

Cite as Det. No. 20-0211, 41 WTD 231 (2022)

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

In the Matter of the Petition for Correction of)	<u>D E T E R M I N A T I O N</u>
Assessment of)	
)	No. 20-0211
)	
...)	Registration No. ...
)	

RCW 82.45.010 – REAL ESTATE EXCISE TAX – LOW-INCOME HOUSING EXCEPTION – EFFECTIVE DATE. The exception from real estate excise tax for the transfer of a low-income housing development applies retroactively.

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.

Peña, T.R.O. – Taxpayer disputes the assessment of additional real estate excise tax (REET) on the transfer of a low-income housing development, arguing the enacting legislation for RCW 82.45.010(3)(s) was retroactive and applied to its property transfer. We grant Taxpayer’s petition.¹

ISSUE

Does the low-income housing development REET exception under RCW 82.45.010(3)(s) apply retroactively to a taxpayer that was assessed additional REET?

FINDINGS OF FACT

[In] 2017, . . . [a] Washington Limited Partnership, and . . . (Transferors) transferred a controlling interest in . . . LLC (Taxpayer) to . . . (Transferee). At dispute here is a property owned by Taxpayer, Unit 2 of a building located . . . , [in] Washington . . . (Property). The . . . [Property] is divided into two units: Unit 1, parcel . . . and Unit 2, parcel

Taxpayer filed a Real Estate Excise Tax Affidavit Controlling Interest Transfer Return, postmarked The affidavit listed . . . [Unit 2] with a value of \$. . . Taxpayer paid \$. . . of real estate excise tax (REET) based on the \$. . . property value. Taxpayer stated it got the property value from a third-party estimate, but it did not provide the Department’s Audit Division (Audit) with any record of an appraisal.

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

The Property (Unit 2) had a 2017 tax year assessed value of \$. . . The Department reviewed the transfer of the Property because the [REET affidavit value] was substantially lower than the county assessed value. The Department concluded that Taxpayer owed REET on \$. . . , the difference between the county assessed value and the declared value on the REET affidavit. On May 1, 2019, the Department assessed Taxpayer \$. . . , which included \$. . . of REET, \$. . . of penalties, and \$. . . of interest.

Taxpayer timely petitioned for review of the Assessment and makes two arguments. First, Taxpayer argues that the transfer of the Property was a transfer of a qualified low-income housing development that is excluded from the definition of sale under RCW 82.45.010(3)(s) and therefore not subject to REET under RCW 82.45.060. The Washington State Housing Commission confirmed that the Property is a qualified low-income housing development. Taxpayer maintains that RCW 82.45.010(3)(s) is retroactive and applies to its . . . 2017, transfer of the Property. Taxpayer acknowledges that it is not entitled to a refund of the REET it has already paid but seeks a cancellation of the Assessment for the additional amount of REET Audit determined was due. . . .

In the event RCW 82.45.010(3)(s) is not retroactive, Taxpayer makes an additional argument on the valuation of the Property. Taxpayer provided what it refers to as an “independent valuation” that Taxpayer states is from 2017. The document is titled “. . . Scenario Analysis, Detailed Assumptions” and was prepared by . . . , a commercial real estate services and investment firm. The document lists “apartment sale price” as \$ Taxpayer also states that it offered to the Department to get an actual appraisal of the Property.

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ANALYSIS

Washington imposes REET on “each sale of real property” in this state. RCW 82.45.060. RCW 82.45.010(1) defines “sale” as “any conveyance, grant, assignment, quitclaim, or transfer of ownership of or title to real property . . . for a valuable consideration” Under this statutory framework, there are two requirements for a taxpayer to be liable for REET: (1) the transfer of an interest in real property; and (2) consideration paid or contracted to be paid in exchange for the transfer. If both of these requirements are met, the Department assesses REET unless “specifically exempted by chapter 82.45 RCW and [chapter 458-61A WAC].” WAC 458-61A-100(1). Transfers of the types of properties excluded from the definition of “sale” under RCW 82.45.010(3) are not subject to REET.

RCW 82.45.010(3) was amended in 2018, adding to the list of transfers that do not constitute a sale for the purposes of REET, the following:

- (s)(i) A transfer of a qualified low-income housing development or controlling interest in a qualified low-income housing development, unless, due to noncompliance with federal statutory requirements, the seller is subject to recapture, in whole or in part, of its allocated federal low-income housing tax credits within the four years prior to the date of transfer.

