



# Department of Taxation and Finance

## Important

The real property transfer gains tax was repealed for transfers of real property that occur on or after June 15, 1996.

The information in this TSB-M is out-of-date and is provided only for historical purposes.

For additional information concerning the repeal of the tax, see [TSB-M-96\(4\)R](#).

The TSB-M begins on page 2 below.

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

TSB-M-93 (1) R  
Real Property Transfer  
Gains Tax  
June 4, 1993

1993 Amendments to the  
Real Property Transfer Gains Tax

Chapter 57 of the Laws of 1993 was enacted on April 15, 1993. Included in Chapter 57 are amendments to Article 31-B of the Tax Law, the Real Property Transfer Gains Tax (gains tax).

The following is a summary of the gains tax amendments effectuated by Chapter 57.

**DEFINITION OF CONSIDERATION**

A new paragraph (d) is added to subdivision (1) of section 1440 of the Tax Law. New paragraph (d) provides a definition of consideration which applies in the case of:

- (1) a transfer of real property resulting from an action to foreclose a mortgage or lien pursuant to the provisions of the Real Property Actions and Proceedings Law including a transfer by a debtor in bankruptcy resulting from such a foreclosure, where the mortgagee or lienor (or any agent or nominee thereof) is the successful bidder;
- (2) a transfer of real property to a mortgagee or lienor (or any agent or nominee thereof) in lieu of foreclosure or in lieu of any other action to enforce a security interest, including a transfer by a debtor in bankruptcy to a creditor holding a mortgage or other lien on the real property; and
- (3) a transfer of real property or an interest therein pursuant to a secured party's enforcement of a lien, security interest or other rights on or in shares of stock of a cooperative housing corporation and associated proprietary lease, including a transfer by a debtor in bankruptcy to the secured creditor.

Specifically, new paragraph (d) provides that in the case of transfers described in (1) above, consideration means the sum of (a) the higher of the bid price or the judgment in foreclosure and (b) the amount of all other liens or encumbrances remaining on the real property after the transfer. However, consideration shall not exceed the fair market value of the real property or interest therein.

For transfers described in (2) above, new paragraph (d) provides that consideration means the sum of (a) the unpaid balance of the debt secured by the mortgage or lien and (b) the amount of all other liens or encumbrances that remain on the real property or interest therein after the transfer. However, consideration shall not exceed the fair market value of the real property or interest therein.

For transfers described in (3) above, new paragraph (d) provides that consideration means the sum of (a) the unpaid balance of the debt secured by such lien, security interest or other rights; (b) the total amount of all other liens, security interests or other interest remaining on the shares of stock of the cooperative housing corporation and associated proprietary lease after the transfer; and (c) a pro rata portion of the total amount of all other liens or encumbrances on the real property of the cooperative housing corporation that remain after the transfer. However, consideration shall not exceed the fair market value of the shares of stock of the cooperative housing corporation and associated proprietary lease.

Furthermore, in the case of the transfers described in (1), (2) and (3) above to an entity owned in whole or in part by the mortgagee, lienor or secured creditor, the provisions of new paragraph (d) shall apply to the extent that the exemption provided in Section 1443.5 of the Tax Law (the mere change of identity exemption) would be allowable with respect to a transfer of real property from the mortgagee, lienor or secured creditor to such entity.

Chapter 57, by amending the definition of consideration as described above, limits the calculation of consideration to the fair market value of the real property or interest therein being transferred, with respect to the specified transfers described herein, to the extent the transferee is the mortgagee, lienor or secured creditor.

These changes in the definition of consideration took effect on April 15, 1993 and apply to transfers occurring on or after such date.

#### **DEFINITION OF ORIGINAL PURCHASE PRICE**

Chapter 57 amended paragraph (a) of subdivision 5 of section 1440 of the Tax Law to expand the definition of original purchase price to include:

- (1) customary, reasonable and necessary advertising and marketing costs paid by the transferor and incurred to sell the real property which are not otherwise included in customary brokerage fees;

