

New York State Department of Taxation and Finance
Office of Counsel
Advisory Opinion Unit

TSB-A-10(4)M
Estate Tax
September 28, 2010

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M091207C

Petitioner [REDACTED] of the [REDACTED], requests an Advisory Opinion determining the value of a contract and mortgage held by decedent on her date of death. It is the executors' responsibility to estimate the fair market value of these assets on the Decedent's date of death for purposes of filing a New York State estate tax return, if required.

Facts

Decedent died a resident of New York State on November 11, 2009. She was predeceased by her husband in 2007. On January 24, 2005, Decedent and her husband sold three parcels of real property in [REDACTED] County consisting of approximately 155 acres, along with the mineral resources of those parcels, to [REDACTED] (Purchaser). Under the contract of sale, Purchaser paid a specified amount per acre at closing for the real property. Purchaser also agreed to pay an additional specified amount per acre for mineral resources, a portion of which was paid at closing. Payment of the remainder of the per-acre price for mineral resources is due at the time all necessary municipal, state and federal permits to mine the parcels are obtained, and is expressly conditioned on Purchaser obtaining those approvals. Interest is due on the remainder of the per-acre price for mineral resources at the rate of 3% per year, until the necessary permits are received. Purchaser may, at its sole option, prepay the remainder prior to obtaining the necessary permits. However, if despite its best efforts, Purchaser does not receive the necessary permits by the 99th year after the closing, the balance due to the sellers will be based on the fair market value of the property at that time. Purchaser executed a mortgage in favor of Decedent and her husband, to secure the debt due in the future under the contract. The mortgage states that the amount of the debt secured is a fixed amount, which is approximately the amount of the remainder of the per-acre price for mineral resources, multiplied by the number of acres. At the time of Decedent's death, no payments had been made under the mortgage.

Analysis

We conclude that the value of the contract and mortgage are includible in Decedent's gross estate. However, we cannot provide a valuation of those assets. It is Petitioner's responsibility to establish the fair market value of those assets for purposes of preparing a New York State estate tax return, if required.

With the exception of the applicable exclusion amount, which is not at issue here, New York's estate tax is conformed to the IRC with all amendments enacted on or before July 22, 1998. Tax Law section 954(a) provides that "[t]he New York gross estate of a deceased resident means his federal gross estate as defined in the internal revenue code (whether or not a federal estate tax return is required to be filed)." Internal Revenue Code (IRC) section 2031 defines the "gross estate" to include the value at the time of death of all property of a decedent, whether real or personal, tangible or intangible, wherever situated. A final federal determination as to the value of any item of property or interest in property determines the value of that property or interest in property for purposes of New York's estate tax, unless the final determination is shown by a preponderance of the evidence to be erroneous. See Tax Law §961(a)(3).

The contract and mortgage described above are property owned by Decedent at the time of her death, and therefore their value is properly includible in her gross estate for both federal and New York State estate tax purposes. *See Matter of Corning's Estate*, 3 Misc. 160 (Surrogate's Court, Monroe Co. 1893). The value of property includible in a decedent's gross estate is its fair market value at the time of the decedent's death, unless the executor elects the alternate valuation date under IRC section 2032. "Fair market value is the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts." 26 CFR §20.2031.1-1; *see also Willow Terrace Development Co. v. Commissioner of Internal Revenue*, 345 F.2d 933 (5th Cir. 1965). If a federal estate tax return is required to be filed, the value of the contract and mortgage is their value as finally determined for federal estate tax purposes.

However, determining the valuation of specific property is an issue of fact, and thus not an appropriate matter for an Advisory Opinion. It is the duty of the executor, with the assistance of professional appraisers if necessary, to estimate the fair market value of the property for purposes of filing New York State and federal estate tax returns. Petitioner would be required to file a New York State estate tax return if decedent's federal gross estate (including the fair market value of the contract and mortgage), plus the federal adjusted taxable gifts and specific exemption exceeds \$1 million. *See Tax Law* §§ 951, 952. The valuation submitted by the executor would be subject to review on an audit of the estate tax return.

DATED: September 28, 2010

/S/

DANIEL SMIRLOCK
Deputy Commissioner and Counsel

NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion.