

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

KURO, INC.,)	
)	
Petitioner,)	
)	
vs.)	CASE NO. 96-0937
)	
DEPARTMENT OF REVENUE,)	
)	
Respondent.)	
_____)	

RECOMMENDED ORDER

A hearing was not held in this case. Pursuant to stipulation of the parties, a formal hearing was waived and the parties agreed that a Recommended Order would be entered by the Administrative Law Judge based upon a stipulated record. Consistent with the stipulation between the parties, this Recommended Order is hereby entered, under the provisions of Section 120.80(14)(b), Florida Statutes, by Arnold H. Pollock, an Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: C. Samuel Whitehead, Esquire
2199 Ringling Boulevard
Sarasota, Florida 34237

For Respondent: James F. McAuley, Esquire
Office of the Attorney General
The Capital - Tax Section
Tallahassee, Florida 32399-1050

STATEMENT OF THE ISSUE

The issue for consideration in this case is whether deeds by property owners which convey unencumbered real property to a corporation solely owned by them, are subject to a documentary stamp tax imposable under Section 201.021(1), Florida Statutes, and Rule 12B-4.013(7), Florida Administrative Code.

PRELIMINARY MATTERS

On November 10, 1994, the Department issued a Notice of Intent to Make Documentary Stamp Tax and Discretionary Surtax Audit Changes to Petitioner, Kuro, Inc. This was followed, on March 27, 1995, by the Department's Notice of Proposed Assessment, which denoted the tax, penalty and interest claimed. Petitioner thereafter filed a timely protest.

By Notice of Decision, dated January 11, 1996, the Respondent herein, Department of Revenue, advised the Petitioner, Kuro, Inc., that it had sustained the assessment as proposed and advised Petitioner of its right to request formal hearing. Thereafter, on February 19, 1996, Petitioner filed its Petition for Administrative Hearings and this proceeding ensued.

After a formal hearing was delayed on several occasions by requested continuances filed by the Department, the parties agreed that a Recommended Order would be entered in this matter by the Administrative Law Judge, without an evidentiary hearing, based upon a submittal of a corporate deposition and other documentary evidence to be supplemented by written argument by

counsel. Thereafter, the deposition of Herbert Richard Byrd, Secretary of Petitioner corporation, was filed with the Division of Administrative Hearings by counsel for the Department on February 28, 1997. Counsel for the Department also filed with the Division the Department's audit file and work papers. No other evidence was presented by either party.

Subsequent to the filing of all the evidentiary matters, both counsel submitted Proposed Findings of Fact which were carefully considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. By Warranty Deed dated April 30, 1991, W. Dewey Kennell sold eight condominium apartments, units 1731, 1733, 1735, 1737, 1741, 1743, 1745 and 1747, in Baywood Colony Southwood Apartments IV, a condominium, to Kurt Rabau and Ronald Rabau, his son, residents of Germany. The Rabaus purchased the properties as an investment in rental property for income. At the time of the sale, the property was subject to mortgages totaling \$250,000, which the Rabaus paid off on May 24, 1994.

2. Sometime after the purchase, the Rabaus were advised to incorporate and hold title to the properties in a corporate capacity to protect themselves against personal liability. Thereafter, on September 14, 1994, the Rabaus formed Kuro, Inc., the Petitioner herein, to take and hold title to the properties,

with Kurt Rabau and Ronald Rabau each owning 50% of the corporate stock. There were no other owners of stock in the corporation.

3. On October 12, 1994, the Rabaus transferred all eight properties to Kuro, Inc. Kuro, Inc. had no assets other than the eight apartments, and did no business prior to the transfer of those apartments to it. Consequently, the stock of Kuro, Inc. was valueless prior to the receipt of the transferred apartments.

4. The corporation's federal tax form relating to transfer of property to a corporation, the "Corporation's Statement on Transfer of Property Under Code Section 351" reflects that the Rabaus "transferred the jointly owned property [described therein] for which Kuro Inc. issued the stock". From the evidence presented it is clear that the Kuro Inc. stock was issued in exchange for the contribution of the apartments to the corporation.

5. Other documents in the corporation's 1994 tax return indicate that the property was valued at fair market value at the time of transfer to the corporation, and the transferee's, (corporation's) adjusted basis was identical after the transfer. Each of the Rabaus received 500 shares of the corporation's stock which was valued at \$618,642. Of that amount, \$617,642 was considered additional paid-in capital. There was no additional property received or possessed by the corporation.

6. A minimal documentary stamp tax was paid by the parties at the time the eight Warranty Deeds for the apartments were

transferred to the corporation. The consideration reflected on the face of each deed was "...the sum of \$10.00 and other valuable consideration."

7. Subsequent to the transfer, the Department conducted an audit of the Clerk of Circuit Court in Sarasota County and, on November 10, 1994, issued a Notice of Intent to Make Documentary Stamp Tax and Discretionary Surtax Audit Changes, by which it indicated its intent to impose a documentary tax of \$4,207.00 on the transfers, a 50% penalty of \$2,103.50, and interest totaling \$38.73 through November 10, 1994, with additional interest to accrue at the rate of 1% per month, prorated daily (\$1.38), until date of payment. Thereafter, on March 27, 1995, the Department issued a Notice of Proposed Assessment to Kuro, Inc., and Petitioner timely filed a protest. Subsequent to that action, on January 11, 1996, the Department issued its Notice of Decision sustaining the proposed assessment, penalty and accrued interest, and Petitioner requested formal hearing.

