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TAX APPEAL BOARD OF THE STATE OF DELAWARE

OCEAN HARBOR ASSOCIATES Petitioner,)	
v.)	DOCKET NO. 851
DIRECTOR OF REVENUE, Respondent.)	
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Before: Joseph S. Yucht, Esquire, Chairman; John H. Cordrey, Esquire, Vice Chairman; Harry B. Roberts, David Eppes and Regina Dudziec, Members.

John A. Sergovic, Jr., Esquire, Tunnell & Raysor, Attorney for Petitioner.

Joseph Patrick Hurley, Jr., Esquire, Deputy Attorney General, Attorney for Respondent.

DECISION AND ORDER

John H. Cordrey, Esquire, Vice Chairman. The parties have stipulated to the facts of the case. They are contained in the stipulation which is attached hereto as "Exhibit A" and incorporated herein by reference.

The issue presented is whether the conveyance of unimproved real estate from various persons who owned the unimproved real estate (individually and jointly) to a partnership owned by these same persons is taxable under 30 Del.C. § 5402. That section provides for the imposition of a two percent transfer tax on the transfer of real estate located in the State of Delaware unless one of the exceptions found in 30 Del.C. § 5401(1)a.-r. apply.

Petitioners argue that the deed was merely a confirmatory deed to place upon the county land records the ownership of the real estate which was created by the partnership agreement, and therefore exempt pursuant to the rationale utilized in Baehr Brothers v. Commonwealth, Pa. Supr., 409 A.2d 326 (1979). This argument is without merit, for assuming the deed to be

merely confirmatory, the underlying transfer of real estate accomplished by the partnership agreement would, absent another exemption from the tax, be a taxable transaction if it or a confirmation of it were recorded as they are a "...deed, instrument or writing whereby any real estate..." within the State is conveyed.

Petitioners next argue that the transaction falls under the "safe harbor" found in 30 Del.C. § 5401 (7) c. That section is inapplicable to the present situation as it was not effective until January 1, 1987 and concerns only transactions which transfer beneficial interest in real estate through conveyances of intangible interests in partnerships. The instant conveyance was a transfer of legal and beneficial interest in real estate through a deed and the section therefore does not apply.

Petitioners contend that the transaction is exempt pursuant to 30 Del.C. § 5401(1)n which provides in pertinent part:

"Any conveyance to...a partnership, where the grantor and grantee owns...an interest in the partnership in the same proportion as his interest in, or ownership of, the real estate being conveyed..."

There is no question that the grantors owned real property which they conveyed to a partnership in which they owned an interest. Factually, the grantors of the real estate owned various parcels of property alone or with other grantors and combined these parcels into one property owned by the partnership. The grantors' ownership in the partnership was determined by attributing a value to the square footage of the land and, if appropriate, dividing that value among the co-owners. The determining legal question, therefore, is whether the grantors' interest in the partnership is in the same proportion as the grantors' interest in the real estate.

If there had been two parcels of land (Parcel 1 and Parcel 2) each owned by 60% by A and 40% by B which was conveyed to a partnership owned 60% by A and 40% by B there would be no transfer tax. See the reverse of this situation in Delaware Realty Transfer Tax Regulations 4.2(j)(1)(c), Example 1. In that example there is no question that the ownership in the real estate conveyed is the same proportion as A and B's interest in the partnership and the conveyance would be exempt from real estate transfer tax.

Respondent argues that as the grantors owned varying interest in the real estate parcels, they could not own the same proportional interest in the partnership. By way of example, Downes (one of the partners) owned 100% of tax parcel number 249, yet owned 65.47% of the partnership. Respondent argues that as the ownership interest in the parcel and the ownership interest in the partnership are not the same the transaction is taxable.

Respondent's view of the "real estate being conveyed" is too narrow. The real estate being conveyed in this particular deed is not only tax parcel 249, but all of the tax parcels that comprised the resulting property described in the metes and bounds description found in Exhibit 5 of the stipulation of facts. All of the owners of the parcels of real estate joined in one deed to convey the whole of the property to the partnership, and gave recitals of the derivation of the title of the parcels comprising the property in the deed. Thus it is the combination of these parcels into one property which is the "real estate being conveyed." The interest of the partners in the partnership is directly proportional to their interest in the real estate.

Of importance is the fact that no asset other than the real estate was conveyed or used in order to determine the interest in the partnership. For instance, had one partner contributed cash, one building supplies and one real estate to the partnership and the ownership were then determined based upon the economic worth of the contributions, the

transfer of the real estate would be subject to the transfer tax.

Therefore, the Division of Revenue's Assessment is hereby reversed and abated.

IT IS SO ORDERED this 8th day of July, 1988.

John H. Cordray

Joseph S. Yucht

Regina C. Andjic

And CL

Wanda B. Polutsky