New York State Department of Taxation and Finance
Office of Counsel

TSB-A-16(1)M
Real Estate Transfer Tax
April 25, 2016

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. M141215A

The Department of Taxation and Finance received a Petition for Advisory Opinion from [redacted]. Petitioner asks whether the additional real estate transfer tax, imposed by section 1402-a of the Tax Law (the "additional tax"), applies to the conveyance of a parcel of vacant land, for which the consideration was less than $1 million, when, on the same date, Petitioner also bought a nearby separate parcel improved by a residence, for which the consideration was more than $1 million.

We conclude that, under the available facts, the consideration for the conveyance of the parcel of vacant land must be aggregated with the consideration for the parcel improved by the residence for purposes of determining the amount of the additional tax due.

Facts

Petitioner bought two separate parcels of land separated by a road owned by a neighborhood association. The properties were directly across the road from each other. One property ("Parcel A") was improved by a single-family residence. The other property ("Parcel B") was described in the Petition as vacant land, but a Residential Contract of Sale on Parcel B indicated that it was improved by a two-car garage. Moreover, aerial photographs of the parcel confirm that Parcel B is improved with a two-car garage near the road. The consideration paid for Parcel A was $2 million. The consideration paid for Parcel B was $450,000.

Petitioner executed a separate Residential Contract of Sale for each property. The contract for Parcel A provided that the purchaser had entered into a contract for Parcel B and that the purchaser's obligation to close on Parcel A was contingent on the purchaser's closing on Parcel B. The contract for Parcel A also contained language that a default by either party under either the contract for Parcel A or for Parcel B would be deemed a default under both contracts. The seller, an individual, executed a separate deed for each property on the same day. Petitioner claims that the purchases of the two properties were unrelated, and that Parcel B was acquired solely as an investment in a buildable lot. For that reason, Petitioner paid the additional tax only on the consideration attributable to Parcel A.

Analysis

The issue raised in the Petition is whether the consideration paid for the transfer of two separate properties by two separate deeds should be viewed separately or aggregated for purposes of calculating the additional tax. In particular, the question is whether the consideration

for the purchase of Parcel B should be combined with the consideration for Parcel A, for purposes of calculating the additional tax due.

Tax Law § 1402 imposes a tax on each conveyance of real property or interest therein when the consideration exceeds $500 at the rate of $2 for each $500 or fractional part thereof. Tax Law § 1402-a(a) imposes an additional tax on each conveyance of residential real property or an interest therein, when the consideration for the entire conveyance is $1 million or more. For purposes of this section, residential real property includes any premises that are or may be used in whole or in part as a personal residence. The rate of such tax is one percent of the consideration or part thereof attributable to the residential real property.

The Department of Taxation and Finance's Publication 577, *FAQs Regarding the Additional Tax on Transfer of Residential Real Property for $1 Million or More*, addresses this issue in the examples given to answer Question 10 and Question 11.

Q. 10: When a one-, two-, or three-family house is sold, does all of the abutting land qualify as residential real property?

A. Residential real property includes the land on which the house is located and the land abutting the house unless the abutting land is used for a nonresidential purpose.

> "Example**:** Grantor A enters into a contract to sell a parcel improved by a one-family house to Grantee B for $900,000. Simultaneously, Grantor A contracts with Grantee B to sell an adjacent parcel of vacant land for $300,000. The timing and terms of the contracts indicate that the conveyances are related. Prior to the conveyance, the abutting parcel was kept vacant. Both parcels are used in conjunction with each other and are considered residential real property. Accordingly, the consideration for the entire conveyance of $1.2 million is subject to the additional tax. . . . .

Q. 11: When are ancillary structures considered part of the residential real property?

A. 11: Ancillary structures are considered part of the residential real property when the structures are used in conjunction with, or are clearly related to, the main residential structure.

> Example**:** A 20-acre parcel is divided into three tax lots for real property tax purposes. Lot 1 contains the main house and a detached three-car garage located on one acre of land. Lot 2 contains a guest cottage located on half an acre of land some distance from the main house. Lot 3 is vacant land. The entire parcel is conveyed to one grantee for $2 million. The lot with the main house and the garage is valued at $995,000, the guest cottage is valued at $405,000, and the abutting land is valued at $600,000. None of the lots are used for anything other than residential purposes and the ancillary structures and abutting land are all used in conjunction with each other. Therefore, since the

> consideration received for all the structures and abutting land is $1 million or more, the conveyance is subject to the additional tax. . . . .

