



**October 18, 2007**  
**Pennsylvania Realty Transfer Tax**  
**No. RTT-07-010**  
**Re-issuance of No. RTT-03-016**  
**Sale of 99-Year Vacation License**

ISSUE:

Is the sale of a 99-year vacation license ("Vacation License") that gives the purchaser the right to a unit in a resort on an annual or bi-annual basis (depending on the license purchased) subject to the Pennsylvania Realty Transfer Tax rather than the Pennsylvania Hotel Occupancy Tax?

CONCLUSION:

This Vacation License is treated by the Department as a lease to occupy subject to Pennsylvania Realty Transfer Tax. The 99-year Vacation License as proposed by Taxpayer, will not be subject to the Pennsylvania Hotel Occupancy Tax. This is based upon assurances made by Taxpayer that: (1) the facility will be dedicated as being subject to the leaseholds created by the sale of the Vacation Licenses and not open generally to the public and (2) that if units are rented to individuals other than those who own a Vacation License, on a per night or per week basis, Taxpayer will collect Pennsylvania Hotel Occupancy Tax on those periodic and occasional transactions.

FACTS:

Taxpayer is a Pennsylvania corporation. Taxpayer is in the business of selling and operating time shares resorts. In its existing time-share operations, Taxpayer sells time shares which comport to the Pennsylvania Real Estate Licensing Act, 63 P.S. § 455.201 et seq., in which the purchaser purchases a deeded interest in perpetuity in the time-share property. Taxpayer also sells the right to use time-sharing licenses of 12 to 20 years in duration.[\[1\]](#)

Taxpayer proposes to sell Vacation Licenses that are 99 years in duration to the general public. The Vacation License allows the purchaser to occupy a unit in Taxpayer's Pennsylvania Resort, either for one week every year or every other year[\[2\]](#) during a particular season. The arrangement resembles a time share as defined in the Pennsylvania Real Estate Licensing Act, 63 P.S. § 455.201; however, there are no fee simple rights in real estate or lease given to the purchaser. The agreement can be terminated by Taxpayer under the terms and conditions of the Vacation Reservation Agreement.[\[3\]](#) Accordingly, there is no need to terminate the property rights of the purchaser through a fore-closure because contractually a purchaser does not have any property rights.

Taxpayer has decided to offer the Vacation License instead of the time share because of a 20% default rate by purchasers with respect to obligations under the Agreement. Because foreclosure is a timely and costly procedure, it is believed that remedies available to Taxpayer in the event of default by a licensee (purchaser) are easier to address than through a formal foreclosure proceedings that would be required if a deeded time-share or a

lease is in default. Taxpayer has represented that formal foreclosure causes a loss of time-loss revenue relating to the unpaid balance of the installment sale that results in connection with the foreclosure proceedings and the loss of revenue relating to the failure of the purchaser to pay the annual maintenance fee. In the event of default of one of the current deed time-share weeks, the owner is not permitted to use the premises; the owner's week may still be rented to a third-party and Pennsylvania Hotel Occupancy Tax is remitted to the Commonwealth on such transactions.

The Vacation Reservation Agreement consists of three parts. The first part is the document called the Vacation Reservation Agreement ("Agreement"), which sets forth the contract terms. The second part is a Purchase Addendum and Finance Disclosure, which explain the costs of the Vacation License. The third is the Vacation License itself, which sets out the entitlement to a type of unit in a season.

The Agreement sets forth that the purchaser agrees to purchase a week within a season in a certain type of unit offered by Taxpayer. The term "season" is defined in the Agreement as:

"Season" refers to the time of year you have selected during which you may reserve a week at [Pennsylvania Resort]. Your selected Season is shown on the attached Addendum. There are three seasons: Red (high), the time of year of highest demand; Yellow (swing), the time of year of average demand; and Green (low), the time of year of lowest demand. The precise weeks included in each season are set forth on the Addendum.[\[4\]](#)

The purchaser pays for either a one or two bedroom unit in the Pennsylvania Resort complex. The units are substantially identical. Purchaser does not have the right to use the same unit from year to year; nor does purchaser have a right to the same week from year to year. Purchaser does have the right to use the recreational facilities at another resort owned by Taxpayer.

