

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

TSB-A-96 (13) R
Real Property
Transfer Gains Tax
October 24, 1996

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M960708B

On July 10, 1996, the Department of Taxation and Finance received a Petition for Advisory Opinion from STEFCO REALTY CORP., 1520 Northern Boulevard, Manhasset, New York, 11030.

The issue raised by Petitioner, STEFCO REALTY CORP., is whether, for purposes of the Real Property Transfer Gains Tax (the "gains tax") formerly imposed by Article 31-B of the Tax Law consideration includes the amount attributable to severance or consequential damages to the remaining property retained by the transferor which is paid by the State as an advance payment, settlement or final award after trial in a condemnation proceeding.

Petitioner submits the following facts as the basis for this Advisory Opinion. The Petitioner was the owner of certain land consisting of approximately 70,567 square feet located on Sunrise Highway in Bohemia, New York. Under a condemnation proceeding pursuant to the Eminent Domain Procedure Law, the New York State Department of Transportation (the "condemnor") acquired 43,715 square feet of the land on October 27, 1994. The Petitioner has retained the remainder of approximately 26,852 square feet of land (the "remainder land"). The Petitioner accepted an advance payment which was less than \$1 million. Included in the advance payment was an amount, which, in the opinion of the condemnor represented the loss of value to the remainder land ("severance damages"). It is the expectation of the Petitioner that either upon settlement or after trial, there will be an additional amount awarded which will result in the total amount received by the Petitioner as a result of the condemnation to be substantially in excess of \$1 million. It is also the expectation of the Petitioner that a significant portion of the total amount it receives will be for severance damages.

Analysis

Section 1441 of the Tax Law imposed the gains tax on the gain derived from the transfer of real property or an interest therein, where the real property was located in New York State and where the consideration for the transfer was \$1 million or more.

Chapter 309 of the Laws of 1996 repealed the gains tax for transfers of real property that occurred or occur on or after June 15, 1996.

Section 1440.7 of the Tax Law included in the definition of "transfer of real property" the taking by eminent domain.

When a transfer of real property occurred the consideration for gains tax purposes was the price paid or required to be paid for the real property transferred less customary brokerage fees related to the transfer. (See former section 1440.1(a) of the Tax Law.)

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Conclusion

As was provided in section 1440.1(a) consideration for purposes of the gains tax was the amount paid or required to be paid for the real property transferred. Therefore, to the extent that Petitioner can establish that the amount of the advance payment, settlement or final award after trial is attributable to severance damage to the remainder land, such amount is not consideration within the meaning of former section 1440.1 of the Tax Law.

DATED: October 24, 1996

/s/
John W. Bartlett
Deputy Director
Technical Services Bureau

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