

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

TSB-A-93(17)-R  
Real Property  
Transfer Gains  
Tax

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M930729A

On July 29, 1993, a Petition for Advisory Opinion was received from Orange County Trust Company, 75 North Street, Middletown, New York 10940.

The issues raised by Petitioner, Orange County Trust Company, are:

1. Whether the transfer of the beneficiaries' dwelling house qualifies for the residential exemption for purposes of the Real Property Transfer Gains Tax (hereinafter the "gains tax") as provided by Section 1443.2 of the Tax Law.
2. Whether the consideration received from the sale of the beneficiaries' dwelling house must be aggregated with the consideration received from two contiguous vacant parcels for the purposes of the gains tax.

Mary and Seely Ward purchased a farm consisting of approximately 100 acres, partly within the Town of Chester and partly within the Town of Goshen, Orange County, New York on August 1, 1945. Upon the death of Seely Ward, Mary Ward became the sole owner of the property until the time of her death.

Mary and Seely Ward had two sons, Thomas and John. Both of them resided with Seely and Mary Ward and then with Mary Ward until the time of her death. They occupied the dwelling house located on the farm.

John Ward is mentally retarded having been born with a birth defect and is incompetent and not capable of taking care of himself. During her lifetime, Mary Ward took care of him. Thomas Ward was involved in a serious automobile accident when he was about 14 years of age and suffered head injuries which left him retarded as well, although not to the same degree as John. He also lived with his mother and father in the farm house on the farm until the death of Mary Ward.

Pursuant to Mary Ward's will dated October 26, 1981, Petitioner, a domestic banking corporation located in Middletown, New York, was named as Executor and as Co-Trustee with Charles M. Smith. Both Trustees qualified in the Surrogate's Court of Orange County and are still acting as Trustees.

Mary Ward's will contained language expressing her desire, but not a direction, that the two sons be permitted to remain in the dwelling house so long as possible after her death. The two sons are now in their late 40s.

Petitioner had insufficient funds to continue to maintain the farm which was, and is, a working farm which has been, and is, rented. An opportunity came to sell the land and retain the house as the residence and home of the two sons, which was the wish and desire of Mary Ward. In order to do this, it was necessary to subdivide the farm, which was done by Petitioner and approved by

the Planning Board of the Town of Goshen, and a subdivision map was filed in the Orange County Clerk's Office on June 19, 1990.

After the subdivision was approved, two contracts were entered into with Andrew L. Palmer, one for \$600,000 and one for \$300,000. The two parcels represented the vacant land on the farm and excluded the residence used by the Wards and, thereafter, continued to be used by the two sons. It was the intention of the Trustee to sell the vacant land on the farm and to maintain the residence and home of the two sons.

In January, 1993, the two sons determined that they no longer wished to reside on the property, and consequently, moved to Unionville, New York, where they presently reside. Thus, since they no longer wished to reside in the residence, the Trustees approached the buyer of the land and he agreed to purchase the residence as well. The purchase price agreed to was \$120,000. The purchaser is not, however, purchasing the residence for use as his personal residence. The sale of the three parcels has not yet been consummated.

From its purchase in 1945 until the present time, there has been no depreciation of the residential property occupied by the Wards either by them or by Petitioner or Trustees. It has been treated as the home acre and solely as a residence. All three parcels are, however, zoned agricultural.

Pursuant to Sections 1441 and 1443.1 of the Tax Law and Section 590.1 of the Gains Tax Regulations the gains tax is a ten percent tax on the gain derived from the transfer of real property, which includes the acquisition or transfer 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 million dollars or more.

Section 1440.7 of the Tax Law provides, in pertinent part, as follows:

7. "Transfer of real property" means the transfer or transfers of any interest in real property by any method, including but not limited to sale, exchange, assignment, surrender, mortgage foreclosure, transfer in lieu of foreclosure, option, trust indenture, taking by eminent domain, conveyance upon liquidation or by a receiver, or transfer or acquisition of a controlling interest in any entity with an interest in real property.

... 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.

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).

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

\* \* \*

(e) Question: Is the sale of premises by an estate exempt from the gains **tax** when the premises were occupied and used as a residence by the decedent?

Answer: Yes. The same rules for determining the applicability of the personal residential exemption for an individual apply to the sale of the premises by a decedent's estate.

(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. (emphasis added)

590.25 Residence used for business purpose.

(a)Question: How does the million-dollar exemption interact with the residential exemption when the transferor used a portion of his residence for a business use?

Answer: The million-dollar exemption is applied to the total consideration received for the transfer of the real property and therefore, if the total consideration is \$1 million or more the transaction will be taxable to the extent of gain realized on the business portion of the real property. The consideration received and the original purchase price must then be allocated between the portion of the property used for business and the residential portion; generally this allocation will be based on the method of allocation used on the transferor's Federal and State income tax return.

