WILLIAM J. SCOTT
ATTORNEY GENERAL
STATE OF ILLINOIS
500 SOUTH SECOND STREET
SPRINGFIELD

March 14, 1974

COPY

File No. S-715

TAXATION:
Application of the Real Estate Transfer Tax Act

Honorable John J. Bowman
State's Attorney
DuPage County
240 East Willow Street
Wheaton, Illinois 60187

Dear Mr. Bowman:

I have your recent letter wherein you state:

"Please give me your opinion on the following questions.

1. A is the owner of Black Acre in fee simple with recorded title in his name. With intent to avoid payment of real estate transfer tax (Ch. 120, Sec. 1001, etc.), on January 2, 1973, he conveys Black Acre into a land trust with himself as beneficiary and with sole power of direction. On January 3, 1973, A enters into a contract of sale with B. B pays A the amount of the purchase price and A by

letter of direction to the trustee makes B the sole beneficiary of the trust with sole power of direction. Neither A, the trustee, or B, file a declaration of value or purchase tax stamps.

Question: Is A required to pay a real estate transfer tax on the 'sale'?

2. A is the beneficiary and holder of power of direction of Land Trust 100 at the National Bank which acts as trustee. Black Acre is the corpus of the trust. A contracts to sell Black Acre to B and enters into an escrow into which he assigns his beneficial interests and power of direction and into which B makes his installment payments. Upon payment of the full purchase price, the escrowee re-assigns the beneficial interest and power of direction to B, who then holds equitable title to the land. B then directs the' National Bank as trustee under Trust No. 100 to convey the property to B individually. B signs a declaration of value showing that the actual consideration is less than $100.00 because no consideration passed from B to the trustee.

Question: By virtue of the above facts, is there a criminal violation of the provisions of Ch. 120, Sec. 1005?

Question: Is there any real estate transfer tax due on the transfer of Black Acre from A to B or from the National Bank as trustee to B."

Section 3 of the "Real Estate Transfer Tax Act" (Ill.

Rev. Stat. 1973 Supp., ch. 120, par. 1003 as amended by Public Act 78-580) provides:

> "A tax is imposed on the privilege of transferring title to real estate, as represented by the deed that is filed for recordation, at the rate of 50 cents for each $500 of value or fraction thereof stated in the declaration provided for in this Section. If, however, the real estate is transferred subject to a mortgage the amount of the mortgage remaining outstanding at the time of transfer shall not be included in the basis of computing the tax.
>
> * * * Except as provided in Section 4 of this Act, no deed shall be accepted for filing by any Recorder of Deeds or Registrar of Titles unless revenue stamps in the required amount have been purchased from the Recorder of Deeds or Registrar of Titles of the county where the deed is being filed for recordation. Such revenue stamps shall be affixed to the deed by the Recorder of Deeds or the Registrar of Titles either before or after recording as requested by the grantee. * * *
>
> At the time a deed is presented for recordation there shall also be presented to the Recorder of Deeds or Registrar of Titles, a declaration, signed by at least one of the sellers and also signed by at least one of the buyers in the transaction or by the attorneys or agents for the sellers or buyers, which declaration shall state the full consideration for the property so transferred the permanent real estate index number of the property, if any; the legal description of the property; the date of the deed; the type of deed; the address of the property; the type of improve-

> ment, if any, on the property conveyed; information as to whether the transfer is between relatives or is a compulsory transaction; and the lot size or acreage. Except as provided in Section 4 of this Act, no deed shall be accepted for recordation unless it is accompanied by a declaration containing all the information requested therein. Where the declaration is signed by an attorney or agent on behalf of sellers or buyers, who have the power of direction to deal with the title to the real estate under a land trust agreement, the trustee being the mere repository of record legal title with a duty of conveying the real estate only when and if directed in writing by the beneficiary or beneficiaries having the power of direction, the attorneys or agents executing the declaration on behalf of such sellers or buyers need only identify the land trust which is the repository of record legal title and not the beneficiary or beneficiaries having the power of direction under the land trust agreement. The declaration form shall be prescribed by the Department of Local Government Affairs and shall include an appropriate place for the inclusion of special facts or circumstances, if any. * * * " (Emphasis added.)

Prior to January 1, 1968, any deed, instrument, or writing by which lands, tenements, or other realty was granted, assigned, transferred or otherwise conveyed were subject to the Federal Documentary Stamp Tax (26 U.S.C.A., §4361, (1967)) without regard to whether they were recorded. The Federal courts interpreted this Act to give a uniform application to a nation-wide scheme of taxation. (Phillips

Petroleum Co. v. Jones, 176 F. 2d 737, cert. den., 339 U.S. 904.) Under the Federal Act, the application of the stamp tax to a particular transaction was not necessarily governed by the legal classification that attached to such a transaction under a state law. (Morrow v. Schofield, 116 F. 2d 16, cert. den., 313 U.S. 573.) Rather the Federal courts looked at the economic realties and where the sale of an interest, recognized in state law as personal property, transferred substantial ownership of land, the stamp tax was applied. (See, Phillips Petroleum Co. v. Jones, 176 F. 2d 733, cert. den., 339 U.S. 904; Jones v. McGruder, 42 F. Supp. 193.) Applying these principles, the transfer of the beneficial interest of an Illinois land trust might well have been taxed under the Federal Act.

