

1989 Amendments to the
Real Estate Transfer Tax

On April 19, 1989, Chapter 61 of the Laws of 1989 was enacted to provide substantive, administrative and clarifying amendments to Article 31 of the Tax Law, Real Estate Transfer Tax.

The effective date of Chapter 61 for Real Estate Transfer Tax purposes is July 1, 1989, and will apply to all conveyances occurring on and after such date, except that the substantive amendments set forth in Part II of this memorandum shall not apply to conveyances made pursuant to binding written contracts entered into on or before February 16, 1989.

This memorandum provides a brief summary of the various amendments.

I. Administrative and Clarifying Amendments

- A. Section 1403 of the Tax Law, which provided for the payment of tax through the purchase of stamps, use of metering machines or any other method, is repealed.
- B. Section 1404(a) of the Tax Law is amended to clarify that where the grantor fails to pay the tax, or where the grantor is exempt from tax, the grantee is personally liable for such tax. Section 1404(a), as amended, also provides that where the grantee has the duty to pay the tax because the grantor has failed to pay, the tax due shall be the joint and several liability of the grantor and grantee.

Section 1404(b) is amended to clarify that where consideration includes property other than money it shall be presumed that the consideration is the fair market value of the real property or interest therein. These presumptions shall prevail until the contrary is proven by the person liable for payment of the tax.
- C. Section 1406 of the Tax Law is amended to add new subdivision (e) to provide that the provisions for the preparation and sale of documentary stamps shall not apply to the extent the Commissioner of Taxation and Finance chooses not to use the stamps in connection with the payment of tax.
- D. Section 1407 of the Tax Law is amended to change the cross reference on payment of the tax to section 1410, rather than 1403, and replace references to the Tax Commission with references to the Commissioner of Taxation and Finance to conform with the new structure of the Department of Taxation and Finance resulting from the creation of the Division of Tax Appeals.
- E. Section 1408 is amended to add that, in addition to recording officers, any other person designated to act as agent pursuant to section 1407 will not be held liable for this tax when the amount of tax collected is inaccurate, provided the amount of tax is computed and collected on the amount of consideration shown on the return.

- F. Section 1409 of the Tax Law, which provided for refunds without interest, is repealed. (See item K for new refund policy.)
- G. New section 1409 requires that a return signed by both the grantor and grantee be filed for each conveyance of real property or interest therein whether or not any tax is due. The return must be filed with the Commissioner of Taxation and Finance, if no instrument is recorded, at the time the tax is due or with the recording officer before the instrument effecting the conveyance may be recorded. In cases where the return is filed with the Commissioner, a receipt evidencing the filing of the return shall be filed with the recording officer before the instrument effecting the conveyance may be recorded. This section also provides that the Commissioner of Taxation and Finance may prescribe a supplemental form in the cases where the conveyance is pursuant to or in lieu of foreclosure, or the conveyance consists in part of a mere change of identity or form of ownership or organization or the conveyance is one for which a credit for tax previously paid will be claimed. This section also requires the Commissioner of Taxation and Finance to combine the newly required transfer tax return with one or all the forms required to be filed for the Real Property Transfer Gains Tax and the Credit Line Mortgage Certificate.

Also, at his discretion, the Commissioner of Taxation and Finance is authorized to combine the state transfer tax return with the transfer tax return required to be filed by the cities of New York, Yonkers or Mt. Vernon.

(Note: The Tax Department has combined the Transfer Tax return with the Gains Tax Affidavit and the Credit Line Mortgage Certificate (Form TP-584) to meet the filing requirements and will issue a separate TSB-M outlining the new filing procedures.)

- H. Chapter 61 renumbers section 1410 to be section 1421.
- I. New section 1410(a) provides that the tax shall be paid to the Commissioner of Taxation and Finance or his agent no later than 30 days after delivery of the conveying instrument to the grantee, whenever an affidavit (Schedule B of new Form TP-584) is required to be completed pursuant to section 1447(1)(f)(ii) of the Tax Law and an instrument is submitted to the recording officer of a county for recording. In all other instances, the tax shall be paid no later than the first business day after the delivery of the conveying instrument to the grantee. The date of the instrument will be presumed to be the date of the instrument's delivery.

New section 1410 (b) provides that the conveying instrument will not be accepted for recording unless accompanied by the required return and payment of the tax.

Recording officers of counties are authorized by the Commissioner of Taxation and Finance to collect the tax and accept returns only in those cases where an instrument is submitted for recording.

