

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

TSB-M-94 (2) - R
Real Property Transfer
Gains Tax
April 7, 1994

Safe Harbor Estimates for Transfers

Pursuant to Cooperative and Condominium Plans

This memorandum supersedes TSB-M-86(3)-R, "Safe Harbor Estimate for Transfer Pursuant to Condominium and Cooperative Plans" dated May 1, 1986, and is being issued for the purpose of revising the safe harbor standards for estimating the consideration to be received from transfers pursuant to cooperative and condominium plans.

Application of Safe Harbor Estimates

The safe harbor estimates are standards that provide a method of calculating the anticipated consideration under a cooperative or condominium plan for unsold shares or units, i.e., those that are (1) not subscribed for or are not under a contract of sale as of the date of the initial submission and (2) those shares or units that continue to be not subscribed for or are not under a contract of sale or remain unsold as of each required update point. The safe harbor estimates apply only to the transfer of cooperative shares or condominium units made by the cooperative or condominium plan sponsor, the nominee of the sponsor and the owners of the sponsor, if the sponsor is an entity. (Hereinafter all such parties shall collectively be referred to as the sponsor.)

Effect of Electing to Use the Safe Harbor Estimates

A sponsor who uses the appropriate safe harbor estimate to calculate the consideration to be received from the transfer of unsold shares or units will be treated during the sell-out period, (i.e., the period that such sponsor is holding unsold^d shares or units pursuant to the cooperative or condominium plan) as if such sponsor had estimated the consideration at the exact amount that is actually received for the shares or units when sold. Accordingly, penalties, interest penalties and interest will not accrue against such a sponsor for the underpayment of tax with respect to the transfer of such shares or units, to the extent that such underpayment is the result of the excess of the actual consideration received for the transfer of shares or units over the proper safe harbor estimate of consideration used for such shares or units. The amount of such underpayment will be rolled forward and be paid as future sales are made unless the sell-out period has ended. However, penalties and interest penalties may accrue and interest will accrue during the sell-out period for the

underpayment of tax resulting from the understatement of any other component of consideration or overstatement of deductions therefrom (e.g., contributions to a working capital fund or reserve fund) or the overstatement of original purchase price.

When the sell-out period has ended, the safe harbor estimate will cease to have any further prospective application. This means that when the sell-out period has ended the sponsor must compute the actual total tax due from the transfers pursuant to the cooperative or condominium plan based on the actual consideration paid or required to be paid for the transfers. Any additional tax due with respect to transfers during the sell-out period must be paid no later than the fifteenth day after the date that the sellout period has ended.

Presumption That Sell-Out Period Has Ended

In general, a sponsor's sell-out period ends when the sponsor has transferred all interest held in the shares or units offered pursuant to the cooperative or condominium plan. However, there will be a presumption that a sponsor's sell-out period has ended, although such sponsor still holds unsold shares or units, under the following circumstances:

- (1) in the case of a newly constructed and vacant cooperative or condominium plan, or a non-eviction conversion plan, if the sponsor has transferred 85% or more interest in the cooperative or condominium and more than one year has passed since such sponsor has made a transfer pursuant to the cooperative or condominium plan; and
- (2) in the case of an eviction conversion cooperative or condominium plan, if the sponsor has transferred 85% or more interest in the cooperative or condominium, more than three years have passed since the plan was declared effective, and more than one year has passed since the sponsor has transferred an interest in the cooperative or condominium.

The percentage of interest transferred in the cooperative or condominium must be determined consistent with the method of apportionment elected on the initial submission for purposes of determining the amount of tax that must be paid as shares and units are transferred.

A sponsor may rebut a presumption that a sell-out period has ended by demonstrating to the Tax Department that such sponsor intended or intends to actively continue selling shares or units in the cooperative or condominium and did not refrain from selling shares or units in order to avoid or evade paying tax on the actual consideration received on prior transfers of shares or units. A sponsor who demonstrates this to the Tax Department will rebut the presumption retroactively to the date it arose, and will benefit from the uninterrupted application of the safe harbor estimate.

Within 15 days of the date that the conditions described in (1) or (2) above have been met, the sponsor is required to make a filing to reflect a calculation of tax due as if the sell-out period has ended (i.e., a final update submission). In lieu of such a filing, the sponsor may rebut the presumption that the sell-out period has ended as described in the preceding paragraph, by submitting a statement or other documentation as may be necessary to support a conclusion that the sell-out period has not ended.

Calculation of the Safe Harbor Estimates

The safe harbor estimate applicable to any cooperative or condominium plan will depend on the plan's status as:

- (1) newly constructed and vacant,
- (2) an eviction conversion plan, or
- (3) a non-eviction conversion plan.

Newly Constructed and Vacant

Initial Submission

On the initial submission, the safe harbor estimate for a newly constructed and vacant cooperative or condominium is the lesser of the following:

- (a) 100% of the total of the offering plan prices for the unsold shares or units; or
- (b) 100% of the total of the fair market value of the unsold shares or units.

The offering plan prices and the fair market value of the shares or units will be those in effect or established as of the date the initial submission is filed, or the date the initial submission is prepared, if within a reasonable time of the filing date. The number of unsold shares or units will be determined as of that same date.

The fair market value of the unsold shares or units will be based on the purchase price of all shares or units as set forth in the subscription agreements or contracts of sale which have been entered into as of the date the initial submission is filed, or the date the initial submission is prepared, if within a reasonable time of the filing date. If there is an insufficient number of subscription agreements or contracts of sale for shares or units to establish fair market value, or if circumstances indicate that the shares or units are not being transferred at fair market value, then the sponsor must use 100% of the total of the offering plan prices to calculate the safe harbor estimate as set forth under (a) above.

Update Submissions

At any required update point, the safe harbor estimate is the lesser of::

- (a) 100% of the total of the offering plan prices for the remaining unsold shares or units; or
- (b) 100% of the total of the fair market value of the remaining unsold shares or units.

The offering plan prices and the fair market value of the shares or units are those in effect or established as of the date the update submission is filed or as of the date the update submission is prepared, if within a reasonable time of the filing date. The number of unsold shares or units is determined as of that same date.

In the case of the first required update submission following the initial submission, the fair market value of the remaining unsold shares or units will be based on the average purchase price of the shares or units that have been transferred to purchasers between the date that the initial submission is filed and the date that the update submission is filed, or the date the update submission is prepared if within a reasonable time of the filing date. In the case of a subsequent update submission, the fair market value of the remaining unsold shares or units will be based on the average purchase price of the shares or units that have been transferred to purchasers between the date that the prior required update submission was filed and the date that the current update submission is filed, or the date the current update submission is prepared, if within a reasonable time of the filing date. If circumstances indicate that shares or units are not being transferred at fair market value, then the sponsor must use 100% of the total of the offering plan prices to calculate the safe harbor estimate as set forth under (a) above.

If the safe harbor estimate elected by the sponsor is 100% of the fair market value of the unsold shares or units, an update submission is required at the 25%, 50%, 75% and 100% sell-out points. Where the safe harbor estimate elected by the sponsor is 100% of the total of the offering plan prices for the unsold shares or units, an update submission is required at the 50%, 75% and 100% sell-out points.

Eviction Conversion Plan

Initial Submission

On the initial submission, the safe harbor estimate for an eviction conversion cooperative

or condominium plan is 100% of the total of the offering plan prices established for tenants in occupancy for the unsold shares or units.

The offering plan prices used are those in effect for tenants in occupancy as of the date the initial submission is filed, or the date the initial submission is prepared, if within a reasonable time of the filing date. The number of unsold shares or units is determined as of that same date.

Update Submissions

At any required update point, the safe harbor estimate is 100% of the average price at which shares or units have been sold to tenants in occupancy multiplied by the number of unsold shares or units. If no sales have been made to tenants in occupancy, the safe harbor estimate is 100% of the total of the offering plan prices for the remaining unsold shares or units established for tenants in occupancy.

The average price at which shares or units have been sold is such average price established as of the date the update submission is filed or the date the update submission is prepared, if within a reasonable time of the filing date. In the case of the first required update submission following the initial submission, the average price at which shares or units have been sold to tenants in occupancy will be based on the average purchase price of the shares or units that have been transferred to tenants in occupancy between the date that the initial submission is filed and the date that the update submission is filed, or the date the update submission is prepared if within a reasonable time of the filing date. In the case of a subsequent update submission, the average purchase price of the shares or units that have been sold to tenants in occupancy will be based on the average purchase price of the shares or units that have been transferred to tenants in occupancy between the date that the prior required update submission was filed and the date that the current update submission is filed, or the date the current update submission is prepared, if within a reasonable time of the filing date.

