

The question of whether one check or two should be issued is an administrative decision which should be made by the Director of the Division of Pensions with the approval of the board of trustees of the retirement system involved. The general administration and responsibility for the proper operation of each pension system is vested in its board of trustees. N.J.S.A. 43:15A-16; N.J.S.A. 43:16A-13; N.J.S.A. 18:13-112.58; N.J.S.A. 43:8A-5; N.J.S.A. 43:7-18; N.J.S.A. 43:16-7. N.J.S.A. 52:18-95 established a Division of Pensions within the Department of the Treasury. N.J.S.A. 52:18-96 transferred the various pension systems to the Division of Pensions together with all of their respective functions, powers and duties. Pursuant to N.J.S.A. 52:18-99 the Division of Pensions is headed, directed and supervised by a Director. It, therefore, follows that administrative decisions should be made by the Director of the Division of Pensions with the approval of the board of trustees of the pension system or systems involved.

Very truly yours,

DAVID D. FURMAN  
*Attorney General*

By: JUNE STRELECKI  
*Deputy Attorney General*

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MAY 29, 1959

HON. JOHN A. KERVICK  
*State Treasurer*  
State House  
Trenton, New Jersey

MEMORANDUM OPINION 1959—P-10

DEAR MR. KERVICK:

You have requested our opinion as to whether Levitt and Sons, Incorporated, a New York corporation (hereinafter called Levitt), is liable for taxes under the Corporation Business Tax Act (1945), Laws of 1945, c. 162, N.J.S.A. 54:10A-1 et seq., for the years 1954, 1955 and 1956. In 1954 and 1955 two agents of Levitt commenced purchase of certain property in New Jersey. Payment for the property was made by the agents and although Levitt supplied the funds title was taken in their names. Levitt was authorized to do business in New Jersey on March 22, 1956 and thereafter received conveyances of the properties previously purchased with its funds. Levitt filed its first return under the Corporation Business Tax Act in 1957 for the fiscal year ending February 28, 1957.

N.J.S.A. 54:10A-2 provides in part:

"Every domestic or foreign corporation which is not hereinafter exempted shall pay in annual franchise tax for the year one thousand nine hundred and forty-six and each year thereafter, as hereinafter provided, for the privilege of having or exercising its corporate franchise in this State, or for the privilege of doing business, employing or owning capital or property, or maintaining an office, in this State. And such franchise tax shall be in lieu

of all other State, county or local taxation upon or measured by intangible personal property used in business by corporations liable to taxation under this act."

The prerequisites to imposition of tax liability in the foregoing section are stated in the disjunctive; thus if Levitt in any given year owned or employed capital or property or was doing business within the State, he is liable for the tax provided by the Corporation Business Tax Act for that year.

Levitt was an equitable owner of property in New Jersey from the time that either of the agents entered into a contract for the purchase of property in this State and was authorized to make payment with moneys advanced by Levitt. It is well settled that if a buyer of property causes title to be taken in the name of another person the later generally secures only a legal interest subject to equitable title in the former. The court ordinarily presumes that no gift was intended and thus impresses a trust on behalf of the supplier of the consideration. *Weisberg v. Koprowski*, 17 N.J. 362 (1955). Usually a purchase money resulting trust arises from a direct payment by the cestui que trust to the vendor; nonetheless even if the person in whose name title is taken makes actual payment to the vendor his interest may be impressed with a resulting trust so long as funds of another person are used for the purchase. For example, in *Young v. Greer*, 250 Ala. 641, 35 So. 2d 619 (Sup. Ct. 1948) the plaintiff and defendant had agreed jointly to purchase a house. The plaintiff supplied half of the purchase price to the defendant who added the other half and actually made payment to the vendor. Title was taken solely in the name of the defendant. The Court imposed the trust and held:

"While it is necessary in order to establish a trust in favor of complainant that his money should enter into the purchase price of the property, this rule does not require that the plaintiff should have actually counted out and paid the money to the vendor. It is sufficient if he furnished respondent with the money to cover one-half of the purchase price at the time of or before the sale and the respondent then paid the purchase money." 35 So. 2d at 620-21.

