

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

TSB-A-93 (20) R
Real Property
Transfer Gains Tax
December 3, 1993

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M930826C

On August 26, 1993, as Petition for Advisory Opinion was received from Deegan Development Group, Inc., PO Box 4090, 112 North Front Street, Kingston, New York 12401.

The issue raised by Petitioner, Deegan Development Group, Inc., is whether the sale or lease of the building Petitioner is constructing for its client will be subject to the Real Property Transfer Gains Tax (hereinafter the "gains tax") upon the completion of a turnkey contract.

Petitioner owns a parcel of land on which it's client wants Petitioner to construct a building for them. The parcel of land represents a portion of the overall land it purchased three years ago.

It is proposed that Petitioner will sell the parcel of land it now owns to it's client for the original cost Petitioner paid to purchase the parcel three years ago. Subsequently, Petitioner will repurchase the parcel of land for the same price. Next, Petitioner will construct a building on the parcel of land and upon completion sell the building and land back to the client.

As an alternative, it is proposed that Petitioner will sell and reacquire the parcel of land for the original cost it paid to purchase the parcel three years ago. Next, Petitioner will construct a building on the parcel of land and upon completion of the building, lease the land and building to it's client. The value of the lease payments are anticipated to be in excess of one million dollars.

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 1443.5 of the Tax Law provides, in pertinent part, as follows:

A total or partial exemption shall be allowed in the following cases:

* * *

5. If a transfer of real property, however effected, consists of a mere change of identity or form of ownership or organization, where there is no change in beneficial interest.

Section 1448.1 of the Tax Law provides, in pertinent part, as follows:

The commissioner of taxation and finance shall administer and enforce the tax imposed by this article and is authorized to make such rules and regulations, and to require such facts and information to be reported, as the commissioner may deem necessary to enforce the provisions of this article. Where such commissioner finds that the transfer of any real property or an interest therein has been formulated that the primary purpose of such formulation is the avoidance or evasion of the tax imposed by this article, rather than for an adequate business purpose, the commissioner shall treat such transfer as subject to the tax imposed by this article... (emphasis added)

Some construction/rehabilitation projects are not subject to gains tax. While it is difficult to generalize about certain unique factual situations, such projects are exempt from the gains tax where although there is a transfer of legal title, the beneficial interest remains unchanged. Such projects may be exempt from gains tax when the following factors have been demonstrated:

1. the developer entered into a construction/rehabilitation agreement with the owner of the real property,
2. the real property was transferred by the owner to the developer solely for the purpose of facilitating the financing for the construction/rehabilitation project, and
3. the consideration paid by the owner to the developer for there conveyance did not include an amount representing the appreciation of the real property for the period the developer held title.

Thus, when an owner of real property transfers his property to a developer solely for the purpose of facilitating the financing for a construction/rehabilitation project for the benefit of the owner and the developer is obligated, upon completion of the project, to transfer the real property back to the owner and all of the facts clearly demonstrate that there was no change in the beneficial ownership of the real property, then the developer will not be viewed as having owned (or, therefore, as having transferred) the beneficial interest in the property.

A determination in the instant case as to whether Petitioner's client will be transferring the parcel back to Petitioner solely for the purpose of facilitating the financing for the construction/rehabilitation project and, thus, effectuating a mere change of identity pursuant to Section 1443.5 of the Tax Law is a factual question which cannot be determined in an Advisory Opinion. An Advisory Opinion merely sets forth the applicability of pertinent statutory and regulatory provisions to a "specified set of facts." Tax Law, Section 171, subd. twenty-fourth; 20 NYCRR 23716.1(a).

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It is further noted that pursuant to Section 1448.1 of the Tax Law, if the initial transfer by Petitioner to its client of the vacant parcel is being formulated for the primary purpose of avoiding or evading the gains tax, rather than for an adequate business purpose, the Commissioner of Taxation and Finance will treat such transfer and the subsequent related transfers between Petitioner and its client as subject to the gains tax. Whether Petitioner is structuring the transaction in such a manner as to avoid or evade the gains tax is also a factual question which cannot be determined within the context of an Advisory Opinion. Tax Law, Section 171, subd. twenty-fourth; 20 NYCRR 23716.1(a).

DATED: December 3, 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.