

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

TSB-A-93 (10)R
Real Property
Transfer Gains Tax
June 15, 1993

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M930304B

On March 4, 1993, a Petition for Advisory Opinion was received from Diamond Point Realty Trust, 288 Glen Street, P.O. Box 299, Glens Falls, New York 128010299.

The issues raised by Petitioner, Diamond Point Realty Trust, are:

1. Whether the Real Property Transfer Gains Tax (hereinafter the "gains tax") applies to the transfer of separate lots in a subdivision from a trust to the individual beneficiaries of the trust.
2. Whether the consideration received by a husband and wife from the subsequent sales of their lots will be aggregated with the consideration received by the children and their spouses from the subsequent sales of their lots for purposes of the gains tax.

A husband and wife acquired title to certain property by deeds in 1945 and 1968. The property consisted of approximately 18.62 acres located in Warren County, New York.

In 1976, the appropriate governmental authorities approved a subdivision plan for the property, pursuant to which the property was subdivided into 13 separate lots. Lots 1 through 8 include frontage upon a lake. Lots 9 through 13 are back lots, without direct lake frontage. Lot 1, one of the lakefront lots, was designed as a beach lot for the purpose of providing lake access for five non-lakefront lots, and therefore, the subdivision consists of twelve "building lots". At the time subdivision approval was granted in 1976, two of the lakefront lots were, and presently are, improved with single family residential structures.

Four of the individual lakefront lots were subsequently sold by the husband and wife. The first lot which was sold was a lakefront lot improved by a single family structure, which was sold in 1978. Two vacant lakefront lots were sold in 1979, and an additional vacant lakefront lot was sold in 1980. The husband and wife continued to own the remaining nine lots of the subdivision subsequent to 1980.

By Trust Indenture dated December 30, 1988, the husband and wife created Petitioner, a grantor trust. The husband and wife were the original sole beneficiaries of the Trust. On December 30, 1988, the husband and wife conveyed the nine (9) remaining lots of the subdivision to Petitioner.

Petitioner was created by the husband and wife for estate planning purposes, as a means of making gifts to their children and the spouses of their children in order to remove assets from their taxable estates. Subsequently, they have made numerous gifts of their beneficial interest in Petitioner. Gifts were made each year from 1988 through and including 1993. The total beneficial

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interest in Petitioner transferred by them to their children was less than fifty percent. At the present time, there are a total of nine beneficiaries of Petitioner, including the husband and wife, their four children and the spouses of the three of their children. Each of the beneficiaries is the owner of a percentage beneficial interest in Petitioner.

Each of the beneficiaries of Petitioner contributes to the annual expenses of maintaining Petitioner and the real property owned by Petitioner, such as real estate taxes and upkeep and repairs of the property. Contributions are made by each beneficiary according to their percentage beneficial interest in Petitioner. In addition to the real property, Petitioner also owns a small amount of liquid assets.

The current Trustee of Petitioner is one of the husband and wife's children, who is also one of the beneficiaries of Petitioner.

All of the beneficiaries have decided to liquidate Petitioner and distribute the property to all of the beneficiaries in proportion of their respective beneficial interest in Petitioner. Three of the lots will be distributed to the husband and wife. These three lots have a current fair market value equal to their percentage beneficial interest in the total fair market value of all of the property owned by Petitioner.

The remaining six lots (including the lot designated as a "beach lot") would be transferred to the remaining seven beneficiaries. Each of the beneficiaries would receive title to property having a fair market value equal to each such beneficiaries' percentage interest in the total fair market value of all the property currently held by Petitioner. The husband and wife will not control the actions of the beneficiaries as to the use of the property following the transfer. Since the seven children and spouses each have a different beneficial interest in Petitioner, and since each of the lots has a different fair market value, each of the children and spouses will be receiving title to a fractional interest in one or more lots. For example, one beneficiary may receive title to one lot plus a fractional interest in a second lot, while a second beneficiary may only receive a fractional interest in one lot. In addition, each of the five non-lakefront building lots will include a one-fifth interest in the beach lot.

Further, the properties transferred to the beneficiaries are not subject to any mortgages, liens or other encumbrances.

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 any method. This would include a transfer upon liquidation or a transfer by partition.

Section 1440.1 of the Tax Law defines the term "consideration", in pertinent part, to mean the price paid or required to be paid for real property or any interest therein, less any customary brokerage fees related to the transfer if paid by the transferor...whether expressed in a deed and whether paid or required to be paid by money, property, or any other thing of value.

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:

* * *

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 no change in beneficial interest.