In order to activate or use the Vacation License, the purchaser must make a written request at least sixty (60) days and not more than one hundred eighty days (180) in advance to reserve a room for a certain week. Reservations are on a first-come, first-served basis. Taxpayer guarantees purchaser a room during the season but not during any particular week. If purchaser does not get the written request to Taxpayer 60 days in advance, Taxpayer will try to accommodate purchaser, but no guarantee is given that the purchaser will in fact secure a room. Purchaser also has the option to reserve a week in a more expensive week than was purchased for a fee above the contract price.

Purchaser does not have to stay in the Taxpayer property. Purchaser has the right to trade his week and stay in another resort. As represented in the meeting, this feature is consistent with many other time-share arrangements.

Unlike a hotel occupant, but like a time-share purchaser, the purchaser agrees to pay a separate maintenance fee each year. The maintenance fee consists of the expenses incurred in insuring and maintaining the property.

The Vacation License provided to the Department with this request does not entitle the purchaser to any interest in the property. In the Agreement, it states under the General Conditions section:

No Interest in Real Estate or Personal Property. You do not acquire any legal or equitable ownership of the furniture, fixtures, equipment, or other personal property in the [Pennsylvania Resort] units, or to the real estate. This agreement does not convey any interest in real estate or a security interest in your favor. Ownership will remain with Taxpayer or its successors and assigns. This Vacation Reservation Agreement does not create a lease or an easement. This Vacation Reservation Agreement gives you a license, which is revocable in the event of default by you under this Vacation Reservation Agreement.

The purchaser has the right to transfer the Vacation License to family members. The purchaser may sell freely his license subject to conditions and approval by Taxpayer. Unlike the hotel occupant, the purchaser may also pass the Vacation License to family members through purchaser's will without approval of Taxpayer.

Taxpayer has reviewed this proposed transaction with the local taxing authority. Taxpayer is to present a copy of the sales listings to the county Recorder of Deeds. The Recorder will use the list to impose and collect Realty Transfer Tax on the purchase.

Taxpayer has represented that the entire Pennsylvania Resort facility is exclusively devoted to the sale of the 99-year Vacation Licenses. Taxpayer retains the right of providing rooms in the Pennsylvania Resort facility, when available, to the general public in which case Taxpayer will collect and remit Hotel Occupancy Tax on the occupant's charges.[\[5\]](#)

#### DISCUSSION:

The Pennsylvania Realty Transfer tax is a tax upon a document that effectuates or evidences the conveyance of title to real estate.  
72 P.S. § 8102-C.

Real Estate is defined, in part, as:

(1) Any lands, tenements or hereditaments within this Commonwealth, including, without limitation, buildings, structures, fixtures, mines, minerals, oil, gas, quarries, spaces with or without upper or lower boundaries, trees and other improvements, immovables or interests which by custom, usage or law pass with a conveyance of land, but excluding permanently attached machinery and equipment in an industrial plant.

72 P.S. § 8101-C.

Title to real estate is defined as:

(1) Any interest in real estate which endures for a period of time, the termination of which is not fixed or ascertained by a specific number of years, including, without limitation, an estate in fee simple, life estate or perpetual leasehold; or

(2) any interest in real estate enduring for a fixed period of years but which, either by reason of the length of the term or the grant of a right to extend the term by renewal or otherwise, consists of a group of rights approximating those of an estate in fee simple, life estate or perpetual leasehold, including, without limitation, a leasehold interest or possessory interest under a lease or occupancy agreement for a term of thirty years or more or a leasehold interest or possessory interest in real estate in which the lessee has equity.

72 P.S. § 8101-C.

The contract provided by Taxpayer expressly provides that it does not grant an interest in real estate to purchaser. Rather, it grants a license.

This grant of Vacation License is not a time share as defined under the Pennsylvania Uniform Condominium Act, 68 Pa.C.S. § 3101 et seq., because it does not grant a fee simple interest in a particular unit for a particular week. Time-share estates are defined as:

1. an "interval estate," meaning a combination of:
  - (i) an estate for years in a unit, during the term of which title to the unit rotates among the time-share owners thereof, vesting in each of them in turn for periods established by a fixed recorded schedule, with the series thus established recurring regularly until the term expires, coupled with
  - (ii) a vested undivided fee simple interest in the remainder in that unit, the magnitude of that interest having been established by the declaration or by the deed creating the interval estate; or
2. a "time-span estate," meaning a combination of:
  - (i) an undivided interest in a present estate in fee simple in a unit, the magnitude of that interest having been established by the declaration or by the deed conveying the time-span estate, coupled with
  - (ii) the exclusive right to possession and occupancy of that unit during the regularly recurring period designated by that deed or by a recorded document referred to therein.

