NO. CV 04 052 54 19

ESSEX SAVINGS BANK, ET AL.	:	SUPERIOR COURT
	:	TAX SESSION
v.	:	JUDICIAL DISTRICT OF NEW BRITAIN :
PAMELA LAW, COMMISSIONER OF REVENUE SERVICES	:	AUGUST 25, 2004

MEMORANDUM OF DECISION ON CROSS MOTIONS FOR SUMMARY JUDGMENT

The estate of Jannette H. Scudder, represented by the Essex Savings Bank and John L. Ericson, Jr., as executors, and John L. Ericson, Jr., individually, bring this tax appeal pursuant to General Statutes § 12-554 contesting the assessment of an additional real estate conveyance tax by the defendant, commissioner of revenue services (Commissioner), made pursuant to General Statutes § 12-494 (b). The parties have filed cross motions for summary judgment.

The issue in this case is whether, at the time of transfer of the subject property, a real estate conveyance tax should have been calculated on the full purchase price of the property or on the consideration paid for each individual share of the property.

The following facts in this case are not in dispute. In 1992, Jannette H. Scudder and John L. Ericson, Jr. (Ericson), brother and sister, each inherited from their mother a one-half interest in a residential estate located at 43 Middle Beach Road West, Madison, Connecticut. Upon the death of Jannette H. Scudder, the Essex Savings Bank and Ericson became the executors of her estate.

In June of 2000, Ericson and the estate of Jannette H. Scudder (Scudder estate), entered into a contract with a realty company in order to list and sell the subject property. Subsequently, on September 29, 2000, the Scudder estate and Ericson sold the property at 43 Middle Beach Road West for $1,125,000. The Scudder estate transferred its half interest in the property by a fiduciary deed dated September 28, 2000. In return for the conveyance, the estate received the sum of $562,500. The estate paid a real estate conveyance tax in the amount of $2,815.50 based upon the receipt of the $562,500. The conveyance tax paid by the estate was calculated by applying the five-tenths of one percent tax rate as set out in § 12-494 (a) to the value of the one-half interest.

Also on September 28, 2000, Ericson individually conveyed his one-half interest in the subject property by warranty deed for the consideration of $562,500. He paid a real estate conveyance tax on the sale of his half interest in the amount of $2,815.50. Ericson's conveyance tax was similarly calculated by applying the five-tenths of one percent tax rate as set out in § 12-494 (a) to the value of his one-half interest.

On July 16, 2003, the Commissioner issued a deficiency assessment against both the Scudder estate and Ericson. The deficiency assessment, which amounted to $1,619 plus penalty and interest, was determined by using the full sale price of the subject property at $1,125,000 rather than the separate one-half interests of the Scudder estate and Ericson valued individually at $562,500. As set forth in § 12-494 (b), a one percent tax was applied by the Commissioner to that amount of the sale price of the subject

property exceeding $800,000, and a one-half of one percent tax was applied to the sale price up to $800,000.

Section 12-494 (a) states in relevant part: "There is imposed a tax on each deed, instrument or writing, whereby any lands, tenements or other realty is granted, assigned, transferred or otherwise conveyed to . . . the purchaser . . . when the consideration for the interest or property conveyed equals or exceeds two thousand dollars, (1) subject to the provisions of subsection (b) of this section, at the rate of five-tenths of one per cent of the consideration for the interest in real property conveyed by such deed, instrument or writing . . . ." Subsection (b) of § 12-494 goes on to state that: "The rate of tax imposed under subdivision (1) of subsection (a) of this section shall, in lieu of the rate under said subdivision (1), be imposed on certain conveyances as follows . . . (2) in the case of any conveyance in which the real property conveyed is a residential estate . . . for which the consideration in such conveyance is eight hundred thousand dollars or more, the tax under said subdivision (1) shall be imposed (A) at the rate of one-half of one per cent on that portion of such consideration up to and including the amount of eight hundred thousand dollars and (B) at the rate of one per cent on that portion of such consideration in excess of eight hundred thousand dollars . . . ."

The plaintiffs' position is that they calculated the conveyance tax due based upon their reading of § 12-494 (a). The key words in § 12-494 (a) that the plaintiffs rely on are: "There is imposed a tax on each deed . . . when the consideration for the interest or property conveyed equals or exceeds two thousand dollars . . . ." The plaintiffs contend that this language requires that the conveyance tax be based on the value of the separate interest being conveyed, which in this instance is the one-half interest held by each of the plaintiffs for the consideration of $562,500, not on the sale price of the property as a whole at $1,125,000.

The Commissioner disagrees with the contention of the plaintiffs. The Commissioner argues, based upon § 12-494 (b), that the conveyance tax is imposed on the total sale price of the real estate, not the value of the individual interests of the sellers. The Commissioner's argument is that although property being sold may be owned by a number of different people and each person may execute an individual deed and receive individual payment from the sale, the conveyance tax is still calculated based upon the full purchase price of the property sold and not the value of the separate interests of the sellers.

