



PREPROPOSAL STATEMENT OF INQUIRY

CR-101 (October 2017) (Implements RCW 34.05.310)

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FILED

DATE: September 28, 2023

TIME: 3:30 PM

WSR 23-20-060

Agency: Department of Revenue

Subject of possible rule making: WAC 458-61A-201 Real Estate Excise Tax – Gifts.

Statutes authorizing the agency to adopt rules on this subject: RCW 82.01.060(2), RCW 82.32.300, RCW 82.45.150, and RCW 82.45.010.

Reasons why rules on this subject may be needed and what they might accomplish: RCW 82.45.010(3)(a) exempts gifts from the Real Estate Excise Tax (REET). The purpose of this rulemaking effort is to further clarify this existing gift exemption rule by also expanding upon situations where an interest in the property is granted while there is debt remaining on the property.

Identify other federal and state agencies that regulate this subject and the process coordinating the rule with these agencies:

Process for developing new rule (check all that apply):

- Negotiated rule making
- Pilot rule making
- Agency study

Other (describe) Parties interested in this rule-making may contact the individual listed below. The public may also participate by providing written comments throughout this rule-making or giving oral testimony at the public meeting or hearing.

Interested parties can participate in the decision to adopt the new rule and formulation of the proposed rule before publication by contacting:


	(If necessary)
Name: Darius Massoudi	Name:
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Other:	Other:

Additional comments: The Department plans to share a preliminary rule draft before the public meeting. Written comments may be submitted by mail or email and should be directed to Darius Massoudi using one of the contact methods above. Written and oral comments will be accepted at the Public Meeting.

Date: October 25, 2023

Time: 10:00 am

Public Meeting Location: This meeting will be conducted over the internet/telephone. Contact Cathy Holder at CathyH@dor.wa.gov for dial in/login information.

Date: September 28, 2023	Signature: 
Name: Atif Aziz	
Title: Rules Coordinator	

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

WAC 458-61A-201 Gifts. (1) **Introduction.** (~~(Generally, a gift of real property is not a sale, and is not subject to)~~) In certain situations, a transfer of real property may qualify as a gift, which is exempt from the real estate excise tax.

(a) A gift of real property is a transfer for which there is no consideration given in return for granting an interest in the property. Consideration not only includes money, but anything of value in return for the sale, such as the grantee assuming liens, mortgages, contract indebtedness, or any other encumbrances that are either assumed to secure the purchase price, or remaining unpaid on the property at the time of sale. See WAC 458-61A-102.

(b) If consideration is given in return for the interest granted, then the transfer is not a gift, but a sale(~~, and it is subject to the real estate excise tax to the extent of the consideration received~~).

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

(3) Consideration.

(a) See WAC 458-61A-102 for the definition of "consideration." Consideration may (~~also~~) include, but is not limited to:

~~((a))~~ (i) Monetary payments from the grantee to the grantor;
~~((b))~~

(ii) Monetary payments from the grantee toward underlying debt (such as a mortgage) on the property that was transferred, whether the payments are made toward existing, assumed, or refinanced debt(~~,~~

~~(3) Assumption of debt.~~ If the grantee agrees to assume payment of the grantor's debt on the property in return for the transfer, there is consideration, and the transfer is not exempt from tax. Real estate excise tax is due on the amount of debt assumed, in addition to any other form of payment made by the grantee to the grantor in return for the transfer. However,);

(iii) The grantee refinancing underlying debt on the property to remove the grantor's obligations for this debt; and

(iv) Any debt remaining on the property that was transferred, regardless of whether it has been legally assumed by the individual grantee or grantees. RCW 82.45.030(3) and WAC 458-61A-103 Transfers involving an underlying debt.

(b) Equity in the property can be gifted. However, in situations where the assumed debt exceeds the true and fair value of the property as calculated by WAC 458-61A-101(4), no gift of equity has occurred because there is no equity.

(4) **Rebuttable presumptions regarding (~~refinancing transactions~~) debt on the property.**

(a) There is a rebuttable presumption that the transfer is a sale and not a gift, if the real property loan, unpaid on the property at the time of sale, contains a due-on-sale clause that permits the lender to declare due and payable all sums secured by the lender's security instrument if all or any part of the property, or an interest therein, securing the real property loan is sold or transferred without the lender's prior consent.

