

**To: New Jersey Law Revision Commission**  
**From: Susan G. Thatch**  
**Re: Bulk sale tax notification – N.J.S. 54:50-38**  
**Date: January 11, 2016**

## MEMORANDUM

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### Executive Summary

In November 2015, the Commission authorized work on a project to research and propose revisions to N.J.S. 54:50-38 which requires a purchaser of business assets to notify the bulk sales unit of the Division of Taxation (“Division”) and to escrow for any state taxes owed by the seller prior to the completion of the sale. A member of the public brought this provision to the Commission’s attention with concerns that the law, as currently written, creates an unnecessary burden for certain purchasers of real estate.

The Legislature amended N.J.S. 54:50-38 in 2011 to exempt transactions involving residences in which the seller is an “individual, trust, or estate.” However, the Division’s interpretation of “individual” is limited to a single person or married/civil union couples.<sup>1</sup> As a result, a prudent purchaser acquiring real estate from unmarried co-owners is compelled to provide notice to the Division and escrow the determined amount, lest he or she risk assumption of the seller’s state tax liabilities.

The amendment’s legislative history suggests a desire to exclude transactions in which the seller is a business entity from the bulk sale notice exemption, yet is unclear with respect to the treatment of transactions involving property jointly owned by unmarried individuals. In the absence of a clear rationale justifying treating unmarried co-owners differently than married co-owners, Staff has proposed a revision designed to exempt transactions involving individual co-tenancies from the bulk sale notification requirements.

#### **A. Overview of New Jersey bulk sale tax law**

Bulk sale laws are often thought of in connection with Article 6 of the Uniform Commercial Code, but those bulk sale laws focus on providing notice to creditors to prevent the inappropriate dissipation of assets and are unrelated to the notification requirements of N.J.S. 54:50-38.<sup>2</sup> With respect to tax obligations, New Jersey has historically enacted statutory

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<sup>1</sup> State of New Jersey, Department of Treasury, Division of Taxation (August 20, 2014), *available at* [http://www.state.nj.us/treasury/taxation/bulk\\_sale\\_act.shtml](http://www.state.nj.us/treasury/taxation/bulk_sale_act.shtml).

<sup>2</sup> Bulk sale statutes were enacted in many states in the early 1900’s to prevent a business owner from defrauding creditors by surreptitiously selling all or a portion of his or her business assets or selling the assets below fair market value. The Uniform Law Commission codified a version of these bulk sale requirements in Article 6 of the Uniform Commercial Code and New Jersey adopted these provisions in 1961.

provisions designed to collect state taxes owed under the Sales and Use Tax Act<sup>3</sup> and the Business Personal Property Tax Act.<sup>4</sup> Each mandates that any person purchasing the whole or portion of another's business assets must notify the Division of the terms of sale for a determination regarding any outstanding taxes owed pursuant to the respective Tax Act. Failure to notify the Division exposes the purchaser to personally liability for the tax owed by his or her predecessor.<sup>5</sup>

The Legislature replicated this tax collection mechanism in 2007 by adding a substantially similar statutory provision in the Gross Income Tax Act that requires a purchaser to notify the Division and obtain clearance with respect to **any** potential state tax.<sup>6</sup> Thus, while only purchasers of businesses required to collect sales and use tax were subject to the notification requirements of N.J.S. 54:32B-22, N.J.S. 54:50-38 requires that transactions involving an individual or entity selling business assets and subject to any form of State taxation provide bulk sale notification and escrow for amounts owed prior to closing.

### **1. N.J.S. 54:50-38**

Mirroring N.J.S. 54:32B-22, N.J.S. 54:50-38 provides:

a. (1) Whenever a person shall make a sale, transfer, or assignment in bulk of any part or the whole of the person's business assets except as provided by paragraph (2) of this subsection, otherwise than in the ordinary course of business, the purchaser, transferee or assignee shall, at least 10 days before taking possession of the subject of the sale, transfer or assignment, or paying therefor, notify the director by registered mail, or other such method as the director may prescribe, of the proposed sale and of the price, terms and conditions thereof whether or not the seller, transferrer or assignor has represented to, or informed the purchaser, transferee or assignee that the seller, transferrer or assignor owes any State tax and whether or not the purchaser, transferee, or assignee has knowledge that such taxes are owing, and whether any such taxes are in fact owing. Within 10 days of receiving such notice, the director shall notify the purchaser, transferee or assignee by such means as the director may prescribe that a possible claim for State taxes exists and include the amount of the State's claim.

