

DEED TRANSFER TAX

The Deed Transfer Tax Act, S.N.S. 1968, Chapter 10 contains the following definitions:

"1(b) "deed" means any instrument or writing not testamentary in character, whereby property is conveyed, transferred, assigned or vested in any person, but does not include a mortgage or an agreement of sale or a lease for a term less than twenty-five years, or a deed given by a clerk of a municipal unit in pursuance of a sale for rates and taxes;"

"1(j) "property" means real property of any kind including any right, easement or power in respect thereof or interest therein;"

"1(m) "sale price" means the entire consideration for the sale of the property and, without restricting the generality of the foregoing, includes:

(i) money consideration paid together with the par or face value of promissory notes, cheques, bills of exchange, agreements and securities forming part of the consideration;

(ii) the gross value or [of] real or personal property given in exchange in whole or in part including mortgages made by the grantee in favor [favour] of the grantor or his executor, nominee, assignee, trustee or anyone on his behalf;

(iii) outstanding obligations or accounts cancelled, assumed or satisfied;

(iv) the amount of rates, taxes, liens, mortgages and encumbrances, including interest and expenses thereon assumed by the grantee at the date of transfer;" Pursuant to section 2, the Act only applies in a municipal unit that has passed a by-law adopting the Act. The Act does not apply in a municipal unit that under the authority of any other act levies a tax of a kind permitted by this Act.

However, section 2A of the Act, a 1982 amendment, applies to every municipal unit that levies a tax. Section 2A(2) reads as follows:

"Gift or Interspousal Transfer Exempt from Tax

- (2) Where a deed transfers property
- (a) between persons married to one another;
 - (b) by way of gift, notwithstanding that
 - (i) the deed transfers property subject to an encumbrance including a mortgage or a lien for rates and taxes and the grantee assumes the amount of the encumbrance, including interest and expenses thereon, or
 - (ii) there is a nominal consideration therefor, it is exempt from deed transfer tax. 1982, c.52, s.1."

Section 3(1) is the taxing section that calls for a tax of one half of one percent of the value of the property conveyed. This tax is payable to the municipal unit within which the property lies.

Sections 4, 5 and 6 exempt registered Canadian charitable organizations, confirmatory deeds and deeds executed before the Act came into effect from the payment of tax.

Section 7 (1) requires the filing of a deed transfer tax affidavit and section 7(2) states **that where the** affidavit is made by a person other than the grantee that person is personally liable jointly and severally with the grantee for payment of the amount of tax.

Pursuant to section 8, the Municipal Clerk shall compute the amount of the tax upon receiving the affidavit from the grantee and the tax is due and payable by the grantee at the time of making the transfer.

The affidavit may be refused according to section 9 if the true and complete sale price is not set out or if the sale price cannot be determined from the affidavit in which case the grantee shall tender the affidavit to a regional assessment appeal court named by the municipality and the court, whose decision is final, shall determine the sale price.

Section 10 requires the deed to be endorsed by the Municipal Clerk and this section works in *conjunction with* section 13 which requires the deed to bear the certificate signed by the Municipal Clerk stating that the tax has been paid in full or stating that no tax is payable before the deed is capable of being received for registration.

Section 11 states that if the grantee does not pay the tax when due he shall pay interest thereon at the rate of one-half of one percent per month until paid beginning ten days after the transfer and a penalty of ten percent on any tax or portion thereof which remains unpaid after thirty days from the date of transfer.

Section 12 states that if the tax is not paid, the tax with interest and penalty constitutes a lien upon the property.

Section 14 is the penalty section whereby any person who makes any false statement in an affidavit or any person who violates the Act is liable on summary conviction to a penalty not exceeding \$500.00 and in default of payment to imprisonment for a term not exceeding three months and further shall be liable to pay the amount of the-tax, together with interest and penalty, that should have been paid upon such deed.

A number of municipalities have their own municipal ordinance or by-law that imposes the deed transfer tax. These municipalities operate outside the parameters of the Act with the exception of section 2A which applies to every municipality.

Although the wording of the various municipal ordinances and by-laws are similar to the wording of the Deed Transfer Act S.N.S. 1968 Chapter 10, the Provincial statute is generally more comprehensive. Further, the percentage of the value of the property equating to tax, the number of days in which the tax is required to be paid, the penalty, and other provisions vary between municipalities. For instance, the County of Halifax begins charging interest ten days after the transfer at the rate of three-quarters of one percent per month and also charges a ten percent penalty based on the amount of tax owing if the tax is not paid within thirty days. Interest charged in the City of Dartmouth is one-half of one percent after ten days and the ten percent penalty is imposed after twenty days. The City of Halifax charges interest at the current rate plus a ten percent penalty after twenty days. Reference should be made to the relevant authority to answer specific queries. Schedule "A" attached lists the municipal phone numbers, addresses and percentages of tax payable in the municipal units. Schedule "B" attached contains the municipal ordinance and by-laws for the City of Halifax, the County of Halifax and the City of Dartmouth.

