

71524-1

71524-1

NO. 71524-1

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

IN RE THE GENERAL RECEIVERSHIP OF THE
MACDONALD LIVING TRUST, ET AL.,

WASHINGTON STATE DEPARTMENT OF REVENUE,

Appellant,

v.

THE GENERAL RECEIVER FOR THE MACDONALD LIVING
TRUST, ET AL.,

Respondent.

**BRIEF OF APPELLANT STATE OF WASHINGTON,
DEPARTMENT OF REVENUE**

ROBERT W. FERGUSON
Attorney General

Zachary Mosner
Assistant Attorney General
WSBA No. 9566
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
206-389-2187

FILED
COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON
2011 JUN -5 PM 12:25

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	ASSIGNMENT OF ERROR.....	1
III.	ISSUES.....	1
IV.	STATEMENT OF THE CASE.....	2
V.	ARGUMENT	4
	A. The Plain Language of the Statute Does Not Grant the Receiver a Tax Exemption.....	4
	B. The Receiver’s Sale of Property Does Not Qualify For A Tax Exemption As A Transfer Made Upon Execution Of A Judgment.	6
	1. The Receiver is Not Entitled to An Exemption Because the Receiver Did Not Have A Judgment On Which To Execute.	7
	2. The Receiver is Not Entitled to An Exemption Because the Receiver Did Not Execute On a Judgment.....	8
	C. If Two Constructions Of “Execution Of A Judgment” Are Plausible, Revenue’s Construction Prevails Because Tax Exemptions Must Be Strictly Construed.....	12
VI.	CONCLUSION	13

TABLE OF AUTHORITIES

Cases

<i>Belas v. Washington State Department of Revenue</i> , 135 Wn.2d 913, 959 P.2d 1037 (1998).....	12
<i>Estate of Haselwood v. Bremerton Ice Arena, Inc.</i> , 166 Wn.2d 489, 210 P.3d 308 (2009).....	4
<i>Lutheran Day Care v. Snohomish County</i> , 119 Wn.2d 91, 829 P.2d 746 (1992), <i>cert. denied</i> , 506 U.S. 1079 (1993).....	12
<i>Spokane Co. v. City of Spokane</i> , 169 Wash. 355, 13 P.2d 1084 (1932).....	12
<i>State v. J.M.</i> , 144 Wn.2d 472, 28 P.3d 720 (2001).....	5

Statutes

RCW 6.17.....	10
RCW 6.17.100.....	10
RCW 6.17.110.....	10
RCW 6.17.130.....	10
RCW 7.60.005(10).....	8
RCW 7.60.060.....	8
RCW 7.60.070.....	9
RCW 7.60.080.....	9
RCW 7.60.160(7).....	9
RCW 7.60.170.....	9

RCW 7.60.230	9
RCW 7.60.260	9, 11
RCW 82.45.010	13
RCW 82.45.010(3).....	4
RCW 82.45.010(3)(i).....	passim
RCW 82.45.020	4, 6, 11, 13
RCW 82.45.020(3).....	11
RCW 82.45.060	4
RCW 82.46.010.....	4
RCW 82.46.035	4

Other Authorities

Laws of 2004, Ch. 165, §1	9
---------------------------------	---

I. INTRODUCTION

This case concerns the application of Washington's real estate excise tax (REET) to the sale of real property in a general receivership. Real property sales are subject to tax as a general rule with limited exceptions for sales in a "mortgage, deed of trust, or lien foreclosure proceeding, or upon execution of a judgment." RCW 82.45.010(3)(i). The trial court's decision that the Receiver's sale of real property was exempt as an execution of a judgment is not supported by the language of the exemption statute itself and is contrary to the rule of statutory construction that exemptions are construed narrowly. The trial court's decision exempting the sale of real property from excise tax should be reversed by this Court.

II. ASSIGNMENT OF ERROR

1. The trial court erred in granting the General Receiver an exemption from payment of the real estate excise tax on the sale of real estate.

III. ISSUES

1. Is the sale of real property in a receivership exempt from the real estate excise tax when the plain language of the statute does not exempt sales in a receivership?

