

## OPINION NO. 85-081

**Syllabus:**

A conveyance of real estate owned jointly by a husband and wife to a corporation of which they are the only shareholders comes within the exemption established by R.C. 319.54(F)(3)(m) where no money or other valuable and tangible consideration readily convertible into money is paid for the real estate and the transaction is not a gift.

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**To: Robert D. Horowitz, Stark County Prosecuting Attorney, Canton, Ohio**  
**By: Anthony J. Celebrezze, Jr., Attorney General, December 26, 1985**

I have before me your request for my opinion concerning the question whether the conveyance of real property owned jointly by a husband and a wife to a corporation of which they are the only shareholders is exempt under R.C. 319.54(F)(3) from the transfer fee established by that division and from any real property transfer tax which may be levied under R.C. Chapter 322. See R.C. 322.01(B) (defining "[d]eed," for purposes of R.C. 322.01-.05, to incorporate the exemptions contained in R.C. 319.54(F)(3)); 1963 Op. Att'y Gen. No. 68-165. You advise that the transferors claim an exemption pursuant to R.C. 319.54(F)(3), under which "no fee shall be charged when the transfer is made. . . (m) To or from a person when no money or other valuable and tangible consideration readily convertible into money is paid or to be paid for the real estate and the transaction is not a gift...." It is firmly established that the exemptions provided in R.C. 319.54(F)(3) are to be strictly, but reasonably, construed in favor of the fee and tax and against the exemption. See, e.g., 1975 Op. Att'y Gen. No. 75-052; Op. No. 68-165 (syllabus, paragraph one).

The transferors' claim of exemption is based upon the premise that the transferors have received no money, or other valuable and tangible consideration readily convertible into money, in exchange for the real property. The information which you have provided indicates that the transfer was carried on the company records by simply increasing the assets of the corporation and also increasing the shareholders' equity by a like amount, but that the shareholders did not receive any additional shares of stock or any money in exchange for the real estate.<sup>1</sup> On the facts presented, it is clear that no money was paid or is to be paid by the corporation for the real estate. There remains the question whether the increase in the assets of the corporation and the corresponding increase in the shareholders' equity which resulted from the transfer of the real estate may be considered to be "other valuable and tangible consideration readily convertible into money," paid to the shareholders, for purposes of R.C. 319.54(F)(3)(m). I do not believe that it may be so considered.

"Stockholder's equity" is defined as "[a] stockholder's proportionate share in the corporation's capital stock and surplus." Black's Law Dictionary 1272 (5th ed. 1979). It is, thus, a figure which may be calculated with some certainty. I

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<sup>1</sup> I further assume for the purposes of this opinion that the transferors did not engage in this instance in a nontaxable exchange of property under 26 U.S.C. §351.

do not, however, believe that an increase in a shareholder's equity may be considered tangible consideration for purposes of R.C. 319.54(F)(3)(m). See Black's Law Dictionary 1305 (5th ed. 1979) (defining "tangible" as "[h]aving or possessing physical form. Capable of being touched and seen"). An increase in a shareholder's equity is, rather, an increase in the shareholder's intangible interest in the corporation. See generally Zamore v. Whitten, 395 A.2d 435, 443 (Maine 1978) ("[a] share of stock is a proportional ownership in the corporation itself, never realized except upon dissolution and winding up of the corporation, but providing the right in the meantime to receive such profits as may be made and declared in the form of dividends, and as such is a species of incorporeal and intangible property in the nature of a chose in action"); 1981 Op. Att'y Gen. No. 81-016 (concluding that a conveyance of real property to a partnership in exchange for an interest in the partnership was exempt under R.C. 319.54(F)(3)(m) on the basis that an interest in a partnership does not constitute "tangible consideration readily convertible into money").

Further, an increase in a shareholder's equity is not readily convertible into money. A shareholder may, at any time, offer his stock for sale, but, particularly in the case of a corporation with only a few shareholders, there may be no buyer readily available. Even if the stock can be sold quickly, there is no assurance that the selling price will directly reflect the increase in the shareholder's equity which results from the transfer of real estate. See generally State ex rel. Biery v. Bowman, No. CA5630 (Stark County Ct. App. June 9, 1981) (holding that real estate is not "readily convertible into money" for purposes of R.C. 319.54(F)(3)(m), on the basis that property must be exposed to the market place for a reasonable length of time in order for a fair market price to be obtained and that the concept of waiting a reasonable length of time is inconsistent with the concept of being readily convertible into money); Op. No. 81-016 (finding that an interest in a partnership is not readily convertible into money).

In addition, in the situation you have described, it does not appear that the increase in shareholders' equity was granted as consideration for the transfer; rather, it appears to be merely a consequence of the transfer, resulting from the bookkeeping activity which was undertaken after the property was transferred. I conclude, therefore, that, in the transaction with which you are concerned, "no money or other valuable and tangible consideration readily convertible into money" was paid or is to be paid for the real estate for purposes of R.C. 319.54(F)(3)(m).

I turn now to the question whether the transaction constitutes a gift. On this point, I note that the transferors have asserted that the transfer was made for tax purposes and not as a gift. This statement constitutes a legal conclusion, however, and I must examine its soundness.

In Op. No. 81-016, my predecessor, quoting National Bank v. Kelly, 19 Ohio Op. 231, 235 (P. Ct. Franklin County 1939), observed that a gift is commonly defined as:

a transfer of property to a donee during the life of the donor, for no consideration, with the intention on the part of the donor to divest himself of control or dominion over the subject of the gift, and with no condition imposed thereon to be met by the donee.

