

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

TSB-A-97(3)R
Real Property
Transfer Gains Tax

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO.M961031A

On October 31, 1996, the Department of Taxation and Finance received a Petition for Advisory Opinion from the Estate of Bonnie Lee Smith, 344 Central Park Avenue, Scarsdale, New York, 10583.

The issue raised by Petitioner, the Estate of Bonnie Lee Smith, is whether the Real Property Transfer Gains Tax Affidavit could have been used to comply with the Real Property Transfer Gains Tax (the gains tax) filing requirements. That is, would it have been necessary to comply with the gains tax pre-transfer audit procedure and submit a gains tax tentative assessment and return in lieu of using the affidavit to comply with these filing requirements?

Petitioner submits the following facts as the basis for this Advisory Opinion. On October 11, 1961, John and Bonnie Lee Smith purchased a single family residence (the "residence") at 151 Kensington Oval in New Rochelle, New York. The residence was used exclusively as the personal residence of the Smiths and their children. By the end of 1975 John Smith had died and the Smith's children had moved out. Thereafter, Ms. Smith continued to live in the residence alone.

Ms. Smith continued to use the residence exclusively as her residence through 1993. She did, however, within this time period, use an apartment within her business located in the Bronx as a secondary residence, since, because of her advancing years she found it more and more difficult to regularly commute back and forth from the house to the business.

In 1987, Ms. Smith stopped paying property taxes on some of the real property that she owned, including the residence and real property she owned in New York City, because she had failed to properly manage her business affairs. The Petitioner states that the failure to pay these property taxes was due to Ms. Smith suffering from senility. Because of this non-payment of taxes both the City of New York and the City of New Rochelle (New Rochelle) commenced in rem foreclosure proceedings against Ms. Smith's properties.

In 1993, New Rochelle foreclosed on Ms. Smith's residence by means of a default judgment and excluded her from the house. Thereafter, New Rochelle commenced the process of placing the property up for auction.

In August 1993, Ms. Smith's daughter, Debra Smith, moved by order to show cause to stay the auction of Ms. Smith's properties and for the appointment of a Guardian for the person and property of Ms. Smith. On October 29, 1993, Debra Smith was appointed as Guardian for Bonnie Lee Smith by order of the Hon. Louis C. Palella, J.S.C., and an injunction, staying the sale of the properties, was

entered. Upon qualifying as Guardian, Debra Smith immediately entered into negotiations with the City of New York and the City of New Rochelle for the return of Ms. Smith's properties. Debra Smith brought a motion to vacate New Rochelle's title on the ground that New Rochelle had taken Ms. Smith's property without due process of law. It was alleged in the motion that New Rochelle had commenced an in rem action and taken a default judgment against an incompetent. The Court denied the motion and ruled that Ms. Smith had to proceed by plenary action. In denying the motion, the Court directed that the injunction be vacated in or about August 1994.

In August 1994, New Rochelle again attempted to auction Ms. Smith's residence. Debra Smith immediately filed a *lis pendens* and commenced a plenary action to void New Rochelle's title, alleging that it had taken Ms. Smith's property without due process of law.

In October 1994, New Rochelle entered into a settlement on the record with Debra Smith whereby the residence was to be returned to Ms. Smith in exchange for payment for the back taxes and a portion of the outstanding interest and penalties. In November 1994, Debra Smith paid the back taxes and penalties after closing on the sale of one of her other properties, and New Rochelle tendered a quit claim deed transferring any claimed interest in the residence to Ms. Smith.

By the time the residence was returned to Ms. Smith, it was uninhabitable. The beach front property had been heavily damaged by storms. In addition, vandals had damaged the property during the period that she was excluded from the residence. Moreover, Ms. Smith had no funds with which to repair the residence. In order to properly provide for Ms. Smith, it was decided that the residence should be sold.

On November 11, 1994, Debra Smith, as Guardian for Ms. Smith, entered into a contract to sell the residence to John Ortiz. The sale price was set at \$500,000. The contract provided that Ms. Smith was to retain a life estate permitting her to reside in the lower level of the residence. The Court approved the sale and a closing date of January 31, 1995 was set. It was subsequently changed to April 6, 1995.

