

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

TSB-M-96 (1) R  
Real Property Transfer Gains Tax  
Real Estate Transfer Tax  
May 21, 1996

**Recent Topics of Interest**

The Department of Taxation and Finance has recently received several inquiries with respect to the determination of consideration for purposes of the Real Property Transfer Gains Tax (the gains tax) imposed by Article 31-B of the Tax Law and the Real Estate Transfer Tax (the transfer tax) imposed by Article 31 of the Tax Law. This memorandum provides the answers to these inquiries.

**Issue One**

Does the amount of the gains tax or transfer tax paid by a party other than the transferee, on behalf of the transferor, constitute consideration received by the transferor for the transfer or conveyance of real property?

**Issue Two**

In a transfer or conveyance pursuant to a mortgage foreclosure, when the mortgagee is foreclosing a senior lien, does the amount secured by junior liens canceled by operation of law resulting from the foreclosure sale constitute consideration for purposes of the gains tax and the transfer tax?

**Issue Three**

What consideration must a defaulted mortgagor recognize for a transfer of real property pursuant to a mortgage foreclosure when the transferee/grantee received the right to purchase the property sold at the foreclosure sale by way of an assignment of the bid from the mortgagee/successful bidder and the transferee/grantee is unrelated to the mortgagee?

**Applicable Law and Regulations**

Section 1440.1(a) of Article 31-B of the Tax Law, in defining consideration for gains tax purposes, states: " 'Consideration' means the price paid or required to be paid for real property or any interest therein, less any customary brokerage fees.... Consideration includes the cancellation or discharge of an indebtedness or obligation. "

Section 140 1 (d) of Article 31 of the Tax Law, in defining consideration for transfer tax purposes, states: “ ‘Consideration’ means the price actually paid or required to be paid for the real property or interest therein,.... It shall include the cancellation or discharge of an indebtedness or obligation....”

Section 590.9 of the gains tax regulations provides:

*Question:* If an agreement is negotiated between a transferor and transferee whereby the transferee agrees to pay the gains tax for the transferor, does such payment constitute additional consideration to the transferor?

*Answer:* Yes. The consideration for the transfer is the price paid or required to be paid for the real property or any interest therein, and includes the cancellation or discharge of an indebtedness or obligation. Since the transferor is personally liable for payment of the gains tax, payment of the tax by the transferee constitutes additional consideration to the transferor.

Section 590.60(c) of the gains tax regulations provides that for a transfer pursuant to a mortgage foreclosure, when the transferee is unrelated to the mortgagee, the "consideration includes, but is not limited to, the sum of the amount of the bid price, and the total amount of any other liens or encumbrances that remain on the real property after the transfer, whether the underlying indebtedness is assumed or taken subject to. ..."

Section 575.1 l(a)(3)(ii) of the transfer tax regulations provides that for a conveyance pursuant to a mortgage foreclosure, when the grantee is a person unrelated to the mortgagee, consideration includes the sum of the bid price plus the total amount of any liens or encumbrances that remain on the real property after the conveyance, whether the grantee assumes the underlying indebtedness or takes the real property subject to the underlying indebtedness.

### **Conclusion**

With respect to issue one, when a party other than the transferee/grantee pays the gains tax and/or the transfer tax, it does not pay this amount for the real property or interest in the real property. Therefore, the payment of the tax does not constitute consideration for purposes of computing either the gains tax or the transfer tax. This is the case as long as the person who pays the tax does not do so on behalf of the transferee/grantee and there is no agreement between the transferor/grantor and the transferee/grantee that the transferee/grantee will pay the tax on behalf of the transferor/grantor. See Robert Schwagerl, (Adv Op Comm Tx and Fin, October 30, 1995, TSB-A-95(14)-R).

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With respect to issue two, since the junior liens are canceled by operation of law, the cancellation of the underlying indebtedness does not constitute consideration paid by the transferee/grantee for the real property. Accordingly, the amount secured by the junior liens is not included in consideration for either gains tax or transfer tax purposes.

With respect to issue three, the consideration for the transfer or conveyance is determined according to the above cited gains tax regulations section 590.60(c) and transfer tax regulations section 575.1 1(a)(3)(ii). Accordingly, consideration includes the sum of the bid price plus any continuing lien,;. It is irrelevant that the unrelated transferee/grantee received the right to purchase the property by way of an assignment of the bid from the mortgagee/successful bidder.