

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

TSB-A-90 (7) R
Real Estate Transfer Tax
July 11, 1990

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M900419A

On April 19, 1990, a Petition for Advisory Opinion was received from Parkside Association, 549-561 41st Street, Brooklyn, New York 11232.

The issue raised by Petitioner, Parkside Association, is whether it is subject to the Real Property Transfer Tax (the "transfer tax") as amended July 1, 1989 to include conveyances of cooperative apartments.

Petitioner, a membership corporation since 1927, is the sole owner of a forty-one unit apartment building located at 549-561 41st Street, Brooklyn, New York. The building consists of forty residential units and one superintendent unit. Each apartment is allotted one share of stock of equal value, although the building consists of three and four bedroom apartments.

The building is one of approximately fifty such buildings which have the same ownership structure. It was constructed in the early part of the twentieth century by Norwegian immigrants and nicknamed "Finnish House". Currently whenever a member wishes to convey his interest in the building, Petitioner requires him to file Form TP-584, Combined Real Property Transfer Gains Tax Affidavit, Real Estate Transfer Tax Return and Credit Line Mortgage Certificate, and pay the applicable transfer tax.

Article II of the By-laws of the Petitioner, sets forth, in part, that the purpose of Parkside Association, Inc. is to promote the improvement of the housing conditions of its members by providing for the erection for them and their families of modern apartments.

Furthermore, Article III of the By-laws provides, in part, that membership shall be open to the following:

"1. Any person of good moral character may become a member of this Association, if he agrees to abide by the rules and the decisions of the Association, and provided that the candidate shall buy one or more shares in the property of this Association and pay all the payments determined by the Association.

2. Each member shall receive a Membership Book where all his payments shall be recorded and receipted by the officers of the Association.

3. Whenever an ownership, interest in, or any right to a property of the Association is transferred by a member, or some other person, through sale, gift, or inheritance, the Association may accept the receiver thereof as its member or buy from such person the ownership or other rights or interests by paying him for such rights at the value obtaining at the time when such sale or transfer is made." (emphasis added)

In addition, Article IX of the By-laws as relating to the real property, provides, in part, as follows:

"Inasmuch as the principal purpose of the Association is to buy and receive lands and erect apartment buildings and prepare apartments for its members, the business shall be conducted according to the following rules:

a) Every member shall take his apartments on the condition that he will comply with all the rules of the Association, which constitute an agreement between the Association and such a member.

b) The Board of Directors shall determine the maintenance expenses of the building and apportion to every apartment a relative equitable share of such expenses. Every member shall pay the share charged against his apartment monthly at a time and in the manner to be ordered by the Board of Directors." (emphasis added)

The transfer tax is imposed on each conveyance of real property or interest therein at the time that the instrument effecting the conveyance is delivered by a grantor to a grantee when the consideration for the conveyance exceeds five hundred dollars.

Section 1401(e) of the Tax Law defines the term "conveyance" to mean:

"the transfer or transfers of any interest in real property by any method, including but not limited to sale, exchange, assignment, surrender, mortgage foreclosure, transfer in lieu of foreclosure, option, trust indenture, taking by eminent domain, conveyance upon liquidation or by a receiver, or transfer or acquisition of a controlling interest in any entity with an interest in real property. Transfer of an interest in real property shall include the creation of a leasehold or sublease only where (i) the sum of the term of the lease or sublease and any options for renewal exceeds forty-nine years, (ii) substantial capital improvements are or may be made by or for the benefit of the lessee or sublessee, and (iii) the lease or sublease is for

substantially all of the premises constituting the real property. Notwithstanding the foregoing, conveyance of real property shall not include the creation, modification, extension, spreading, severance, consolidation, assignment, transfer, release or satisfaction of a mortgage; a mortgage subordination agreement, a mortgage severance agreement, an instrument given to perfect or correct a recorded mortgage; or a release of lien of tax pursuant to this chapter or the internal revenue code." (emphasis added)

Section 1401(b) of the Tax Law defines the term "controlling interest" to mean:

"(i) in the case of a corporation, either fifty percent or more of the total combined voting power of all classes of stock of such corporation, or fifty percent or more of the capital, profits or beneficial interest in such voting stock of such corporation, and (ii) in the case of a partnership, association, trust or other entity, fifty percent or more of the capital, profits or beneficial interest in such partnership, association, trust or other entity."

