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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.

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

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2012 FEB 10 10:02 AM
COURT OF APPEALS
DIVISION I
FILED: 02

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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. The general rule is that sales of real property are taxed, including sales by receivers. The statute contains 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).¹

The FDIC offers several arguments to support its contention that the sale in this case is exempt from taxation because the sale by the receiver is "upon execution of a judgment." The FDIC supports this argument primarily based upon a dictionary definition of the term "execution." However, the dictionary does not support the FDIC's position; rather, it supports the State's position or is equivocal at best.

The FDIC's other arguments also fail. Its interpretation of the statute would result in the anomalous result that all receivership sales of real property are exempt from taxation, making an exemption the general rule, and rendering the term "receiver" superfluous in the statute that identifies taxable sellers. The State is not collaterally attacking the sale order at issue in this appeal, as it timely sought reconsideration of the order and then timely appealed it to this Court. The FDIC's final

¹ This subsection was renumbered as RCW 82.45.010(3)(j). *See* Laws of 2014, ch. 58, § 24, at 23.

argument that the State is collaterally estopped from objecting to the order because a prior sale order for a different parcel of real property and a prior *ex parte* order appointing a receiver were entered does not bar an appellate court from reviewing the sale order on direct appeal.

II. ARGUMENT

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 statute contains an exception for a transfer "upon execution of a judgment." RCW 82.45.010(3)(j). The FDIC seeks to avoid taxation of the sale of real property in the receivership proceeding by equating a Sheriff's execution of a single creditor's judgment with a receiver's sale in a general receivership. A receivership sale is for the benefit of numerous creditors and parties in interest and is not the "execution of a judgment." It is not exempt from taxation under RCW 82.45.010(3)(j).

A. **The Dictionary Meanings of the Term "Execution" Support the Positions of Both the FDIC and the State. For That Reason the Dictionary Cannot Determine Which Definition Should Apply In This Case.**

Although the State believes that the exemption statute is clear and unambiguous and that statutory construction is unnecessary, the State responds to the FDIC's definitional argument first because that is the FDIC's primary argument in this appeal. The FDIC relies on definitions

of “execution” in Black’s Law Dictionary and an unidentified Webster’s Dictionary to support its argument that the receiver’s sale of property was “upon execution of a judgment.” To analyze the FDIC’s argument it is important to understand how a receivership operates and how property is sold in a receivership.

Although the FDIC sought the receivership, the receiver neither represents the FDIC nor acts on its behalf. The Receivership Act 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).

In the purpose section to the Act, the Legislature noted as follows:

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.

That the receiver is an agent of the court acting on behalf of all creditors is clearly reflected in 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, ¶ 6. This is consistent

with the FDIC's application to the court, which provided that "Cowlitz Bank and other creditors are owed substantial sums . . ." *Plaintiff's Motion and Petition for Appointment of a General Receiver and Memorandum in Support Thereof*, p. 2, CP 2 (emphasis added).

Thus the receiver 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. *See, Security Pacific Nat'l Bank v. Geernaert*, 199 Cal. App. 3d 1425, 1431-32 (1988). As such, the receiver is not a creditor of the debtor and does not possess any judgments against the debtor.

The Receiver did not go out and seize the debtors' property or otherwise sequester and protect it from the debtors. Because the Receiver stands in the shoes of the debtor and acts as an agent of the court, the Receiver did not need a sheriff or law enforcement official to obtain control over the property. Instead, the Receiver simply filed a motion with the court authorizing the sale.

This process is to be compared with the FDIC's dictionary definitions of "executed." For ease of review, those definitions are repeated here, but are numbered sequentially:

[1] the process for carrying into effect the judgment or decree of a court; *esp* : the enforcement of such judgment or decree by arrest of the person or seizure of the property

of a debtor. [2] a judicial writ by which an officer is empowered to carry a judgment into effect – called also *final process*.

[3] The act of carrying out or putting into effect (as a court order . . .); . . . [4] Judicial enforcement of a money judgment, usu. By seizing and selling the judgment debtor's property; . . . [5] A court order directing a sheriff or other officer to enforce a judgment, usu. By seizing and selling the judgment debtor's property.

