

OPINION NO. 68-165**Syllabus:**

1. The statutory exemptions provided in division (F) (3) of Section 319.54, Revised Code, exempting certain transfers and deeds from the transfer fee and permissive county real estate transfer tax, should be construed strictly, but reasonably, in favor of the fee and tax and against exemption.

2. The county auditor has the inherent authority, in receiving statements of value and administering Section 319.202 ~~319.20.27~~, Revised Code, and in collecting the permissive real property transfer tax authorized to be levied pursuant to Chapter 322, Revised Code, to inquire into the facts and circumstances surrounding any and all transfers or conveyances claimed to be exempt under division (F) (3) of Section 319.54, Revised Code, in order to determine if the one claiming the exemption has affirmatively established his right to the exemption.

3. A transfer of real estate by a settlor to a trustee which, upon termination of the trust, is to be distributed to the settlor's lineal descendants per stirpes would not be exempt from the transfer fee and transfer tax under either subparagraph (d), (m) or (o) of division (F) (3) of Section 319.54, Revised Code.

4. A transfer of a lot by the owner to a builder so that the builder can obtain a construction mortgage and erect a dwelling upon the lot for the owner, the lot and dwelling to be conveyed to the owner upon completion, would be exempt from the transfer fee and transfer tax under subparagraph (m) of division (F) (3) of Section 319.54, Revised Code.

5. A transfer of real estate by an agent, who had purchased said real estate at a sheriff's sale using this principal's money for the purchase price, would be exempt from the transfer fee and transfer tax under subparagraph (m) of division (F) (3) of Section 319.54, Revised Code.

To: James V. Barbuto, Summit County Pros. Atty., Akron, Ohio
By: William B. Saxbe, Attorney General, December 4, 1968

Your request for my opinion sets forth the following transactions involving transfers of real estate, to-wit:

"1. Transfer by settlor to a trustee for persons entitled to inherit while he is still alive. This involves the trustee for persons named in sub paragraph 'D' and it does not involve any type of sale or consideration. We enclose copy of typical trustee agreement.

"2. Transfers to and from a person who is acting as a trustee for the grantor and is making the transfer back to the grantor. Typical examples are as follows:

A lot owner transfers the lot to the builder for purpose of the builder receiving construction mortgage thereon, and erecting a dwelling for the grantor. On completion the builder conveys the lot and the dwelling back to the grantor.

A purchaser at a sheriff's sale, acting as agent for a third party now conveys to the party who, in fact, paid the purchase price at the sheriff's sale."

and you ask whether any of these transfers are exempted from the transfer fee provided in division (F) (3) of Section 319.54, Revised Code.

Division (A) of Section 319.202 ~~319.20.2~~, Revised Code, provides in pertinent part:

"(A) Before the county auditor indorses any real property conveyance presented to him pursuant to section 319.20 of the Revised Code, the grantee or his representative shall submit in triplicate a statement, prescribed by the board of tax appeals and other information as the county auditor may require, declaring the value of real property conveyed, except when the transfer is exempt under division (F) (3) section 319.54 of the Revised Code only a statement of the reason for the exemption shall be required. The grantor shall pay the fee required by division (F) (3) of section 319.54 of the Revised Code; and, in the event the board of county commissioners of the county has levied a real property transfer tax pursuant to Chapter 322. of the Revised Code, the amount required by the real property transfer tax so levied. If the conveyance is exempt from the fee provided for in division (F) (3) of section 319.54 of the Revised Code and the tax, if any, levied pursu-

ant to Chapter 322. of the Revised Code, the reason for such exemption shall be shown on the statement. Value means, in the case of any deed not a gift in whole or part, the amount of the full consideration therefor, paid or to be paid for the real estate described in the deed, including the amount of any mortgage or vendor's lien thereon, and, in the case of a gift in whole or part, the estimated price the real estate described in the deed would bring in the open market and under the then existing and prevailing market conditions in a sale between a willing seller and a willing buyer, both conversant with the property and with prevailing general price levels. * * * (Emphasis added)

As can be observed from the above quotation, the grantee is required to submit a statement of the value of the real estate transferred irrespective of whether the transfer is for a consideration or is a gift, unless the transfer is specifically exempted under division (F) (3) of Section 319.54, Revised Code.

