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State of South Carolina  
**Department of Revenue**  
301 Gervais Street, P. O. Box 125, Columbia, South Carolina 29214

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SC REVENUE RULING #95-08 (TAX)

**SUBJECT:** Incorporation of a Church under the South Carolina Nonprofit Act (Documentary Tax)

**EFFECTIVE DATE:** Applies to all periods open under the statute.

**SUPERSEDES:** All previous documents and any oral directives in conflict herewith.

**REFERENCES:** S. C. Code Ann. Section 12-21-380 (Supp. 1994)

**AUTHORITY:** S. C. Code Ann. Section 12-4-320 (Supp. 1994)  
SC Revenue Procedure #94-1

**SCOPE:** A Revenue Ruling is the Department of Revenue's **official advisory opinion** of how laws administered by the Department are to be applied to a specific issue or a specific set of facts, and is provided as guidance for all persons or a particular group. It is valid and remains in effect until superseded or modified by a change in the statute or regulations or a subsequent court decision, Revenue Ruling or Revenue Procedure.

Question:

Is the transfer of realty, as described in the facts, from the trustees of a church (or their successors) to the church upon its incorporation under the South Carolina Nonprofit Corporation Act subject to the State documentary tax under Code Section 12-21-380?

Conclusion:

The transfer of realty, as described in the facts, from the trustees of a church (or their successors) to the church upon its incorporation under the South Carolina Nonprofit Corporation Act is not subject to the State documentary tax under Code Section 12-21-380.

Facts:

In 1994 the General Assembly enacted the South Carolina Nonprofit Corporation Act.

Prior to the enactment of this legislation, it was not in the best interest of many churches to incorporate. Now, many churches are planning to incorporate.

The realty of a church is usually vested in the names of the trustees of the church or their successors. In the process of incorporating, title to the realty will be conveyed from the trustees to the newly formed nonprofit corporation. In some cases, the church will have a mortgage on the realty and the newly formed nonprofit corporation will take the realty subject to the mortgage or will assume the mortgage.

The corporation may or may not have members as defined in the South Carolina Nonprofit Corporation Act. In addition, the governing boards of these nonprofit corporations might have different structures or titles in different churches.

The question has arisen as to whether or not the transfer of realty from the trustees of the church (or their successors) to the church upon its incorporation is subject to the State documentary tax.

#### Discussion:

Code Section 12-21-380 imposes the State documentary tax and reads in part:

A deed, instrument, or writing whereby any lands, tenements, or other realty sold is granted, assigned, transferred, or otherwise conveyed to, or vested in, the purchaser or any other person by the purchaser's direction when the consideration or value of the interest or property conveyed exclusive of the value of any lien or encumbrance remaining on the interest or property at the time of sale exceeds one hundred dollars and does not exceed five hundred dollars must be taxed one dollar and thirty cents and for each additional five hundred dollars, or fractional part thereof, one dollar and thirty cents.

In United States v. Niagara Hudson Power Corporation, 53 F. Supp. 796 (1944), the U.S. District Court of New York, in reviewing a now rescinded federal documentary tax statute similar to South Carolina Code Section 12-21-380, held:... a mere transfer or change of legal title is not a taxable transaction under Schedule A-8 which, as it now stands, expressly confines taxable transactions to "realty sold."

In Berkeley Savings and Loan Association of Newark, N.J. v. United States, 301 F. Supp. 22 (1969), the court stated, with respect to the federal documentary tax statute, that:

... whether or not there is a sale depends, in the court's view, on whether or not the transfer of title was for consideration, and on the intention of the parties and the purpose for which the "purchasing" party desires the property. (Emphasis added.)

Based on the above, the documentary tax is only imposed when realty has been transferred for consideration. If property is transferred without the payment of consideration (e.g. money, property, intangibles), the documentary tax cannot be imposed. However, if the only consideration paid is the assumption of any outstanding liabilities remaining on the realty at the time of the transfer, the tax is not due.

Finally, we must determine if consideration has been given when realty is transferred into a corporation upon its formation.

Generally, when realty is transferred to a corporation the transfer is subject to the tax. See South Carolina Regulation 117-46 and 1967 Opinion of the Attorney General, No. 2215. However, there are circumstances where it has been held such transactions are not subject to the tax.

The court in United States v. Niagara Hudson Power Corporation, supra, again provides guidance. The court held:

In Cortland Special Co. v. Commissioner of Internal Revenue, 2 Cir., 60 F2d 937, it is said - "Reorganization, merger, and consolidation are words indicating corporate readjustments of existing interests. They all differ fundamentally from a sale where the vendor corporation parts with its interests for cash and receives nothing more." Page 939

In New York Central R. Co. v. Commissioner of Internal Revenue, 2 Cir., 29 F2d 247 certiorari denied Helvering v. New York Central R. Co., 296 U.S. 653, 56 S.Ct. 370, 80 L.Ed. 465, the court said - "The consolidated corporation does not succeed to the rights and liabilities \*\*\* as a purchaser but as a successor by operation of law." Page 249 of 79 F. 2d.

The court concluded that the change of title of real estate effected solely by a certificate of consolidation was not made for consideration and therefore not subject to the tax.

The transfer of realty from the trustees of the church (or their successors) to the church upon its incorporation is similar to a corporate reorganization.

Even though the realty is held in trust by the church trustees prior to incorporation, beneficial title to the realty is vested in the church. After the incorporation, the realty is still vested in the church. In essence, nothing has changed. There has merely been a change in form, or "reorganization", of the church. No sale or transfer for consideration has taken place. As such, the documentary tax does not apply.

SOUTH CAROLINA DEPARTMENT OF REVENUE

s/Burnet R. Maybank III  
Burnet R. Maybank, III, Director

Columbia, South Carolina  
June 6, 1995

For any questions concerning documentary taxes, contact John P. McCormack at (803) 737-4438 or Gary Heuer at (803) 737-4744.