CONCLUSIONS OF LAW

8. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter in this case. Section 120.57(1), Florida Statutes.

9. The Department of Revenue seeks to impose an assessment, penalty and interest on the Petitioner herein, Kuro, Inc., contending it's failure to pay appropriate documentary tax stamps upon deeds of real estate from the Rabaus to the corporation.

The First District Court of Appeal has determined that tax assessments such as these must be considered prima facie correct, with the burden of proof resting on the party against whom the assessment is made. Department of Revenue v. Nu-Life Health and Fitness Center, 623 So.2d 747, 751-752 (Fla. 1DCA 1992). The burden in such a case is a preponderance of the evidence.

10. The Rabaus gave up their interest in real property for stock in a corporation, which is intangible personal property. They formed a corporation for the purpose of limiting their personal liability related to the ownership of the real property and the business uses to which it was put. This is a perfectly legitimate tactic, but once the incorporators elect to form the limited liability entity, they must accept the ramifications of that election and may not disavow the existence of the corporation for a tax advantage. Regal Kitchens, Inc. v Fla. Dept. of Revenue 641 So.2d 158 (Fla. 1DCA 1994).

11. Section 201.02(1), Florida Statutes, provides, in pertinent part:

On deeds, instruments, or writings whereby any lands, tenements, or other real property, or any interest therein, shall be granted, assigned, transferred, or otherwise conveyed to, or vested in, the purchaser or any other person by his direction, on each \$100 of the consideration therefore the tax shall be 70 cents.

12. The term "consideration" is further defined in the statute as including but not being limited to:

... the money paid or agreed to be paid; the discharge of an obligation; and the amount of any mortgage; purchase money mortgage lien; or other encumbrance, whether or not the underlying indebtedness is assumed. If the consideration paid or given in exchange for real property or any interest there include property other than money, it is presumed that the consideration is equal to the fair market value of the real property or interest therein.

13. Consistent therewith, the Department of Revenue has promulgated Rule 12B-4.012(2), Florida Administrative Code, wherein it states:

Property other than money includes, but is not limited to, property that is corporeal or incorporeal, tangible or intangible, visible or invisible, real or personal; everything that has an exchangeable value or which goes to make up wealth or estate.

14. Rule 12B-4.013(7), Florida Administrative Code provides:

A conveyance of realty to a corporation in exchange for shares of its capital stock, or as a contribution to the capital of a corporation, is subject to tax. There is a presumption that the consideration is equal to the fair market value of the real property.

The taxability of an exchange of stock for property was also provided for in the 1983 version of the above-cited Department rule. (See Rule 12B-4.13(7) Florida Administrative Code, 1983 Ed.) Since each rule was lawfully promulgated by the Department it is presumed valid. City of Palm Bay v. State, Dept. of Transportation, 588 So.2d 624 (Fla. 1DCA 1991). In addition, the taxability of a conveyance to a corporation in consideration of

corporate stock of the corporation is considered a taxable transaction. (See Attorney General Opinion 63-18).

15. It is the transfer of an interest in real estate which is subject to the tax. It matters not who the parties to the transfer are. In the instant case, the Kuros transferred real property they owned to a corporation in which they were the only shareholders, and this transfer was paid for by the issue of stock in that corporation of a value equal to the value of the property conveyed. As such, the transfer is taxable.

16. Section 201.17(2)(a),(b) and (c), Florida Statutes, provides that whenever a document tax due under the statute is not paid timely, the person liable for the tax is subject to payment of the tax not paid, payment of a penalty equal to 50 percent of the tax not paid, and payment of interest. However, consistent with subsection (3) of the statute, the Department may settle or compromise any interest or penalties pursuant to Section 72.011, Florida Statutes. At subsection (3)(a), it provides:

A taxpayer's liability for penalties under any of the chapters specified in s. 72.011(1) may be settled or compromised if it is determined by the department that the noncompliance is due to reasonable cause and not to willful negligence, willful neglect, or fraud. In addition, a taxpayer's liability for penalties under any of the chapters specified in s. 72.011(1) in excess of 25 percent of the tax shall be settled or compromised if the department determines that the noncompliance is due to reasonable cause and not to willful negligence, willful neglect, or fraud.

17. In the instant case, Kuro, Inc. received the property as a transfer for stock in the corporation. The deeds were subsequently recorded in the office of the Clerk of Circuit Court, and a tax based on the token consideration paid. There appears to be no evidence of fraud, willful concealment or willful misconduct on the part of the Rabaus or any of their employees or advisers. At worst, what appears to be an erroneous interpretation of the law is involved. That being so, it would appear that a compromise of the amount due from the corporation is appropriate. Clearly the tax is due and payable, as is the interest on the amount of tax. However, the penalty as assessed by the Department should be compromised and waived.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is recommended that the Department of Revenue enter a final order imposing a tax in the amount of \$4,207.00 with interest from date of filing at 1 percent per month based on the amount of tax not paid to date of payment.

DONE and ENTERED this 22nd day of April, 1997, in
Tallahassee, Florida.

ARNOLD H. POLLOCK
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 22nd day of April, 1997.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this recommended order. Any exceptions to this recommended order should be filed with the agency that will issue the final order in this case.