Section 319.54, Revised Code, provides in pertinent part:

"(F) The county auditor shall charge and receive fees as follows:

"* * * * *"

"(3) For receiving statements of value and administering section 319.202 ~~319.20.27~~ of the Revised Code, one dollar, or ten cents per hundred dollars for each one hundred dollars or fraction thereof of the value of real property transferred, whichever is greater, except no fee shall be charged when the transfer is made:

"* * * * *"

"(d) To evidence a gift between husband and wife, or parent and child or the spouse of either;

"* * * * *"

"(m) To or from a person when no consideration is paid or to be paid for the real estate and the transaction is not a gift;

"* * * * *"

"(o) To a trustee acting on behalf of minor children of the deceased;"

Before examining into the question of whether the par-

ticular situations set forth in your letter are exempt, it must be noted that the exemptions from the auditor's fee also are the exemptions provided by law from the permissive real estate transfer tax authorized to be levied in Chapter 322, Revised Code. See the definition of "Deed" contained in division (B) of Section 322.01, Revised Code. Therefore, considering that the transfer fee is upon all transfers unless specifically exempted by law and the permissive real estate tax is levied upon all deeds conveying real property unless specifically exempted by law, said law being division (F) (3) of Section 319.54, Revised Code, the specific exemptions contained in said exemption provision must be strictly, but reasonably, construed in favor of the fee and tax and against exemption therefrom. See State, ex rel. Keller, v. Forney et al., Tax Commission of Ohio, 108 Ohio St. 463, wherein the first branch of the syllabus reads:

"1. Exceptions to the operation of laws, whether statutory or constitutional, should receive strict, but reasonable, construction."

Also, the second branch of the syllabus in the case of National Tube Co. v. Glander, Tax Commr., 157 Ohio St. 407, reads:

"2. Statutes relating to exemption or exception from taxation are to be strictly construed, and one claiming such exemption or exception must affirmatively establish his right thereto."

In regard to the collection or exemption of the fee and the tax, the county auditor and his deputies have the inherent authority, in administering the fee and tax, to inquire into the facts and circumstances surrounding any and all transfers or conveyances of real estate which are claimed to be exempt so as to determine if the one claiming the exemption has affirmatively established his right to the exemption claimed. Accordingly, I will now consider

your questions upon the premise that the facts and circumstances stated are proven to exist.

In regard to your first situation, involving a transfer of real estate by the settlor to a trustee for the use and benefit of persons entitled to inherit from the settlor, I have examined the "typical trustee agreement" which you have submitted, and must conclude that the transfer would not qualify for exemption under either subparagraph (d) or (m) of division (F) (3) of Section 319.54, Revised Code. In analyzing the "typical trustee agreement," I note that the transfer is in trust as a gift to the beneficiaries and thus would not qualify under subparagraph (m). Furthermore, since the trust is to be distributed, upon termination thereof, to the settlor's living descendants, not being limited to the settlor's children or their spouses, the transfer in trust would not qualify for exemption under subparagraph (d). This conclusion is supported by the fact that the legislature has expressly exempted transfers "To a trustee acting on behalf of minor children of the deceased" in subparagraph (o) of division (F) (3) of Section 319.54, Revised Code.

In regard to your second situation, which you describe as a transfer to or from a person acting as a trustee and making the transfer back to the grantor, you first give as an example a transfer by a lot owner to a builder for the purpose of the builder's obtaining a construction loan and erecting a dwelling thereon for the grantor. Upon completion, the builder conveys the lot and building back to the grantor. It is my opinion that this example would not be subject to the transfer fee by reason of the clear applicability of the language of subparagraph (m) of division (F) (3) of Section 319.54, Revised Code. Likewise, the other example, a transfer

by an agent, who has purchased real estate at a sheriff's sale using his principal's money for the purchase price, to his principal, would also fall within the express provisions of subparagraph (m) of division (F) (3) of Section 319.54, Revised Code.

Therefore, it is my opinion, and you are hereby advised, that:

1. The statutory exemptions provided in division (F) (3) of Section 319.54, Revised Code, exempting certain transfers and deeds from the transfer fee and permissive county real estate transfer tax, should be construed strictly, but reasonably, in favor of the fee and tax and against exemption.

2. The county auditor has the inherent authority, in receiving statements of value and administering Section 319.202 ~~319.20.27~~, Revised Code, and in collecting the permissive real property transfer tax authorized to be levied pursuant to Chapter 322, Revised Code, to inquire into the facts and circumstances surrounding any and all transfers or conveyances claimed to be exempt under division (F) (3) of Section 319.54, Revised Code, in order to determine if the one claiming the exemption has affirmatively established his right to the exemption.

3. A transfer of real estate by a settlor to a trustee which, upon termination of the trust, is to be distributed to the settlor's lineal descendants per stirpes would not be exempt from the transfer fee and transfer tax under either subparagraph (d), (m) or (o) of division (F) (3) of Section 319.54, Revised Code.

4. A transfer of a lot by the owner to a builder so that the builder can obtain a construction mortgage and erect a dwelling upon the lot for the owner, the lot and dwelling to be conveyed to the owner upon completion, would

be exempt from the transfer fee and transfer tax under subparagraph (m) of division (F) (3) of Section 319.54, Revised Code.

5. A transfer of real estate by an agent, who had purchased said real estate at a sheriff's sale using this principal's money for the purchase price, would be exempt from the transfer fee and transfer tax under subparagraph (m) of division (F) (3) of Section 319.54, Revised Code.