

New Procedures for Real Property Recordings

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New procedures for recording an instrument affecting an interest in real property in New York State are being implemented. To record a deed transferring title on or after September 1, 2003, additional forms will need to be completed, and a seller may have to pay estimated personal income tax on gain realized from the sale before the deed will be accepted for recording. Further, in the first calendar quarter of 2004, it is expected that forms submitted with an instrument affecting real property in New York City, such as New York State and New York City transfer tax forms, will be required to be completed on the Internet. This article discusses these current developments.

New York State Estimated Tax

The recently enacted New York State Budget Bill added Section 663 to the Tax Law requiring non-resident taxpayers to pay estimated personal income tax on gain resulting from the sale or transfer of real property in the state. This requirement, effective September 1, does not apply to the transfer of a principal residence, a conveyance in a foreclosure or by a deed in lieu of foreclosure, or a transfer by a governmental agency or a private mortgage insurance company.

A deed executed by an individual, estate or trust will be submitted to the county recorder accompanied by (i) a certification that the transferor is a resident of New York State or a non-resident exempt from the requirement to pay estimated tax, or (ii) a new form receipted by the New York State Department of Taxation and Finance ("Department") when the transferor is a non-resident required to file the new form and perhaps pay estimated personal income tax on any gain from the transfer.

The requirement to pay estimated tax applies only to the transfer of title by a deed and only to a transfer of title by a non-resident individual, estate or trust. Transfers of leasehold estates, including leasehold condominiums, cooperative units or interests in an entity in title to real property are not subject to the requirement. Estimated tax need not be paid under this procedure when an entity is the transferor, even if a non-resident individual, estate or trust holds an interest in that entity.

A transferor who is a natural person is a "resident" not subject to payment of estimated income tax if, at the time of the transfer, he or she is domiciled in New York State or maintains a permanent place or residence or abode in the State and spends at least 184 days in the State during the tax year.

For an estate or trust, the fiduciary's residence is not controlling. An estate is a resident estate and a testamentary trust is a resident trust if the decedent was domiciled in New York on the date of death. A revocable inter vivos trust is deemed a resident trust if the settlor was domiciled in the state when the property was transferred to the trust. An irrevocable inter vivos trust is a resident trust if the trust consists of property of a person domiciled in New York when the trust became irrevocable.

Even if not qualifying for resident status, a transferor may be exempt from the payment of estimated tax if the property has been used as the taxpayer's principal residence. To qualify as a principal residence, the transferor generally must have owned the property and lived in it as his or her main home for at least two years during the five year period ending on the date of the transfer. If only a portion of the property was used as the transferor's principal residence, estimated tax is required to be paid on the gain allocable to the non-qualifying portion of the property.

To implement the new requirement that estimated personal income tax be paid prior to recording, the Department has issued a revised Form TP-584 ("Combined Real Estate Transfer Tax Return, Credit Line Mortgage Certificate, and Certificate of Exemption from the Payment of Estimated Personal Income Tax"), and a new Form IT-2663 ("Application for Certification for Recording of Deed and Nonresident Estimated Income Tax Payment Voucher"). These forms, and instructions, can be downloaded from the Department's WEB Site.¹

A transferor claiming exemption from the requirement to pay estimated tax must complete and sign Schedule D ("Certification of exemption from the payment of estimated personal income tax") of Form TP-584. When all transferors to a deed are exempt, Form TP-584 with Schedule D (in addition to the balance of the Form) completed and signed is to be submitted to the recorder with the deed.

To claim an exemption, a transferor who is a resident must certify residence in the state on Schedule D. A transferor not a resident may also claim an exemption by certifying on Schedule D that (i) the property was used exclusively as the transferor's principal residence within a period sufficient to establish residence for purposes of the exemption, as noted above, (ii) the transferor is a mortgagor conveying to a mortgagee in foreclosure or by a deed in lieu of foreclosure without payment of any additional consideration, or (iii) transferor or transferee is an agency or authority of the United States or the State of New York, FNMA, FHLMC, GNMA or a private mortgage insurance company. Each transferor claiming exemption must sign Schedule D of Form TP-584.

If no exemption applies to a transferor, that transferor must complete, sign and submit to the Department Form IT-2663 accompanied by payment of any estimated tax due computed on the form, and then submit receipt stamped Part IV to the recorder. There is no authority for payment

of the estimated tax to be made to the recorder as in the case of the now repealed Real Property Transfer Gains Tax.²

On Form IT-2663, the transferor will compute the amount of estimated tax due or certify that tax is not required to be paid as the transfer will not result in a gain for federal income tax purposes, or the transferor is not required to recognize gain or loss under the IRC (except for Section 121) or a treaty entered into by the United States. A Worksheet in Form IT-2663 must be completed if a tax is being paid or no gain is claimed.

