

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

TSB-A-93 (21) R
Real Property
Transfer Gains Tax
December 29, 1993

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M930728A

On July 28, 1993, a Petition for Advisory Opinion was received from George Murian, 2312 Demeyer Street, Bronx, NY 10469, Vincent and Linda Cafarelli, 2310 Demeyer Street, Bronx, NY 10469, Alfonso and Diane Spagnoli, 2316 Demeyer Street, Bronx, NY 10469, Frank and Angela Ross, 2318 Demeyer Street, Bronx, NY 10469, and Peter and Flavia Lasalandra, 104 Rollingwood Drive, Stamford, CT.

The issue raised by Petitioners, George Murian, Vincent and Linda Cafarelli, Alfonso and Diane Spagnoli, Frank and Angela Ross and Peter and Flavia Lasalandra, is whether the consideration received by each Petitioner for their houses following the withdrawal of the property from a condominium form of ownership must be aggregated for purposes of the Real Property Transfer Gains Tax (hereinafter the "gains tax").

Petitioners premises consist of six semi-attached condominium units in Bronx County, New York. The units are owned by five families. Two of the units are owned by the same family. The intentions of Petitioners is to remove the property from condominium form of ownership and to have each respective owner of the condominium unit own the lot and building in fee simple.

In order to effectuate the transaction, Petitioners will first record a document entitled "Withdrawal of Property from Article 9-B of the Real Property Law of the State of New York." When the document is recorded, all six homes will, by operation of law, be owned by Petitioners as tenants-in-common. However, while by operation of law bare legal title will be vested in Petitioners as tenants-in-common, it is understood and agreed to by and between Petitioners that beneficial ownership of each home will continue to be vested solely in each individual Petitioner. Simultaneously, Petitioners will convey each of the lots and homes to the five families. The deeds are merely intended to transfer title to each of the homes to the same owner who now owns the respective dwellings in a condominium form of ownership.

Pursuant to Sections 1441 and 1443.1 of the Tax Law and Section 590.1 of the Gains Tax Regulations the gains tax is a ten percent tax on the gain derived from the transfer of real property, which includes the acquisition or transfer 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.

Section 1440.7 of the Tax Law defines the term "transfer of real property", in part, to mean the transfer or transfers of any interest in real property by any method. This would include a transfer upon liquidation or a transfer by partition.

Section 1440.1 of the Tax Law defines the term "consideration", in pertinent part, to mean the price paid or required to be paid for real property or any interest therein, less any customary brokerage fees related to the transfer if paid by the transferor. . . whether expressed in a deed

and whether paid or required to be paid by money, property, or any other thing of value.

Section 1443 of the Tax Law provides, in part, as follows:

Sec. 1443. Exemptions.--A total or partial exemption shall be allowed in the following cases:

* * *

5. If a transfer of real property, however effected, consists of a mere change of identity or form of ownership or organization, where there is no change in beneficial interest.

Section 590.43 of the Gains Tax Regulations provides, in part, as follows:

590.43 Aggregation of partial or successive transfers of real property. [Tax Law, § 1440(7)]

Question: How is the aggregation clause of section 1440(7) of the Tax Law, which states in part:

" . . . Transfer of real property shall also include partial or successive transfers, unless the transferor or transferors furnish a sworn statement that such transfers are not pursuant to an agreement or plan to effectuate by partial or successive transfers a transfer which would otherwise be included in the coverage of this article, and the transfer of real property by tenants in common, joint tenants or tenants by the entirety, provided that the subdividing of real property and the sale of such subdivided parcels improved with residences to transferees for use as their residences, other than transfers pursuant to a cooperative or condominium plan, shall not be deemed a single transfer of real property."

applied in the case of:

* * *

(d) Several transferors, owning one parcel of land either as joint tenants, tenants in common, or as tenants by the entirety, one transferee?

Answer: The statute specifically requires that the consideration paid to each such transferor be aggregated with the consideration paid to the other transferors in determining whether the consideration is \$1 million or more. Once the million-dollar threshold is met, each transferor is liable for payment of tax based on the consideration he receives, less his original purchase price for the property.

