

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

TSB-A-92(3)-R
Real Property
Transfer Gains Tax
July 17, 1992

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M920114A

On January 14, 1992, a Petition for Advisory Opinion was received from European American Bank, EAB Plaza, Uniondale, New York 10053.

The issues raised by Petitioner, European American Bank, are whether for purposes of the Real Property Transfer Gains Tax (hereinafter the "gains tax"):

1. Petitioner will incur transferee liability in a U.C.C. foreclosure proceeding against Bennett Avenue Associates (hereinafter the "borrower") as a result of the applicability of Section 1447.3(b) of the Tax Law.
2. If Petitioner is subject to transferee liability, for purposes of computing the "consideration" in the foreclosure, would it be appropriate to treat the loan to borrower as having been bifurcated as a result of a participation agreement into two indebtednesses.
3. If Petitioner is subject to transferee liability, is it appropriate to apportion the outstanding amount of the loan between the two classes of collateral.
4. If Petitioner is subject to transferee liability, is the computation of the gains tax as annexed to the Petition correct.

On September 20, 1989, Petitioner made an acquisition, development and conversion loan of \$5,400,000 to the borrower, the sponsor of the Bennett Avenue Owners Corp., a cooperative housing corporation. The loan is secured by certain assets of the borrower consisting of (a) a pledge of certain shares of stock of the cooperative housing corporation respecting certain co-operative apartment units which have not been sold pursuant to the offering plan commenced by the borrower as sponsor, (b) a collateral assignment of certain proprietary leases appurtenant to the units, and (c) certain purchase money promissory notes issued to the borrower by certain purchasers of shares of stock (and the corresponding proprietary leases with respect to certain apartment units) of the cooperative housing corporation, which shares of stock were sold by the borrower as sponsor pursuant to the offering plan.

Simultaneously with Petitioner extending the loan to the borrower, Petitioner entered into a loan participation agreement with CorEast Federal Savings Bank (hereinafter "CorEast"). Pursuant to the participating agreement, CorEast purchased a \$1,200,000 interest in the loan. The participation agreement provides that the CorEast interest is subject and subordinate to Petitioner's interest in the loan. In the event of a default on the loan, Petitioner is entitled to recover its entire share of the loan and all accrued interest thereon prior to CorEast receiving any payment of principal or interest due on its interest.

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The borrower defaulted under the terms of the loan agreement, and, accordingly, Petitioner intends to initiate a U.C.C. foreclosure proceeding against borrower. Pursuant thereto, Petitioner anticipates "bidding-in" its portion of the loan and thereby taking legal ownership of the unsold shares, the leases and the purchase money promissory notes.

The aggregate face amount of the notes is \$1,167,022. Petitioner estimates that the aggregate fair market value of the notes is \$757,000. The aggregate fair market value of the units has been appraised by Petitioner to equal \$800,000. The total amount of borrower's indebtedness outstanding (the principal amount of the loan outstanding together with the accrued and unpaid interest thereon) equals \$3,200,000, \$1,750,000 of which is allocable to Petitioner and \$1,450,000 of which is allocable to CorEast under the terms of the participation agreement. The cooperative housing corporation apartment building was originally transferred by the borrower to the cooperative housing corporation subject to certain wraparound mortgage indebtedness in the aggregate principal amount of \$2,500,000 (the "Underlying Mortgage"), and as of the date of the foreclosure, the outstanding principal of the underlying mortgage allocable to the units equals \$1,779,644.

The borrower did not pay any gains tax upon the original transfer of the apartment building to the cooperative housing corporation. Petitioner estimates that the amount of gains tax due as a result of the borrower's sale of 31 units pursuant to the offering plan was \$60,269.40. Petitioner assumes that such amount was in fact paid by the borrower upon the sale of such units. Petitioner estimates that the original purchase price of the cooperative housing corporation's apartment building allocable to the units to be \$3,668,751. It is assumed that the borrower will be unable to pay the gains tax due as a result of the foreclosure and any tax liability will be satisfied by Petitioner if so required by the Tax Law.

Section 1447.3(b)(2) of the Tax Law, as added by Chapter 172 of the Laws of 1992, effective June 16, 1992, provides as follows:

(2) Notwithstanding paragraph (a) of this subdivision, in an action, proceeding, or an enforcement of rights to enforce a lien, security interest or other rights on or in shares or other ownership interest evidenced by stock certificates or other instruments, and a leasehold evidenced by a proprietary lease, or either of the foregoing, the cooperative housing corporation or other secured party in such action, proceeding or enforcement procedure shall be released from personal liability as transferee for taxes determined to be due from the transferor under this article.

Accordingly, concerning issue "1", pursuant to Section 1447.3(b)(2) of the Tax Law if Petitioner enforces its lien, security interest or other right on or in the shares and proprietary leases pledged as security by the borrower, Petitioner will not incur transferee liability for purposes of the gains tax.

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With respect to issues "2", "3" and "4" since Petitioner will not incur transferee liability as a result of the U.C.C. foreclosure proceeding against the borrower, these issues are moot and need not be addressed.

It is noted that while Section 1447.3(b)(2) of the Tax Law relieves Petitioner of transferee liability as a result of the foreclosure proceeding, it does not relieve Petitioner as transferor of any gains tax liability when it later transfers the shares foreclosed on to third parties.

DATED: July 17, 1992

/s/
PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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