

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

TSB-A-94 (6)R
Real Property Transfer
Gains Tax
Real Estate Transfer Tax
May 24, 1994

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M940422C

On April 22, 1994, a Petition for Advisory Opinion was received from Vacation Village Homeowners Association, Inc., P. O. Box 650, Loch Sheldrake, New York 12759.

The issue raised by Petitioner, Vacation Village Homeowners Association, Inc., is whether the proposed conversion of lots within the homeowners association into condominium units and the resulting exchange by association members of their lot deeds for condominium deeds would constitute a mere change of identity or form of ownership or organization and therefore be exempt from the Real Property Transfer Gains Tax (hereinafter the "gains tax") and the Real Estate Transfer Tax (hereinafter the "transfer tax").

Petitioner is a homeowners association encompassing a realty subdivision, known as Vacation Village, located in Sullivan County, New York. Each lot in the development has been deeded to its homeowner by a deed, recorded in the Office of the Sullivan County Clerk. Many lots are encumbered by mortgages which are recorded as liens against the applicable lots. Pursuant to the Declaration of Covenants, Restrictions, Easements, Charges and Liens (the "Declaration") each homeowner is automatically a member of Petitioner, which owns title to the common facilities such as athletic facilities and the community center.

It is proposed that the ownership of the lots in the development will be converted to a condominium structure of ownership. It is anticipated that homeowners who participate in such conversion would realize reductions in real property taxes and increased value and marketability of their respective properties. All of the members of Petitioner must consent to the conversion, although not every homeowner will be required to exchange his or her lot for a condominium unit. In such instances, homeowners who do not wish to convert their lots to condominium ownership will continue to own their lots under the existing homeowner association form of ownership.

Under the proposed structure, Petitioner would remain in existence with all of its members, and would continue to own all of the existing common areas. The Declaration would be amended and a new Condominium Declaration would be recorded. The lot of each converting homeowner would be deeded to the condominium through an escrow agent or similar nominee (most likely a title company). In exchange, the homeowner would receive a condominium unit deed. After the exchange, the homeowner would own a condominium unit, comprised of his entire home, including the exterior (or the middle, in the case of townhouse party walls) of the walls, roof and foundation slab. In addition, the homeowner would own an equal percentage interest in the condominium's common elements, including (and with exclusive use of) the limited common elements consisting of the homeowners former lot. Thus, each condominium unit owner would enjoy the same exclusive

right to "his land" as he did prior to the conversion. Moreover, the homeowners would remain a member of Petitioner, which would continue to own the existing common areas (i.e., the entire subdivision other than the individual lots). Petitioner would continue to collect equal assessments from all owners, whether or not they participated in the conversion, and would continue to maintain all of the common areas.

In accordance with Section 1402 of the Tax Law, a transfer tax is imposed on each conveyance of real property or interest therein at the time that the instrument effecting the conveyance is delivered by a grantor to a grantee when the consideration for the conveyance exceeds five hundred dollars.

Section 1401(e) of the Tax Law provides, in pertinent part, that the term "conveyance" means the transfer or transfers or any interest in real property by any method.

Section 1405 of the Tax Law provides, in part, as follows:

Sec. 1405. Exemption.--(a) The following shall be exempt from payment of the real estate transfer tax:

* * *

6. Conveyances to effectuate a mere change of identity or form of ownership or organization where there is no change in beneficial ownership, other than conveyances to a cooperative housing corporation of the real property comprising the cooperative dwelling or dwellings;

Pursuant to Sections 1441 and 1443.1 of the Tax Law and Section 590.1 of the Gains Tax Regulations the gains tax is a ten percent tax on the gain derived from the transfer of real property, which includes the acquisition or transfer of a controlling interest in any entity with an interest in real property, where the property is located in New York State and where the consideration for the transfer is one million dollars or more.

Section 1440.7 of the Tax Law defines the term "transfer of real property", in part, to mean the transfer or transfers of any interest in real by an method.

Section 1443 of the Tax Law provides, in pertinent part, as follows:

Sec. 1443. Exemptions.-- A total or partial exemption shall be allowed in the following cases:

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5. If a transfer of real property, however effected, consists of a mere change of identity or form of ownership or organization, where there is a no change in beneficial interest.

In 115 Spring Street Company, Adv Op Comm T&F, March 30, 1994, TSB-A-94(3)R, the Commissioner opined that where each partner pursuant to a partnership agreement held a beneficial interest solely in the unit he occupied and had no interest in the other partners' units, that it was recognized that the beneficial ownership of each unit vested with each individual partner without regard to ownership of the property being held by the petitioner. Thus, the transfer of the shares allocated to the units from the cooperative housing corporation to each partner whereby each partner received shares allocated to the unit he occupied constituted a mere change of identity or form of ownership or organization since there was no change in the beneficial ownership of each unit.

In the instant case each homeowner, pursuant to the Declaration, holds a beneficial interest solely in the lot and home he or she occupies as his or her residence and holds no interest in the other homeowner's lots and homes. Under the proposed plan, each homeowner who participates in the conversion would exchange his or her lot and home for a condominium unit (and appurtenant limited common elements) comprised of the same exact lot and home. Accordingly, it is recognized that the beneficial ownership of each lot and home has continuously vested with each individual homeowner without regard to the homeowner being a member of a homeowners association.

Therefore, for purposes of the transfer tax, pursuant to the rationale set forth in 115 Spring Street Company, *supra*, the conversion of the lots and homes within Petitioner into condominium units and the resulting exchange by the homeowners of their lot deeds for condominium unit deeds will not effectuate a change in the beneficial ownership interest as held by the homeowners prior to the conversion. Accordingly, pursuant to Section 1405(a)(6) of the Tax Law the conversion of the lots and homes within Petitioner into condominium units and the resulting exchange by the homeowners of their lot deeds for condominium unit deeds will constitute a mere change of identity or form of ownership or organization since there will be no change in the beneficial ownership of each lot and home and, thus, such conveyances will not be subject to the transfer tax.

For purposes of the gains tax, in the instance case each homeowner pursuant to the Declaration holds a beneficial interest solely in the lot and home he or she occupies as his or her residence and holds no interest in the other homeowner's lots and homes. Moreover, under the proposed plan, each homeowner who participates in the conversion would exchange his or her lot and home for a condominium unit (and appurtenant limited common elements) comprised of the same exact lot and home. Accordingly, since the conversion of the lots and homes within Petitioner into condominium units and the resulting exchange by the homeowners of their lot deeds for condominium unit deeds will not effectuate a change in the beneficial ownership interest as held

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by the homeowners prior to the conversion, pursuant to Section 1443.5 of the Tax Law and 115 Spring Street Company, supra, the conversion of the lots and homes within Petitioner into condominium units and the resulting exchange by the homeowners of their lot deeds for condominium unit deeds will constitute a mere change of identity or form of ownership or organization since there will be no change in the beneficial ownership of each lot and home and, thus, such transfer will not be subject to the gains tax.

DATED: May 24, 1994

/s/
PAUL B. COBURN
Deputy Director
Taxpayer Services Division

NOTE: The opinions expressed in Advisory Opinions
are limited to the facts set forth therein.