Section 590.50 of the Gains Tax Regulations provides, in part, as follows: 590.50

Mere change of identity. [Tax Law, § 1443(5)]

(a) Question: Section 1443(5) of the Tax Law exempts a transfer from the gains tax to the extent it "consists of a mere change of identity or form of ownership or organization where there is no change in beneficial interest." Does this exempt:

* * *

(3) The transfer of real property by a corporation to its shareholders, who will hold the real property as tenants-in-common in the same pro rata share as they own the corporation?

Answer: Yes. This is a mere change of identity or form of ownership or organization. The shareholders will have a carry-over original purchase price in the real property.

In Board of Managers of Powell's Cove View Condominium, Adv Op Comm T&F, June 14, 1993, TSB-A-93(8)R the Commissioner advised that the transfer by Petitioner of the common area to the owners resulting from the termination of the condominium declaration was not subject to gains tax since the transfer of the property to the owners as tenants-in-common constituted a mere change of identity or form of ownership or organization since there is no change in beneficial ownership. However, the Commissioner advised that pursuant to Sections 1440.7 and 1443.5 of the Tax Law and Section 590.50 of the Gains Tax Regulations the subsequent transfer by the owners of their tenants-in-common interest was subject to the gains tax to the extent that the transfers resulted in a change in beneficial interest. The Commissioner further advised that pursuant to Section 590.43(d) of the Gains Tax Regulations the consideration paid to each owner for their interest in the real property must be aggregated with the consideration paid to the other owners for their interest in determining whether the consideration for the transfer is one million dollars or more, but that, once the one million dollar threshold was met that each owner was liable for payment of the gains tax based on the consideration he receives, less his original purchase price for the property.

Under the condominium form of ownership the lots which represent the common area of the condominium, were commonly owned by Petitioners. Accordingly, pursuant to Sections 1440.7 and 1443.5 of the Tax Law, Section 590.50 of the Gains Tax Regulations and Board of Managers of Powell's Cove View Condominium, supra, the transfer of real property by Petitioners of the lots which represent the common area as a result of the withdrawal of the property from the condominium form of ownership will not be subject to the gains tax since the transfer of such lots to Petitioners as tenants-in-common will not result in a change in the beneficial interest of such lots.

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As for the transfer of the lots from tenant-in-common ownership to the individual Petitioners, pursuant to Sections 1440.7 and 1443.5 of the Tax Law such transfer will be subject to the gains tax, to the extent that the transfer of the lots results in a change in beneficial interest. Pursuant to Section 1440.1 of the Tax Law and Board of Managers of Powell's Cove View Condominium, supra, the consideration for the transfer of an individual Petitioner's tenant-in-common interest is equal to the fair market value of the interest in real property received by each individual Petitioner as a result of the transfer. Pursuant to Section 590.43(d) of the Gains Tax Regulations and Board of Managers of Powell's Cove View Condominium, supra, the consideration paid to each individual Petitioner for their interest in the real property must be aggregated with the consideration paid to the other Petitioners for their interests in determining whether the consideration for the transfer is one million dollars or more. However, once the one million dollar threshold is met, each individual Petitioner is liable for payment of gains tax based on the consideration he receives, less his original purchase price for the property.

Concerning the transfers of the homes under the aforementioned transaction, it is recognized that beneficial ownership of each home is continuously vested in each Petitioner without regard to bare legal title being vested with Petitioners as tenants-in-common for a moment in time. Therefore, pursuant to Section 1443.5 of the Tax Law and Section 590.50 of the Gains Tax Regulations the transfers by Petitioners of their homes, including any commonly owned walls, roofs and overhangs, as a result of the withdrawal of the property from its condominium form of ownership to Petitioners as tenants-in-common and the transfer of their homes by Petitioners as tenants-in-common back to the respective Petitioner's which owned the homes in condominium form will not be subject to the gains tax since each transfer constitutes a mere change of identity or form of ownership or organization as there is no change in the beneficial interest of the homes.

DATED: December 29, 1993

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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