

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

TSB-A-87 (4) R
Real Property Transfer
Gains Tax
April 10, 1987

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. M870219A

On February 19, 1987, a Petition for Advisory Opinion was received on behalf of 45 Broadway Atrium Partners, located at 126 East 56th Street, 30th Floor, New York, New York 10022.

The issue raised is whether the method proposed by the Petitioner for determining the amount of construction period interest, construction period real property taxes, insurance, security and specifically identified indirect project costs to be included in the original purchase price of a building for purposes of computing the Real Property Transfer Gains Tax imposed by Article 31B of the Tax Law (hereinafter the "Gains Tax") would be accepted by the Department of Taxation and Finance.

The facts as presented by the Petitioner are as follows: 45 Broadway Atrium Partners, a New York partnership, (hereinafter the "Partnership"), owns an office building, (hereinafter the "Building") in New York City at 45 Broadway. Financing for the construction of the Building was provided first by Manufacturers Hanover Trust Company and then by Aetna Life Insurance Company. The Partnership, as lessor, has leased and intends to continue to lease floors of the building to individual tenants and has completed construction on some of the floors in the Building and intends to complete construction of the balance of the floors in the Building according to tenants' specifications.

Construction began in March of 1982 and occurred in two stages: During the first stage, the Building's foundation, shell (including external walls), core and lobby were substantially completed, as evidenced by the issuance of a temporary certificate of occupancy.

The first stage of construction was substantially completed in August, 1983. During the second stage, the Partnership enters into leases covering one or more floors with individual tenants and completes construction of the leased floor(s) according to the particular tenant's specifications. The second stage of the construction is now ongoing and includes as to each floor the installation of air-conditioning ducts, sprinkler systems, flooring, ceiling, lighting, electrical and telephone outlets, and any necessary partitions on the particular leased floor(s). The second stage of the construction began in April, 1984 and depending on market conditions, the Partnership estimates that the second stage of construction will be completed in the last quarter of 1988.

The Petitioner proposes that for purposes of computing the original purchase price of the Building, since the construction of the Building will not be completed at a single time, but rather on a floor by floor basis, as each floor is completed, interest on loans incurred in connection with the construction of the Building, construction period real property taxes, insurance, security and specifically identified indirect project costs will be allocated to a particular floor in proportion to the

ratio of that floor's square footage to the Building's total square footage. Such amounts will be included in such original purchase price to the extent paid or accrued through the date that construction ends with respect to that floor.

Gains Tax regulations 590.16(d) in describing the costs to be included as costs of constructing capital improvements states in pertinent part as follows:

- (d) Q. What additional costs are allowed if incurred during a construction period?
- A. Other costs that are clearly associated with construction of a real estate project can also be included as a cost of constructing a capital improvement. If the capital improvement requires a construction period, a period of time in which necessary activities are conducted to bring the improvement on the real property to that state or condition necessary for its intended use, the interest cost paid during that period on a construction loan, real property taxes, insurance or similar items are includible as a cost of construction.

Also, section 590.16(d) of the Gains Tax regulations states in pertinent part as follows:

Indirect project costs may also be included in original purchase price if they are specifically identified with a project. Indirect project costs are indirect costs incurred after the acquisition of the property, such as construction administration costs, legal fees, and various office costs (cost accounting expenses, design costs, and other expenses of departments providing services to projects), that clearly relate to projects under construction. The full amount of indirect project costs that clearly relate to a specific project, such as costs associated with a field office at a project site and the administrative personnel that staff the office, may be added to the cost of the capital improvement. However, indirect project costs which relate to numerous projects must be allocated in a rational manner to the projects to which the cost relate based on the nature of activity that gave rise to the costs.

Indirect project costs that do not clearly pertain to projects under construction and all general and administrative costs cannot be added to the cost of capital improvement. General and administrative costs include such costs as corporate management salaries, general accounting expenses, corporate office expenses, general legal fees, and similar costs which are generally incurred by all enterprises in the conduct of business.

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In addition, section 590.16(e) of the Gains Tax regulations states, in pertinent part,:

The construction period ends when the real property is substantially complete and ready to be placed in service. Some construction projects are completed in sections, leaving part of the real property capable of being used independently while construction continues on other sections. For such projects, allowable construction period expenses shall cease on each part when it is substantially complete and ready for use. A construction period for a project may be suspended before a project is completed for various reasons, such as insufficient sales or insufficient rental demands. In such a case, the construction period has ended, and the costs allowed during a construction period will no longer be allowed.

Based on the foregoing, the costs of interest on construction loans incurred in connection with the construction of the Building, construction period real property taxes, insurance, security, and specifically identified indirect project costs accruing during a construction period are allowed as costs of constructing of a capital improvement. The method of allocating such costs in the case of a construction project which is completed in steps is not specifically stated in the Gains Tax regulations. However, the method chosen by the Petitioner of allocating such costs would be deemed a proper method as long as it resulted in an equitable allocation.

Also, as provided at Section 590.16(e), if there is a suspension of the construction activity between the end of the first stage of construction and the beginning of the second stage the costs allowed during a construction period will no longer be allowed between such stages.

DATED: April 10, 1987

s/FRANK J. PUCCIA
Director
Technical Services Bureau

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