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FILE NO. S-504

REAL ESTATE:
Real Estate Transfer Tax Act-
Applicability to leases and
assignment of leases

COPY

Honorable Richard A. Hollis
State's Attorney
Sangamon County
Room 404 County Building
Springfield, Illinois 62701

Dear Mr. Hollis:

I have your letter wherein you state in part:

"The Sangamon County Recorder of Deeds has requested through me your opinion as to his responsibility for collecting a real estate transfer tax for transfer of lake leases.

"Pursuant to Chapter 120, paragraph 1003, the General Assembly has imposed a tax on the privilege of transfer of a title to real estate as represented by the deed that is filed for recording. Further, the duty is placed upon the Recorder of Deeds to collect such transfer tax.

"In Sangamon County, a large area of land owned by the City of Springfield adjoins Lake Springfield. As shown by the enclosures, the land is leased to an individual or individuals for a term of 60 years. The lease arrangement calls for a small amount of annual rent.

"Enclosed you will find a Lakeshore lease . . . dated April 2, 1960; assignment of that Lakeshore lease dated April 10, 1972; and a copy of a real estate tax ledger for that piece of real estate for the years 1961 through 1970. You will note that the tax ledger does not carry the City of Springfield as owner of record. The assignment of Lakeshore lease is recorded with the Recorder of Deeds in Sangamon County. On the enclosed assignment you will find a tax stamp for the sum of $44.00. In this particular case the purchasers desired the tax stamp. Most assignments of Lakeshore leases are not taxed by the County Recorder of Deeds and most Lakeshore leases are not taxed by the Recorder of Deeds.

"From examination of the tax stamp $44.00, and an examination of the real estate tax ledger, it is obvious that there is more than a leasehold interest transferred from one party to another in this situation.

"Your opinion is requested to the question whether the Recorder of Deeds of Sangamon County, Illinois should require under the statute that the purchaser pay a transfer tax as required by the Revenue Act and whether a declaration of value should be filed by the purchaser of such leasehold."

You have enclosed with your letter the following documents:

A. A copy of an executed and acknowledged document titled "Lakeshore Lease."

B. A copy of an executed and acknowledged document titled "Assignment of Lakeshore lease." Said assignment is consented to by the City of Springfield.

C. A copy of a real estate tax assessment ledger.

Section 3 of the "Real Estate Transfer Tax Act" (Ill. Rev. Stat., 1971, ch. 120, par. 1003) reads, in part, as follows:

> "A tax is imposed on the privilege of transferring title to real estate, as represented by the deed that is filed for recordation, at the rate of 50 cents for each $500 of value or fraction thereof stated in the declaration provided for in this Section. If, however, the real estate is transferred subject to a mortgage the amount of the mortgage remaining outstanding at the time of transfer shall not be included in the basis of computing the tax.
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> * * *
>
> "* * * Except as provided in Section 4 of this Act, no deed shall be accepted for filing by any recorder of deeds or registrar of titles

> unless revenue stamps in the required amount have been purchased from the recorder of deeds or registrar of titles of the county where the deed is being filed for recordation. Such revenue stamps shall be affixed to the deed by the recorder of deeds or the registrar of titles either before or after recording as requested by the grantee. * * *
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> "At the time a deed is presented for recordation there shall also be presented to the recorder of deeds or registrar of titles, a declaration, signed by at least one of the sellers and also signed by at least one of the buyers in the transaction or by the attorneys or agents for the sellers or buyers, which declaration shall state the full consideration for the property so transferred and also the permanent real estate index number of the property, if any. * * * The recorder of deeds or registrar of titles shall not record such declaration, but shall insert thereon the document number assigned to the deed, and shall then transmit such declaration to the supervisor of assessments, assessor or board of assessors of the county, as the case may be, who shall insert on such declaration the most recent assessed value for each parcel of the transferred property and, at least once during every month, shall transmit all such declarations to the Department of Local Government Affairs. * * *"

To promote clarity, I have below rephrased your letter into two questions.

1. Is the privilege of transferring a leasehold interest in real estate, as represented by a lease or assignment of a lease that is filed for recordation, subject to the Real Estate Transfer Tax Act?

2. Do the aforementioned documents, A, B and C, either separately or together, represent the transfer of a real estate interest that is subject to the Real Estate Transfer Tax Act?

Turning to question number 1, it is noted that section 3 of the Real Estate Transfer Tax Act states that "a tax is imposed on the privilege of transferring title to real estate ..." Ill. Rev. Stat., 1971, ch. 120, par. 1003. [Emphasis added].

The Missouri Supreme Court has had occasion to interpret this phrase "title to real estate." Section 3 of Article V of the Missouri Constitution of 1945 was amended in 1970 and the term "title to real estate" has been deleted, but prior to the amendment said section 3 read as follows:

> "The supreme court shall have exclusive appellate jurisdiction in all cases involving the construction of the Constitution of the United States or of this state, the validity of a

> treaty or statute of the United States, or any authority exercised under the laws of the United States, the construction of the revenue laws of this state, the title to any office under this state, the title to real estate, in all civil cases where the state or any county or other political subdivision of the state or any state officer as such is a party, in all cases of felony, in other classes of cases provided by law, and until otherwise provided by law, in all cases where the amount in dispute, exclusive of costs, exceeds the sum of seventy-five hundred dollars." [Emphasis supplied]

The Missouri Supreme Court has often stated that controversies concerning the validity of a lease or the ownership of a leasehold interest in real estate do not involve "title to real estate" in an appellate jurisdictional sense. Blake v. Shower, 356 Mo. 618, 202 S.W. 2d 895; Thacker v. Flottman, (Mo., 1952), 244 S.W. 2d 1020; Sun-Ray DX Oil Co. v. Lewis, (Mo., 1968), 426 S.W. 2d 44.

