

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-01(6)R
Real Estate Transfer Tax
June 1, 2001

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M010430A

On April 30, 2001, the Department of Taxation and Finance received a Petition for Advisory Opinion from Andrew S. Roffe, 737 Park Avenue, New York, New York (herein referred to as “Petitioner”).

The issue raised by Petitioner, based on the facts described in this petition is whether Petitioner is liable for tax under section 1402-a of the Tax Law (the “mansion tax”) upon the purchase of a nonresidential cooperative unit which (i) has been used as doctors’ offices (and not as a residence) for decades, (ii) is configured and fixtured as doctors’ offices, and (iii) may not at the time of transfer be lawfully occupied as a residence under the building’s certificate of occupancy, notwithstanding that the Petitioner intends to convert the unit to residential use.

Petitioner presented the following facts as the basis for this advisory opinion.

Petitioner contracted for and purchased the cooperative corporation shares and lease appurtenant to unit 1-D (the “Unit”) at 1192 Park Ave., New York, NY (the “Building”),¹ for a purchase price in excess of \$1,000,000. The sellers of the Unit are two physicians (the “Sellers”) who had used the Unit as medical offices, and not as a residence, for several years. The Unit has been used only as medical offices for at least 40 years. The certificate of occupancy of the Building (the “C of O”) permits occupancy of the Unit only as professional offices. The Unit is configured as offices and examination rooms. It has no kitchen facilities or residential bathroom facilities, nor does the general layout of the Unit permit residential use. The Unit cannot legally be occupied as a residence without substantial physical alterations and amendment of the C of O.² Under the terms of the contract of sale, the Sellers specifically disclaimed any representation as to the permitted use

¹ Unless otherwise indicated, all statements regarding the Unit were valid both at the time of contract and at the time of closing.

² New York City Building Code (“Building Code”) §27-217 [C26-121.5]. The Building Code defines “Habitable Room” (including, inter alia, bedrooms and kitchens) for residential purposes in terms of minimum dimensions which are not satisfied by the Unit as presently configured (see §27-751 [C26-1205.7]) and imposes requirements for residential units including, inter alia, plumbing (see, e.g. §27-901(1) [C26-1600.6(1)], “Required plumbing fixtures”). The Unit as purchased is in material non-compliance with the Building Code requirements for issuance of a certificate of occupancy for residential use, and cannot be brought into compliance without substantial physical alterations and improvements upon application to the Department of Buildings.

of the Unit. Petitioner was allowed a 5 day due diligence period to determine whether the Unit could lawfully be converted to residential use. During that period, Petitioner obtained a written statement from the Borough Commissioner of the Department of Buildings to the effect that the Unit could be converted to residential use under applicable zoning law and regulations without violation of floor/area ratio limits. In reliance upon such statement, Petitioner consummated the purchase and is presently proceeding with such conversion.

Applicable Law and Regulations

Subdivision (a) of section 1402-a of the Tax Law provides, in part:

In addition to the tax imposed by section fourteen hundred two of this article, a tax is hereby imposed on each conveyance of residential real property or interest therein when the consideration for the entire conveyance is one million dollars or more. For purposes of this section, residential real property shall include any premises that is or may be used in whole or in part as a personal residence, and shall include a one, two, or three-family house, an individual condominium unit, or a cooperative apartment unit. The rate of such tax shall be one percent of the consideration or part thereof attributable to the residential real property. . . .

Example 5 of subdivision (b) of section 575.3 of the Real Estate Transfer Tax Regulations provides:

Example 5: A grantor constructs a two-family house which he then sells for \$1,000,000. The grantee intends to convert the house to two offices. The grantee is required to pay the additional tax of \$10,000 (\$1,000,000 X .01) because the property may be used as residential real property at the time of conveyance. After purchasing the property, the grantee does in fact convert the property to offices. He later sells the property for \$1,200,000. *No additional tax is due on the sale because the property, at the time of the sale, had been converted to offices and is no longer considered to be residential real property.* (emphasis added)

Conclusions

As supported by Example 5 of subdivision (b) of section 575.3 of the Real Estate Transfer Tax Regulations, residential real property which has been converted to nonresidential use and may function only as nonresidential property at the time of conveyance is not subject to the additional transfer tax under section 1402-a of the Tax Law. Accordingly, in the case of Petitioner the

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additional transfer tax is not applicable, since at the time of conveyance the cooperative unit in question had not been converted to residential use and could only be used for nonresidential occupancy.

DATED: June 1, 2001

/s/
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Technical Services Division

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