

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

TSB-A-96 (6) R  
Real Property  
Transfer Gains Tax  
June 27, 1996

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M960404A

On April 4, 1996 the Department of Taxation and Finance received a Petition for Advisory Opinion from RAI (NY), Inc., 25875 Science Park Drive, Beachwood, Ohio, 44122.

The issue raised by Petitioner, RAI (NY), Inc., is whether, under the circumstances, Petitioner would be entitled to the exemption from the Real Property Transfer Gains Tax ("the gains tax") provided by section 1443.2 of the Tax Law, which the Petitioner refers to as the personal residence exemption.

Petitioner submits the following facts as the basis for this Advisory Opinion. In order to protect their confidentiality, Mr. and Mrs. A formed Petitioner to acquire title to residential real property. Mr. and Mrs. A intend to use and occupy the premises exclusively as a residence. No portion of this residence will be depreciated.

Applicable Law and Regulations

Section 1441 of the Tax Law imposes the gains tax on gains derived from the transfer of real property within the state at the rate of ten percent of the gain.

Section 1443.2 of the Tax Law provides an exemption from the tax to the extent that the real property that is transferred 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 residential purposes).

Also, Section 590.25(d) of the gains tax regulations (Part 590 of 20 NYCRR) provides as follows:

*Question:* Is the sale of the premises which is owned by a corporation and occupied by its sole shareholder as his residence exempt from the gains tax pursuant to section 1443(2) of the Tax Law?

*Answer:* No. Generally, a corporation cannot occupy premises as its residence. However, if the transferor can establish through all the facts and circumstances that the ownership and maintenance of the premises related solely to personal use and that the premises were never treated as business property (for example, it was not depreciated for Federal income tax purposes), the exemption may be allowed. The exemption will be applied strictly on a case by case basis by taking all the facts and circumstances into consideration.

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Conclusion

If, at the time of the transfer of the real property comprising the residential premises, the conditions for the allowance of the residential exemption as described in Section 1443.2 of the Tax Law and Section 590.25(d) of the gains tax regulations are met, the transfer will be exempt from the gains tax.

DATED: June 27, 1996

/s/  
John W. Bartlett  
Deputy Director  
Technical Services Bureau

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