The Missouri Supreme Court has reasoned that at common law a leasehold estate, whatever may be its duration in years, is personal property, a chattel real. (Blake v. Shower, 356 Mo. 618, 621, 202 S.W. 2d 895, 897). "According to common law, estates are classified with regard to duration

or quantity of interest, as freehold estates and estates less than freehold. Estates less than freehold are regarded as chattel interests, and include leasehold interests or estates for years." Thacker v. Flottman, (Mo., 1952), 244 S.W. 2d 1020, 1022.

Thus, in order for a leasehold interest to be classified or treated as real property or as a freehold, the legislature must specifically express this intent. See, e.g., Ill. Rev. Stat., 1971, ch. 77, par. 3.

The Illinois Supreme Court has likewise taken the view that at common law a leasehold interest is treated as personal property. (See, Pierce v. Pierce, 4 Ill. 2d 497; McArthur v. Weidert, 375 Ill. 212; Zimmermann v. Dawson, 294 Ill. 380; Thornton v. Nehring, 117 Ill. 55). It has also been noted that a lease is not a freehold but a chattel real. McArthur v. Weidert, 375 Ill. 212, 214.

The common law is not to be regarded as abrogated by statute unless it clearly appears that such was the legislative intent. (Waesch v. Elgin, J. & E. Ry. Co., 38 Ill. App.

2d 56, 60). Thus, if a leasehold interest is to be classified as real estate, the statute must clearly express this intent. See, Pierce v. Pierce, 4 Ill. 2d 497.

Section 3 of the Real Estate Transfer Tax Act does not contain any statement that leasehold interests are to be treated as real estate. In fact, a scrutiny of the entire Real Estate Transfer Tax Act will reveal no expression by the legislature that they intended leasehold interests to be included in the phrase "title to real estate."

Furthermore, it should be noted that the word "deed" is continuously used throughout section 3 and throughout the entire Act for that matter. Nowhere in the Real Estate Transfer Tax Act does the word "lease" appear. There is, to say the least, some doubt as to whether the word "deed" encompasses the word "lease." Since the Real Estate Transfer Tax Act is a taxing statute, it is to be strictly construed and is not to be extended beyond the clear import of its language. (Valier Coal Co. v. Department of Revenue, 11 Ill. 2d 402). In cases of doubt, taxing statutes are to be construed against the state

and in favor of a taxpayer. Valier Coal Co. v. Department of Revenue, 11 Ill. 2d 402, 410; Oscar L. Paris Co. v. Lyons, 8 Ill. 2d 590; Ingersoll Mill. Mach. Co. v. Department of Revenue, 405 Ill. 367.

Therefore, I am of the opinion that the privilege of transferring a leasehold interest as represented by the lease or assignment of the lease that is filed for recordation, is not subject to the provisions of the Real Estate Transfer Tax Act.

Now turning to the second question, if document A, referred to above, represents the transfer of leasehold interest only, then, of course, the assignment of this leasehold interest is not subject to the provisions of the Real Estate Transfer Tax Act.

The issue boils down to whether document A is indeed a lease. Of course, whether or not document A is a lease depends upon the intent of the parties. (Holloday v. Chicago Arc Light & Power Co., 55 Ill. App. 463, 466.) The intention

of the parties should be ascertained from the language in the instrument (Wistain v. Phillips Petroleum Co., 349 Ill. App. 365) and the words used should be given their common and generally accepted meaning. (Bryden v. Northrup, 58 Ill. App. 233). Where the language used in a writing has a definite and precise meaning there is no need for interpretation. (Stone v. Van Alvea, 334 Ill. App. 264). In such a case the instrument speaks for itself and the parties thereto are held to mean what they have clearly stated in the writing. Brenzel v. Kirschner, 128 Ill. App. 136.

Due to these rules of construction, the following facts about document A become pertinent:

(1) Document A is entitled "Lakeshore lease."

(2) The word "lease" is used continuously throughout document A.

(3) Paragraph 3, page 1 of document A provides that the city leases the described property for the term of 60 years.

(4) Paragraph 8, page 2, provides that the lease may not be assigned without the written consent of the City of Springfield.

(5) Paragraph 10, page 2, provides that the City of Springfield has the power to terminate the lease.

(6) Paragraph 11, page 2, gives the City of Springfield the right to go upon the premises for purposes of inspection and other specifically outlined purposes.

(7) Paragraph 13, page 3, provides that upon the expiration of the leasehold term the custodian shall be preferred if the city desires to again lease these premises. However, the city is not obligated to again lease these premises and if it does desire to do so the city can charge whatever rental it sees fit.

I am of the opinion that document A is a lease. It clearly purports to be a lease. There is no reason why the instrument should not be held to mean what it clearly says. There is nothing within the four corners of this document that reveals a contrary intent.

Since the City of Springfield originally transferred a leasehold interest only, it is axiomatic that the assignment by the original lessees was the assignment of a leasehold interest only.

The fact that the tax ledger for the real estate does not carry the City of Springfield as the record owner cannot change the nature of document A. Likewise, the fact that the sub-lessees voluntarily paid the real estate transfer tax and recorded their assignment with the Recorder of Deeds does not have any effect upon the nature of document A.

Therefore, I am of the opinion that documents A, B and C, which you have attached to your letter, do not, either separately or together, represent the transfer of a real estate interest that is subject to the Real Estate Transfer Tax Act.

Very truly yours,

ATTORNEY GENERAL