

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

TSB-A-93 (5)R
Real Property
Transfer Gains Tax
March 19, 1993

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M921029E

On October 29, 1992, a Petition for Advisory Opinion was received from 110 East 87 Co., One Penn Plaza, Suite 3515, New York, New York 10119.

The issues raised by Petitioner, 110 East 87 Co., are as follows:

- 1) Whether the transfer of unsold condominium units by the realty transferor, a partnership, to the respective partners, for resale, in proportion to their respective ownership interests in the entity will require the payment of the Real Property Transfer Gains Tax.
- 2) Whether the distributions from or contributions to the realty transferor of cash or other property from or to the partners solely to equalize the distributions of condominium units to the respective partners in proportion to their ownership interests will comply with the requirement of a distribution in proportion to the respective ownership in the entity and thus would not require the payment of gains tax. Due to the low partnership interest of certain partners, such partners may receive cash and other property only in lieu of realty, in proportion to their ownership interests.
- 3) Alternatively, whether the distributions from the realty transferor of unsold condominium units to the partners and distributions of cash or other property to equalize the value of such distributions, including the distribution of cash or other property only to certain "low" ownership partners, all in proportion to ownership interests, will be considered a transaction which will require the payment of gains tax.
- 4) As a second alternative, whether the distributions of unsold condominium units by the realty transferor to the respective partners in proportion to their respective ownership interests, including a contribution to or distribution of cash or other property to equalize value, and a distribution of realty as tenants-in-common to certain of the low ownership partners, will require the payment of gains tax.
- 5) That following the transfer of condominium units to the respective partners, what will the total original purchase price be to each of the respective partners, for purposes of the gains tax, after the transfer of condominium units from the realty transferor in the proposed transaction considering each of the alternatives and the extent, if any, that each such proposed transfer from the realty transferor did or did not require the payment of gains tax.
- 6) Whether regarding subsequent transfers of condominium units by the respective partners, what would be the proper application of the aggregation rules, for purposes of the \$1 million exemption, for realty received from the realty transferor in the

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proposed transfer and each of the alternatives, considering the extent, if any, that such units were received in a transaction which did or did not require the payment of gains tax.

Petitioner, a New York Limited Partnership, is the owner of residential real property located in Manhattan, New York. Originally, Petitioner owned an entire building, and adopted a plan to convert to condominium ownership. The approximate date of first offering was June 1, 1984. At such time, the purchase price for 65 residential and 3 professional units was in excess of \$10,000,000 pursuant to the offering plan.

Petitioner currently possesses 26 unsold condominium units from the original offering plan. It is anticipated that the unsold units will have a current fair market value (FMV) ranging from \$40,000 to \$60,000 per unit, for a total FMV of approximately \$1,110,000. The partnership is composed of eight partners, the ownership of which is as follows:

	(1) <u>Ownership</u>	<u>Allocation of FMV</u>
Trust	9.00%	\$ 99,000
Individual 1	1.50	16,500
Individual 2	1.50	16,500
Individual 3	1.50	16,500
Individual 4	1.50	16,500
Corporation 1	42.50	467,500
Corporation 2	14.16	155,760
Corporation 3	<u>28.34</u>	<u>311,740</u>
	<u>100.00%</u>	<u>\$1,100,000</u>

The four individual partners, each having a 1.5% ownership interest, are considered the "low" ownership partners.

The sale of condominium units, in the aggregate have exceeded one million dollars and, thus, gains tax has been paid on such transfers.

Petitioner, aside from holding the condominium units for sale, acts as a rental agent for some of the units. A portion of the units remain vacant. A transaction is contemplated in which Petitioner will terminate and distribute the partnership property in complete liquidation to its partners.

Petitioner's property to be distributed consists mainly of the unsold condominium units. The actual FMV of these units will be determined by independent appraisal prior to the proposed transaction. It is planned that the individual unsold condominium units will be distributed to the various partners in proportion to their respective ownership interests in the partnership. The allocation of these units to the various partners or distribution raises some problems since each unit has an estimated FMV ranging from \$40,000 to \$60,000 per unit. The allocation of unsold condominium units for distribution to the three corporate partners, which separately have the highest ownership percentages, and the trust partner, can be accomplished, with a minimal amount of cash

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or other property required to be contributed from or distributed to such partners necessary to equalize the value of distributions. The four individual partners, each with a 1.5% ownership interest in the partnership, present some problems. Based upon the estimated FMV of partnership property (the unsold condominium units) of \$1,110,000, each of these individual partners have a proportional share of an estimated FMV of \$16,500. Thus, with the lower range of FMV of unsold units being approximately \$40,000, steps have to be considered to equalize the FMV of distributions according to the individuals' proportionate interest in the partnership. A number of alternatives have been considered to accomplish this. None of the ten partners will take the condominium units to be used as a residence in any of the alternatives, and all of the partners will hold the units for sale.

