

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

TSB-A-92(8)-R
Real Property Transfer
Gains Tax
November 3, 1992

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M920922B

On September 22, 1992, a Petition for Advisory Opinion was received from Underberg and Kessler, 1800 Lincoln First Tower, Rochester, New York 14604.

The issues raised by Petitioner, Underberg and Kessler, are:

1. Whether the sale of the personal residence of Petitioner's client and her husband by a bankruptcy trustee would be exempt from the Real Property Transfer Gains Tax (hereinafter the "gains tax") under Section 590.24 of the Gains Tax Regulations where the premises were used at all times by Petitioner's client or her husband as a residence and never used for a business purpose.
2. Whether the fact that Petitioner's client moved out of the premises during the past six months due to marital discord would alter the conclusion reached for issue "1" above.
3. Whether the fact that Petitioner's clients interest in the premises will be transferred to a tax-exempt organization would alter the conclusion reached for issues "1" and "2" above.

Petitioner's client and her husband own, in joint name, a personal residence on approximately 30 acres of land in the Rochester, New York metropolitan area. Another seven acres of vacant land with a different tax number is contiguous to the 30 acre parcel. None of the 37 acres abutting the home ever was used for business purposes. The home was occupied jointly by Petitioner's client and her husband from the time it was acquired until Petitioner's client vacated the premises several months ago due to marital discord. Her husband continues to reside in the home. Petitioner's client is preparing to sue her husband for divorce. Both Petitioner's client and her husband are now in bankruptcy.

Petitioner's client and her husband have been offered approximately \$1.5 million by a tax-exempt organization for the home and 37 acres. If the offer is accepted and the transfer occurs, the technical transferors of the premises will be the bankruptcy estates of both Petitioner's client and her husband.

Section 1443 of the Tax Law provides, in part, as follows:

Sec. 1443. Exemptions.-- A total or partial exemption shall be allowed in the following cases:

* * *

2. If the real property consists of premises occupied by the transferor as his residence (but only with respect to that portion of the premises actually occupied and used for such purposes).

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Section 590.24 of the Gains Tax Regulations provides, in part, as follows:

(a) Question: Is the sale of an individual's personal residence subject to the gains tax where the consideration received is in excess of \$1 million?

Answer: No. Section 1443(2) of the Tax Law specifically exempts from the gains tax the sale of premises occupied by the transferor exclusively as his residence.

* * *

(f) Question: When a residence is sold, does all of the land abutting the residence qualify for the exemption?

Answer: Yes. A residence includes all the land on which the dwelling is located and the land abutting the dwelling as long as the abutting land was never used for business purposes (e.g., farm, rental, etc.). (See section 590.25 of this Part for a discussion on property used for business.) However, the land alone is not a residence and thus where part of the land is sold separately, the portion or portions sold without the dwelling will not qualify for the residential exemption found in section 1443(2) of the Tax Law.

In Jacoby Bender, Inc., 40 BR 10, 15 (Bkrcty. 1984) the U.S. Bankruptcy Court held that the debtor is not exempt from liability for the gains tax under Section 1146(c) of the Federal Bankruptcy Code.

Concerning issue "1", in accordance with Jacoby Bender, Inc., supra, the debtor in bankruptcy is deemed to be the transferor for any real property transferred in bankruptcy for purposes of determining the liability for the gains tax. Section 1443.2 of the Tax Law and Sections 590.24(a) and 590.24(f) of the Gains Tax Regulations provides that the sale of premises occupied by the transferor exclusively as his residence, including all land on which the dwelling is located and the land abutting the dwelling as long as the abutting land was never used for business purposes, is not subject to gains tax. Therefore, pursuant to Section 1443.2 of the Tax Law, Sections 590.24(a) and 590.24(f) of the Gains Tax Regulations and Jacoby Bender, Inc., supra, the transfer by a bankruptcy trustee of the personal residence and abutting land of Petitioner's client and her husband would not be subject to the gains tax.

With respect to issue "2", the opinion reached for issue "1" would still apply to issue "2" since Petitioner's client's husband continues to occupy the premises during the marital discord, Petitioner's client has only been out of the premises for a short period of time and the premises continues to be a joint asset of the marriage.

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Regarding issue "3", the opinions reached in issues "1" and "2" would not be altered by the fact that the premises will be transferred to a tax-exempt organization.

DATED: November 3, 1992

/s/
PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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