

DIVISION OF REVENUE
TAX RULING 2003 - 01

DATE: April 1, 2003

SUBJECT: REALTY TRANSFER TAX – TRANSFER TO AND FROM AN EXCHANGE ACCOMODATION TITLEHOLDER UNDER INTERNAL REVENUE SERVICE, REV. PROC. 2000-37.

AUTHORITY: This regulation is published pursuant to authority granted to the Department of Finance in 30 Del. C. § 5407 to adopt rules pertaining to the administration and enforcement of Chapter 54 of Title 30 of the Delaware Code.

BACKGROUND:

Questions have arisen concerning whether a conveyance between an “exchange accommodation titleholder” (as defined in Internal Revenue Service, Rev. Proc. 2000-37, 200-40 IRB (September 18, 2000) hereinafter “Rev. Proc. 2000-37”) and the taxpayer with whom such exchange accommodation titleholder has entered into a “qualified exchange accommodation arrangement” (hereinafter the “taxpayer”), also as defined in Rev. Proc. 2000-37, may be exempt from the realty transfer tax as a conveyance to or from a “trustee, nominee or straw party” under 30 Del. C. § 5401(1)j.

Pursuant to 30 Del. C. § 5401(1)j, any conveyance “to a trustee, nominee or straw party for the beneficial owner” or “from a trustee, nominee or straw party to the beneficial owner” is not a “document” subject to realty transfer tax under Chapter 54 of Title 30 of the Delaware Code.

Section 1031 of the Internal Revenue Code of 1986, as amended (the “Code”), provides for non-recognition of gain or loss on an exchange of certain property by a taxpayer for property of like-kind for purposes of the federal income tax (a “like-kind exchange”). In a like-kind exchange, the property transferred by the taxpayer is called the “relinquished property” and the property acquired by the taxpayer is called the “replacement property.” On April 25, 1991, the United States Treasury Department and the Internal Revenue Service issued final regulations, Section 1.1031(k)-1, et seq. (the “Regulations”), providing rules for deferred like-kind exchanges under Section

1031(a)(3) of the Code. The preamble to the Regulations states that the Regulations apply only where the relinquished property is transferred before the taxpayer acquires the replacement property (“Forward Exchanges”) and do not apply to situations where the replacement property is acquired before the conveyance of the relinquished property (“Reverse Exchanges”). Based on the Regulations and applicable case law, a practice evolved for Forward Exchanges whereby Forward Exchanges were accomplished by deeds directly from and to the taxpayer, with no deeds to or from any intermediary or facilitator. Insofar as Reverse Exchanges were concerned, a practice evolved whereby a facilitator would agree to take title to either the relinquished property or the replacement property so that, as to the taxpayer, the exchange might be treated as a Forward Exchange. In such Reverse Exchanges, the facilitator might not seek an exemption from realty transfer tax to further support its status in the exchange, for federal income tax purposes, as the beneficial owner of the property, which it holds.

On September 18, 2000, the Internal Revenue Service published Rev. Proc. 2000-37, which provides a "safe harbor" for certain qualifying Reverse Exchanges. Rev. Proc. 2000-37 states, in part, that “it is in the best interest of sound tax administration to provide taxpayers with a workable means of qualifying their transactions under §1031 in situations where the taxpayer has a genuine intent to accomplish a like-kind exchange at the time that it arranges for the acquisition of the replacement property and actually accomplishes the exchange within a short time thereafter.” However, Rev. Proc. 2000-37 continues to require that the facilitator (or “exchange accommodation titleholder”) holding title to property to facilitate an exchange be treated as the beneficial owner of the property for all federal income tax purposes. Normally, a transfer of real property to a beneficial owner is subject to the Delaware Realty Transfer Tax. However, in this case the exchange accommodation titleholder who takes title as beneficial owner is merely acting as the agent of a taxpayer to qualify the transaction for non-recognition treatment as a like-kind exchange under section 1031 of the Code. In reality, the exchange accommodation titleholder acquires beneficial ownership only in a transitory way in

order to facilitate the exchange. Taking title as the agent of the taxpayer in a transitory way without intending to acquire any beneficial interest in the property for his or her own account (other than to facilitate the exchange), combined with the fact that the parties intend the exchange accommodation titleholder to be treated as a beneficial owner only for purposes of section 1031, should result in the exchange accommodation titleholder acting as a "trustee, nominee or straw party" for the taxpayer. This view is supported by the determination of the Internal Revenue Service in P.L.R. 2001-48-042. In that ruling, the Internal Revenue Service stated its position that state or local tax treatment of beneficial ownership may differ from the treatment for federal income taxes, and permitted a provision in a qualified exchange accommodation agreement declaring the exchange accommodation titleholder to be the taxpayer's agent for realty transfer tax purposes.