In Mandell v. Gavin, 262 Conn. 659, 670, 816 A.2d 619 (2003), our Supreme Court made clear that the legislative intent behind § 12-494 was to impose a conveyance tax based upon the actual consideration that was the result of a bargained for exchange, and not merely the fair market value of the property. See also Ferris v. Gavin, 262 Conn. 680, 685-86, 816 A.2d 628 (2003). In the present action, the plaintiffs entered into a bargained for sale of the subject property, the ownership of which consisted of their two half interests, apparently held as tenants in common, as inherited from their mother's estate. One could argue, as the plaintiffs have here, that the sale by the estate and the sale by Ericson were two separate transactions. However, they were not. As the commissioner points out, the Scudder estate and Ericson together entered into and exclusive listing agreement with a real estate broker to market the subject property and both also entered into a sales agreement together in order to sell the subject property. (Defendant's Memorandum of Law, dated June 14, 2004, Exhs. 3, 4.) Although one-half of the proceeds from the sale went to the estate of Jannette H. Scudder for distribution through the probate process and one-half of the proceeds went separately to John L. Ericson, Jr., the sale itself was a single transaction, not two separate transactions. We recognize, as the plaintiffs argue, that a party holding a partial interest in real estate may

independently convey that interest and in that sense pay a conveyance tax based on the consideration received for that interest. See Burritt Interfinancial Bancorporation v. Wood, 33 Conn. App. 401, 405-406, 635 A.2d 879. However, in this case, as we have previously stated, the Scudder estate and Ericson sold the subject property in one transaction. The purchasers of the subject property paid one price, $1,125,000, as the bargained for consideration.

Section 12-494 (b), as amended by Public Acts 1989, No. 89-25l, § 19 is specific that the conveyance tax is based on the sale of a "residential estate . . . for which the consideration in such conveyance is eight hundred thousand dollars or more . . . ." We cannot read into this statutory provision that the conveyance tax on the sale of a "residential estate" in excess of $800,000 could be defeated by each common interest owner executing a separate deed conveying their separate interest as a portion of the total consideration for the sale of the residence. See New Haven v. State Board of Education, 228 Conn. 699, 719, 638 A.2d 589 (1994); Giannitti v. Stamford, 25 Conn. App. 67, 76, 593 A.2d 140, cert. denied, 25 Conn. App. 67, 593 A.2d 140 (1991).

The Commissioner further relies on what she considers to be clarifying legislation that supports her interpretation of § 12-494 (b). Public Acts 2004, No. 04-201, § 4, An Act Concerning Administration of Various State Taxes, reads: "Subsection (b) of section 12-494 of the general statutes, as amended by section 40 of public act 03-2, is repealed and the following is substituted in lieu thereof (*Effective from passage*):

"(b) The rate of tax imposed under subdivision (1) of subsection (a) of this section shall, in lieu of the rate under said subdivision (1), be imposed on certain conveyances as follows: (1) In the case of any conveyance of real property which at the time of such conveyance is used for any purpose other than residential use, except unimproved land, the tax under said subdivision (1) shall be imposed at the rate of one per cent of the

consideration for the interest in real property conveyed; [and] (2) in the case of any conveyance in which the real property conveyed is a residential estate, including a primary dwelling and any auxiliary housing or structures, regardless of the number of deeds, instruments or writings used to convey such residential estate, for which the consideration or aggregate consideration, as the case may be, in such conveyance is eight hundred thousand dollars or more, the tax under said subdivision (1) shall be imposed (A) at the rate of one-half of one per cent on that portion of such consideration up to and including the amount of eight hundred thousand dollars, and (B) at the rate of one per cent on that portion of such consideration in excess of eight hundred thousand dollars . . . ."

The plaintiffs contend that Public Act 04-201, § 4 is not a clarifying act but rather a substantive change in § 12-494 that requires the pooling of deeds in the conveyance of a residential estate in excess of $800,000. Whether Public Act 04-201, § 4 is a substantive change to § 12-494 or merely a clarification of that section is significant because it will determine whether such change can be applied retrospectively.

Our Supreme Court long has "recognized that a subsequent amendment to an existing statute may clarify the legislature's original intent." (Internal quotation marks omitted.) Pollio v. Planning Commission, 232 Conn. 44, 56, 652 A.2d 1026 (1995); Daly v. DelPonte, 225 Conn. 499, 511, 624 A.2d 876 (1993). "An amendment which in effect construes and clarifies a prior statute must be accepted as the legislative declaration of the meaning of the original act." (Internal quotation marks omitted.) Kluttz v. Howard, 228 Conn. 401, 409, 636 A.2d 816 (1994). See also Shelton v. Commissioner, 193 Conn. 506, 513-14, 479 A.2d 208 (1984); Prudential Property & Casualty Insurance Co. v. Bannon, 233 Conn. 243, 249, 658 A.2d 567 (1995). "Where an amendment is intended to clarify the original intent of an earlier statute, it necessarily has retroactive effect . . . ."

