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HARRISBURG OFFICE

PHONE: (717) 783-5417
FAX: (717) 783-2664
irrc@irrc.state.pa.us
<http://www.irrc.state.pa.us>

INDEPENDENT REGULATORY REVIEW COMMISSION

333 MARKET STREET, 14TH FLOOR, HARRISBURG, PA 17101

January 18, 2012

Honorable Daniel Meuser, Secretary
Department of Revenue
Strawberry Square, 11th Floor
Harrisburg, PA 17128

Re: Regulation #15-453 (IRRC #2924)
Department of Revenue
Realty Transfer Tax Amendments

Dear Secretary Meuser:

Enclosed are the Commission's comments for consideration when you prepare the final version of this regulation. These comments are not a formal approval or disapproval of the regulation. However, they specify the regulatory review criteria that have not been met.

The comments will be available on our website at www.irrc.state.pa.us. If you would like to discuss them, please contact me.

Very truly yours,

A handwritten signature in black ink, appearing to read "David Sumner". The signature is stylized and includes a long horizontal stroke extending to the right.

David Sumner
Executive Director

sfn

Enclosure

cc: Honorable Michael W. Brubaker, Majority Chairman, Senate Finance Committee
Honorable John N. Wozniak, Minority Chairman, Senate Finance Committee
Honorable Kerry A. Benninghoff, Majority Chairman, House Finance Committee
Honorable Phyllis Mundy, Minority Chairman, House Finance Committee
Robert A. Mulle, Esq., Office of Attorney General
Megan L. Consedine, Esq., Office of General Counsel

Comments of the Independent Regulatory Review Commission



Department of Revenue Regulation #15-453 (IRRC #2924)

Realty Transfer Tax Amendments

January 18, 2012

We submit for your consideration the following comments on the proposed rulemaking published in the November 19, 2011 *Pennsylvania Bulletin*. Our comments are based on criteria in Section 5.2 of the Regulatory Review Act (71 P.S. § 745.5b). Section 5.1(a) of the Regulatory Review Act (71 P.S. § 745.5a(a)) directs the Department of Revenue (Department) to respond to all comments received from us or any other source.

1. Determining whether the regulation is in the public interest.

Section 5.2 of the RRA (71 P.S. § 745.5b) directs this Commission to determine whether a regulation is in the public interest. When making this determination, the Commission considers criteria such as economic or fiscal impact and reasonableness. To make that determination, the Commission must analyze the text of the proposed rulemaking and the reasons for the new or amended language. The Commission also considers the information a promulgating agency is required to provide under §745.5(a) in the Regulatory Analysis Form (RAF).

The information contained in the RAF submitted with this rulemaking is not sufficient to allow this Commission to determine if the regulation is in the public interest. By way of example, there is no detailed fiscal impact and cost benefit analysis in the RAF. How did the Department arrive at the conclusion that there will be no costs or savings to the regulated community, local government and state government? Regarding the approximate number of people that will be required to comply with the regulation, the Department responded that the number is indeterminable. Why is that number indeterminable? The Department has also failed to describe how the regulation compares to those of other states. Without this information, we cannot determine if this proposed regulation is in the public interest. In the Preamble and RAF submitted with the final-form rulemaking, the Board should provide more detailed information required under §745.5(a) of the RRA.

2. Section 91.101. Definitions. – Whether the regulation is consistent with the intent of the General Assembly; Clarity.

Business trust

A commentator believes that, under this definition, all trusts would be considered business trusts. Therefore, every transfer of real estate to a trust would be subject to realty transfer tax. This

would be contrary to the Realty Transfer Tax Law (72 P.S. §§ 8101-C –8103-C.1) (Law) and the statutory exclusions it provides for living trusts and ordinary trusts. Given the concerns raised by the commentator, we ask the Department to explain if transfers to living trusts and ordinary trusts would be taxable, and if so, what statutory provision would allow the Department to tax those transfers. If the transfers are not taxable, we recommend that the definition of “business trust” be clarified to reflect that fact.

3. Section 91.138. Valuation. – Clarity.

Paragraph (3) pertains to other valuation methods when there is not a bona fide sale or computed value. A commentator has pointed out two concerns with this paragraph. First, under Subparagraph (3)(ii)(A), the reference to the term “licensed real estate appraiser” is incorrect and should be replaced with “certified real estate appraiser” because appraisers in Pennsylvania are certified, not licensed. Second, Subparagraph (3)(ii)(b) includes the phrase “realistic estimate of the value of the real estate.” The commentator notes that the term “realistic” is difficult to quantify and suggests that it either be deleted or a reference to Section 608(c) of the Real Estate Licensing and Registration Act be added to the regulation. We agree with the commentator and ask the Department to amend the regulation accordingly.

4. Section 91.153. Agent and straw party transactions. – Reasonableness; Need; Clarity.

According to the Preamble, new Subsection (e) expands on the subject matter of this section because it has generated questions from taxpayers. We have two concerns. First, we ask the Department to explain the nature of the questions and how the new language addresses the concerns. We also ask the Department to explain the need for invalidating an indemnification or subrogation agreement between a purported principal or real party in interest and a purported agent or straw party, and whether this invalidation is consistent with the law.

Second, as noted by a commentator, what does the phrase “does not circumvent this condition” found in Subsection (e)(4) mean? We suggest that this phrase be clarified.

5. Section 91.193. Exemptions and exclusions. – Statutory authority; Whether the regulation is consistent with the intent of the General Assembly; Clarity.

Amendments to this section of the regulation replace the characterization of certain transactions as being “excluded” from tax as now being “exempt” from tax. The Preamble provides little information on why this change is needed. Commentators are concerned that this change conflicts with the Law. We agree that this change appears to conflict with excluded transactions specifically cited as such in Section 1102-C.3 of the Law (72 P.S. § 8102-C.3). We ask the Department to provide a more detailed explanation of why this change is needed and how it is consistent with the Law and the intent of the General Assembly when it enacted the Law.

In addition, it is our understanding that the Court of Common Pleas issues divorce decrees. Therefore, Example 2 under § 91.193(b)(6)(i)(F) should be amended accordingly.