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

TSB-A-95 (8)R
Real Property Tax
August 22, 1995

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. M950314A

On March 14, 1995, a Petition for Advisory Opinion was received from BDL Properties, Inc., c/o Timothy Downing, P.O. Box 235, Fairport, New York 14450.

The issues raised by Petitioner, BDL Properties, Inc., are:

1. Whether the transfers of subdivided lots improved with residences thereon to transferees for use as their residences for a consideration of less than $1,000,000 each, using two deeds, one from the corporation which owned the land, and one from the building company which did not own the land, where deed descriptions were identical and deeds were recorded simultaneously, are deemed not to be a single transfer and, therefore, not subject to aggregation under Section 1440.7 of the Tax Law.

2. Whether the transfers would constitute a mere change of identity or form of ownership and thus be exempt from the Real Property Transfer Gains Tax (the "gains tax") if the transfers are determined to be transfers of real property from the corporation to the individual building companies.

In the 1980's, four individuals, who own three home building companies, discussed the development, by their respective companies, of a large parcel of land located in New York State. The building companies (hereinafter referred to as "A", "B" and "C") were separately owned 100% by each said individual, except for A, which was owned 100% by two brothers. A, B and C standing alone, did not have the capital or buying power available to develop a parcel as large as the one contemplated. Thus, A, B and C pooled their resources and formed Petitioner to help streamline management, allow for more efficiency in developing the land and increase their probability of obtaining construction loans.

The ownership of Petitioner was set up so that the owners of A, B and C each held one-third of the corporate stock. The two brothers who owned A held five shares each. The owners of B and C owned 10 shares each. The Petitioner had four shareholders; two of the shareholders owned 100% of A and the other two shareholders owned 100% of B and C separate and distinct from each other. There were no other shareholders or interest holders in Petitioner or A, B or C at any other time.

With Petitioner in place as the legal title holder of the property, the shareholders determined an equitable manner in which to carry out their intentions. The intent was for each shareholder (the two brothers treated as one) to have enough lots to equal one-third of the value of the total parcel,

and then to sell the individual lots with personal residences constructed on them to individuals who would use them as such. To do this, the shareholders first established a market value for each lot by group of lots. There were five or six groups of lots which were grouped by location. Thus, there was a group of lots with woods, a group by the stream, and a group inside a circle.

Once market values were determined, a method had to be devised to divide the lots fairly among the shareholders to yield to the individuals who owned A, B and C one-third of the value, or as close to that value as possible, of the total parcel. It was decided that the easiest and fairest method to divide the lots was to utilize a lottery type system. In a manner similar to drawing straws, A received the opportunity to pick the first lot, B received the second lot and C received the third lot. After the first round, the order was reversed, giving C, who previously had third choice, first choice. After that, the order was changed to give B who previously had second choice, first choice. This was done until A, B and C each had 16 lots.

When that was accomplished, each shareholder went his or her own way. A, B and C placed signs on their respective lots and used their own offices for contracts of sales and their own sales staff.

The transfer of the lots occurred in the following manner. When a prospective buyer wanted to purchase a home, they approached the individual builder whose sign was on the lot. The individual home builder (either A, B or C) would have the customer sign two contracts, one with Petitioner for the lot and one with the builder for the home. The contracts were signed simultaneously and were tied together in such a way that a lot could not be transferred without an improved residence on it. The contract stated that one could not buy a lot without a house, and that the transfer of the house and lot must be simultaneous. The contract for the lot contained a contingency requiring not only that the buyer qualify for a home mortgage, but that the builder of the home must be the builder who acquired the lot by lottery. No one could buy the house without buying the lot simultaneously and Petitioner could not close on the lot without a residence being constructed on it.

Title to the lots was never transferred from Petitioner to the builders. In some instances only one deed for both the lot and house was given by Petitioner to the home buyer. In other instances there were two deeds (sometimes one warranty and one quit claim deed, and sometimes two warranty deeds) given to the buyer, one from Petitioner and one from the home builder. The deeds were always given simultaneously and recorded simultaneously. Two deeds were often used since Petitioner owned the lot and the buyer's attorney wanted a deed from the builder rather than a bill of sale which traditionally cannot be recorded. The deed descriptions were identical, were delivered simultaneously and recorded simultaneously. Since there was never a transfer from Petitioner to the builder, the deed from the builder was redundant and served only as a bill of sale. Every house sold in the subdivision sold for less than $1 million. All the transfers occurred between October 28, 1987 and January 25, 1990.

In addition, Petitioner made transfers of lots to builders other than A, B and C. The taxability of those transfers are not being considered as part of this Advisory Opinion.

Pursuant to Sections 144 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.

At the time of the transfer of the lots at issue, Section 1440.7 of the Tax Law 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)

Moreover, at the time of the transfer of the lots at issue, Section 590.43(g) of the Gains Tax Regulations provides as follows:

> (g) Question: Will the subdividing of real property be subject to aggregation pursuant to section 1440(7) of the Tax Law?
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> Answer: Yes. Section 1440(7) of the Tax Law specifically provides that all subdividing of real property is subject to the aggregation rule, except in the case where the subdivided property is improved with residences and is used for residential purposes, other than those pursuant to cooperative or condominium plans. (See section 590.68 of this Part for information on payment of tax in aggregated transfer situations.) (emphasis added)

In the instant case, subdivided lots owned by Petitioner were contracted to be purchased by individual purchasers contingent upon such purchasers contracting with A, B or C, entities related to the beneficial owners of Petitioner, to build a residence on such lots. At the time of closing, the

lots were improved with residences built by A, B or C. Titles to the lots were never transferred from Petitioner to A, B or C. In some instances only one deed for both the lot and house was given by Petitioner to the home buyer. In other instances there were two deeds given to the buyer, one from Petitioner and one from the home builder. The deeds were always given simultaneously and recorded simultaneously. Pursuant to Section 1440.7 of the Tax Law and Section 590.43(g) of the Gains Tax Regulations, the consideration received from the transfer of subdivided real property is not subject to aggregation where the subdivided parcels are transferred improved with residences to transferees for use as their residences. Accordingly, with respect to issue "1", since title to the lots did not pass between Petitioner and A, B or C, but the lots were transferred from Petitioner to the individual purchasers improved with residences, the consideration received by Petitioner for the sale of such lots was not required to be aggregated for purposes of establishing the $1 million threshold.

Concerning issue "2", since the transfers by Petitioner of lots in the subdivision were deemed transferred directly to the individual home purchaser improved with residences and not to A, B or C, this issue need not be addressed.

It is noted that Section 1440.7 of the Tax Law was amended by Chapter 61 of the Laws of 1989 and Chapter 170 of the Laws of 1994. Such amendments, however, do not affect the Advisory Opinion rendered. In addition, Section 590.43(g) of the Gains Tax Regulations has been amended and since renumbered to be 590.44(g). The amendments to 590.43(g)also do not affect the Advisory Opinion rendered.

DATED: August 22, 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.