This presumption may be overcome if federal or state law prohibits the lender from exercising the due-on-sale clause, and the property is not refinanced in the name of the grantee. (See 12 U.S.C. § 1701j-3(d) (2020) or similar laws that may be in effect at the time of transfer).

~~(b) There is a rebuttable presumption that the transfer is a sale and not a gift if the grantee ((is involved in a)) refinances ((of)) debt on the property ((within six months of the time of the transfer.~~

~~(b) There is a rebuttable presumption that the transfer is a gift and not a sale if the grantee is involved in a refinances of debt on the property more than six months from the time of the transfer)) to remove the grantor as a debtor.~~

~~(5) **Documentation.**~~

~~(a) A completed real estate excise tax affidavit is required for transfers by gift. A supplemental statement approved by the department must be completed and attached to the affidavit.~~

~~(b) The supplemental statement will attest to the existence or absence of underlying debt on the property, whether the grantee has or will in the future make any payments on the debt, whether the debt contains a due-on-sale clause, and whether a refinance of debt has occurred or is planned to occur.~~

~~(c) If the debt contains a due-on-sale clause, the supplemental statement must also attest to the basis for why the lender may not legally exercise the due-on-sale clause.~~

~~(d) The statement must be signed by both the grantor and the grantee.~~

~~((b)) (e) The grantor must retain financial records providing proof that grantor is entitled to this exemption in case of audit by the department. Failure to provide records upon request will result in subsequent denial of the exemption.~~

~~(6) **Examples - No debt.**~~

~~(a) ((**Overview.** The following examples, while not exhaustive, illustrate some of the circumstances in which a grant of an interest in real property may qualify for this exemption. These examples should be used only as a general guide. The taxability of each transaction must be determined after a review of all the facts and circumstances.~~

~~(b) **Examples - No debt.**~~

~~(i)) **Example 1**~~

~~**Facts:** John conveys his residence valued at \$200,000 to Sara. ((John)) John's name comes off ((of)) the title. There is no underlying debt on the property, and Sara gives John no consideration for the transfer.~~

~~**Conclusion:** Because there is no consideration for the transfer the conveyance from John to Sara qualifies for the gift exemption from real estate excise tax.~~

~~((ii)) (b) **Example 2**~~

~~**Facts:** Keith and Jean, as joint owners, convey their residence valued at \$200,000 to Jean as her sole property. There is no underlying debt on the property. In exchange for Keith's one-half interest in the property, Jean gives Keith \$10,000.~~

~~**Conclusion:** Keith has made a gift of \$90,000 in equity, and received consideration of \$10,000. Because the total consideration given by Jean to Keith is \$10,000, real estate excise tax is due on the \$10,000.~~

~~((e)) (7) **Example(s) - Existing debt with enforceable due-on-sale clause.**~~

~~((i))~~ **Example 3**

Facts: Josh conveys his residence valued at \$200,000 to Samantha. Josh has \$25,000 in equity and an underlying mortgage debt of \$175,000. ~~((Josh continues to make the mortgage payments out of his own funds, and Samantha does not contribute any payments toward the debt. Since Josh continues to make the payments, there is no consideration from Samantha to Josh, and the transfer qualifies for exemption as a gift.~~

~~(ii) Josh conveys the residence to Samantha, and after the transfer, Samantha begins to make payments on the debt. Josh does not contribute to the payments on the debt after the title is transferred. Josh has made a gift of his \$25,000 equity, but real estate excise tax is due on the \$175,000 debt that Samantha is now paying.~~

~~(iii) Dan conveys his residence valued at \$200,000 to himself and Jill as tenants in common. Dan has \$25,000 in equity and an underlying debt of \$175,000. Dan and Jill open a new joint bank account, to which they both contribute funds equally. Mortgage payments are made from their joint account. There is a rebuttable presumption that real estate excise tax is due on the conveyance because Jill appears to be contributing toward payments on the debt. In that case, real estate excise tax is due on the consideration given by Jill, (50% of the underlying debt) based upon her contributions to the joint account. The tax will be calculated on a one-half interest in the existing debt (\$87,500).~~

