

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

TSB-A-99(4)R
Real Estate Transfer Tax
July 27, 1999

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M990524A

On May 24, 1999, the Department of Taxation and Finance received a Petition for Advisory Opinion from Halmar Construction Corp., 160 W. Lincoln Avenue, Mount Vernon, NY 10550.

The issue raised by Petitioner, Halmar Construction Corp., is whether the purchase of a residential subdivision which includes an existing one-family dwelling on the property is subject to the additional real estate transfer tax imposed by section 1402-a of the Tax Law.

Petitioner presents the following facts. On March 17, 1999, Petitioner purchased, for the sum of \$1,175,000, property located at 237 Davenport Avenue, New Rochelle, New York (the "Property"). The purchase by Petitioner included a one-family dwelling located on the Property (the "Dwelling"). Petitioner paid \$11,750 in real estate transfer tax, pursuant to section 1402-a of the Tax Law, at the time of the purchase of the Property. Petitioner has since applied for a refund of such tax.

The grantor of the property was 466 Main Street Realty Corp., which, in turn, had acquired the property on November 15, 1996, for the sum of \$500,000. Subsequent to its purchase of the Property in 1996, 466 Main Street Realty Corp. applied for and received approval to subdivide the Property so as to achieve a six lot subdivision, inclusive of the Dwelling which remained on the land. Petitioner contends that it was the receipt of the approval to subdivide the Property that led to the increase in the value of the Property, as reflected by the price paid by Petitioner in 1999 versus the price paid by 466 Main Street Realty Corp. in 1996. Petitioner states that the Dwelling had not been modernized or improved in any way, and at all times remained vacant. Petitioner further states that it purchased the Property for development as either a residential subdivision or as a multi-unit assisted-living development, and that the Dwelling was not intended to be used as a personal residence.

Applicable Law

For purposes of the real estate transfer tax, the term "conveyance" is defined in section 1401(e) of the Tax Law. Included in the definition of conveyance is the transfer of any interest in real property by any method.

Subdivision (f) of section 1401 of the Tax Law provides:

(f) "Interest in the real property" includes title in fee, a leasehold interest, a beneficial interest, an encumbrance, development rights, air space and air rights, or any other interest with the right to use or occupancy of real property or the right to receive rents, profits or other income derived from real property. . . .

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Subdivision (a) of section 1402-a of the Tax Law provides, in part:

(a) In addition to the tax imposed by section fourteen hundred two of this article, a tax is hereby imposed on each conveyance of residential real property or interest therein when the consideration for the entire conveyance is one million dollars or more. For purposes of this section, residential real property shall include any premises that is or may be used in whole or in part as a personal residence, and shall include a one, two, or three-family house The rate of such tax shall be one percent of the consideration or part thereof attributable to the residential real property. . . . (emphasis added)

Subdivision (b) of such section 1402-a provides, in part, that "the additional tax imposed by this section shall be paid by the grantee If the grantee is exempt from such tax, the grantor shall have the duty to pay the tax."

Subdivision (b) of section 575.3 of the Real Estate Transfer Tax Regulations provides, in part:

Example 1: A three-family house is sold for \$1.2 million. The seller did not occupy any portion of the house. The buyer is required to pay the additional tax of \$12,000 The result would be the same if the seller had occupied any portion of the house.

Conclusions

The purchase of the Property by Petitioner was properly subject to the additional tax imposed by section 1402-a of the Tax Law. The Property qualified as residential real property under section 1402-a because it included a one-family dwelling that could have been used as a personal residence at the time of conveyance. The fact that the grantor did not occupy the Dwelling at the time of the conveyance, and the fact that Petitioner did not intend to use the Dwelling as a personal residence, are not relevant to this determination.

DATED: July 27, 1999

/s/
John W. Bartlett
Deputy Director
Technical Services Bureau

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