RULING:

Based on the foregoing, the Director hereby establishes a safe harbor from the Delaware realty transfer tax consistent with the safe harbor established under Rev. Proc. 2000-37. It is the ruling of the Division of Revenue that a conveyance of relinquished property by the taxpayer to a person intended to be an "exchange accommodation titleholder," pursuant to a writing intended to be a "qualified exchange accommodation agreement," both as defined in Rev. Proc. 2000-37, constitutes a conveyance "to a trustee, nominee or straw party" within the meaning of 30 Del. C. § 5401(1)j; and that a conveyance of replacement property from an exchange accommodation titleholder to the taxpayer constitutes a conveyance "from a trustee, nominee or straw party" within the meaning of 30 Del. C. § 5401(1)j; *provided*, in either case, that one or both of the following conditions applies:

(a) The qualified exchange accommodation agreement between the taxpayer and the exchange accommodation titleholder declares that the exchange accommodation titleholder is the taxpayer's agent for all purposes, except federal income tax purposes, or other similar language; or

(b) The exchange accommodation titleholder qualifies as an exchange accommodation titleholder under Rev. Proc. 2000-37 and the transaction involving the conveyance to or from the purported exchange accommodation titleholder qualifies for non-recognition of gain or loss under Section 1031(a) of the Code.

A transaction otherwise qualifying for the foregoing safe harbor will not fail to qualify because the conveyance was accomplished by a transfer of an intangible interest in a corporation, partnership, or trust, as described in 30 Del. C. § 5401(7).

Parking transactions or other transfers designed to qualify a transaction for non-recognition treatment under Code section 1031 accomplished outside the safe harbor provided in Rev Proc. 2000-37 or this Tax Ruling are presumptively subject to the realty transfer tax unless the taxpayers otherwise have established that the transactions are exempt.

Like-kind exchanges will continue to be subject to the realty transfer tax, as between the principals to the exchange transaction, twice: once on the transfer of the relinquished property from the taxpayer to the other principal, and again on the transfer of the replacement property to the taxpayer from the other principal, unless it is established that the transaction is otherwise excluded from the application of the realty transfer tax, either because the relinquished or replacement property is not Delaware real estate, or because it is excluded under other provisions of Chapter 54.

EXAMPLES:

The application of this Ruling may be illustrated by the following examples:

(a) Pursuant to a document intended to be a qualified exchange accommodation agreement, the taxpayer conveys the relinquished property by deed to a person intended to be an exchange accommodation titleholder ("Conveyance #1") in exchange for the taxpayer's receipt of the replacement property by deed from a third party pursuant to the direction of the exchange accommodation titleholder ("Conveyance #2"). The exchange accommodation titleholder subsequently conveys the relinquished property by deed to a third party ("Conveyance #3"). The qualified exchange accommodation

agreement declares that the exchange accommodation titleholder is the taxpayer's agent for all purposes, except federal income tax purposes, or other similar language, or the exchange accommodation titleholder qualifies as an exchange accommodation titleholder under Rev. Proc. 2000-37 and the conveyance of the relinquished property qualifies for non-recognition of gain or loss under Section 1031(a) of the code. Conveyance #1 is exempt from the Delaware realty transfer tax based on the exemption provided under 30 Del. C. § 5401(1)j. Unless another exemption applies, Conveyance#2 and Conveyance #3 are not exempt from the Delaware realty transfer tax.

(b) Pursuant to a document intended to be a qualified exchange accommodation agreement, a person intended to be an exchange accommodation titleholder acquires title to property by deed, which the taxpayer intends to acquire as its replacement property ("Conveyance #1). The taxpayer subsequently conveys the relinquished property by deed to a third part pursuant to the direction of the exchange accommodation titleholder ("Conveyance #2") in exchange for the exchange accommodation titleholder's conveyance of the replacement property by deed to the taxpayer ("Conveyance #3"). The qualified exchange accommodation agreement declares that the exchange accommodation titleholder is the taxpayer's agent for all purposes, except federal income tax purposes, or other similar language, or the exchange accommodation titleholder qualifies as an exchange accommodation titleholder under Rev. Proc. 2000-37 and the taxpayer's conveyance of the relinquished property qualifies for non-recognition of gain or loss under Section 1031(a) of the Code. Conveyance #3 is exempt from the Delaware realty transfer tax based on the exemption provided under 30 Del. C. § 5401(a)j. Unless another exemption applies, Conveyance #1 and Conveyance #2 are not exempt from the Delaware realty transfer tax.

ADMINISTRATION:

The exemption from the realty transfer tax provided by this safe harbor shall be claimed, as with other exemptions, on the affidavit of residence and gain filed with the exempt document to or from the accommodation titleholder as the particular case may be.

As these transactions require three separate documents to complete, upon the filing of the document completing the like-kind exchange, the closing attorney shall, in order to qualify for this safe harbor, notify the Division of Revenue by letter of the other parts of the transaction comprising the exchange. The notification shall include the name and address of each of the principals, the identity of the accommodation titleholder, the identity of the relinquished property and the replacement property by address (and tax parcel number to the extent the property is Delaware property), and the realty transfer tax paid on each part of the exchange, unless a part does not involve Delaware property or is otherwise exempt from Chapter 54. The notification shall be sent to:

Delaware Division of Revenue
Carvel State Office Building
820 N. French Street
Wilmington, DE 19899
Attention: Realty Transfer Tax Auditor

David M. Sullivan
Director of Revenue