



January 28, 2008
Pennsylvania Realty Transfer Tax
No. RTT-08-001
Riparian/Littoral/Lake Rights

ISSUE:

Is an addendum to an agreement of sale that provides for the transfer of "Lake Rights" subject to Pennsylvania Realty Transfer Tax?

CONCLUSION:

An addendum to an agreement of sale is not, in itself, a taxable document. However, any deed that is executed to effectuate the conveyance of the Lake Rights pursuant to the addendum is subject to Pennsylvania Realty Transfer Tax.

FACTS:

In 1983, Seller was the owner of a lake ("Lake") in Pennsylvania. Also, in 1983, Seller adopted a plan of complete liquidation. Pursuant to the plan of liquidation, Seller entered into an agreement of sale ("Agreement") with Taxpayer in July, 1983. The Agreement provided that Seller would sell all of Seller's right, title and interest in and to the land underneath the Lake for \$28,000.

Seller, excepted and reserved unto itself, its successors and assigns, in this case Successor, all perpetual water rights in, on and to the Lake. The agreement called the water rights "Lake Rights" and defined them as:

The unrestricted right of ingress and egress to said lake and the right and privilege to the free and unrestricted use of the premises and water contained thereon, including but not limited to swimming, boating, skating, fishing, skiing, and other purposes usually connected with the use of a lake; said use extending to and covering all of the waters owned, controlled, or otherwise by the Seller herein, together with the right to use and maintain a dock, boathouse, and a raft extending on and over said premises.

In addition to the sale of the Lake, the Agreement provided that Seller would sell 80 "Lake Rights" to Taxpayer for \$200,000 (\$2,500 per Lake Right). Taxpayer also had the right to purchase up to an additional 10 Lake Rights at closing for \$2,500 per Lake Right. Taxpayer also had the right to purchase up to 30 more Lake Rights for two years after the closing at \$3,500 per right. The Agreement provided that Taxpayer is required to issue any purchaser of Lake Rights a certificate evidencing the purchase.

In September, 1983, a deed was executed to convey the Lake from Seller to Taxpayer. Realty Transfer Tax in the amount of \$400 (taxable value of \$40,000) was paid on the deed. It is unclear from the facts provided why tax was paid on a value of \$40,000 when the negotiated sale price for the Lake was only \$28,000. The deed included the exception and reservation of the Lake Rights to the Seller as described in the Agreement. The deed did not reference the sale of the Lake Rights to the Taxpayer in any respect, including the

number of Lake Rights that Taxpayer purchased. Taxpayer did not submit any documents to this Office for review that would have effectuated the conveyance of the Lake Rights to Taxpayer or any certificate evidencing a subsequent transfer from Taxpayer to any purchaser of a Lake Right. Consequently, there is no evidence of any Pennsylvania Realty Transfer Tax paid for the conveyance of the Lake Rights.

Seller subsequently liquidated and Successor succeeded to Seller's Lake Rights.

In October, 2007, Successor entered into a contract that the parties referred to as addendum to the original Agreement ("Addendum"). The Addendum provided that Successor would sell all of his residual Lake Rights as reserved in the Agreement to Taxpayer for \$400,000, excepting and reserving five Lake Rights for himself. Although the contract is titled an Addendum to the original Agreement, it is not actually an addendum. An addendum in its normal sense would merely be an attachment to the original Agreement and list the items that were subject to sale under the original Agreement. This Addendum provides for a sale of Lake Rights that are separate and distinct from those Lake Rights sold under the original Agreement. Therefore, it is a separate agreement of sale.

Taxpayer has not supplied any document that has or will effectuate the conveyance of the remaining Lake Rights from Successor to Taxpayer under the Addendum.

Taxpayer has asked for a ruling on whether the Addendum is subject to Pennsylvania Realty Transfer Tax.

DISCUSSION:

Pennsylvania Realty Transfer Tax is imposed upon a document that effectuates or evidences the conveyance of title to real estate. 72 P.S. § 8102-C and § 8101-C (definition of "document"). By definition a land contract, also known as real estate sale agreement, is generally not a taxable document unless it is an installment sale contract for less than 30 years where legal title does not pass to the grantee until the total consideration is paid. 72 P.S. § 8101-C (definition of "document"). Rather than impose tax on a sale agreement, the statute imposes the tax on the deed of conveyance.

In this case the Addendum is a sale agreement between Successor and Taxpayer for all but five of the remaining Lake Rights that Seller reserved unto itself in the original Agreement. The Addendum is not an installment sale contract. Therefore, the Addendum is not itself a taxable document.

