

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Application	:	
of	:	
ROBERT C. BELL, JR.	:	DETERMINATION
to Review a Determination under Article	:	
11 of the Tax Law with Reference to an	:	
Instrument recorded January 25, 1972.	:	

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Applicant, Robert C. Bell, Jr., has filed an application with the State Tax Commission pursuant to Article 11 of the Tax Law to review a determination by the Miscellaneous Tax Bureau that an instrument executed by him and recorded on January 25, 1972, was subject to the mortgage recording tax.

Upon notice to all interested parties, a formal hearing was held before Paul B. Coburn, Hearing Officer, at the offices of the State Tax Commission, 80 Centre Street, New York, New York, on May 22, 1973, at 1:30 P.M. Applicant appeared pro se. The Miscellaneous Tax Bureau appeared by Saul Heckelman, Esq., (James Scott, Esq., of Counsel).

#### ISSUE

Is an executory contract for the sale of real property between a partnership as vendor and one of its partners as vendee subject to the mortgage recording tax?

#### FINDINGS OF FACT

1. On or about November 15, 1960, Robert C. Bell, Jr., and John M. Lyden formed a partnership which purchased 186 acres of land located in the Town of Lewisboro, Westchester County, New York. The partnership agreement provided that Robert C. Bell, Jr. would

provide two-thirds and John M. Lyden would provide one-third of the cost and expenses. It further provided that profits would be shared in proportion to the investment except that Robert C. Bell, Jr., who was to be the managing partner, would receive, in addition, 20% of the share of the profit accruing to John M. Lyden.

2. Subsequently, Robert C. Bell, Jr. and John M. Lyden formed another partnership which purchased an additional 97 acres of land contiguous to the acreage referred to in the prior paragraph. The partnership agreement provided that each partner would provide one-half of the cost and expenses. It further provided that profits would be shared in proportion to the investment except that Robert C. Bell, Jr., who was to be the managing partner, would receive, in addition, 20% of the share of the profit accruing to John M. Lyden.

3. On January 11, 1972, Robert C. Bell, Jr. and John M. Lyden individually and as partners doing business as Lewisboro Associates Company and Lake Kitchawan Associates entered into a contract with ADB Realty Corporation to sell to said corporation 283 acres of land owned by them in the Town of Lewisboro, Westchester County, New York. The purchase price was \$1,135,000.00 payable \$35,000.00 upon the signing of the contract, \$74,000.00 by the purchaser taking subject to or assuming existing mortgages and \$1,025,600.00 on the delivery of the deed. The closing of title was conditioned upon the purchasers obtaining certain authorizations from state, local and Federal authorities within 38 months from the date of the contract. If the purchaser failed to obtain such authorizations, it could cancel the contract and the sellers would be entitled to retain the \$35,000.00 paid on contract. The contract further

provided that DWS Holdings, Inc., a corporation affiliated with the purchaser, would lend to Robert C. Bell, Jr. the sum of \$200,000.00 secured by a mortgage on the property being sold to ADB Realty Corporation.

4. On January 11, 1972, Robert C. Bell, Jr., executed a mortgage note payable to DWS Holdings, Inc. in the sum of \$200,000.00. The note was payable on March 11, 1975, or at the time of the closing of title to the property set forth in the contract of January 11, 1972, referred to in the prior paragraph, whichever event occurred sooner. The note further provided that John M. Lyden individually and as a partner of Lewisboro Associates Company and Lake Kitchawan Associates would have no personal liability in connection with the note.

5. On January 11, 1972, as security for the note referred to in the previous paragraph, Robert C. Bell, Jr. and John M. Lyden, individually and as partners doing business as Lewisboro Associates Company and Lake Kitchawan Associates, executed a mortgage on the 283 acres owned by them in the Town of Lewisboro, Westchester County, New York to DWS Holdings, Inc. in the sum of \$200,000.00. The mortgage contained the same conditions as set forth in the note referred to in the prior paragraph. The mortgage was recorded in the office of the Westchester County Clerk on January 25, 1972, in Liber 7409 Page 618 of mortgage and a mortgage recording tax in the sum of \$1,500.00 was paid.

6. On January 11, 1972, Robert C. Bell, Jr., and John M. Lyden, individually and as partners doing business as Lewisboro Associates Company and Lake Kitchawan Associates as sellers and John M. Lyden,

individually, as purchaser entered into a contract wherein the sellers agreed to sell the 283 acres owned by them in the Town of Lewisboro, Westchester County, New York, to the purchaser for the sum of \$200,010.00 payable \$10.00 on the signing of the contract and \$200,000.00 on the closing of title. The contract provided that the closing of title was to take place on the tenth day after the note referred to in paragraph 4, became due or 38 months and ten days from the date of the contract. It further provided that if the mortgage referred to in paragraph 5 was discharged of record prior to the date set for the closing of title then the contract would be of no force or effect. It also provided that the purchaser had the right to pay off the \$200,000.00 mortgage and to receive credit for said payment at closing. The contract was recorded in the office of the Westchester County Clerk on January 25, 1972, in Liber 7037 of deeds at page 55. A mortgage recording tax was not paid at the time of the recording of said contract.

7. On March 1, 1972, the Miscellaneous Tax Bureau advised the Westchester County Clerk that the contract referred to in paragraph 6, was subject to a mortgage recording tax in the sum of \$1,500.00 upon the grounds that said contract was an executory contract for the sale of real property under which the vendee has or is entitled to possession.

8. On May 2, 1972, Robert C. Bell, Jr., demanded a hearing on the issue of whether the aforesaid contract was subject to the mortgage recording tax.

CONCLUSIONS OF LAW


A. That a partner has no personal rights in any specific property of a partnership of which he is a member. Any real estate which the partnership owns is considered personalty and, in essence, the only pertinent property which the partner possesses is a claim for an accounting. In Re Dumarest's Estate 146 Misc. 442, 262 N.Y.S. 450 (Sur. Ct. Kings Co., 1933); La Russo v. Paladino, 109 N.Y.S. 2d 627 (Sup. Ct., Kings Co., 1951); In Re Estate of Havemeyer, 17 N.Y. 2d 216, 270 N.Y.S. 2d 197 (1966).

B. That accordingly, John M. Lyden, the contract vendee, was not in possession of the real property owned by the partnerships of which he was a partner on January 11, 1972, when he entered into an executory contract with the partnerships for the purchase of the real property owned by them, and therefore, the said contract was not subject to the mortgage recording tax imposed on certain executory contracts by section 250 of the Tax Law.

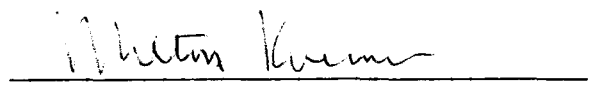
C. That the application of Robert C. Bell, Jr. is granted.

DATED: Albany, New York  
February 4, 1974

STATE TAX COMMISSION

  
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