Title: Deeds Conveying Real Property to a Limited Partnership

Date: Jul 10, 1996

STATE OF FLORIDA
DEPARTMENT OF REVENUE

IN RE: The Petition of)
) Case No. DOR 96-002 DS
HELEN M. GLADMAN)
_____)

DECLARATORY STATEMENT

Petitioner seeks a Declaratory Statement concerning documentary stamp tax on deeds conveying real property to a limited partnership.

ISSUE

Whether deeds conveying unencumbered real property to a family limited partnership, for management, marketing and estate planning purposes, are subject to documentary stamp tax under section 201.02(1), F.S., and rule 12B-4.013(10), F.A.C.

JURISDICTION

The Department of Revenue has jurisdiction to render a declaratory statement as provided in section 120.565, F.S. (1995), and Rules 12-2.010 through 12-2.013, F.A.C. Filing of the petition was duly noticed in the Florida Administrative Weekly.

FACTS

Petitioner, 98 years of age, owns unimproved, unencumbered**[1]** real property valued at approximately $10,000,000. For management, marketing and estate planning purposes petitioner wishes to convey her interest in the real property to a limited partnership, as defined in s. 620.102(7),

F.S.**[2]** The limited partnership agreement identifies petitioner and four other individuals as limited partners. The general partner is a corporation, as defined in s. 607.01401(5), F.S., of which petitioner is the sole shareholder.

Approximately 99.99 percent of all the property to be contributed to the partnership is the real property in question. Interests in this property are as follows: petitioner, 98.2%; the other four limited partners, 0.2% each; the general partner, 1%. The balance of capital, $1,000, is contributed by the general partner. The partnership agreement states that petitioner remains the beneficial and equitable owner of property she contributes. It must be reconveyed to her upon termination of the partnership. If sold, consideration received from the sale must be paid to her.

To qualify for federal tax and estate planning benefits, petitioner conveys to the general partner and the other limited partners their interests in the property to be contributed. Taxation of the transfers to the corporation and to the other limited partners is not the subject of this declaratory statement.**[3]**

ANALYSIS

Florida Documentary Stamp Tax is imposed by chapter 201 of the Florida Statutes. The tax is imposed on various documents and other written instruments. Section 201.02, F.S., relating to the tax on documents conveying real property provides:

> (1) On deeds, instruments, or writings whereby any lands, tenements, or other real property, or any interest therein, shall be granted, assigned, transferred, or otherwise conveyed to, or vested in, the purchaser or any other person by his or her direction, on each $100 of the consideration therefor the tax shall be 70 cents. When the full amount of the consideration for the execution, assignment, transfer, or conveyance is not shown in the face of such deed, instrument, document, or writing, the tax shall be at the rate of 70 cents for each $100 or fractional part thereof of the consideration therefor.

For a document to be taxable under this subsection the document must convey an interest in real property. The amount of tax is based on the amount of consideration for the transfer.

I. CONVEYANCE OF AN INTEREST IN REAL PROPERTY TO THE PARTNERSHIP

By statute, a partnership is an entity separate and distinct from its partners. s. 620.8201, F.S.**[4]** All property originally brought into the partnership or subsequently acquired by it is partnership property. s. 620.156(1), F.S. There is no doubt that a deed executed by petitioner conveying her interest in real property to a limited partnership is a transfer within the meaning of s. 201.02(1), F.S. A partner's interest in the partnership is personal property. ss. 620.149, 620.685, 620.8502, F.S. In exchange for her individual real property, petitioner receives an intangible personal property interest; she no longer is the owner of the real property.

Partnership property is owned by the partnership as an entity, not by the partners. s. 620.8501, F.S. A partner has no interest in specific partnership property that can be transferred. Id. A partner's interest in the partnership is her share of the profits and losses and the right to receive distributions, ss. 620.102(7), 620.685, F.S., and it is the only transferable interest of the partner in the partnership. s. 620.8502, F.S.