68 Pa.C.S. § 3403.

Time shares are further defined in the Real Estate Licensing Act, which reads as follows:

Time share. The right, however evidenced or documented, to use or occupy one or more units on a periodic basis according to an

arrangement allocating use and occupancy rights of that unit or those units between other similar users. As used in this definition, the term "unit" is a building or portion thereof permanently affixed to real property and designated for separate occupancy or campground or portion thereof designated for separate occupancy. The phrase "time share" does not include a campground membership.

63 P.S. § 455.201.

A "time share" is then expressly included under the definition Of "Real Estate" under the above-cited statute:

Any interest or estate in land, whether corporeal, incorporeal, freehold or nonfreehold, whether the land is situated in this Commonwealth or elsewhere including leasehold interests and time share and similarly designated interests.

63 P.S. § 455.201.

The sale of a time share is subject to the Pennsylvania Realty Transfer Tax. However, because the Vacation License is not a time share and because Taxpayer is not granting a fee simple interest in the unit and is expressly not giving an interest in the land or unit, an analysis of the sale of Vacation License and the use of land must be made to determine if the Vacation License is an interest in real estate nonetheless and therefore subject to the Pennsylvania Realty Transfer Act.

The sale of Vacation Licenses has been the subject of divergent treatment by various taxing authorities and courts. In some cases, the sale of the license has been held to be the right to rent a room; and other cases, the sale has been determined to be a lease and thus an interest in real estate.

The New York Revenue Department in an advisory opinion held that the sale of a Vacation License in a building that was also regularly used and kept open as such for the lodging of guests was equivalent to the renting of a hotel room, and therefore, New York sales tax is applied to the transaction. TSB-A-81(13)S (August 14, 1981).

In Sombrero Reef Club v. Allman, 18 Bankr. 612 (Bankr. S.D. FLA 1982), the court held that where purchasers acquired time shares with a qualified right to obtain accommodation of a certain quality within a certain time in a complex but where specifically no interest in property was conveyed, these were held to be executory contracts, not leases. However, in Cal-Am Corp. v. Department of Real Estate, 104 Cal. App. 3d 453, 163 Cal. Rptr. 729 (1980), the California Court of Appeals found that there was a lease created. In Cal-Am, the purchasers acquired licenses of one to four weeks a year in a condominium resort for a term of years. Purchasers were not entitled to any particular unit or any particular week. Purchasers could let others use the license. Purchasers could sell the license with the consent of the club and they could bequeath the license without the consent of the club. The court held that where there was a definite term of duration and description these licenses were in the nature of leases. "The test for determining whether an agreement for

the use of real property is a license or a lease is whether the contract gives exclusive possession of the premises against all the world, including the owner, in which case it is a lease, or whether it merely confers a privilege to occupy under the owner, in which case it is a license." Cal-Am Corp. 104 Cal. App. 3d at 457, 163 Cal. Rptr. at 732, citing Von Goerlitz v. Turner, 65 Cal. App. 2d 425, 429, 150 P.2d 278 (1944).

[T]he fact that [the club] retains the right to specify which unit will be occupied and to provide maintenance and maid services to each unit does not derogate the exclusive possessory interests of the members during their annual periods of one to four weeks. The membership agreement itself guarantees to members the right to occupy, during their annual periods, one of the club's condominiums. One who buys exclusive occupancy, even for only a portion of each year, in a condominium, occupies a special position with relation to a portion of the condominium premises. Regardless of the term used to describe the purchaser's rights of exclusive occupancy, it is an estate or interest or possessory interest in the property itself.

Id. 104 Cal. App. 3d at 457-58, 163 Cal. Rptr. at 732.

