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The New Bulk Sales Notification Requirements and Their Application to New Jersey Real Estate Transactions - Part I

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Introduction

Recent changes to the bulk sales notification requirements under New Jersey law have resulted in the application of these requirements to a wider array of real estate transactions and this means that New Jersey real estate attorneys must now, in the greater majority of cases, comply with New Jersey's bulk sales notification requirements prior to, and as a condition of, closing. Failure to do so will mean that the purchaser is deemed by statute to have assumed liability for payment of all of the seller's outstanding tax obligations to the State of New Jersey.

New Bulk Sale Notification Requirements

The New Jersey Sales and Use Tax Act, adopted in 1966, set forth bulk sale notification requirements designed to provide the New Jersey Division of Taxation with notice of asset sales for the purpose of collecting any outstanding tax liabilities owed by a seller. However, such bulk sales notification requirements were not applicable to commercial real estate transactions unless the transaction was part of the sale of business assets which included real estate, e.g., the sale of an existing hotel business.

On June 28, 2007, the landscape of bulk sales notification requirements changed dramatically when Governor Corzine signed into law N.J.S.A. 54:50-38, effective June 28, 2007 and operative August 1, 2007. This significantly expanded the scope of the notification requirements to include all transactions in which a bulk sale is made. The new section provides, in pertinent part:

Whenever a person required to collect tax shall make a sale, transfer, or assignment in bulk of any part or the whole of his business assets, 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 said sale, transfer or assignment, or paying therefor, notify the director by registered mail 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 he owes any tax pursuant to this act, 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.

Whenever the purchaser, transferee or assignee shall fail to give notice . . . or whenever the director shall inform the purchaser, transferee or assignee that a possible claim for such 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 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, . . . 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 tax under this act.

For purposes of the new law: (i) “Business’ means any endeavor from which revenue or consideration is realized for the purpose of generating a profit or loss.” and (ii) “Business assets,’ tangible or intangible, include . . . realty if the primary use of the realty is to support a business on its premises.” See N.J. Div. of Tax. Tech. Bull. 60 (July 3, 2008).

The obvious consequence of this statutory expansion and the Division’s Technical Bulletin is the applicability of the notification requirements to a far larger class of real estate transactions. On its face, the new law must be presumed to encompass any real estate transaction where the purpose of the real property is to support a business of any type from which revenue (profit or loss) may be realized, and for which the sale is not in the “regular course of business.” This would likely include sales by “single purpose entities”, such as limited liability companies and limited partnerships, which are prevalent in recent real estate transactions, where the sole asset is the subject real property and the sole business is the leasing, operation and management of that property. It therefore seems, with the exception of large building contractors who make sales of single units as inventory in the regular course of their business, single family residences used solely for that purpose, and other unique transactional situations, that all real estate transactions require statutory notification of sale.

Compliance

In order to comply with the new law and thereby avoid personal tax liability, all New Jersey real estate sale transactions, other than the sale

of the seller's personal residence, should be administered in the following manner:

1. Contract of Sale. The contract of sale between the parties should include a provision that both seller and purchaser are required to fully comply with the statute. This provision should enumerate the various responsibilities of the parties including, but not limited to: (1) the seller providing the purchaser with all required documentation, (2) the purchaser filing all of the requisite notices with the Director of the Division of Taxation at least ten days prior to closing, (3) withholding from seller's proceeds at closing of the amount set forth in the Director's initial reply notification to the purchaser of the State's claim to seller's State tax debts owed, which amount will then be held in escrow by the purchaser's attorney until the State makes a final determination as to the amount owed by the seller (alternatively, this provision may provide that the seller pay the claim directly to the State from the seller's proceeds at closing rather than utilizing an escrow mechanism), (4) a requirement that the seller post any additional amounts as required to fund the escrow (if applicable), (5) a provision authorizing payment from the escrow account (or direct payment to the State) to satisfy the final determination of the Director, and (6) a provision indemnifying the purchaser from any outstanding liability that may exist following fiscal exhaustion of the escrow account (if applicable).

2. Division of Taxation Filings (Seller). The seller must prepare and deliver to the purchaser the Asset Transfer Tax Declaration (Form TTD). This form requires the seller disclose information that will assist the Director in estimating the gain on the transfer of asset(s) and the estimated tax on the gain. Form TTD can be found at <http://www.state.nj.us/treasury/taxation/pdf/ttdv1.pdf>.

3. Division of Taxation Filings (Purchaser). The purchaser must prepare a Notification of Sale, Transfer or Assignment in Bulk (Form C-9600). This form provides for basic information regarding the sale, transfer, or assignment of property, including the names of the parties, the scheduled date of sale, and the sale prices of the assets being sold, transferred, or assigned. Form C-9600 can be found at http://www.state.nj.us/treasury/taxation/pdf/other_forms/misc/c9600.pdf.

4. Submission to the Division of Taxation. The purchaser must then submit Form TTD, Form C-9600, and the fully executed Purchaser Agreement including price, terms and conditions thereof by registered mail to the Director at least ten days prior to the date of closing.
5. Director Notification. Within ten days following receipt of the documents, the Director will notify the purchaser/attorney/designee of any possible claim for State taxes and specify the amount to be escrowed (or paid directly to the State) by the purchaser at closing. This amount may include deficiencies (i.e. underpayments), delinquencies (i.e. unfiled returns), any audit assessment(s) (fixed or pending), and the tax gain from the transfer of the asset(s). The purchaser's attorney may act as escrow. If no taxes are owed, the Director will issue a letter of clearance.
6. Closing and Final Payments. After closing, any and all amounts owed to the State will be paid out of the escrow account (or paid directly to the State). When all final returns have been filed and all State taxes have been paid, the Director will issue a letter of clearance authorizing the release of any funds remaining in the escrow account (if an escrow mechanism has been used). Upon receipt of this letter, the purchaser is relieved of any further liability.

Conclusion

Real estate attorneys must be aware of the new statutory notification requirements and advise their clients accordingly. Although it is relatively simple to adhere to the requirements set forth in the new statute, failure to do so could have drastic financial repercussions for clients engaged in applicable transactions. While the steps set forth above are a good starting point for compliance, it would be prudent for any individual engaged in real estate transactions that are not standard single-family residences occupied by the seller to seek legal advice regarding compliance with these new notification requirements. Recent changes to the bulk sales notification requirements under New Jersey law have resulted in the application of these requirements to a wider array of real estate transactions and this means that New Jersey real estate

attorneys must now, in the greater majority of cases, comply with New Jersey's bulk sales notification requirements prior to, and as a condition of, closing. Failure to do so will mean that the purchaser is deemed by statute to have assumed liability for payment of all of the seller's outstanding tax obligations to the State of New Jersey.

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