REPORT # 595

TAX SECTION

New York State Bar Association

Report on Proposed Amendments to Regulations
Relating to the New York City
Real Property Transfer Tax

By The
Committee on New York City
Tax Matters

December 5, 1988

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TAX SECTION

New York State Bar Association

December 7, 1988

Real Property Transfer Tax Regulations

Dear Stanley:

I enclose our report on the proposed regulations under the New York City Real Property Transfer Tax, prepared by the Committee on New York City Tax Matters. The report was written by Carolyn Ichel, one of the Co-chairs of the committee, with comments from Peter L. Faber, Arthur A. Feder, Carolyn Forman, Paul Frankel, Bertram Gezelter, Michael Hirschfeld, Robert J. Levinsohn, Stephen L. Millman, Ronald A. Morris, John P. Oswald, Howard Rothman and David Sachs.

Overall, the report commends the Department for its thorough and thoughtful work in modernizing the regulations, particularly in incorporating the current Information Bulletins into the proposed regulations. The report also sets forth our comments on a number of important aspects of the proposed transfer tax regulations that require further development, including:

1) the application of the transfer tax transfers of interests in upper-tier entities;

2) the rules regarding the aggregation transfers of interests in entities;

3) the need to develop reasonable rules avoid the imposition of multiple transfer taxes where a series of transfers takes place pursuant to a single plan;

4) the current inconsistencies in the treatment of encumbrances in transactions involving entities and their owners; and

5) certain issues that remain open in the co-op area.

Attached to the report is a copy of the proposed regulations marked to show other less significant comments.

Sincerely,

Herbert L. Camp

The Honorable Stanley E. Grayson,
Commissioner of Finance,
The City of New York,
Municipal Building (Room 500),
New York, N. Y. 10007

Enclosure

Copy w/encl. to Deputy Commissioner Maria T. Jones, Esq.

New York City Department of Finance,
345 Adams Street (3rd Floor),
Brooklyn, New York 11201.

December 5, 1988

NEW YORK STATE BAR ASSOCIATION

TAX SECTION

Report on Proposed Amendments to Regulations Relating to the New York City Real Property Transfer Tax

By The

Committee on New York City Tax Matters

December 5, 1988

NEW YORK STATE BAR ASSOCIATION

TAX SECTION

Report on Proposed Amendments to Regulations Relating to the New York City Real Property Transfer Tax[1]

This report comments on the proposed amendments to the regulations relating to the New York City Real Property Transfer Tax (the “transfer tax”), which amendments were proposed by the New York City Department of Finance in September, 1988. The proposed amendments relate principally to those areas of the transfer tax law that were changed by the 1986 enactment of amendments commonly known as the “anti-Pan Am” amendments, and draw heavily from the two Information Bulletins published by the City in 1986. “The proposed amendments affect other substantive areas of the transfer tax regulations, however, and reorganize the structure of the regulations as well.

Overall, the proposed regulations are fairly detailed, and are organized in a logical and useful order.

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1 This report was prepared by Carolyn Ichel. Helpful comments were received from Peter L. Faber, Arthur A. Feder, Carolyn Forman, Paul Frankel, Bertram Gezelter, Michael Hirschfeld, Robert J. Levinsohn, Stephen L. Millman, Ronald A. Morris, John P. Oswald, Howard Roth- man and David Sachs.

We specifically commend the City for drafting regulations that do not resort to the Question-and-Answer format but instead make positive statements of general principles of law that are illustrated by examples. Questions-and-Answers, while at times useful as an interim means to provide quick insight into specific aspects of a new law, are often inappropriate as final regulations.

Attached to this report is a copy of the proposed amendments marked to indicate those portions of the regulations that are addressed in this report, and to show other, less important comments.

1. Taxation of Transfers that do not Result in any Change in Beneficial Interest.

In 1986 the New York State Bar Association Tax Section issued a lengthy Report discussing the application of the New York City Real Property Transfer Tax to transfers of economic interests in real property in the context of related entities. (NYSBA Report No. 551-A November 20, 1986.) In that Report the Tax Section recommended that the transfer tax on transfers of controlling interests in entities that own real property be applied by looking to the substance of a transaction, rather than its form. Specifically, the Tax Section recommended that a credit against the transfer tax should be available to the extent a transfer constitutes a change in the form of ownership of controlling interests in entities with no change in beneficial ownership. The credit could be provided by regulation pursuant to the authority contained in Sections 11-2112.1 and 11-2117 of the Administrative Code and Section 1201(b)(vii) of the enabling legislation under the New York Tax Law. This recommendation was made in the context of transfers of economic interests, but it is equally applicable to transfers of direct interests in real estate.

Many of the inequities currently encountered under the transfer tax are the result of the application of the tax to transfers in which there is no change in beneficial interest. The problems of multiple transfer taxes on a series of related transfers (discussed in section 4, below) and the problems of duplicative taxation of debts (discussed in section 5, below) are examples of existing inequities that could be largely eliminated by including in the regulations a credit such as that proposed in the 1986 Report. We reiterate the importance of such a credit mechanism, and again we recommend that the proposed regulations include the following Article:

> “A credit shall be allowed against the tax imposed by chapter eleven of the administrative code on any transfer that is a change in identity or form of ownership or organization, to the extent there is no change in beneficial interest. The amount of such credit shall be equal to the amount of tax imposed under section 11-2102.b(1) of the transfer tax law on the consideration for that portion of the interest in real property or the economic interest in real property transferred with respect to which there is no change in beneficial interest.”

2. <u>Transfers of Interests in Upper-Tier Entities</u>.

a. The discussion in <u>Article 6</u> of the proposed amendments raises a number of questions regarding the treatment of transfers of interests in upper-tier entities. The standard that is to be applied in determining whether to impose a tax on a transfer of an upper-tier entity is unclear because the proposed example refers both to X Corporation's "sole" purpose, and to its "principal" purpose. The language of the enabling legislation and the transfer tax law is quite precise; both statutes impose the tax only on the transfer of interests in a "corporation, . . . partnership, association or other [unincorporated] entity, . . . or trust <u>which owns real property</u>." N.Y. Tax Law §1201(b)(ii); City Admin. Code 511-2101.6 (emphasis added). Accordingly, it appears that the legislature did not intend to impose a tax on the transfer of an interest in an upper-tier entity unless the upper-tier entity could be disregarded as a tax-avoidance device. <u>See</u> <u>595 Investors Limited Partnership v. Abraham Biderman</u>, 531 N.Y.S. 2d 714 (1988), which involved a shell entity that had no other assets and no apparent function other than as a device to avoid the transfer tax.

