

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

TSB-A-93 (8)R
Real Estate Transfer Tax
Real Property
Transfer Gains Tax
June 14, 1993

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M921231A

On December 31, 1992, a Petition for Advisory Opinion was received from Board of Managers of Powell's Cove View Condominium, c/o George Nassif, 3-05 127th Street, College Point, New York 11356.

The issues raised by Petitioner, Board of Managers of Powell's Cove View Condominium, are:

1. Whether the termination of a condominium declaration pursuant to a plan that provides for the partition, without consideration, of the real property subject to the condominium declaration so that each unit owner acquires a 100% interest in that portion of the real property which consists of the condominium unit and the limited common elements appurtenant thereto, is exempt from the Real Estate Transfer Tax (hereinafter the transfer tax") and the Real Property Transfer Gains Tax (hereinafter the "gains tax").
2. Whether the consideration received by each owner for purposes of the transfer tax and the gains tax is computed on the increase in the value of each owner's interest after the termination of the condominium declaration over the value prior to the termination if issue "1" is subject to transfer tax and gains tax.
3. Whether the "consideration" received by each owner must be aggregated for the purpose of computing the gains tax.

Petitioner is the Board of Managers of a condominium consisting of eight units, each of which is comprised of a two-family, semi-attached house. The condominium regime has been established for more than ten years. Each unit owner received a deed which conveyed to him a condominium unit and a 12.5% interest in the common elements. As a result, each owner has the exclusive and perpetual right to use not only his own unit, but also to use exclusively as a limited common element the portion of the real property upon which the unit is located, that is the portion that comprises the yard immediately surrounding his unit. The portion of the real property exclusively used by each owner is approximately equal in both value and square footage, to 12.5% of the total real property. Except for certain commonly shared repairs, insurance and utility charges, each unit owner's rights to his or her home and yard are indistinguishable from those of a fee owner. Some of the units are owner-occupied, and some are not. Each unit is mortgaged.

The present market value of each unit and its 12.5% share of the common elements may be \$150,000 to \$200,000, for a total value of \$1,200,000 to \$1,600,000. It is believed that termination

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of the condominium declaration, and the resulting removal of the benefits and burdens that the condominium declaration places on each unit owner, would result in an increase in the market value of each owner's home.

Petitioner contemplates that all owners would enter into an agreement calling for them to execute a unanimous declaration terminating the condominium declaration. Following the termination, the owners would then hold title to the real property as tenants-in-common. Next, the owners would execute a deed to each owner conveying that portion of the real property now occupied by the owner's home and the yard he is exclusively entitled to use (e.g., owners 2 through 8 would execute a deed to owner 1 conveying their 87.5% interest in that portion of the real property now occupied by owner 1's home and yard, etc.). The square footage of each yard and the market value of all 8 units is approximately equal and would be treated under the agreement as if it were equal.

At the completion of the contemplated transaction, each owner will continue to be the fee owner of his or her condominium unit as defined in the Declaration of Condominium and will acquire the outstanding 87.5% interest in those common elements as defined in the Declaration of Condominium that he or she does not already own and that are reserved for his or her exclusive use, including the outstanding 87.5% of the front and rear yards adjacent to, and the exterior walls and the roof surrounding his or her unit.

In accordance with Section 1402 of the Tax Law, a transfer tax is imposed on each conveyance of real property or interest therein at the time that the instrument effecting the conveyance is delivered by a grantor to a grantee when the consideration for the conveyance exceeds five hundred dollars.

Section 1401(e) of the Tax Law provides, in pertinent part, that the term "conveyance" means the transfer or transfers of any interest in real property by any method. This would include a conveyance upon liquidation or a conveyance of real property by tenants-in-common pursuant to a partition.

Section 1401(d) of the Tax Law provides in part, that the term "consideration" is defined to mean the price actually paid or required to be paid for the real property or interest therein...whether or not expressed in a deed and whether paid or required to be paid by money, property, or any other thing of value.

Section 1405 of the Tax Law provides, in part, as follows:

Sec. 1405. Exemptions.- - (a) The following shall be exempt from payment of the real estate transfer tax:

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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;

7. Conveyances which consist of a deed of partition;

Section 575.9 of the Transfer Tax Regulations provides, in part, as follows:

575.9 Exemptions and non-taxable transactions. [Tax Law, §1405]

(a) Certain governmental organizations or entities are exempt from the payment of the real estate transfer tax. In addition, there are certain types of transactions to which this tax does not apply.

