

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

TSB-A-87 (9) R  
Real Property Transfer  
Gains Tax  
October 26, 1987

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M870901D

On September 1, 1987, a Petition for Advisory Opinion was received on behalf of John Malasky and John Malasky, Inc., located at Route 23, Claverack, New York 12513.

The issue raised is whether John Malasky, Inc. and John Malasky, individually, are to be treated as separate transferors in determining if the transaction described below will be taxable under Article 31-B of the Tax Law (the "gains tax").

The facts as presented are that the Petitioner, John Malasky, Inc. is a domestic business corporation organized in 1948, engaged primarily in the retail sales of mobile and modular homes. The corporation also engages in the purchase and sale of real property. John Malasky, is the owner of all issued and outstanding shares of stock in the corporation, John Malasky, Inc.

Under contract of sale, the Gillman Organization, Ltd. is to purchase four contiguous tracts of land for \$1.2 million. Two of the four parcels, hereinafter Parcel 1 and Parcel 3, are owned by Mr. Malasky individually. The remaining two parcels, hereinafter Parcel 2 and Parcel 4, are owned by John Malasky, Inc.

Under the terms of the contract, because of its configuration, road frontage and suitability for immediate subdivision (i.e., connection to public water and sewer), \$750,000 of the total \$1.2 million consideration is allocated to Parcel 1. Based upon their acreage and improvements, the balance of \$450,000 is by estimation of Petitioner allocated among the remaining three parcels, as follows: Parcel 2 \$50,000, Parcel 3 \$100,000 and Parcel 4 \$300,000. The allocation among the three parcels is not determined by the contract of sale. However, Petitioner argues that any reasonable allocation of the \$450,000 would result in receipt by each of the transferors of total consideration of less than \$1 million. Therefore, Petitioner states that upon the closing of title, anticipated to occur on or about January 15, 1988, John Malasky, Inc. will receive a total consideration of \$350,000 for Parcel 2 and Parcel 4, and John Malasky, individually, will receive a total consideration of \$850,000 for Parcel 1 and Parcel 3.

John Malasky acquired title to Parcel 1 through two deeds, both dated March 26, 1973. In the following year, he conveyed the property in an arm's length transaction to a development corporation taking back a mortgage to secure the financing. After five years of ownership, the development corporation, in lieu of foreclosure, reconveyed the parcel to Mr. Malasky by deed dated September 5, 1979.

John Malasky, Inc. took title to Parcel 2 by deed dated December 24, 1975. Subsequently, in two contingent purchases from related grantors, John Malasky individually acquired title to Parcel 3 and simultaneously, John Malasky, Inc. took title to Parcel 4.

Petitioner contends that the four parcels involved in the present contract were acquired and held, and are to be conveyed, by two separate entities, John Malasky individually and the corporation, John Malasky, Inc. Moreover, Petitioner states that it is self-evident that the parcels were so acquired for reasons purely apart from any contemplation of tax consequences under Article 31-B, for the reason that all acquisitions took place between 1973 and 1979, whereas Article 31-B was not enacted until 1983. Inasmuch as Article 31-B by its provisions is not applied retroactively, Petitioner states that it would be improper to view the present transaction as having been structured so as to avoid the gains tax.

Based on the foregoing, it is Petitioner's contention that John Malasky and the corporation, John Malasky, Inc., are separate entities and should be considered separate transferors in accordance with the discussion contained in Gains Tax Regulation 590.43(b), and that the gains derived from the sale now under contract are not taxable under Article 31-B of the Tax Law.

Whether the consideration received from transfers of real property is to be aggregated depends on whether the transferor is subject to the aggregation clause for partial or successive transfers provided for in § 1440.7 of the Tax Law, which states, in pertinent part, that:

“.. [t]ransfer of real property shall also include partial or successive transfers, unless the transferor or transferors furnish a sworn statement that such transfers are not pursuant to an agreement or plan to effectuate by partial or successive transfers a transfer which would otherwise be included in the coverage of this article, and the transfer of real property by tenants in common, joint tenants or tenants by the entirety, provided that the subdividing of real property and the sale of such subdivided parcels improved with residences to transferees for use as their residences, other than transfers pursuant to a cooperative or condominium plan, shall not be deemed a single transfer of real property. . . .”

Gains Tax Regulation 590.43 states, in pertinent part, as follows:

- "Q. How is the aggregation clause of § 1440.7 of the Tax Law... applied in the case of:
- b. Several transferors, each owning a separate parcel of land, each parcel contiguous with or adjacent to the others, one transferee?

- A. The consideration is not aggregated, even if there is a clause in each contract that conditions the sale of each parcel on the ability of the transferee to acquire the other contiguous or adjacent parcels. The consideration paid to each transferor is not aggregated even in the case of one contract between the transferee and the several transferors.

The intent of this regulation was to not aggregate consideration paid to separate and distinct transferors merely because they negotiated to sell contiguous or adjacent property to a single transferee. Where contiguous or adjacent interests in real property are owned by a person in his individual capacity and also through his ownership of an entity, the mutuality of ownership in the real property is recognized, and such person is treated as one transferor to the extent that he owns the real property directly and through his ownership interest in the entity that owns the real property. This position is consistent with the "look through" principle which has been applied throughout the administration of the gains tax.

Moreover, the fact that the properties were acquired at different times prior to the effective date of Article 31-B and not pursuant to a prearranged plan is irrelevant in determining the contiguity or adjacency of the properties, and whether the consideration is to be aggregated.

Accordingly, based on the foregoing, it is concluded that since John Malasky, Inc. is owned 100% by John Malasky, the transfer of real property by John Malasky, individually, and by the corporation John Malasky, Inc. will be deemed to be by a single transferor. Therefore, the consideration received from such sales is required to be aggregated.

DATED: October 26, 1987

s/ANDREW F. MARCHESE  
Chief of Advisory Opinions

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