

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

TSB-A-91 (9) R
Real Property
Transfer Gains Tax
Real Estate Transfer Tax
September 16, 1991

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M901026A

On October 20, 1990, a Petition for Advisory Opinion was received from Federal Home Loan Mortgage Corporation, 1759 Business Center Drive, PO Box 4115, Reston, VA 22090.

The issues raised by Petitioner, Federal Home Loan Mortgage Corporation, are:

1. Whether the federal statutory exemption under 12 USC Section 1452(e) exempts Petitioner from the Real Property Transfer Gains Tax (the "Gains Tax") as a transferor and from the Real Estate Transfer Tax (the "Transfer Tax") as a grantor or a grantee.
2. Whether Petitioner is required to meet the criteria of Section 1447(1)(f)(1) of the Tax Law to record instruments which effectuate the transfer of real property if it is deemed that Petitioner is exempt from the gains tax as a transferor and the transfer tax as a grantor or a grantee.
3. Whether the exemption from gains tax afforded by Section 1443(3)(b) of the Tax Law and the exemption from transfer tax afforded by Sections 1405(a)(2) and 1405(b)(1) of the Tax Law for instrumentalities of the United States applies to Petitioner.
4. Whether a conveyance of real property in which Petitioner is the grantor is exempt from the transfer tax.

Petitioner is a corporate instrumentality of the United States created pursuant to the Federal Home Loan Mortgage Corporation Act (Title III of the Emergency Home Finance Act of 1970, as amended, 12 USC sections 1451-1459, the "Freddie Mac Act").

The stated statutory purposes of Petitioner are to provide stability in the secondary market for home mortgages, respond appropriately to the private capital market, and to assist the secondary market for home and multifamily mortgages on an ongoing basis by increasing the liquidity of mortgage investments and improving the distribution of investment capital available for home mortgage financing. Toward this end, Petitioner purchases first lien, conventional, residential mortgages and participation interests in such mortgages from mortgage lending institutions and resells the whole loans and participations so purchased in the form of guaranteed mortgage securities. Petitioner generally matches its purchases of mortgages with sales of guaranteed mortgage securities. Mortgages retained by Petitioner are financed with short and long term debt and equity capital.

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Petitioner currently holds mortgages which are secured by real property located in New York State (hereinafter the "New York State Mortgages"). As a result of the severe downturn in the real estate market, a number of mortgagors have defaulted on the loans that are secured by the New York State Mortgages, and Petitioner anticipates that more defaults will occur. Where defaults have occurred, Petitioner either has initiated a foreclosure action against the defaulting mortgagors, or has negotiated settlements with the defaulting mortgagors such as transfers in lieu of a foreclosure sale. Title obtained through such foreclosure sales or transfers in lieu of foreclosure will be held by Petitioner. Petitioner does not intend to hold any of the real property it has acquired or will acquire through such foreclosure proceedings, and intends to sell such properties as soon as practicable.

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 1440.7 of the Gains Tax Law provides, in pertinent part, that a "transfer of real property" means the transfer or transfers of any interest in real property by any method, including but not limited to sale. . .mortgage foreclosure, transfer in lieu of foreclosure. . .

Further, Section 1443.3(b) of the Gains Tax Law provides, an exemption from the gains tax in the following case:

3. If the transferor is one of the following:

* * *

(b) The United Nations or any other international organization of which the United States is a member, the United States of America or any of its agencies or instrumentalities. (emphasis added)

Section 1447.1 of the Gains Tax Law provides, in pertinent part, that:

(f)(1) A county clerk or register of a county shall not record or accept for record any conveyance, other than a conveyance by a court of appropriate jurisdiction, or an officer thereof, resulting from an action to foreclose a mortgage, of real property in New York State, unless accompanied by:

(i) the statement of tentative assessment of the amount of tax or statement that no tax is due provided pursuant to subdivision two of this section, together with the payment of the tentative assessment of the amount of tax, if any, or

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(ii) an affidavit, or other form prescribed by the state tax commissioner. . .(emphasis added)

Further, Section 590.59(b) of the Gains Tax Regulations which is concerned with mortgage foreclosures provides as follows:

Question: Is the transferee (the successful bidder) subject to any personal liability for taxes determined to be due from the defaulting mortgagor?

Answer: No. Section 1447(3)(b) of the Tax Law specifically exempts the transferee from personal liability and does not forbid the transferee from transferring the consideration to the referee. The county clerk may record a conveyance resulting from an action to foreclose a mortgage without a statement of tentative assessment, statement of no tax due, or affidavit. (emphasis added)

In accordance with Section 1402 of the Tax Law, a transfer tax is imposed on each conveyance of real property or interest therein at the time that the instrument effecting the conveyance is delivered by a grantor to a grantee when the consideration for the conveyance exceeds five hundred dollars. In addition, in accordance with Section 1402-a of the Tax Law an additional transfer tax is imposed upon the transfer of residential real property where the consideration exceeds one million dollars.