EXEMPTIONS FROM DEED TRANSFER TAX

As mentioned, sections 4, 5 and 6 of the Act call for Canadian charitable organizations, confirmatory deeds, transfers between companies that are wholly owned by another company or person and deeds executed before the Act came into effect to be exempt from the payment of tax. The definition of deed exempts testamentary transfers from tax. Certain trust deeds, deeds from the Department of Veterans Affairs and the deeds from a Co-op into the member buying out fall within the exemption rules as well. Remember to make reference to the appropriate authority for each municipality to confirm an exemption.

Most of the controversy over the exemption rules has revolved around section 2A of the Act which applies to every municipal unit that levies a tax. This amendment was apparently enacted in response to two cases in particular in an attempt to clarify the problems presented in each case.

In Haccart v. City of Halifax 44 N.S.R. (2d) p.54 the Court of Appeal held that deed transfer tax was payable on total consideration of \$36,000.00 where a husband transferred his interest in the matrimonial home to his wife for \$4,000.00 and her assumption of the \$32,000.00 mortgage.

In City of Dartmouth v. Hoque 46 N.S.R. (2d) p.162, the Court of Appeal held there was a gift and not a sale between spouses and therefore no tax was payable **even though the transfer was made** subject to a mortgage.

Upon section 2A of the Act coming into force, some municipalities interpreted the subsections to read conjunctively and therefor required there be a gift between spouses before an exemption would be allowed. Accordingly, with a conjunctive interpretation, a grantee would pay tax on a gift of real property subject to a mortgage when the grantee and the grantor were not spouses as this type of transaction was covered in the definition of sale price. These types of transactions were complicated even further as the actual computation of tax seemed to vary from municipality to municipality.

In any event, much of the confusion would now appear to be eliminated. I refer you to Missons v. Dartmouth (City) (unreported July 31, 1986, N.S.S.C.; 5226/21) and the article, by Charles M. MacIntosh, Q.C. in the Nova Scotia Law News, Volume 13 #2, October, 1986 .

Mr. Justice Nunn ruled in the Missons case that the word "notwithstanding" applies to both categories of transactions, gifts and interspousal transfers. He held that section was to be read disjunctively and not conjunctively. Accordingly, all transfers between spouses are exempt from tax. Gifts and interspousal transfers of real property are exempt from tax whether or not the property is transferred subject to an encumbrance like a mortgage or tax lien. Gifts and interspousal transfers are exempt as well if there is only nominal consideration. Therefore, transfers of real property between spouses for valuable consideration are exempt from tax as are transfers of real property resulting from separation or divorce.

With regard to a transfer by way of gift, a father could give his son real property subject to a mortgage and the transfer is exempt from tax. Further, corporations or people making gifts of real property, subject to the assumption of a mortgage or tax lien, to other corporations or people is apparently exempt from tax. The disjunctive interpretation of section 2A creates a definition of gift that opens up ways to convey real property and avoid the payment of tax and thereby reduce municipal revenue. I would anticipate that in order to avoid absurdity the proof required by the municipality to substantiate a gift would be quite rigorous.

Although with the Missons case it is clear that some problem areas have been removed, it is also clear that new problems will come to light for resolution by the legal process.

CLOSING

Each transaction seems to have its own peculiar set of facts which may or may not attract tax. One can only form an opinion by looking to the appropriate legislation and case law and then raise the question with the proper municipal authority. Given the proper lead time a satisfactory resolution is normally reached. If not, the parties may look to the appropriate remedies available at law.

Finally, I want to mention two types of *transactions that* generate debate between municipalities and grantees.

The acquisition of real property by way of a share transfer as opposed to a deed transfer raises the question of the applicability of the payment of deed transfer tax. The names in the shareholders register have changed thereby effectively transferring ownership of the assets, including any real estate, to the new shareholders. However, the title to the property remains in the name of the company as there has not been a deed transferring the real estate from the company to any other person or company. Is deed transfer tax payable in such a situation?

Mr. Smith agrees to buy a lot from a developer either by way of an Agreement of Purchase and Sale or by taking an assignment of an existing Agreement of Purchase and Sale. At the time of agreeing to purchase the lot, construction has not been started: Mr. Smith then enters into a building contract with a builder who completes the home and receives final payment on the same day that Mr. Smith buys the lot from the developer. Is deed transfer tax payable on just the value of the lot or on the value of the lot plus the value of the building contract? Are the taxing implications different if the lot is purchased during the construction of the house or if the lot is purchased before the construction is started but after the building contract has been signed?

Each of these three scenarios again raises the question of the applicability of deed transfer tax. When, if at all, does the building contract become consideration for the sale of **property and fall into the definition of sale price?**

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Oh! To have all the answers... Happy conveyancing

Respectfully submitted