Upon the expiration of the Federal tax, the Illinois General Assembly enacted the "Real Estate Transfer Tax Act" approved July 17, 1967, to be effective January 1, 1968. (Ill. Rev. Stat. 1971, ch. 120, pars. 1001 et seq.) The Illinois tax is levied on the "privilege of transferring title to real estate, as represented by the deed that is filed for recordation." Unless exempted by the Act, no deed can be

accepted by the recorder for filing unless revenue stamps in the required amount are affixed to the deed. The scope of the Illinois Act is significantly more restricted than the expired Federal tax. Unlike the Federal tax, it is a tax on the privilege of transferring title to real estate by recorded deed rather than a document tax on any instrument by which an interest in land is conveyed, assigned or transferred.

It is well established under Illinois law that in a land trust, unlike the ordinary trust situation, both legal and equitable title are vested in the trustee. The beneficiary's interest under the trust is personal property as distinguished from real property. (Chicago Fed. Sav. & Loan Assn. v. Cacciatore, 25 Ill. 2d 535.) The beneficiary exercises all the rights of ownership other than holding or dealing with the title to the property. The trustee deals with the title to the trust property only as directed in writing by the beneficiary or other person named as having the power of direction. The trustee is also prohibited from disclosing the identity of any beneficiary. Robinson v. Chicago National Bank, 32 Ill. App. 2d 55.

The General Assembly must be presumed to be aware of the well recognized distinction between real estate and personal property. (G. S. Lyon & Sons Lumber & Manufacturing Co. v. Dept. of Revenue, 23 Ill. 2d 180.) It should be noted that the word "deed" is used continuously throughout the Real Estate Transfer Tax Act. Nowhere in the Act is there any suggestion that documents which transfer interests regarded as personal property are subject to the tax.

The only mention of a land trust situation in the Act is language that recognizes the right of privacy of ownership of a holder of a beneficial interest in a land trust. The attorney or agent acting for the beneficiary of a land trust in a real estate transaction is permitted to complete the necessary declaration of value for the transaction without revealing the identity of the beneficiary. While that language may be construed as an indication that all deeds to or from a land trustee are not exempt from the tax, it does not dictate the applicability of the tax to all or any particular type of land trust transaction. That language merely recognizes that in transactions where a land trustee would be involved in the transfer of title to real estate by deed, the beneficiary's identity

should be protected.

Since the Real Estate Transfer Tax Act is a taxing statute, it is to be strictly construed. It is not to be extended beyond the clear import of its language. (Central Television Service v. Isaacs, 27 Ill. 2d 420; Valier Coal Co. v. Dept. of Revenue, 11 Ill. 2d 402.) If there is any doubt in the application of a tax statute, the statute will be construed most strongly against the government and in favor of the taxpayer. Oscar L. Paris Co. v. Lyons, 8 Ill. 2d 590, 598; Peoples Gas Light Co. v. Ames, 359 Ill. 152.

Therefore, I am of the opinion that the transfer of the beneficial interest and power of direction of a land trust as described in your first example is not taxable under the Real Estate Transfer Tax Act. I assume your question is not restricted to whether A must pay the tax, but whether a tax is payable by someone before recording. The trustor's motive in setting up a valid land trust is irrelevant to the determination of the tax due on the sale of the beneficial interest of the trust. A taxpayer is free to arrange his financial affairs to minimize his tax liability. The taxing

authorities may not treat an otherwise bona fide transaction as a nullity merely because of the presence of a tax avoidance motive in the transaction. (Estate of Stranahan v. Commissioner of Internal Revenue, 472 F. 2d 687; Chisholm v. Commissioner of Internal Revenue, 79 F. 2d 14.) In your first example, the transfer of the beneficial interest cannot be treated as, in fact, a transfer of title to the real estate.

Turning to your second question, it is my opinion that there is no tax due on the transaction you describe and that there is no falsification of the declaration of value. For the stated reasons, the sale of the beneficial interest of a land trust is not covered by the Real Estate Transfer Tax Act. The consideration that passed from B to A would be for the transfer of A's beneficial interest in the land trust not for a transfer of title to the corpus of the trust by deed. Later, in a separate transaction, where B orders the National Bank to convey title to the corpus of the trust to him, no consideration passed at that time from him to the trustee or to anyone else for the transfer. Therefore, the transaction comes within the exemption granted

in section 4 of the Act for deeds involving actual consideration less than $100. Since no actual consideration passed in this later transaction, any declaration to that effect would be truthful and not a willful falsification of a declaration of value prohibited by section 5 of the Act. Ill. Rev. Stat. 1972 Supp., ch. 120, par. 1005.

A contrary interpretation of the statute would raise more questions that it would solve. Under the standard provisions of the land trust agreement, title to a given piece of real estate could remain in a specific trust for up to 20 years. During that period of time, the beneficial interest of the trust could pass through any number of beneficiaries in any number of transactions. Usually, neither the county recorder, the land trustee nor the party in whom title finally vests would have any knowledge as to the consideration given for each intervening transfer of the beneficial interest and power of direction. In addition, the General Assembly has established no guidelines for the imposition of the tax in such situations. This would lead to a general uncertainty as to the application of the tax to a multiplicity of diverse factual situations.

The statute would thus be rendered absurd in its consequence, difficult in its operation or mischievous in its results, all of which should be avoided, if possible, in the interpretation of a statute. People ex rel. Brenza v. Edwards, 413 Ill. 514; Ambassador East Inc. v. City of Chicago, 399 Ill. 359.) Where language of a statute admits to two constructions, one which leads to a definite and certain uniform application which makes the statute practicable and workable, while the other construction leads to consequences, at times absurd, and makes the statute impracticable in operation without extensive tinkering, the objectionable alternative should be rejected. Childers v. Modglin, 2 Ill. App. 2d 292.

In conclusion, it is my opinion that no revenue stamps are required by the statute to either situation you present.

Very truly yours,

ATTORNEY GENERAL