See also *Hoffman v. Maseley*, 247 N.C. 121, 100 S. E. 2d 243 (Sup. Ct. 1957); 2A *Bogert, Trusts and Trustees* §455 (1953). The New Jersey cases are in accord with the above quotation. *Ostheimer v. Single*, 73 N.J. Eq. 539 (Ch. 1907) (*dictum*); *Fagen v. Falvey*, 96 N.J. Eq. 461 (Ch. 1924), *aff'd per curiam*, 98 N.J. Eq. 411 (E. & A. 1925); see *Weisberg v. Koprowski*, 17 N.J. 362 (1955). Thus in the absence of contrary evidence we are obliged to presume that the purchasers took title as trustees for Levitt.

But Levitt must be considered to have had equitable title to property in New Jersey even prior to the transfer of legal title to either agent. Upon the making of a contract for the purchase of realty equitable title vests in the purchaser, though legal title remains in the seller. *Newark v. Fischer*, 8 N.J. 191 (1951); *Coolidge & Sickler, Inc. v. Regn*, 7 N.J. 93 (1951). Thus even prior to the closing of title the agents were vested with equitable title as against the vendors. But their equitable title was in turn impressed with the resulting trust in favor of Levitt. While ordinarily a trust is imposed upon a legal title of another, nonetheless the validity of a trust on an equitable title has often been recognized. 1 *Scott, Trusts* §83 (2d ed. 1956); 1 *Bogert, Trusts and Trustees* §113 (1951). See *Schumacher v. Howard Savings Institution*, 128 N.J. Eq. 56 (Ch. 1940), *aff'd per curiam*, 131 N.J. Eq. 211 (E. & A. 1942) (validity assumed without discussion). Thus Levitt became an equitable owner of

property in New Jersey at the instant that either agent, contemplating making payment with money advanced by Levitt, made a contract for the purchase of realty in New Jersey.

We are of the view that an equitable title must be considered ownership within N.J.S.A. 54:10A-2. Our case law prior to the passing of the Corporation Business Tax Act in 1945 had announced that an equitable title was sufficient to support imposition of tax liability on account of ownership of realty. In *Mausoleum Builders v. State Bd. of Taxes and Assessments*, 90 N.J.L. 163 (E. & A. 1917) the prosecutor on *certiorari* sought to challenge an assessment of realty taxes levied against it. The *locus in quo*, property within a cemetery purchased by the prosecutor from a cemetery company, under the applicable statute had been exempt from taxation in the hands of the vendor. Laws of 1903, c. 208, §3(6). The prosecutor though not a cemetery company sought to invoke the exemption in its behalf on the theory that inasmuch as its only interest in the property was under an executory contract of purchase the exemption of its vendor had continued. The court rejected this position and held that equitable title was sufficient to justify assessment against the prosecutor. See also *West Ridgelawn Cemetery v. Clifton*, New Jersey Tax Reports (1934-39), 775 (Bd. of Tax App. 1939), *cert. dismissed sub nom. West Ridgelawn Cemetery v. State Bd. of Tax Appeals*, 124 N.J.L. 284 (Sup. Ct. 1940), *aff'd per curiam*, 125 N.J.L. 274 (E. & A. 1940), following *Mausoleum Builders v. State Bd. of Taxes and Assessments* on similar facts. *Cf. Ocean Grove Camp Meeting Ass'n v. Reeves*, 79 N.J.L. 334 (Sup. Ct. 1910), *aff'd per curiam*, 80 N.J.L. 464 (E. & A. 1911). In *In re Hance*, 53 N.J.L.J. 118 (Bd. of Taxes and Assessments 1930) the petitioners were vendees under an executory contract for the sale of realty from a Federal agency in whose hands the property had been exempt from taxation. Though legal title had not passed, the Board held that the making of the contract had placed equitable title in the purchaser who was therefore rightfully assessed. The Board declared:

"There seems to be no reasonable doubt that an equitable interest in land is subject to taxation in New Jersey." 53 N.J.L.J. at 120.