We recognize that a test based on a sole purpose of tax avoidance might be too easily manipulated. On the other hand the language of the statute is unambiguous, and cannot be ignored. We therefore suggest that proposed regulation Article 6(b) be amended to include the following sentences at the end thereof:

> “The ownership of interests in an entity (the “upper-tier entity”) that owns an economic interest in real property will be presumed to be an economic interest in real property where the principal effect of the tiered structure is the ownership of an economic interest in real property through the upper-tier entity. A taxpayer may seek to rebut this presumption by attaching to the transfer tax form an affidavit setting forth facts that support a finding that the upper-tier entity is not merely a shell designed to avoid the imposition of” Real Property Transfer Tax.”

The example then should be changed to state that:

> “since X exists for the principal purpose of holding Y's stock, the ownership of X stock is presumed to be an economic interest.”

b. Information Bulletin-No. 2, Q&A 1,[2] sets forth an example in which stock of an upper-tier entity is not

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[2] References herein to the Information Bulletin are to New York City Real Property Transfer Tax Information Bulletin-No. 1, published by the City of New York Department of Finance on July 28, 1986, and Information Bulletin-No. 2, published on December 16, 1986. References to Q&As are to Questions and Answers contained in the Information Bulletins.

treated as an economic interest. This example is very important for it provides useful guidance for business corporations that hold indirect interests in New York realty and are not merely passive shells. For example, X Corporation might conduct extensive business operations directly or through other subsidiaries and conduct its New York operations through Y Corporation, a subsidiary that leases office space in New York City. Under the above Q&A X's stock was not viewed as an economic interest. That result should not have changed, and the example of the Q&A therefore should be included in the regulations to illustrate the treatment of an upper-tier entity where the tiered structure does not have the principal effect of the ownership of an economic interest in real property through an upper-tier entity.

c. It should be made clear that a holding company -- that is, an entity that owns no operating assets directly but owns interests in more than one lower-tier entity -- is not automatically treated as an economic interest but in-stead is subject to the same analysis as any other upper- tier entity. Thus, if in the above example X Corporation does not conduct its business operations directly but in-stead operates through subsidiaries (other than Y), the X shares should not be viewed as an economic interest. Even though X owns no assets directly, the principal effect of the tiered structure is not the ownership of an economic interest in real property through the upper-tier entity.

d. The regulations should make it clear that the above standards will be applied to determine whether an interest in an upper-tier entity that owns shares of a cooperative housing corporation constitutes an economic interest in real property.

Where an entity owns a cooperative apartment not for any business purpose but for the purpose of making it available for the personal use of an owner of the entity, the regulations should provide that the transfer of ownership interests in the entity, and the transfer of the coop apartment by the entity itself, may be exempt from transfer tax. if the conditions specified in Article 22 are satisfied.

3. Controlling Interests and Aggregation Rules (Article 8).

a. The aggregation of transfers occurring within a three-year period should not be a conclusive rule but a presumption that can be rebutted if the taxpayer furnishes sufficient proof that the transfers are not related. This was clearly stated in Information Bulletin-No. 2, Q&A 20. The regulations in Article 8(b) should incorporate the concepts expressed in that Q&A.

b. All the examples in the proposed regulations and in the Q&As involve transfers <u>by</u> one transferor or <u>to</u> one transferee. The presumption for aggregation of these transfers, and of transfers in situations where several transferors or transferees act in concert, is often appropriate, inasmuch as a single person or group is acting to dispose of or to acquire control.

The application of an aggregation presumption to unrelated transfers of minority interests by different transferors to different transferees is, however, an entirely different question. We believe it would be extremely inappropriate to aggregate transfers of minority interests by unrelated transferors to unrelated transferees where neither the transferors nor the transferees are acting pursuant to a plan to dispose of or to acquire a controlling interest. Such transactions simply do not result in the kind of transfer of controlling interest at which the anti-Pan Am legislation was directed.

We therefore recommend that Article 8(b) be revised to include a statement that:

> "Transfers of economic interests by two or more unrelated persons to two or more unrelated persons will not be presumed related and will not be aggregated unless the grantors are acting in concert pursuant to a plan to transfer a controlling economic interest or the grantees are acting in concert pursuant to a plan to acquire a controlling economic interest."

The regulations should include an example to illustrate this rule. For example, assume a partnership of 4 equal partners, A, B, C and D. On January 1, 1989, D transfers his 25% interest to his wholly-owned corporation. On January 15, 1989, A sells his 25% interest to a third party. The example should state that as a factual matter it is assumed that the transfers were not part of a plan to transfer or to acquire a controlling interest, but instead were the result of each partner's separate, personal planning. The example should conclude that transfers by A and D will not be presumed related.

c. In applying the three-year aggregation rule it should be stated that transfers on death are not aggregated with other transfers, and that transfers made to beneficiaries under the terms of a trust established 3 or more years prior to the date of other transfers are not aggregated with such other transfers. Thus, if an individual dies and under the terms of his will a 25% partnership interest passes to his children, that 25% interest simply should not “count” in determining whether any other transfers of interests in the partnership are subject to tax.

d. It would be useful to include in the regulations examples or general rules that would clarify the application of the tax to the following situations. (The terms “Day,” “Day 2,” and “Day 3” are used to clarify the sequence of transfers, but should not be read to suggest that the transactions occur over a two- or three-day period. In each case the transfers described in these examples take place at any time within the three-year period of presumed aggregation.)

1. On Day 1 A buys a 60% interest from C, and C pays a tax on such sale. On Day 2 A sells 10% of his new interest to D. It should be made clear that the sale of 10% to D is not added to any part of the 60% acquired by A, since the 10% is part of the 60% and has already been taxed as part of the transfer to A.

2. On Day 1 A sells a 20% interest to B. On Day 2 A buys a 30% interest from C. Again,. it should be made clear that A's 20% sale is not added to A's 30% purchase. When the smoke clears, there has been a shift of 30%, B acquiring 20%, and A acquiring 10%. To the extent A sells and then reacquires an interest, the transaction should be analyzed as a direct transfer from A's transferor to A's transferee.

