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

TSB-A-95 (3)R
Real Property
Transfer Gains Tax
April 21, 1995

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. M950109A

On January 9, 1995, a Petition for Advisory Opinion was received from Gick Road Development Corp., One Washington Street, c/o Alan R. Rhodes, Esq., Glens Falls, New York 12801.

The issue raised by Petitioner, Gick Road Development Corp., was whether the consideration received from the sale of two parcels of real property located on the same side of a street, separated by another parcel of real property owned by an unrelated party, and not otherwise touching or connected by easement, right-of-way, or other means to each other, was required to be aggregated for gains tax purposes under Section 1440.7 of the Tax Law when sold by the same transferor to the same transferee.

Petitioner owned two parcels on the east side of Old Gick Road. The first parcel, comprising approximately 1.24 acres, was a 65-foot wide strip, a former railroad bed, extending from its 65-foot road frontage on Old Gick Road east-northeast approximately eight hundred thirty feet. This property was used by Petitioner as part of a mobile home park. This strip is surrounded on both sides by private property not owned by Petitioner.

Approximately 124 feet of road frontage north of this strip, Petitioner's second parcel begins at a point which follows the road for 1380 linear feet and fans back in a triangular shape comprising 14.74 acres. The intervening 124 feet of road frontage is the narrow tip of a substantial parcel owned by another person who is not related and is completely independent of Petitioner, and with whom Petitioner has not had any success in obtaining cooperation or coordination of any kind in relation to sales to third parties. This triangular second parcel is bounded by the road, the other person's property from the southernmost road frontage across the eastern side due north, and by a third unrelated party's property across the north back to the road. This parcel was undeveloped and held as vacant land for investment by Petitioner.

The first parcel was sold by Petitioner by separate deed to Wal-Mart for $489,000 on April 27, 1993. The second parcel was sold by Petitioner by separate deed to Wal-Mart for $2,779,478 also on April 27, 1993. Petitioner treated the parcels as separate sales because the properties were neither adjacent nor contiguous.

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 1440.1 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 1440.7 of the Tax Law, as it existed at the time of the transfers which are the subject of this petition, provided, in pertinent part, as follows:

> 7. "Transfer of real property" means the transfer or transfers of any interest in real property by any method, including but not limited to sale, exchange, assignment, surrender, mortgage foreclosure, transfer in lieu of foreclosure, option, trust indenture, taking by eminent domain, conveyance upon liquidation or by a receiver, or transfer or acquisition of a controlling interest in any entity with an interest in real property.
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> 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. (emphasis added)

Section 590.42 of the Gains Tax Regulations, as it existed at the time of the transfers which are the subject of this petition, provided as follows:

> 590.42 Contiguous or adjacent parcels.
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> Question: Is the consideration received by a transferor for the transfer of contiguous or adjacent parcels of property to one transferee added together for purposes of applying the $1 million exemption?
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> Answer: Generally, yes. A transfer of real property is defined in section 1440(7) of the Tax Law to mean "the transfer or transfers of any interest in real property." Thus, the separate deed transfers of contiguous or adjacent properties to one transferee are, for purposes of the gains tax, a single transfer of real property. It is the consideration for the interests in a single transfer, regardless of the number of deeds used to transfer the property, that is used to determine the application of the $1 million exemption.

> However, if the transferor establishes that the only correlation between the properties is the contiguity itself, and that the properties were not used for a common or related purpose, the consideration will not be aggregated.
>
> When the transfer is to more than one transferee, whether the amount paid for each deed transfer is added together depends on whether the transferor is subject to the aggregation clause for partial or successive transfers. (See section 590.43 of this Part). (emphasis added)

In the Matter Fred M. Calandra and Salvatore C. Calandra, Dec Tx App Trib, November 13, 1987, TSB-D-89(6)-R the Tax Appeals Tribunal in determining whether the Division of Taxation properly aggregated consideration received by the petitioners upon their transfer of two properties held as follows:

> "F. The 160 Sugg Road and 195 Sugg Road parcels were 'adjacent' to one another within the plain meaning of that word and within the meaning of 20 NYCRR 590.42. The term adjacent 'may or may not imply contact but always implies an absence of anything of the same kind in between.' (Webster's Ninth New Collegiate Dictionary 56 [1984]). In the context of 20 NYCRR 590.42 the term is used as an alternative to the more rigidly defined 'contiguous' which 'implies having contact' (Webster's Ninth New Collegiate Dictionary 56 [1984]). Thus, in the present context the term adjacent refers to circumstances wherein properties are not physically in contact but which are in close proximity with an 'absence of anything of the same kind in between.' In the situation at issue, the parcels are indeed in close proximity as they are separated only by approximately 65 feet of county-owned property consisting of a two-lane county road and its shoulders. The county road is certainly not 'of the same kind' as the properties at issue, inasmuch as petitioners had immediate access to the road and had the right to use the road at all times. Sugg Road and its shoulders do not, therefore, separate the properties to a degree which would result in a finding of nonadjacency.
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> G. It is noted that the foregoing interpretation of 20 NYCRR 590.42 is in accord with the broad statutory language of Tax Law Section 1440(7) and 1448(1) and legislative purposes underlying the enactment of Article 31-B (see Louis Bombart v. State Tax Commission, 516 NYS2d 989)."

In the instant case, Petitioner transferred two parcels of real property located on the same side of 01d Gick Road to one transferee. Such properties were not touching or connected by easement, right-of-way or other means to each other and were separated by another parcel of real property owned by an unrelated third party. In Fred M. Calandra and Salvatore C. Calandra, supra, the Tax Appeals Tribunal held that the term adjacent refers to circumstances wherein properties are not physically in contact but which are in close proximity with an absence of anything of the same kind in between. While the two parcels transferred by Petitioner were in close proximity to one another, they were separated by a property of a similar kind owned by an unrelated third party. Therefore, in

accordance with Fred M. Calandra and Salvatore C. Calandra, supra, since the two parcels were separated by a property of a same kind which was owned by an unrelated third party such properties are not deemed to be adjacent.

Accordingly, since the properties transferred by Petitioner were not contiguous or adjacent to one another, pursuant to Section 1440.7 of the Tax Law, Section 590.42 of the Gains Tax Regulations and Fred M. Calandra and Salvatore C. Calandra, supra, such transfers are not deemed a single transfer. Therefore, the consideration received by Petitioner from the transfer of the properties was not required to be aggregated.

DATED: April 21, 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.