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

TSB-A-94 (11) R
Real Property Transfer
Gains Tax
October 18, 1994

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. M940811E

On August 11, 1994, a Petition for Advisory Opinion was received from Randall P. McIntyre, et al., Half Hollow Road, Dix Hills, New York 11746.

The issue raised by Petitioner, Randall P. McIntyre, et al., is whether the transfer of the family homestead by Randall P. McIntyre, Helen Pond McIntyre, Angus P. McIntyre, Barbara Eckhardt McIntyre, and Sally McIntyre Lewis (collectively referred to herein as "McIntyre") is subject to the Real Property Transfer Gains Tax (hereinafter the "gains tax").

The property to be transferred consists of a family homestead originally purchased by Otto E. McIntyre, (hereinafter the "father") the deceased father of Randall, Angus and Sally McIntyre (collectively the "children"). The family estate consists of a 71± acre parcel improved with four residences and nine outbuildings, including a horse barn. The estate is located in a residential area of the Town of Huntington, Suffolk County, New York, known as Dix Hills. The McIntyre's have contracted to sell the land and improvements thereon to a developer for $6,550,000.

The children grew up on the estate, the core portion of which has been owned continuously by the father and the McIntyre family since 1923. An additional portion was added as protection in 1943 to complete the 71± acre parcel. Randall and his wife Helen, as well as, Angus and his wife Barbara, currently occupy residences on the premises. Sally's principal residence is in Santa Barbara, California, but has continued to reside on the estate from time to time making regular use during such times of the pool, grounds and stable. During her stays, she resides in a cottage, which is on Lot 34 of the estate.

For various family and estate planning purposes, the parents of the children either gifted or devised the estate to them in various ways. In 1953, the father made a gift of a 4.31 acre parcel to Angus and Barbara McIntyre. In 1955, the father made a gift of a 7.16 acre parcel to Randall and Helen McIntyre. When the father died in 1967, the children and their stepmother each inherited 58.5 acres in equal undivided interests. Upon the stepmother's death in 1984, the children succeeded to her interest. Moreover, the stepmother left an .8 acre parcel of property to the sons and daughters of the McIntyre's. Such parcel was subsequently purchased by the children and title is held as tenants in common.

There are no boundary lines or fences which demark division lines between the lands the children own as tenants in common and the lands individually gifted to the children and/or their spouses. The entire estate has always been considered the family homestead by the children and the McIntyre's and has been used continuously on a strictly residential basis.

A few neighbors of the McIntyre's use the horse barn and give money to them to meet the expenses of maintaining it. However, the McIntyre's do not depreciate the barn for income tax purposes. Moreover, the father's house is currently occupied by a part-time caretaker who performs miscellaneous carpentry tasks on the estate in exchange for rent.

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:
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> 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?
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> 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.
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> (b) Question: Is the sale of the premises occupied and used solely by the transferor as his summer residence subject to the gains tax?
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> Answer: No. The exemption does not state that it must be the transferor's primary residence. Thus, a summer residence qualifies for the exemption.
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> (f) Question: When a residence is sold, does all of the land abutting the residence qualify for the exemption?
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> 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.

Pursuant to Section 1443.2 of the Tax Law and Sections 590.24(a), (b) and (f) of the Gains Tax Regulations the transfer of real property consisting of premises occupied by the transferor as a residence, including premises occupied and used solely by the transferor as a summer residence and land abutting the residence which was not used for a business purpose, is exempt from the gains tax. In the instant case, the 71± acre parcel of real property to be transferred consists of a 4.31 acre parcel owned and occupied by Angus and Barbara McIntyre as their personal residence, a 7.16 acre parcel owned and occupied by Randall and Helen McIntyre, and a 60± acre parcel which abuts the aforementioned parcels owned as tenants in common by the children. The 60± acre parcel contains two additional residences, one of which is used periodically by Sally McIntyre Lewis as her residence and the other which is used by the part-time caretaker as his residence. In addition, the 60± acre parcel contains nine outbuildings, none of which are used by the transferors for business purposes, except that a nominal fee is paid to the transferors by neighbors for use of a horse barn.

Accordingly, pursuant to Section 1443.2 of the Tax Law and Sections 590.24(a), (b) and (f) of the Gains Tax Regulation since the premises owned and occupied by Angus and Barbara McIntyre was used solely as their residence, the premises owned and occupied by Randall and Helen McIntyre was used solely as their residence and the appurtenant acreage abutting such premises owned as tenants in common by the children was used solely as a residence of the children the transfer by the McIntyre's of the 71± acre parcel for a consideration in excess of $1 million is not subject to the gains tax. Further, it is noted that since the horse barn was not depreciated for income tax purposes and the money received by the transferor from its neighbors for use of the barn was incidental to meet the expenses of maintaining it, that such use is not deemed to be use for a business purpose.

DATED: October 18, 1994

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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