2. Was the Receiver's sale of real property an "execution upon a judgment" when the Receiver did not have a judgment against the debtors and did not bring an execution action?

3. Does granting the Receiver a tax exemption violate the basic rule that exemption statutes are to be strictly construed when the Receiver's position avoids payment of the excise tax in all receivership sales of real property?

IV. STATEMENT OF THE CASE

The Federal Deposit Insurance Corporation (the "FDIC") is the receiver of the Cowlitz Bank. Cowlitz Bank and other creditors are owed substantial sums by the MacDonald Living Trust and the other defendants below (hereafter referred to as "debtors"). *Plaintiff's Motion and Petition For Appointment of a General Receiver and Memorandum in Support Thereof*, p. 2. CP 2. The debtors defaulted on loans made by Cowlitz Bank and Cowlitz Bank obtained a judgment against them. *Id.* CP 2-4. The FDIC sought the appointment of a general receiver to "control, sell, and manage Defendants' [debtors'] assets." *Id.*, p. 6. CP 6.

The court appointed Pacific Realty Advisors LLC ("PRA") as the general receiver. In particular, the court granted the Receiver authority to "sell, transfer, or otherwise liquidate the Assets . . . , and to manage,

operate, lease, maintain and control the Assets.” *Order Appointing General Receiver*, p. 5, ¶ 7. CP 33.

The Receiver filed a motion to sell real property exempt from the real estate excise tax. *Receiver’s Motion to Approve the Sale of real Property (Lot 6, Granite Highlands Phase IV) Free and Clear of Liens; and (2) Pay Broker*, p. 4, § 10. CP 64. Revenue appeared in the receivership proceeding for the first time and objected to the tax exemption. *State of Washington Objection to Sales of (1) Brady Road and (2) Granite Highlands Without Payment in Full of Real Estate Excise Tax*. CP 72.

Judge Dean Lum granted the Receiver’s motion to sell the property without payment of the real estate excise tax. *Order Granting Receiver’s Motion to (1) Approve the Sale of Real Property (Lot 6, Granite Highlands Phase IV) Free and Clear of Liens; and (2) Pay Broker*. CP 104. The judge held that the sale “shall be considered an order of sale by the Court to execute upon a judgment . . .” *Id. at 3. CP 106*.

Revenue’s motion for reconsideration was denied by Judge Lum on January 7, 2014. *Order On State of Washington Motion for Reconsideration Under CR 59*. CP 108. The matter was appealed to this Court on January 22, 2014.

V. ARGUMENT

As a general rule, sales of real property are subject to an excise tax of 1.78% of the property's sale price. RCW 82.45.060; RCW 82.46.010; RCW 82.46.035. The Receiver seeks to avoid imposition of this tax on the sale of real property in the receivership proceeding. When interpreting a statute, the first step is to look at its plain language. *Estate of Haselwood v. Bremerton Ice Arena, Inc.*, 166 Wn.2d 489, 498, 210 P.3d 308 (2009). The statute's plain language does not grant the Receiver a tax exemption.

A. **The Plain Language of the Statute Does Not Grant the Receiver a Tax Exemption.**

The real estate excise tax statute expressly identifies those individuals who are subject to its terms by defining them as sellers:

As used in this chapter the term "seller," unless otherwise indicated by the context, shall mean any individual, receiver, assignee, trustee in bankruptcy, trust, estate, firm, copartnership, joint venture, club, company, joint stock company, business trust, municipal corporation, quasi municipal corporation, corporation, association, society, or any group of individuals . . . RCW 82.45.020 (emphasis added).

Thus, receivers who sell real property are subject to the real estate excise tax, unless they can identify an exemption which applies to their sale.