The initial plan to terminate Petitioner and distribute the property includes the distribution of only cash or other property, other than realty, to two, and possibly three, of the individual partners in proportion to their ownership interest in the partnership and thus allowable share of the FMV of the partnership property. One, or possibly two of the individual partners may contribute cash or other property to the partnership and be able to receive a distribution of a condominium unit upon termination of the partnership. The additional cash or other property received by the partnership will be used to supplement and equalize the distributions to the other partners according to their respective partnership interests. The ownership interests of the individual partners (1.5% each) is not material compared to the total FMV of the partnership.

An alternative to the original plan may be to distribute cash or other property only in the total amount of approximately \$66,000 to the four individual partners, having in the aggregate a 6% ownership interest in the partnership. This portion of the transaction could be accomplished prior to the termination of the partnership or pursuant to the plan of liquidation. The other partners may be required to contribute to or receive a distribution from the partnership of cash or other property, in order to equalize the distributions of realty according to their respective ownership interests, and to have sufficient funds to accomplish the payment of cash or other property, other than realty, to the four individual partners.

As a second alternative it may be proposed that the four individual partners, having an aggregate ownership interest in the partnership of 6%, and possibly the trust partner, having an ownership interest in the partnership of 9%, receive a distribution of unsold condominium units as tenants-in-common in proportion to their aggregate ownership interests. The corporate partners, and possibly the trust partner, if not included with the individuals as tenants in-common, would receive a distribution of realty according to their respective partnership interests. All of the partners may have distributions from or require contributions to the partnership of cash or other property solely to equalize the distribution of condominium units to the respective partners, including those as tenants-in-common, in proportion to the respective partnership interests.

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. 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. (emphasis added)

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

590.35 Transfers of shares which require payment of tax. [Tax Law, S1440(7)]

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?

* * *

(f) Transfers by the realty transferor to its owners?

Answer: No, if the realty transferor is a partnership, corporation, or other entity and transfers the shares to its owners, for investment or resale, in proportion to their respective ownership interests in the entity, these transfers will not require payment of tax. This result applies whether the owners hold the shares jointly or individually, provided that the owners do not take the shares as tenant stockholders. Following transfers to the owners of the realty transferor which do not require payment of tax, the owners hold the shares in the place of the realty transferor and their total original purchase price is equal to that of the realty transferor's immediately before the transfer ... (emphasis added)

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

590.40 Million-dollar exemption. [Tax Law, §§ 1440(7) 1443(1)]

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?

(a) The transfer of shares by the realty transferor and the owners of the realty transferor?

Answer: All transfers by the realty transferor are aggregated with all the transfers by any transferor who received his shares in a transaction that did not require payment of tax, as described in section 590.35 of this Part, because the transferee was an owner of the realty transferor. This total aggregation will determine the application of the \$1 million exemption to all transfers by the realty transferor and to all such owners.

Further, Section 590.44(a) of the Gains Tax Regulation provides as follows:

590.44 Acquisition of a controlling interest. [Tax Law, S1440(2)]

(a) Question: How is the phrase "acquisition of a controlling interest in an entity with an interest in real property" applied?

Answer: The term controlling interest is defined in section 1440(2) of the Tax Law to mean:

"(i) in the case of a corporation, either fifty percent or more of the total combined voting power of all classes of stock of such corporation, or fifty percent or more of the capital, profits or beneficial interest in such voting stock of such corporation, and (ii) in the case of a partnership, association, trust or other entity, fifty percent or more of the capital, profits or beneficial interest in such partnership, association, trust or other entity."

