

News & Types: Real Estate Update

# Bulk Sales Act in Illinois

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The repeal of the Uniform Commercial Code provisions regarding bulk transfers of the assets of a business may have led purchasers of real property to believe that they no longer had to worry about their own liability for certain outstanding taxes and perhaps debts owed by sellers of real property at the time of the transfer of such property. However, this is not the case with regard to real property located in Illinois.

In Illinois, various "Bulk Sales Acts" impose an obligation on purchasers of a business or a major portion of the assets of a business, which can include the transfer of real estate, for certain unpaid taxes and even debts for which the seller of such property was responsible. These obligations are imposed by statute and by ordinance, as in the case of property located within the City of Chicago. The statutes applicable to such transactions in Illinois include: (1) the Retailers' Occupation Tax Act (35 ILCS 120/1 et seq.); (2) the Illinois Income Tax Act 35 ILCS 5/101 et seq.; and (3) the Illinois Unemployment Insurance Act (820 ILCS 405/100 et seq.) (only under certain circumstances may real property transfers be encompassed by this statute). If the subject property is located in Cook County, Section 34-92 of the Code of Ordinances applies, if in the City of Chicago, the City's Uniform Revenue Procedures Ordinance, Chapter 3-4, applies, and includes both sellers who are required to pay city taxes as well as those required to hold city licenses. Depending upon the business location, the location of the property subject of the transaction or otherwise, any County or Municipal ordinance applicable to the transaction should be considered along with State law.

While the various Bulk Sales Acts may seem to impose harsh penalties on a purchaser who was never involved in the generation of the taxes due, a purchaser of real property can protect himself by requiring the seller to provide notice to the applicable governmental agency of the date that the "Bulk Sale" will be taking place. Once the notice is issued, the governmental agency is given a certain number of days to respond and to indicate whether a tax is due. Under most of the acts, if the agency fails to respond, then the purchaser will be exonerated from future liability for any taxes due. The number of days the agency is granted in order to give its response can be as long as 45 days, as in the case of Cook County and the City of Chicago. Therefore, the contract for purchase must give ample time for notice prior to the transfer. As a caution, while the Illinois Unemployment Insurance Act does not specifically provide for the aforementioned clearance from liability after proper notice, a purchaser should be able to contact the Illinois Department of Employment Security for information on whether any taxes may be due from the seller. However, this particular act does not guarantee exoneration, even if this step is taken.

To protect the purchaser, the terms of the purchase agreement should contain language indicating that the purchaser's performance, specifically the payment of the purchase price, is expressly made subject to and

preconditioned upon the delivery to the purchaser at or prior to the closing date of: (1) releases from all of the agencies with respect to the seller and the transaction establishing that no taxes or debts from or against the seller or the property on account of the transaction are claimed; or (2) evidence that all of the agencies have received notice of the transaction contemplated under the agreement and a request for a determination of the amount of tax, if any, owed by the seller (see note above regarding the lack of exoneration from liability under the Illinois Unemployment Insurance Act). Regarding either of the aforesaid conditions, the form of the release and evidence of notification should be satisfactory to the purchaser at his/her sole discretion.

Finally, the purchase contract should also provide for a "holdback" provision in case any of the applicable agencies indicates that a certain amount of tax or debt is due or if the agency issues a "Bulk Sales Stop Order" indicating that payment must be made. The holdback provision will then require that an amount sufficient to cover the taxes due from the seller be withheld from the purchase price and used for the payment of such taxes due. This amount should be withheld until any such Bulk Sales Stop Order is released by the applicable agency and the purchaser is cleared of its obligation to pay any taxes.