

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

TSB-A-86 (2) R  
Real Property Transfer  
Gains Tax  
April 28, 1986

STATE OF NEW YORK  
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. M860307B

On March 7, 1986, a Petition for Advisory Opinion was received from Dasha A. Epstein, 720 Park Avenue, New York, New York 10021.

The issue raised concerns the application of the Real Property Transfer Gains Tax imposed by Article 31-B of the Tax Law (hereinafter the "Gains Tax") to the following factual situation.

Harry D. Epstein died on July 19, 1980. At the time of his death, Mr. Epstein was the owner of 1,100 shares of 720 Park Avenue Corp., a cooperative housing corporation, including a proprietary lease to a cooperative apartment which was used as his primary place of residence.

Under the terms of Mr. Epstein's will, the shares of 720 Park Avenue Corp. became part of his residuary estate which passed into three separate trusts. One of the trusts under the decedent's will is the owner of the aforementioned shares and is presently contemplating a sale of the residence. The Petitioner is the co-trustee of this trust and co-executrix of Mr. Epstein's estate.

With respect to the proposed transfer by the trust, the Petitioner cites Section 1443.2 of the Tax Law which provides an exemption from the Gains Tax: "If the real property consists of premises occupied by the transferor as his residence (but only with respect to that portion of the premises actually occupied and used for such purposes)."

Also, the Petitioner cites Gains Tax Regulations Section 590.24(e) which states as follows:

"Q. Is the sale of the premises by an estate exempt from the gains tax when the premises were occupied and used as a residence by the decedent?"

A. Yes. The same rules for determining the applicability of the personal residence exemption for an individual apply to the sale of the premises by a decedent's estate." 20 NYCRR 590.24.

It is the contention of the Petitioner that, although the contemplated sale will be by a testamentary trust which was designated to receive a share of the residue of the decedent's estate, the sale should be exempt pursuant to Section 1443.2 of the Tax Law and Section 590.24(e) of the Gains Tax Regulations as cited above in the same manner that the sale would be exempt if it were a sale by the estate of the decedent.

As cited by the Petitioner, Section 1443.2 of the Tax Law provides an exemption from the Gains Tax where the real property being transferred consists of premises occupied by the transferor as his residence. (emphasis added)

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Also, as previously cited by the Petitioner, Gains Tax Regulations Section 590.24(e) provides an exemption from the Gains Tax in the case of a sale of premises by an estate when the premises were occupied and used as a residence by the decedent.

However, where there is an actual transfer of a personal residence by an estate of a decedent to a trust as beneficiary of the estate, the beneficiary of the trust must actually occupy and use the premises as his or her residence in order for the residential exemption to apply in the case of a subsequent transfer of the premises by the trust.

Accordingly, if a beneficiary of the trust is currently occupying the premises as a personal residence, and if the beneficiary is not paying rent to the trust or other beneficiaries to use the premises, the transfer would be exempt pursuant to Section 1443.2 of the Tax Law. If no beneficiary is currently occupying the premises as a personal residence or if the beneficiary is paying rent to use the premises, the sale of the stock in the cooperative housing corporation by the trust would be subject to the Gains Tax if the consideration received for such transfer is \$1 million or more.

DATED: April 10, 1986

s/FRANK J. PUCCIA  
Director  
Technical Services Bureau

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