

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

TSB-A-95 (12) - R
Real Property Transfer
Gains Tax
October 3, 1995

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M940629A

On June 29, 1994, a Petition for Advisory Opinion was received from Robert Liberman and Katherine Gill, c/o The Adler Group, 654 Madison Avenue, New York, New York 10021.

The issue raised by Petitioners, Robert Liberman and Katherine Gill, is whether the transfer of the couple's residential cooperative apartment (hereinafter the "marital co-op") was exempt from Real Property Transfer Gains Tax (the "gains tax") under Section 1443.2 of the Tax Law.

On April 19, 1969, Robert Liberman and Katherine Gill, the transferors, were married. On April 30, 1976, Robert Liberman purchased 975 shares of stock of Fifth and 63rd Street Corporation (the "Corporation") and the proprietary lease appurtenant to apartment 1/2, which is the marital co-op. The purchase price was \$115,000.00. In addition, Robert Liberman incurred costs for capital improvements to the marital co-op in the amount of \$128,616.00. Thereafter, on October 25, 1976, Petitioners' son was born.

On September 9, 1981, Petitioners entered into an agreement dividing all marital property acquired during the marriage (the "Agreement"). Paragraph SECOND (B)(i) of the Agreement states, in relevant part, that while Robert Liberman is the record owner of the marital co-op, he will attempt to convey his interest therein into the joint names of the parties so that they will each be tenant-in-common thereof. The Agreement further provided that in the event the Corporation would not cooperate in so transferring the ownership that Robert Liberman would nevertheless hold title to the marital co-op as if it had been so transferred.

Simultaneous with the execution of the Agreement, Robert Liberman executed the necessary documents required by the cooperative corporation seeking the approval to effectuate the transfer of the marital co-op into the joint names of Petitioners. However, the approval to transfer the cooperative shares into the joint names of Petitioners was denied by the cooperative corporation. Nevertheless, Robert Liberman considered the marital co-op as if it had been so transferred and as such filed Federal Income Tax Form 2119 to report the transfer of the marital co-op from Robert Liberman as sole owner to Robert Liberman and Katherine Gill as joint owners.

In accordance with Katherine Gill's rights as set forth in the Agreement, she had the sole and exclusive occupancy of the marital co-op for as long as she personally continued to use the apartment as her primary residence. Also, she had the sole and full responsibility to pay all maintenance charges and assessments levied by the cooperative corporation as well as all utility, telephone, repair,

decorative or other expenses associated with the occupancy or ownership of the apartment until its sale. Moreover, the Agreement provided that the marital coop could only be sold at such time as she in her discretion determined or upon her death.

The Agreement further stated that the distribution of proceeds from the sale of the marital co-op following the divorce would be as follows:

1. Up to the first \$2,000,000 of net proceeds to be equally divided between the parties.
2. If the net proceeds of sale should exceed the sum of \$2,000,000, Robert Liberman would receive, before distribution of the balance, a sum equal to the interest which would have been earned on an investment of \$1,000,000 had such sum been invested on the date of the Agreement at an interest rate of ten (10) percent compounded annually through the date of closing. In the event that the net proceeds of sale of the marital co-op are in excess of two million dollars plus the aforesaid sum payable to the husband, the balance remaining would be divided equally between the husband and wife or their estate.
3. Net proceeds of sale shall be defined for the purposes hereof as the amount received from a purchaser less any and all legal fees, brokers' commission, advertising expenses, or other expenses directly related to the sale of the marital co-op.

At or about the time of entering into the Agreement, the marital co-op was appraised at a value of \$1,600,000. On December 7, 1982, the parties were divorced and the Agreement was incorporated but not merged into the divorce decree.

On May 2, 1994, Petitioners agreed to sell the marital co-op at the price of \$6,350,000. Following its transfer, Petitioners individually prepared Federal Income Tax Form 2119 to report the gain and transfer of their respective interests in the marital co-op.

Neither Robert Liberman nor Katherine Gill ever took depreciation or otherwise treated the apartment as business property. The apartment was used only as a residence by Petitioners (prior to their divorce) and by the son and Katherine Gill after the divorce.

Petitioners believe that the sale of the marital co-op is exempt from the gains tax pursuant to Section 1443.2 of the Tax Law and Section 590.24 of the Gains Tax Regulations since the marital co-op was the residence of Petitioners during the marriage and remained the residence of Katherine Gill following the divorce until the sale thereof. In addition, Petitioners reference TSB-A-92(8)R (November 3, 1992) in which the residence exemption under Section 1443.2 of the Tax Law totally applied to a residence where a spouse removed herself from the premises due to marital discord. Further, Petitioners reference TSB-A-92(7)R (November 3, 1992) which provides that where a

resident dies and a trustee for the resident is the transferor, the failure of the decedent to be the resident or owner of the premises at the time of the transfer is not fatal to the availability of the residential exemption.

Petitioners submitted a copy of the closing statement pertaining to the acquisition of the marital co-op, a copy of Paragraph SECOND (B) (i) of the Agreement, a copy of the contract of sale to sell the marital co-op and a copy of a schedule of capital improvements made to the marital co-op as part of its Petition for Advisory Opinion.

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 any interest in real property, which includes the acquisition or transfer of a controlling interest in any entity with an interest in real property, where the real property is located in New York State and where the consideration for the transfer is one million dollars or more.

