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DATE: June 11, 1998

TO: All Clerks of the Circuit Courts

FROM: Julia Freit, Assistant Attorney General *JMF*

SUBJECT: Tax-Property Article, §12-108(p) - Application to Business Trusts

A question has arisen regarding application of the exemption under Tax-Property Article (hereinafter "TP"), §12-108(p)(1) to a conveyance from a corporation to a business trust that is wholly owned by the corporate grantor. This raises a question regarding the meaning of "corporation" as used in the exemption. For the following reasons, I have concluded that the exemption applies.

Under TP §12-108(p)(1), a conveyance of property from a parent corporation to a subsidiary corporation, or between two subsidiary corporations wholly owned by the same parent corporation, for no consideration, nominal consideration, or consideration comprised of only the issuance, cancellation, or surrender of stock of the subsidiary corporation, is not subject to recordation tax. This exemption is made applicable to State transfer tax and county transfer tax by TP §§13-207(a)(9) and 13-405(c).

While "corporation" is not defined in the Titles 12 and 13 definition sections, §§12-101 and 13-101, it is defined in TP §1-101(f). As defined, the term includes "an association or joint-stock company," and expressly excludes "a common trust fund as defined in §3-501(b) of the Financial Institutions Article." This definition of "corporation" was added to Article 81 by Acts of 1929, Chapter 226 as part of a major revision of the tax laws. The revision was based on the December 1, 1928 Report of the Tax Revision Commission Appointed under the Act of 1927, Chapter 687. The report was accompanied by a draft bill. The revisor's note following the proposed definition of "corporation" states as follows: "This provision is new. It is intended to take care of so-called 'Massachusetts trusts' and similar unincorporated associations which have a quasi-corporate organization and most of the attributes of corporations."

A business trust - some types of which are a common law trust, Massachusetts trust, and real estate investment trust (REIT)- historically has been considered to be an unincorporated association that has quasi-corporate organization and most of the attributes of a corporation. In 15 *Opinions of the Attorney General* 81 (1930), the Attorney General, relying on the definition of "corporation" in Article 81, determined that a Massachusetts Trust must comply with the laws of this state relating to registration and taxation of foreign corporations. The opinion stated that "all doubt with respect to the power of the state to treat Massachusetts Trusts as corporations within the meaning of the laws relating to registration and taxation, has been foreclosed by the Supreme Court of the United States

in the recent case of *Hemphill vs. Orloff*, 277 U.S. 537, 72 L. Ed. 978."

As explained in *Laws of Corporations and Other Business Entities* by Harry G. Henn and John R. Alexander (1983), pp. 117-124, Massachusetts trusts were developed and used to achieve limited liability and to avoid the restrictions then existing on corporations acquiring and developing real property; this type of trust has been perpetuated in more modern times by the investment trust and REITs. Corporations and Associations Article, §3-101(d) defines "business trust" as "an unincorporated trust or association, including a common-law trust, Massachusetts trust, or Maryland real estate investment trust as defined in §8-101(b) of this article, which is engaged in business and in which property is acquired, held, managed, administered, controlled, invested, or disposed of by trustees for the benefit and profit of any person who may become a holder of a transferable unit of beneficial interest in the trust."

The exemption currently set forth in TP §12-108(p) was enacted in 1975. Chapter 268 of the Acts of 1975 indicated that its purpose was for "imposing a recordation tax and property transfer tax when an instrument of writing is filed with the State Department of Assessments and Taxation pursuant to a sale, lease, exchange, or other transfer of all or substantially all the property and assets of a corporation, subject to certain exceptions." New subsection (t) of §277 of Article 81 provided, in pertinent part, as follows:

Notwithstanding the other provisions of this section, on the filing with the State Department of Assessments and Taxation of articles of sale, lease, exchange or other transfer of all or substantially all the property and assets of a corporation under §3-112 of the Corporations and Associations Article, the Department shall collect the tax at the rate of \$1.65 for each \$500 of the actual consideration paid or to be paid for any real property or improvement thereto so transferred.

The tax shall not apply to (1) the transfer of title to real property between a subsidiary corporation and its parent corporation for no consideration, for nominal consideration, or in sole consideration of the issue or the cancellation or surrender of a subsidiary's stock, or (2) the transfer of title to real property between two or more subsidiary corporations wholly-owned by the same parent corporation for no consideration, for nominal consideration, or in sole consideration of the issue or cancellation or surrender of a subsidiary's stock, or (3) deeds made pursuant to reorganizations within the meaning of section 368(a) or in accordance with sections 371 to 374 inclusive of the Internal Revenue Code.

At the time of this enactment, Article 81 included the definition of "corporation" referenced above

Finally, it is noteworthy that the various exemptions from recording taxes set forth in TP 12-108 that pertain to business entities never separately reference a business trust. For example, TP §12-108(q) relates to liquidation, dissolution, or termination of an entity and conveyance of real property from the entity to an original owner of the entity, an original owner's direct descendant or relative

within 2 degrees, or a person who acquired an ownership interest in the entity by gift or bequest from the original owner. This exemption expressly references a corporation, limited liability company, and partnership. It contains no reference to a business trust. This omission of any express reference to a business trust supports the view that the word "corporation" includes a business trust. Because the term "corporation," as defined in TP §1-101(f), includes a business trust, there is no need to separately reference a business trust.

Therefore, I have concluded that the exemption in TP §12-108(p) includes transfers involving business trusts which own or are owned by corporations. Since the word "corporation" as used in that exemption includes a business trust, the term "stock" as used in the exemption must be construed as including units of transferrable interest in a business trust, also sometimes referred to as a "shares." See CA §§-101(c).

If you have any questions regarding this matter, please do not hesitate to contact me.

cc: David M. Lyon, Assistant Attorney General