3. A owns a 50% interest. On Day 1 A purchases an additional 25% interest from B. On Day 2 A sells a 25% interest to C. Overall, all that has happened

is a shift of 25% from B to C. It should be clear that A's purchase is not added to A's sale, again by analyzing the transaction as a direct transfer from B to C.

4. On Day 1 A sells a 25% interest to B. On Day 2 A sells a 25% interest to E. On Day 3, B sells his new 25% interest to E. Assume that B was not acting as a conduit in his acquisition of the 25% interest. The correct treatment of these transactions should be a tax on 50%, not 75%, because 50% is all that has been transferred, and the same 25% interest is not counted twice. It should be clarified, however, whether the taxable transfers are on Days 1 and 2 or Days 2 and 3. The former seems the more correct result — Day 3 may never come. However, an example that provides a rule for this case would be useful.

5. It should be made clear that transfers will not be considered related solely because under the terms of a partnership agreement, shareholder's agreement, loan agreement, right of first refusal, or other similar agreement it is necessary to obtain the consent of the entity, or of other persons, to effect a transfer.

6. Where interests are properly aggregated it should be made clear that the tax is imposed only with respect to such real property as was owned by the entity throughout the entire period during which the transfers occurred. Thus, if A buys a 40% interest on Day 1 when the entity owns Parcel 1 and Parcel 2, Parcel 2 is sold on Day 2, and then A buys a 10% interest on Day 3, the tax imposed on A's transferors should be measured only by the value of Parcel 1.

e. The examples in Article 8(d) are helpful in determining whether a transfer of an upper-tier interest causes a tax. There may be some confusion, however, as to whether the relevant test is the net percentage interest transferred, or whether the parent owns a controlling interest in the subsidiary. We believe the former test is the correct one. That could be clarified by changing the Examples to present a situation in which X owns 60% of Y, and A transfers (1) 80% of X, or (2) 90% of X. 80% x 60% = 48%, so case (1) would not constitute a transfer of a controlling interest. 90% x 60% = 54%, so case (2) would be taxable.

f. The examples generally illustrate transfers of controlling economic interests to third-parties. Clearly the transfer tax also applies to transfers to other owners of the entity, even where such other owner or owners already own a controlling interest. It would be helpful to illustrate this with an example, as follows:

> “X Corporation owns real property in New York City. A and B each owns 50% of the stock of X. A sells his X stock to B. The transfer tax will apply to A's sale to B.
>
> “If A transfers 49% of the stock of X to B, at a time when B has held his 50% interest for at least three years, no taxable transfer of a controlling economic interest in real property has occurred and no transfer tax is due on A's transfer to B (unless the acquisitions by B are related and pursuant to a plan)”.

g. An entity owning real property may be recapitalized, or one type of economic interest in the entity may be converted into another type of economic interest in the same entity. For example, a corporation may recapitalize and replace one class of its outstanding stock with a different class of stock. Similarly, a general partner in an existing limited partnership might convert his general partnership interest to a limited partnership interest; the real property is not transferred, and the partner retains the same capital and profits interest, albeit now as a limited partner. In these situations, where there is no shift in voting shares or value, or in capital or profits, there is no real transfer of an economic interest. The same persons own the same proportionate interests in the same entity both before and after the transaction.

We therefore suggest that the regulations include the following provision:

> “The transfer or issuance of shares of stock in a corporation, interests in a partnership, association or unincorporated entity, or beneficial interests in a trust are not included in the term “transfer” to the extent such transactions (i) take place between the corporation, partnership, association, trust or other entity and persons who already own economic interests therein (the “owners”), and (ii) do not effect a change in the owners' respective interests in the total combined voting power or the total fair market value of all classes of the issued and outstanding stock of the corporation, in the capital or profits interests in the partnership, or in the beneficial interests in the association, trust or other, entity (as the case may be).
>
> “To illustrate:
>
> “X Corporation owns real property in New York City. X Corporation has one class of stock outstanding, Class A voting common stock. 50% of the Class A voting stock is owned by A and 50% is owned by B. B thus owns shares of X stock representing 50% of the voting power and 50% of the fair market value of all of the issued and outstanding shares of X Corporation. Pursuant to a recapitalization transaction B exchanges his Class A voting stock for Class B voting stock. The Class B stock issued to B represents 25% of the voting power and 50% of the fair market value of all of the issued

> and outstanding stock of X Corporation. B is considered to have transferred 25% of the total combined voting power of all classes of stock of X Corporation. Unless such transfer is properly aggregated with other transfers under the provisions of this Article 8, the transfer by B does not constitute a transfer of an economic interest in real property, and the transfer tax will not apply to the recapitalization transaction."

h. Many of the examples illustrating the aggregation principles of Article 8 involve a transferor who transfers various portions of his interest in an entity over successive years. Example 3, for instance, states that "On January 1, 1988, A sells 20% of his interest in X to B. On December 31, 1990, A sells <u>30% of his interest in X</u> to C. Since A has transferred a controlling interest in real property within a three year period, the transfer tax will apply to both sales made by A." (Emphasis added). The underscored language is confusing and should be changed to read "a 30% interest in X." Because A transferred 20% of his 100% interest in X in 1989, on December 30, 1990, A owned only 80% of X. A transfer of <u>30% of A's interest in X</u>, therefore, would be only 24% of X. In that case, the aggregate of

A's transfers would be only 44%, which is not a controlling economic interest.

i. Additional guidance is needed in Article 8(c) addressing transfers of small interests made on recognized exchanges or over-the-counter markets. It is often impossible for a shareholder or partner with a small interest to know whether his transferor or transferee has a plan to sell or acquire a controlling economic interest in the entity, and a transferor or transferee with only a small interest in an entity will find it difficult to determine its proportionate interest in, and the value of, the underlying real property. It is not reasonable to hold a transferor or a transferee with a small interest in a publicly traded entity liable for the transfer tax as a result of the plan of his buyer or seller. If the transfer tax is to apply to such situations, the tax should be borne by the party whose plan triggers the tax. The regulations should therefore provide that in the case of transfers of a less than 5% interest on a recognized exchange or over-the-counter market, the tax, if any, will be imposed upon the transferor(s) or transferee(s) whose plan brought the transaction under Article 8 (c)(1).

In addition, Article 8(c)(2) should be revised to clarify that the rule applies not only to transfers of corporate stock but also to partnership interests, beneficial interests in trusts and any other interests potentially subject to transfer tax.

