

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

TSB-A-87 (2) R
Real Property Transfer
Gains Tax
January 12, 1987

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. M861205A

On December 5, 1986, a Petition for Advisory Opinion was received on behalf of Miller Buckley Overseas Limited located at Millbuck House, Corporation Street, Rugby, England.

The issue raised concerns the method of determining the consideration for purposes of computing the Real Property Transfer Gains Tax imposed by Article 31-B of the Tax Law (hereinafter "the gains tax") in the case of an acquisition of a controlling interest of an entity with an interest in real property.

The facts as presented by Petitioner are as follows: Miller Buckley Overseas Limited (hereinafter MBO) is a 45% shareholder in Millbuck Homes Inc. (hereinafter "MHI"), a U.S. corporation whose only asset is real property located in New York State. The other shareholders in MHI are Argent, a 50% shareholder and Multinational Financial Services Limited (hereinafter "MFSL"), which owns the remaining 5%.

MBO has entered into a contract with TVS Realty Corp., DBA the MacFarlane Company (hereinafter "TVS") to sell its interest in MHI. MBO is to receive \$1 as consideration for its shares. In addition, TVS has agreed to assume bank loans of MHI with Barclays Bank and European American in the amounts of \$1,300,000 and \$800,000, respectively. TVS has also agreed to satisfy debts totalling \$1,435,100 on loans payable by MHI.

The loans are payable to the following corporations as follows:

Buckley Investments Limited (hereinafter "Investments")	\$1,072,300
Buckley Holdings Inc. (hereinafter "Holdings")	142,000
Bertrum Limited (hereinafter "Bertram")	209,000
Catherine Holdings Limited (hereinafter "Catherine")	11,500

Seven hundred thousand dollars of the amount payable to Investments is to be used to satisfy a loan by Barclays Bank to Investments on which MHI was the guarantor.

MBO is a 49% and 99% stockholder in Holdings and Bertram, respectively, and a 100% stockholder in Miller Buckley Coignet, which in turn owns 100% of Catherine. Investments is the parent corporation of MBO. There is no relationship between the other stockholders in MHI and these corporations.

The original purchase price of the realty, the cost of capital improvements made and other acquisition costs incurred total \$3,148,286 as recorded on the books and records of MHI.

TVS has informed MBO that it would acquire Argent's 50% share in MHI in the near future and that it will pay Argent \$50,000 as consideration for its shares. MFSL will not be selling its shares to TVS.

Petitioner acknowledges that the acquisition by TVS of MBO's 45% interest and Argent's 50% interest in MHI will result in TVS acquiring a controlling interest in MHI, and, therefore, a transfer within the purview of the gains tax will occur.

It is the contention of Petitioner that the fair market value of the acquisition of a controlling interest in MHI, a corporation whose only asset is New York real property, is the total consideration paid by TVS to acquire such interest; that the total consideration for the 95% interest is \$3,585,101, which includes all cash paid plus debts assumed, satisfied or discharged; that the consideration to be used by MBO in computing its gain subject to tax under Article 31-B should be 47.37% (MBO's 45% share divided by the 95% interest acquired by TVS) of the total consideration paid by TVS to acquire a controlling interest in MHI; that MBO's original purchase price in the realty should be 45% of the \$3,148,286 original purchase price recorded on the books of MHI and that MBO will derive a gain of \$281,583 on its transfer of stock in MHI and will incur a \$28,153 gains tax liability.

Gains Tax Regulations Section 590.47(a) states, in pertinent part, as follows:

"Q. Is the price paid for the ownership interest in an entity the consideration for a controlling interest used to calculate gain?

A. Generally, no. Section 1440.1 of the Tax Law states that '...there shall be an apportionment of the fair market value of the interest in real property to the controlling interest to ascertain the consideration for the controlling interest.'"

Also, Gains Tax Regulations Section 590.47(b) states, in pertinent part, as follows:

"Q. How is fair market value determined?

A. Generally, by appraisal. It is the amount a willing buyer would pay a willing seller for the real property. It is not 'net fair market value' which deducts mortgages on the property from fair market value."

As provided at section 590.47(a) of the Gains Tax Regulations, when an acquisition of a controlling interest of an entity with an interest in real property occurs, the consideration used to determine the gains tax due is the fair market value of the interest in real property of the entity apportioned to such interest acquired.

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The burden of establishing fair market value of real property for gains tax purposes is on the parties to the transaction. As stated at section 590.47(b) of the gains tax regulations, such fair market value is generally established through an appraisal. However, if fair market value of real property can be established through an alternative method, and without an appraisal, an appraisal may not be necessary.

In the case at hand, when TVS acquires MBO's 45% interest in MHI, the consideration used to compute the gains tax will equal 45% of the fair market value of the interest in real property owned by MHI at the time of such acquisition. The original purchase price used to compute the gains tax in the MBO to TVS transfer equals 45% of the original purchase price of the interest in real property in the hands of MHI.

Advisory Opinions are written statements setting forth the applicability to a specified set of facts of pertinent statutory and regulatory provisions. Thus, questions of fact such as the exact amount of Petitioner's gains tax liability cannot be determined within the context of an Advisory Opinion. Rather, such amounts are determined by the Audit Division of the Department of Taxation and Finance in its pre-transfer audit procedure.

Accordingly, if it can be demonstrated to the satisfaction of the Audit Division that 47.37% of \$3,585,101 is equal to 45% of the fair market value of the interest in real property held by MHI at the time that MBO sells its stock to TVS, such amount would be the consideration used to compute the gains tax in the MBO to TVS transfer.

DATED: January 12, 1987

s/FRANK J. PUCCIA
Director
Technical Services Bureau

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