- (2) any tax paid by the transferor to record a mortgage which secures a debt incurred by the transferor (a) to acquire the real property, (b) to construct a capital improvement or (c) any tax paid by the transferor to record a mortgage created as a result of a conveyance of the real property to a cooperative housing corporation. Chapter 57 thus specifically permits the special additional mortgage recording tax paid by the transferor to be included in original purchase price;
- (3) a portion of the interest paid or required to be paid by the transferor on a loan used to acquire the real property. The amount of interest which may be included in original purchase price with respect to such a loan is limited to the interest which accrues during a construction period and is attributable to that portion of the real property that is the subject of the construction of a capital improvement during such construction period; and
- (4) customary, reasonable and necessary costs, fees and expenses incurred by the transferor to acquire a full or partial real estate tax exemption available under section 421-a of the Real Property Tax Law. The amount of such costs, fees and expenses included in original purchase price is, however, subject to amortization. The total amount of such costs, fees and expenses is multiplied by a fraction, the numerator of which is the number of months remaining at the time of transfer in which the 421-a exemption may be claimed with respect to the real property being transferred and the denominator of which is the total number of months the 421-a exemption could be claimed.

These amendments to the definition of original purchase price took effect on April 15, 1993 and apply to transfers occurring on or after such date.

#### **PENALTY AND INTEREST PENALTY REVISION**

Chapter 57 amended section 1446.2 of the Tax Law to revise the penalties and interest penalty imposed under the gains tax to apply certain aspects of the corporate tax/income tax penalty structure to the gains tax. The interpretation of concepts introduced to the gains tax penalty structure by Chapter 57 will generally follow the interpretation of such concepts for purposes of the corporate and personal income taxes, applied in light of the circumstances presented by the different structure and nature of the gains tax. Specifically, Chapter 57 amends paragraph (a) of section 1446.2 of the Tax Law, reletters paragraphs (b) and (c) to be paragraphs (e) and (g) and adds new

paragraphs (b),(c), (d), and (f) as described below.

- (1) Paragraph (a) of section 1446.2 of the Tax Law is amended to limit the application of the penalty and interest penalty under this paragraph to a failure to file a tentative assessment and return or to pay the tax shown on a tentative assessment and return. The failure to pay an amount of tax required to be shown which is not shown would be covered by the new paragraph (b), discussed below (and possibly by new paragraphs (c) and (d)). Paragraph (a) is also amended to provide the Commissioner with the authority to remit, abate or waive all or a part of the penalty and interest penalty imposed, where a failure to file or a failure to pay the tax shown within the prescribed time was due to reasonable cause and not due to willful neglect. Thus, the Commissioner may abate a portion of the penalty where that portion is attributable to a failure which is due to reasonable cause. Under the previous penalty structure, the Commissioner did not have the authority to partially remit, abate or waive the penalty or interest penalty.
- (2) New paragraph (b) of section 1446.2 of the Tax Law, as added by Chapter 57, provides that a penalty of 1/2 of 1 percent per month shall be imposed for the failure to pay the amount of tax stated to be due in a notice and demand within 10 days of the date of such notice, to be computed on the amount of tax which was required to be shown on a tentative assessment and return which was not so shown (e.g. additional tax assessed as a result of a post transfer audit), unless it is shown that such failure is due to reasonable cause and not due to willful neglect. The penalty under new paragraph (b) applicable in this situation begins accruing only after a failure to pay following notice and demand. Under prior law any late payment penalty would begin accruing from the time tax was due. For purposes of computing this penalty for any month, the amount of tax stated in the notice and demand is reduced by the amount of any part of the tax which is paid before the beginning of such month. New paragraph (b) also limits the combined penalties and interest penalty imposed under paragraph (a) and new paragraph (b) of section 1446.2 attributable to the tax shown on a notice and demand to a maximum of 50 percent of such tax.
- (3) New paragraph (c) of section 1446.2 has been added to provide a penalty for failure to pay any amount of tax required to be shown on a tentative assessment and return filed which is not so shown, if the failure to pay any tax within the time required

is due to negligence or intentional disregard of Article 31-B or rules or regulations thereunder (but without intent to defraud). In such a case, there shall be added to the tax (i) a penalty of five percent of the amount of tax due plus (ii) for the period beginning on the last day prescribed for the payment of such tax and ending on the day the amount of tax due is finally determined or if earlier, on the day on which the tax is paid, an interest penalty equal to fifty percent of the interest payable under subdivision one of section 1446 of the Tax Law, on that portion of the unpaid tax which is attributable to negligence or intentional disregard. The interest penalty under paragraph (c) is compounded daily.

