JURISDICTION: **OKLAHOMA TAX COMMISSION**
CITE: **89-09-28-016 / NON-PRECEDENTIAL**
ID: **P-88-313-P**
DATE: **SEPTEMBER 28, 1989**
DISPOSITION: **SUSTAINED**
TAX TYPE: **DOCUMENTARY STAMP TAX**
APPEAL: **NO APPEAL TAKEN**

ORDER

This matter comes on before the Oklahoma Tax Commission pursuant to the motion of the Business Tax Division for a hearing by the Tax Commissioners sitting en banc, which motion was granted February 8, 1989, Order No. 89-02-08-03. This en banc hearing was held on June 19, 1989. Protestant, PARTNERSHIP, a partnership, appeared by its representative, DAUGHTER, a partner in PARTNERSHIP. The Division appeared by its representative, OTC ATTORNEY, Assistant General Counsel of the Oklahoma Tax Commission.

STATEMENT OF FACTS

The record of the hearing before the Administrative Law Judge reveals the facts of this case to be as follows:

> PARTNERSHIP, hereafter PARTNERSHIP, is a partnership composed of a mother, father, and daughter. The purpose of the partnership according to the partnership agreement is to acquire real estate as investments.
>
> PARTNERSHIP owned a number of real properties which were transferred from the partnership to the parents as husband and wife to obtain refinancing of the properties. According to the testimony of DAUGHTER, the daughter, the mortgage company would not lend money to a partnership but required that the properties be held by HUSBAND AND WIFE, as individuals. Having acquired the refinancing, the parents transferred ownership of the properties back to PARTNERSHIP.
>
> It is the second transfer that is the subject of this protest. No documentary stamps were purchased by the parties and affixed to the deeds for these transfers. DAUGHTER testified that in her opinion there was no sale of realty and thus the documentary stamp tax was not imposed on the deeds. In support of her opinion, she testified that there was no contract for the sale of the properties between the individuals in the partnership, no money changed hands, and the intent was solely to transfer the properties back to the partnership to fulfill the original purpose of holding the property as investments.
>
> On May 13, 1988, the Division issued proposed assessments of documentary stamp tax to the partnership for the purpose of taxing the deeds on the transfers to the partnership. The amount of the proposed assessment for taxes is Five

Hundred Thirty-eight Dollars and Fifty Cents ($538.50). Protestant timely protested the proposed assessment.

On December 12, 1988, the Administrative Law Judge issued Findings, Conclusions, and Recommendations which concluded that PARTNERSHIP successfully carried its burden of proving that consideration did not exist within the subject transactions. There being no sale upon which the tax may be imposed, the Administrative Law Judge recommended that the protest filed by PARTNERSHIP be sustained.

CONCLUSIONS OF LAW

Title 68 O.S.A. §5101 imposes a tax on each deed in which realty sold is granted to the purchaser. The issue involved in the present case is whether the transfers of the realty from the individuals to the partnership were for valuable consideration and therefore constituted sales. In order for a deed to be taxable under the Documentary Stamp Tax Act, §5101 requires that the realty transferred must have been sold, which means a transfer of an interest for a valuable consideration, which may involve money or anything of value. "Consideration" means the actual pecuniary value to be exchanged presently or in the future, whether in money or otherwise, for the transfer of an interest in realty. Therefore, a deed transferring a gift of land is not taxable, Attorney General Opinion No. 74-102.

The issue of what constitutes "realty sold" for documentary stamp tax was addressed in Attorney General Opinion No. 74-102 in answer to the question of whether a conveyance of realty as a gift from one party to another is a transaction subject to tax. The Attorney General answered in the negative. In construing the Documentary Stamp Tax Act, the Attorney General cited to a federal case, Berkeley Savings and Loan Association of Newark, New Jersey v. United States, 301 F.Supp. 22 (D.N.J. 1969), where the former Federal Stamp Tax Statute was construed. According to the Attorney General, Section 5101 of Title 68 was taken verbatim from the former federal statute. The federal court, reasoning that not all transfers of realty involved a sale, stated:

> Necessary, then, is an examination of the transaction being considered to see if there is a sale of realty; 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. Id. at 25.

According to Protestant's representative, the intent of the parties in the transfer of the properties was to effectuate the purpose of the partnership agreement. As for "valuable consideration", there was no evidence presented by the Protestant's representative or the Division of an exchange of money or anything of pecuniary value, nor that anything of value would be exchanged in the future. The partnership did not "purchase" the property from the individuals, in conclusion, because there was no exchange of valuable consideration, there was no sale of realty as defined in 68 O.S. §5101 and documentary stamp tax was not imposed on the deeds transferring the realty.

The Administrative Law Judge's conclusion on this point did not consider the authority of Attorney General Opinion 71-230 which the Division maintains as its authority to tax the deed and which should be addressed. A.G. Opinion 71-230 involved a case in which a father and son formed a corporation and transferred land to the corporation in exchange for corporate stock. The Opinion finds that in such a transfer, consideration does pass to the individuals as evidenced by the amount of their basis in the corporate stock received by them which is the original purchase price of the land. The Opinion concluded that the documentary stamp tax must be paid on the deed, computed on the basis of the original purchase price of the land transferred because there is no question but what the corporation, although closely held by family members, is a separate legal entity, that title has passed to the corporation, and that consideration has been given by the corporation to the transferor, despite the fact that no cash changed hands. This opinion demonstrates that an exchange of cash is not necessary in order to find that consideration existed within the transaction.

The Commissioners find that A.G. Opinion 71-230 is distinguishable on its facts from the case at bar and is not controlling authority. In the present case, the transfers between the partnership and the partners were effected for the purpose of refinancing the properties with a bank. Both before and after the series of transfers were completed, PARTNERSHIP owned the property. This situation is different from that presented in A.G. Opinion 71-230 where the individuals owned the land before the transfer and the corporation owned the land subsequent to the transfer in exchange for stock or an interest in the corporation. However, the Commission's ruling today is limited to the unique and specific facts of this case and turns on the fact that no sale occurred whereby the documentary stamp tax is not imposed on such conveyance pursuant to statute, 68 O.S.A, §5101.

The Commission, having reviewed the facts and authorities presented, and being fully advised in the premises, finds and Orders that the documentary stamp tax protest of PARTNERSHIP be sustained.

OKLAHOMA TAX COMMISSION

CAVEAT: This decision was NOT deemed precedential by the Commission. This means that the legal conclusions are generally applicable or are limited in time and/or effect. Non-precedential decisions are not considered binding upon the Commission. Thus, similar issues may be determined on a case-by-case basis.