- J. New section 1411 gives authority to the Commissioner of Taxation and Finance to assess additional tax where the return is not filed or is incorrect when filed. This section also provides that such assessment becomes final and irrevocable unless a petition for a

- hearing before the Division of Tax Appeals is filed within 90 days after the assessment is issued or unless the Commissioner of Taxation and Finance on his own motion redetermines such assessment. Section 1411 also sets forth the procedure to be followed if an Article 78 review is to be requested.
- K. New section 1412(a) provides that a grantor or grantee who erroneously paid the tax or any person designated by such grantor or grantee may file a claim for a refund within two years from the date the tax is paid. Section 1412(b) provides the procedure for review of the determination made by the Commissioner of Taxation and Finance whereby such refund application was denied in whole or in part. Section 1412(c) provides that a grantor or grantee shall not be entitled to a refund under this section for tax, penalty or interest assessed pursuant to section 1411 of the Tax Law where such grantor or grantee has had a hearing or an opportunity for a hearing, as provided in such section, or has failed to avail himself or herself of the remedies therein provided. Section 1412(d) provides that interest shall be paid on refunds that are granted.
- L. New section 1413 provides that the review procedures of sections 1411 and 1412 are the exclusive remedies to obtain review of a real estate transfer tax liability or an application for refund of such tax.
- M. New section 1414 provides the Commissioner of Taxation and Finance with collection methods to recover real estate transfer tax, penalty and interest. These methods include the right to request the Attorney General to bring an action to enforce payment and the right to issue a warrant to a sheriff or a Tax Department employee commanding them to levy upon and sell property of the person liable for the tax.
- N. New section 1415 describes the general powers of the Commissioner of Taxation and Finance and includes the power to make rules and regulations, the power to require the grantor and grantee to keep records, the power to examine books and records, and the power to subpoena witnesses. Section 1415(c) also states that the Commissioner of Taxation and Finance shall extend, for cause shown, the time for filing a return, for a period not exceeding three months. Section 1415(d) provides that the Commissioner of Taxation and Finance may prescribe the method for determining consideration on the portion of real property located in New York State where the real property is located both in and outside of New York State.
- O. New section 1416 provides for the payment of interest on assessments, late payment of tax and refunds, at the rate set by section 1096(e) of the Tax Law. This section also imposes a penalty of 10% of amount of tax due for any delay in paying tax, and an interest penalty of 2% of such amount per month or fraction thereof. The interest penalty is capped at a maximum of 25%. This section authorizes the Commissioner of Taxation and Finance to waive such penalty and interest penalty, if the delay in paying tax was based on reasonable cause and was not due to willful neglect.
- P. New section 1417 cross references Article 37 of the Tax Law for applicable criminal penalties.

- Q. New section 1418 provides for the secrecy of the real estate transfer tax returns, but allows for the exchange of such returns with certain other governmental officials, provided a reciprocity agreement exists between the Commissioner of Taxation and Finance and the other governmental officials and the information is used for tax purposes only. This section further provides that, upon written request by the Commissioner of Internal Revenue, copies of the returns shall be provided to such Commissioner for use in court actions or proceedings under the Internal Revenue Code provided a reciprocity agreement exists. The new section also allows the Tax Appeals Tribunal to publish a copy or a summary of any decision rendered after the hearing required pursuant to the Tax Law. This section also provides that any officer or employee of the state who willfully violates the provisions of this section shall be dismissed from office and be incapable of holding any public office in this state for a period of five years thereafter. However, these provisions do not prohibit a recording officer from indicating on an instrument effecting a conveyance the amount of tax paid.
- R. New section 1419 provides rules for the mailing of notices and returns authorized or required under the provisions of Article 31.
- S. New section 1420 provides a three-year statute of limitations on assessments, except in the case of a willfully false or fraudulent return or where no return was filed, in which cases tax can be assessed at any time. Section 1420 also provides for the extension of time to assess additional tax where the taxpayer has consented to such extension in writing. Section 1420 also provides that where the taxpayer has consented in writing to the extension, the period for filing for a refund pursuant to section 1412 shall not expire prior to six months after the extension has expired.
- T. Chapter 61 also amended section 1825 of Article 37 of the Tax Law (Crimes and Other Offenses, Seizures and Forfeitures) to add that a violation of the secrecy provision of section 1418(a) of the Tax Law is a misdemeanor.

II. Substantive Amendments

- A. Subdivision (b) of section 1401 of the Tax Law, which defines the word "deed", is repealed.
- B. New subdivision (b) of section 1401 of the Tax Law adds the definition of the term "controlling interest." The term "controlling interest" means (i) in the case of a corporation, either 50% or more of the total combined voting power of all classes of stock of such corporation, or 50% 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, 50% or more of the capital, profits or beneficial interest in such partnership, association, trust or other entity.
- C. Subdivision (c) of section 1401 is amended by deleting from the definition of the term "real property or interest therein" the reference to "interest therein." A separate definition of "interest in real property" is added to section 1401.