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In 1989, the Uniform Law Commission and the American Law Institute reevaluated Article 6, weighing the efficacy of the bulk sale notice requirement against its administrative inconvenience and determined that creditors were adequately protected by other legal mechanisms, including the perfection of security interests pursuant to Article 9, as well as contemporary fraudulent transfer legislation. The New Jersey Law Revision Commission analyzed the ULC's determination and solicited comments from the public, ultimately recommending the repeal of New Jersey's Article 6 based provisions. In 1994, the Legislature repealed New Jersey's Article 6 bulk sale creditor notice requirements.

<sup>3</sup> N.J.S. 54:32B-22 (enacted 1966).

<sup>4</sup> N.J.S. 54:11A-15, *repealed by* L.1993, c.174 section 1.

<sup>5</sup> N.J.S. 54:32B-22 (c).

<sup>6</sup> N.J.S. 54:50-38 (a).

The Division has specified that realty is included within the definition of “business assets.”<sup>7</sup> As in 54:32B-22, failure to provide the required bulk sale notice exposes the purchaser to liability for seller’s unpaid tax liabilities. Other states have similar statutory provisions designed to recapture unpaid tax liabilities to varying degrees; New Jersey covers all of the seller’s unpaid taxes (not simply a sale and use or similarly limited tax)<sup>8</sup> and requires a purchaser to escrow for all unpaid taxes, even if the owed taxes (and hence, the required escrow) exceed the bargained purchase price.<sup>9</sup> States also differ as to whether the tax clearance obligation is placed upon the seller or the purchaser.<sup>10</sup>

After enactment, both the legal community and New Jersey Realtors identified this requirement as overly burdensome and an unnecessary complication in the sale of homes that have been rented or otherwise may have generated income at some point in the past.<sup>11</sup> Furthermore, in charging the purchaser with the notice obligation, some maintain that the statute places an unfair diligence obligation on the purchaser to determine whether the property has ever been used in a business capacity (such as rental, claimed as a home office, etc.)<sup>12</sup>

## 2. 2011 Amendment

In response to these concerns, Assemblyman Patrick J. Diegnan, Jr. introduced a bill in 2010 designed to carve-out certain residential sales from the bulk sale notice requirements.<sup>13</sup> The relevant portion of the exclusion was originally drafted as follows:

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<sup>7</sup> State of New Jersey, Department of Treasury, Division of Taxation, *Frequently Asked Questions - Law and Procedures for the Filing of the C-9600 Form* (March 9, 2015), available at <http://www.state.nj.us/treasury/taxation/faqbulksale.shtml>.

<sup>8</sup> See also, 70 PA. CON. STAT. § 1403(a) (2015) (imposing liability on purchaser for all taxes due); S.C. CODE ANN. § 12-54-124 (2015) (imposing liability for any taxes owed by a business); cf. N.Y. TAX LAW § 1141(c) (McKinney 2015) (requiring bulk sale notification to collect to sales and compensating use taxes); GA. CODE ANN. § 48-8-46 (2015) (requiring certificate that all sales and use taxes have been paid); N.C. GEN STAT. § 105-164.38 (requiring purchaser to escrow for outstanding sales and use tax).

<sup>9</sup> *Frequently Asked Questions*, supra note 7 at 22 (stating “[t]he New Jersey Tax Court has indicated that the escrow can exceed the purchase price.”); see also 72 PA. CONS. STAT. § 1403(a); N.M. STAT. ANN. § 7-1-61.

<sup>10</sup> See MD. CODE ANN., TAX-GENERAL § 11-505 (2015) (requiring purchaser to file bulk sale notice regarding sales and use tax); N.Y. TAX LAW § 1141(c) (McKinney 2016) (requiring purchaser to file bulk sale notice regarding sales and compensating use taxes); cf. 72 PA. CONS. STAT. § 1403(a) (2015) (requiring seller to present purchaser with a certificate from the Department of Revenue); COLO. REV. STAT. § 39-26-117(1) (2015) (requiring the purchaser to obtain a receipt from the seller showing that tax obligations have been paid); MISS CODE ANN. § 27-65-55(1) (2015) (requiring purchaser to hold money to cover any taxes until the seller produces a payment receipt or a certificate that no taxes are due); GA. CODE ANN. § 48-8-46 (2015) (requiring seller to file bulk sale notice and purchaser to require tax certificate).

