

PENNSYLVANIA AMENDS TRANSFER TAX REGULATIONS by Brad Dornish

In late December, the PA Department of Revenue issued changes to several regulations affecting the assessment of transfer taxes on the sale of real estate, many of which are directed at transactions by investors. The new regulations govern how the Department of revenue will interpret and enforce the existing transfer tax laws, and were immediately effective.

These regulations can be found at 61 PA Code Chapter 91, and are discussed with online examples at: [www.revenue.state.pa.us/revenue/lib/revenue/RTT 2008-01.pdf](http://www.revenue.state.pa.us/revenue/lib/revenue/RTT%2008-01.pdf).

The first change in the regulations, Section 91.132 affects transactions where the agreement of sale is assigned by the buyer to a third party assignee. The Department of Revenue will impose transfer tax on the seller based upon the total paid to the seller on assignment, if not reflected on the deed. While the regulation clearly identifies the tax the seller is responsible for, the regulation does not explain what tax the buyer / assignee and assignor in the middle of the transaction are responsible for. At least one major title insurer in PA, First American Title, has issued a directive to its agents and approved attorneys that those parties should be responsible for the tax on the rest of the assignment consideration not paid to the seller. That means if you sign an agreement of sale to buy for \$50,000.00, and assign that agreement for \$5,000.00, the transfer tax will be collected from the seller on any part of the \$55,000.00 total consideration paid to the seller, regardless of the price on the deed showing only \$50,000.00, and the buyer and assignor will be responsible for the tax on the rest of the \$55,000.00 total not paid to the seller.

This change is consistent with the underlying principle that transfer tax is due on the value of any transfer of interest, and the deed is only a mechanism for collection of the tax. It will, however, be confusing to see transfer stamps in amounts in excess of the amount which would be based on applying the tax rate to the price reflected on the deed. To show the correct taxable amount, affidavits of value should be attached to deeds being recorded on assignment transactions.

The next changes in the Department of Revenue Regulations involve transfers between principals and agents. Under Section 91.153, transfers from an agent to a principal, or transfers from a principal to an agent are transfer tax exempt if the transfers are without consideration, and the agent deals in the property for the exclusive benefit of the principal. The regulations make it clear that transactions by the agent to or to the agent from third parties are subject to tax as though made directly by the principal.

These regulations support the straw party transactions allowed elsewhere in the Revenue Regulations, but establish a rebuttable presumption that the transaction IS subject to tax if the deed does not mention that the transaction is for the benefit of the principal. We believe that the Straw Party Affidavits which we use in such circumstances will be sufficient to rebut the presumption and keep the straw party transaction transfer tax free.

Section 91.153 also confirms the present position of the Department of Revenue that Section 1031 Reverse or Starker Exchanges, where the Qualified Intermediary takes title to the replacement property while the Exchangor is waiting to sell the Relinquished property, ARE subject to transfer tax, both when the third party sells to the Qualified Intermediary, and when the Intermediary transfers to the Exchangor. This is contrary to the provisions for straw parties generally, but makes it clear that the Department of Revenue considers the Intermediary to be more than or different from other agents.

Section 91.154 of the regulations confirms that despite recent efforts to exempt transfers between entities and their owners, the Department will still enforce transfer tax on transfers between entities and their shareholders, partners and members, and transfers in consideration for which stock or ownership interests are issued.

The amendments also address transfers to and from trusts, and confirm the Department of Revenue's current position that most such transfers ARE taxable. Under Section 91.156 of the new regulations, transfers to trusts are taxable unless a direct transfer of the property from the Grantor/Settlor of the trust to ALL possible beneficiaries and remaindermen of the trust would be excluded from tax. Transfers from trusts to their beneficiaries are also taxable unless the transfers are for nominal or no consideration, and are from the trustee

to the beneficiaries in proportion to their beneficial interests, and in accordance with the terms of the trust document. Note that in order to claim a transfer tax exemption regarding a transfer to or from a trust, a copy of the trust agreement must be attached to the Statement of Value submitted to the recorder for the transaction.

Finally, the regulations also confirm that most sale leaseback transactions are fully taxable on the sale, AND on the lease if 30 years or more.