- D. The definition of the term "consideration" in subdivision (d) of section 1401 is amended to make it applicable to the transfers of leasehold interests, sublease hold interests and the granting of options to purchase an interest in real property accompanied with use or occupancy of such real property, to assignments or surrenders of leasehold interests, to assignments of options or contracts to purchase real property, to transfers or acquisitions of controlling interests in entities that own or that have an interest in real property located in New York State, and to conveyances of shares of stock in a cooperative housing corporation in connection with the grant or transfer of a proprietary leasehold.
- E. New subdivision (e) of section 1401 is added to provide the definition of the term "conveyance." The term "conveyance" means the direct or indirect transfer of any interest in real property, including the creation of a leasehold interest where (1) the sum of the term of the lease or sublease and any options for renewal exceeds 49 years, (2) substantial capital improvements are or may be made by or for the benefit of the lessee or sublessee, and (3) the lease or sublease is for substantially all of the premises constituting the real property; the acquisition or transfer of a controlling interest of an entity with an interest in real property; and the assignment of options, contracts and leaseholds.
- F. New subdivision (f) of section 1401 adds the definition of the term "interest in the real property." The term "interest in the real property" includes title in fee, a leasehold interest, a beneficial interest, an encumbrance, development rights, air space and air rights, or any other interest with the right to use or occupancy of real property or the right to receive rents, profits or other income derived from real property. It also includes an option or contract to purchase real property.
- G. Subdivision (g) of section 1401 is amended to change the definition of the term "grantor" to mean the person making the conveyance of real property or interest therein, and in the case where the conveyance consists of a transfer or an acquisition of a controlling interest in an entity with any interest in real property, "grantor" means the entity with an interest in real property or a shareholder or partner transferring stock or partnership interest, respectively, to a person or persons acquiring a controlling interest in such entity.
- H. Subdivision (h) of section 1401 is amended to change the term "grantee" to mean the person who obtains real property or interest therein as a result of a conveyance.
- I. Section 1402 is amended to provide that a tax is imposed on each conveyance of real property or interest therein where the consideration received exceeds \$500.
- J. New section 1402-a imposes an additional transfer tax on each conveyance of residential real property or interest therein when the consideration for the entire conveyance is \$1 million or more. Residential real property includes any premises that is or may be used in whole or in part as a personal residence, and shall include a one-, two-, or three- family house, an

individual condominium unit, or a cooperative apartment unit. The rate of tax is 1% of the consideration or part thereof attributable to the residential real property. The tax shall be paid by the grantee. However, if such grantee is exempt from tax, the grantor shall pay the tax.

- K. Section 1405 is amended to delete the references to the term "deed" and replace it with the term "conveyance." Three new exemptions are also added. The first is for conveyances which involve a "mere change" in identity, or form of ownership or organization where there is no change in beneficial ownership. (The current exemption applicable to mergers, dissolutions or consolidations of corporations is repealed). A second exemption is added for the conveyance of real property that consists of the execution of a contract to sell real property without the use or occupancy of such real property or the granting of an option to purchase real property without use or occupancy of such property. The third exemption added is for the conveyance of an option to purchase real property with use or occupancy where the consideration is less than \$200,000 and such property was used solely by the grantor as his or her personal residence.
- L. New section 1405-A provides a credit to the extent tax was paid by the grantor on a prior creation of a leasehold or granting of an option or contract to purchase real property of all or a portion of the same property by such grantor.
- M. New section 1405-B clarifies that the real estate transfer tax is applicable to the original conveyance of shares in a cooperative housing corporation in connection with the grant of a proprietary leasehold and to the subsequent conveyances of such shares. In determining the tax on the original conveyance of shares in the corporation, a credit will be allowed for a proportionate part of the amount of tax paid on the conveyance to the cooperative housing corporation of the real property comprising the cooperative dwelling to the extent such conveyance effected a mere change of identity or form of ownership of the property and not a change in beneficial ownership. The credit will not be allowed for a tax paid more than 24 months prior to the first conveyance of shares in the cooperative housing corporation. In determining the tax on subsequent conveyances of shares, a continuing lien deduction will be allowed for individual cooperative units. An information return requirement is imposed on the cooperative housing corporation to report conveyance of shares of stock in the corporation by January 15 and July 15 of each year, covering the preceding six month period.