The laws governing partnerships are not changed by the partnership agreement provision that the partner is to retain equitable and beneficial title to the real property conveyed by deed to the partnership. The agreement cannot render ineffective these statutory provisions.**[5]** Furthermore, "the liability of an instrument to a stamp duty... is determined by the form and face of the instrument, and cannot be affected by proof of facts outside the instrument itself." Lee v. Kenan, 78 F.2d 425, 426 (5th Cir. 1935) citing United States v. Isham, 17 Wall. 496, 504, 84 U.S. 728, 730 (1873). The partnership agreement is extrinsic to the deed, and cannot exempt an otherwise taxable deed.**[6]**

Prior to delivering the deed, petitioner holds title to the real property. Petitioner has full ownership, including power to possess, use, manage, control, and dispose of the property. The exercise of these ownership rights is within the sole discretion of petitioner. After the deed is given, the **partnership** has full title and ownership, including the rights to possession, use, management, control and disposition of the property. These rights would then be exercised by the general partner, see ss. 620.125, 620.129, F.S.,**[7]** subject to restrictions different from any to which petitioner was subject, see, e.g., s. 620.147, F.S. After the property is conveyed to the partnership by the deed, the petitioner has no rights in the real property itself. Rather, the petitioner has an interest in the partnership, personal property.

In that property of value was transferred by the deed, the deed is subject to tax, based on the amount of consideration received in exchange for that property.

II. CONSIDERATION

Consideration as defined in s. 201.02(1), F.S., is not limited to monetary compensation. Encumbrances, the discharge of debt, and even the exchange of property other than money are included in the definition. The question of consideration arises with regard to a transfer from a partner to a partnership where the more obvious forms of consideration such as money or the existence of an encumbrance on the real property are not present.

In 1990, the legislature amended s. 201.02(1), F.S., to include a definition of consideration. Prior to this amendment, the statute used the term consideration without defining it. The amendment, chapter 90-132 s. 7 pp. 447, 451. Laws of Fla., reads:

> Section 7. Section 201.02, Florida Statutes, is amended to read:
> 201.02 Tax on deeds and other instruments relating to real property or interests in real property.--
> (1)... For purposes of this section, consideration

> includes, but is not limited to, the money paid or agreed to be paid; the discharge of an obligation; and the amount of any mortgage, purchase money mortgage lien, or other encumbrance, whether or not the underlying indebtedness is assumed. If the consideration paid or given in exchange for real property or any interest therein includes property other than money, it is presumed that the consideration is equal to the fair market value of the real property or interest therein. (e.s.)

The statutory definition of consideration is inclusive and not exclusive. It states that "consideration paid or given in exchange for real property or any interest therein includes property other than money...." (e.s.) The term "property other than money" is not defined in the statute. The Department has interpreted s. 201.02(1), F.S., in its rules as applied to the term "property other than money" in Rule 12B-4.012(2), F.A.C. This rule states:

> (2) Definitions:
> (b) "Property other than money" includes, but shall not be limited to, property that is corporeal or incorporeal, tangible or intangible, visible or invisible, real or personal; everything that has an exchangeable value or which goes to make up wealth or estate. (e.s.)

An example and further elaboration of the type of intangible consideration that can exist in a transfer is provided in Rule 12B-4.013(10), F.A.C., which provides:

> (10) Partnerships: A conveyance of real property by a partner in exchange for an interest in a partnership, or where the value of the partner's interest in the partnership is increased by the conveyance, is taxable. There is the presumption that the consideration is equal to the fair market value of the real property interest being transferred.**[8]**

A conveyance of real property in exchange for a partnership interest or an increase in the value of a partnership interest has long been held to be a taxable transfer. This position is

consistent with the Opinion of the Attorney General in AGO 63-018, that a deed from individuals to a corporation wholly owned by those individuals, as a contribution to capital, increases the value of the corporate stock, and is taxable. The Opinion also notes that, former 26 U.S.C. s. 4361, the Federal Documentary Stamp Tax law, provided in part a list of taxable conveyances, including transfers in exchange for "other property" and as a contribution to partnership assets.**[9]** The Florida Documentary Stamp Tax Act is patterned after the Federal Documentary Stamp Tax Act. The Florida Supreme Court, in Choctawatchee Electric Coop., Inc. v. Green, 132 So.2d 556, 558 (Fla. 1961), wrote:

> The Florida Documentary Stamp Tax Act, chapter 201, Florida Statutes, F.S.A., was taken largely from s. 800 et seq., of the federal revenue act of 1924, as amended in 1926 and 1928, 26 U.S.C.A. s. 4301, et seq. **Consequently the decisions of this court have followed the federal decisions with respect to the imposition of documentary stamp tax**... (e.s.)

