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in the principal case, but it also would foster a flexibility which could prove to be advantageous in the future.

APPLICABILITY OF REAL ESTATE SALES TAX TO TRANSFERS FOR BENEFIT OF UNFORMED CORPORATION

A corporate promoter entered into an earnest money agreement which contemplated corporate purchase of real property. At the planned closing date, the incorporation process was incomplete. To avoid losing the property, the promoter entered into a real estate contract naming himself and two nominees as purchaser-trustees to hold the property in trust for the benefit of the proposed corporation. The one-percent real estate sales tax¹ was paid by the seller, since the transfer to the trustees constituted a sale.² One month later, the beneficiary was incorporated. Pursuant to the trust agreement, the trustees transferred the property to the corporation by quitclaim deeds executed separately by each trustee for nominal consideration. King County assessed an identical tax upon this transfer, contending that it was a second sale. The trustees, who were incorporators, paid the tax under protest, claiming double assessment, and brought action to recover the tax. On appeal, judgment for plaintiffs was affirmed. *Held*: Where an earnest money agreement for purchase of real property expressly contemplates that the purchaser will be a corporation, and the incorporators accept title in trust since the incorporation process is incomplete, the subsequent conveyance of title from the incorporators to the beneficiary corporation is not a "sale" and hence not a taxable event for purposes of the transfer tax. *Senfour Investment Co. v. King County*, 66 Wash. Dec. 2d 61, 401 P.2d 319 (1965).

The sales tax statute provides that: "the term 'sale' shall have its ordinary meaning and shall include any conveyance . . . for a valuable consideration, and any contract for such conveyance . . ." ³ The import of these provisions is that application of the tax depends upon the transfer of an interest in land for valuable consideration. In *Deer Park Pine Indus. v. Stevens County*,⁴ the court held that, since stockholders

¹ WASH. REV. CODE § 28.45.050 (1963) provides: The county commissioners of any county are authorized by ordinance to levy an excise tax upon sales of real estate not exceeding one per cent of the selling price.

² WASH. REV. CODE § 28.45.010 (1963).

³ WASH. REV. CODE § 28.45.010 (1963).

⁴ 46 Wn. 2d 852, 286 P.2d 98 (1955).

had a pre-existing right to corporate assets upon dissolution, transfer of realty by a trustee in liquidation was not a taxable event within the meaning of the sales tax provisions. It was further held, however, that the transferees' assumption of the liabilities of the dissolved corporation constituted valuable consideration, and there was a pro tanto taxable event for purposes of the sales tax.⁵ It was subsequently held, in *Doric Co. v. King County*,⁶ that when corporate liabilities exist upon dissolution, but shareholders do not expressly agree to assume them, there is no consideration for the transfer and hence no taxable event.⁷

In the principal case, it was stipulated that the original sale to the trustees was a taxable event. Holding that a valid trust was created by that transfer,⁸ the court reasoned that the conveyance from the trustees to the corporation was simply the mechanical performance of the trust obligation. Citing *Deer Park*, the court concluded that such a transfer does not constitute a sale in its "ordinary meaning," with the result that there was no taxable event.

In reaching its conclusion, the court rejected King County's contention that nominal consideration for the second transfer is sufficient to meet the statutory requirement of a sale. This result is consonant

⁵ In *Deer Park Pine Indus. v. Stevens County*, *supra* note 4, the court observed that, although shareholders have a pre-existing right to share in the assets upon dissolution—a right acquired upon purchase of stock—creditors have a paramount right to corporate assets, citing *Taylor v. Interstate Inv. Co.*, 75 Wash. 490, 135 Pac. 240 (1913). Thus, the court reasoned, when shareholders assume corporate liabilities they, in effect, purchase the real property from the creditors, and this constitutes consideration which is to that extent a "sale" under WASH. REV. CODE § 28.45.010 (1963).

⁶ 57 Wn. 2d 640, 358 P.2d 972 (1961), 37 WASH. L. REV. 219 (1962).

