

STATE OF NEW YORK
DEPARTMENT OF TAXATION AND FINANCE
COMMISSIONER OF TAXATION AND FINANCE
ALBANY, NEW YORK

Pursuant to the authority contained in subdivision First of section 171, section 663 and subsection (a) of section 697 of the Tax Law, the Commissioner of Taxation and Finance hereby makes and readopts as an emergency measure and proposes to make and adopt as a permanent rule the following amendments to the New York State Personal Income Tax Regulations, as published in Subchapter A of Chapter II of Title 20 of the Official Compilation of Codes, Rules and Regulations of the State of New York, such amendments to read as follows:

Section 1. A new part 163 is added to such regulations to read as follows:

PART 163

ESTIMATED PERSONAL INCOME TAX DUE UPON THE SALE OR TRANSFER OF REAL PROPERTY
BY A NONRESIDENT TAXPAYER

(Statutory authority: Tax Law, §§171, 663, 697)

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Section 163.1 General and definitions.

(a) Section 663 of the Tax Law requires that a nonresident taxpayer must estimate and pay the personal income tax liability on the gain, if any, upon the sale or transfer of real property within New York State. For purposes of section 663, the following rules and definitions apply:

(1) “Date of sale or transfer” is the date the deed effecting the conveyance is delivered by the seller or transferor to the transferee.

(2) “Nonresident taxpayer.” (i) A nonresident taxpayer is an individual who qualifies as a nonresident individual under section 605(b)(2) of the Tax Law, or an estate or trust that qualifies as a nonresident estate or trust under section 605(b)(4) of the Tax Law, on the date of sale or transfer of real property.

(ii) An individual who is not domiciled in New York State but who may be considered a resident of New York State for tax purposes under section 605(b)(1)(B) of the Tax Law at the end of a taxable year, by virtue of maintaining a permanent place of abode in New York State for substantially all of the taxable year and by spending in aggregate more than one hundred eighty-three days of the taxable year in New York State, is a nonresident for purposes of this requirement unless the individual has already qualified as a resident on the date of sale or transfer of real property. (See section 105.20 of this Title concerning qualifying as a resident under section 605(b)(1)(B).)

(3) “Gain” on the sale or transfer has the same meaning as used in section 1001 of the Internal Revenue Code as that section applies to the sale or transfer of real property.

(4) “Sale or transfer of real property” means the change of ownership of a fee simple interest in real property by any method.

(5) "Seller or transferor" means the individual, estate, or trust making the sale or transfer of a fee simple interest in real property.

(6) "Recording officer" means the county clerk of the county, except in a county having a register, where it means the register of the county, or in the city of New York where it means the city register and any other employee of the Department of Finance, as appropriate.

Section 163.2 Estimation of tax due.

(a) A nonresident taxpayer must estimate the personal income tax due on a form prescribed by the commissioner, using an estimated tax rate that equals the highest rate of tax for the taxable year provided in section 601 of the Tax Law. The estimated tax due will equal the gain, if any, multiplied by that rate. The amount of the gain used in the computation is equal to the amount reportable for federal income tax purposes for the taxable year.

(b) If the real property being sold or transferred is located partly within and partly without New York State, then the nonresident taxpayer must estimate the tax due using only the portion of the gain reasonably attributable to the portion of the real property located within New York State.

(c) If the nonresident taxpayer is an estate or trust, it must estimate the tax due based on the gain, if any, computed without reduction for any distribution of income to the beneficiaries during the tax year of the sale or transfer.

Section 163.3 Filing and payment.

(a) A nonresident taxpayer must file the estimated tax form with the recording officer, along with payment of any estimated tax due, at the time a deed is recorded or accepted for recording. The taxpayer must make a payment payable to the Department of Taxation and Finance for the estimated tax that is separate from any other payment made to the recording officer at this time. (For an alternate payment and certification procedure which is available for sales with a date of sale or transfer on or before December 31, 2003, see Part 163 of Title 20 NYCRR

(adopted on August 26, 2003) and section 663 of the Tax Law enacted by Chapter 62, Laws of 2003. The payment and certification procedure set forth in the August 26, 2003 regulation is in lieu of the procedure set forth herein.) Except for a nonresident taxpayer who meets one of the exemptions from the requirements described in section 163.4 of this Part, all nonresident taxpayers who are sellers or transferors of real property within New York State must file the estimated tax form whether or not they have a gain.

Section 163.4 Exemption from requirements.

(a) Section 663(d) of the Tax Law provides that the requirements of section 663 do not apply where:

(1) the real property being sold or transferred is the principal residence of the seller or transferor within the meaning of section 121 of the Internal Revenue Code (see subdivision (b) of this section);

(2) the seller or transferor is a mortgagor conveying the mortgaged property to a mortgagee in foreclosure or in a transfer in lieu of foreclosure with no additional consideration (see definition of “consideration” in section 575.1(d) of this Title); or

(3) the seller or transferor, or transferee is an agency or authority of the United States of America, an agency or authority of New York State, the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, the Government National Mortgage Association, or a private mortgage insurance company.

(b) The principal residence exemption set forth in paragraph (a)(1) of this section applies only where the property being sold or transferred qualifies in total as the principal residence of the seller or transferor. If the property being sold or transferred includes both the principal residence and other property, then the taxpayer must file and pay any estimated tax due based on the gain from the other property.

Section 163.5 Requirements for recording of deed.

(a) No deed shall be recorded or accepted for recording by any recording officer unless the recording officer has received with respect to every seller or transferor who is an individual, estate or trust: (1) a form prescribed by

the commissioner, along with payment in full of the estimated tax due, if any, or, (2) a form prescribed by the commissioner containing a certification by the individual, estate or trust that section 663 is inapplicable to the sale or transfer. The method for taxpayers to make the certification is prescribed in forms and instructions.

Section 163.6 Designation of and duties of agents.

The recording officers in New York State shall act as the agents of the commissioner to collect the estimated tax due, if any, shown to be payable on the form prescribed by the commissioner. The recording officer must collect the estimated tax at the time that a deed is recorded or accepted for recording and must collect a payment payable to the Department of Taxation and Finance for the estimated tax that is separate from any other payment made to the recording officer at this time. Every recording officer must remit to the commissioner any funds collected and returns filed with such recording officer in a timely manner, not to exceed three business days after receipt of the funds and returns.

Section 163.7 Liability of recording officer.

A recording officer is not liable for any inaccuracy in any statement on the form prescribed by the commissioner or in the amount of estimated tax collected so long as he or she collects the estimated tax shown as payable on the form.

Section 163.8 Validity of record of deed.

When a deed is recorded notwithstanding an omission or inaccuracy in the form prescribed by the commissioner or in any certification by the transferor on such form or a deficiency in the payment of estimated tax, the record of such deed is not invalidated by reason of such omission, inaccuracy, erroneous certification or deficiency and the title founded on such deed is not impaired thereby.

Section 2. This emergency readoption is effective on January 22, 2004, the date that the Notice of Emergency Adoption and Proposed Rule Making is filed with the Secretary of State, and will remain in effect for

a period of 60 days (March 21, 2004). These amendments shall take effect as a permanent rule on the day the Notice of Adoption regarding such amendments is published in the State Register. Both the amendments readopted on an emergency basis and the amendments adopted as a permanent rule shall apply to all sales or transfers of real property within New York State by taxpayers subject to Article 22 of the Tax Law on or after September 1, 2003.

Dated: Albany, New York
January 22, 2004

Andrew S. Eristoff
Commissioner of Taxation and Finance