No. 00-196, 20 WTD 279 (2001); *see also Smiley v. Citibank*, 517 U.S. 735 (1996). Any interpretive rule is based on the statute it is interpreting and the statutory mandate to administer and enforce that statute, not solely on a general grant of rule

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<sup>5</sup> The Washington Court of Appeals, in a different division, later issued a different case that touches on receivers and REET. *Umpqua Bank v. Shasta Apartments LLC*, 194 Wn. App. 685, 378 P.3d 585 (2016). However, receivers and REET were not the subject of the litigation, unlike in *FDIC*, the case does not mention *FDIC*, and the Department was not party to the litigation. Accordingly, we do not view *Umpqua Bank* as binding precedent regarding receivers and REET.

making authority. *Ass'n of Washington Business v. Dep't of Revenue*, 155 Wn.2d 430, 455, 120 P.3d 46 (2005).

WAC 458-61A-208 interprets RCW 82.45.010(3)(j), the language of which has been the same since prior to the sale. The current version of WAC 458-61A-208 does not reverse a prior interpretation regarding receivers because the prior version was silent about the taxation of receivers. The Department, through RCW 82.45.150 and RCW 82.32.300, has authority to promulgate rules for the effective administration of chapter 82.45 RCW, and thus the current version of WAC 458-61A-208 applies here. One part of that rule, section (5)(c) plainly states that REET applies to sales by receivers appointed by a court to give effect to the court's judgment under RCW 7.60.025, which is what we have here.

The position that receivers' sales are taxable is consistent with the REET statutes and regulations generally. In defining "seller," RCW 82.45.020 explicitly includes receivers. Further, as mentioned above, WAC 458-61A-208(4)(a) states that "generally, any type of negotiated sale is taxable unless an exemption applies." One of the main reasons receivers are appointed is because they can sell real property at market value, thus bringing in what tends to be a far higher price than would be brought in at a sheriff's sale. REET is imposed on the "true and fair value of the property conveyed" under RCW 82.45.030(1), which is its market value. *See* WAC 458-61A-101(2)(c).

Taxpayer argues that this case is distinguishable from *FDIC* because there was a foreclosure here, and there was none in *FDIC*. We are unpersuaded by this argument. The complaint in this matter alleged receivership as one cause of action and judicial foreclosure as another. The motions and orders provided indicate that the receivership avenue under chapter 7.60 RCW was pursued, and that the judicial foreclosure avenue under chapter 61.12 RCW was not pursued. The receiver sold the [property] at market value using its chapter 7.60 RCW authority, and no sheriff's sale was made below market value under chapter 61.12 RCW authority. Thus, we do not find that the fact that the plaintiff claimed a cause of action under judicial foreclosure enough to distinguish this case from *FDIC*.

Since the current version of WAC 458-61A-208 is the applicable regulation, and since section (5)(c) directly addresses the circumstances here, we hold that Special Programs correctly denied Taxpayer's refund request. Accordingly, we deny Taxpayer's petition.

#### DECISION AND DISPOSITION

We deny Taxpayer's petition for refund.

Dated this 20th day of October 2020