

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

TSB-A-90 (1) R  
Real Property  
Transfer Gains Tax  
January 24, 1990

STATE OF NEW YORK

COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M891010A

On October 10, 1989, a Petition for Advisory Opinion was received on behalf of Bonnie Heights Realty Corp., c/o Turecamo Coastal and Marine Towing, 1 Edgewater Plaza, Staten Island, New York 10314.

The issue raised by Petitioner, Bonnie Heights Realty Corp., concerns the application of the Real Property Transfer Gains Tax (hereinafter the "Gains Tax") to the execution of a contingent purchase agreement between Petitioner and Temporary Transit Services, Inc. ("Transit") and the simultaneous execution of a lease between the Petitioner and Amboy Bus Co., ("Amboy") a New York corporation unrelated to the Petitioner but affiliated with Transit.

The facts presented are that on March 30, 1973, the Petitioner purchased a parcel of land in the Borough of Brooklyn, Kings County, New York, located at 1752 Shore Parkway (the "property"). On the date of acquisition of the property by the Petitioner and at all times thereafter, the property had a cloud on title rendering it unmarketable. At the present time, it is not clear whether the cloud on title ever will be removed and, consequently, whether the property ever will be marketable. Thus, legal title to the property cannot be transferred by the Petitioner.

On August 5, 1986, Petitioner entered into a contingent purchase agreement (the "agreement") with Transit to purchase the property, but only if two prerequisites were satisfied. First, Transit agreed to purchase the property if, at any time during the succeeding fifteen years, Petitioner obtained clear title. The purchase price increases over the fifteen-year term of the agreement in accordance with a schedule provided in the agreement. Second, Petitioner and Transit agreed that the agreement would become null and void unless the New York State Tax Commission (now the Commissioner of Taxation and Finance) issued an advisory opinion stating that the execution of the agreement and the simultaneous execution of a lease between Petitioner and Amboy did not result in the application of Chapter 60, Article 31-B of the New York Tax Law. The lease between the Petitioner and Amboy also was executed on August 5, 1986, and provides that Amboy will rent the property from the Petitioner for a term of five years at its fair rental value and that Amboy has the option of renewing the lease for two successive five year terms at the base rent increased by a formula tied to the Consumer Price Index.

Section 1440.4 of the Tax Law defines the term "interest", when used in connection with real property, to include, but not limited to title in fee, leasehold interest, a beneficial interest, an encumbrance, a transfer of development rights or any other interest with the right to use or occupancy of real property or the right to receive rents, profits or other income derived from real property. Interest shall also include an option or contract to purchase real property. (emphasis added)

Moreover, section 1440.6 of the Tax Law defines the term "real property" to mean every estate or right, legal or contingent, in lands, tenements or hereditaments, including buildings, structures and other improvements thereon and leaseholds, which are located in whole or in part within the state. (emphasis added)

Further, the term "transfer of real property" is defined, in pertinent part, to mean the transfer or transfers of any interest in real property by any method, including but not limited to sale, exchange, assignment ... option ... Transfer of an interest in real property shall include the creation of a leasehold or sublease only where (i) the sum of the term of the lease or sublease and any options for renewal exceeds forty-nine years (ii) substantial capital improvements are or may be made by or for the benefit of the lessee or sublessee, and (iii) the lease or sublease is for substantially all of the premises constituting the real property.

In addition, gains tax regulation 590.5(b) provides:

- Q. Is the creation of a leasehold for a term of less than 49 years ever taxable?
- A. Yes. If a leasehold is coupled with the granting of an option to purchase the property, the transfer is taxable regardless of the term of the lease.

While such regulation only makes reference to a lease coupled with an option to purchase, the granting of a contract to purchase coupled with a lease is to be treated in the same manner. This is based on the fact that an executed contract to purchase contains the same elements as an option, except that the right to purchase is not discretionary; the contract vendee is bound to purchase. This is so even if the contract contains contingencies, since, if the contingencies are removed, the contract vendee is bound to purchase.

Also, where separate interests in real property are transferred by one transferor to related transferees, the mutuality of ownership in such transferees is recognized, and the related transferees are treated as one transferee to the extent of the common ownership for purposes of acquiring the interest in real property. This position is consistent with the "look through" principle which has been applied throughout the administration of the gains tax.

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Accordingly, based on the foregoing, it is concluded that the execution of the agreement between the Petitioner and Transit and the simultaneous execution of a lease between the Petitioner and Amboy are deemed to be a transfer of an interest in real property and, thus, subject to the gains tax.

DATED: January 24, 1990

s/PAUL B. COBURN  
Deputy Director  
Taxpayer Services Division

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