The statute lists seventeen transactions that are not considered a "sale" and are therefore exempt from the tax. RCW 82.45.010(3). To determine if the Receiver is entitled to an exemption one must examine

what the Receiver did with regard to the subject property. After her appointment, the Receiver filed a Motion to Sell Granite Highlands. *Receiver's Motion to Approve the Sale of real Property (Lot 6, Granite Highlands Phase IV) Free and Clear of Liens; and (2) Pay Broker*, CP 61. The court subsequently entered an Order Granting Receiver's Motion to (1) Approve the Sale of Real Property (Lot 6, Granite Highlands Phase IV) Free and Clear of Liens; and (2) Pay Broker. CP 104. This order is an order to sell free and clear of liens.

Reviewing the seventeen transactions that are exempt from taxation, some orders to sell are included in the list of exemptions:

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)(i) (emphasis added).

The Receiver is not entitled to an exemption based on the underlined language above because the order of sale was entered in a receivership proceeding. It was not entered in a "mortgage, deed of trust, or lien foreclosure proceeding". The statute does not grant an exemption for an order of sale in a receivership proceeding.

A statute that is clear on its face is not subject to judicial construction. *State v. J.M.*, 144 Wn.2d 472, 480, 28 P.3d 720 (2001).

According to the plain terms of RCW 82.45.020, a receiver is a “seller” for purposes of the statute and an order for sale in a receivership proceeding is subject to the real estate excise tax.

B. The Receiver’s Sale of Property Does Not Qualify For A Tax Exemption As A Transfer Made Upon Execution Of A Judgment.

Unable to qualify for an exemption from the real estate excise tax under the plain terms of the statute, the Receiver seeks an exemption by construing the exemption for transfers made upon execution of a judgment:

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)(i) (emphasis added).

Judge Lum granted the Receiver’s request for an exemption, ruling that the “sale of the Property shall be considered an order of sale by the Court to execute upon a judgment for purposes of RCW 82.45.010(3)(i)”. *Order Granting Receiver’s Motion to (1) Approve the Sale of Real Property (Lot 6, Granite Highlands Phase IV) Free and Clear of Liens; and (2) Pay Broker.* CP 106 (emphasis added). Judge Lum erred in so ruling because the Receiver did not have a judgment against the debtor and did not execute to collect on a judgment.

1. The Receiver is Not Entitled to An Exemption Because the Receiver Did Not Have A Judgment On Which To Execute.

The tax exemption in RCW 82.45.010(3)(i) for “execution of a judgment” must require, at a minimum, that the party selling the property have a judgment against the debtor. Absent a judgment, there can be no execution. In this case, the Receiver did not have a judgment against the debtors.

As is made clear in the Plaintiff’s Motion and Petition for Appointment of Receiver and Memorandum In Support Thereof, CP 4, the FDIC sought the appointment of a receiver because Cowlitz Bank had a judgment against the defendants and the FDIC succeeded to the interests of Cowlitz Bank. But it is equally clear that the Receiver does not have a judgment against the defendants.

In order to do an “execution of a judgment,” the party that does the execution must have a judgment. It was the Receiver who sold the property in this case, and the Receiver did not have a judgment against the debtors. The statutory exemption for “execution of a judgment” requires the seller to have a judgment. Since the Receiver does not have a judgment against the debtors, she does not qualify for the exemption.

2. The Receiver is Not Entitled to An Exemption Because the Receiver Did Not Execute On a Judgment.

Turning again to Judge Lum's ruling, Judge Lum ruled that the "sale of the Property shall be considered an order of sale by the Court to execute upon a judgment for purposes of RCW 82.45.010(3)(i)". *Order Granting Receiver's Motion to (1) Approve the Sale of Real Property (Lot 6, Granite Highlands Phase IV) Free and Clear of Liens; and (2) Pay Broker.* CP 106 (emphasis added). Judge Lum erred because the Receiver did not execute upon a judgment when selling property in this case.

The receivership statute and the Order Appointing a Receiver entered in this case define the Receiver's role with respect to the Debtors and the numerous creditors seeking payment from those Debtors. The receivership statute defines a receiver as follows:

"Receiver" means a person appointed by the court as the court's agent, and subject to the court's direction, to take possession of, manage, or dispose of property of a person. RCW 7.60.005(10) (emphasis added).

This role is reflected in paragraph 6 of the Order Appointing General Receiver, which provides that the "Receiver shall not be subject to the control of any party to this proceeding but shall be subject only to the Court's direction in the fulfillment of the Receiver's duties." CP 33.

Once appointed, the receiver exercises broad powers over the debtor's property. RCW 7.60.060. The receiver acts to gain control over the

debtor's property and may compel a debtor or creditor to turnover the property. RCW 7.60.070. The debtor is required to cooperate with the receiver as the receiver assumes control over the debtor's property. RCW 7.60.080. Once the receiver has control of the property, the receiver may sell that property, RCW 7.60.260, and disburse the proceeds to the debtor's creditors. RCW 7.60.230. All of these provisions are set forth in the Order Appointing General Receiver. CP 29-39, ¶¶ 1, 4, 7, 10, 21, 23.

Two further provisions are worthy of note. A judgment taken against a receiver is the equivalent of a judgment against the debtor and the debtor's property. RCW 7.60.160(7). And, a receiver is liable to the debtor for any diminution in the value of property caused by the receiver. RCW 7.60.170.

Taken together, a receiver acts as the court's agent, not as a creditor's agent. This is further supported by the purpose statement to the Receivership Act:

The purpose of this act is to create more comprehensive, streamlined, and cost-effective procedures applicable to proceedings in which property of a person is administered by the courts of this state for the benefit of creditors and other persons having an interest therein. Laws of 2004, Ch. 165, §1 (emphasis added).

Thus it is clear that the receiver is not a creditor of the debtor, but rather serves as an agent of the court, standing in the shoes of the debtor to

dispose of the debtor's assets for the benefit of its various creditors, while acting in a purely fiduciary capacity.

The role of a receiver contrasts sharply with the role of a creditor who executes on property, which is authorized by chapter 6.17 RCW. In an execution upon real property, the judgment creditor files an affidavit with the court setting forth its inability to locate nonexempt personal property from which to satisfy the judgment and the status of the real property against which the execution will lie. RCW 6.17.100. A writ of execution is issued by the court and is delivered to the sheriff. RCW 6.17.110. The sheriff delivers the writ to the debtor and proceeds to sell the property. RCW 6.17.130.

As a judgment creditor, the FDIC on behalf of Cowlitz Bank could have taken action to collect its judgment by obtaining a writ of execution. If it had done so and then sold the property, the sale by the FDIC would have been exempt from the real estate excise tax. But rather than executing on a judgment, the FDIC sought appointment of a receiver.

The Receiver in this case did not take any action under chapter 6.17 RCW. She did not present an affidavit to the court to describe her efforts to locate personal property, she did not obtain a writ of execution, and the sheriff did not sell the property. Clearly the Receiver did not execute upon a judgment in this case.

Indeed, there is no reason for a receiver to execute on a debtor's property because the receiver stands in the debtor's shoes and has express statutory authority to sell the property. RCW 7.60.260. All the Receiver had to do in this case to sell the property was to file a motion and obtain a court order approving the sale. CP 61, 104. Execution is for creditors who seek to obtain and dispose of the property of another – the debtor. This is unnecessary for a receiver who by statute and court order has control over the debtor's property, with the result that the property essentially belongs to the receiver for purposes of control and disposition.

Under the trial court's construction of the statute, a receiver is exempt from taxation on all sales of real property because a receivership sale is considered a sale to execute on a judgment. *Order Granting Receiver's Motion to (1) Approve the Sale of Real Property (Lot 6, Granite Highlands Phase IV) Free and Clear of Liens; and (2) Pay Broker*. CP 106. However, the real estate excise tax statute includes "receiver" within its definition of a seller subject to imposition of the tax. RCW 82.45.020(3). It is illogical to include a receiver within the definition of a seller who is subject to the tax and then exclude all sales by a receiver from taxation, which is the result of Judge Lum's ruling. To do so renders inclusion of "receiver" in RCW 82.45.020 superfluous, and statutes should not be construed to render terms superfluous. *Lutheran Day Care v. Snohomish*

County, 119 Wn.2d 91, 104, 829 P.2d 746 (1992), *cert. denied*, 506 U.S. 1079 (1993).

