



Department of Taxation and Finance

Important

The real property transfer gains tax was repealed for transfers of real property that occur on or after June 15, 1996.

The information in this TSB-M is out-of-date and is provided only for historical purposes.

For additional information concerning the repeal of the tax, see [TSB-M-96\(4\)R](#).

The TSB-M begins on page 2 below.

SUMMARY OF OPINION LETTERS WITH REGARD TO THE
REAL PROPERTY TRANSFER GAINS TAX

The Department of Taxation and Finance has issued several letter opinions on issues not specifically addressed in Publication 588 (November 1984).

The following are summaries of the issues resolved in the opinions issued from October 1984 through March 1985. For easy reference, the summaries are listed in the order the topics are found in Publication 588, and include the date the opinion was written.

CONSIDERATION/Mortgage
November 2, 1984

The face amount of a mortgage is includable in consideration.

CONSIDERATION/Closing Costs
January 3, 1985

Closing costs added to the purchase price for purposes of financing such costs do not constitute additional consideration to the transferor as long as the transferor is contractually bound to pay the costs on behalf of the transferee. The parties must submit the contract which evidences this arrangement.

CONSIDERATION/Mortgage Prepayment Penalty
February 25, 1985

The payment of a "prepayment penalty" on a mortgage that was prepaid does not constitute additional consideration for the real property.

GRANDFATHERED CONTRACTS/Independent Evidence
January 30, 1985

Acceptable independent evidence to support a claim for the grandfather exemption may include evidence of the hiring of a surveyor or the making of an application for title insurance specifically relating to the property to be acquired if such actions are shown to have occurred prior to March 28, 1983.

PERSONAL RESIDENTIAL EXEMPTION/Subdivision
November 30, 1984 Memorandum
December 12, 1984 Addendum to Memorandum

When a residence is part of a large estate, all of the land abutting the residence qualifies for the exemption, even if the transferee has filed a subdivision plan and the transfer occurs by several deeds.

The transferor must not be part of the plan, and may not receive a different consideration dependent on whether he transfers by one or several deeds. 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.

LEASE/SUBLEASE/Substantially All of Premises
November 21, 1984

In determining whether a lease constitutes "substantially all" of the premises constituting the real property, the amount of area covered by the lease is compared to the total area available for use by other tenants, whether previously rented or not. Thus, in a shopping center situation in which no one lease to a tenant is for more than 90% of the space, the creation of such lease is not taxable. An option to purchase with use and occupancy of the real property is taxable regardless of the amount of space leased.

COOPERATIVE OWNERSHIP/Residence
October 4, 1984

The residential exemption applies to the sale of cooperative shares allocated to an apartment, if it was used by the transferor as his residence.

COOPERATIVE OWNERSHIP/Consideration
October 19, 1984

The consideration for the sale of an individual cooperative unit by the sponsor includes the price paid by the purchaser for the unit plus the amount of unpaid mortgage balance apportioned to the unit.

COOPERATIVE OWNERSHIP/Forms
December 6, 1984

When cooperative shares are sold to unit purchasers, transferor and transferee forms are required to be filed.

When a unit purchaser resells his coop shares to a new purchaser, the affidavit may be used if the coop was his residence or if the consideration is under \$500,000 for the transfer. If it was a non-residential use and the consideration was \$500,000 or more, transferor and transferee forms are required to be filed 20 days prior to the transfer. The affidavit, when appropriate, must be filed with the Tax Department on the date of transfer since no recording is necessary.

COOPERATIVE OWNERSHIP/Sales by Investors
February 13, 1985

The Gains Tax Affidavit, Form TP-584, may not be used on the resale of cooperative shares by an investor. The sale of cooperative shares by a person who purchased the shares for resale, i.e.,

an investor, are to be aggregated for purposes of applying the \$1 million exemption.

ENTITIES/Penalty/Interest
October 18, 1984

The transfer occurs when a 50% acquisition has occurred. When the transaction involves a continuing acquisition of interest, tax is due on the date the 50% interest is acquired, and is due on the date of each subsequent acquisition of interest.

The Tax Commission may waive penalty and interest penalty found in section 1446.2 if such delay was due to reasonable cause.

