

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

TSB-A-96 (9) R
Real Property
Transfer Gains Tax
June 27, 1996

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M960411A

On April 11, 1996 the Department of Taxation and Finance received a Petition for Advisory Opinion from Dshal 67, LLC, c/o Princeton Int'l Properties Corp., 24 E. 38th Street, New York, NY 10016.

The issue raised by Petitioner, Dshal 67, LLC is whether the construction of the capital improvement described here is "distinct and separate" from any capital improvement for which construction commenced prior to 1994 and, thus, constitutes a "qualifying capital improvement" for purposes of the exemption from the real property transfer gains tax (the "gains tax") provided by Section 1443(8) of the Tax Law (the "builders' exemption").

Petitioner submits the following facts as the basis for this Advisory Opinion. On or about May 1, 1996, Petitioner intended to purchase a five-story building for approximately \$2,500,000. Immediately thereafter, the Petitioner is going to do a gut rehabilitation of the building so that only the four external walls will remain and an additional story and one-half will be added to the structure. The estimated cost of this capital improvement is \$2,500,000.

Applicable Law

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

Section 1443.8 of the Tax Law provides that a transfer of real property is exempt from the gains tax where the transfer is of real property on which a qualifying capital improvement has been constructed. The method of calculating the exemption is set forth in Section 1440.5(i) of the Tax Law.

Clauses (A) and (B) of Section 1440.5(i) provide as follows:

Pursuant to the provisions of subdivision eight of section fourteen hundred forty-three of this article, in the case of a transfer of real property on which a qualifying capital improvement has been constructed, there shall be added to original purchase price, as determined under paragraphs (a) through (h) of this subdivision, the amount of qualifying capital improvement costs that are properly accruable to the qualifying period, to construct such qualifying capital improvement to such real property. Provided, however, that, in the case of the transfer of real property which consists of a building or other structure on which a qualifying capital improvement has been constructed, such qualifying capital improvement costs properly accruable to the qualifying period shall be included in original purchase price only if the total amount of such qualifying capital improvement costs incurred to construct such qualifying

capital improvement exceeds (i) fifteen percent of the original purchase price attributable to such building or other structure, excluding the original purchase price attributable to the land, determined immediately prior to the start of the qualifying period, if such real property was acquired by the transferor after December thirty-first, nineteen hundred eighty-four, and (ii) in all other cases, twenty-five percent of the original purchase price attributable to such building or other structure, excluding the original purchase price attributable to the land, determined immediately prior to the start of the qualifying period.

For purposes of this paragraph, the term 'qualifying capital improvement' means a capital improvement to real property for which construction actually commences on or after January first, nineteen hundred ninety-four and before June thirtieth, nineteen hundred ninety-seven and which is distinct and separate from any other capital improvement to such real property for which construction actually commenced prior to January first, nineteen hundred ninety-four. For purposes of this paragraph, the construction of a capital improvement actually commences when the plan of construction for such capital improvement is essentially implemented and the physical labor directly related to the construction of such capital improvement starts.

Conclusion

Based on the facts as set forth by the Petitioner, the rehabilitation of the building, including the construction of the additional story and one-half, constitutes a separate and distinct capital improvement and, thus, would meet the definitional test of the term "qualifying capital improvement" for purposes of the "builders' exemption". Therefore, since the real property was acquired after December 31, 1984, and the estimated "qualifying capital improvement costs" to be incurred will exceed the 15 percent threshold described in Section 1440.5(i)(A)(i) of the Tax Law, these costs may be included in original purchase price for purposes of the "builders' exemption". In addition, in order for the capital improvement to constitute a "qualifying capital improvement", its construction must commence prior to June 30, 1997.

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.