Many of the definitions and administrative legal interpretations pertaining to Article 31 of the Tax Law are conformed to the former Article 31-B, Tax on Gains Derived from Certain Real Property Transfers ("the gains tax"), which was adopted in 1983 and repealed in 1996. The gains tax imposed a 10 percent tax on the gain derived from a transfer of real property if the consideration for the conveyance was $1 million or more. The gains tax and the RETT historically have had many elements in common, and the Department's policies on similar issues have been conformed. Thus, the laws and regulations of the gains tax may inform legal questions presented in the context of the additional tax.

Real Estate Transfer Gains Tax Regulation 20 NYCRR § 590.42 provided that separate deed transfers of contiguous or adjacent properties by one transferor to one transferee are to be regarded as a single transfer of real property for purposes of calculating the threshold for the gains tax, if the properties are used for a common or related purpose.

TSB-M-86(4)R summarized gains tax opinion letters issued by the Department during the previous year. One such letter stated: "Properties are considered contiguous or adjacent when the properties border each other, or they are in close proximity, and they are not completely separated by property owned by another party. If the properties are nearby and are separated only by a public street, highway, or walkway, the properties are considered adjacent, (i.e., a building and parking lot across the street from each other)."

This interpretation was upheld in *Matter of Iveli and Signund* (Tax Appeals Tribunal, February 23, 1988) and in *Matter of Calandra*, Tax Appeals Tribunal (Sept. 29, 1988). In *Matter of Calandra*, the transfer of two properties that were directly across from each other and separated only by a two-lane county road and its shoulders were treated as a single transfer. The Tribunal pointed out that the public way did not hinder intercourse between the two properties or in any way create a barrier between them that could negate the conclusion that the properties existed and were transferred as a single economic unit, saying: "Not only do we find that the instant properties were adjacent to each other within the meaning of the regulation [§ 590.42], we find that to treat the instant properties as a single transfer, if used for a common or related purpose, [is] an appropriate application of the gains tax. In that case, both properties were used as rental property for office space and warehousing, and they were managed by a single owner. Thus, the Tribunal concluded that the properties were used for a common or related purpose and should be aggregated for purposes of the gains tax.

In the Matter of Michael and Frances Sacks, Tax Appeals Tribunal (March 10, 2011), the Tribunal noted that "conveyance" under the Real Estate Transfer Tax means the transfer or transfers of any interest in real property and opined that the number of conveyances is not determined by the quantity of instruments used to transfer real property interests. In this case, the Petitioners, a married couple, bought two adjacent apartment units that were connected by a passage way; the two units were listed as one apartment with an asking price of more than $1

million. Each spouse entered into a purchase and sale contract for one of the units, each for a purchase price below $1 million. Each spouse filed a separate transfer tax return after the respective closings. Upon audit, the Department of Taxation and Finance determined that the conveyances to the Petitioners were subject to the additional tax and issued a Notice of Determination. The Tribunal held that the entire conveyance of real property must be analyzed "to search for substance over form with emphasis on economic reality" (*Matter of Avon Products v. State Tax Commn.*, 90 AD2d 393, 395 [1982] citing *United Housing Found v. Forman*, 421 US 837 [1975]). The Tribunal said: "While the formal structure reflects two contracts for two separate apartments, the substance amounted to the transfer of an interest in a single and indivisible apartment. We hold that in order to accurately reflect the conveyance and actual purchase price, the considerations must be aggregated."

Like *Matter of Michael and Frances Sacks*, this Petitioner's purchase of the two properties was in substance the transfer of a single property. The tax map for the town of Shelter Island shows that Parcel A and Parcel B are located directly across a 2-lane road from each other and, therefore, they are contiguous or adjacent. The properties also were used in conjunction with each other or for a common or related purpose. Real estate listings of the Parcel A represent that the property has a detached two-car garage. Aerial views of the house do not show a garage on Parcel A, but they do show a two-car garage near the road on Parcel B. Although the properties were conveyed by separate deeds, the Residential Contract for Sale for Parcel A contained a cross-purchase clause providing that a default by Petitioner on either the contract for Parcel A or the contract for Parcel B would be deemed a default under both contracts. Thus, we conclude that the parcels, which were contiguous or adjacent and used for a common purpose, were in substance a transfer of an interest in a single property. Accordingly, the consideration for Petitioner's purchase of Parcel B must be aggregated with the consideration for his purchase of Parcel A to determine the amount of consideration subject to the additional tax.

DATED: April 25, 2016

/S/

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NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion. The information provided in this document does not cover every situation and is not intended to replace the law or change its meaning.