Thus, for purposes of the gains tax, in the case of a corporation which has an interest in real property, the acquisition of a controlling interest in the corporation occurs when a person or group of persons, acting in concert, acquires a total of 50 percent or more of the voting stock in such corporation. In the case of a partnership, association, trust or other entity, the acquisition occurs when a person or group of persons, acting in concert, acquires a total of 50 percent or more of the capital, profits or beneficial interest in such entity. Because the statute looks to the acquisition of the controlling interest, it is the act of the transferee which triggers the tax.

Section 590.45(d) of the Gains Tax Regulations provides as follows:

(d) Question: If a shareholder acquires a 50-percent interest in a corporation and gains tax is paid on the transfer, and one year later the same shareholder acquires an additional 20 percent, is there a second acquisition of a controlling interest?

Answer: Yes. The interests acquired after March 28, 1983 are added together in determining whether an acquisition of a controlling interest has occurred. No acquisition of stock will be added to another acquisition of stock if they occur more than three years apart, unless the acquisitions were so timed as part of a plan to avoid the gains tax. An example of this would be if T acquired 80 percent of the stock and simultaneously contracted for the purchase of the remaining 20 percent in three years and one day.

Regarding issue "1", pursuant to Section 590.35 of the Gains Tax Regulations the transfer of unsold cooperative shares by a cooperative corporation to the owners of the realty transferor in proportion to their respective ownership interests in the entity is not subject to gains tax. The principle established by such regulation would apply to condominium units transferred by the realty transferor to its owners. Therefore, the transfer of the unsold condominium units to the partners of Petitioner in proportion to their respective ownership interest would not be subject to gains tax.

Concerning issue "2", provided the distributions from or contributions to the realty transferor of cash or other property from or to the partners precedes the distribution of the condominium units to the partners, the distribution of the condominium units to the partners will not be subject to the gains tax within the principle established by Section 590.35(f) of the Gains Tax Regulations.

It is noted, however, that the distributions from or contributions to the realty transferor of cash or other property from or to the partners in exchange for or to increase the "low" ownership partners interest may result in the transfer and acquisition of a controlling interest pursuant to Section 1440.7 of the Tax Law and Sections 590.44 and 590.45(d) of the Gains Tax Regulations.

Concerning issue "3", provided the distribution from the realty transferor of cash or other property to the "low" ownership partners in liquidation of their partnership interest precedes the distribution of the condominium units to the remaining partners, the distribution of the condominium units to the partners will not be subject to the gains tax within the principle established by Section 590.35(f) of the Gains Tax Regulations.

It is noted, however, that the distribution from the realty transferor of cash or other property to the "low" ownership partners in liquidation of their partnership interest may result in the transfer or acquisition of a controlling interest pursuant to Section 1440.7 of the Tax Law and Sections 590.44 and 590.45(d) of the Gains Tax Regulations.

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As for issue "4", provided the contribution or distribution of cash or other property to equalize value precedes the distribution of the condominium units to the partners in proportion to their respective ownership interest either individually or as tenants-in-common, such distributions of units will not be subject to the gains tax within the principle established by Section 590.35(f) of the Gains Tax Regulations.

It is noted, however, that the distribution from the realty transferor of cash or other property to equalize ownership interest may result in the transfer or acquisition of a controlling interest pursuant to Section 1440.7 of the Tax Law and Sections 590.44 and 590.45(d) of the Gains Tax Regulations.

With respect to issue "5", provided the distributions from or contributions to the realty transferor of cash or other property from or to the partners precedes the pro rata distribution of the condominium units to the partners, pursuant to Section 590.35(f) of the Gains Tax Regulations the original purchase price of such condominium units is equal to that of the realty transferor's immediately before the transfer.

Where the distributions from or contributions to the realty transferor of cash or other property to the partners results in the transfer or acquisition of a controlling interest, the original purchase price of such condominium units as held by the realty transferor may be stepped-up to reflect the consideration recognized on the transfer of the ownership interest.

It is noted, however, that the distribution of realty to certain "low" ownership partners will not affect the original purchase price of the condominium units as held by the realty transferor unless such distribution of realty results in a transfer or acquisition of a controlling interest through the liquidation of the "low" ownership partner's interest.

Concerning issue "6", pursuant to Section 590.40(a), all transfers by the partners of the condominium units received from the realty transferor must be aggregated with all the sales made by the realty transferor for purposes of the \$1 million exemption where the units are held by the partners for investment or resale.

DATED: March 19, 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.