Op. No. 81-016 at 2-62. See also 1980 Op. Att'y Gen. No. 80-029. Under this definition, a transfer of property is not a gift if it is made: (1) for consideration; (2) without the intention of the donor to divest himself of control or dominion over the subject of the gift; or (3) with a condition imposed thereon to be met by the donee. As discussed above, it appears from the information you have provided that the transferors will receive tax benefits as a result of the transfer of their real property to the corporation and that their equity as shareholders will increase. It does not, however, appear on the facts presented that the increase in shareholders' equity constitutes consideration given by the corporation to induce the transfer, or that any condition must be met by the corporation as a condition of the transfer. I turn, therefore, to the question whether the transferors intended to divest themselves of control over the real estate that they transferred to the corporation. See Adams v. Fleck, 171 Ohio St. 451, 172 N.E.2d 126 (1961) (syllabus, paragraph one) ("[g]enerally, there can be no gift where the donor has not relinquished all dominion and control over the property given").

A corporation is an entity separate and distinct from its shareholders. See R.C. 1701.04(D);<sup>2</sup> Perkins v. Benquet Consolidated Mining Co., 155 Ohio St. 116, 98 N.E.2d 33 (1951), vacated and remanded on other grounds, 342 U.S. 437, overruled, in part, on other grounds, 158 Ohio St. 145, 107 N.E.2d 203 (1952); 1970 Op. Att'y Gen. No. 70-033. From this principle it follows that, while a shareholder has a proprietary interest in the corporation in which he holds shares, he does not have a proprietary interest in the corporation's property. See Society for Savings v. Peck, 161 Ohio St. 122, 118 N.E.2d 651 (1954), rev'd on other grounds, 349 U.S. 143 (1955), even though he owns or controls a majority of the shares of the corporation. See generally Krell v. Krell Piano Co., 23 Ohio N.P. (n.s.) 193 (Sup. Ct. Cincinnati 1920), aff'd, 14 Ohio App. 74 (Hamilton County 1921). Therefore, without more, I would conclude that, by transferring the real estate to the corporation, these transferors divested themselves of control over the real estate, and the transfer was a gift.

In this instance, however, the transferors are the only shareholders of the transferee corporation. R.C. 1701.55 provides for the election of corporate directors by the shareholders. Presumably, the transferors have elected, or very well could elect, themselves as directors, and could also control the election of other directors, if any. R.C. 1701.59 provides that, in general, the authority of a corporation shall be exercised by its directors.<sup>3</sup> If the transferors,

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<sup>2</sup> R.C. 1701.04(D) states: "The legal existence of the corporation shall begin upon the filing of the articles and, unless the articles otherwise provide, its period of existence shall be perpetual." See R.C. 1701.13 (authority of corporation).

<sup>3</sup> R.C. 1701.59(A) states:

Except where the law, the articles, or the regulations require action to be authorized or taken by shareholders, all of the authority of a corporation shall be exercised by or under the direction of its directors. For their own

acting as the directors of the corporation and exercising the corporation's authority, determined to convey the real estate from the corporation to themselves in their individual capacities--or to take other action with respect to the real estate--they would, within the limitations imposed by law, be empowered to do so.<sup>4</sup> Therefore, the transferors have not, as a practical matter, divested themselves of control of the real estate, and a gift did not result from the transfer. See Op. No. 81-016. Cf. Op. No. 75-052 (when real property is transferred to a revocable inter vivos trust, the transfer for taxing purposes occurs when the equitable interest vests in the remaindermen, rather than when the legal interest is transferred to the trustee); 1970 Op. Att'y Gen. No. 70-124 (a transfer of real estate to a trustee under a revocable inter vivos trust is not exempt under R.C. 319.54(F)(3)(m) because a gift to the remaindermen arises from such transfer).

Based upon the foregoing, it is my opinion, and you are advised, that a conveyance of real estate owned jointly by a husband and wife to a corporation of which they are the only shareholders comes within the exemption established by R.C. 319.54(F)(3)(m) where no money or other valuable and tangible consideration readily convertible into money is paid for the real estate and the transaction is not a gift.

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government, the directors may adopt bylaws that are not inconsistent with the articles or the regulations.

Although I do not have before me the regulations of the corporation, if any, whether action could be taken by the corporation's shareholders as opposed to its directors is immaterial for purposes of this opinion inasmuch as the transferor husband and wife are the only shareholders of the corporation.

<sup>4</sup> The articles of incorporation of the subject corporation permit an officer or director of the corporation to deal or contract with the corporation as a vendor, purchaser, employee, agent, or otherwise, provided that full disclosure is made to the other directors.

I note, however, that the powers of corporate officers to distribute corporate assets are not unlimited. The greatest constraint on an officer's power to sell or distribute assets is the rule that a distribution of assets to shareholders or other persons may not be made in contravention of the claims of creditors. See R.C. 1701.95 (distribution of assets to shareholders when winding up corporation without making adequate provision for payment of outstanding obligations subjects directors to liability); MacQueen v. Dollar Savings Bank Co., 133 Ohio St. 579, 15 N.E.2d 529 (1938) (transfer of property by corporation to secure debt of corporate officer is subject to rights of creditors); Schaefer v. DeChant, 11 Ohio App. 3d 281, 464 N.E.2d 583 (Erie County 1983) (liability imposed on directors under R.C. 1701.95 for unlawful loans, dividends, or distribution of assets runs to corporation). Therefore, the power of the transferors to control the real estate which has been transferred to the corporation is not completely unfettered.