The offering plan prices are those in effect for tenants in occupancy as of the date the initial submission is filed or the date the initial submission is prepared, if within a reasonable time of the filing date.

The number of unsold shares or units is determined as of the date the update submission is filed or the date the updated submission is prepared, if within a reasonable time of the filing date.

An update submission is required at the 75% and 100% sell-out points.

Non-eviction Conversion Plan

Initial Submission

On the initial submission, the safe harbor estimate for a non-eviction conversion cooperative or condominium plan is the lesser of the following:

- (a) 100% of the total of the offering plan prices established for tenants in occupancy for the unsold shares or units; or
- (b) 50% of the total of the vacant market value for the unsold shares or units.

The offering plan prices for tenants in occupancy and the vacant market value are those in effect or established as of the date the initial submission is filed, or the date the initial submission is prepared, if within a reasonable time of the filing date. The number of unsold shares or units is determined as of that same date.

The vacant market value of the unsold shares or units will be based on the purchase price of the shares or units as set forth in the subscription agreements or contracts of sale which have been entered into as of the date the initial submission is filed, or the date the initial submission is prepared, if within a reasonable time of the filing date. If there is an insufficient number of subscription agreements or contracts of sale for such shares or units to establish vacant market value, or if circumstances indicate that such shares or units are not being transferred at vacant market value, then the sponsor must use 100% of the total of the offering plan prices established for tenants in occupancy to calculate the safe harbor estimate as set forth under (a) above.

Update Submissions

At any required update point, the safe harbor estimate is the lesser of:

- (a) 100% of the average price at which shares or units have been sold to tenants in occupancy multiplied by the number of unsold shares or units. If no sales have been made to tenants in occupancy, then 100% of the total of the offering plan prices for the remaining unsold shares or units established for tenants in occupancy is used instead of such average price; or
- (b) 50% of the total of the vacant market value for the unsold shares or units.

The average price at which shares or units have been sold to tenants in occupancy is such average price established as of the date the update submission is filed or the date the update submission is prepared, if within a reasonable time of the filing date. In the case of the first required update submission following the initial submission, the average price at which shares or units have been sold to tenants in occupancy will be based on the average purchase price of the shares or units that have been transferred to tenants in occupancy between the date that the initial submission is filed and the date that the update submission is filed, or the date the update submission is prepared if within a reasonable time of the filing date. In the case of a subsequent update submission, the average price at which shares or units have been sold to tenants in occupancy will be based on the average purchase price of the shares or units that have been transferred to tenants in occupancy between the date that the prior required update submission was filed and the date that the current update submission is filed, or the date the current update submission is prepared, if within a reasonable time of the filing date.

The offering plan prices are those in effect as of the date the initial submission is filed or as of the date the initial submission is prepared, if within a reasonable time of the filing date.

The vacant market value of the unsold shares or units is that which is established as of the date the update submission is filed or the date the update submission is prepared if within a reasonable time of the filing date. In the case of the first required update submission following the initial submission, the vacant market value of the remaining unsold shares or units will be based on the average purchase price of the shares or units that have been transferred to purchasers between the date that the initial submission is filed and the date that the update submission is filed, or the date the update submission is prepared if within a reasonable time of the filing date. In the case of a subsequent update submission, the vacant market value of the remaining unsold shares or units will be based on the average purchase price of the shares or units that have been transferred to purchasers between the date that the prior required update submission was filed and the date that the current update submission is filed, or the date the current update submission is prepared, if within a reasonable time of the filing date.

The number of unsold shares or units is determined as of the date the update submission is filed or the date the update submission is prepared, if within a reasonable time of the filing date.

An update submission is required at the 25%, 50%, 75% and 100% sell-out points.

Effective date

The revised safe harbor estimates set forth in this memorandum apply to initial and update submissions made or required to be made on or after June 1, 1994.

Future Changes

The Tax Department reserves the right to change the formulation of the safe harbor estimate. Any such changes may apply to pending submissions but will only apply prospectively.