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INDEPENDENT REGULATORY REVIEW COMMISSION
333 MARKET STREET, 14TH FLOOR, HARRISBURG, PA 17101

January 4, 2006

Honorable Gregory C. Fajt, Secretary
Department of Revenue
Strawberry Square, 11th Floor
Harrisburg, PA 17128

Re: Regulation #15-429 (IRRC #2503)
Department of Revenue
Realty Transfer Tax Amendments

Dear Secretary Fajt:

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.

Sincerely,

Kim Kaufman
Executive Director

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Enclosure

cc: Honorable Jane M. Earll, Chairwoman, Senate Finance Committee
Honorable John N. Wozniak, Minority Chairman, Senate Finance Committee
Honorable Dennis E. Leh, Majority Chairman, House Finance Committee
Honorable David K. Levdansky, Democratic Chairman, House Finance Committee

Comments of the Independent Regulatory Review Commission

on

Department of Revenue Regulation #15-429 (IRRC #2503)

Realty Transfer Tax Amendments

January 4, 2006

We submit for your consideration the following comments on the proposed rulemaking published in the November 5, 2005 *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. Section 91.101. Definitions. – Consistency with the statute; Clarity.

Association – The Philadelphia Bar Association (PBA) has questioned whether new language pertaining to restricted professional companies is intended to mean that the characterization of those companies depends on how many members it has and also questioned the need to make such a distinction. They suggest that the phrase “that is deemed to be a limited partnership” be deleted. Does the characterization of a restricted professional company depend on how many members it has?

Living trust and ordinary trust – These definitions differ from the statutory definitions found at 72 P.S. § 8101-C. Why do these definitions differ? We recommend that the statutory and regulatory definitions be verbatim or, in the alternative, that the regulatory definitions cross reference the statutory definitions.

Ordinary trust – This definition includes a citation to 15 Pa.C.S. (relating to Association Codes). The correct citation is 15 Pa.C.S.A (relating to corporations and unincorporated associations). The final-form regulation should be amended accordingly. We also recommend that a more specific citation to the relevant chapters of 15 Pa.C.S.A. be added to the regulation. This would assist the regulated community in complying with the requirements of the regulation.

Testamentary trust – This definition includes the phrase “private trust.” What is a “private trust”? Does the term include “living trusts” and “ordinary trusts”? The Department should add a definition of this term.

2. Section 91.132. Bona fide sale transactions. – Clarity.

This section has been amended to address the Pennsylvania Supreme Court decision in *Allebach v. Commonwealth*, 546 Pa. 146,683 A.2d 625 (1996). The PBA believes that the regulation should be revised to “...include the value amounts received by a seller’s affiliate for

an assignment of a contact.” Has the Department considered including more detailed language in this provision?

3. Section 91.152. Confirmatory deed. – Consistency with the statute; Clarity.

The Department has added language to this section with the intent of providing additional guidance on mergers and business form changes. The PBA has submitted extensive comments on the new language. They believe that the new language contains numerous errors in interpreting the Realty Transfer Tax Act (Act) and case law. The PBA has made suggestions to correct each of the potential errors it has identified. We urge the Department to carefully consider and respond to all issues raised by the PBA.

In addition, Subsections (b) and (c) are incomplete. Both subsections have omitted the phrase “is not taxable.” This phrase should be added to both subsections.

4. Section 91.154. Documents involving corporations, partnerships, limited partnerships and other associations. – Consistency with the statute; Clarity.

New language has been added to this section that clarifies the taxation regarding conversion of real estate between certain types of businesses and their owners. We have three recommendations. First, the Department should explain the need for the exclusions created by the new language. A commentator has suggested that the approach proposed by the Department will create “...an underground of unrecorded title documents that would provide no one with the necessary notice or access to information that is the basis of the Statute of Frauds and recording process.” The PBA also commented on the new language. They believe it is not consistent with general concepts of the Act and it should be deleted.

Second, Subsections (b), (c) and (d) should include a citation to the “Statute of Frauds.” This citation should also be included in § 91.171.

Third, the term “writings,” should be defined. This term is included in Subsections (b), (c) and (d), and also in §§ 91.170(a) and 91.171. The Department has explained that this term can mean any sort of document from a deed to a sales invoice. We recommend that this definition be included so that all parties understand the meaning the Department will ascribe to this term.

5. Section 91.155. Timber, crops and natural resources. – Reasonableness; Clarity.

This section pertains to the taxability of timber, crops and natural resources. We have two concerns. First, the term “natural resources” was added to the title of this section, even though this section only addresses timber and products of the soil. Therefore, the term “natural resources” should be deleted from the title.

Second, proposed language in Subsection (b) establishes a standard that cannot be enforced. Under existing Subsection (b), standing timber is considered nontaxable personal property if the instrument provides for severance and removal “within an immediate ascertainable date.” The proposed rulemaking changes the standard from an immediate specified date to “...at once or as soon as it can be reasonably done.” The Department has stated that a reasonable amount of time could be established by using industry standards on a case-by-case basis. We believe that the

contract or sales agreement should specify a reasonable time frame for removing the timber, such as within six months. This would provide the parties involved in the transaction and the Department with a measurable standard that could be enforced.