In Part IV of Form IT-2663, the transferor is to set forth its name, address and tax identification number, the description and location of the property, the date of the transfer, the sale price, and the amount of the payment of estimated tax. The transferor may also identify a representative to whom Part IV is to be returned by the Department and a facsimile number for either the transferor or its designated representative.

Form IT-2663, with payment to "NYS Income Tax" of any estimated tax computed as due may be mailed or delivered to the Department in Albany. It may, alternatively, be walked-in to any of twelve offices of the Department listed on an attachment to Form IT-2663.

Part IV, which includes a "Nonresident Estimated Income Tax Payment Voucher", will be stamped to evidence the Department's receipt of the form and payment of any tax due. It will be returned to the taxpayer or its designated representative for submission to the recorder with the deed.

When more than one non-resident transferor is required to file Form TP-2663, each must file a separate form and separately pay their estimated tax. This does not apply to married couples filing a joint return for the year in which the transfer was made who can file a single form and make one payment.

A non-resident transferor may, in advance of a closing, pay the tax to the Department and have at closing a stamped receipt for payment. When Form IT-2663 is filed prior to closing the figures needed to compute the gain or loss on the transfer may be estimated. If, however, filing and payment will not be made until the amount of consideration for the transfer is finally settled at closing and paid, arrangements need to be made for Form IT-2663 and any tax payment to be handled promptly after closing. A delay in recording a deed leaves the purchaser's title at risk to intervening interests, liens and encumbrances being recorded or filed prior to recording of the deed. A delay may also result in the assessment of interest and penalties for the late payment of State and New York City transfer taxes, for which transferors are primarily liable and transferees are secondarily liable.

A transferor should consider designating a representative on Part IV of Form IT-2663, such as the closing title company or agent, to file the form, deliver the taxpayer's check in payment of the tax, and obtain receipted Part IV at a walk-in office of the Department. Although the instructions for Form IT-2663 provide that three business days from receipt of Form IT-2663 in Albany should be allowed to process and return the form, obtaining receipted Part IV at a walk-in office should avoid delay in obtaining the receipted form and recording the deed.

Recordings in New York City

On January 1, 2003, the Department of Finance of the City of New York implemented an Internet-based system known as the "Automated City Register Information System" for recordings in the New York, Bronx, Kings, and Queens counties. This program is more commonly known by its acronym of "ACRIS". Using ACRIS, a person investigating title to a property can review indices of recordings and print out an image of many of the recorded documents. A Cover Page for the recording of each document and a Payment Sheet for each transaction, generated in ACRIS, are submitted to the City Register's office with the document being recorded.³

It is expected that in the first quarter of 2004 certain forms required to record an instrument affecting real property are to be completed on-line in ACRIS. Revised TP-584, the City's Real Property Transfer Tax Return ("RPTT"), the New York State Real Property Transfer Report (RP-5217NYC), the Affidavit of Compliance with the Smoke Detector Requirement, the Property Owner's Registration Form, and the Customer Registration Form for Water and Sewer Billing will all have to be completed and signed as printed from ACRIS.

The recorder will not accept printed but incomplete forms and the related documents. These forms will have a watermark reading "Draft-Required Fields Not Completed". Final, acceptable forms will be imprinted with a Tax Transaction ID number and not contain the "Draft" watermark.

Additions to an incomplete form and changes to a completed form will be made only in ACRIS. Draft forms or forms to be amended will be accessible entering the User ID and password for the person who commenced the process and the Tax Transaction ID. Forms changed by pen or in any other manner outside of ACRIS will not be accepted.

Unless these forms are fully and finally completed prior to closing the procedure will require that there be available at closing a computer with Internet access. The parties required to sign the forms will need to be available when the final forms are printed. Ensuring that Internet access is readily available at each closing will be a radical change from usual closing procedures.

While Revised TP-584 and IT-2663 must be used as of September 1, 2003, the City Register has advised that once implemented the electronic forms will be phased in over at least a two-month period. After that grace period, however, each form will be required to be completed on-line. These new procedures will be a challenge to the real estate industry.

¹ State Tax forms listed numerically, and instructions, are at http://www.tax.state.ny.us/forms/form_number_order_auct.htm ² Tax Law, Article 31-B, repealed by Chapter 309 Laws of 1996 effective July 13, 1996 ³ ACRIS is on the Internet at <http://www.nyc.gov/html/dof/html/acris.html>. See Todd, "Title Search Questions Raised by City's New Land Record System", NYLJ, June 30.

*Published August 20, 2003 as "Rules Change on Sept. 1
For Real Property Recordings" in the New York Law Journal, page 5.*