The Department's rules provide that a deed of conveyance is taxable where the property is transferred by a partner in exchange for an interest in the partnership. These rules reflect the economic reality that valuable consideration is received when property is exchanged for a partnership interest or when a property transfer results in an increase in the value of the partnership interest.

In the present case the party to the partnership agreement specifically agrees to make a contribution to capital and in exchange for an interest in the partnership. Moreover, there can be no dispute that the contribution of capital increases the value of the partnership since it has no significant assets prior to the execution of the deed.**[10]** The consideration received by petitioner is realized in the value of the partnership interest.**[11]** Petitioner exchanges her interest in real property for a personal property interest in a partnership. This interest, even if intangible, constitutes property that is consideration for the transfer.

Several other factors support a finding that the petitioner receives consideration in the amount of the value of the property conveyed to the partnership.

First, section 620.162, F.S., provides that the partner has a right to the return of the amount of her capital contributions. Thus, when capital is contributed to a partnership, in exchange for the contribution, the partner becomes entitled to receive a distribution upon dissolution in the same amount as the amount by which the capital is increased. This right to distributions is consideration to the contributing partner, and the amount is the value of the contribution.**[12]** This right to return of capital is a valuable personal property right that obviously represents a very real form of consideration.

Second, after the deed is given, petitioner receives relief from certain liabilities or obligations related to the property. See, e.g., s. 620.129(1), F.S.

Third, consideration is necessary to support a deed. A deed must be founded on a sufficient consideration, or else it is a nullity. 19 FLA. JUR. 2D Deeds s. 44 (1980). If the deed is effective to convey the real property,**[13]** the grantor must have received sufficient consideration for the conveyance. Consideration to be "sufficient," must be "good" or "valuable." Id. at s. 48. "Good" consideration is natural love and affection, and there must be some blood or marriage relation between the grantor and the grantee. Id. at s. 49. Thus, in the case of a deed conveying by gift, there is "good" consideration, not of determinable monetary value. See, Culbreath v. Reid, 65 So.2d 556 (Fla. 1953). Such a deed is subject to the tax, but the amount of the tax is zero in that the consideration is of no determinable monetary value.**[14]**

Consideration may take the form of property other than money, s. 201.02(1), F.S., but consideration is ultimately quantified in terms of monetary value. "Valuable" consideration means the grantor gets something of value in return for her conveyance of the property. Id. at s. 49. The partnership interest as increased in value by the value of the real property

is thus valuable consideration necessary to support the deed. This is the consideration received by the petitioner in exchange for the property conveyed by the taxable deed.

Section 201.02(5), F.S., exempts certain conveyances from a partnership to the partner that conveyed the real property to the partnership. Petitioner suggests that the exemption of one form of conveyance to a partner means the legislature would not tax conveyances to the partnership. To the contrary, this section establishes that transfers to partners are taxable except in limited circumstances. This section illustrates that the legislature knows how to provide for exemption or exclusion, and that the legislature has neither exempted nor excluded conveyances to a partnership. Petitioner seeks exemption from tax. A tax exemption must be strictly construed against the party claiming the exemption. Dept. of Revenue v. Anderson, 403 So.2d 397 (Fla. 1981); State ex rel. Szabo Food Serv., Inc. of N.C. v. Dickinson, 286 So.2d 529 (Fla. 1973); Green v. Pederson, 99 So.2d 292 (Fla 1957). An exemption strictly construed must be limited to its terms. The Department has no right to extend s. 201.02(5) to apply to conveyances to the partnership.

Finally, chapter 201 provides no exemption from the tax because a party to a document is a family limited partnership. Neither is there an exemption provided for arrangements, including the formation of artificial legal entities, to reduce gift, estate or other taxes or for estate planning.

CONCLUSION

Documentary stamp taxes are imposed by section 201.02, F.S., on every deed whereby any interest in real property is conveyed. The tax is 70 cents on each $100 of any consideration for the transfer. If the consideration includes property other than money, it is presumed to be the value of the real property. A conveyance from partners to a limited partnership, as a contribution of capital, increases the value of the partnership interests, and is a taxable transaction. Rule 12B-4.013(10), F.A.C. The rule is a reasonable interpretation of the statutory language as amended.