- (4) New paragraph (d) of section 1446.2, as added by Chapter 57, provides a 10 percent penalty for substantially understating the amount of tax due for a transfer, computed on the amount of the understatement. For purposes of the substantial understatement penalty, a taxpayer substantially understates the tax if the amount of the understatement exceeds the greater of 10 percent of the tax required to be shown on the tentative assessment and return or \$5,000. The amount of the understatement is the excess of the total tax for the transfer (i.e. the tax required to be shown on the tentative assessment and return that was filed) over the amount of the tax shown on the tentative assessment and return, reduced by any rebate (within the meaning of subsection (h) of section 1081 of the Tax Law). Provided that in the case of transfers pursuant to a cooperative or condominium plan or other partial or successive transfers, the amount of the understatement is the excess of the total amount of tax required to be shown on all tentative assessments and returns filed with respect to the transfers, over the amount of tax shown on the tentative assessments and returns, reduced by any rebate as described above. However, when determining whether the substantial understatement penalty applies, the understatement shall be reduced by the amount of tax which is attributable to the tax treatment of any item by the person liable for the tax, for which there was substantial authority for the treatment or any item with respect to which the tax treatment is or was adequately disclosed (as determined by the Commissioner) in the pre-transfer audit procedure filing prescribed by section 1447 of the Tax Law or in a statement designated for such purpose by the Commissioner (where, for instance, the taxpayer has not complied with the pre-transfer audit procedure). New paragraph (d) provides the Commissioner with the

authority to waive all or part of the substantial understatement penalty described herein on a showing by the person liable for the tax that there was reasonable cause for the understatement or part thereof, and that such person acted in good faith.

- (5) Paragraph (e) of section 1446.2, as relettered by Chapter 57, is amended to provide that the penalty imposed by paragraph (e) due to fraud is imposed in lieu of the penalties imposed by newly added paragraphs (b) and (c), as well as paragraph (a), of section 1446.2.
- (6) New paragraph (f) of section 1446.2 is added to provide that the amount of tax due upon which the penalties are computed under clause (i) of paragraphs (c) and (e) of section 1446.2 shall be reduced by the amount of tax shown on a tentative assessment and return if and only if such tentative assessment and return was timely filed.

The amendments to the penalty and interest penalty provisions take effect on September 12, 1993 and shall apply to liabilities relating to transfers of interests in real property with respect to which the statute of limitations for determination of tax under section 1444.3 has not expired as of September 12, 1993 and no notice of determination has been issued as of such date with respect to such liabilities.

## **TRANSFEEE LIABILITY**

Chapter 57 amended the transferee liability provisions in section 1447 of the Tax Law by adding a new subparagraph 3 to Section 1447.3 (b). New subparagraph 3 provides that in the case of a transfer of real property in lieu of foreclosure or in lieu of enforcement of a lien, security interest or other rights on or in shares or other ownership interests evidenced by stock certificates or other instruments, and a leasehold evidenced by a proprietary lease, or either of the foregoing, the mortgagee, the lienor, the cooperative housing corporation or other secured party in such a transfer is released from personal liability as transferee for any gains tax determined to be due from the transferor. This relief from transferee liability also applies to a transfer to a secured creditor by a debtor in bankruptcy. Please note, however, that new subparagraph 3 also provides that to the extent any sum of money is paid or is required to be paid to the transferor by the mortgagee, lienor, cooperative housing corporation or other secured party, transferee liability exists to the extent of the amount of such sum of money paid or required to be paid by the transferee to the transferor. Thus, the transferee would be required to withhold the lesser of such sum of money or the amount of gains tax due on the transfer. Lastly, new subparagraph 3 provides that the limitation on transferee liability

does not apply where the Commissioner determines that such lien, security interest or other right was created for the primary purpose of acquiring the real property or interest therein in a transaction which would limit or eliminate transferee liability.

The amendments to the transferee liability provisions do not relieve the transferor and the transferee from their obligation to comply with the pre-transfer audit filing procedure as provided in subdivision 1 and 2 of Section 1447 of the Tax Law.

The above provisions are also applicable in the case of such a transfer to a party named to act on behalf of the secured party. For example, if stock or a partnership interest is transferred from a defaulting obligor, as transferor, to a wholly owned subsidiary of the secured party, as transferee, in full satisfaction of the debt and no money is paid to the defaulted obligor, the wholly owned subsidiary would be relieved of transferee liability to the extent that the exemption provided for in Section 1443.5 of the Tax Law would apply to a transfer of real property from the secured party to such wholly owned subsidiary.

The amendments to the transferee liability provisions took effect April 15, 1993 and apply to transfers occurring on or after such date.