

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

TSB-A-94 (3)R  
Real Property  
Transfer Gains Tax  
March 30, 1994

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M931206B

On December 6, 1993, a Petition for Advisory Opinion was received from 115 Spring Street Company, 115 Spring Street, New York, New York 10012.

The issue raised by Petitioner, 115 Spring Street Company, is whether the transfer of real property as herein described constitutes a "mere change of identity or form of ownership" and is therefore exempt from the Real Property Transfer Gains Tax (hereinafter the "gains tax").

Petitioner is a partnership that owns the land and five-story building known as 115 Spring Street, New York, New York (the "property"). Petitioner has owned the Property for approximately 20 years. The second, third, fourth, and fifth floors of the Property are each single residential units. The first floor and cellar are rented out for commercial use.

Petitioner has four partners, each of whom holds a twenty-five (25) percent partnership interest. For purposes of the Advisory Opinion petition, a husband and wife are considered as a single partner. The four partners occupy the four residential units located on the second through the fifth floors of the Property. The Partnership Agreement, dated as of February 1, 1974, specifies which residential unit is to be occupied by each of the partners. Each of the partners has the exclusive use of his unit and no rights to use the other partners' units. All of the partners have occupied the Property in accordance with the Partnership Agreement since 1974.

It is proposed that the Property will be converted into a two-unit condominium. One unit (the "Professional Unit") will consist of the cellar and the first floor, apart from the portions of these floors that will be part of the common elements. The second unit (the "Residential Unit") will consist of the four residential units, which are located on the second through the fifth floors of the Property. The Professional Unit will be retained by Petitioner. The Residential Unit will be transferred to a corporation intended to qualify as a cooperative housing corporation under the Internal Revenue Code. Twenty-five percent of the stock of the corporation will be allocated to each of the four residential units and each partner will receive the shares allocated to the unit currently occupied by him, together with a proprietary lease for his unit.

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 provides, in pertinent part, as follows:

7. "Transfer of real property" means the transfer or transfers of any interest in real property by any method, including but not limited to sale, exchange, assignment, surrender, mortgage foreclosure, transfer in lieu of foreclosure, option, trust indenture, taking by eminent domain, conveyance upon liquidation or by a

receiver, or transfer or acquisition of a controlling interest in any entity with an interest in real property.

... 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. For purposes of this article, transfers pursuant to a cooperative plan shall include all transfers of stock in a cooperative corporation which owns real property. (emphasis added)

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 590.33 of the Gains Tax Regulations provides:

Question: On a conversion to cooperative ownership, is a tax payable on the transfer of the property to the cooperative corporation, as well as on the issuance of the stock and proprietary leases by the cooperative corporation to the purchasers?

Answer: No. Article 31-B of the Tax Law has special provision triggering payment of the tax on cooperative conversions and for calculating the tax due on such transactions. The special provisions are set forth in section 1442 of the Tax Law and provide that, "In the case of a transfer pursuant to a cooperative or condominium plan, the date of transfer shall be deemed to be the date on which each cooperative or condominium unit is transferred. For purposes of calculating the amount of tax due in each such transfer, an apportionment of the original purchase price of the real property and total consideration anticipated under such plan shall be made for each such cooperative or condominium unit." Basically, the statute provides that the transfer of real property to a cooperative corporation is not the event which requires payment of tax. Rather, it is the transfers of share pursuant to the plan which are the events requiring payment of tax.

Section 590.35 of the Gains Tax Regulations provides, in part, as follows:

590.35 Transfers of shares which require payment of tax. [Tax Law, §1440(7)]

Question: Which transfers of cooperative shares by the person who transfers an interest in real property to the cooperative housing corporation (the realty transferor), or by the owners of the realty transferor, or by the cooperative corporation itself, require payment of tax?

(e) Transfers by the cooperative corporation to the owners of the realty transferor?

Answer: No, the transfer of shares by the cooperative corporation to the owners of the realty transferor, in proportion to their respective ownership interests in the entity, will not require payment of tax. This result applies whether the owners hold the shares jointly or individually, provided that the owners, or family members of the owners, do not take the shares as tenant stockholders.

(f) Transfers by the realty transferor to its owners?

Answer: No, if the realty transferor is a partnership, corporation, or other entity and transfers the shares to its owners, for investment or resale, in proportion to their respective ownership interests in the entity, these transfers will not require payment of tax. This result applies whether the owners hold the shares jointly or individually, provided that the owners do not take the shares as tenant stockholders. Following transfers to the owners of the realty transferor which do not require payment of tax, the owners hold the shares in the place of the realty transferor and their total original purchase price is equal to that of the realty transferor's immediately before the transfer ... (emphasis added)

Although the above-cited regulations make references to only transfer of cooperative shares in a cooperative corporation, it should be noted that it is the Department's position that such provisions should also apply to the transfer of condominium units in the same manner.

Pursuant to Section 1440.7 of the Tax Law and the rationale set forth in Sections 590.33 and 590.35(e) and (f) of the Gains Tax Regulations, the conversion of the Property by Petitioner to a two-unit condominium is not a transfer which requires the payment of the gains tax since the Partners will not take ownership of the condominium units as unit purchasers, but will retain ownership in the Property in proportion to their respective ownership interest in the Petitioner prior to the conversion. Therefore, the conversion of the Property to a two-unit condominium is not subject to gains tax at this time.

Moreover, pursuant to Section 590.33 of the Gains Tax Regulations the transfer of the Residential Unit to a cooperative housing corporation in exchange for the stock allocated to the four residential units is not a transfer of real property which requires the payment of the gains tax, but

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rather it is the transfer of shares pursuant to the plan which are the events requiring payment of tax. However, pursuant to Section 590.B5(e) and (f) of the Gains Tax Regulations where an owner receives the shares allocated to the unit occupied by him, together with a proprietary lease for his unit, as tenant stockholders such transfer is a transfer which requires the payment of the gains tax.

Notwithstanding, in the instant case each Partner pursuant to the Partnership Agreement held a beneficial interest solely in the unit he occupied prior to the conversion of the Property to its condominium and cooperative form of ownership, and had no interest in the other Partners' units. Accordingly, it is recognized that the beneficial ownership of each Residential Unit has continuously vested with each individual Partner without regard to ownership of the Property being held by Petitioner. Thus, the transfer of the shares allocated to the Residential Units from the cooperative housing corporation to each Partner whereby each Partner will receive shares allocated to the unit he occupied prior to the conversion and a proprietary lease for his unit will constitute a mere change of identity or form of ownership or organization since there is no change in the beneficial ownership of each residential unit. Therefore, pursuant to Section 1443.5 of the Tax Law, the transfer of the shares allocated to the Residential Units by the cooperative housing corporation to the Partners as tenant stockholders is not subject to the gains tax.

DATED: March 30, 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.