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## Real Estate Title Insurance & *Construction Law*

### Broad View of The Expansion Of the Tax Bulk Sales Notification Requirements

Buyers of NJ commmerical and rental real estate must beware

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**R**eal estate attorneys have not typically had to deal with the New Jersey tax bulk sales notice requirements with regard to most property sales and conveyances. That has now changed, as a result of the signing of a new statute and the adoption of new procedures by the New Jersey Division of Taxation.

Back in 1994, New Jersey repealed the bulk transfer provisions (Chapter 6) of the Uniform Commercial Code. However, for many years New Jersey's tax law has contained its own bulk sale notification provisions designed to provide tax authorities with notice of asset sales, so that the state can take advantage of a liquidity event that may be its last chance to collect outstanding tax liabilities.

The New Jersey Sales and Use Tax Act, N.J.S.A. 54:32B-1 et seq., was adopted in

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1966. Among other provisions, Section 54:32B-22(c) of the act states that whenever a person required to collect and remit sales tax makes a sale, transfer or assignment in bulk of the whole or any part of its business assets, other than in the ordinary course of business, the purchaser has to notify the Division of Taxation at least 10 days in advance. A purchaser who fails to provide the required notice, or having provided the notice fails to remit to the state or escrow the amount of sales tax claimed by the state, becomes liable for the amount of past sales tax obligations of the seller.

There are no separate monetary penalties for failure to file the notice, so this notice requirement has often been ignored in larger acquisitions when the buyer had done its due diligence and was comfortable relying on the indemnification provisions of the transactional documents and the credit rating of the seller. In smaller transactions, buyers more frequently file the notice form both because the outstanding sales tax liability could exceed the purchase price and the process is a relatively cheap way to accomplish due diligence of state tax obligations.

#### The 2007 Expansion of Coverage

On June 28, 2007, Gov. Corzine signed P.L. 2007, Ch. 100 into law, which adopted an entirely new provision, N.J.S.A. 54:50-38, which expanded the tax bulk sale notice to make it applicable to transactions in which any seller makes a bulk sale, not just sellers who are required to collect and remit sales tax. In addition, failure to comply results in the buyer becoming liable for all state tax obligations of the seller, not just sales tax.

Sellers with respect to most major real estate transactions generally are not collecting and remitting sales tax, except when an operating business is being sold and real estate is just one of the assets of the business, a hotel being one example. As a result of the new changes in the law, a much broader class of transactions is now covered by the notice provisions.

For example, a purchaser of assets from a tax-exempt organization will need to consider filing a tax bulk sales notice because even though the seller may not be collecting sales taxes and is not subject to income tax, it is likely subject to income tax withholding obligations.

Consistent with the foregoing modifications, the Division of Taxation updated its notification form, Form C-9600. In addition, on July 3, the Division of Taxation issued a new form, Form TTD, which appears to be intended to be used by the Division of Taxation to supplement

Form C-9600 by requesting information on any income tax liability that might accrue to the seller as a result of the bulk sale.

### Technical Bulletin TB-60

When the Division of Taxation issued new Form TTD, it issued Technical Bulletin TB-60 ("TB-60"), which explains that the seller is to use Form TTD to estimate the income generated on the sale and calculate the estimated amount of New Jersey income tax on the sale, whether the Gross Income Tax applicable to individuals, or the Corporation Business Tax.

TB-60 also includes a number of definitions of terms used in N.J.S.A. 54:50-38 that expands the reach of N.J.S.A. 54:50-38 even more so. For instance, the term "bulk sale, transfer or assignment" is defined to mean "any sale, transfer or assignment, in whole or in part, of a person's business assets, not made in the ordinary course of business." In addition, the term "business assets, tangible or intangible" is defined to mean "goodwill, materials, supplies, licenses, patents, copyrights, equipment, leases, merchandise or other inventory and realty if the primary use of the realty is to support a business on its premises."

In turn, the term "business" is defined to mean "any endeavor from which revenue or consideration is realized for the purpose of generating a profit or loss."

Based on these definitions, a purchaser of commercial or residential rental real estate, buying from a single purpose entity such as a limited liability company or limited partnership holding only rental real estate, is required to comply with N.J.S.A. 54:50-38. Business assets are defined to include realty if the primary use of the realty is to support a business (presumably anyone's business, not just the holder) on the premises and a business is any endeavor from which revenue is realized for the

purpose of generating a profit or loss. It is hard to see how rental real estate avoids the grasp of these definitions.

The historically broad and somewhat undefined definition of a bulk sale, which the new definitions basically leave intact, also acts to expand the scope of these provisions. For instance, in *Bunting v. Director*, 1 N.J. Tax 189 (1980), the New Jersey Tax Court held that a transfer of inventory was not necessary for a transfer to be subject to these notice requirements and that the definition of a bulk sale was broader than that found in the now-repealed Chapter 6 of the UCC.

### New Form TTD

In the past, in considering whether to file Form C-9600, purchasers and the Division of Taxation were primarily concerned with past-due sales tax obligations. But in issuing new Form TTD on July 3, consistent with the broader breadth of N.J.S.A. 54:50-38, the division is seeking information from the seller on the expected income tax (whether under the Corporation Business Tax or the Gross Income Tax) generated by the bulk sale transaction. Based on TB-60, this information will be used by the division to adjust the amount of the escrow that the buyer is to withhold from the purchase price.

Based on TB-60, the normal process with respect to bulk sales will be that a purchaser that is concerned with personal transferee liability for New Jersey state tax obligations of the seller will complete and file Form C-9600 with the Bulk Transfers Section. In turn, that section will issue a notice to the buyer of the amount of escrow to be held by the attorney/designee of the buyer, taking into account the division's records of deficiencies, delinquencies and audit assessments as well as an

estimate of the tax on the gain on the sale (although Form C-9600 does not elicit information on the basis of the assets to be sold). The division will also issue a blank Form TTD to the seller. Upon completion of Form TTD by the seller, the division may adjust the escrow amount to reflect the actual anticipated income tax triggered by the bulk sale.

Form TTD (which is apparently a work in progress) requests that in the case of pass-through partnerships or LLCs, all of the partners or members must each separately complete Form TTD. There is no reference as to how an S corporation should complete Form TTD. TB-60 also makes the point that only after "all final returns have been filed and all final payments of State tax debts are remitted," the division will authorize the release of the remaining portion of escrow funds held by the attorney of the transferee. Given the broad definition of "bulk sale," which means it applies even when a business sells less than all of its assets, TB-60 unfortunately does not specify when a clearance letter will be issued when a seller continues in business after a bulk sale.

### Conclusion

Although the process of administering and enforcing the new tax bulk sale notification requirements appears to be in flux, a number of classes of buyers that did not historically concern themselves with these provisions will now need to consider them prior to closing. Buyers of commercial and residential rental properties and their closing attorneys obviously need to understand these changes. Buyers of small businesses that have not been subject to sales taxes, such as service businesses, will also need to examine whether they can afford to ignore these requirements. ■