<sup>11</sup> David Bunning, *New Jersey Reaffirms the Draconian Scope of its Bulk Sale Law*, Greenberg Traurig Tax Alert, Dec. 2010; See also A2748, Assembly Commerce and Economic Development Committee Statement to Assembly, June 10, 2010 (stating that “[w]hile these procedures ensure the proper payment of tax in commercial transactions, they add an unnecessary layer of complication to home sales.”)

<sup>12</sup> Senate Commerce Committee Hearing on S.2313 (January 20, 2011) (testimony of Senator Jeff Van Drew).

<sup>13</sup> A2748 (2010).

(2)(a) Paragraph (1) of this section shall not apply to the sale, transfer or assignment of a simple dwelling house. “Simple dwelling house” mean a dwelling unit, attached or detached, and land appurtenant thereto, including but not limited to a one-family building or structure...

During the reconciliation process, the language regarding the types of sales exempt from the bulk sale requirement was modified to read:

(2)(a) Paragraph (1) of this section shall not apply to the sale, transfer or assignment of a simple dwelling house, if the seller, transferrer or assignor is an “individual,” “estate,” or “trust” as those terms are used for the purposes of the “New Jersey Gross Income Tax Act, or if the seller, transferrer or assignor is a limited liability company; paragraph (1) shall apply to the sale, transfer or assignment of a simple dwelling house if the seller, transferrer or assignor is a business entity, including but not limited to a corporation or a partnership. “Simple dwelling house” mean a dwelling unit, attached or detached, and land appurtenant thereto, including but not limited to a one-family or two family building or structure...<sup>14</sup>

And the provision’s final form as enacted reads as follows:

(2)(a) Paragraph (1) of this section shall not apply to the sale, transfer or assignment of a simple dwelling house, if the seller, transferrer or assignor is an “individual,” “estate,” or “trust” as those terms are used for the purposes of the “New Jersey Gross Income Tax Act, ~~or if the seller, transferrer or assignor is a limited liability company;~~ paragraph (1) shall apply to the sale, transfer or assignment of a simple dwelling house if the seller, transferrer or assignor is a business entity, including but not limited to a corporation or a partnership. “Simple dwelling house” mean a dwelling unit, attached or detached, and land appurtenant thereto, including but not limited to a one-family or two family building or structure...<sup>15</sup>

Testimony during committee hearings for A.2748 referenced that N.J.S. 54:50-38 was created to capture taxes on commercial sales, but is currently being applied to single family residential dwellings and creates a burden on purchasers.<sup>16</sup> Other testimony stated that the amendment intended to clarify the previous legislation that, as interpreted, could cause chaos in

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<sup>14</sup> A. 2748 (First Reprint) (January 20, 2011).

<sup>15</sup> A. 2748 (Second Reprint) (June 6, 2011).

<sup>16</sup> *Senate Commerce Committee Hearing on S.2313*, 214<sup>th</sup> Legislature (January 20, 2011) (testimony of Senator Jeff Van Drew).

the real estate industry.<sup>17</sup> The New Jersey Association of Realtors also appeared in support of the amendment.<sup>18</sup>

As the bill advanced with various modifications, the Department of Treasury, Division of Taxation noted in Fiscal Notes that the new exclusion would present “a potentially significant annual revenue loss . . . although precise numbers are unavailable.”<sup>19</sup> Both houses of the Legislature approved the law unanimously.

## **B. Analysis**

The Division stipulates that the bulk sale exemption for transactions involving an “individual” seller is limited to a “single-person, married or civil union couple, spouse or civil union partner.”<sup>20</sup> The Division’s bulk sale unit orally confirmed that transactions with sellers who are unmarried co-owners would be ineligible for the bulk sale exemption and the purchasers would be required to provide notification and escrow to mitigate the risk of future tax liabilities.

The text of the 2011 amendment as initially introduced contrasted with the language ultimately enacted indicates that the Legislature considered and rejected providing a blanket exemption for all transactions involving the sale of a one (or two) family dwelling. Particular care was given to ensure that purchases from sellers that are business entities are not exempt from the bulk sale requirements.<sup>21</sup> Yet, there is no indication that the Legislature intended to affirmatively and similarly require that transactions with two or more individual co-owners fall under the mandate of the bulk sale tax statute. This may represent a statutory gap in which individuals, trusts and estates are clearly exempted, business entities are clearly not exempted, but individuals holding property in joint tenancy or as tenants in common are unaddressed.