Section 1401(e) of the Transfer Tax Law provides, in pertinent part, that a "conveyance" means the transfer or transfers of any interest in real property by any method, including but not limited to sale...mortgage foreclosure, transfer in lieu of foreclosure...

Section 1405 of the Transfer Tax Law provides, in pertinent part, as follows:

Exemptions.--(a) The following shall be exempt from payment of the real estate transfer tax:

* * *

2. The United Nations, the United States of America and any of its agencies and instrumentalities.

The exemption of such governmental bodies or persons shall not, however, relieve a grantee from them (sic) of liability for the tax.

(b) The tax shall not apply to the following conveyances:

1. Conveyances to the United Nations, the United States of America, the State of New York, or any of their instrumentalities, agencies or political subdivisions (or any public corporation,

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including a public corporation created pursuant to agreement or compact with another state or the Dominion of Canada); (emphasis added)

Further, Section 1409(a) of the Transfer Tax Law provides, in part, as follows:

A joint return shall be filed by both the grantor and the grantee for each conveyance whether or not a tax is due thereon. The return shall be filed with the recording officer before the instrument effecting the conveyance may be recorded. . .(emphasis added)

Furthermore, Title 12 USC Section 1452(e), concerning exemption from taxation of the Petitioner provides that:

(e) Exemption from taxation. The Corporation, including its franchise, activities, capital, reserves, surplus, and income, shall be exempt from all taxation now or hereafter imposed by any territory, dependency, or possession of the United States or by any State, county, municipality, or local taxing authority, except that any real property of the Corporation shall be subject to State, territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxes.

Also, Title 12 USC Section 1452(f) provides that Petitioner is deemed to be an agency of the Federal government for purposes of Title 28 USC Sections 1345 and 1442. Moreover, in Rocap v Indick (1976) 176 App DC 172, the court held that Petitioner is a federal agency within the scope of "government controlled corporation" term of Title 5 USC Section 552(e), and thus is an "agency" for purposes of the Freedom of Information Act (5 VSCS §552).

Pursuant to Section 1440.7 of the Tax Law, the term "transfer of real property" includes a transfer as a result of a mortgage foreclosure or a transfer in lieu of foreclosure. However, Section 1443.3(b) of the Tax Law provides exemption from gains tax where the transferor of real property is the United States of America or any of its agencies or instrumentalities. Therefore, Petitioner is exempt from the payment of gains tax when it is the transferor of real property pursuant to Section 1443.3(b) of the Tax Law since Petitioner is an agency of the United States of America as set forth in Title 12 USC Section 1452(f) and is exempt from taxation pursuant to Title 12 USC Section 1452(e).

Under sections 1447(1)(f)(1)(i) and (ii) of the Tax Law, a county clerk or register is not permitted to record or accept for recording any conveyance unless the deed is accompanied by either: (i) a statement of tentative assessment of the amount of tax due together with the payment of such assessed amount, or a statement of no tax due or (ii) the filing of appropriate affidavits or forms claiming an exemption from the imposition of the gains tax. The recording requirements do not apply with respect to a deed which is conveyed to a transferee in a foreclosure sale, since in that case

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the transferee is released from personal liability with respect to any potential gains tax liability of the defaulting mortgagor.

Pursuant to Section 590.59(b) of the Gains Tax Regulations in satisfaction of the gains tax filing requirements a deed taken in a mortgage foreclosure, may be recorded without a statement of tentative assessment, statement of no tax due or affidavit.

Pursuant to Section 1401(B) of the Tax Law, the term "conveyance" includes a transfer as a result of a mortgage foreclosure or a transfer in lieu of foreclosure. Pursuant to Section 1405(a)(2) of the Tax Law Petitioner is exempt from the payment of transfer tax imposed under section 1402 of the Tax Law since it is an agency of the United States of America in accordance with Title 12 USO Section 1452(f); and exempt from taxation pursuant to Title 12 USC Section 1452(e). However, the exemption afforded to Petitioner does not relieve a grantee from the liability for the tax. In addition, a grantee may be liable for the additional transfer tax imposed under Section 1402-a of the Tax Law. However, conveyances to Petitioner would be entirely exempt from transfer tax pursuant to Section 1405(b)(1) of the Tax Law since Petitioner is an agency of the United States of America exempt from taxation pursuant to the above Sections of the United States Code.

For purposes of the transfer tax, pursuant to Section 1409(a) of the Tax Law, a joint return (Form TP-584, Combined Real Property Transfer Gains Tax Affidavit, Real Estate Transfer Tax Return, Credit Line Mortgage Certificate, Schedule C) must be filed, whether or not a tax is due, with the recording officer before the instrument effecting the conveyance may be recorded.

DATED: September 16, 1991

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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