

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

TSB-A-85 (3)
Estate and Gift Taxes
September 18, 1985

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. Z840501A

On May 1, 1984, a Petition for Advisory Opinion was received from R. Walter Kaszubinski, 404 North Main Street, North Syracuse, New York 13212.

The issue raised is whether the transfer by gift of jointly owned real property, including a retail store on the property but not the assets of the business operating the store, creates a tax liability under the following articles of the Tax Law: 1) the gift tax imposed under Article 26-A; 2) the sales and use tax imposed under Article 28; 3) the real estate transfer tax imposed under Article 31; and the tax on real property transfers imposed under Article 31-B.

Petitioner sets forth the following situation: Petitioner will receive from his parents a gift of real property which the parents jointly own. One parent operates a retail store as a sole proprietorship on the property. The gift would include the retail store but not the assets of the business, such as inventory, furniture, fixtures or other equipment. Petitioner would rent the store back to the parent for continued operation. The property's estimated value lies between \$80,000 and \$100,000 and the parents intend to elect gift-splitting.

ISSUE (1)

Section 1001 of Article 26-A of the Tax Law imposes a tax on the transfer of property by gift. The tax imposed by Article 26-A must be paid by the donor. The amount of tax depends on the property's value and the total amount of gifts made during the calendar year and the preceding calendar period as defined by section 1002 of the Tax Law. Since the property in question is jointly owned by Petitioner's parents, each would be making a gift of one-half the current market value of the property. As long as the parents retain no future interest in the property, each parent would be entitled to a \$10,000 gift tax exclusion. (IRC§2503(b)).

Where both spouses consent, section 2513 of the Internal Revenue Code allows gifts made by one spouse to be considered as made one-half by each spouse, commonly known as "gift-splitting". Spouses consenting to gift-splitting are jointly and severally liable for the entire tax imposed on each spouse for the calendar year. (Tax Law §1007(d)). Since the property is jointly owned, election to use gift-splitting would merely re-divide the tax liability. In any case, each parent would be making a gift of one-half of the property's value.

Accordingly, Petitioner's parents will each be liable for one-half the property's value when computing the amount of tax owed under Article 26-A of the Tax Law since the jointly owned real property is being transferred by gift.

ISSUE (2)

Section 1141(c) of the Tax Law requires a purchaser of business assets in a bulk sale transaction to notify the Tax Commission before taking possession of the assets.

Section 537.1(a) of the Sales and Use Tax Regulations define bulk sale in part as:

"any sale, transfer or assignment in bulk of any part or the whole of business assets, other than in the ordinary course of business."

The fact that this transfer is by way of gift does not preclude the transfer from being a bulk sale. (20 NYCRR 537.1(a)(3)).

Section 537.1(b) of the same regulations defines business assets to include "any assets of a business pertaining directly to the conduct of the business, whether such assets are intangible, tangible or real property." The store transferred in this case falls squarely within the meaning of business assets as the building is an essential element of the business. The uncommon nature of this gift places the transfer outside the ordinary course of business.

Accordingly, the gift to Petitioner constitutes a bulk sale within the meaning of section 1141(c) of the Tax Law since the transfer of business assets was outside the ordinary course of business. Consequently, the Petitioner will be required to file a Notification of Bulk Sale (Form AU 196.10) at least 10 days before taking possession of the asset.

ISSUE (3)

Section 1402 of the Tax Law imposes a tax on deeds transferred by a grantor to a grantee. Section 1405(b)(4) of the Tax Law, however, expressly exempts "deeds or conveyances of real property without consideration . . . including deeds conveying realty as bona fide gifts."

Accordingly, Petitioner will be exempt from the Real Property Transfer Tax imposed under Article 31 of the Tax Law since the transfer is by way of gift.

ISSUE (4)

Section 1441 of the Tax Law imposes a tax on gains derived from the transfer of real property within the state. Section 1443.1 of the Tax Law provides an exemption if the consideration is less than one million dollars. Since the fair market value of the property is between \$80,000 and \$100,000, the transfer will be exempt from the tax imposed under Section 1441 of the Tax Law.

Accordingly, Petitioner's parents will be exempt from the Real Property Transfer Gains Tax imposed under Article 31-B of the Tax Law since the property transferred has a fair market value of less than one million dollars. If the total consideration for the transfer is less than \$500,000, the transferor may claim the exemption by filing form TP-584 when the deed is recorded. If the total consideration is between \$500,000 and \$999,000, the questionnaires TP-580 and TP-581 must be filed twenty days before the transfer.

DATED: September 18, 1985

s/FRANK J. PUCCIA
Director
Technical Services Bureau

NOTE: The opinions expressed in Advisory Opinions
are limited to the facts set forth herein.