In the case of a late filing in the case of a merger, the Tax Commission will consider the inherent delay in filing as a factor in determining if reasonable cause existed. Interest under section 1446.1 is due from the date acquisition occurred.

ENTITIES/Mere Change of Identity
November 2, 1984

In order to claim a mere change exemption, transferor and transferee forms (TP-580, TP-581) must be filed.

ENTITIES/Syndication
December 3, 1984

The purchase of ownership interests in an entity which owns real property will be aggregated if the individuals negotiate and consummate their acquisition of interests as a single unit.

The fact that the selling partners engage a brokerage concern to market the interests in one or more partnerships does not affect the analysis.

In this case, the partnership interests were sold by the departing partners.

The subsequent transfer of ownership interest in the partnership by the investor to a holding partnership, in return for the same percentage interest in the holding partnerships assets as the old partnerships assets, is a mere change in form, § 1443.5 of the Tax Law.

ENTITIES/Non-Voting Stock
December 5, 1984

The acquisition of non-voting stock has no gains tax implications, no forms need be filed.

ENTITIES/Liquidating Dividend/Mere Change
December 6, 1984

When a corporation liquidates, non-pro-rata, by distributing all of the real property to the majority shareholder and other assets to the minority shareholders, the mere change exemption partially applies. The transfer of the real property would be exempt to the extent of the majority shareholder's interest in the corporation.

ENTITIES/Acting in Concert
December 17, 1984

Three trusts were determined not to be acting in concert when they merely accepted an offer made to them. In this case, the grantor determined the price and all other terms of the transaction, and funded the trusts by gifts. The beneficiaries of the Trusts did not consult with each other, nor act together to initiate, negotiate, or carry out the transaction. The beneficiaries provided affidavits to this effect.

Other factors relevant to this decision: The transaction was part of the grantor's estate planning, and was only for benefit of family members.

ENTITIES/Sublease
December 19, 1984

A corporation whose only interest in real property is that of a tenant of a sublease, is an entity with an interest in real property. Thus, the 100% acquisition of the stock in such a corporation results in a taxable event.

ENTITIES/Step Up in Original Purchase Price
January 29, 1985

When an acquisition of a controlling interest occurs and the entity just acquired has, as part of its assets, a controlling interest in another entity that owns real property, the second tier entity applies the rule of step up in original purchase price for an entity which has had a controlling interest acquired.

ENTITIES/Less than a Controlling Interest
March 13, 1985

The acquisition of 60% interest in B Corporation which sole asset is a 70% interest in EF Partnership owning real property by C is not an acquisition of a controlling interest since C has only acquired a 42% interest in EF.

MISCELLANEOUS TRANSFFRS/Affidavits/Nominee
November 16, 1984

In a situation involving a nominee transferring property, the affidavit (TP-584) is appropriate only when there is no consideration.

MISCELLANEOUS TRANSFERS/Industrial Development Agency Projects/Documentation
December 4, 1984

A copy of the bond financing agreement and a copy of the agreement between the IDA and company must be submitted along with completed questionnaires.

MISCELLANEOUS TRANSFERS/Exempt Organization/Agent
December 28, 1984

The deed transfer of real property by an agent of a charitable organization exempt under § 1116(a)(4) will still qualify as an exempt transfer under §1443.3 provided the charity holds all beneficial interest in the property until its transfer.

MISCELLANEOUS TRANSFERS/Turnkey Contracts
January 4, 1985

The deed transfer of property from the developer of low-income or elderly housing to a housing authority is not a transfer of beneficial interest for gains tax purposes if, as part of an overall transaction in which the developer is obligated to rehabilitate and transfer property to a housing authority:

1. The developer enters into a turnkey contract of sale with a housing authority.
2. The holding of record title by the developer is on a temporary basis merely to facilitate the obtaining of financing and does not confer genuine incidents of ownership on the developer.
3. The consideration paid to the developer by the housing authority for the transfer does not include an amount representing appreciation of the real property for the period the developer held record title.

REFUNDS/Review Procedure
January 30, 1985

In a case where the installment payment method is elected, the transferor has to pay some amount of tax in order to file an application for a refund, which then starts the review procedures.