Respondent's Brief, pp. 22-23.

Of the five definitions, three support the State's position and two supports the FDIC's. In order, the first definition supports the State's position because the Receiver did not seize the debtors' property or arrest the debtors. The second definition supports the FDIC's position as the Receiver carried out the court's orders to sell property. The third definition also supports the FDIC's position, as the Receiver did carry out the terms of the sale order. The fourth definition supports the State's position because there was no seizure of property. The fifth definition also supports the State's position, as again, there was no seizure of property and no sheriff was involved in the process.

As the definitions can support either position, the dictionary cannot resolve the legal issue presented to this court. The answer is better found in the statute at issue in this case.

B. The FDIC’s Interpretation of the Term “Execution” Yields an Absurd Result that is Plainly at Odds with the Statute at Issue. The FDIC Bears the Burden of Establishing Its Entitlement to an Exemption and, Reading the Exemption Language In Light of the Statute As a Whole, the FDIC Fails to Meet Its Burden.

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 a sale by a receiver is subject to taxation unless an exemption can be identified. Because there is no express exemption for receivers or sales in a receivership, the FDIC points to the following language as the source of its exemption from taxation:

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).

The FDIC argues that when the Receiver sold the property, the Receiver gave effect to its judgment, which is a transfer “upon execution of a judgment.” Considering this argument to its fullest extent, the FDIC

contends that whenever property is sold that is subject to a judgment, that sale is exempt from taxation because such a sale “gives effect to a judgment.” There is no support for this contention.

The exemptions listed in RCW 82.45.010(3)(j) are specific identifiable proceedings brought by a single creditor against a debtor, such as a foreclosure proceeding. Execution of a judgment is also a specific proceeding brought by a single creditor, one that is governed by Ch. 6.17 RCW. The FDIC’s definition is overbroad because it does not identify a specific type of proceeding. It applies to any action taken when there is a judgment on real property. If the FDIC’s construction was correct, the statute simply would have been written as:

Any transfer or conveyance made pursuant to a deed of trust or an order of sale by the court to give effect to a judgment, mortgage, or deed of trust.

But the Legislature did not use general terms that include every collection action by a creditor. Rather, the Legislature used terms that describe specific legal proceedings. That language does not broadly exempt from taxation any judgment creditor’s collection action, and it does not provide an exemption for the sale of property in this case.

The FDIC’s construction completely re-writes the exemption statute. As written, receivers are subject to the tax unless a specific exemption exists – an execution pursuant to Ch. 6.17 RCW. Under the

FDIC's approach, every receivership sale of property subject to a judgment would be exempt from taxation because, according to the FDIC, such a sale "gives effect to the judgment." As creditors typically have a judgment against a debtor, it is difficult to imagine that any receivership would be filed in which no judgment existed against the debtor. Because every receivership debtor likely has judgments against his or her property, every receivership sale would be exempt from taxation.

If that were the correct result, then the Legislature would not have included receivers in the definition of "sellers" whose sales of real property are subject to taxation. The FDIC's construction 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).

Indeed, if the Legislature intended to exempt sales that "give effect to a judgment," the statute could have been written as such. That exact language appears in RCW 7.60.025(c), which authorizes the appointment of a receiver "[a]fter judgment, in order to give effect to the judgment; . . ." The Legislature used different language in the exemption statute which yields a different result.

A statute that is clear on its face is not subject to judicial construction. *HomeStreet, Inc. v. Washington State Department of Revenue*, 166 Wn.2d 444, 452, 210 P.3d 297 (2009). There is nothing to “interpret” in this case because a receivership sale is not set forth as an exemption within the plain language of RCW 82.45.010(3)(j). To the extent that counsel would rely upon a prior tax advisory opinion as cited at page 37 of the FDIC’s brief, at note 4, it is not to be used by this court when plain language is set forth in the statute. *Agrilink Foods, Inc. v. Department of Revenue*, 153 Wn.2d 392, 396, 103 P.3d 1226 (2005). If it matters, the opinion, not on point factually, has been withdrawn.

