

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

TSB-A-88 (4) R
Real Property
Transfer Gains Tax
December 20, 1988

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M881011A

On October 11, 1988, a Petition for Advisory Opinion was received on behalf of Earltown Corp., a New York Corporation located at 1 Broad Street Plaza, Glens Falls, New York, 12801.

The issue raised concerns the application of the Real Property Transfer Gains Tax imposed by Article 31B of the Tax Law, (the gains tax) in the case of transfers of certain parcels of real property and specifically the application of the aggregation clause found at section 1440.7 of such Article in the case of such transfers.

The facts as presented by Petitioner are that Petitioner is engaged in real property development and construction. Over an extended period of time, Petitioner acquired various parcels of real estate which are shown on the survey map attached to the petition. The acquired parcels essentially comprise the entire tract of land bordered by Montcalm St., Broad St., Fielding St., and Mission St., as indicated on the survey map, with the tract of land known as Broad Street Plaza. Also, as indicated by the survey map, Petitioner has re-subdivided the acquired tract of land.

Over a period of time since the acquisition of the land comprising Broad Street Plaza, Petitioner has sold three parcels to other entities as the Plaza has progressed. The three conveyances to date and consideration paid for each are as follows:

- 1) Petitioner transferred parcel #1 to the City of Glens Falls Industrial Development Agency by deed dated August 1, 1985. The transfer to the Industrial Development Agency was made on behalf of Broad Street Professional Center General Partnership I which simultaneously leased back the property. The consideration paid to Petitioner for this transfer was \$319,800.
- 2) Petitioner transferred parcel #2 to the City of Glens Falls Industrial Development Agency by deed dated December 18, 1986. The transfer to the Industrial Development Agency was made on behalf of Broad Street Professional Center General Partnership II which simultaneously leased back the property. The consideration paid to Petitioner for this transfer was \$386,200.
- 3) Petitioner transferred parcel #3 to Glens Falls National Bank and Trust Company by deed dated June 25, 1987 for consideration of \$209,216.

Parcels #1 and #2 as described above are contiguous with one another but not with parcel #3.

At the present time, Petitioner is proposing to transfer the parcel of land between parcels #2 and #3 to a transferee other than the transferees of parcels #1, #2, and #3.

Petitioner contends that there was and is no plan, written or oral, to transfer these parcels in such a manner so as to avoid imposition of the gains tax. Petitioner is willing to submit a sworn statement that the transfers were not made pursuant to a plan or agreement. Thus, Petitioner contends that these transfers should not be aggregated.

Gains Tax regulations section 590.43 states in pertinent part as follows:

Question: How is the aggregation clause of section 1440.(7) of the Tax Law, which states in part:

"...Transfer of real property shall also include partial or successive transfers, unless the transferor or transferors furnish a sworn statement that such transfers are not pursuant to an agreement or plan to effectuate by partial or successive transfers a transfer which would otherwise be included in the coverage of this article, and the transfer of real property by tenants in common, joint tenants or tenants by the entirety, provided that the subdividing of real property and the sale of such subdivided parcels improved with residences to transferees for use as their residences, other than transfers pursuant to a cooperative or condominium plan, shall not be deemed a single transfer of real property."

applied in the case of:

(a) One transferor, more than one transferee, contiguous or adjacent parcels of land?

Answer: When the sales are pursuant to a plan or agreement, the consideration for each parcel is to be aggregated in determining whether the consideration is \$1 million or more.

A transferor may furnish, along with his questionnaire, a sworn statement that the sales are not pursuant to an agreement or plan to effectuate by partial or successive transfers a transfer which would otherwise be included in the coverage of Article 31B.

Whether the sales are pursuant to a plan or agreement depends on the intent of the transferor at the time of each transfer. The department will examine the transferor's intention, as manifested by his actions and the facts and circumstances surrounding the transfers, to ensure the transfers should not be aggregated.

Also, gains tax regulations section 5490.43(g) states in pertinent part as follows:

Question: Will the subdividing of real property be subject to aggregation pursuant to section 1440(7) of the tax Law?

Answer: Yes. Section 1440(7) of the Tax Law specifically provides that all subdividing of real property is subject to the aggregation rule, except in the case where the subdivided property is improved with residences and is used for residential purposes, other than those pursuant to cooperative or condominium plans.

With respect to the reference to the sworn statement Petitioner is willing to submit, that the successive transfers were not being made with intent to evade the tax, it must be noted that the statute does not make an intent to avoid, or evade the gains tax a prerequisite for the aggregation rule to apply (Tax Appeals Tribunal Decision, In the Matter of the Petition of Thomas Iveli and Robert Sigmund, February 23, 1988 and Matter of Cove Hollow Farms, Inc. v State Tax Commn., Sup. Ct., Special Term, Albany County, October 1, 1987, McDermott, J.).

The facts of this matter cannot support a finding that a plan or agreement does not exist. Conversely, the facts show that Petitioner, over a relatively short period of time has assembled a tract of land, has re-subdivided such tract, and has begun to make sales of such subdivided parcels.

Accordingly, the consideration received from the sale of all parcels within the subdivided tract must be aggregated for the purpose of determining the gains tax \$1 million threshold. Since Petitioner is the subdivider of the tract, the relative contiguity or adjacency of each subdivided parcel at the time it is transferred has no relevance in determining whether the consideration from the transfer must be aggregated with the consideration received from the sale of other parcels within the tract.

Gains tax questionnaires must be filed at least 20 days before the sale of each parcel, and when the aggregate consideration received from the sale of all such parcels reaches \$1 million, gains tax must be paid based on the gain derived from all previous sales and on the date of all subsequent transfers (Gains tax regulations section 590.68(a) and (b)).

DATED: December 20, 1988

s/FRANK J. PUCCIA
Director
Technical Services

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