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BEFORE THE TAX APPEAL BOARD  
OF THE STATE OF DELAWARE

ROBERT C. BARRY and VIVIAN	)	
A. BARRY, his wife, and	)	
MICHAEL CREUS,	)	
	)	
Petitioners,	)	
	)	
v.	)	Docket No. 634
	)	
DIRECTOR OF REVENUE,	)	
	)	
Respondent.	)	

Before: Joseph S. Yucht, Esquire, Chairman; James C. Eberly, Sr., Esquire, Vice-Chairman; Cyric W. Cain, Jr., Harry B. Roberts, Jr., and Nettie C. Reilly, Members.

John E. Messick, Esquire for Petitioners.

John P. Fedele, Esquire, Assistant Attorney General for Respondent.

DECISION AND ORDER

James C. Eberly, Sr., Esquire, Vice-Chairman: The facts presented to the Tax Appeal Board are admitted by the parties to be as follows:

1. The Petitioners are assignees of an agreement of lease between Rehoboth-By-The-Sea Realty Company and Gerson Nordlinger, Jr. (by way of an intervening assignment to Michael Creus), which assignment of lease was for the premises known as Lot No. 19, Block 28, Chesapeake Street, Rehoboth Beach, Sussex County, Delaware.

2. The Petitioners paid the amount of Fifty-Five Thousand Dollars (\$55,000.00) for this assignment of lease, which lease is for a period of forty-six (46) years.

The issue before the Tax Appeal Board was raised by a determination by the Director of Revenue that the transaction above recited was subject to the provisions of 30 Del. C., Section 5401, et sec, and was therefore taxable as a realty transfer. The issue squarely put before the Tax Appeal Board is whether this assignment of a lease to the Petitioners is a taxable event under the statute.

The Director of Revenue and the Petitioners agree that the lease assignment was a valid one and that the ownership of the real estate in question is now, and was prior to the transaction in question, vested in the Rehoboth-By-the-Sea Realty Company.

The Director of Revenue's position is that the residence located on the real estate is real estate in and of itself and that the Petitioners have purchased the residence and thus have purchased real estate, and the logical conclusion is that this raises the application of the Realty Transfer Tax.

The Petitioners' position is that the residence is affixed to the realty and that their interest is only a leasehold, the owner of the realty being the owner of the residence.

Both parties agree that the Realty Transfer Tax provisions have been amended by the Legislature, which amendment was effective at the time of this transaction. 30 Del.C. §5401, as effective at the time of the above referred to transaction was set out, in pertinent part, as follows:

"§5401 - Definitions

As used in this chapter, except where the context clearly indicated a different meaning:

(1) "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:

xxx

b. Any lease other than those described in subdivision (4) below;" (emphasis supplied)

The very definition of document excludes any lease from its terms. There are however, exceptions to the exception included in subdivision (4). Subdivision (4) states:

"(4) The term "document" defined in subdivision

(1) above shall include the following:

a. 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;

b. 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."

The Petitioners and Respondent both agree that the subject transaction is not involved in a condominium unit, nor is it owned by the State or other political subdivision thereof. The only apparent disagreement between the Petitioners and the Respondent is whether the residence may be viewed separately from the land for purposes of taxation. The generally accepted view of the law is that buildings are considered part of the realty. See in this regard 35 Am Jur 2d, Fixtures, §78. Along with this generally accepted view of the status of buildings as fixtures, it is also generally accepted that a fixture may be removed from realty and assume the status as personal property.

It should be noted that there has been no provision for taxation of the transfer of personalty argued before the Tax Appeal Board in this case.

We hold that the assignment of the lease received by the Petitioners falls without the scope of the Realty Transfer Tax inasmuch as the definitions specifically exempt leases from the application of the transfer tax.

IT IS SO ORDERED.

Joseph S. Yuck  
James C. Elroy Jr  
Eyrie W. Cain, Jr.  
Patricia C. Reilly  
Harry B. Roberts

Dated: Aug. 18, 1977

SYNOPSIS

DOCKET NO. 634

TAX SEGMENT: REALTY TRANSFER TAX

ISSUE: The question is whether the purchase of a residence located on real estate which is transferred by lease give rise to a taxable transaction for purposes of the realty transfer tax.

The position of the petitioner was that the residence is affixed to the realty and their interest is only a leasehold, the owner of the realty being the owner of the residence.

Should the residence be viewed separately from the land for the purposes of taxation. The generally accepted view of the law is that buildings are considered part of the realty. There is also an accepted view of the status of the buildings as fixtures. A fixture may be removed from realty and assume the status as personal property.

TAB DECISION: There is no provision for taxation of the transfer of personalty argued before the Tax Appeal Board.

The Board held the assignment of the lease received by the petitioners does not fall within the scope of the application of the transfer tax.

DECISION: For Petitioner

DECISION DATE: August 18, 1977