

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

TSB-A-90(6) R  
Real Property  
Transfer Gains Tax  
July 9, 1990

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M900315A

On March 15, 1990, a Petition for Advisory Opinion was received on behalf of Estate of Alan M. DaCunzo, c/o Lowenthal, Landau, Fischer and Ziegler, P.C., 250 Park Avenue, New York, New York 10177.

The issues raised by the Petitioner, Estate of Alan M. DaCunzo, are whether the consideration received from the sale of cooperative apartments by a beneficiary of the Estate of Alan M. DaCunzo will be aggregated with the consideration received from sales of other cooperative apartments by other beneficiaries for purposes of applying the one million dollar exemption provided for by the Tax on Gains Derived From Certain Real Property Transfer (the "gains tax") and whether the consideration received by the beneficiaries from the sale of cooperative apartments is to be aggregated with consideration received by Alan M. DaCunzo as sponsor of a cooperative conversion prior to his death.

The decedent, Alan M. DaCunzo, was the sponsor of an offering plan dated November 29, 1984 to convert 359-361 West 30th Street, New York, New York (the "Premises"), which contains twelve apartment units, to cooperative ownership. The Premises were conveyed to the cooperative housing corporation on December 31, 1985. At the time of conversion, the decedent sold three of the apartments, and prior to his death he sold one additional apartment.

In his will, the decedent bequeathed the eight remaining apartments: one each to three unrelated individuals and the other five to his parents and brother, as tenants in common. None of the beneficiaries had any interest in the cooperative apartments or in the real estate prior to the decedent's death. Furthermore, the beneficiaries of the Estate are unrelated to one another (except for the decedent's family who will own their units as tenants in common) and will not maintain any business relationship with one another subsequent to the distribution of assets.

At this time Petitioner would like to close out the cooperative filing made for gains tax purposes, in order that a final determination of any tax due with respect to the decedent's apartments may be made prior to the distribution of the assets of the estate since if the case remains open, a portion of the total gains tax ultimately owed will be attributable to the apartments sold by the decedent prior to his death. This creates serious administrative difficulties for the Petitioner, since it will be impossible for the Petitioner to make a final accounting until there is a conclusive determination of the Petitioner's ultimate gains tax liability.

The gains tax is a ten percent tax on the gain derived from the transfer of real property, which includes the transfer or acquisition of a controlling interest in any entity with an interest in real property, where the property is located in New York State and where the consideration for the

transfer is one located in New York State and where the consideration for the transfer is one million dollars or more.

Section 1440.7 of the Tax Law, in pertinent part, defines the term "transfer of real property" to mean:

the transfer or transfers of any interest in real property by any method, including but not limited to sale .... 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. For purposes of this article, transfers pursuant to a cooperative plan shall include all transfers of stock in a cooperative corporation which owns real property. Notwithstanding the foregoing, transfer of real property shall not include a transfer pursuant to devise, bequest or inheritance... (emphasis added)

Furthermore, Section 590.35 of the Gains Tax Regulations provides in part, as follows:

Question: Which transfers of cooperative shares by the person who transfers an interest in real property to the cooperative housing corporation (the realty transferor), or by the owners of the realty transferor, or by the cooperative corporation itself, require payment of tax?

(a) Transfers to tenant stockholders?

Answer: Yes, gains tax must be paid when the shares are transferred to persons who buy shares and are granted proprietary leases with respect to units.

(c) Transfers to family members of the realty transferor or family members of owners of the realty transferors?

Answer: Yes, gains tax must be paid when shares are transferred to family members of the realty transferor or family members of the owners of the realty transferor.

In addition, Section 590.40 of the Gains Tax Regulations provides, in part, as follows:

Question: In the case of transfers pursuant to a cooperative plan, how does the aggregation clause of section 1440(7) of the Tax Law and, accordingly, the \$1 million exemption apply to the following transfers?

(d) The transfer of shares by family members of the realty transferor or family members of the owners of the realty transferor?

Answer: As long as the transfers to the family members of the realty transferor or family members of the owners of the realty transferor were not made for the purpose of avoiding the gains tax, the transfers by such family members will not be aggregated with each other nor with the transfers by the realty transferor for purposes of applying the one million dollar exemption.

Moreover, section 1443.2 of the Tax Law provides exemption from the gains tax to the extent the real property being transferred consists of premises occupied by the transferor as his residence.

The bequest of the eight remaining apartments by Alan M. DaCunzo is not a transfer of real property for purposes of the gains tax and, therefore, the transfer by the Petitioner to the legatees is not subject to said tax since pursuant to Section 1440.7 of the Tax Law transfer of real property shall not include a transfer pursuant to devise, bequest or inheritance. This is so, regardless of the fact that the transfers are made to family members as deemed taxable in Section 590.35(c) of the Gains Tax Regulations. Thus, the Petitioner and the decedent will be deemed to have made a complete sell-out of all their units and their gains tax liability can be determined.

As for the subsequent transfer of the cooperative apartments by the family members, since such apartments were not acquired in a scheme to avoid the gains tax, the consideration received from the transfer of such apartments by the Petitioner is not required to be aggregated with the consideration received from transfers made by the decedent. In addition, the consideration received from their transfers are not required to be aggregated with the consideration received by the other three individual beneficiaries. However, the transfer of the five apartments by the family members will be subject to gains tax if the aggregate consideration anticipated to be received from the subsequent transfer of such apartments is one million dollars or more. Therefore, the family members must make a gains tax filing in connection with the subsequent transfer of these five apartments.

Moreover, the subsequent transfers of the apartments by the three unrelated beneficiaries will be treated separately for purposes of the one million dollar exemption. Even if the sales price

exceeds one million dollars, such transfers would not be subject to gains tax if the individual transferor can establish that he occupied and used such apartment exclusively as his residence.

DATED: July 9, 1990

s/PAUL B. COBURN  
Deputy Director  
Taxpayer Services Division

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