

BULK SALES TAX REVISITED

The “bulk sale” of certain assets is subject to taxation under the Sales and Use Tax Act, *N.J.S.A. 54:32B-1 et seq.* Accordingly, the statutory scheme imposed a notice requirement in connection with such sales. In 2007 the Legislature enacted **P. L. 2007, c.100, §5** (eff. June 28, 2007 and operative Aug. 1, 2007). This section, which has been codified as *N.J.S.A. 54:50-38*, expands the bulk sale requirements as follows:

“Whenever a person shall make a sale, transfer, or assignment **in bulk** of any part or the whole of the person’s **business assets, otherwise than in the ordinary course of business**, the **purchaser** ... shall, at least ten (10) days before taking possession of the subject of the sale ... notify the Director [of the Division of Taxation]. ... Within 10 days of receiving such notice, the Director shall notify the **purchaser** ... that a possible claim for State taxes exists... .” [Emphases added.]

The statute goes on to state that if the purchaser fails to give notice to the State, the amount of unpaid taxes becomes a **lien on the proceeds of sale** payable to the seller. Furthermore, the **purchaser** shall be **personally liable** for the payment of the taxes due to the State. See also *N.J.S.A. 54:49-1* (entitled “Tax a debt and a lien...”). The notice requirement is satisfied through the timely submission by the transferee of form **C-9600** (“Notification of Sale, Transfer or Assignment in Bulk”) to the Treasury Department. As a practical matter, the “bulk sales” program has become a general tax collection statute, which enables the government, when it is notified of a pending transaction, to collect any taxes which may be due and owing from the seller.

The Treasury Department, Division of Taxation, has published a Technical Bulletin regarding this subject: **TB-60** (7-3-08), as amended by **TB-60R** (10-21-10). Annexed thereto is form **TTD** (“Asset Transfer Tax Declaration”), which is to be completed by the transferor. Note that form **TTD** does **not** replace form **C-9600**, which must also be submitted. If the Treasury Department is unable to make a timely determination of the amount of tax due (which frequently occurs), it will require that a portion of the proceeds be held in escrow. To what extent does real estate fall within the scope of the foregoing statute?

TB-60R notes that the term **business assets** includes **realty**, “...if a use of the realty is to support a business on its premises which includes, but is not limited to, “renting space to another”. In any event, it seems that

the Treasury Department takes the position that sales of real estate which do not occur “in the ordinary course of business” are subject to the bulk sales rules.

Thus, the sale of a warehouse or factory is *included* within the scope of the law, because the seller’s “ordinary course of business” is the storage or manufacture of goods, rather than the sale of real estate. Similarly, the sale of a multi-family dwelling is included, even if the seller occupies one of the units, because the seller’s “ordinary course of business” consists of the collection of rents, rather than the sale of real estate. (But the Legislature has amended *N.J. S.A. 54:50-38* to exempt certain one- and two-family dwelling units and seasonal rental properties from bulk sales requirements, *provided* the seller is an individual, estate or trust.) On the other hand, the sale of a house by a builder or developer is *excluded*, because it is part of the developer’s “ordinary course of business” to build and sell homes. For more information, visit the website of the Division of Taxation: www.nj.gov/treasury/taxation.

To what extent is the bulk sales tax a title insurance issue? Compliance with tax laws is, in general, beyond the scope of coverage afforded by the policy and thus beyond the concern of title companies. There are, of course, exceptions to the rule, such as taxes which (if unpaid) become liens on realty. Even to the extent that real estate transactions fall within the scope of the law, it is clear that the responsibility for compliance lies with the purchaser (or his or her attorney), and **not** the title company. And in the event of non-compliance, a personal penalty is imposed on the purchaser (rather than a lien on

the insured realty). Even if the State obtains a judgment against the purchaser based on his or her personal liability, it would not become a lien on the insured realty until after the policy had been issued, and, in any event, it would be excluded from coverage under the policy's terms. See *ALTA Owner's Policy* (2006), Excl. No. 3(a).

Thus, although compliance with bulk sales requirements can be a significant problem in many real estate transactions, it is not a title insurance issue. For this reason, many title insurers (including FNTG) have suggested that bulk sales be treated by way of an *informational note* inserted in the title commitment, rather than as a requirement which must be fulfilled.



Title Talk is published periodically in printable electronic format by the Fidelity National Title Group, and is distributed free of charge to its customers and friends. Title Talk contains general information about topics of interest to those involved with real estate conveyancing and title insurance in New Jersey. It is not intended to provide legal advice or opinions or as a substitute for obtaining the advice of counsel.