The Receiver in this case sold real property pursuant to a court order. She did not “execute upon a judgment” because she neither had a judgment against the debtors nor brought an execution action. Her sale of real property is subject to the real estate excise tax.

C. If Two Constructions Of “Execution Of A Judgment” Are Plausible, Revenue’s Construction Prevails Because Tax Exemptions Must Be Strictly Construed.

The trial court was offered two interpretations of the statutory exemption for “execution of a judgment.” The Receiver argued that the process of a receivership was to be considered an execution and therefore sales of real property qualified for the exemption. Revenue argued that the exemption was limited to cases in which there was an actual “execution of a judgment” by a judgment creditor. The trial court chose the broader interpretation and granted the tax exemption. That determination violated a basic rule of statutory construction.

It is well-established that a tax exemption is the exception and that statutes granting exemptions must be strictly construed. *Spokane Co. v. City of Spokane*, 169 Wash. 355, 358, 13 P.2d 1084 (1932). Any doubt or ambiguity must be construed in favor of the public. *Belas v. Washington State Dep’t of Revenue*, 135 Wn.2d 913, 934, 959 P.2d 1037 (1998). Faced

with conflicting interpretations, the *Belas* decision requires this court to adopt Revenue's narrower construction of the term. The narrower construction of the term precludes the Receiver from selling real property without paying the real estate excise tax.

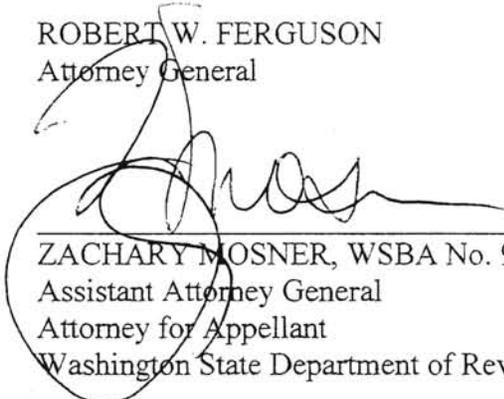
VI. CONCLUSION

The Receiver is not a creditor of the debtors, nor does she hold a judgment against them. While RCW 82.45.010 grants creditors an exemption from the real estate excise tax when they execute on a judgment, neither the receivership statute nor the real estate excise tax statute grant an exemption to receivers. Since a receiver stands in the shoes of a debtor, the sale of property by a receiver is to be treated the same as a sale of property by a debtor – subject to the real estate excise tax. The receiver is specifically enumerated by statute as a “taxable party.” RCW 82.45.020. A review of the sale order entered in this case makes it clear that the Receiver sold the debtors' property pursuant to a

court order, without having to bring an execution action. Such a sale is subject to the real estate excise tax.

RESPECTFULLY SUBMITTED this 5th day of June, 2014.

ROBERT W. FERGUSON
Attorney General



ZACHARY MOSNER, WSBA No. 9566
Assistant Attorney General
Attorney for Appellant
Washington State Department of Revenue

PROOF OF SERVICE

I certify that I served a copy of this document on all parties or their counsel of record on the date below as follows:

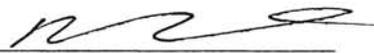
US Mail Postage Prepaid via Consolidated Mail Service

SERVICE LIST

Diana K. Carey Attorneys for Receiver, Pacific Realty Advisors, LLC Karr Tuttle Campbell 701 Fifth Avenue, Suite 3300 Seattle, WA 98104
Nathaniel S. Strauss Karr Tuttle Campbell 701 5 th Ave Ste 3300 Seattle WA 98104-7055
The Federal Deposit Insurance Corporation c/o John R. Knapp, Jr. Brian W. Esler Miller Nash LLP 4400 Two Union Square 601 Union St Seattle, WA 98101-2352

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 5th day of June, 2014, at Seattle, WA.


BOBBY COVACH
Legal Assistant

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2014 JUN -5 PM 12:25