The FDIC bears the burden of proof in seeking an exemption from taxation. *Group Health Coop. of Puget Sound, Inc. v. Washington State Tax Commission*, 72 Wn.2d 422, 452, 433 P.2d 201 (1968). Tax exemptions and deductions must be narrowly construed. *Department of Revenue v. Schaake Packing Co.*, 100 Wn.2d 79, 83–84, 666 P.2d 367 (1983). Taxation is generally the rule and deductions or exemptions are the exceptions. *Budget Rent-A-Car of Washington-Oregon v. Department of Revenue*, 81 Wn.2d 171, 174, 500 P.2d 764 (1972) (citing *Fibreboard Paper Products Corp. v. State*, 66 Wn.2d 87, 401 P.2d 623 (1965)).

The FDIC has not met its burden of proof to establish an exemption because its construction exempts all receivership sales from taxation, contrary to the statute's plain language.

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

The tax exemption in RCW 82.45.010(3)(j) 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.

The FDIC posits this case as being the equivalent of a two-party collection action whereby the Receiver sold property on its behalf so that its judgment against the debtors would be paid. But as stated above, the receiver acts as the court's agent, not as the FDIC's agent, for the benefit of all of the debtors' creditors. RCW 7.60.005(10). The receiver's obligation to all creditors is also reflected in the bonding requirement:

Unless otherwise ordered by the court, the receiver's bond runs in favor of all persons having an interest in the receivership proceeding or property held by the receiver and in favor of state agencies. RCW 7.60.045.

The statute recognizes that many persons, including state agencies such as the Department of Revenue, have an interest in receiverships.

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 pre-condition to issuance of the writ is the existence of a judgment. RCW 6.17.020(1) (“the party in whose favor a judgment of a court has been or may be filed or rendered”); RCW 6.17.100 (“Before a writ of execution may issue on any real property, the judgment creditor must . . .”).

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. The execution process involves only two parties – the debtor and the creditor. A receivership involves the debtor and all persons with an interest in the debtor’s property, including state agencies.

The FDIC cites numerous provisions of Ch. 6.17 RCW, but fails to cite its operative provision. In order to do an execution, a creditor must obtain a writ of execution. RCW 6.17.110. The FDIC did not execute on its judgment because it did not obtain a writ of execution pursuant to Ch.

6.17 RCW. The Receiver did not execute on a judgment because the Receiver is not a judgment creditor.

The Receiver did not execute on the FDIC's judgment because it did not obtain a writ of execution and his sale of real property was pursuant to RCW 7.60.260. There was nothing of record that constituted an act to "execute upon a judgment".

Sales on execution are governed by Ch. 6.21 RCW, not RCW 7.60.260. In such sales, the property is sold by the sheriff at public auction. RCW 6.21.030, -.050, -.090. The Receiver's sale of property in this case was not an execution sale.

The FDIC's reliance on Ch. 6.32, Proceedings Supplemental to Execution, is misplaced. *Brief of Respondent*, pp. 30-34. That procedure allows a creditor to obtain information from a debtor and to obtain an order requiring the debtor or a third party to deliver that money or property to the sheriff. RCW 6.32.080. If property is delivered to the sheriff, the sheriff is required to execute on the property to liquidate it. RCW 6.32.085. But the FDIC did not choose this collection remedy, and no one executed on the real property in this case.

The Receiver did not execute on any property in this case and did not sell the property on execution. The sale is not exempt from taxation as a sale "upon execution of a judgment."

D. The State Timely Appealed the Sale Order That Granted the Receiver a Tax Exemption. The State Did Not Collaterally Attack the Receivership Order, Nor Does Collateral Estoppel Bar This Appeal.

The FDIC argues that the Receivership order, which entered *ex parte* and granted a tax exemption, is binding on the State. The FDIC also argues that because one sale order granted a tax exemption, the State could not challenge a separate sale order. These arguments fail because the State does not challenge the Receiver's authority to act, but rather, his right to a tax exemption. And, as each sale motion is independent of the other, each order can be challenged and appealed.

