

New York State Department of Taxation and Finance
Taxpayer Services Division
Technical Services Bureau

TSB-A-90(3)R
Mortgage Recording Tax
March 3, 1990

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M891215F

On December 12, 1989, a Petition for Advisory Opinion was received on behalf of The Guild for Exceptional Children, Inc., 280 68th Street, Brooklyn, New York 11220.

The issue raised by Petitioner, The Guild for Exceptional Children, Inc., concerns the application of the Real Estate Transfer Tax (hereinafter the "transfer tax") in situations where a tax-exempt, not-for-profit corporation is either the seller or purchaser of real property situated in New York State. In addition, a second issue is raised as to whether a tax-exempt, not-for-profit corporation is exempt from Mortgage Recording Tax.

Petitioner, which is a tax-exempt not-for-profit corporation, is about to enter into a contract for the purchase of a condominium apartment. The apartment will be used to house mentally retarded adults. The proposed contract of sale provides that all transfer and conveyance taxes, including New York State Real Property Transfer Taxes, are to be paid by the purchasers as part of the consideration for the conveyance. Petitioner contends that although the transfer tax is usually paid by the seller, in the case of new construction it is the custom for the tax to be passed on to the purchaser.

Further, in order to purchase the aforementioned condominium apartment, it will be necessary for the Petitioner to execute a mortgage with a lending institution.

Section 575.2 of the Transfer Tax Regulations provides that the transfer tax is imposed on each conveyance of real property or interest therein, including the conveyance of shares in a cooperative housing corporation, when the consideration exceeds \$500.00. The rate of tax is \$2.00 for each \$500.00, or fractional part thereof, of such consideration or value.

The term "consideration" is defined in Section 1401(d) of the Tax Law, in pertinent part, to mean the price actually paid or required to be paid for the real property or interest therein. Consideration is also defined to include the cancellation or discharge of an indebtedness or obligation.

Moreover, Section 1404(a) provides, in part, that the transfer tax shall be paid by the grantor. If the grantor has failed to pay the tax imposed by Article 31 of the Tax Law at the time required by Section 1410 or if the grantor is exempt from such tax, the grantee shall have the duty to pay the tax.

Section 1405 of the Tax Law, which sets forth the conveyances for which the tax shall not apply, does not provide exemption from the transfer tax on the basis that the grantor or grantee is a tax-exempt, not-for-profit corporation.

TSB-A-90(3)R
Mortgage Recording Tax
March 3, 1990

Accordingly, the Petitioner's purchase of the condominium unit will be subject to transfer tax. In addition, since the Petitioner is required to pay the grantor's obligation for the transfer tax as a condition of the contract, such payment of tax will be deemed to be additional consideration for the real property.

As for the application of the mortgage recording tax to the proposed transaction, Article 11 of the Tax Law imposes a mortgage recording tax on all mortgages recorded in New York State.

In accordance with Section 253 of the Tax Law, the mortgage recording tax is made up of three parts: the basic tax, the special additional tax and the additional tax. In addition, Section 253-a imposes a further tax on mortgages recorded in any city in New York State having a population of one million or more.

Section 253.1-a(b) provides exemption from the special additional tax where the mortgagor is an organization organized other than for profit which is operated in a non-profit basis, no part of the net earnings of which inures to the benefit of any officer, director or member and which is exempt from federal income tax pursuant to section 501(a) of the Internal Revenue Code. However, in such instances, the special additional tax must be paid by the mortgagee. The statute does not provide exemption to tax-exempt not-for-profit corporations for the portion of mortgage recording tax which represents the basic tax, the additional tax and the tax on mortgages recorded in cities having a population of one million or more.

Therefore, if the Petitioner is an organization that has established exemption pursuant to section 501(a) of the Internal Revenue Code, the Petitioner will be exempt from the portion of the mortgage recording tax which represents the special additional tax, but will be subject to the basic tax, the additional tax and the tax on mortgages recorded in cities having a population of one million or more.

DATED: March 3, 1990

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

NOTE: The opinions expressed in Advisory Opinions are limited to the facts set forth therein.