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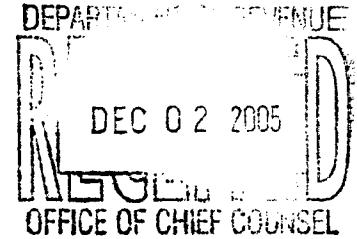
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December 1, 2005

Via Certified Mail

Mary R. Sprunk
Office of Chief Counsel
Department of Revenue
Dept. 281061
Harrisburg, PA 17128-1061



In Re: Department of Revenue's Proposed Rulemaking Relating to Realty Transfer Tax

Dear Ms. Sprunk:

This office serves as the general counsel for the Pennsylvania State University ("Penn State"). In that capacity, we are writing to convey our comments regarding the potential impact on Penn State of the Department of Revenue's ("DOR") proposed Realty Transfer Tax Amendments as published in the November 5, 2005 Pennsylvania Bulletin. Specifically, our comments are directed to the amendment adding §§ 91.195(b) and (d).

It is our opinion that the DOR's proposed regulations do not comply with the realty transfer tax provisions of the Tax Reform Code of 1971. *See* 72 PA. STAT. § 8101-C *et seq.* In particular, § 8102-C.2 provides:

Exempt parties. The United States, the Commonwealth or *any of their instrumentalities*, agencies or political subdivisions shall be exempt from payment of the tax imposed by this article. (emphasis added).

In addition, § 8102-C.3(1) provides:

Excluded parties. The tax imposed by section 1102-C¹ shall not be imposed upon:

(1) A transfer to the Commonwealth or to *any of its instrumentalities*, agencies or political subdivisions by gift, dedication or deed in lieu of condemnation or deed of confirmation in connection with condemnation proceedings, or a reconveyance

¹ 72 PA. STAT. § 8102-C.

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by the condemning body of the property condemned to the owner of record at the time of condemnation, which reconveyance may include property line adjustments provided said reconveyance is made within one year from the date of condemnation. (emphasis added).

Penn State is an instrumentality of the Commonwealth as is its affiliate, The Pennsylvania College of Technology. *See* 24 PA. STAT. § 2510-504 and the attached Memorandum. As an instrumentality of the Commonwealth, Penn State is exempt from realty transfer tax under 72 PA. STAT. § 8102-C.2. The DOR's proposed regulation § 91.195(b) purports to establish that Penn State does not constitute an excluded party for realty transfer tax purposes. As such, the proposed regulation is not in accord with the provisions of state law.

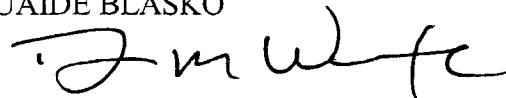
In addition, the DOR's proposed regulation § 91.195(d) purports to establish that transfers by gift to Penn State will be taxable for realty transfer tax purposes. Realty transfer tax should not be imposed on Penn State with respect to gifts it receives, since gifts to instrumentalities of the Commonwealth are excluded under 72 PA. STAT. § 8102-C.3(1). Accordingly, just as with § 91.195(b), this proposed regulation is also not in accord with state law.

For the above-stated reasons, we believe that the aforementioned proposed amendments to the realty transfer regulations should not be adopted.

Very truly yours,

McQUAIDE BLASKO

By:



David M. Weixel

DMW/dgr

To: Pennsylvania Department of Revenue
From: David M. Weixel, Esq.
In Re: Penn State's Status as an Instrumentality of the Commonwealth
Date: December 1, 2005

The Commonwealth of Pennsylvania, Department of Treasury, Board of Finance and Revenue (the "BF&R") has, on several occasions, specifically determined that the Pennsylvania State University ("Penn State") is an instrumentality of the Commonwealth for the purposes of realty transfer tax. *See, e.g., In re Galen E. & Nancy J. Dreibelbis*, No. 0016169 (BF&R, June 19, 2001); *In re Charles and Jeanne Rider*, No. 0017128 (BF&R, March 28, 2001).² In the *Dreibelbis* case, the BF&R considered and distinguished the principal case upon which the Department of Revenue Board of Appeals based its decision to uphold the imposition of realty transfer tax, *The Pennsylvania State University, the Milton S. Hershey Medical Center v. Derry Township School Dist.*, 731 A.2d 1272 (Pa. 1999). Specifically the BF&R stated, in relevant part:

"The [University] is an instrumentality of the Commonwealth for purposes of the exemption from the realty transfer tax set forth in 72 PA. STAT. § 8102-C.2. This is consistent with the Department [of Revenue]'s own ruling with respect to state sales and use tax and the numerous other opinions respecting other state imposed taxes. The holding in [the *Derry Township* case] is distinguishable as limited to the issue of immunity from local real estate taxation and is based upon the specific facts of that case."