4. Transfers to and from Agents, Dummies, Strawmen and Conduits.

a. One of the most frustrating and unreasonable aspects of the transfer tax is the possibility that one transaction may be taxed numerous times in the process of getting from point A to point B. Unlike the income tax or the gains tax, the transfer tax has no offset for basis or original purchase price. As a result, while multiple income taxes and gains taxes are avoided by step-ups in basis and OPP, there is no similar protection against multiple transfer taxes. Taxpayers are too often faced with the prospect of paying 4%, 6% or 8% of the gross fair market va-lue of their real property to complete a complicated transaction. This is inappropriate. Where a series of transactions is completed pursuant to a clear plan, the transfer tax should be imposed just once. Article 20 goes part of the way in addressing this problem, but does not do enough.

(1) Proposed regulation Article 20 prescribes certain situations in which a series of transactions will be treated as one direct transfer from the original owner to the ultimate owner, so that the series of steps is taxed only once. Under these rules interim transfers are presumed to be transfers to and from conduits, and as such are not subject to tax. The proposed regulation relates to transfers involving a multi-tiered network of corporations and partnerships, and imposes 5 requirements:

(i) The series of transfers must be pursuant to a plan;

(ii) The plan must have a fixed beginning and end;

(iii) The plan must be completed within thirty days;

(iv) The plan must require each interim holder to hold the real property (or economic interest therein) solely to pass it on to another person; and

(v) The plan must not result in a change in the respective percentage interests of the persons who were the owners of the network at the beginning of the plan. (However, changes in the ownership of the owners themselves are not taken into account in determining whether the series of transactions is eligible for this conduit rule.)

We believe that the fifth condition is not appropriate. The presence or absence of third parties in the series of transactions is not relevant to whether a conduit rule should apply. What is relevant and important under the conduit theory is that an interim holder takes the property (or an economic interest therein) under a plan pursuant to which he will, within a specified, short period of time, pass the property along to someone else. That is the definition of conduit -- something through which property flows.

Assuming that the parties demonstrate to the City by clear evidence that they satisfy the first four require-ments described above, any transitory interim owner should be treated as a conduit. We therefore recommend that the requirement in paragraph (c) of Article 20 be dropped, and that the rule be available in all situations, not just the reorganization of a multi-tiered network of entities.

(2) From an administrative perspective presumably it is preferable to provide a safe harbor exemption only for transfers that take place over a short period of time. Sometimes, however, it is not possible to complete a series of transactions within a short time frame. For example, given the time required for S.E.C., New York State Attorney. General and Hart Scott Rodino filings and the necessary waiting periods, it may be impossible to complete a transaction within thirty days. To address this, it may be appropriate to lengthen the thirty-day period under the regulations. At a minimum, however, the thirty-day period in Article 20 should be a safe harbor, not a hard and fast rule; the City should reserve the flexibility to apply conduit treatment to a plan of longer duration, and taxpayers should have the opportunity to demonstrate that, although a plan takes longer than thirty days to complete, it is nonetheless appropriate to apply the conduit rules to the overall transaction.

(3) It is not clear whether, if the criteria of Article 20 are satisfied, the taxpayer still must ask for a ruling to be assured of conduit treatment. We recommend that the regulations state that if the requirements of (a), (b) and (d) of Article 20 are satisfied, the transactions will be treated as conduit transfers as described in the regulation. The case-by-case analysis should be restricted to transactions that do not satisfy the regulations' safe harbor.

(4) Information Bulletin-No. 2 included two examples, Q&A 7 and Q&A 8, that have not been included in the regulations. Presumably this was because Article 20 was thought to be broad enough to cover these cases without requiring specific examples. The two examples do provide helpful guidance in a number of circumstances, however, and we recommend that they be included in the final regulations.

b. Article 27(b)(7) sets forth the exemption for transfers to and from agents, dummies, strawmen and conduits, and contains some examples of conduit transfers. Article 20 is in a sense another example of the exemption, and that Article should be cross referenced in Article 27.

The examples given in Article 27(b)(7) are very narrow and will have limited practical use. For example, in 7(A) the facts assume that property is transferred by an individual to a corporation in order to obtain financing, and then is immediately reconveyed by the corporation to the individual. In many construction situations, however, the property will remain in the corporation until construction is complete.

Similarly, example 7(C) appears to be drawn from the decision in Commissioner v. Jesse C. Bollinger, 108 S. Ct. 1173, a recent Supreme Court case that analyzed the federal income tax characterization of the relationship between a corporation and its owner/principal. We believe that the standards applied to federal income tax cases should not be determinative under the transfer tax. For example, the Bollinger decision was based in part on the fact that the corporate agent was held out as an agent in all dealings with third parties. In some cases, however, a lender may not be willing formally to acknowledge the agency status of the corporate borrower, or a principal may use a wholly- owned entity as his agent in a real estate transaction precisely so that third parties will not know of the involvement of the principal (such as where several parcels are being acquired as part of an assemblage). While this might affect the federal income tax analysis, it should not mean that the transfer tax becomes applicable to transfers by the agent to its principal.

We recognize that the City has a legitimate interest in protecting the fisc against taxpayers who endeavor to create agency-type relationships retroactively in order to avoid transfer tax. On the other hand, the statute clearly provides an exemption for transfers involving agents, dummies, strawmen and conduits, and that exemption should not be rendered useless simply to protect against abuse. We believe that in applying this exemption the focus of the analysis should be whether, from the inception of a transaction to its conclusion, there is clear proof that the interim owner was intended to and did act as an agent, dummy, strawman or conduit. The form of that proof may vary -- it may be a written plan or agreement; it may be the manner in which the agent or conduit dealt with third parties; it may be a ruling request filed with the City before the transaction commenced. Whatever the form, however, if that proof is provided, the interim owner should be respected as such under the transfer tax, and transfers to or from the agent, dummy, strawman or conduit should not be taxed.

We therefore recommend that Article 27(b)(7) be expanded to clarify that the situations described are just examples of cases that qualify, and that the City will consider other situations on a case-by-case basis, in each case looking for clear proof that throughout the course of its ownership of property the interim owner was acting as an agent, dummy, strawman or conduit.

5. The Treatment of Encumbrances.

The transfer tax treatment of encumbrances on real property is inconsistent, and this inconsistency results in taxpayers paying tax repeatedly on the same debts, as if they could be relieved of the same indebtedness more than once.