6. Section 91.165. Reservations or conveyances of life estates. – Statutory authority; Implementation procedures.

Subsection (c) states the following: “The Department will update Table I at least once every 5 years by published notice in the *Pennsylvania Bulletin*.” It is our understanding that the table is based on Federal actuarial tables and adjusted by the Department. A codified regulation has the full force and effect of law. It cannot be amended or updated by a published notice in the *Pennsylvania Bulletin*. If the Department wants to update the table, it must do so by promulgating another regulation. Therefore, Subsection (c) should be deleted.

In the alternative, the table could be deleted from the regulation and in its place the Department could specify how it calculates the values in the table. This would allow the Department to update the table as needed as a statement of policy without promulgating another regulation.

7. Section 91.170. The rule in *Baehr Bros. v. Commonwealth*, 493 Pa. 417, 426 A.2d 1086 (1981). – Implementation procedures; Clarity.

This section sets forth rules to determine whether a document is taxable. As noted by the PBA, it appears to restate the principles set forth in *Baehr Bros. v. Commonwealth*, 493 Pa. 417, 426 A.2d 1086 (1981). The PBA believes this new section lacks clarity and questions how it will be interpreted and administered by the Department. We agree and ask the Department to provide detail on how it intends to administer this new section.

Also, PBA questions whether the Department has incorrectly cited the *Baehr Bros.* decision. It feels that the correct citation is 487 Pa. 417, 426 A.2d 1086 (1981). The case should be correctly cited in the final-form regulation.

8. Section 91.193. Excluded transactions. – Statutory authority.

Subsection (c) states the following: “Documents that convey or evidence the transfer of real estate between the parties involved in the transactions enumerated in subsection (b) are excluded from tax. Subsection (b) has no application to acquisitions of real estate companies as provided in § 91.202.” It is being promulgated to codify the Department’s policy that the list of excluded transactions in Subsection (b) does not apply to acquisitions of real estate companies. The PBA believes that transfers of interests in a real estate company are statutorily exempt. They also commented as follows: “There is no rational policy reason to tax transfers of interests in real estate companies where comparable transfers of real estate would be subject to an exclusion or exemption from RTT.” What is the Department’s statutory authority for taxing these types of transactions?

9. Section 91.195. State-related universities and public charities. – Statutory authority; Consistency with the intent of the General Assembly.

We have two concerns with this section.

First, the Department incorrectly excludes “other State-related institutions,” such as the Pennsylvania State University, Temple University, the University of Pittsburgh and their affiliates from being considered as excluded parties under this section. The Department indicates that these institutions are not included in the list of excluded parties because it does not believe they are “instrumentalities of the Commonwealth.” We disagree.

Paragraph 6 in 24 P.S. § 2510-503 states “The Corporation For Penn State is a wholly controlled affiliate of the Board of Trustees of the Pennsylvania State University, a State-related university **and an instrumentality of the Commonwealth.**” (Emphasis added). In addition, similar language is found in 24 P.S. § 2510-202(6) for the University of Pittsburgh, 24 P.S. § 2510-2(7) for Temple University, 24 P.S. § 2510-503(7) for the Pennsylvania College of Technology and 24 P.S. § 2510-402(7) for Lincoln University.

Further, the Act, at 72 P.S. § 8102-C.3(1), states that the realty transfer tax shall not be imposed on “a transfer to the Commonwealth or to **any of its instrumentalities....**” (Emphasis added). Considering this and the fact that the General Assembly is clear that it considers these institutions to be “instrumentalities of the Commonwealth,” the Department should amend this section to include them in the list of excluded parties in Subsections (a) and (c). Subsections (b) and (d) should be deleted.

Second, if the Department does not make the revision discussed above, this section should include an applicable provision from the Institutions of Purely Public Charity Act (IPPC). The IPPC, in 10 P.S. § 374(b), states “All real property owned by State-related universities...shall be deemed public property...relating to the assessment, taxation and exemption of real estate and **shall be exempt from all State and local taxation when actually and regularly used for public purposes.**” (Emphasis added).

Section 374(d) of IPPC defines “State-related universities” as “The Pennsylvania State University and its affiliate, the Pennsylvania College of Technology, the University of Pittsburgh, Temple University and its subsidiaries Temple University Hospital, Inc., and Temple University Children’s Hospital, Inc., and Lincoln University.” This definition does not include the institutions that are part of the State System of Higher Education.

Therefore, if the Department does not add the “State-related universities” to the list of excluded parties, it should add a provision for those institutions that exempts them from the tax when the property is used for public purposes as directed by IPPC.

10. Section 91.221. Family farm partnership. – Consistency with statute; Need.

This section establishes the criteria for when an entity qualifies as a family farm partnership. It is being added to address statutory changes to the Act. The PBA has questioned the reason Subsection (a)(2) and (a)(3) impose additional requirements that are not found in the Act. We share the concerns of the PBA. What is the need for these additional requirements?

Facsimile Cover Sheet

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Date: January 4, 2006
Pages: 6

Comments: We are submitting the Independent Regulatory Review Commission's comments on the Revenue Department's regulation #15-429 (IRRC #2503). Upon receipt, please sign below and return to me immediately at our fax number 783-2664. We have sent the original through interdepartmental mail. You should expect delivery in a few days. Thank you.

Accepted by:

Mary R Sprunk

Date:

1-4-06