² Please note that 35 BF&R decisions identical to the *Rider* case were issued concurrently with the *Rider* decision. *See* BF&R Nos. 0017131; 0017900-0017915; 0013754-0013761; 0013764; 001376-0013768; 0013771-0013773; 0025612; 0003298; 0014013 (BF&R, March 28, 2001). Each of these matters involved the issue of whether Penn State is an instrumentality of the Commonwealth for purposes of the imposition of realty transfer tax; accordingly, they were consolidated by the BF&R and considered simultaneously.

(BF&R, No. 0016169, op. at 5 (June 19, 2001)).

Moreover, Penn State's status as an instrumentality of the Commonwealth has been recognized in contexts other than realty transfer tax. In the Pennsylvania College of Technology Act, 24 PA. STAT. §§ 2510-501-512, the Legislature in 1989 expressly declared that the Pennsylvania College of Technology "is granted the benefits and responsibilities of the status of The Pennsylvania State University as a state-related institution and *as an instrumentality of the Commonwealth of Pennsylvania.*" 24 PA. STAT. § 2510-504 (emphasis added). Under the State Employees' Retirement Act, 71 PA. CON. STAT. § 5102, the definition of "State employee" includes any employee of Penn State. Similarly, the Public School Employees Retirement Code, 24 PA. CON. STAT. §§ 8101-8104, specifically defines "employer" as being "any governmental entity directly responsible for the employment and payment of the school employee and charged with the responsibility of providing public education within this Commonwealth, including but not limited to... The Pennsylvania State University." 24 PA. CON. STAT. § 8102. Under the Probate Estate and Fiduciary Code, 20 PA. STAT. § 7305, the Legislature under the heading of obligations of Pennsylvania *governmental* organizations states that obligations of the following Pennsylvania government organizations shall be authorized investments: The Pennsylvania State University -- obligations of the Pennsylvania State University (20 PA. STAT. § 7305(12)).

The instrumentality status of Penn State has not only been recognized by the Legislature, but on numerous occasions by the State Attorney General and the federal government as well.

In 1972, the Attorney General held that Penn State employees were "state employees" within the meaning of certain amendments to the Unemployment Compensation Law. Under that opinion, Penn State employees were considered by the Attorney General to fall within the category of "the Commonwealth of Pennsylvania and all of its departments, bureaus, boards, agencies commissions and authorities." 1972 Op. Att'y Gen. 132. In so ruling, the Attorney General stated as follows:

Former Attorney Generals have already ruled that the Pennsylvania State University is an instrumentality of the state in much the same way as those entities known as state "authorities," as opposed to a private state-aided institution - like Temple and Pittsburgh Universities. See Attorney General's Opinions dated December 21, 1921 (Penn State enjoys Commonwealth's immunity from gasoline

tax); December 23, 1921 (Penn State enjoys similar immunity from inheritance tax); May 23, 1958 (bonds of Penn State exempt from Capital Stock Tax); May 14, 1964 (Penn State is instrumentality of Commonwealth for social security purposes).

In addition, the following acts of the General Assembly suggest that the Legislature considers Pennsylvania State University to be similar to a state authority: Act of June 27, 1923, P.L. 858, § 1(6), as amended (71 PA. STAT. § 1731(6)) (employees of Penn State are members of State Employees Retirement Fund); Act of May 2, 1949, P.L. 870 (72 PA. STAT. § 3484) (unexpended appropriations to Penn State do not revert to Commonwealth as do funds of State-aided institutions); Act of May 11, 1949, P.L. 1126 (72 PA. STAT. § 3942) (appropriations to Penn State are not entered as liens against it as they are against state-aided institutions); Act of June 1, 1945, P.L. 1242, § 601 (36 PA. STAT. § 670-601) (roads on Penn State campus are built by the State Highway Department).

