

WSR 22-01-220

PROPOSED RULES

DEPARTMENT OF REVENUE

[Filed December 22, 2021, 10:13 a.m.]

Original Notice.

Preproposal statement of inquiry was filed as WSR 21-19-077.

Title of Rule and Other Identifying Information: WAC 458-61A-214
Nominee.

Hearing Location(s): On Tuesday, January 25, 2022, at 10:00 a.m., at Conference Room 114, 6400 Linderson Way S.W., Tumwater, WA, and virtual attendance option. Contact Keith Dacus at KeithD@dor.wa.gov for login/dial-in information.

Date of Intended Adoption: February 4, 2022.

Submit Written Comments to: Brenton M. Madison, P.O. Box 47453, Olympia, WA 98504-7453, email BrentonM@dor.wa.gov, fax 360-534-1606, by Monday, January 31, 2022.

Assistance for Persons with Disabilities: Contact Julie King or Renee Cosare, phone 360-704-5733 or 360-704-5734, TTY 800-833-6384, by Thursday, January 6, 2022.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: The department plans to amend WAC 458-61A-214. WAC 458-61A-214 describes the application of the real estate excise tax in transfers involving a nominee. The proposed amendments are intended to resolve existing conflict within the rule, specifically by replacing the example in WAC 458-61A-214 (5)(b) with a new one. Presently, the example in subsection (5)(b) of the rule conflicts with the nominee exclusion requirements described in subsection (3) of the rule. The department is also proposing several other amendments to the rule in order to improve the rule's clarity and usefulness and in response to comments received by external stakeholders at the October 19, 2021, public meeting, and shortly thereafter.

Reasons Supporting Proposal: Clarifies the department's policy for transfers of real property that involve a nominee for purposes of the real estate excise tax.

Statutory Authority for Adoption: RCW 82.04.060(2) and 82.45.150.

Statute Being Implemented: RCW 82.45.010.

Rule is not necessitated by federal law, federal or state court decision.

Name of Proponent: Department of revenue, governmental.

Name of Agency Personnel Responsible for Drafting: Brenton M. Madison, 6400 Linderson Way S.W., Tumwater, WA, 360-534-1583; Implementation and Enforcement: John Ryser, 6400 Linderson Way S.W., Tumwater, WA, 360-534-1605.

A school district fiscal impact statement is not required under RCW 28A.305.135.

A cost-benefit analysis is not required under RCW 34.05.328. This rule is not a significant legislative rule as defined by RCW 34.05.328.

The proposed rule does not impose more-than-minor costs on businesses. Following is a summary of the agency's analysis showing how costs were calculated. The proposed rule amendments do not impose more than a minor cost on businesses as they do not impose any new fees, filing requirements, or recordkeeping guidelines that have not already been established by statute or by the department of revenue in the administration of real estate excise tax.

December 22, 2021

OTS-3252.3

AMENDATORY SECTION (Amending WSR 05-23-093, filed 11/16/05, effective 12/17/05)

WAC 458-61A-214 Nominee. (1) **Introduction.** This rule describes the application of the real estate excise tax in transfers involving a nominee. A "nominee" is a person who acts as an agent on behalf of another person in the purchase of real property.

(a) This rule includes examples that identify a set of facts and then state a conclusion. These examples are only a general guide. The department of revenue (department) will evaluate each case on its particular facts and circumstances.

(b) In addition to this rule, readers may want to refer to WAC 458-61A-213 IRS "tax deferred" exchange.

(2) **Initial acquisition.** The initial acquisition of property by a nominee on behalf of a third-party purchaser (third party) is subject to the real estate excise tax.

(3) **Subsequent transfer.** The ~~((later))~~ subsequent transfer of the property by the nominee to the third-party purchaser is subject to real estate excise tax, unless ~~((each))~~ all of the following requirements ~~((is))~~ are met indicating the transaction is not a sale under RCW 82.45.010 (nominee exclusion):

(a) The proper tax was paid on the initial purchase of the property by the nominee;

(b) The funds used by the nominee to acquire the property were provided by the third party;

(c) The agreement between the nominee and the third party ~~((legally))~~ existed at the time of the initial ~~((transaction))~~ acquisition of the real property by the nominee;

(d) In cases where the third party is a corporation, partnership, association, trust or other entity, the third party legally existed at the time of the initial acquisition of the real property by the nominee; and

~~((d))~~ (e) (i) The subsequent transfer from the nominee to the third party is not for a greater consideration than that of the initial acquisition and the nominee does not receive any consideration in exchange for acting as an agent of the third party; or

(ii) In the case where the nominee is a licensed contractor and the subsequent transfer to the third party ~~((customer))~~ reflects the completed construction contract, the retail sales tax is collected on the construction contract and remitted to the department. See also WAC 458-61A-104 Assignments.

