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

TSB-A-89 (3)R
Real Property
Transfer Gains Tax
September 5, 1989

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. M890503A

On May 3, 1989, a Petition of Advisory opinion was received on behalf of Gurney's Inn Resort and Spa, Ltd., c/o James L. Tenzer, Esq., Margolin, Winer, and Evans, 600 Old Country Road, Garden City, New York 11530.

The issues raised by Petitioner, Gurney's Inn Resort and Spa, Ltd., concern the application of the Real Property Transfer Gains Tax imposed by Article 31-B of the Tax Law (hereinafter the "Gains Tax") to the sale of weekly time sharing cooperative interests in Petitioner.

Petitioner owns and operates a transient lodging facility known worldwide as Gurney's Inn on property zoned for hotel/motel use on the eastern end of Long Island, New York.

Petitioner has operated Gurney's Inn under the New York State "Innkeepers Law" (i.e., General Business Law Section 200 et. seq.) from its inception in late November, 1982 to the present and must continue to do so until the year 2032 or beyond according to the "non-disturbance" and other provisions of its 51 week time sharing cooperative offering plan.

Petitioner states that the Innkeepers Law is designed to set forth certain rules affecting the relationship between the innkeeper and the lodger during the lodger's temporary and transient stay at the inn. In addition, the Innkeepers Law requires Gurney's Inn to post plaques in conspicuous places at Gurney's Inn giving testimony to the fact that Gurney's Inn is a transient lodging facility in the nature of a hotel or motel and, therefore, is not a residence. Since the real property occupied by Gurney's Inn is zoned locally for hotel/motel use and occupancy and the Gurney's Inn facility is subject to the New York State Innkeeper's Law, Gurney's Inn cannot be and is not used or occupied as a residence.

Petitioner contends that the word "residence" connotes permanency with no present intention of definite and early removal. Residence usually and customarily indicates a person's intent to remain in a dwelling place for an undetermined period of time and not to remain for a determined preconceived period of time such as the case when one plans a vacation at a resort. The difference between a residence on the one hand and a spa, resort, health club and vacation paradise (i.e., a transient lodging facility) on the other is the difference, respectively, between owning a single-family home, a cooperative apartment or a condominium apartment (the American dream) versus owning a one week's vacation stay at a world renowned vacation hotel or resort.

Petitioner also contends that the Innkeepers Law is not applicable nor available to protect the owners or residents of apartment houses or single-family homes because these facilities are not, by definition, transient lodging facilities (i.e., inns, hotels and/or motels).

Petitioner further contends that another factor which distinguishes a temporary lodging facility from a residence is that the temporary lodging facility customarily and usually does not contain many of the permanent essential living accommodations present in a single-family home, apartment unit or other type of residence. For example, temporary lodging facilities, for the most part, will not contain kitchens, dining rooms, dinettes, etc. Although, depending on location and/or type of temporary lodging facility, some may contain "hot plates," kitchenettes, etc. Most of the units at Gurney's Inn are not equipped with kitchens or even "hot plates". These units are configured as the typical room or suite of rooms a vacationer would expect to occupy while on vacation.

Therefore, Petitioner concludes that based in part on the fact that the units at Gurney's Inn do not contain kitchens and based, in part, on the fact that Petitioner operates the Gurney's Inn facility as a hotel, motel, etc., it does not now qualify and has never qualified as a cooperative housing corporation under Section 216 of the Internal Revenue Code. In order to qualify as a cooperative housing corporation under Section 216, each shareholder of such corporation must have the unlimited and unrestricted right to occupy an apartment for dwelling purposes. If the apartments in the building are incapable of being occupied for dwelling purposes because the right to occupy is limited and restricted as in the case of Gurney's Inn or they do not contain essential minimum amenities such as kitchens, the corporation owning the building is not and cannot be a cooperative housing corporation for purposes of Section 216.

Further, Petitioner states that during the last calendar quarter of 1982, Petitioner decided to market its vacation paradise in a most unusual and unique way. Instead of waiting, week-in and week-out, for prospective guests to decide whether to take a vacation or stay home or visit for a few days or be motivated by weather conditions, etc., Petitioner decided to sell 5,712 interval vacation weeks to the general public each for a period of 50 years or more. The 5,712 interval vacation weeks is computed by multiplying the then 112 available units by 51 weeks in every calendar year (one week each year for each unit is devoted to maintenance for that unit) to arrive at the total number of weekly vacations available for sale. In this way, Petitioner states it could pre-sell all the vacation time available and could go about its business of operating one of the world's most famous, glamorous and luxurious spas without worrying about a vacancy rate. On the other hand, each transferee simply reserved one interval vacation week a year for a 50 year or more period by making vacation reservations and paying in advance.