Taking all of these factors into account, it is our opinion, and you are so advised, that the Legislature intended that the employees of Pennsylvania State University be considered "state employees" within the meaning of § 1001 of Act No. 108 (43 PA. STAT. § 891)....

1972 Op. Att'y Gen. No. 132.

The Commonwealth Court has expressly approved this opinion of the Attorney General. *See Pearson v. Unemployment Compensation Board of Review*, 689 A.2d 352 (Pa. Commw. Ct. 1997). In so ruling, the Court observed that Penn State's relationship to the Commonwealth was more akin to that of the wholly state-owned and state-run universities (SSHE) than it was to Temple, Pitt or other private institutions.

This 1972 Opinion of the Attorney General with regard to the status of Penn State is consistent with the very first Attorney General's Opinion in 1921 on this same issue. In that Opinion, the Attorney General correctly observed that by accepting the provisions of the Morrill Act, "the State of Pennsylvania *entered into a covenant* with the United States, to establish and maintain a college of the character described in the Act...." 1921 Op. Att'y Gen. No. 6 (emphasis

added). In that same Opinion, the Attorney General concluded as follows at page 74 with respect to Penn State:

"...the Trustees of Pennsylvania State College...hold their property as trustees for the people of the Commonwealth. The institution is...a state institution. Its status is quite different from that of similar institutions which merely receive state aid from time to time. I am of the opinion, that so far as relates to the application of tax laws, its property and its functions are to be deemed purely public in character, and that the rule hereinbefore stated as applying to municipal sub-divisions of the state applies to it and relieves its property and its functions from the operation of such laws."

Similarly, in another Opinion dated December 23, 1921, the Attorney General held that a bequest to the University was not subject to the Transfer Inheritance Tax. In so holding, the Attorney General reiterated that the "Pennsylvania State College....is a purely public institution and, therefore, it never was within the contemplation of tax laws, and no exemption is necessary to relieve it from their operation." In the Opinion of May 23, 1938, the Attorney General held that bonds issued by Penn State were not subject to the Capital Stock Tax. This was true, reasoned the Attorney General, even though the tax was not on the institution, but on the holder of the bond. To hold otherwise would affect the interest rates on those bonds, and thereby indirectly affect Penn State in an adverse fashion. As an instrumentality, the University was properly shielded from even the indirect effects of the tax laws, as an adverse effect on Penn State could inure to the detriment of the citizens of the Commonwealth provided services of various kinds by Penn State.

The federal government, with respect to the operation of its tax laws, has likewise consistently determined Penn State to be an instrumentality of the Commonwealth. In 1949, the Internal Revenue Service ruled that Penn State was "an instrumentality of the Commonwealth of Pennsylvania, and as such,...not subject to federal income tax." In that same ruling, the Internal Revenue Service also held that:

- 1) Contributions to the University are deductible by the donors in arriving at their taxable net income;

- 2) Bequests to the University are deductible in arriving at the value of the net estate of a decedent for estate tax purposes; and
- 3) Gifts of property to the University are deductible in computing net gifts for gift tax purposes.

There has been no change in any of these rulings to the present day.

More recently, in the Deficit Reduction Act of 1984, the United States Congress determined that interest on obligations of Penn State was exempt from federal income tax. In so doing, the House Ways and Means Committee explained as follows:

The Committee has examined the operations of the Pennsylvania State University and its relationship with the Commonwealth of Pennsylvania and believes that the operations of the Pennsylvania State University are sufficiently a part of the operations of the Commonwealth of Pennsylvania and its relationship to the Commonwealth of Pennsylvania is sufficiently close that interest on obligations of the Pennsylvania State University should be exempt from federal income tax.

The bill provides that the Pennsylvania State University is to be treated as a State Governmental unit for purposes of the tax-exempt bond provisions of the Internal Revenue Code....

Based on the foregoing, we respectfully submit that there can be no question regarding Penn State's status as an instrumentality of the Commonwealth. Any other conclusion would contradict a history of such treatment by all branches of the state and federal governments extending from 1921 to the present.