In a Pennsylvania case, Kalins v. Commonwealth, 92 Pa. Cmwlth. 569, 500 A.2d (1985), that had similar facts but was a sale of a time share, the Commonwealth Court expressed a similar view to that of the California Court in Cal-Am. Mr. Kalins' company, Vacation Charters, Ltd, sold the right to occupy for one or more weeks a year during the twelve years following the execution of the agreement, a choice of accommodation in their resort. The purchaser did not receive the right to occupy any particular unit. Further, Vacation Charters chose the week during a season when the purchaser could use the unit. Vacation Charters agreed to make available to the purchaser the right to reserve for occupancy at the resort for the twelve-year period.<sup>[6]</sup>

Investigators from the Bureau of Professional and Occupational Affairs visited the resort and were greeted by a sales representative, who explained the costs of purchasing a unit. The manager then joined them. Neither the manager nor the sales representative was licensed to sell real estate. The Real Estate Licensing Commission (REC) then cited Vacation Charters for violating the Real Estate Licensing Act.

Vacation Charters argued that no real estate license was needed for the sales people because they were selling licenses and not interests in real estate. Vacation Charters argued that the right to occupy was not a leasehold interest because Vacation Charters, and not the purchaser, determined which unit is to be used by the purchaser and to a certain extent the time when purchaser can use it. Vacation Charters further argued that their grants only conferred a license to use and not an exclusive possession and enjoyment for a term specified. The REC argued that the interest given was a lease.

The Court agreed with the REC. The court cited to Justice Stern's description of a lease in the case of Schweitzer v. Evans, 360 Pa. 552, 63 A.2d 39 (1949), wherein it was stated a lease was "any writing which establishes the intention of one party to dispossess himself of the premises, for a consideration, and the other to assume the possession for himself."

Kalins v. Commonwealth, 92 Pa. Cmwlth. 569, 577,500 A.2d 200, 204 (1985), citing Schweitzer, supra.<sup>[7]</sup>

In the subject transaction the purchaser is given rights similar to those given in Kalins. The only apparent differences are that Kalins was silent regarding whether or not the licensing agreement denied an interest in the real estate to the purchaser, and the license in Kalins was for a period of 12 or 20 years and here it is for 99 years. Therefore, this transaction would be governed by the decision in Kalins, and it will be deemed that a right in the real estate is being given notwithstanding the express provision to the contrary. Since an interest in the real estate is being transferred and the length of the contract is for a period greater than 30 years, the transaction would be taxable under the Pennsylvania Realty Transfer Tax. 72 P.S. § 8102-C, 61 Pa. Code § 91.111.

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[1] The sale of these Vacation Licenses is subject to Hotel Occupancy Tax pursuant to an agreement between the Department and Taxpayer. It must be noted that in the letters, which comprise the agreement, the Department uses the term “time-share leases” and Taxpayer uses the term “time-share licenses,” in its reciprocal letter.

[2] Taxpayer has proposed to sell two different products, which will be subject to this letter ruling.

[3] The document states as follow: “In the event you fail to make an installment payment under this Vacation Reservation Agreement or the accompanying Note when due, or in the payment of any annual maintenance fee when due or in the performance of any other condition of this Vacation Reservation Agreement, you will have a grace period of sixty (60) days after the due date of such payment or date for performance to cure such failure before you will be in default.... You shall not be deemed in default of the payment of any installment or other performance, unless such notice has been given. Upon occurrence of a default, you **will immediately lose the right to use and occupy or exchange any [Unit].**”

[4] “For purposes of determining when a season begins and ends, the weeks of the year are numbered. Week Number 1 is seven (7) days commencing on the first Friday, Saturday or Sunday of each year. The “Red” weeks are Weeks 1 through 8, 21 through 39, 41 and 51 and 52. The “Yellow” weeks are Weeks 17 through 20, and 40, 42 through 46. The “Green” weeks are Weeks 9 through 16 and 47 through 50.” From the Purchase Addendum and Finance Disclosure.

[5] It is understood from our discussions that this arrangement is currently standard practice and is occurring in the deeded time-share facilities Taxpayer currently operates.

[6] It is unknown what type of property interest was expressly given to the purchaser in the licensing contract in Kalins. It is also unknown if Vacation Charters rented out rooms in the facility like a hotel or if the facility was run as a stand-alone facility as is the case in the subject transaction.

[7] In reviewing the underlying facts of Schweitzer, it must be noted that the interest given was a lease wherein the individual who rented the room had exclusive rights to the room.

It was not a situation as is here wherein if that person did not use the room it would be given to someone else.