

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

TSB-A-92(7)-R
Real Property Transfer
Gains Tax
Real Estate Transfer Tax
November 3, 1992

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M920903A

On September 3, 1992, a Petition for Advisory Opinion was received from Hilles Timpson, 373 Millstonebrook Road, Southampton, New York 11968.

The issues raised by Petitioner, Hilles Timpson, are:

1. Whether the transfer by Petitioner of certain parcels of real property to a revocable grantor trust will be subject to New York State Real Property Transfer Gains Tax (hereinafter the "gains tax") or New York State Real Estate Transfer Tax (hereinafter the "transfer tax").
2. Whether following the death of Petitioner, the sale by the trustee of Petitioner's personal residence will be exempt from gains tax.

Petitioner owns three improved parcels of real property within New York State. The first parcel (the "Southampton Residence") is located in Southampton, New York and is used by Petitioner exclusively as her personal residence. The Southampton Residence is not encumbered by a mortgage.

The second parcel (the "New York City Residence") is located New York City and is used by Petitioner's children and grandchildren for residential purposes. Petitioner is not compensated by her relatives for their use of the New York City Residence. The New York City Residence is not encumbered by a mortgage.

The third parcel (the "New York City Rental Property") is residential property located in New York City that is leased by Petitioner to a university for use by the university. The New York City Rental Property is not encumbered by a mortgage.

It is assumed that each of the three properties has a fair market value in excess of \$1,000,000.

Petitioner plans to enter into a trust agreement (the "Trust Agreement") with herself and another individual as trustees (the "Trustees") creating a revocable trust (the "Revocable Trust") for Petitioner's sole benefit during her life. Under the Trust Agreement, Petitioner will retain all of her rights to use all property transferred to the Revocable Trust and Petitioner will have the exclusive right to have distributed to her all income earned on the property held by the Revocable Trust. In addition, Petitioner will have the unconditional right to revoke the Revocable Trust. Upon such revocation, the Trustees will transfer all property held by the Revocable Trust to Petitioner.

The Trust Agreement will provide that upon Petitioner's death the Southampton Residence will be sold by the surviving Trustee.

Petitioner plans to transfer the Southampton Residence, the New York City Residence and the New York City Rental Property to the Revocable Trust for the purpose of having those properties administered by the Trustee after her death in order to avoid the delay and expense that would result from having the properties administered under Petitioner's will pursuant to a probate proceeding. Petitioner will receive no compensation for making the transfers to the Revocable Trust. The transfer of the three properties to the Revocable Trust will not in any way affect the use and occupancy of the properties.

With respect to the transfer tax, Section 1405(b) of the Tax Law provides as follows:

(b) The tax shall not apply to the following conveyances:

* * *

6. Conveyances to effectuate a mere change of identity or form of ownership or organization where there is no change in beneficial ownership, other than conveyances to a cooperative housing corporation of the real property comprising the cooperative dwelling or dwellings.

As for the gains tax, Section 1443 of the Tax Law provides, in part, as follows:

Sec. 1443. Exemptions. -- A total or partial exemption shall be allowed in the following cases:

* * *

2. If the real property consists of premises occupied by the transferor as his residence (but only with respect to that portion of the premises actually occupied and used for such purposes).

* * *

5. If a transfer of real property, however effected, consists of a mere change of identity or form of ownership or organization, where there is no change in beneficial interest.

Section 590.24 of the Gains Tax Regulations provides, in part, as follows:

(a) Question: Is the sale of an individual's personal residence subject to the gains tax where the consideration received is in excess of \$1 million?

Answer: No. Section 1443(2) of the Tax Law specifically exempts from the gains tax the sale of premises occupied by the transferor exclusively as his residence.

* * *

(e) Question: Is the sale of premises by an estate exempt from the gains tax when the premises were occupied and used as a residence by the decedent?

Answer: Yes. The same rules for determining the applicability of the personal residence exemption for an individual apply to the sale of the premises by a decedent's estate.

Concerning issue "1", the transfer of the three parcels of real property by Petitioner to a revocable trust is deemed a mere change of identity pursuant to Sections 1405(b) and 1443.5 of the Tax Law since there is no change in the beneficial ownership of the property following the transfer. Therefore, pursuant to Sections 1405(b) and 1443.5 of the Tax Law the transfer of the property by Petitioner will not be subject to gains tax and transfer tax.

Regarding issue "2", the transfer of the Southampton Residence by the Trustee following the death of Petitioner will constitute the transfer of a personal residence in accordance with Section 1443.2 of the Tax Law and Section 590.24 of the Gains Tax Regulations provided the premises was occupied and used by Petitioner up until her death exclusively as a residence. Therefore, pursuant to Section 1443.2 of the Tax Law and Section 590.24 of the Gains Tax Regulations if Petitioner occupies and uses the premises up until her death exclusively as a residence the transfer will not be subject to gains tax.

DATED: November 3, 1992

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

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