The decision of the Supreme Court of the United States in *New Brunswick v. United States*, 276 U.S. 547 (1928), though not binding on questions of New Jersey law, is in accord with the above decisions and is entitled to great weight. In that case, arising through the Federal courts, the Supreme Court anticipated the decision in *In re Hance* and held that under New Jersey law the equitable interest of a purchaser of property from the United States under an executory contract of sale was taxable even though legal title secured by a vendor's lien remained in the United States.

The foregoing cases were available to the Legislature in 1945 and, presumably having been considered by it, control the construction of the word "owner" as used in the Corporation Business Tax Act. See *Barringer v. Miele*, 6 N.J. 139, 144 (1951); *Asbury Park Press, Inc. v. Asbury Park*, 19 N.J. 183, 190 (1955); *cf. Egan v. Erie R.R. Co.*, 29 N.J. 243 (1959). Though the Corporation Business Tax Act imposes a franchise tax on account of the ownership rather than a property tax upon the ownership, in each case the prerequisite to liability is simply ownership. Thus the distinction is without substance.

The cases subsequent to 1945 are consistent with those before. In *Newark v. Fischer*, 8 N.J. 191 (1951) property owned by the Trustees for the Support of Public Schools but subject to an executory contract of sale to a private person was held taxable notwithstanding the vendors' exempt status. The court quoted the following language from *S.R.A., Inc. v. Minnesota*, 327 U.S. 558 (1946) with approval:

"The whole equitable ownership is in the petitioner and the value of that ownership may be ascertained on the basis of the full value of the land." 327 U.S. at 570; 8 N.J. at 198.

In *S.R.A., Inc. v. Minnesota* the Supreme Court of the United States had sustained imposition by Minnesota of a tax on land subject to an executory contract of sale from the United States to the taxpayer. Cf. *Milmar Estate, Inc. v. Fort Lee*, 36 N.J. Super. 241 (App. Div. 1955). *State v. Low*, 18 N.J., 179 (1955) though not a tax case is helpful. There the Supreme Court held that a vendee under an executory contract for the sale of realty is an "owner" within N.J.S. 2A:102-10 which provides:

"All moneys received by a contractor from the owner or mortgagee of real estate for the purpose of having a building erected \* \* \*" are a trust fund.

The court observed:

"The vendee under a contract for the purchase of real estate is the *owner* of an interest in such property." 18 N.J. at 184. (Emphasis added.)

As a foreign corporation owning realty in New Jersey, it is our opinion that Levitt became liable for taxes under the Corporation Business Tax Act at the time when either agent entered into a contract for the purchase of realty in New Jersey, having been authorized to make payment with funds derived from Levitt.

In view of the foregoing it is not necessary to determine whether Levitt was doing business or employed capital in the State prior to its registration here.

Very truly yours,

DAVID D. FURMAN  
*Attorney General*

By: MORTON I. GREENBERG  
*Deputy Attorney General*

MAY 29, 1959

NED J. PARSEKIAN, *Acting Director*  
*Division of Motor Vehicles*  
State House  
Trenton, New Jersey

MEMORANDUM OPINION 1959—P-11

DEAR DIRECTOR PARSEKIAN:

You have requested our opinion as to whether the Director of Motor Vehicles may approve an ordinance regulating traffic permitting temporary and experimental regulations to be put in effect for a 90 day period, or in the alternative, whether he may approve an ordinance regulating traffic which would be effective for a pre-determined period of time. R.S. 39:4-8 provides for the approval of local ordinances