

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

TSB-A-93 (16) R
Real Property
Transfer Gains Tax
November 1, 1993

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M930823D

On August 23, 1993, a Petition for Advisory Opinion was received from Burton B. Brous, c/o Nodgson, Russ, Andrews, Woods & Goodyear, 1300 One M & T Plaza, Buffalo, NY 14203.

The issue raised by Petitioner, Burton B. Brous, is whether the transfer of Petitioner's beach house and a barn located on the same parcel by a single deed to one purchaser will be subject to the Real Property Transfer Gains Tax (hereinafter the "gains tax").

On June 15, 1988, Petitioner purchased a nine acre parcel of beach front property on Long Island, New York with the intention of making the property his principal residence. The nine acre parcel had then and still has three structures: a main house, a beach house and an old barn. After renovations necessary to make the main house habitable, Petitioner occupied the main house, sold his prior principal residence and claimed the benefit of Section 1034 of the Internal Revenue Code with respect to the gain recognized upon the sale of his prior principal residence. Petitioner has consistently treated the entire nine acre parcel as his "principal residence" under IRC § 1034.

Petitioner has continuously occupied the entire nine acre parcel as his principal residence. The beach house is used for guest entertainment and during summers for Petitioner's personal use. On occasion, Petitioner has spent the night at the beach house. It has never been rented and Petitioner views the beach house as an adjunct to the main house. Additionally, Petitioner has never taken depreciation or any other business expense deduction on his federal or New York State income tax returns in connection with the beach house.

Similarly, the old barn has not been rented nor has Petitioner allowed any use other than personal use of the old barn. Petitioner has not taken any depreciation or any other business expense deduction on any tax returns in connection with the old barn. Consistent with Petitioner treatment of the entire nine acre parcel and the three structures on it, the old barn has been used for residential purposes, i.e., storing of Petitioner's lawn and garden equipment, Petitioner's vehicles, Petitioner's off-season wardrobe, etc.

The beach house and the old barn have not been utilized by Petitioner for business purposes.

Petitioner has received an offer to purchase the beach house and old barn as part of a total area of six acres. To effectuate the transfer, the nine acre parcel would be subdivided into two parcels. One for the main house and one for the beach house and old barn. The offer has come from one purchaser and if the purchase takes place, the six acre parcel may be structured for zoning or other "real estate" concerns. Also, the purchaser may require Petitioner to remove or demolish the old barn prior to the transfer.

Pursuant to Sections 1441 and 1443.1 of the Tax Law and Section 590.1 of the Gains Tax Regulations the gains tax is a ten percent tax on the gain derived from the transfer of real property, which includes the acquisition or transfer of a controlling interest in any entity with an interest in real property, where the property is located in New York State and where the consideration for the transfer is one million dollars or more.

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).

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.

(b) Question: Is the sale of the premises occupied and used solely by the transferor as his summer residence subject to gains tax?

Answer: No. The exemption does not state that it must be the transferor's primary residence. Thus, a summer residence qualifies for the exemption.

* * *

(f) Question: When a residence is sold, does all of the land abutting the residence qualify for the exemption?

Answer: Yes . A residence includes all the land on which the dwelling is located and the land abutting the dwelling as long as the abutting land was never used for business purposes (e.g., farm, rental, etc.). (See section 590.25 of this Part for a discussion on property used for business.) However, the land alone is not a residence and thus where part of the land is sold separately, the portion or portions sold without the dwelling will not qualify for the residential exemption found in section 1443(2) of the Tax Law.

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The beach house was used by Petitioner as a second residence during the summer months. In addition, the beach house and the old barn were neither depreciated nor used for business purposes. In accordance with Section 590.24(b) of the Gains Tax Regulations, the sale of a transferor's residence qualifies for exemption from the gains tax under Section 1443(2) of the Tax Law even though such summer home was not the transferor's primary residence. Also, pursuant to such regulation, there is no requirement that the summer residence be in a different location than that of the primary residence. Moreover, pursuant to Section 590.24(f) provided the premises has not been used for business purposes, the residence includes all the land on which the dwelling is located and the land abutting the dwelling. Therefore, pursuant to Section 1443.2 of the Tax Law and Section 590.24 of the Gains Tax Regulations the transfer by Petitioner of his beach house, with or without the old barn, is not subject to the gains tax.

DATED: November 1, 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.