For example, partner A transfers encumbered real property to his partnership. Under the regulations A is deemed to have received consideration for the real property that includes the debts thereon. A therefore is taxed on the amounts of the encumbrances on the real property as if the partnership had relieved him of these liabilities in consideration for the property.

A now sells his partnership interest. Having taxed A on the relief of debts at the time of A's contribution to P, it makes no sense to tax A again on those same debts when he sells his partnership interest. Nevertheless that is what the regulations do. Taken together the two provisions of the proposed regulations treat A as having received the same consideration twice.

Similarly, the regulations tax both the entity and the entity owners on the same debt. If B buys a partnership interest from A, the tax is imposed on A as if B had relieved A of A's share of the partnership debts. If the partnership subsequently liquidates, the partnership is taxed on those same debts again.

The regulations have created this problem of multiple taxation by including debts in the definition of consideration on transfers into and out of entities. We think this interpretation is not mandated by the statute, particularly in light of the changes that have been made in the statute since the regulations were first promulgated; and clearly the existing system reaches the wrong result. We recommend that the regulations be revised to establish an internally consistent, theoretically sound body of law. Specifically, the regulations should treat entity debt for all purposes as if it were the debt of the entity owners. On a transfer of encumbered property to an entity consideration should be limited to the net value of the interests received, plus that portion of the debt that is, as a result of the contribution, shifted to the other entity owners. (Principles similar to those of section 752 of the Internal Revenue Code could be applied to establish the entity owners' shares of debt following a transfer of encumbered property to an entity.) Similarly, on a distribution by an entity, “value” should be defined as net of the liabilities encumbering the distributed property, and consideration should be limited to consideration other than the relief of liabilities. The treatment of liabilities in this manner would permit the imposition of tax on full fair market value when entity interests are sold, yet would avoid the anomalies of taxing the entity owners as if they received the same consideration twice, and taxing both the entity and the entity owners on the same debt.

An alternative solution to the multiple taxation of the same liabilities would be to define consideration on the sale of an economic interest as not including the seller's share of the entity's liabilities. Unlike the gains tax, which provides specific language designed to capture such inside indebtedness in consideration, the transfer tax statute contains no provision that defines consideration to include inside liabilities. The regulations thus are on weak ground in reaching to include inside debt in consideration, and clearly it is inappropriate to attempt to do so when the theories underlying different portions of the regulations are internally inconsistent.

We recognize that the inclusion of inside liabilities in consideration on a sale of economic interests is important

important if the anti-Pan. Am legislation is to have its intended effect. We therefore prefer the first solution to the problem of multiple taxation of liabilities. Either way, however, we urge that the proposed regulations be revised to reach a result that is fair, internally consistent, and logically supportable.

6. Transfers Into and Out of Trusts.

In the case of a liquidation of an entity the anti-Pan Am amendments provide that consideration is the greater of fair market value or the debts allocated to the property. This rule applies also to trusts (Article 21). Where a trust is established to serve a business purpose of the grantor the application of this rule makes sense, because such trusts should be treated in the same manner as partnerships and corporations. However, the treatment of terminations of trusts established for family or donative purposes as transfers taxable at value would produce unintended results.

For example, assume that Grandfather dies and leaves real property in trust for the benefit of Grandmother for her life, and upon her death the trust is to be terminated and the property conveyed to Grandchildren. There is no transfer tax on the testamentary transfer to the trust, and it would be inappropriate to impose a transfer tax on the value of the property when the trust is terminated. All that happens when the trust terminates is that Grandfather's testamentary transfer has been completed. Accordingly, the distribution to Grandchildren on the termination of the trust should be treated as the completion of the testamentary transfer that is not subject to tax. By adopting this approach, the transfer to the testamentary trust will be treated the same as if Grandfather's will had provided that Grandmother was to have a life estate in the real property, with the remainder interest owned by Grandchildren.

Similarly, if Grandfather made the transfer as an intervolves gift, there should be a tax on the. transfer into the trust measured by the amount of any liabilities to which the property is subject, but the transfer out of the trust upon its termination should not be taxed again. In each case the correct result is obtained by analyzing the initial transfer into the trust and determining the tax treatment of this transfer, and treating all further transfers of the property to beneficiaries in accordance with the terms of the trust as a continuation of the original transfer, not as new, separate transfers. This analysis should be applied to all testamentary trusts, to all trusts that are established in connection with donative transfers, and to any other trust established by an individual in connection with his or her estate, gift or personal planning.

7. Definition of Consideration on Exchanges.

Article 9, new Example (d) could be expanded somewhat and would answer a number of questions that frequently arise regarding the tax treatment of exchanges. Specifically, the Example should show how B is taxed on the exchange. B transfers property with a fair market value of $20,000 and assumes a debt of $30,000 to acquire A's property. On these facts, B should be treated as having received property with a value of $20,000 in exchange for his $20,000 property. Thus, the consideration for the transfer of B's property is $20,000.

8. Transactions Involving Cooperative Housing Corporations.

a. It would be useful in Article 17(c) to include an example showing that the rate of tax on a co-op sale is 1% even where the consideration exceeds $500,000.

b. Article 22(a) states that consideration is not reduced by payments made to a reserve fund. We do not believe this is the correct result. Generally, the current form of co-op transactions is that a buyer buys stock from the co-op for, say, $10, the co-op deposits say $1 to the reserve fund, and the co-op remits $9 to the sponsor. The stock sale by the co-op is taxable (but for the credit). When the shareholder pays $10, however, he is paying $9 for real estate and $1 for a separate asset, the cash that is deposited into the Corporation's reserve fund and remains in the co-op as an asset available for the benefit of the shareholders. The sponsor does not derive the benefit of the $1 paid to the co-op, and he should not be taxed as if he received the $1 in consideration for his real property.

Similarly, if a sponsor sells real property for $10 and remits $1 to the co-op for its reserve fund, he does not receive $10 in consideration for the real estate alone, but rather in consideration for both the real estate and his agreement to make a $1 contribution to the reserve fund. The consideration therefore must be allocated between the reserve fund and the real property, with the result that the sponsor is taxed on the $9 consideration he receives for the real property.

c. Article 22(c)(7) of the proposed regulations states that it is a “commercial activity” to purchase an apartment and allow a family member to stay there, paying only the maintenance. We believe that is an unreasonable extension of the concept of “commercial activity,” and an unsupportable result. The owner derives no profit, he has no tax incentives, he is simply providing housing for a family member. Similarly, the treatment of 15 days’ rental as generating a commercial activity is unreasonably broad. Presumably this standard was drawn from Internal Revenue Code section 280A, but that section relates primarily to the treatment of income and expenses, not to the character of the property itself; in applying the transfer tax a more reasonable analog is the authority under section 1034 of the Code regarding the impact of temporary rentals on the ability of a taxpayer to rollover gain on the sale of a principal residence. We believe these provisions should be deleted from the regulations. We suggest that the regulations instead include provisions similar to those found in Sections 590.24 and 590.25 of the regulations under the New York State gains tax.