(ii) For purposes of this subsection (3)(s), "qualified low-income housing development" means real property and improvements in respect to which the seller or, in the case of a transfer of a controlling interest, the owner or beneficial owner, was allocated federal low-income housing tax credits authorized under 26 U.S.C. Sec. 42 or successor statute, by the Washington state housing finance commission or successor state-authorized tax credit allocating agency.

(iii) This subsection (3)(s) does not apply to transfers of a qualified low-income housing development or controlling interest in a qualified low-income housing development occurring on or after July 1, 2035.

Laws of 2018, ch. 221, § 1 (the Act). The amendment was effective July 1, 2018. *Id.* at § 3. Also included in the Act is the following section [with additional details about implementing the amendment]²:

Sec. 2. This act applies with respect to transfers occurring before, on, or after the effective date of this section. However, this act may not be construed by the department of revenue, state board of tax appeals, or any court as authorizing the refund of any tax liability imposed or authorized under chapter 82.45 or 82.46 RCW and property paid before the effective date of section 1 of this act with respect to a transfer of qualified low-income housing as a defined in RCW 82.45.101(3)(s).

Here, Taxpayer argues that under RCW 82.45.010(3)(s), the December 31, 2017, transfer of the Property was the transfer of a controlling interest in a qualified low-income housing development. It follows, Taxpayer argues, that RCW 82.45.010(3)(s) excludes this transfer as a “sale” because Section 2 of the Act makes RCW 82.45.010(3)(s) retroactive. . . .

In determining the meaning of statutes, we must ascertain and carry out the Legislature’s intent. *G-P Gypsum Corp. v. Dep’t of Revenue*, 169 Wn.2d 304, 309, 237 P.3d 256 (2010); *City of Spokane v. County of Spokane*, 158 Wn.2d 661, 672-73, 146 P.3d 893 (2006). Washington courts employ a “plain meaning” approach to interpreting statutes. Where a statute’s meaning is “plain on its face,” we must “give effect to the plain meaning as an expression of legislative intent.” *Dep’t of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002); Det. No. 13-0191, 33 WTD 116 (2014). The “plain meaning” of a statute “is discerned from all that the Legislature has said in the statute.” *Jongeward v. BNSF R. Co.*, 174 Wn.2d 586, 594, 278 P.3d 157 (2012) (quoting *Campbell & Gwinn*, 146 Wn.2d at 9-10).

Here, the retroactive meaning of Section 2 of the Act is plain on its face. There is no ambiguity when it states the “act applies with respect to transfers occurring before, on, or after the effective date of this section.” *Id.* Moreover, the very next sentence of Section 2 is plain on its face and prohibits the Department from “authorizing the refund of any tax liability imposed or authorized under chapter 82.45 . . . RCW and property paid before the effective date of section 1 of this act with respect to a transfer of qualified low-income housing as a defined in RCW 82.45.101(3)(s).”

² See Code Reviser’s note, “Application,” quoting Section 2 of the Act.

In considering whether to give a statute retroactive effect, courts are guided by certain principles:

A statutory amendment will be applied retroactively, if constitutionally permissible under the circumstances, when it is (1) intended by the Legislature to apply retroactively, (2) curative in that it clarifies or technically corrects ambiguous statutory language, or (3) remedial in nature. *McGee Guest Home, Inc. v. Dep't of Soc. & Health Servs.*, 142 Wn.2d 316, 324–325, 12 P.3d 144 (2000) (citing *State v. Cruz*, 139 Wn.2d 186, 191, 985 P.2d 384 (1999)). The court may turn to the statute's purpose and language, legislative history, and legislative bill reports to analyze retroactivity. . . .

Barstad v. Stewart Title Guar. Co., 145 Wn.2d 528, 536–37, 39 P.3d 984 (2002) (footnotes omitted). As discussed above, the express retroactivity clause of Section 2 of the Act is a plain statement of legislative intent. Thus, the low-income housing REET exception of RCW 82.45.010(3)(s) must be applied retroactively.

Applied here, the December 31, 2017, transfer of the Property was the transfer of a controlling interest in a qualified low-income housing development and RCW 82.45.010(3)(s) excludes this transfer as a “sale.” Therefore, the Department issued the [2019] Assessment in error and the Assessment is cancelled. Under Section 2 of the Act, the Department cannot, however, issue a refund for REET paid before July 1, 2018, for the transfer of qualified low-income housing, but Taxpayer acknowledges this and is not seeking a refund of the REET it previously paid on January 5, 2018. Because we have determined the Assessment must be cancelled and Taxpayer is not seeking a refund, we do not address Taxpayer's valuation argument.

DECISION AND DISPOSITION

Taxpayer's petition is granted.

Dated this 6th day of August 2020.