

Realty Transfer Tax Regulation Invalidated by Commonwealth Court

The Commonwealth Court of Pennsylvania held that an exemption to the application of PA Realty Transfer Tax Section (RTT) for no or nominal consideration from a trust under Section 1102-C.3(9.1)¹ applies not only to transfers of real estate but also to transfers of interests in a real estate company. The court invalidated the Department of Revenue's (the Department) application of Section 91.193(c) of the RTT regulations.² The court determined that transfers of real estate companies constitute transfers of the underlying interests in real property held by such companies for RTT purposes, and nothing in the Tax Reform Code demonstrated legislative intent to limit the exemption statute's application solely to direct transfers of real estate. Trustees of living trusts that made transfers for no or nominal consideration after the death of the underlying settlor to a beneficiary to whom the property is devised through the transfers of interests in real estate companies should strongly consider filing timely protective refund claims.

430 Stump LLP was a limited liability partnership that purchased real property in Montgomery County in 1994. In addition, 430 Stump LLP also met the definition of a real estate company as that term is defined in 72 P.S. § 8101-C. A revocable living trust owned 98% of the interest of 430 Stump LLP. Under the terms of the revocable living trust, it designated a second trust, a marital trust, as the beneficiary to receive the 98% interest in 430 Stump LLP after the revocable trust's settlor's death. The settlor's wife was the beneficiary of the marital trust. In March of 2017, upon the settlor's death, the revocable living trust transferred its 98% partnership interest in 430 Stump LLP to the marital trust. Upon the transfer after the settlor's death, the parties claimed an exemption from RTT on the grounds that the transfer was from a trustee of a living trust to the beneficiary of a living trust under 72 P.S. § 8101-C.3(9.1). In September 2021, the Department issued a Notice of Assessment and imposed RTT, reasoning that because it was not a merger, RTT was owed.³ The Assessment was thereafter appealed, and 430 Stump LLP argued that RTT was not owed because it was a transfer from a trustee of a living trust to the beneficiary of a living trust. The Board of Appeals and the Board of Finance and Revenue rejected 430 Stump LLP's argument, indicating that the exception advanced only applied to direct transfers of realty and not transfers of interests in real estate companies, citing the Department's regulation at 61 Pa Code § 91.193(c). 430 Stump LLP thereafter appealed the adverse decision to the Commonwealth Court.

On appeal, the court reversed the BOA and BF&R. The court initially noted that RTT is imposed upon the filing of a document, and Section 8101-C defines a document as *both* a writing that evidences a transfer of title to real estate *and* a declaration of acquisition relating to a real estate company. The court concluded that if the General Assembly had intended to differentiate between those two kinds of documents for RTT purposes, it could have done so, but it did not. Moreover, the court pointed out that the Tax Code itself does not make such a distinction in listing out the transfers not subject to the RTT.

The court further observed that in two previous cases, the court treated the transfers of a corporation and partnership interests as transfers of those entities' interests in real property for RTT purposes.⁴ As a result, the court concluded that a transfer of interests in a real estate company is the equivalent of a transfer of the real estate company's interest in the real estate it owns for RTT purposes.

The court went on to note the Department's regulation under Section 91.193(c) purports to limit the effect of the subsection (b) regulation, which lists a number of transactions not subject to RTT by stating that "Subsection (b) has no application to acquisitions of real estate companies as provided in [Section] 91.202 (relating to acquired real estate company)." However, the court, citing *Canteen*



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Corp. v. Commonwealth,⁵ noted that where a regulation is not consistent with the statute under which it is promulgated, the regulation is not lawfully applied. Accordingly, because the regulation conflicted with the court's interpretation of the statute, it was invalid and disregarded.

At this point, we are waiting to see if the Department appeals the decision to the Pennsylvania Supreme Court. However, trustees of living trusts that made transfers for no or nominal consideration from a trustee of a living trust after the death of the settlor of the trust or from a trustee of a trust created pursuant to the will of a decedent, through the transfer of interests in a real estate company, to a beneficiary to whom the property is devised or bequeathed, should strongly consider filing timely protective refund claims. While this issue is resolved finally by the courts, protective refund claims must be filed with the Department and possibly at the local level within three years of the underlying payment of the RTT.

¹ (72 P.S. § 8102-C.3 (9.1))

² 61 Pa. Code § 91.193(c).

³ The BF&R noted that since 430 Stump LLP was not a corporation, no statutory merger or consolidation was at issue in this matter.

⁴ See *Health Group Care Centers, Inc. v City of Pittsburgh*, 552 A.2d 323 (Pa. Commw. 1988) and *Equitable Life Assurance Society v. Murphy*, 621 A.2d 1078 (Pa. Commw. 1993).

⁵ *Canteen Corp. v. Commonwealth*, 818 A.2d 594, 599-600 (Pa. Commw. 2003), *aff'd per curiam*, 854 A.2d 440 (Pa. 2004)
