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Paying the Transfer Tax in Massachusetts, Even When You Are Not Recording a Deed

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There is a common misunderstanding in Massachusetts that an excise tax, often called a "deed stamp," "stamp tax," or "transfer tax," is only due upon recording a deed when transferring an interest in real property. Massachusetts General Laws chapter 64D, §1 provides that an excise "shall be levied, collected and paid" upon a "deed, instrument or writing" transferring an interest in real estate. Therefore, the excise tax is not limited to deeds or other instruments that will be recorded in the registry of deeds. For example, when you transfer an interest in a nominee trust, enter into a 99-year lease, or exchange two pieces of real estate, you are required to pay the excise tax regardless of the instrument used and regardless of whether the instrument is recorded in the registry of deeds.

1. Transferring an Interest in a Nominee Trust.

Many properties in Massachusetts are owned under a nominee trust. Generally, the beneficiaries of the nominee trust are not of public record, the beneficiaries are able to terminate the trust at any time, and the trustee of the nominee trust can only act as directed by the beneficiaries. Massachusetts courts often treat the beneficiaries of the nominee trust as the true owners of the real estate. See Morrison v. Lennett, 415 Mass. 857, 616 N.E.2d 92 (1993). Moreover, the Massachusetts Department of Revenue (DOR) looks at the substance rather than the form of the transaction in determining if an excise is applicable. Thus, sales and transfers of beneficial interests in nominee trusts for consideration in excess of one hundred dollars are subject to the excise tax, even though title to the real estate remains unchanged with the trust. This is the case whether or not any transfer documents are recorded in the registry of deeds.

2. Entering into a 99-year Lease.

Based on the same "substance over form" logic, the DOR also ruled that leases covering extensive periods of time are subject to the excise tax. However, the standard for determining whether a long-term lease is taxable is not as clear. The DOR's Letter Ruling

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79-52 provides that "ordinary leases of real property and assignments of such leases do not constitute taxable conveyances; however, leases or assignments thereof which are for very extended terms or are renewable indefinitely are taxable. To illustrate, a lease for ten years, renewable for an additional ten years, is not taxable; a lease for 99 years is taxable."

3. Exchanging Two Pieces of Real Estate.

Finally, an excise tax is due when exchanging two pieces of real estate. The common question asked on this type of transfer is whether both parties need to pay an excise tax. G.L. c. 64D, § 1 provides the excise is based upon the consideration given for the property and applies whenever the consideration, exclusive of any lien or encumbrance remaining on the property, is greater than $100. Customarily, the tax is paid by the person making or signing the deed and is evidenced by an affixed stamp.

However, Directive 89-14 clarifies that "when parties exchange real estate the conveyance of each parcel is subject to the deeds excise. If a parcel of real estate is conveyed in exchange for property other than real estate (i.e., personally) only the conveyance of the real estate is subject to the excise. In like-kind exchanges, the consideration in each case is the value of the property received by the transferee." This means both parties in an exchange must pay excise tax for each of their properties.

Disclaimer: This summary is provided for educational and informational purposes only and is not legal advice. Any specific questions about these topics should be directed to attorney Yana Zheng or Anthony A.A. McGuinness.

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