

To: Commission
From: Amy Huber
Re: Bulk Sales Act – Notice Requirement
Date: November 9, 2015

MEMORANDUM

Introduction

Commission Staff seeks authorization to conduct further research regarding the New Jersey Bulk Sales Act¹ in order to determine if a modification of one of its provisions would be appropriate. This project was brought to the attention of Commission Staff by a member of the public with experience in real estate closings as a result of a concern that the law, as currently written, creates an unnecessary burden for certain sellers of real estate.

The law applies both presently and retroactively to sales, transfers and assignments, made on or after August 1, 2007,² and requires the purchaser to notify the bulk sales unit of the Division of Taxation prior to the completion of the sale.³ The purpose of the notice is to see if the seller owes any taxes and to protect the buyer from being liable to pay the seller's taxes.⁴

The statute contains an exemption to the notice requirement for single persons, married or civil union couples. This exemption does not, however, apply to other forms of joint property ownership (an unrelated couple, siblings, etc.). Staff would like to undertake further research to examine whether it would be appropriate to broaden the statutory exemption to include sellers composed of two or more people who are not a married or civil union couple.

Statute

N.J.S.A. 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

¹ N.J.S.A. 54:50-38.

² State of New Jersey, Department of the Treasury (updated Aug. 2014), http://www.state.nj.us/treasury/taxation/bulk_sale_act.shtml

³ Peter J. Ulrich, Russel B. Bershad, *N.J. Bulk Sales Notification Requirements: Recent Changes and Guidance*, New Jersey Law Journal, (March 14, 2012) 16A N.J. Prac., Legal Forms § 55:105 (4th ed.).

⁴ Ibid.

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 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.; 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 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.; 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.⁵

Background

Assemblyman Patrick J. Diegnan, Jr. introduced A2748 in 2010 to amend 54:50-38, adding the exemption sections, 2(a) and 2(b).⁶ In his statement to the Assembly, he emphasized that while these procedures were necessary to help ensure that a business pays all of its State

⁵ N.J.S.A. 54:50-38 (*emphasis added*).

⁶ A2748, Assembly Commerce and Economic Development Committee Statement to Assembly.

taxes, they added an unnecessary layer of complication to home sales.⁷ As a result the purchaser could potentially be held liable for that prior owner's taxes unless they go through the trouble and expense of filing the notice with the Director of the Division of Taxation and delaying the sale until the expiration of the period in which the director can respond.⁸

Formally enacted in 2011, the exemption excused sellers, transferrers or assignors that were an "individual," "estate," or "trust".⁹ Assemb. Diegan's amendment defined individual as it is used for the purposes of the New Jersey Gross Income Tax Act:¹⁰ a "single-person, married or civil union couple, spouse or civil union partner."¹¹ Under this exemption, a transaction involving two or more joint sellers who are not a married or civil union couple, such as a parent and child, siblings, or a couple who own property jointly, is not exempt from the notice requirement. In those cases, the purchaser must choose between the complex, time-consuming and potentially costly procedure of notification or the assumption of potential tax liability.

Procedurally the process breaks down as follows:

- The purchaser submits a fully completed and signed C-9600 form along with a copy of the executed contract of sale to the Division of Taxation no later than 10 business days before closing.¹²
- The division must respond within 10 business days of receipt and will either issue a clearance letter confirming that the seller owes nothing, or an escrow letter stating the amount of the state's claim.¹³ The purchaser or its escrow agent must hold back the escrow amount from the purchase price.¹⁴ If this is not done, the purchaser is responsible for the seller's N.J. state tax liabilities.¹⁵

The law has been described as problematic because it has been deemed to apply to the sale of all one or two family dwellings, thereby increasing the cost and complexity of home sales.¹⁶ The delay occasioned by the notice requirement could potentially delay a closing, causing problems with a mortgage commitment or other time-sensitive matters. Furthermore, there are additional concerns when dealing with foreclosures or short sales where the seller lacks

⁷ Ibid.

⁸ Ibid.

⁹ State of New Jersey, Department of the Treasury (updated Aug. 2014), http://www.state.nj.us/treasury/taxation/bulk_sale_act.shtml

¹⁰ Ibid.

¹¹ Ibid.

¹² Ibid.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ A2748, Assembly Commerce and Economic Development Committee Statement to Assembly.

the necessary funds to remit payment and the lender is only offering relief from debt in exchange for the dwelling.¹⁷ In addition, the burden is upon the purchaser to be aware of the seller's status, and the exemption's definition of "individual", in order to know whether notice is required.

One example that was provided to Commission Staff received to highlight the issue presented by the current statutory language involved a recent closing in which the residential real estate owners were a husband and wife – who owned as joint tenants, rather than tenants by the entirety. 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 wife were not. It appears that the 2011 amendment to the statute, which seems to have been intended to address this and other issues, omitted some categories of sellers who might be appropriate for inclusion.

Conclusion

In practice, the notice requirement of the Bulk Sales Act is now applied differently to parties who are arguably similarly situated. It imposes a substantial penalty and may be unnecessarily burdensome for the average person involved in a home sale simply because they fall outside of the scope of the current exemption. Staff seeks authorization to engage in further research and outreach in order to determine if it would be appropriate to expand the scope of the exemption slightly to address the issue raised.

¹⁷ Peter J. Ulrich, Russel B. Bershad, *N.J. Bulk Sales Notification Requirements: Recent Changes and Guidance*, New Jersey Law Journal, (March 14, 2012) 16A N.J. Prac., Legal Forms § 55:105 (4th ed.).