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BEFORE THE TAX APPEAL BOARD OF THE STATE OF DELAWARE

JAMES H. SCOTT,	)	
	)	
Petitioner,	)	
	)	
v.	)	Docket No. 569
	)	
DIRECTOR OF REVENUE,	)	
	)	
Respondent.	)	

Before: Maurice A. Hartnett, III, Esquire, Cyric W. Cain, Jr.,  
Joseph J. Longobardi, Jr., Esquire, Rhett McGriff,  
Nettie C. Reilly, Board Members.

Alfred F. Isaacs, Esquire, for Petitioner.

Stephen T. Spiller, Esquire, Special Counsel for Respondent.

DECISION

Maurice A. Hartnett, III: On July 6, 1971, Petitioner purchased from William Fell a house located in Ardencroft, New Castle County, Delaware. The land, upon which the house is erected, is subject to a 99-year lease dated November 1, 1966.

The lease was transferred to Petitioner by a document dated July 6, 1973, and recorded in New Castle County Deed Record F, Volume 85, Page 150.

The document in question, on its face, purports to be an assignment or conveyance of a leasehold interest in a lease granted by Ardencroft Association to petitioners' predecessors.

Petitioner, at the time of recording of the transfer document, paid, under protest, the transferee's share (1/2) of the Delaware Realty

Transfer Tax. The tax at that time was 1% of the consideration which was \$26,000. Petitioner, therefore, paid \$130 of the \$260 total Delaware Realty Transfer Tax.

Petitioner subsequently petitioned for a refund of the \$130 which he paid, maintaining that the transfer was in fact an assignment of a lease which is exempt from the Delaware Realty Transfer Tax.

The Delaware Realty Transfer Tax (Chapter 54, Title 30, Delaware Code) was originally enacted on June 9, 1965, by 55 Delaware Laws, Chapter 109.

As originally enacted, Chapter 54, Title 30, Delaware Code, apparently did not have any provision which would exclude the transfer tax on leasehold interests. The pertinent portions of 50 Delaware Code §5401 as originally enacted defined document as: "any deed, instrument or writing whereby any real estate within this state or any interest therein shall be quitclaimed, granted, bargained, sold, or otherwise conveyed to the grantee, but does not include wills, mortgages, ...". Leases were not mentioned as an exception.

In 1966 the General Assembly amended the definition of a document which is subject to the tax. §5401(a), Title 30, Delaware Code, as amended in 1966 (55 Delaware Laws, Chapter 413) defined document as follows: "Document means any deed, instrument, or writing whereby any real estate within this State, or any interest therein, shall be quitclaimed, granted, bargained, sold, or otherwise conveyed to the grantee, but shall not include the following: (1) any will; (2) any lease; (3) any mortgage; ...".

In 1973 the General Assembly again amended the Realty Transfer Tax Act by enacting 59 Laws of Delaware 153. Under that Act

the General Assembly interalia added a new definition of document to §5401, Title 30, Delaware Code, to read: "Section 4. Amend Section 5401, Chapter 54, Title 30, Delaware Code, by adding thereto new subsections (d), (e) and (f) to read as follows: "(d) The term 'document' defined in subsection (a) above shall include the following: (1) any writing purporting to transfer a title interest or possessory interest for a term of more than 5 years in a condominium unit or any unit properties subject to the Unit Property Act; (2) any writing purporting to transfer a title interest or possessory interest under a lease for a term of more than 5 years; (3) any writing purporting to transfer a title interest or possessory interest of any lessee or other person in possession of real estate owned by the State or other political subdivision thereof; (4) the exercise of any right or option to renew or extend a title or possessory interest in an existing lease where such extension or renewal is for a term of more than five years. (e) In determining the term of a lease under subsection (d) above, it shall be presumed for the purpose of computing the lease term than any rights or options to renew or extend will be exercised. (f) For purposes of subsection (c), in the case of a document described in subsection (d) under which the consideration is based in whole or in part on a percentage of the income or receipts to be received in the future, actual consideration shall include the amounts actually received under such percentage of income or receipts provision; provided, however, and notwithstanding any other provisions of this chapter, the tax imposed by this chapter shall be due and payable to the Division of Revenue within 30 days after the date such amounts become due and payable under the agreement."

In view of the legislative history of Chapter 54, Title 30, Delaware Code, and the amendments thereto, it seems clear that in 1966 the General Assembly, for reasons best known to it, exempted leases from the Delaware Realty Transfer Tax, a hiatus which was corrected in 1973.

At the time of the transfer to Petitioner, therefore, leases were exempt from the Transfer Tax.

Petitioner is therefore entitled to receive a refund of the \$130 he has paid.

In denying the application for refund the Director of Revenue relied on an opinion of the Attorney General dated March 11, 1966.

Opinions of the Attorney General are not binding on this Board and we do not agree with the reasoning of the Attorney General as set forth in his opinion.

SO ORDERED.

*James H. Scott*

*Shelley McGriff*

*Nathaniel C. Keilly*

Date 3/12/75

SYNOPSIS

DOCKET NO. 569

TAX SEGMENT: REALTY TRANSFER TAX

ISSUE: The issue in question is whether the transfer on a leasehold interest entered into in 1966 is exempt from the Realty Transfer Tax.

TAB DECISION: The Tax Appeal Board held that the statute as originally enacted in 1965 did not make provisions for the application of the tax on leases. Therefore an assignment or conveyance on leasehold interests made prior to the statute amendments in July, 1973 are exempt from the Realty Transfer Tax.

DECISION: For Petitioner

DECISION DATE: March 12, 1975