~~((For example, Sara finds a home to buy. However, she is in the military and has learned she is going to be called to duty out of the country. She gives her money for the home purchase to Tom, who finalizes the purchase and obtains the mortgage in his name. Sara pays the down payment, closing costs, and makes all the payments on the mortgage. When Sara returns from duty, Tom will transfer the home back to her, and she will refinance the mortgage into her own name. Tom's~~

transfer to Sara is exempt from real estate excise tax, as Tom was acting as her nominee in the purchase of the home and all funds associated with the purchase of the home have come from Sara.)

(4) **Proof of payment.** If the nominee is a licensed contractor transferring to the ~~((third-party principal))~~ third party at the completion of a construction contract, proof of the payment to the department of retail sales tax on the construction contract must be attached to the affidavit.

~~((For example,))~~ **Example 1.** Bill contracted with ~~((Phil's))~~ ABC Construction (ABC) to build a home for him on ~~((a lot Phil))~~ an unimproved parcel of real property ABC will acquire. ~~((Phil buys a lot))~~ ABC purchases the parcel of real property from Kevin, an unrelated individual, using funds provided entirely by Bill. Real estate excise tax is paid on the sale from Kevin to ~~((Phil. Phil's Construction))~~ ABC. ABC builds the home and collects retail sales tax from Bill on the total construction contract, which is then remitted to the department ~~((of revenue. Phil's Construction)).~~ ABC files a real estate excise tax affidavit with the county, together with proof that retail sales tax has been paid. Bill pays the full price for the new home and the parcel of land it was built upon. The transfer of ~~((the lot and completed home from Phil's Construction))~~ real property, including the home and the parcel of land it was built upon, from ABC to Bill is exempt from real estate excise tax, as ABC acted as a nominee on behalf of Bill.

(5) **Documentation.** ~~((The))~~ Parties to a nominee arrangement must provide documentation that they have met all the requirements necessary to claim ~~((this exemption))~~ the nominee exclusion. Acceptable documentation includes a notarized statement, dated on or before the date of the initial purchase, that the nominee acquired the property on behalf of the third party, or other documentation clearly demonstrating the requirements of subsection (3) of this section have been satisfied. Such documentation may include, but is not limited to, financial documentation evidencing the nominee/third-party relationship existed from the time of the original transfer, and confirming the source of the funds used to purchase the property.

~~((Examples-~~

~~(a) Tom is on title to property. Tom wants to transfer the property to Angie and claim the nominee exemption, but they do not have a notarized statement. In lieu of that statement, Angie presents documentation that she provided the funds for the down payment and all closing costs for the initial purchase of the property. Angie also presents documentation that she provided the funds on the first year's payments on the debt after the initial purchase and provided funds for the last year's payments on the debt. This is acceptable documentation that the requirements of subsection (3) of this section have been satisfied.~~

~~(b) Dan wants to buy a house and executes an earnest money agreement, contingent on financing. When he applies for a mortgage he is turned down because of insufficient credit. Dan's Uncle Bob agrees to purchase the house in his name and loans Dan the down payment of \$10,000. Dan signs a promissory note agreeing to repay Uncle Bob. Dan makes all the mortgage payments on the property. After two years, Dan has sufficient credit to refinance the debt in his own name. Uncle Bob quitclaims title to Dan.)~~ **Example 2.** Diana finds a home to buy in Tacoma. However, Diana, a member of the military, is called to active duty outside of the country. Before deploying, Diana provides the funds necessary to purchase the home, including the down payment, ear-

nest money, and closing costs, to a friend, Brent, who agrees to act as a nominee on behalf of Diana. Brent finalizes the purchase of the home and takes title in his name. REET is paid on this initial acquisition of the real property. When Diana returns from overseas, Brent transfers the home to Diana. Diana does not provide Brent any consideration for the services provided. This transfer meets the nominee ((exemption)) exclusion requirements because:

((i)) • Real estate excise tax was paid on the initial transaction (acquisition of the real property by Brent, nominee);

((ii) The signed earnest money agreement shows Dan's initial intent to purchase the property in his name;

(iii) Dan has made all the payments on the debt; and

(iv) The signed promissory note is sufficient evidence Uncle Bob did not intend to have a financial interest in the property.) • The funds used by Brent, nominee, to acquire the real property were provided entirely by Diana, third party;

• The agreement between Brent, nominee, and Diana, third party, existed at the time of the initial acquisition of the real property by Brent; and

• The subsequent transfer of the real property from Brent to Diana was not for a greater consideration than that of the initial acquisition.

(6) **Prior affidavit.** The real estate excise tax affidavit reflecting the claim ((for tax exemption)) that the transfer is excluded from the definition of a sale of real property must show the prior real estate excise tax affidavit ((and number)) for the nominee's initial acquisition, including the real estate excise tax affidavit receipt and date of the tax payment.

[Statutory Authority: RCW 82.32.300, 82.01.060(2), and 82.45.150. WSR 05-23-093, § 458-61A-214, filed 11/16/05, effective 12/17/05.]