* * *

(7) conveyances which consist of a deed of partition.

Section 575.10 of the Transfer Tax Regulations provides, in part, as follows:

575.10 Mere change in identity. [Tax Law, § 1405(b)(6)] To the extent that a conveyance effectuates a mere change of identity or form or ownership or organization and there is no change in beneficial ownership, the real estate transfer tax does not apply. Examples of transactions where the issue of change in beneficial ownership would arise include the following:

* * *

(b) the conveyance by a corporation to its shareholders who will hold the real property as tenants-in-common in the same pro rata share as they own the corporation. Such conveyance is not taxable as there is no change in beneficial ownership...

Moreover, the gains tax is a 10% tax on the transfer of an interest in real property where the property is located in New York State and where the consideration received for the transfer is \$1 million dollars or more.

Section 1440.7 of the Tax Law defines the term "transfer of real property", in part, to mean the transfer or transfers of any interest in real by any method. This would include a transfer upon liquidation or a transfer of real property by tenants-in-common pursuant to a partition.

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 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:

* * *

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

590.43 Aggregation of partial or successive transfers of real property.
[Tax Law, § 1440(7)]

Question: How is the aggregation clause of section 1440(7) of the Tax Law, which states in part:

"... 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."

applied in the case of:

* * *

(d) Several transferors, owning one parcel of land either as joint tenants, tenants in common, or as tenants by the entirety, one transferee?

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Answer: The statute specifically requires that the consideration paid to each such transferor be aggregated with the consideration paid to the other transferors in determining whether the consideration is \$1 million or more. Once the million-dollar threshold is met, each transferor is liable for payment of tax based on the consideration he receives, less his original purchase price for the property.

Section 590.50(a) of the Gains Tax Regulations provides, in part, as follows:

590.50 Mere change of identity. [Tax Law, § 1443(5)]

(a) Question: Section 1443(5) of the Tax Law exempts a transfer from the gains tax to the extent it "consists of a mere change of identity or form of ownership or organization, where there is no change in beneficial interest." Does this exempt:

* * *

(3) The transfer of real property by a corporation to its shareholders, who will hold the real property as tenants-in-common in the same pro rata share as they own the corporation?

Answer: Yes. This is a mere change of identity or form of ownership or organization. The shareholders will have a carry-over original purchase price in the real property.

With respect to issue "1", pursuant to Sections 1401(e) and 1405(a)(6) of the Tax Law and Section 575.10 of the Transfer Tax Regulations the conveyance by Petitioner of the common areas to the owners resulting from the termination of the condominium declaration will not be subject to transfer tax since the conveyance of the property to the owners as tenants-in-common is totally exempt as a mere change of identity or form of ownership or organization where there is no change in beneficial ownership. Furthermore, the conveyances resulting from the pro rata partition of the real property is exempt from transfer tax pursuant to Section 1405(a)(7) of the Tax Law and Section 575.9(c)(7) of the Transfer Tax Regulations.

As for the gains tax consequences, pursuant to Sections 1440.7 and 1443.5 of the Tax Law and Section 590.50 of the Gains Tax Regulations the transfer of real property by Petitioner of the common areas to the owners resulting from the termination of the condominium declaration will not be subject to gains tax since the transfer of the real property to the owners as tenants-in-common is totally exempt as a mere change of identity or form of ownership or organization where there is no change in beneficial interest. However, the subsequent transfer by the owners of their tenants-in-common interests are transfers subject to gains tax. Such transfers, however, would be exempt to the

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extent that the transfers result in a mere change of identity or form of ownership with no change in beneficial interest.

Concerning issue "2", in accordance with Sections 1401(d) and 1440.1 of the Tax Law, the consideration for the conveyance and transfer of an individual owner's tenant-in-common interest for both transfer tax and gains tax purposes respectively, is equal to the fair market value of the interest in real property received by each owner as a result of the conveyance and transfer. It is noted, however, that the conveyance, is not subject to transfer tax.

As for issue "3", pursuant to Section 590.43(d) of the Gains Tax Regulations, the consideration paid to each owner for their interest in the real property must be aggregated with the consideration paid to the other owners for their interests in determining whether the consideration for the transfer is \$1 million dollars or more. However, once the million-dollar threshold is met, each owner is liable for payment of the gains tax based on the consideration he receives, less his original purchase price for the property.

DATED: June 14, 1993

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

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