One example illustrative of the issues presented by the current statutory framework is the sale of a property that had been owned by a husband and wife as tenants in common (rather than as tenants by the entirety), perhaps choosing the ownership structure most suitable to their estate planning goals. Upon the husband’s death, his interest passed to his children, and the wife maintained her interest. As sellers, the husband and wife would have been exempt from the notice requirement, however, the children and the wife were not; the purchaser of this property was required to provide a bulk sale notification in order to avoid any unexpected tax liabilities.

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<sup>17</sup> *Assembly Commerce and Economic Development Committee*, 214<sup>th</sup> Legislature (June 10, 2010) (testimony of Assemblyman Patrick J. Diegnan, Jr.).

<sup>18</sup> *Senate Commerce Committee Hearing on S.2313*, 214<sup>th</sup> Legislature, (January 20, 2011).

<sup>19</sup> *Fiscal Note to Assembly on A. 2748*, 214<sup>th</sup> Legislature (June 15, 2010); *Fiscal Note to Assembly on A. 2748*, 214<sup>th</sup> Legislature (June 27, 2011).

<sup>20</sup> State of New Jersey, Department of Treasury, Division of Taxation (August 20, 2014), available at [http://www.state.nj.us/treasury/taxation/bulk\\_sale\\_act.shtml](http://www.state.nj.us/treasury/taxation/bulk_sale_act.shtml).

<sup>21</sup> “[P]aragraph (1) shall apply to the sale, transfer or assignment of a simple dwelling house if the seller, transferrer or assignor is a business entity, including but not limited a corporation or a partnership.” N.J.S. 54:50-38 (2)(a).

Representatives from NJ Realtors have noted that the initial bulk sale tax provision and the subsequent amendment have caused confusion among attorneys, tax agents, and other practitioners, especially in shore communities. NJ Realtors also commented that confusion arises in estate situations, when multiple children have taken title to real property.

### **Conclusion**

Staff has proposed revisions to the language of N.J.S. 54:50-38 that would extend the bulk sale exemption to properties owned jointly by one or more individuals, trusts, or estates as a starting point for the Commission's consideration. Staff will continue outreach to knowledgeable parties for input and comment on these provisions.

## Appendix

54:50-38. Certain transactions involving sale, transfer or assignment in bulk or in whole of business assets; exemption for certain homes and rental units; notice to buyer of state tax obligation; priority of right and tax lien; liability for noncompliance

a. (1) Whenever a person shall make a sale, transfer, or assignment in bulk of any part or the whole of the person's business assets except as provided by paragraph (2) of this subsection, otherwise than in the ordinary course of business, the purchaser, transferee or assignee shall, at least 10 days before taking possession of the subject of the sale, transfer or assignment, or paying therefor, notify the director by registered mail, or other such method as the director may prescribe, of the proposed sale and of the price, terms and conditions thereof whether or not the seller, transferrer or assignor has represented to, or informed the purchaser, transferee or assignee that the seller, transferrer or assignor owes any State tax and whether or not the purchaser, transferee, or assignee has knowledge that such taxes are owing, and whether any such taxes are in fact owing. Within 10 days of receiving such notice, the director shall notify the purchaser, transferee or assignee by such means as the director may prescribe that a possible claim for State taxes exists and include the amount of the State's claim.

(2)(a) Paragraph (1) of this subsection shall not apply to the sale, transfer or assignment of a simple dwelling house if the seller, transferrer or assignor is

(i) an "individual," "estate," or "trust," as those terms are used for the purposes of the "New Jersey Gross Income Tax Act," N.J.S.54A:1-1 et seq.; or

(ii) more than one "individual," "estate," or "trust," as those terms are used for the purposes of the "New Jersey Gross Income Tax Act," N.J.S.54A:1-1 et seq., owning the simple dwelling house as joint tenants, tenants in common, or in any other real estate tenancy relationship recognized under the laws of this State.;

¶Paragraph (1) shall apply to the sale, transfer or assignment of a simple dwelling house if the seller, transferrer or assignor is a business entity, including but not limited to a corporation or a partnership. "Simple dwelling house" means a dwelling unit, attached or detached, and land appurtenant thereto, including but not limited to a one-family or two-family building or structure, a unit of a horizontal property regime established pursuant to the "Horizontal Property Act," P.L.1963, c. 168 (C.46:8A-1 et seq.), a unit in a housing cooperative as defined under "The Cooperative Recording Act of New Jersey," P.L.1987, c. 381 (C.46:8D-1 et seq.), or a unit of a condominium property established pursuant to the "Condominium Act," P.L.1969, c. 257 (C.46:8B-1 et seq.), but does not include a structure or structures containing more than two units of dwelling space or containing, according to the records of the municipal property tax assessor, commercial property including, or in addition to, the units of dwelling space.

