

**New York State Department of Taxation and Finance
Office of Counsel**

TSB-A-14(2)R
Real Estate Transfer Tax
December 4, 2014

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M130816A

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED] (“Petitioner”). Petitioner, the grantor of an intentionally defective grantor trust, asks whether the conveyance of her New York apartment to the trust, in exchange for cash she previously conveyed to the trust when it was created, equal to the value of the apartment, is exempt from the New York State real estate transfer tax (RETT).

We conclude that the conveyance of a New York condominium apartment by Petitioner to the trust in exchange for cash equal to the value of the apartment is a conveyance, subject to the RETT. The consideration for the conveyance is equal to the cash received from the trust.

Facts

In December, 2012, the federal estate and gift tax laws allowed a unified \$5 million credit, that, without Congressional action, was set to be reduced to \$1 million after December 31, 2012. During that month, Petitioner met with her tax advisor and concluded that she wanted to gift her New York apartment to her son. Because Petitioner was unable to complete the transfer of the apartment to her son before the end of December 2012, when the higher federal tax benefits for gifts expired, the structure that her advisor recommended and subsequently implemented was an estate planning technique known as an intentionally defective grantor trust (“IDGT”).

Under an IDGT, the assets that are contributed to the trust are not part of the grantor’s estate, but, nevertheless, the income generated by those assets remains taxable to the grantor. In order to accomplish this purpose, the terms of the IDGT may permit the grantor to retain the power to acquire or reacquire all or any portion of the assets in the trust by substituting other property of equivalent value. This substitution power causes the IDGT to be classified as a grantor trust for income tax purposes.

In December 2012, Petitioner contributed \$5 million cash to the IDGT. Petitioner now intends to exercise her power of substitution to exchange her New York condominium apartment for cash equal to the value of the apartment.

Analysis

Under Tax Law § 1402(a), a tax is imposed on each conveyance of real property or interest therein when the consideration exceeds \$500. The rate of tax is equal to \$2 for each \$500 of consideration. A “conveyance” means the transfer or transfers of any interest in real property by any method, including but not limited to an exchange. See Tax Law § 1401(e). “Consideration”

means the price actually paid or required to be paid for the real property or interest therein, whether or not expressed in the deed and whether paid or required to be paid by money, property, or any other thing of value. *See* Tax Law § 1401(d). An additional tax on each conveyance of residential real property or interest therein is imposed when the consideration for the entire conveyance is \$1 million or more. For purposes of this additional tax, residential real property includes 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 this additional tax is one percent of the consideration. *See* Tax Law § 1402-a.

Although Petitioner originally had intended to transfer the condominium to her son in a non-taxable transaction, the form of the actual transaction would not qualify as such. Once the apartment is substituted for the cash as an asset of the IDGT, under the terms of the IDGT, Petitioner would no longer hold any beneficial interest in the real estate. This transfer of the Petitioner's condominium apartment to the IDGT fits within the statutory definition for RETT purposes of a conveyance of real property or interest therein. Further, in order for a conveyance to qualify for the exemption under Tax Law § 1405(4) as a gift, a property must be conveyed without consideration. Exemptions from the real estate transfer tax must be strictly construed. *See Matter of Grace v. New York State Tax Commissioner*, 37 NY 2d 193; *Matter of Viacom*, Tax Appeals Tribunal, May 3, 2007. Here, in exchange for the conveyance of the condominium apartment to the IDGT, Petitioner would receive cash equal to the amount of the appraised value of the apartment. Thus, Petitioner is receiving cash consideration, and the conveyance of the apartment to the IDGT would be subject to RETT and the additional tax.

DATED: December 4, 2014

/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.