

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

TSB-A-93 (7)R
 Real Property
 Transfer Gains Tax
 May 21, 1993

STATE OF NEW YORK
 COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M930204A

On February 4, 1993, a Petition for Advisory Opinion was received from Westside Platinum Associates, 117 Cuttermill Road, c/o Einhorn, Great Neck, New York 11021.

The issue raised by Petitioner, Westside Platinum Associates, is whether a reduction in the principal of the underlying mortgage will reduce the anticipated consideration to be recognized under a cooperative plan for purposes of the Real Property Transfer Gains Tax (hereinafter the "gains tax").

Petitioner is the sponsor of a non-eviction cooperative offering plan. For purposes of the gains tax, Petitioner anticipated the consideration to be received under the plan based upon the cash price for the units and an apportionment of the cooperative apartment owner's share in the underlying cooperative wrap-around mortgage.

It is proposed that Petitioner will negotiate with the cooperative board of directors (the "cooperative board") to acquire unsold cooperative shares held by Petitioner which are subject to substantial shortfalls (rent collections much less than cooperative maintenance requirements). As an incentive for the cooperative board taking back the unsold cooperative shares, Petitioner will reduce the underlying mortgage by \$375,000.

Petitioner provides the following example:

	June 8, 1986 Prior to <u>Mortgage Allowance</u>	1993 Mortgage <u>Reduction</u>	After <u>Mortgage Allowance</u>
Total Cash Proceeds	\$1,000,000		\$1,000,000
Mortgage Receivable	<u>1,875,000</u>	<u>(375,000)</u>	<u>1,500,000</u>
Projected Sale Price	\$2,875,000	(375,000)	\$2,500,000
Estimated Costs	<u>\$2,000,000</u>	<u> </u>	<u>\$2,000,000</u>
Projected Gain	<u>\$ 875,000</u>	<u>(375,000)</u>	<u>\$ 500,000</u>
Gains Tax Due	\$ 87,500		\$ 50,000

Section 1442(b) of the Tax Law provides, in part, that for purposes of calculating the amount of tax due for a transfer pursuant to a cooperative plan, an apportionment of the original purchase price of the real property and total consideration anticipated under such cooperative plan shall be made for each cooperative unit transfer.

Section 590.36 of the Gains Tax Regulations provides as follows:

590.36 Mortgages.

Question: How does a mortgage on the real property transferred to the cooperative corporation affect the calculation of the gains tax?

Answer: The amount of any mortgage to which the real property is subject when transferred by the realty transferor to the cooperative corporation, and any mortgage taken back by the realty transferor, is included as consideration to the realty transferor. The amount of any such mortgage is allocated among any shares sold by the cooperative corporation, to the shares taken back by the realty transferor and to the shares held by the owners of the realty transferor, if such owners received their shares in a transfer that did not require payment of tax, as described in section 590.35 of this Part.

If while the realty transferor, or any such owner of the realty transferor, holds the shares, payments are made on mortgage principal, through the payment of monthly maintenance charges, the amount of such mortgage principal payments will reduce the consideration received on the sale of the shares. This is so whether the mortgage is held by a third party or by the realty transferor.

Where the real property was transferred to the cooperative corporation prior to March 29, 1983, subject to a mortgage, or a mortgage was taken back by the realty transferor, the total amount of any such mortgage is also allocated to the shares sold by the cooperative corporation and to the shares which the realty transferor took back. To the extent these shares are sold pursuant to the cooperative plan on or after March 29, 1983, the amount of such mortgages allocated to such shares, reduced by principal payments made by the realty transferor with respect to such shares, will be subject to the gains tax.

In Matter of V & V Properties, Dec Tax App Trib, July 16, 1992, the Tax Appeals Tribunal stated that, "[O]ur conclusion, which determines the amount incurred to acquire an interest in real property at the time of the subject acquisition for purposes of establishing original purchase price, is consistent with the conclusion that the amount of consideration received for the transfer of real property must be determined at the time that the transfer occurred, and that the consideration cannot be reduced on subsequent events (Matter of Cheltoncort Co., Dec Tax App Trib, December 5, 1991; Matter of Perry Thompson Third Co., Dec Tax App Trib, December 5, 1991)."

Safe Harbor Estimate for Transfers Pursuant to Condominium and Cooperative Plans, TSB-M-86(3)R, May 1, 1986 provides, in pertinent part, that each transferor of shares pursuant to a cooperative plan will be required to estimate the consideration that he will receive pursuant to the plan. This estimate of consideration on the entire plan will be made on the initial Gains Tax submission for the plan and at each required update point of the plan.

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Pursuant to Section 1442(b) of the Tax Law and Section 590.36 of the Gains Tax Regulations to determine the anticipated consideration to be received pursuant to the cooperative plan, the Petitioner must allocate any mortgage taken back by Petitioner among any shares sold by the cooperative corporation, to the shares taken back by the Petitioner and to the shares held by the owners of the Petitioner. The consideration is then fixed on a unit by unit basis as each unit is transferred.

Accordingly, pursuant to Matter of V & V Properties, supra, Matter of Cheltoncort Co., supra, and Matter of Perry Thompson Third Co., supra, the mortgage reduction which is attributable to the units previously sold by Petitioner is not a reduction in consideration since the consideration, including the pro rata share of the mortgage taken by Petitioner attributable to such units, was fixed at the time of transfer to the unit purchasers. However, Petitioner may reduce the consideration to the extent that the mortgage reduction is attributable to the unsold shares being transferred to the cooperative board.

Therefore, based on Petitioner's example, to determine the mortgage reduction attributable to the unsold shares being transferred to the cooperative board, the mortgage reduction of \$375,000 must be multiplied by a fraction, the numerator of which is amount of unsold shares being transferred to the cooperative board and the denominator of which is the total number of shares pursuant to the cooperative plan. Pursuant to TSB-M-86(3)R, supra, such reduction in consideration should be shown by Petitioner when Petitioner's submits it's next required update.

DATED: May 21, 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.