⁷ No doubt relying upon *Deer Park*, the shareholder did not expressly assume the corporate debt, but took real estate subject to creditor's security interest. Even though the amount of debt secured was more than half the value of the asset, the court concluded that the conveyance was not for valuable consideration and that, thus, there was no taxable event. See 37 WASH. L. REV. 219, 223 & nn. 22-24 (1962).

⁸ Defendant contended that a trustee cannot hold property for a cestui which is not in being at the time the trust is established. Brief for Appellant, p. 17. Rejecting this contention, and relying upon *Bruun v. Hanson*, 103 F.2d 685 (9th Cir. 1939), the court held that a valid trust was created by the nominees and that it is not necessary that the beneficiary be in existence at the time of the creation of the trust. *Accord*, 1 RESTATEMENT (SECOND), TRUSTS § 112, comment *e* (1959). The Restatement also states that such a trust is valid only if the corporation will be definitely organized within the period of the rule against perpetuities. *Id.* § 112. See 2 SCOTT, TRUSTS § 112.2 (2d ed. 1956).

Defendant's contention is based on the idea that, to have a trust at any given time, there must be normal trust consequences at that time, including the existence of the beneficiary. This view has been used to some extent in income tax cases. *E.g.*, *Morsman v. Commissioner*, 90 F.2d 18 (8th Cir.), *cert. denied*, 302 U.S. 701 (1937), holding a trust for unborn children invalid where the settlor was also the trustee. The better view, however, is that to have a trust at any given time, there need be only the possibility of normal trust consequences without further action by the settlor, the lack of such action being the controlling question. See generally 2 SCOTT, TRUSTS § 112.1 (2d ed. 1956). A leading case tacitly employing this approach is *Folk v. Hughes*, 100 S.C. 220, 84 S.E. 713 (1915), recognizing the validity of a trust for the benefit of unborn children.

with the tenet that "the essence of a 'transfer' [for purposes of taxation] is the passage of control over the economic benefits of property rather than any technical changes in its title."⁹ The result is further supported by the fact that the incorporators were the shareholders of the corporation, a fact indicative of control remaining static.

Recitation of nominal consideration in quitclaim deeds is desirable as a factor in insuring irrevocability.¹⁰ To hold that such recitation is sufficient to assess a second tax would be to ignore the fact that nothing given by the trustees had been bargained for. As the distribution in *Deer Park* was in satisfaction of the pre-existing rights of the shareholders, so the transfer in the principal case was in satisfaction of the pre-existing right of the transferee corporation. In neither case was there the bargained-for consideration required by the statute.

Since transfers of real property can be accomplished without even nominal consideration, to regard the payment of such consideration as sufficient for purposes of the excise tax would accomplish nothing beyond creating a trap for the unwary. Plaintiffs, for example, could have avoided the possibility of their transaction falling within the provisions of the transfer tax statute by originally taking the property in fee, and making a gift of it to the corporation¹¹ after acquisition of a few shares of corporate stock. Clearly, the court was correct in its refusal to foster the development of a situation in which the question of imposition of a tax would depend upon the form of the transfer, without regard to its substance.

ASSUMPTION OF RISK—BASIS FOR DENIAL OF RECOVERY?

A recent decision of the Washington Supreme Court casts considerable doubt on the exact status of the defense of assumption of risk, and illustrates a serious problem concerning the judicial process in Washington. The action was brought against a school district for injuries

⁹ *Sanford's Estate v. Commissioner*, 308 U.S. 39, 43 (1939) (dictum).

¹⁰ A conveyance is not a contract, although it results from an agreement, and consideration is not necessary in a deed unless it operates under the Statute of Uses. Most conveyances, however, recite at least nominal consideration in order to rebut the reservation of an equitable estate in favor of the grantor and to furnish support for the conveyance as a bargain and sale. Such acknowledgement is conclusive upon the parties for the purpose of supporting the conveyance. See generally TIFFANY, *REAL PROPERTY* 680 & nn. 59, 61-64 (new abr. ed. 1940), and cases cited therein.

¹¹ WASH. REV. CODE § 28.45.010 (1963) provides that the term "sale" "shall not include a transfer by gift, devise, or inheritance...."