In addition, the tainting of an entire apartment where only a portion is used for commercial purposes is unnecessarily harsh; it would be a more reasonable application of the statute to tax that portion of the consideration that relates to the commercial portion of the apartment.

d. Co-operative housing corporations sometimes find it desirable to convert to a condominum form of ownership. Generally this is effected by liquidating the cooperative corporation and distributing apartments to the shareholders as condominium units. The Technical and Miscellaneous Revenue Act of 1988 added a new federal Code provision to permit such liquidating transfers to be made tax-free to the extent the distributee shareholder could have qualified for non-recognition of gain on a sale of his co-op shares. Internal Revenue Code section 216(e). It would be useful if the proposed regulations provided a similar exemption, so that no transfer tax would be imposed on the liquidations of a co-operative housing corporation to the extent of distributions to shareholders who could transfer their co-op shares without incurring transfer tax. Such a provision would, we believe, further the legislative intent that the anti Pan-Am amendments not increase the tax burden on co-ops.

9. Transfer Tax Credit Provisions.

There are certain respects in which the credit provision (Article 21(d)) should be clarified in the regulations. First, it should be available not only on a liquidation of the acquired entity, but also on any distribution of the property where the entity receives consideration, including any distribution in partial liquidation of an entity and any non-liquidating distribution for consideration. There is no need to construe the credit so narrowly.

Similarly, consider a situation where, for example, A buys 100% of the stock of X, A then transfers 40% of the stock to B, and X then is liquidated. The credit should be available not only where property is distributed to the "purchaser" of the X stock, but also where property is distributed to any successor of the purchaser. This interpretation of the credit rules also would be useful where, after a purchase by A, A is merged into B in a nontaxable trans-action and X then liquidates, or A dies and B, as his heir, acquires the X stock and liquidates X.

In addition, the application of the credit to tiered-entity situations should be clarified. The purpose, of the credit mechanism is to enable the buyer of an economic interest in real property to restructure the target entity and acquire a more direct interest in the property with no duplicative transfer tax liability. Accordingly, if a transfer tax is paid on the acquisition of stock in an upper-tier entity (because the upper-tier is treated as an economic interest in real property), the credit should be available for all distributions by upper- and lower-tier entities within the twenty-four month period, even where such transfers do not otherwise qualify under the conduit rules. Moreover, the credit should not be "used up" on the first such distribution, but should be available for each distribution through the chain. For example, A purchases 100% of the stock of X Corp. X Corp. owns no real property directly, but is treated as an economic interest in real property because of its ownership of 100% of Y Corp. Y Corp. is liquidated into X Corp., and subsequently X Corp. is liquidated, distributing the real property to A. The credit should be available to Y Corp. on its liquidating distribution of the real property to X Corp., and also should be available to X Corp. on its liquidating distribution of the real property to A (assuming both transfers occur within the twenty-four month period). It would be unreasonable to apply the statute to upper-tier entities without applying the credit in the same expanded manner.

10. Treatment of Redemptions.

It would be useful to expand the redemption example (Article 24(e)) to show what happens where the redeemed party owns a controlling interest. Thus, if instead of redeeming A for the $250,000 parcel, X redeems the stock of B, C and D in exchange for the $750,000 parcel, there would be a tax on X measured by the consideration X is deemed to receive for that parcel, and a tax on B, C and D (as a consequence of their stock ownership having declined from 75% to zero) measured by the consideration they are deemed to receive for their 75% direct interest in the $250,000 parcel.

11. Secrecy of Returns.

We understand that the commissioner of finance is working to improve the confidentiality of returns filed with New York City, and we applaud these efforts. We ask whether the proposed regulations have been reviewed in this regard and whether there are changes that would appropriately be included in the final regulations.

12. Refunds and interest on Overpayments.

Article 33 of the proposed regulations prescribes in some detail the rules relating to interest and penalties on underpayments of tax, and Articles 39 and 40 prescribe procedures relating to the collection of tax deficiencies. The regulations should provide a similar description of the rules relating to refund claims and interest on overpayments of tax.

13. Mergers

Article 19 should be clarified to provide that a statutory merger or consolidation is a transaction that is so defined under the laws of the jurisdiction in which the constituent corporation, the continuing corporation or the new corporation is incorporated.

14. Effect of the Death of a General Partner; Conversion to Limited Partnership

a. The partnership law of New York and most (if not all) other states provides that a general partnership is dissolved upon the death or bankruptcy of a general partner. N.Y. Partnership Law-562. The remaining general partners can decide, however, to continue the partnership business as general partners in a reconstituted partnership. Similarly, N.Y. Partnership Law 5109 provides that the retirement, death or insanity of a general partner dissolves a limited partnership unless the business is continued by the remaining general partners, but here a technical dissolution can be avoided by the action of the remaining general partners.

We believe that the dissolution of a general partnership upon the occurrence of the above-described events should not result in a transfer tax, nor should the technical creation of a new partnership as a result of the continuation of the partnership business by the remaining partners. There is no real transfer of property in these situations, and it would be unprecedented to apply the transfer tax to these cases. We believe that the proper result can be achieved by providing that, in the partnership context, the term “liquidation” does not refer to a dissolution of the partnership, but instead refers to a termination of the partnership business in connection with the winding up of the partnership affairs. See N.Y. Partnership Law 561.

b. Partnership agreements sometimes provide that upon the death of a general partner his partnership interest is converted into a limited partnership interest. If the partnership had not theretofore been a limited partnership, the death of a partner thus will result in the conversion of the partnership to a limited partnership.