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:

* * *

2. If the real property consists of premises occupied by the transferor as his residence (but only with respect to that portion of the premises actually occupied and used for such purposes).

Former Section 590.24(c) of the Gains Tax Regulations (renumbered 590.25(c) effective November 9, 1994), provides as follows:

(c) Question: Is the sale of an individual's shares of capital stock of a cooperative corporation that are allocated to the apartment he uses solely as his personal residence subject to the gains tax?

Answer: No. The shares of stock in a cooperative corporation are an interest in real property for gains tax purposes, and the sale of such stock will be treated as the sale of the premises.

In Curtis B. and Laura L. Perry v. Commissioner, 67 TCM 3035, May 31, 1994, the Tax Court held for Federal income tax purposes that an individual who removed himself from his residence in 1984 due to marital discord and later divorced his wife was not entitled to roll over the gain from the sale of their residence because at the time of the sale in 1988 it was not considered to be his principal residence. Under the terms of the marital settlement agreement, the individual's wife had exclusive right to temporarily use the property until it was sold two years after their divorce. The individual did not have a right to reside at the residence and, thus, did not physically occupy and live in the dwelling at the time of sale. As a result, he could not claim it as his primary residence and defer his share of the gain.

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In Hilles Timpson, Adv Op Comm T&F, November 3, 1992, TSB-A-92(7)-R, the Commissioner held that the transfer of a residence by the Trustee following the death of the petitioner would constitute the transfer of a personal residence in accordance with Section 1443.2 of the Tax Law and Section 590.24 of the Gains Tax Regulations provided the premises were occupied and used by the petitioner up until her death exclusively as a residence.

In Underberg and Kessler, Adv Op Comm T&F, November 3, 1992, TSB-A-92(8)-R, the Commissioner held that the transfer of a personal residence held in the joint names of the transferors was totally exempt from the gains tax under Section 1443.2 of the Tax Law since the transferors jointly owned and occupied the premises exclusively as a personal residence. The fact that the wife removed herself from the premises for several months due to marital discord did not affect the exemption since the wife was only removed from the premises for a short period of time and the premises continued to be a joint asset of the marriage.

In the instant case, Robert Liberman was the owner in title to the marital co-op he purchased on April 30, 1976. Robert Liberman executed the necessary documents required by the cooperative corporation seeking the approval to effectuate the transfer of the marital co-op into the joint names of Petitioners. However, the approval to transfer the cooperative shares into the joint names of Petitioners was denied by the cooperative corporation. Nevertheless, Robert Liberman considered the marital co-op as if it had been so transferred and as such filed Federal Income Tax Form 2119 to report the transfer of the marital co-op from Robert Liberman as sole owner to Robert Liberman and Katherine Gill as joint owners. The marital co-op was occupied by Robert Liberman and Katherine Gill until September 9, 1981, at which time Robert Liberman, due to marital discord removed himself from the premises. Robert Liberman never again occupied the premises. However, Katherine Gill continued to occupy and use the marital co-op as a personal residence for her and her son. On May 2, 1994, Petitioners contracted to transfer the premises to a third party for consideration of \$6,350,000.

Pursuant to Section 1443.2 of the Tax Law and Section 590.25(c) of the Gains Tax Regulations the Transfer of real property consisting of premises occupied by the transferor as such transferor's residence is not subject to the gains tax. While record title to the marital co-op was never held jointly by Petitioners, by agreement Robert Liberman did transfer a portion of his interest in such co-op to Katherine Gill. Therefore, since Katherine Gill held an ownership interest in the marital co-op and she occupied the marital co-op exclusively as her residence, the transfer of her interest in the marital co-op was not subject to gains tax pursuant to Section 1443.2 of the Tax Law and Section 590.25(c) of the Gains Tax Regulations.

With respect to the transfer of Robert Liberman's interest in the marital co-op, Robert Liberman did not occupy the premises after September 9, 1981. Therefore, such premises are no longer his personal residence. This position is supported by the determination reached for Federal income tax purposes in Curtis B. and Laura L. Perry v. Commission, *supra*, which provided that a husband who vacated his residence four years prior to its sale due to marital discord was not entitled to roll over the gain from the sale because the premises were no longer considered to be his principal

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residence. Accordingly, since Robert Liberman did not occupy the premises being transferred as his residence after 1981, the transfer of his interest in such cooperative apartment would not be exempt from the gains tax under Section 1443.2 of the Tax Law and Section 590.25(c) of the Gains Tax Regulations. Thus, since the consideration for the transfer is in excess of \$1 million dollars, the gain from the transfer allocated to his interest in the marital co-op would be subject to the gains tax. It is noted that to determine his interest in the marital co-op, the formula set forth in the Agreement for the distribution of the proceeds should be utilized.

In distinguishing Hilles Thompson, supra, from the instant case, Robert Liberman is not deceased and a trustee is not transferring real property occupied by the transferor as his residence up until his death on behalf of the transferor. In that case, the trustee was standing in the place of the deceased. Moreover, in Underberg and Kessler, supra, the wife merely removed herself from the premises for several months prior to its sale. Robert Liberman removed himself from the residence for 14 years. Thus, the facts of this Advisory Opinion are clearly distinguishable from the facts at issue in Underberg and Kessler, supra, given the evident abandonment of Robert Liberman of the premises as his residence and the fact that the divorce decree was granted in 1982.

DATED: October 3, 1995

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

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