(b) Paragraph (1) of this subsection shall not apply to the sale, transfer or assignment of a seasonal rental unit or the sale, transfer or assignment of a lease for the seasonal use or rental of real property if the seller, transferrer or assignor is

(i) an “individual,” “estate,” or “trust” as those terms are used for the purposes of the “New Jersey Gross Income Tax Act,” N.J.S.54A:1-1 et seq., or

(ii) more than one “individual,” “estate,” or “trust,” as those terms are used for the purposes of the “New Jersey Gross Income Tax Act,” N.J.S.54A:1-1 et seq., owning the seasonal rental unit as joint tenants, tenants in common, or in any other real estate tenancy relationship recognized under the laws of this State, or jointly possessing a leasehold interest for the seasonal use or rental of real property.

Paragraph (1) shall apply to the sale, transfer or assignment of a seasonal rental unit or the sale, transfer or assignment of a lease for the seasonal use or rental of real property if the seller, transferrer or assignor is a business entity, including but not limited to a corporation or a partnership.

For the purposes of this paragraph:

“seasonal rental unit” means

(i) a “timeshare estate” as that term is defined by section 2 of P.L.2006, c. 63 (C.45:15-16.51); and

(ii) a dwelling unit rented for a term of not more than 125 consecutive days for residential purposes by a person having a permanent residence elsewhere; and

“lease for the seasonal use or rental of real property” means

(i) a “timeshare use” as that term is defined by section 2 of P.L.2006, c. 63 (C.45:15-16.51); and

(ii) the use or rental for a term of not more than 125 consecutive days for residential purposes by a person having a permanent place of residence elsewhere.

b. If, upon receiving timely notice of a sale, transfer or assignment from a purchaser, transferee or assignee, the director fails to provide timely notice to the purchaser, transferee or assignee that a possible claim for such State tax or taxes exists, the purchaser, transferee or assignee may transfer over to the seller, transferrer or assignor any sums of money, property or choses in action, or other consideration to the extent of the amount of the State's claim. The purchaser, transferee or assignee shall not be subject to the liabilities and remedies imposed under the provisions of the uniform commercial code, Title 12A of the New Jersey Statutes,<sup>1</sup> and shall not be personally liable for the payment to the State of any such taxes theretofore or thereafter determined to be due to the State from the seller, transferrer or assignor.

c. If the purchaser, transferee or assignee shall fail to give notice to the director as required by the preceding paragraph, or if the director shall inform the purchaser, transferee or assignee that a possible claim for such State tax or taxes exists, any sums of money, property or choses in action, or other consideration, which the purchaser, transferee or assignee is required to transfer over to the seller, transferrer or assignor shall be subject to a first priority right and lien for any such State taxes theretofore or thereafter determined to be due from the seller, transferrer or assignor to the State, and the purchaser, transferee or assignee is forbidden to transfer to the seller, transferrer or assignor any such sums of money, property or choses in action to the extent of the amount of the State's claim. For failure to comply with the provisions of this section the purchaser, transferee or assignee, in addition to being subject to the liabilities and remedies imposed under the provisions of the uniform commercial code, Title 12A of the New Jersey Statutes, shall be personally liable for the payment to the State of any such taxes theretofore or thereafter determined to be due to the State from the seller, transferrer or assignor, and such liability may be assessed and enforced in the same manner as the liability for any State tax under the State Uniform Tax Procedure Law, R.S.54:48-1 et seq.

COMMENT:

These modifications seek to exempt transactions involving unmarried individuals co-owning a simple dwelling house or seasonal rental unit from the bulk sale notification provisions. The revision preserves the exemption for an "individual," "estate," or "trust" contemplated by the Legislature, but also exempts transactions involving sellers in tenancy relationships comprised of more than one "individual," "estate," or "trust." The drafted language does not extend the exemption to transactions in which the seller is a business entity, such as a corporation and partnership; the existing language excluding business entity transactions remains unaltered, though it seems curious that the statute does not specifically reference LLCs given their prevalence in real estate ownership structures.