

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

TSB-A-95 (14) - R
Real Property
Transfer Gains Tax
October 30, 1995

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M950601A

On June 1, 1995, a Petition for Advisory Opinion was received from Robert Schwagerl, 152 West 58th Street, New York, New York 10019.

The issue raised by Petitioner, Robert Schwagerl, is whether the payment of the New York State Real Property Transfer Gains Tax (the "gains tax") by the real estate broker representing the transferor will be treated as additional consideration for the transfer of real property.

Petitioner is contracting to sell a parcel of vacant land in Suffolk County, New York for \$1,250,000 to Michail Watford, a foreign national. Petitioner will pay a real estate broker's commission of \$50,000 to Sagaponack Real Estate. The purchaser is also buying two parcels adjoining Petitioner's parcel, of which Petitioner is not the owner. The two adjoining parcels are also vacant land.

The real estate broker in the transaction is arranging the sale of all three parcels to the purchaser and has agreed to pay the gains tax due on Petitioner's real property to have the sales of the three parcels proceed, as all three transfers are contingent upon the other. Petitioner's accountant has determined the gains tax to be due on Petitioner's real property as approximately \$76,000. The broker has acknowledged to Petitioner that it has not nor will it be reimbursed by the purchaser for the gains tax paid and has indicated that it will affirm the same in writing as a condition of the contract.

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 of the Tax Law provides, in pertinent part, as follows:

1.(a) "Consideration" means 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, including payment for an option or contract to purchase or use real property. Consideration includes any price paid or required to be paid, whether expressed in a deed and whether paid or required to be paid by money, property, or any other thing of value and including the amount of any mortgage, purchase money

mortgage, lien or other encumbrance, whether the underlying indebtedness is assumed or taken subject to. Consideration includes the cancellation or discharge of an indebtedness or obligation.

Section 590.9 of the Gains Tax Regulations provides, in part, as follows:

590.9 Transferee agrees to pay gains tax. [Tax Law, §1440(1)]

Question: If an agreement is negotiated between a transferor and transferee whereby the transferee agrees to pay the gains tax for the transferor, does such payment constitute additional consideration to the transferor?

Answer: Yes. The consideration for the transfer is the price paid or required to be paid for the real property or any interest therein, and includes the cancellation or discharge of an indebtedness or obligation. Since the transferor is personally liable for payment of the gains tax, payment of the tax by the transferee constitutes additional consideration to the transferor . . . (emphasis added)

In the instant case, the real estate broker has agreed to pay the gains tax on behalf of the transferor to facilitate the transfer of the real property. The purchaser (transferee) will not reimburse the broker for the gains tax paid. Accordingly, provided the arrangement by the broker to pay the gains tax is not formulated to relieve the transferee from a contractual obligation to pay the gains tax on behalf of the transferor, such payment of the gains tax by the broker will not constitute additional consideration for the sale in accordance with Section 1440 of the Tax Law and Section 590.9 of the gains tax regulations.

DATED: October 30, 1995

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

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