

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. M160916A

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED]. Petitioner asks whether the conveyance described below will be subject to the New York State Real Estate Transfer Tax (the “RETT”).

We conclude that, if the interest in real property that is held in the Trust is distributed to a beneficiary pursuant to the terms of the Trust Agreement after the death of the settlor of the trust, and no consideration is paid by the beneficiary for the conveyance, the RETT will not be due on the transfer. To the extent that the beneficiary is paying cash to the Trustee for the transfer of the real property, the RETT will be due.

Facts

The Settlor established the Trust for her own lifetime benefit and for the subsequent benefit of her descendants. The Trust Agreement provides that, upon the Settlor’s death and after the distribution of the Settlor’s tangible personal property and certain cash amounts as provided therein, the remaining property (the “Trust Balance”) shall be paid to the Settlor’s issue. The Settlor was survived by her four children, each of whom was over the age of thirty-five at the time of the Settlor’s death.

The Trust Balance consisted of (i) marketable securities, (ii) cash, and (iii) a 96% undivided interest in a condominium apartment located in New York City (the “Interest”). The Trust Agreement provided the Trustee with “discretionary powers without limitation” to make, without the consent of any beneficiary, any payment, distribution or division required by the Trust Agreement, either in cash or in kind, or partly in cash and partly in kind, in proportions like to or different from that paid or transferred to anyone else. Pursuant to that authority, the Trustee proposes to distribute the Trust Balance in amounts equal to one-quarter of the Trust Balance to each child. To facilitate the division, the Trustee plans to distribute the Interest to one of the Settlor’s children (the “Beneficiary”), in satisfaction of the Beneficiary’s right to receive a one-quarter portion of the Trust Balance. However, because finalization of the amount of estate taxes and other expenses payable has not yet been completed, the value of the Trust Balance cannot be conclusively determined at this time. Accordingly, the Petitioner submits two scenarios under which each of the Settlor’s three other children would each receive cash and/or marketable securities having an aggregate value equal to a one-quarter share of the Trust Balance, and that each child other than the Beneficiary would receive no portion of the

Interest. For purposes of this Advisory Opinion, it is assumed that the fair market value is equal to \$1,000,000.

Scenario 1. This scenario assumes that the fair market value of the Interest to be distributed is less than or equal to the one-quarter portion of the Trust Balance to which the Beneficiary is entitled. To the extent that the value of one-quarter of the Trust Balance exceeds the fair market value of the Interest, the balance of such one-quarter Trust Balance would be satisfied by an additional distribution of cash and/or marketable securities to the Beneficiary to make up the difference. For example, if the value of one-quarter of the Trust Balance is \$1,000,000, the Beneficiary would receive only the Interest. If the value of one-quarter of the Trust Balance is \$1,100,000, the Beneficiary would receive the Interest, plus cash and/or marketable securities with an aggregate value of \$100,000.

Scenario 2. This scenario assumes that the fair market value of the Interest to be distributed exceeds the one-quarter portion of the Trust Balance to which the Beneficiary is entitled. In connection with distribution of the Interest, the Beneficiary would transfer to the Trustee cash in an amount equal to the excess of (a) the fair market value of the Interest over (b) the value of one-quarter of the Trust Balance. For example, if the value of one-quarter of the Trust Balance is \$900,000, the Trustee would distribute the Interest to the Beneficiary, and the Beneficiary would transfer \$100,000 in cash to the Trustee.

Under both of the above scenarios, the Trustee would distribute to each of the three other children of the Settlor cash and/or marketable securities having an aggregate value equal to a one-quarter share of the Trust Balance and each child other than the Beneficiary would receive no portion of the Interest.

Analysis

RETT is imposed by Tax Law § 1402(a) generally on each conveyance of real property or interest therein when the consideration exceeds \$500. The tax is equal to \$2 for each \$500 of consideration.

With regard to Scenario 1: Tax Law § 1401(e) expressly provides that for purposes of the RETT, the conveyance of real property does not include a conveyance pursuant to devise, bequest or inheritance. Conveyance of the Interest to the Beneficiary is a conveyance pursuant to an inheritance, and as such, it is not subject to the RETT.

With regard to Scenario 2: Tax Law § 1401(e) defines “conveyance” in part as the transfer of any interest in real property by any method. Tax Law § 1405(4) provides that the RETT shall not apply to conveyances of real property without consideration and otherwise than in connection with a sale. By requiring the beneficiary to transfer cash equal to the excess of the fair market value of the Interest over the value of one-quarter of the Trust balance, the Trustee is in essence selling the Interest to the Beneficiary and the amount of cash paid by the Beneficiary to the Trustee in exchange for the distribution of the Interest is the consideration for

the sale of the Interest. As such, the transfer of the Interest to the Beneficiary under Scenario 2, is subject to the RETT. The tax is measured by the amount of cash transferred by the Beneficiary to the Trustee.

DATED: July 31, 2017

/S/

DEBORAH R. LIEBMAN
Deputy Counsel

NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion. The information provided in this document does not cover every situation and is not intended to replace the law or change its meaning.