A few hours before the scheduled closing, the purchaser notified the attorney for Debra Smith that the contract to purchase had been assigned. In addition, the purchaser stated that the transfer could not close because they lacked a necessary gains tax waiver (the gains tax Tentative Assessment and Return-Form TP-582) in the name of a newly disclosed assignee. Subsequently, the attorney for John Ortiz was advised that Debra Smith was ready, willing and able to close, and that a gains tax waiver was unnecessary because the residence was used and wholly occupied by Ms. Smith as a residence. Therefore, a Real Property Transfer Gains Tax Affidavit (Schedule B of Form TP-584) could have been submitted at the closing in compliance with the gains tax filing requirements for this particular transfer. At this point, John Ortiz refused to close claiming that a TP-582 was required. The purchaser and the alleged assignee never appeared at the scheduled court ordered closing.

Approximately one week later, the attorney for John Ortiz filed a lis pendens and commenced an action against the estate claiming that Ms. Smith failed to tender all the documents necessary to close on April 6, 1995. Specifically, it was claimed in the action that the transfer could not have closed because they lacked the proper TP-582.

On March 25, 1996, Ms. Smith died. Because the residence had been heavily damaged during her absence, she never had the opportunity to move back in as it was uninhabitable. However, her personal possessions remained in the residence and at no time was the residence ever used for non-residential or commercial purposes nor was it ever depreciated.

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 1443.2 of the Tax Law provided an exemption from the tax to the extent that the real property that was transferred consisted of premises occupied and used by the transferor as his or her residence (but only with respect to that portion of the premises actually occupied and used for residential purposes).

Section 1447(1)(a) of the Tax Law provided as follows:

The commissioner of taxation and finance shall make available forms which he shall prescribe, to be completed by each transferor and transferee for each transfer for which an affidavit is not prescribed in clause (ii) of subparagraph one of paragraph (f) of this subdivision occurring after the effective date of this article.

Section 1447(1)(d) set forth as follows:

Such forms shall be filed with the state tax commission in accordance with the pre-transfer audit procedure established by the commissioner of taxation and finance pursuant to subdivision two of this section.

Section 1447(1)(f) of the Tax Law mandated that, with certain exceptions not relevant to this advisory opinion, a recording officer could not record or accept for record any conveyance unless accompanied by a statement of tentative assessment and return (which was obtained by complying with the pre-transfer audit procedure) or an affidavit which could be used if the conveyance met certain statutorily prescribed conditions. As set forth in subclause (F) of this section, one of the transfers for which the affidavit could be used in lieu of complying with the pre-transfer audit procedure was a transfer which was exempt from the gains tax pursuant to section 1443.2 of the Tax Law.

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The only issue which needs to be settled here is whether the proposed transfer of the residence by Ms. Smith to John Ortiz or his assigns which was to close on April 6, 1995 would have been exempt pursuant to section 1443.2 of the Tax Law.

Based on the facts presented, if the transfer on April 6, 1995 had occurred, it would have constituted a transfer of real property consisting of premises used by the transferor as her personal residence. Ms. Smith's exclusion from the premises by New Rochelle because of her tax problems did not change the nature of the real property as her personal residence. Therefore, the filing of an affidavit pursuant to Section 1447(1)(f) of the Tax Law would have sufficed with respect to the proposed transfer by Ms. Smith. Alternatively, if the parties so desired based on their uncertainty as to whether the proposed transfer qualified for the residential exemption provided by Section 1443.2 of the Tax Law, the pre-transfer audit procedure could have been used, culminating with the issuance of a tentative assessment and return with respect to the proposed transfer to comply with the gains tax filing requirements. In summary, the parties had the option of using either method to accomplish compliance with the gains tax filing requirements. It is not within this Department's province to determine the respective contractual obligations of the parties to the transactions described in this petition for advisory opinion.

DATED: March 28, 1997

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

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