We do not believe that the conversion of a general partnership to a limited partnership, in and of itself, should be subject to transfer tax. Again, there is no real transfer of property in these situations — the property remains in a partnership, owned by the same persons holding the same proportionate interests. All that happens is that the relationship of certain partners to third-party creditors has changed. Moreover, it is well established that for income tax purposes the new limited partnership is treated as a continuation of the general partnership. See Internal Revenue Code, section 708. Accordingly, the transfer tax regulations should provide that the conversion of a general partnership into a limited partnership (and vice versa) does not constitute a transfer subject to tax. If, in connection with the conversion, changes occur in the ownership of the partnership (for example, by the admission or withdrawal of a partner, or by amendment to the agreement altering the proportionate interests of the partners), those changes may involve a transfer subject to tax, and it would be appropriate for the regulations to provide that any transfers of capital or profits interests reflected in such changes may be subject to tax on their own facts.

15. <u>Viability of Information Bulletins after Final Regulations are Promulgated</u>.

Many of the provisions included in the proposed regulations discuss issues that also were addressed by the Information Bulletins. To avoid possible misunderstandings where there is a difference between the final regulations and the Information Bulletins, the City should, either in the regulations or by a separate formal notice, rescind the Information Bulletins and declare them inapplicable to any transaction consummated subsequent to the effective date of the final regulations. With respect to transactions that occurred after the Information Bulletins were issued but before the promulgation of final regulations, or transfers consummated pursuant to binding written contracts entered into during such period, we believe that the City should announce that it will not take a position different.

from the Information Bulletins to the detriment of the taxpayer. The Information Bulletins, while recognized as being of a lesser stature than final regulations, have nevertheless been relied upon by taxpayers in evaluating the application of the transfer tax to transactions consummated after July 13, 1986. It would be inequitable for the City now to apply a different interpretation of the tax retroactively.

THE CITY OF NEW YORK

DEPARTMENT OF FINANCE

Notice of Opportunity to Comment on Proposed Amendments to Regulations Relating to the New York City Real Property Transfer Tax

IN COMPLIANCE WITH SECTION 1105 OF THE NEW YORK CITY CHARTER, and exercising the authority vested in me as Commissioner of Finance by Section 11-2112 of the Administrative Code of the City of New York, notice is hereby given of intention to adopt the following proposed amendments to the Regulations Relating to the New York City Real Property Transfer Tax.

Written comment regarding the proposed amendments must be submitted to Maria T. Jones, Deputy Commissioner for Legal Affairs, 345 Adams Street, Brooklyn, New York 11201, on or before October 5, 1988.

Note: New matter <u>underscored</u>: old matter in brackets [ ] to be deleted.

AMENDMENTS TO REGULATIONS

REAL PROPERTY TRANSFER TAX LAW

PROMULGATED JULY 30, 1965

Section 1. The Introduction to the Regulations of the Commissioner of Finance of the City of New York pertaining to the Real Property Transfer Tax (Chapter 21, Title 11 of the Administrative Code of the City of New York) is amended to read as follows:

INTRODUCTION

The Real Property Transfer Tax was first enacted in 1959 as Title I of Chapter 46 of the Administrative Code of the City of New York. Pursuant to the provisions of Chapter 93 of the Laws of 1965, as amended, it was re-enacted commencing August 1, 1965, and is incorporated in [Title II of] Chapter [46] 21 of Title 11 of the Administrative Code.

The tax is generally imposed on (1) each deed at the time of delivery (unless** for instruments deeds expressly exempt by the law), (2) each instrument or transaction, at the time of the transfer, whereby any controlling economic interest in real property is transferred, and (3) transfers of stock in a cooperative housing corporation in specified situations when the consideration for the real property or economic interest therein exceeds $25,000. The tax is payable by the grantor or, if it is not paid by the grantor or the grantor is exempt from tax, by the grantee.

**Parenthetical should modify a three clauses.

§2. Article 2 of such Regulations is amended to read as follows:

DEED

Article 2. Any document, instrument or writing (other than a will), regardless of where made, executed or delivered, whereby any real property or interest therein is created, vested, granted, bargained, sold, transferred, assigned or otherwise conveyed, including, on and after February 1, 1982, any such document, instrument or writing whereby any leasehold interest in real property is granted, assigned or surrendered.

To illustrate:

(a) The devise of an interest in real property under a will is not subject to tax.

(b) A deed given by an executor in accordance with the terms of a will is not subject to tax; however, if by reason of a consideration passing between devisees, one of them takes a greater share in the realty than that to which he is entitled under the will, the deed given by the executor to convey such greater share is subject to tax computed upon the amount of such consideration.

(c) A deed given by an executor in connection with the sale of an interest in real property is subject to tax.

(d) A collateral assignment of rents due under the terms of a leasehold, given as security for an indebtedness, is not a leasehold interest in real property and is not subject to tax.

[(e) A sale of a cooperative apartment effected by the sale of the cooperative corporation's shares of stock and the issuance or transfer of the proprietary lease entitling the purchaser to occupy his apartment is not subject to tax.

(See Article 13 for further illustrations of taxable and non-taxable conveyances.)]

§3. New Article 3 is added to such Regulations to read as follows:

INSTRUMENT

Article 3. Includes any document or writing (other than a deed or a will), regardless of where made, executed or delivered, whereby any economic interest in real property is transferred.

§4. New Article 4 is added to such Regulations to read as follows:

TRANSACTION

Article 4. Any act or acts, regardless of where performed, and whether or not reduced to writing, unless evidenced by a deed or instrument, whereby any economic interest in real property is transferred (other than a transfer pursuant to the laws of intestate succession).

§5. Former Article 3 of such Regulations is renumbered as Article 5 and amended to read as follows:

REAL PROPERTY [OR INTEREST THEREIN]

Article [3]5. Every estate or right, legal or equitable, present or future, vested or contingent, in lands, tenements or hereditaments, which are located in whole or in part within the City of New York, including, on and after February 1, 1982, a leasehold interest in real property.

To illustrate:

(a) The term includes an easement (including a negative easement) in real property, but not a license to use real estate in which a person confers upon another only a personal, revocable and unassignable privilege to make use of the property but grants no interest or estate therein.

(b) The term includes [transfers of] excess zoning rights *Lang seems unnecessary and [transfers of] development rights [to nearby parcels].

(c) The term includes not only [the conveyance of] an estate in fee simple but also [the grant of] a life estate. The estate granted need not take effect immediately upon conveyance but may be postponed to a future time, as where a grantor grants a remainder to another to take effect upon the termination of a precedent life estate *Unnecessary limitation.

(d) The term includes [the transfer of] an ownership interest in a condominium unit.