~~(iv) Dan conveys the residence to himself and Jill. Dan has \$25,000 in equity, and a mortgage of \$175,000. Dan and Jill open a new joint bank account, which is used to make the mortgage payments, but Dan contributes 100% of the funds to the account. The conveyance is exempt from real estate excise tax, because Jill has not given any consideration in exchange for the transfer.~~

~~(v)) Josh's mortgage contains a due-on-sale clause that applies to his transfer to Samantha. Josh has not received any written confirmation from the lender that the lender will not exercise the due-on-sale clause in effect at that time, and there are no federal or state laws prohibiting the lender from exercising the due-on-sale clause in effect at that time.~~

Conclusion: If no other consideration is given, Josh has made a gift of his \$25,000 equity. Because the lender may legally accelerate the \$175,000 debt and make it payable in full, real estate excise tax is due on the \$175,000 debt.

(8) Examples - Existing debt with unenforceable due-on-sale clause.

(a) Example 4

Facts: Bob conveys his residence valued at \$200,000 to himself and Jane as tenants in common. Bob has \$25,000 equity, and an underlying debt of \$175,000. A state law in effect at that time prohibits Bob's lender from exercising the mortgage's due-on-sale clause. Bob and Jane have contributed varying amounts to an existing joint bank account for many years prior to the conveyance. Mortgage payments have been made from the joint account both before and after the transfer. Jane neither separately compensates Bob through money or anything of value in exchange for this transfer, nor compensates Bob in the future in exchange for this transfer.

Conclusion: The conveyance is exempt from real estate excise tax ~~((7))~~ because Jane's contributions toward the joint account from which the payments are made is not deemed consideration in exchange for the transfer from Bob ~~((because she))~~. Because Jane made contri-

butions for many years before the transfer, as well as after the transfer, there is no evidence that her payments were consideration for the transfer(+) , and the conveyance from Bob to Jane qualifies for the gift exemption from real estate excise tax.

~~((vi))~~ (b) **Example 5**

Facts: Bill and Melanie, as joint owners, convey their residence valued at \$200,000 to Melanie, as her sole property. There is ~~((an underlying debt))~~ a mortgage, in Bill's name only, of \$170,000 with a due-on-sale clause. However, there is a state law in effect at that time that prohibits Bill's lender from exercising his mortgage's due-on-sale clause. Prior to the transfer, both Bill and Melanie had contributed to the monthly payments on the debt. After the transfer, Melanie begins to make 100% of the payments, with Bill contributing nothing toward the debt.

Conclusion: Bill's equity (\$15,000) is a gift, but Melanie's taking over the payments on the mortgage is consideration received by Bill. ~~((Real estate excise tax is due on \$85,000 ()))~~ Because the total consideration given from Melanie to Bill in exchange for the conveyance is \$85,000 (which is Bill's fractional interest in the property multiplied by the outstanding debt at the time of transfer: 50% x \$170,000), real estate excise tax is due on the \$85,000.

~~((vii))~~ Casey and Erin, as joint owners, convey their residence to Erin. There is an underlying debt of \$170,000 in both their names. For the three years prior to the transfer, Erin made 100% of the payments on the debt. After the transfer, Erin continues to make 100% of the payments. The transfer is exempt from the real estate excise tax because Erin made all the payments on the property before the transfer as well as after the transfer; there is no evidence that her payments were consideration for the transfer.

~~(d))~~ (9) **Examples - Refinanced debt.**

~~((i))~~ Bob conveys his residence to himself and Jane. Within one month of the transfer, Bob and Jane refinance the underlying debt of \$175,000 in both their names, but Bob continues to make the payments on the debt. Jane does not contribute any funds toward the payments. The conveyance qualifies for the gift exemption because Jane gave no consideration for the transfer.

~~(ii))~~ (a) **Example 6**

Facts: Casey and Erin, as joint owners, convey their residence valued at \$200,000 to Erin as sole owner. There is an underlying mortgage on the property of \$170,000. Prior to the transfer, Casey and Erin had both contributed to the monthly mortgage payments. Within one month of the transfer, Erin refinances the mortgage in her name only and begins to make payments from her separate account.