Section 1405-B of the Tax Law provides, in part, as follows:

"(a) Notwithstanding the definition of "controlling interest" contained in subdivision (b) of section fourteen hundred one of this article or anything to the contrary contained in subdivision (e) of section fourteen hundred one of this article, the tax imposed by this article shall apply to (1) the original conveyance of shares of stock in a cooperative housing corporation in connection with the grant or transfer of a proprietary leasehold by the cooperative corporation or cooperative plan sponsor, and (2) the subsequent conveyance of such stock in a cooperative housing corporation in connection with the grant or transfer of a proprietary leasehold by the owner thereof... (emphasis added)

The term "cooperative housing corporation" is not defined in the Real Property Transfer Tax Law or in the regulations adopted pursuant thereto. However Section 3-1.2 of the Business Corporation Franchise Tax Regulations defines the term for, Corporation Franchise Tax purposes, as follows:

(b) For the purposes of this section a cooperative housing corporation means a corporation:

(1) having one and only one class of stock outstanding (stock which is disregarded under section 216 of the Internal Revenue Code will be disregarded);

(2) each of the stockholders of which is entitled, solely by reason of his ownership of stock in the corporation, to occupy for dwelling purposes a house, or an apartment in a building, owned or leased by such corporation;

(3) no stockholder of which is entitled (either conditionally or unconditionally) to receive any distribution not out of earnings and profits of the corporation except on a complete or partial liquidation of the corporation; and

(4) 80 percent or more of the gross income of which for the taxable year is derived from tenant-stockholders.

Furthermore, section 3(c) of the Corporative Corporations Law defines the term "cooperative corporation", in pertinent part, to be:

The terms "cooperative," "cooperative association" and "cooperative corporation" mean a corporation organized under this chapter, or heretofore organized under any special or general law of this state, for the cooperative rendering of mutual help and service to its members. A cooperative shall be either a general cooperative, a membership cooperative, an agricultural cooperative as defined in article six of this chapter or a worker cooperative as defined in section eighty-one of this chapter.

Section B(d) of the Cooperative Corporations Law adds that:

A cooperative corporation shall be classed as a non-profit corporation, since its primary object is not to make profits for itself as such, or to pay dividends on invested capital, but to provide service and means whereby its members may have the economic advantage of cooperative action, including a reasonable and fair return for their product and service." (emphasis added)

Furthermore, 19NY Jur 2d, Condominium and Co-operative Apartments § 51, notes that:

The primary interest of every stockholder in a co-operative housing corporation is a long-term proprietary lease, also known as an occupancy agreement. The stock interest involved has been described as incidental and affording the practical means of combining an ownership interest with a method for sharing proportionately the assessments for maintenance and taxes.

The lessee of the proprietary lease is in much the same position as any other tenant under usual leasing arrangements. By the proprietary

TSB-A-90 (7) R
Real Estate Transfer Tax
July 11, 1990

lease, the shareholder tenant acquires a right to occupy a particular apartment. He is only a lessee and his property rights are restricted. The nature of his tenancy is a leasehold coupled with forfeiture provisions, usually in the nature of a right of re-entry by the cooperative corporation (emphasis added)

In a New Jersey case, Bluvias v. Winfield Mutual Housing Corporation, 224 N.J. Super. 515, 540 A.2d 1324, the court held that a housing corporation that owned all property in township with exception of streets was a cooperative housing corporation, even though owners received mutual ownership contract rather than stock certificates since the certificate of incorporation clearly recognized that owners were members of corporation, members voted to control corporation's policies and had right to amend agreements restricting their rights.

Accordingly, Petitioner is a cooperative housing corporation for purposes of the Transfer Tax. Although Petitioner may not grant proprietary leases per se in the building, it does afford membership in Petitioner which entitles each member to an apartment in the building for which he must pay monthly maintenance charges. Such right to occupancy is the same right that would be afforded a lessee under a proprietary lease, conditional on the payment of monthly maintenance charges. Therefore, the conveyance of shares in Petitioner, as allocated to each apartment, is subject to the transfer tax.

DATED: July 11, 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.