

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

TSB-A-91 (4) R
Real Property
Transfer Gains Tax
May 23, 1991

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M910408A

On April 8, 1991, a Petition for Advisory Opinion was received from John S. Pereira, 150 East 58th Street, New York, New York 10155.

The issues raised by Petitioner, John S. Pereira, are whether for purposes of the Real Property Transfer Gains Tax (hereinafter the "gains tax"):

- (1) Will "consideration" include the outstanding principal amount of mortgages encumbering the transferred real property to the extent such amount exceeds the price paid by the transferee if the transferee is not the mortgagee and does not assume the mortgages or take the real property subject to the mortgages.
- (2) Will "consideration" include the outstanding principal amount of mortgages encumbering the transferred real property to the extent such amount exceeds the sum of that portion of the mortgages assumed (or taken subject to) by the transferee and other consideration paid by the transferee if a non-mortgagee transferee partially assumes the mortgages encumbering the transferred real property (or takes the real property subject to a portion of the mortgages less than the outstanding principal amount of the mortgages).
- (3) What portion, if any, of the outstanding principal amount of mortgages encumbering the transferred real property will be included in consideration if the transferee is the sole mortgagee or one of the mortgagees and the transferee/mortgagee acquires the real property by "credit bidding" an amount less than the outstanding principal amount of its mortgage encumbering the transferred real property at an auction sale conducted by order of the Bankruptcy Court.

In March 1990, Petitioner was appointed as trustee of 68 limited partnerships which filed for bankruptcy under Chapter 11 of the Bankruptcy Code on February 15, 1990. Each limited partnership owns at least one parcel of real property. Pursuant to orders of the Bankruptcy Court for the Southern District of New York, Petitioner has sold and will sell the real properties owned by each limited partnership free and clear of liens, claims or interests, with said liens, claims or interests, if any, to attach to the net proceeds of the sale in their order of priority, and to the extent of their validity pursuant to subsections 363(b) and (f) and Section 506(c) of the Bankruptcy Code.

Section 590.65 of the Gains Tax Regulations provides as follows:

Question: Is a transfer pursuant to a plan under the liquidation or reorganization provisions of the Bankruptcy Code taxable?

Answer: Yes. Section 1440(7) of the Tax Law defines transfer of real property to include a transfer of any interest in real property, including a conveyance upon liquidation or by a receiver. Therefore, such a conveyance is subject to the gains tax.

The U.S. Bankruptcy Court held that the debtor is not exempt from liability for the gains tax under section 1146(c) of the Federal Bankruptcy Code, *In re Jacoby Bender, Inc.*, 40 BR 10, 15 (Bkrcty. 1984).

Consideration is defined to include the cancellation or discharge of an indebtedness or obligation. Therefore, the consideration for a transfer of real property pursuant to a liquidation or reorganization plan is the amount paid by a purchaser of the real property pursuant to such a plan plus the amount of liens the property was taken subject to (if any) or, in the case of a transfer to a creditor mortgagee, the amount of indebtedness extinguished.

A trustee in bankruptcy may file returns on behalf of a bankrupt transferor, and should withhold the tax due under the gains tax until the tax is paid. (emphasis added)

Therefore, in issue "1" where the non-mortgagee transferee purchases real property, but does not take subject to or assume the amount of any existing mortgages on the property, the consideration for the transfer will be the amount actually paid by the transferee to the transferor pursuant to Section 590.65 of the Gains Tax Regulations.

Accordingly in issue "2", where a non-mortgagee transferee purchases real property and partially assumes or takes subject to a portion of the mortgage on the property, the consideration for the transfer will be the price paid by the transferee for the real property plus the proportionate amount of the outstanding mortgage principal assumed or taken subject to pursuant to Section 590.65 of the Gains Tax Regulations.

Finally in issue "3", where the transferee who is the sole mortgagee acquires the real property by "credit bidding" an amount less than the outstanding principal amount of its mortgage, the consideration for the transfer will be the amount of the indebtedness extinguished by the transferee/mortgagee in accordance with Section 590.65 of the Gains Tax Regulations. In situations where the transferee is not the sole mortgagee and the amount of any additional mortgages survives the transfer, the consideration for the transfer will be the amount of indebtedness the transferee extinguished plus the amount of any additional mortgages assumed or taken subject to. If the

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additional mortgages do not survive the transfer, then the consideration for the transfer will be the portion of the indebtedness the transferee/mortgagee extinguished or the bid price, whichever is higher.

DATED: May 23, 1991

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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