



301 Gervais Street, P.O. Box 125, Columbia, South Carolina 29214

SC TECHNICAL ADVICE MEMORANDUM #88-15

TO: Mr. William R. Geddings, Jr., Director
Office Services Division

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

DATE: June 23, 1988

SUBJECT: Real Estate Transfers - 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:

Is the transfer of realty without consideration between a development corporation and a construction company subject to the documentary tax pursuant to Code Section 12-21-380?

Facts:

ABC Development Corporation owns title to a tract of land which it conveyed, without consideration, to XYZ Construction Corporation. The stock in both corporations is owned by the same individual. XYZ Construction Company will construct a house and sell the house and lot.

Discussion:

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 or 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)

In Opinion of the Attorney General Number 2018, 1965-66, p.81, it was held that the deed transferring real property from one corporation to another required documentary stamps, since stock received by the grantor corporation represented consideration for the property. The tax was upheld in a similar instance, outlined in Opinion of the Attorney General Number 2413, 1967-68, p.62. In that case, real property was transferred from a parent corporation to a wholly-owned subsidiary in exchange for stock of the subsidiary.

However, the U.S. District court of New York stated in United States v. Niagara Hudson Power Corporation, 53 F. Supp. 796 (1944), a case concerning a federal documentary tax statute similar to South Carolina Code Section 12-21-380:

Whether a transfer of realty should be taxable as well as property consisting of securities is not for the court to say. However, 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 transfers to "realty sold". (emphasis added)

In addition, a now rescinded Internal Revenue Regulation, 47.4361-1(a) (4)(ii), defined the term "sold", as used in the federal documentary statute with respect to conveyances, as a "transfer of an interest for a valuable consideration, which may involve money or anything of value."

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 tax on conveyances, 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.

The 26 RIA Federal Tax Coordinator 2d para W-11030 reads, in part - "The tax applied in the case of a sale of real estate. Gifts or other conveyances without consideration consisting of money or anything else of intrinsic value were not subject to the tax."

Conclusion:

A deed conveying realty from a development corporation to a construction corporation without consideration is not subject to the documentary tax imposed at Code Section 12-21-380.