(Internal quotation marks omitted.) Andersen Consulting, LLP v. Gavin, 255 Conn. 498, 517-18, 767 A.2d 692 (2001). However, where substantive rights are affected by legislation, there is a presumption, as expressed in General Statutes § 55-3, in favor of prospective applicability unless the legislature clearly and unequivocally expresses its intent that the legislation shall apply retrospectively. See Oxford Tire Supply Inc. v. Commissioner of Revenue Services, 253 Conn. 683, 691-92, 755 A.2d 850 (2000).

In this case, Public Act 04-201, § 4 did not create any new tax or make any substantive changes to subsection (b) of § 12-494. It only clarified what had been previously enacted, that residences that sold for more than $800,000 should bear a heavier conveyance tax burden than residences that sold for less. We can only conclude that Public Act 04-201, § 4 was intended to clarify the earlier legislation. Greenwich Hospital v. Gavin, 265 Conn. 511, 522, 829 A.2d 810 (2003).

We note that there was no legislative intent expressed in Public Act 04-201, § 4 to make its provisions retrospective or prospective. More importantly, the legislature indicated the importance of clarifying its intent in Public Act 04-201, § 4 by making the effective date of the amendment from the date of passage so that the amendment, reflecting its intent, would go into effect immediately.[1]

[1]We note that the legislature has periodically attempted to distinguish the terms "consideration" and "purchase price." As an example, Public Acts 1983, No. 83-1, § 6 repealed the term "consideration for the interest or property conveyed" in § 12-494 and imposed the one- half of one percent tax on "the full purchase price for the interest in real property conveyed by such deed." Public Acts 1985, No. 85-480, § 1 repealed and substituted § 12-494 by removing "deed, instrument or writing" and substituting the words "for the privilege of making any sale or transfer of an interest in real property . . . under any deed . . .[with the tax] imposed on each such sale or transfer . . . ." Public Acts 1989, No. 89-205, § 1 repealed that portion of § 12-494 stating "a tax is hereby imposed on each such sale or transfer. . . ." and substituted "when the consideration for the interest or property conveyed equals or exceeds two thousand dollars . . . ." Furthermore, § 2 (c) of Public Act 89-205 removed language basing the conveyance tax on the full purchase price of the conveyance in favor of basing the conveyance tax on the consideration for the interest conveyed.

The Commissioner points out that prior to the passage of Public Act 04-201, § 4, the General Assembly's Office of Legislative Research stated that "[t]his bill . . . clarifies how to calculate the real estate conveyance tax due on a residence when the selling price exceeds $800,000." (Defendant's Memorandum of Law, dated June 14, 2004, p. 13.) In examining the Commissioner's position that Public Act 04-201, § 4 is a clarifying act, we have to understand that what is being clarified is the language in § 12-494 (b) as modified by Public Act 89-251, § 19. Prior to Public Act 89-251, § 19, no distinction was made by the legislature as to the type of real estate that was subject to the conveyance tax. As noted in Public Acts 1989, No. 89-205, § 1, the conveyance tax was imposed on the deed or instrument conveying an interest in real estate other than property exempt from taxation. For the first time, in 1989, the legislature made a distinction between commercial property and residential property as a basis for generating new taxes. The language in Public Act 89-251, § 19 changed the basis for the conveyance tax from a tax on the conveyance of an interest in real estate to a tax on commercial property and a separate tax on residential property. Public Act 04-201, § 4 did not change the rate of the conveyance tax as set forth in Public Act 89-251, § 19. The only legislative purpose that could be served by the enactment of Public Act 04-201, § 4 would be to clarify the language in § 12-494 (b) that the conveyance tax, as expressed in this statute, would be based upon the consideration representing the full selling price of the residence.

We note that the purpose of the passage of Public Act 89-251, § 19 was to generate additional taxes for the state. Representative William Cibes, speaking in favor of the passage of the bill that later became Public Act 89-251 stated: "The Senate and House leadership also recommended an alteration of the real estate conveyance tax, again in part recapturing lost revenue which we are able to give back to our citizens in good times. A few years ago, were able to lower the state real estate conveyance tax from .5

[percent] to .45 [percent]. We propose, and the Senate has adopted, moving back to the .5 [percent] level for residential real estate. In addition, in a progressive manner, we are suggesting that residences which sell for more than $800,000 be subjected to a real estate conveyance tax of 1 [percent] on the amount in excess of $800,000." (Defendant's Memorandum of Law, dated June 14, 2004, Ex. 22.) This purpose of generating new taxes is further served by the clarification in Public Act 04-201 because it prevents sellers from evading the legislative intent to impose a higher conveyance tax on the sale of residential estates over $800,000 by transferring the property using more than one deed.

For all of the above reasons, we conclude that the conveyance tax imposed on the plaintiffs for the sale of the subject property should be based upon the full purchase price and not on the value of the half interest of each of the plaintiffs.

Accordingly, the defendant's motion for summary judgment is granted and the plaintiffs' motion for summary judgment is denied. Judgment may enter in favor of the defendant Commissioner dismissing this appeal without costs to either party.

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Arnold W. Aronson
Judge Trial Referee