Section 590.43 of the Gains Tax Regulations provides, in part, as follows:

590.43 Aggregation of partial or successive transfers of real property. [Tax Law, S 1440(7)]

Question: How is the aggregation clause of section 1440(7) of the Tax Law, which states in part:

" ... Transfer 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 transfers 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."

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?

Answer: 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.

* * *

(d) Several transferors, owning one parcel of land either as joint tenants, tenants in common, or as tenants by the entirety, one transferee?

Answer: The statute specifically requires that the consideration paid to each such transferor be aggregated with the consideration paid to the other transferors in determining whether the consideration is \$1 million or more. Once the million-dollar threshold is met, each transferor is liable for payment of tax based on the consideration he receives, less his original purchase price for the property.

* * *

(g) Question: Will the subdividing of real property be subject to aggregation pursuant to Section 1440(7) of the Tax Law?

Answer: Yes. Section 1440(7) of the Tax Law specifically provides that all subdividing of real property is subject to the aggregation rule, except in the case where the subdivided property is improved with residences and is used for residential purposes, other than those pursuant to cooperative or condominium plans.

In Matter of Kim Poy Lee, Eunice Tan, Hugh Kee Lee, Et al., Dec Tax App Trib, October 15, 1992, the Tax Appeals Tribunal (hereinafter the "Tribunal") held that the Department properly aggregated the consideration received from petitioners' transfers of certain lots. In that instance petitioners sold four lots to a single transferee. Two of the petitioners held an interest in all four properties. Two others held interests in three, while the remaining three held interests in two properties. Some of the parties were related, and all the interests were sold in the same transaction at the same time to one purchaser. The Tribunal, in citing Section 590.43(b) of the Gains Tax Regulations explained that in order for the parties to be deemed "several" transferors, such parties must demonstrate independence with respect to their ownership interests and the transfers thereof. The Tribunal further elaborated that the use of the words "several" and "separate" in the regulation indicates that it is aimed at the situation where independent and separate owners of contiguous and/or adjacent parcels are sold to an individual needing to purchase all the parcels for a particular real estate project, and in the case at hand, the transferors were not separate and distinct as to each parcel or to each other as contemplated by the regulation.

Concerning issue "1", the liquidation of Petitioner and the transfer of lots to the beneficiaries constitutes the partition of the real property that was owned jointly by the beneficiaries through their beneficial interest in Petitioner. Pursuant to Section 1440.7 of the Tax Law a transfer by partition

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constitutes the transfer of real property. Moreover, pursuant to Sections 1441 and 1443.1 of the Tax Law and Section 590.1 of the Gains Tax Regulations, the transfer of real property located in New York State for a consideration of one million dollars or more is subject to gains tax. In the instant case, each beneficiary is deemed to be the transferor of an interest in the jointly owned real property. Also, each beneficiary is deemed to be receiving an interest in real property in exchange for the interest transferred.

In accordance with Section 1440.1 of the Tax Law, the consideration for the transfer to each beneficiary is equal to the fair market value of the interest in real property received in exchange for their interest in Petitioner. Pursuant to Section 590.43(d) of the Gains Tax Regulations, the consideration paid to each such beneficiary must be aggregated with the consideration paid to the other beneficiaries to determine whether the consideration is one million dollars or more. Once the one million-dollar threshold is met, each beneficiary is liable for payment of the gains tax based on the consideration he or she receives, less his or her original purchase price for the property. If it is noted, however, that pursuant to Section 1443.5 of the Tax Law each beneficiary is entitled to a partial mere change of identity exemption to the extent of the interest the beneficiary held in Petitioner immediately prior to the liquidation.

With respect to issue "2", pursuant to Section 590.43(b) of the Gains Tax Regulations and Kim Poy Lee, et al., supra, the consideration received from the subsequent sale of lots by the children and their spouses must be aggregated since the relationship between them indicates that the transferors are not separate and distinct as to each lot or each other. However, since the husband and wife have no beneficial interest in the lots owned by the children and their spouses and will not have control over the children and their spouses as to the use or future transfer of such lots, the consideration received by the husband and wife for the sale of their lots is not required to be aggregated with the consideration received by the children and their spouses from the sale of their lots. It is noted that pursuant to Sections 590.43(b) and 590.43(g) of the Gains Tax Regulations, the consideration received by the husband and wife from the sale of their lots is also required to be aggregated for purposes of determining the gain tax implications for their sales, unless the lots are improved with residences and transferred to transferees for use as their residences.

DATED: June 15, 1993

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

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