

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

TSB-A-87 (8) R  
Real Property Transfer  
Gains Tax  
September 14, 1987

STATE OF NEW YORK  
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. M870518A

On May 18, 1987, a Petition for Advisory Opinion was received on behalf of Syosset Shopping Center Associates located at Suite 305, 510 Broad Hollow Road, Melville, New York, 11747.

The issue raised by the Petitioner is whether an agreement to extend the term of an existing lease coupled with an increase in the rent to be paid during the balance of the term of such lease constitutes a transfer of an interest in real property for purposes of the Real Property Transfer Gain Tax imposed by Article 31-B of the Tax Law (hereinafter the gains tax).

The facts as presented by Petitioner are as follows: Petitioner is the lessee on a long-term lease that was originally executed in the early nineteen fifties. The initial term of the lease was 75 years and the remaining balance of such term is approximately 37 years. The subject property is improved with a shopping center, which was constructed after it was leased.

Under the provisions of the extension agreement, approximately 30 years will be added to the initial term and there will be substantial rent increases during the remaining balance of such term. The extension agreement does not contain an option to purchase the underlying real property.

It is the contention of the Petitioner that the subject extension agreement should not be subject to the gains tax.

The Petitioner supports its contention by citing the applicable portion of Section 1440.7 of the Tax Law which sets forth the three conditions necessary for the creation of a lease to constitute a transfer of an interest in real property. Such applicable portion of Section 1440.7 to which the Petitioner refers states, in pertinent part, as follows:

Transfer of an interest in real property shall include the creation of a leasehold or sublease only where (i) the sum of the term of the lease or sublease and any options for renewal exceeds forty-nine years, (ii) substantial capital improvements are or may be made by or for the benefit of the lessee or sublessee, and (iii) the lease or sublease is for substantially all the premises constituting the real property.

The Petitioner states that the subject lease extension fails at least two of the above conditions.

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First of all, the Petitioner states that it should be noted that the issue with which this Advisory Opinion deals is an extension of an existing lease rather than the creation or grant of a lease. Thus, the Petitioner contends that the statutory language simply does not cover such extension. Moreover, the extension itself is for less than 49 years.

Secondly, the Petitioner contends that the extension agreement does not meet the second condition as provided at section 1440.7 which refers to substantial capital improvements being made by or for the benefit of the lessee or sublessee. It is the opinion of the Petitioner that the provision relating to capital improvements should not be interpreted to embrace customary capital improvements made by or for a tenant in respect of improved real estate. Rather, such provision should be limited in its application to situations involving unimproved real estate, which may be improved by or for the benefit of the lessee or sublessee.

Where an existing lease is substantially modified to extend the term of the lease and to change the rental payments over the remaining balance of the initial term of such lease, for purposes of the gains tax, such modifications constitute a new agreement between the parties and therefore the creation of a leasehold. The term of such leasehold begins as of the effective date of the modifications.

With respect to the Petitioner's contention that the extension agreement does not meet the second condition which is necessary for the creation of a lease to constitute a transfer of an interest in real property (Section 1440.7 (ii) of the Tax Law), there is no present evidence to indicate that the Legislature intended the language at Section 1440.7 (ii) to be applicable to unimproved real estate only. Furthermore, the facts presented indicate that capital improvements have been made and may continue to be made by or for the benefit of the Petitioner.

Accordingly, since it has been established that the extension agreement in the case presented by the Petitioner constitutes the creation of a lease that is for a sum of a term of more than forty-nine years and under which substantial capital improvements are or may be made by or for the benefit of the lessee, and since the lease is for substantially all the premises constituting the real property, such new lease would be a taxable transfer of an interest in real property for gains tax purposes.

DATED: September 14, 1987

s/FRANK J. PUCCIA  
Director  
Technical Services Bureau

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