The sales vehicle chosen to accomplish Petitioner's objective was the offering of 51 weekly time sharing interests in the then 112 units and related amenities at Gurney's Inn, as shown in the offering plan submitted with the Petition. Petitioner as the owner of the facility sold shares in the cooperative corporation to the general public with the proceeds of sale being utilized by Petitioner to pay its costs and expenses. With 648,975 shares then being offered for the sale of 5,712 interval vacation weeks (an average of approximately 114 shares per interval vacation week) no single purchaser acquired or can presently acquire a controlling interest in Petitioner. It is for this reason and for the reason that Petitioner states that it is <u>not</u> a residential cooperative housing corporation within the meaning of the Gains Tax and that Petitioner believes it is not liable for Gains Tax due

at this time although Petitioner like any other entity owning real property located in New York is subject to tax albeit in its case, with no present tax liability.

The Gains Tax is a ten percent tax on the gain derived from the transfer of real property, which includes the transfer or acquisition of a controlling interest in any entity with an interest in real property, where the property is located in New York State and where the consideration for the transfer is one million dollars or more.

The term "transfer of real property" is defined, in pertinent part, by section 1440.7 of the Tax Law to include the transfer or acquisition of a controlling interest and transfers pursuant to cooperative plans. For purposes of the Gains Tax, the statute provides that transfers pursuant to a cooperative plan shall include all transfers of stock in a cooperative corporation which owns real property.

Section 590.35 of the Gains Tax Regulation concerning the transfer of shares which require the payment of tax provides, in pertinent part, the following examples of transfers of shares in a cooperative housing corporation which may be subject to the Gains Tax:

1. Transfers to tenant stockholders?

A. Yes, gains tax must be paid when the shares are transferred to persons who buy shares and are granted proprietary leases with respect to units.

2. Transfers to investors unrelated to the realty transferor?

A. Yes, gains tax must be paid when the shares are transferred to persons who are unrelated to the realty transferor who purchase the shares for investment or resale.

Transfers pursuant to a cooperative plan are subject to the Gains Tax if the aggregate consideration for all transfers pursuant to the plan is $1 million or more. For purposes of determining if a Gains Tax will be due, the consideration and the original purchase price anticipated pursuant to the plan must be established by the transferor pursuant to Section 1442 of the Tax Law. If the anticipated consideration (the anticipated gross consideration less the anticipated brokerage fees) is one million dollars or more, the anticipated gain is subject to tax.

Since the statute specifically imposes the Gains Tax on the transfer of shares of stock sold pursuant to a cooperative plan, the fact that no single purchaser acquired a controlling interest in Gurney's Inn and that Gurney's Inn is operated under the New York State "Innkeepers Law" and has not qualified as a cooperative housing corporation under section 216 of the Internal Revenue Code is irrelevant when ascertaining the application of the Gains Tax to the time sharing cooperative sales. Gurney's Inn has been operated under the Innkeepers Law from its inception and must continue to

do so until the year 2032 or beyond according to the non-disturbance and other provisions of its 51 week time sharing cooperative offering plan.

Pursuant to the offering plan of Petitioner it is a New York corporation formed for the purpose of cooperative time share ownership. Moreover, section "A-3 Introduction" of the offering plan states that "the Gurney's Inn Resort and Spa, Ltd. (the "Sponsor" and the "Corporation") is a cooperative time sharing corporation offering ownership time sharing." Under this regime, the plan states, that "a purchaser acquires shares of stock in Gurney's Inn Resort and Spa, Ltd., the Cooperative Corporation owning the entire resort premises, and an appurtenant Internal Proprietary Lease granting to and regulating the purchaser's right to use a resort accommodation unit for a specific week reoccurring annually for a fifty year term."

Also, section "A-2, Purposes of Offering" provides that "the principal purpose of this offering is the sale of cooperative apartments for use (on a regular annual basis depending on the interval week purchased) as vacation homes by purchasers, for their own use and occupancy during the vacation periods, with the ordinary concomitants of vacation home ownership subject to unique features of time share cooperative ownership."

Accordingly, based on the foregoing, since Petitioner is selling time sharing cooperative apartments in Gurney's Inn, such sales are subject to the Gains Tax.

DATED: September 5, 1989

s/FRANK J. PUCCIA
Director
Technical Services Bureau

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