However, any document that is executed to effectuate the conveyance of the Lake Rights pursuant to the Addendum is subject to tax if the Lake Rights are an interest in real estate.

The statute defines real estate as

"REAL ESTATE."

(1) Any lands, tenements or hereditaments within this Commonwealth, including, without limitation, buildings, structures, fixtures, mines, minerals, oil, gas, quarries, spaces with or without upper or lower boundaries, trees and other improvements, immovables or interests which by custom, usage or law

pass with a conveyance of land, but excluding permanently attached machinery and equipment in an industrial plant.

(2) A condominium unit.

(3) A tenant-stockholder's interest in a cooperative housing corporation, trust or association under a proprietary lease or occupancy agreement.

72 P.S. § 8101-C (definition of "real estate").

In this case, the interests or property rights at issue are the Lake Rights. As prescribed in the Agreement, Seller reserved unto itself all of the Lake Rights. Nevertheless, Seller agreed to sell some of the Lake Rights to Taxpayer. Each Lake Right provides an irrevocable and unrestricted access right to use and enjoy the water rights of the Lake.

Generally, water rights are referred to as riparian rights. Technically, water rights in the context of a lake are known as littoral rights.^[1] "Riparian rights are subject to disposition like other property. The proprietor thereof may transfer to another such rights as boating, fishing and bathing rights, or the right to take water and to convey it to a distant destination. . . . A transfer may effectively be made, for example, by a grant or a reservation in a deed, by license or contract or by lease." P.L.E. Waters § 131 (footnotes omitted). "An unrestricted conveyance of land will ordinarily pass as appurtenances all water rights and privileges which are incident to the situation of the land as riparian to a stream or other body of water, or which are at the time rightfully used in connection with the land and necessary to its beneficial enjoyment." P.L.E. Waters § 135 (footnote omitted).

"The proprietor of a water right may transfer this right to another by a bare license as in the case of a parole grant. In such case, the licensee has no property right, and ordinarily, the license may be terminated at any time." P.L.E. Waters § 134 (*citing Rerick v. Kern*, 14 Serg. & Rawle 267 (Pa. 1826)). A license is not an interest in real estate, and therefore not subject to Pennsylvania Realty Transfer Tax.

In this case, the Lake Rights are greater than a mere license. Each Lake Right issued is an irrevocable grant of unrestricted access and enjoyment to the Lake. Further, because riparian rights, such as these Lake Rights, are appurtenances that by custom or usage normally pass with an outright conveyance of the Lake itself, such rights are considered real estate for Pennsylvania Realty Transfer Tax purposes. As a result, any document that effectuates or evidences the conveyance of a Lake Right is subject to Pennsylvania Realty Transfer Tax. The taxable value is the consideration paid for the conveyance, assuming the consideration is part of a bona fide arms length sale of the real estate. 72 P.S. § 8102-C and § 8101-C (definition (1) of "value").

Taxpayer did not submit a copy of a document that has or will convey the Lake Rights from Successor to Taxpayer pursuant to the Addendum. It is unclear if such a document exists or will be executed. If such a document exists or will be executed, it is subject to tax based upon the consideration paid, which according to the Addendum is \$400,000.

Also, it should be noted that Taxpayer did not submit a copy of any document that conveyed the Lake Rights from Seller to Taxpayer pursuant to the original Agreement or

any certificates from Taxpayer to subsequent purchasers of the Lake Rights. If such documents exist, they are subject to tax based upon the consideration paid. Tax is due and interest begins to run from the date such documents were filed or 30 days from the date of execution, whichever is earlier. 72 P.S. § 8102-C.

Because the Lake Rights are interests in real estate, the Statute of Frauds requires a writing, such as a deed or similar document, to be executed in order to effectuate the conveyance of the Lake Rights. Although the Department cannot require or compel someone to execute a document of conveyance, a document must be issued for each conveyance of a Lake Right to be effective. Neither the Agreement nor the Addendum effectuates the conveyance of the Lake Rights. They only provide the contract for the conveyance of such rights.

[1] “The term ‘riparian rights’ refers to the rights of owners of land abutting a stream, while the term ‘littoral rights’ refers to the rights of owners of land abutting the surface waters of a lake or the sea. Courts now commonly use the word ‘riparian’ when describing water rights in either context.” Wehby v. Turpin, et al., 710 So.2d 1243 (Ala. 1998) (citations omitted).