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Example: X uses 20 percent of his home exclusively for business purposes. In 1985, X sells his home for 1.6 million dollars. Since the total consideration is more than \$1 million the transfer will be subject to the gains tax. If X's original purchase price was \$600,000, his taxable gain would be computed as follows:

	<u>Total</u>	<u>Business</u> <u>(Total x 20%)</u>
Consideration	\$1,600,000	\$320,000
Original purchase price	<u>600,000</u>	<u>120,000</u>
Gain	\$1,000,000	\$200,000
Rate		<u>.10</u>
Tax Due		\$ 20,000

Section 590.42 of the Gains Tax Regulations provides as follows:

590.42 Contiguous or adjacent parcels.

Question: Is the consideration received by a transferor for the transfer of contiguous or adjacent parcels of property to one transferee added together for purposes of applying the \$1 million exemption?

Answer: Generally, yes. A transfer of real property is defined in section 1440(7) of the Tax Law to mean "the transfer or transfers of any interest in real property." Thus, the separate deed transfers of continuous or adjacent properties to one transferee are, for purposes of the gains tax, a single transfer of real property. It is the consideration for the interests in a single transfer, regardless of the number of deeds used to transfer the property, that is used to determine the application of the \$1 million exemption.

However, if the transferor establishes that the only correlation between the properties is the continuity or adjacency itself, and that the properties were not used for a common or related purpose, the consideration will not be aggregated.

When the transfer is to more than one transferor, whether the amount paid for each deed transfer is added together depends on whether the transferor is subject to the aggregation clause for partial or successive transfers. (See section 590.43 of this Part). (emphasis added)

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In Vincent Melomo et al. v. Tax Appeals Tribunal, 600 NYS2d 391, July 15, 1993, the Court held that the Division of Taxation's methodology of first computing the total consideration to determine if the \$1,000,000 gains tax threshold was met and then subtracting the apportioned value of the exempt residential interest was the correct method to follow when determining the gain subject to tax.

In Ahmet and Ioana M. Ertegun, Dec Tax App Trib, July 16, 1992 the Tribunal held that the consideration received from the sale of subdivided parcels should be aggregated even though one parcel was improved with the personal residence of the transferor and the other parcel was improved with a guest house.

In its decision the Tribunal held that since the transfer of the contiguous parcels were made to one transferee and that there was a correlation between the properties besides the contiguity or adjacency of the parcels that the provisions of Section 590.42 of the Gains Tax Regulations applied. In its discussion, the Tribunal held that only in the rare instance that the nature of the properties at issue had no kinship whatsoever, except their physical proximity, would the petitioners burden of showing that there was no correlation between the properties be met. Moreover, it was decided that since one parcel was the residence of the transferor and the other contiguous parcel was used for business purposes to derive rental income that the provisions of Sections 590.24(f) and 590.25 of the Gains Tax Regulations should also be applied for purposes of applying the one million dollar exemption.

With respect to issue "1", pursuant to Section 590.24(e) of the Gains Tax Regulations the transfer by an estate of the personal residence of a decedent is not subject to gains tax. In the instant case, Petitioner is transferring the residence of the decedents, Seely and Mary Ward, which is in trust for their sons John and Thomas Ward who occupied the premises as their personal residence. Therefore, pursuant to Section 1443.2 of the Tax Law and Section 590.24(e) of the Gains Tax Regulations the transfer of the residence by Petitioner is not subject to gains tax.

Concerning issue "2", pursuant to Section 1440.7 of the Tax Law and Section 590.42 of the Gains Tax Regulations the transfer of contiguous or adjacent parcels to one transferee is to be treated as a single transfer for purposes of the gains tax. Moreover, pursuant to Ahmet and Ioana M. Ertegun, supra, the transfer of contiguous parcels, which included a parcel improved with the personal residence of the transferor, to one transferee was treated as a single transfer and the consideration received for such parcels was required to be aggregated for purposes of the one million dollar threshold. In the instant case, Petitioner is transferring the personal residence of the beneficiaries and two contiguous parcels to one transferee. Further, the residence and the two vacant parcels have a correlation in that they were used for agricultural purposes and are zoned for agricultural use. Accordingly, pursuant to Section 1440.7 of the Tax Law, Section 590.42 of the Gains Tax Regulations, and Ahmet and Ioana M. Ertegun, supra, the consideration from the sale of the three parcels is to be aggregated.

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It is noted that since the real property was used partly as a residence of the transferor and partly for business use, the transfer of the real property will qualify for a partial exemption from the gains tax in accordance with Sections 590.24(f) and 590.25 of the Gains Tax Regulations and Ahmet and Ioana M. Ertegun, supra. However, in accordance with Vincent Melomo et al. v. Tax Appeals Tribunal, supra, Petitioner must first compute the total consideration for the transfer of all the parcels before apportioning the value of the exempt residential interest in determining the gain subject to tax.

DATED: November 2, 1993

s/PAUL B. COBURN  
Deputy Director  
Taxpayer Services Division

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