The FDIC concedes that the State was not given notice of the Receiver's appointment, but seeks to enforce the terms of that Order against the State. The cases it cites that bar a collateral challenge relate to the validity and the authority of a receiver to proceed. *Respondent's Brief*, pp. 45-47. That authority is not challenged by the State.

The State does challenge the validity of a provision, the tax exemption, which applies only to the State. The Receiver did not serve the State with that request. Absent service of process, the tax exemption portion of the order is void.

The FDIC also argues that a prior order of sale from a completely different property precludes the State from being heard. A review of the

motion for that prior sale reveals that the motion did not request a tax exemption.

The Receiver filed the “Receiver’s Motion to Approve The Sale of Real Property (Lots 2, 10, 12, 14, 15 and 16, Granite Highlands Phase IV) Free and Clear of Liens and Pay Broker.” CP 56. The Receiver requested the following relief:

(1) approve the proposed sale of real property of the estate, Lots 2, 10, 12, 14, 15 and 16, Granite Highlands Phase IV, Washougal, Washington, free and clear of liens; and (2) and approve the Receiver’s payment of the listing broker’s commission. This motion is supported by the declaration of John P. Rader. *Receiver’s Motion*, pp. 1-2.

No request for a tax exemption is included in the Receiver’s “Relief Requested.”

The tax exemption issue is raised below, in the Statement of Facts, at ¶ 10, and in the Authority section. Nevertheless, when relief is granted beyond that prayed for, such relief is void. *See In re Marriage of Leslie*, 112 Wn.2d 612, 772 P.2d 1013 (1989).

Even if that provision is not void, it does not affect the sale of other property. A notice and hearing is required for each and every property sold in a receivership. RCW 7.60.260. If the provisions of prior sale orders were binding, there would be no reason to set a hearing for each successive sale. And this is why the Receiver sought a tax exemption

in each property sale, because the general provisions of the Order Appointing Receiver and the prior sales do not govern the terms of each subsequent sale.

Finally, even if prior orders were binding on subsequent sales, the issue of the tax exemption would still be subject to appeal. The State directly appealed a sale order. The alternative would be to file an appeal when the receivership was closed, at which point there would be no funds available to pay the State. The State opted for the prudent, fairer option, which was to appeal the sale order and reach an agreement with the Receiver to hold the tax funds on the sales until the issue was resolved by this Court.

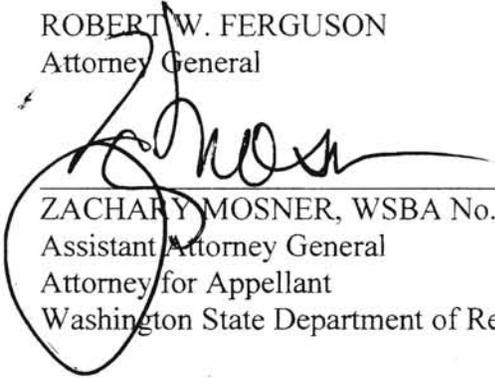
III. CONCLUSION

The Receiver is specifically identified by statute as a “taxable party.” RCW 82.45.020. To obtain a exemption, the Receiver bears the burden of proof to establish that the sales meet one of the specifically enumerated exemptions in that statute. The language “execution upon a judgment” refers to executions under Ch. 6.17 RCW. The language does not refer to any sale of real property subject to a judgment, which is the interpretation urged by the FDIC. The Receiver, as fiduciary to numerous

creditors, acting on behalf of the court, sold real estate. That sale was not an "execution" and the Receiver owes tax on that sale.

RESPECTFULLY SUBMITTED this 9th day of September, 2014.

ROBERT W. FERGUSON
Attorney General

A handwritten signature in black ink, appearing to read "Zachary Mosner", is written over a horizontal line. The signature is fluid and cursive, with a large loop at the beginning and a long tail extending to the right.

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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:

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

DATED this 12th day of September, 2014, at Seattle, WA.


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Legal Assistant

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