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SC TECHNICAL ADVICE MEMORANDUM #89-8

TO: Mr. William F. Bray, Director
Office Service Division

FROM: Jerry B. Knight, Manager
Tax Policy and Procedures Department

DATE: February 22, 1989

SUBJECT: Realty Transferred to a Partnership
(Documentary Tax)

REFERENCE: S.C. Code Ann. Section 12-21-380 (Supp. 1987)

AUTHORITY: S.C. Code Ann. Section 12-3-170 (1976)
SC Revenue Procedure #87-3

SCOPE: A Technical Advice Memorandum is a temporary document issued to an individual within the Commission, upon request, and it applies only to the specific facts or circumstances related in the request. Technical Advice Memoranda have no precedential value and are not intended for general distribution.

Question:

Does the contribution of jointly owned realty to a partnership by the partners, not in return for an interest in the partnership, constitute "realty sold", thereby subject to the documentary tax, pursuant to Code Section 12-21-380?

Facts:

On March 8, 1988, A and B formed a partnership with each contributing an equal amount of cash, thereby receiving a fifty percent interest each in the partnership. On May 2, 1988, A and B contributed a tract of land to the partnership. The partners, prior to conveyance of the property, each owned one-half of the tract.

Discussion:

The issue is the taxability of the transfer, to a partnership, of realty jointly owned by both partners. Code Section 12-21-380 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 his direction when the consideration or value of the interest of property conveyed exclusive of the value of any lien or encumbrance remaining thereon at the time of sale exceeds one hundred dollars and does not exceed five hundred dollars must be taxed one dollar and ten cents and for each additional five hundred dollars, or fractional part thereof, one dollar and ten cents. (emphasis added)

The above cited code section is similar to a now repealed federal documentary tax statute. Internal Revenue Regulation 47.4361-2 (a)(12) stated that "[a] conveyance of realty by a partner to a partnership as a contribution of partnership assets" is a conveyance subject to the tax.

In addition, it has been the long-standing position of the Tax Commission that "[a] conveyance of property to a partnership in the partnership name as a contribution of partnership assets is a conveyance subject to the documentary tax" 1979 Ops. Atty. Gen., No. 2876, p. 12.

However, in M.T. 4, (I.R.S. Manual Transmittal) 1942-2 CB 275, it was held:

Section 3482 of the Internal Revenue Code, as amended by section 1 of the Revenue Act of 1939, sections 209 and 210 of the Revenue Act of 1940, and sections 505 and 521(a)24 of the Revenue Act of 1941, imposes a stamp tax on any Deed, instrument, or writing * * * whereby any lands, tenements, or other realty sold shall be granted, assigned, transferred, or otherwise conveyed to, or vested in, the purchaser or purchasers * * *." Section 113.81(b) of Regulations 71 (1941) provides that the "term 'sold' imports transfer of title for a valuable consideration which may involve money or anything of value."

A partnership is not a legal entity separate and distinct from its component members. Partnership property is the common property of the partners, whose interest therein is that of co-owners, being similar in many respects to that of tenants in common. Accordingly, since partners are treated as co-owners of all the partnership assets, when a partner contributes real estate to the partnership assets he receives a consideration in exchange. For example, where partners A and B contribute real estate to the partnership, A has in effect sold an undivided interest in his land for an undivided interest in B's property. An exchange of real estate constitutes a taxable conveyance of both pieces of real estate. (Section 113.83(a) of Regulations 71 (1941).) Like-wise, where A contributes real estate and B contributes an amount of cash or property to the partnership, A has in effect sold an undivided interest in his real estate for an undivided interest in the cash or property contributed by B.

In view of the foregoing, it is held that a conveyance of realty to a partnership by a partner as a contribution to partnership assets constitutes a conveyance of realty sold subject to stamp tax under section 3482 of the Internal Revenue Code, as amended, to the extent that the conveyance is a transfer of an undivided interest in the realty to members of the partnership other than the transferor. (emphasis added)

In summary, a conveyance of realty by a partner to a partnership, as a contribution of partnership assets, is subject to the tax; however, M.T.4, 1942-27 CB 275 qualifies such a statement. The conveyance must be a transfer to partners who are not the grantors or transferors of the realty, in order for the transaction to be subject to the tax.

Conclusion:

A conveyance of realty by a partner to a partnership, as a contribution of partnership assets, is subject to the documentary tax, pursuant to Code Section 12-21-380.

However, where realty, which is owned by all the partners of a partnership, is conveyed to that partnership, the conveyance is not subject to the documentary tax, if and only if, each partner's percentage interest in the realty (prior to the conveyance) is the same as his percentage interest in the partnership.