Conclusion: In this case, there is a rebuttable presumption that this is a disguised sale, since Erin, through her refinance, has assumed sole responsibility for the underlying debt. ~~((Real estate excise tax is due on))~~ Because the total consideration given from Erin to Casey in exchange from the conveyance is \$85,000 (Casey's fractional interest in the property multiplied by the total debt on the property: 50% x \$170,000), real estate excise tax is due on the \$85,000.

~~((iii))~~ Kyle conveys his residence valued at \$200,000 to himself and Amy as tenants in common. Kyle has \$25,000 in equity, and an underlying debt of \$175,000. Within one month of the transfer, Kyle and Amy refinance the mortgage in both their names, and open a joint bank account to which they contribute funds equally. Payments on the new mortgage are made from the joint account. There is a rebuttable presumption that Amy's contributions to the joint account are considera-

tion for the transfer, since Amy appears to have agreed to pay half of the monthly debt payment, and real estate excise tax may be due. The measure of the tax is one-half of the underlying debt to which Amy is contributing (\$87,500).

(iv) Kyle conveys his residence to himself and Amy. Kyle continues to make the payments on the underlying debt of \$175,000. Nine months after the transfer, Kyle and Amy refinance the property in both of their names. After the refinance, Kyle and Amy contribute equally to a new joint bank account from which the mortgage payments are now made. Amy's contribution to the mortgage nine months after the transfer is not deemed consideration in exchange for the transfer from Kyle to the two of them as tenants in common. The conveyance will qualify for the gift exemption.

(e-)) (b) **Example 7**

Facts: Hengameh, as sole owner, conveys her residence, valued at \$500,000, to herself and her girlfriend Parisa, as joint owners. There is an underlying mortgage on the property of \$200,000.

Conclusion: Because of a due-on-sale clause on the mortgage that the lender could exercise at that time, Hengameh and Parisa refinance the mortgage, for the same remaining principal amount of \$200,000, to add both of their names onto this underlying debt. Because Parisa now is also responsible for the mortgage, there has been a transfer of real estate for consideration subject to the real estate excise tax. The measure of the tax is \$100,000, which is one-half of the underlying debt relieved.

(10) **Example - Refinanced debt((-)) with "Cosigner."**

Example 8

Facts: Charlie and Sadie, a married couple, own a residence valued at \$200,000 with an underlying mortgage of \$170,000. Sadie receives the property when they divorce. After a few months, Sadie tries to refinance, but her credit is insufficient to obtain a loan in her name only. Aunt Grace offers to assist her by becoming a "co-borrower" on the loan. As a result, the bank requires that Aunt Grace be added to the title. Following the refinance, Sadie makes 100% of the payments on the new debt, and Aunt Grace gives no consideration for being added to the title.

Conclusion: The conveyance adding Aunt Grace to the title is exempt from real estate excise tax. Although the quitclaim deed from Sadie to Aunt Grace may be phrased as a gift, the transfer is exempt as Aunt Grace's presence on the title acts as an exempt security interest to protect Aunt Grace in the event Sadie defaults on her mortgage. See WAC 458-61A-215 for this exemption.

((+f)) (11) **Example - Rental or commercial property.**

Example 9

Facts: Sue owns a rental property valued at \$200,000, with an underlying mortgage of \$175,000. Sue conveys the property to herself and Zack as tenants in common. Prior to the transfer, the rental income went to a bank account in Sue's name only, and she made the mortgage payments from that account. After the transfer, Zack's name is added to the bank account. The rental income is now deposited in the joint account, and the mortgage payments are made from that account.

Conclusion: There is a rebuttable presumption that this is a taxable transaction, because this appears to be a business arrangement. As a business venture, one-half of the rental income now belongs to Zack, and is being contributed toward payment of the mortgage. The re-

Under no circumstances is this proposed rule to be used to determine tax liability and/or exemptions.

al estate excise tax will be due on the one-half interest of the debt contributed by Zack (\$87,500).

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