DONE AND ORDERED this 10th day of July, 1996.

STATE OF FLORIDA
DEPARTMENT OF REVENUE

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L.H. FUCHS
Executive Director

APPEAL RIGHTS

Any party whose substantial interests are determined by this Declaratory Statement has the right to seek judicial review of the Declaratory Statement as provided in Section 120.68, F.S., by the filing of a Notice of Appeal as provided in Rule 9.110, Florida Rules of Appellate Procedure, with the Clerk of the Department in the Office of General Counsel, Post Office Box 6668, Tallahassee, Florida 32314-6668, and by filing a copy of the Notice of Appeal, accompanied by the applicable filing fees, with the appropriate District Court of Appeal. The Notice of Appeal must be filed within 30 days from the date this Declaratory Statement is filed with the Clerk of the Department.

CERTIFICATE OF FILING

I HEREBY CERTIFY that the foregoing DECLARATORY STATEMENT has been filed in the official records of the Department of Revenue this _____ day of July, 1996.

_____

JUDY LANGSTON
Clerk, Department of Revenue
State of Florida

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this DECLARATORY STATEMENT has been furnished by U.S. Mail to: T. Paine Kelly, Jr., Esq., MacFarlane, Ausley, Ferguson & McMullen, P.O. Box 1531, Tampa, Florida, 33601, on this _____ day of July

1996.

JUDY LANGSTON
Clerk, Department of Revenue
State of Florida

FOOTNOTE 1: With the exception of 1996 ad valorem taxes.

FOOTNOTE 2: The Petition states that the partnership is a family limited partnership.

FOOTNOTE 3: Petitioner specifically requests only a ruling regarding petitioner's conveyance of real property to the partnership.

FOOTNOTE 4: Note that s. 620.186, F.S., provides: "In any case not provided for in the [Limited Partnership] act, the provisions of the Uniform Partnership Act or the Revised Uniform Partnership Act of 1995, as applicable, and the rules of law and equity shall govern."

FOOTNOTE 5: Although some provisions in the Partnership Laws, Chapter 620, F.S., are qualified by language such as "except as provided in the partnership agreement," see, e.g. s. 620.145, F.S., none of the above cited provisions are so qualified.

FOOTNOTE 6: Furthermore, even if only legal title to the real property as conveyed by the deed, the deed is subject to the tax. Section 201.02(2), F.S., imposes the tax on deeds whereby "any interest" in real property is conveyed. It is not limited to deeds conveying title in fee simple.

FOOTNOTE 7: And the partnership agreement.

FOOTNOTE 8: Prior to the law change the rule provided such transfers were taxable based on the value of the partnership interest before the transfer. After the law change, the rule was amended to conform to the new statute. The focus for measuring the consideration shifted from the value of the

partnership interest to the fair market value of the real property.

FOOTNOTE 9: See also, Revenue Ruling M.T. 4, 1942-37-11194)"A conveyance of realty to a partnership by a partner as a contribution to the partnership assets is subject to stamp tax...")

FOOTNOTE 10: See for example, Treasury Regulations s. 1.704(b)(3)(ii)(a) and s. 1.704-1(b)(2)(iv)(b), the latter of which provides: "The basic capital accounting rules contained in paragraph (b)(2)(iv)(b) of this section require that a partner's capital account be increased by the fair market value of property contributed to the partnership by such partner on the date of the contribution." Thus, a partner's contribution of property affects that partner's basis in his or her partnership interest.

FOOTNOTE 11: See for example, 26 U.S.C. s. 704(b), which provides:

> A partner's distributive share of income, gain, loss, deduction, or credit (or item thereof) shall be determined in accordance with the partner's interest in the partnership,...

The partnership agreement contains similar language.

FOOTNOTE 12: If the partnership dissolves immediately after the deed is given, petitioner receives a distribution of the full value of the property contributed. This establishes that the amount of consideration is the value of the property.

FOOTNOTE 13: Petitioner's very purpose is to convey the property, and she would not assert that the deeds are nuda pacta.

FOOTNOTE 14: This is not the case here. There is no family relationship between a partner and a partnership. Furthermore, a partnership, being an artificial legal entity and not a natural person, is not the object of natural love and affection.