(e) The term does not include a mortgage or a release of mortgage.

(f) The term does not include rights to sepulture.

§6. New Article 6 is added to such Regulations to read as follows:

ECONOMIC INTEREST IN REAL PROPERTY

<u>Article 6.</u> <u>(a)</u> <u>The ownership of shares of stock in a corporation which owns real property; the ownership of an interest or interests in a partnership, association or other unincorporated entity which owns real property; and the ownership of a beneficial interest or interests in a trust which owns real property.</u>

<u>(b)</u> <u>The ownership of shares of stock in a corporation which owns an economic interest in real property, the ownership of an interest or interests in a partnership, association, or other unincorporated entity which owns an economic interest in real property, and the ownership of a beneficial interest or interests in a trust which owns an economic interest in real property, may also constitute an economic interest in real property. The factors to be weighed in making this determination include the nature of the activities, assets, and purposes of the above-described entities.</u>

To illustrate:

X Corporation is a holding company whose sole asset is 100% of the see stock of Y Corporation. Y owns real property located in New York See Repot City. Since X exists principally for the purpose of holding subsidiary stock, the ownership of X stock constitutes an economic interest in real property. Also: Insert an example showing the an entity that owns only mortgages in not covered by the tax.

§7. New Article 7 is added to such Regulations to read as follows:

TRANSFER OR TRANSFERRED

Article 7. When used in relation to an economic interest in real property, the terms "transfer" or "transferred" shall include the transfer or transfers or issuance of shares of stock in a corporation, interest or interests in a partnership, association or other unincorporated entity, or beneficial interests in a trust, whether made by one or several persons, or in one or several related transactions, which shares of stock or interest or interests constitute a controlling interest, in such corporation, partnership, association, trust or other entity.

§8. New Article 8 is added to such Regulations to read as follows:

CONTROLLING INTEREST

Article 8. (a) General. In the case of a corporation, 50% or more of the total combined voting power of all classes **the issued and outstanding corporation, or =£0% or more of the total fair market value of all classes **the issued and outstanding of such corporation; and, in the case of a partnership, association, trust or other entity, 50% or more of the *or capital, *profit interest in such partnership **or 50% or more of the beneficial interest in such association trust or other entity.

(b) Aggregation of transfers made on recognized exchanges or over-the-counter markets subject to Securities and Exchange Commission regulation.) Transfers aggregated with respect to whether a controlling economic interest has been transferred. Related transfers include. *Is there anythelse? transfers made pursuant to a plan to either or acquire economic interest in real property. Transfers made within a three year period are else? presumed to be related and are aggregated. (However, see paragraph (c) for aggregation of transfers made on recognized exchanges or over-the-counter markets subject to Securities and Exchange Commission regulation.) Transfers aggregated with respect to whether a controlling economic interest has been transferred will also be aggregated with respect to the $25,000 threshold for See imposition of the tax and the applicable rate of tax. Transfers made prior to July 13, 1986, are not aggregated. See Report

To illustrate:

(1) X Corporation owns real property in New York City. A, B and C each own 1/3 of X's outstanding stock. A and B, acting in concert, each sell their entire interest in X Corporation to D. B's sale occurs four years after A's sale. The transfers made by A and B are related and, therefore, subject to the transfer tax, even though made more than three years apart.

(2) X Corporation owns real property in New York City. A, B and C each own 1/3 of X's outstanding stock. A sells his entire 1/3 interest to D for $20,000. Within three years of A's sale, B sells his entire 1/3 interest in X to D for $20,000. The transfers made by A and B are presumed to be related because they were made within a three year period. Since the total consideration exceeds $25,000, the transfer tax will apply to the sales of stock by A and B.

(3) X Corporation owns realproperty in New York City. A owns 100% of the stock of X. On January 1, 1988, A sells 20% of his interest in X to B. On December 31, 1990, A sells 30% of his interest in X to C. Since A has transferred a controlling economic interest in real property within a three year period, the transfer tax will apply to both sales made by A.

(4) X Corporation owns real property in New York City. A owns 100% of the stock of X. In year 1, A transfers 20% of his interest in X to B. In year 3, A transfers 30% of his interest in X to C. In year 5, A transfers 25% of interest in X to D. In year 9, A transfers his remaining 25% interest in X to E.

(i) Since A's transfers to B and C (constituting 50% of the stock of X) have occurred within a three year period, they are presumed to be related. Therefore, these transfers are subject to the transfer tax.

(ii) Since A's transfers to C and D (constituting 55% of the stock of X) have occurred within a three year period, they are also presumed to be related. Therefore, the transfer to D is also subject to the transfer tax. No additional tax is due on the transfer to C above what was already due on the transfer to C in year 3.

(iii) The transfer to E has not occurred within three years of any other transfer of X stock. Accordingly, unless the transfer to E was part of a plan under which 5096 or more of X was to be transferred, the transfer to E is not subject to the transfer tax.

(5) X Corporation owns real property in New York City. A owns 100% of the stock of X. In year 1, A transfers 20% of his interest in X to B. In year 3, A transfers 10% of his interest in X to C. In year 5, A transfers 20% of his interest in X to D. No transfer of a controlling economic interest in X has occurred within

three years. Therefore, if A's transfers to B, C and D were each independent and not made pursuant to a plan, the transfers are not aggregated. No transfer tax will be due on A's transfers to B, C and D.

(6) X Corporation owns real property in New York City. A owns 100% of X's stock. On January 1, 1986, A sells 20% of his interest in X to B. On April 1, 1986, A sells 25% of his interest in X to C. On September 1, 1986, A sells 25% of his interest in X to D. Since A has only transferred 25% of his interest in X on or after July 13, 1986, no taxable transfer of a controlling economic interest in real property has occurred and no transfer tax is due on A's transfers to B, C and D.

(7) X Corporation owns real property in New York City. A owns 100% of the outstanding stock of X. A embarks on a five year plan to sell 75% of his interest in X. These sales are made to unrelated parties, none of whom will acquire 50% or more of X. All of A's transfers are related and, therefore, are aggregated. Once a 50% interest in X, in the aggregate, has been transferred, a transfer tax will be due and transfer tax returns will be required to be filed for every transfer which has been made pursuant to the plan. In addition, each subsequent transfer by A made after the 50% interest has been transferred will require the filing of a return and the payment of tax.

(8) X Corporation owns, real property in New York City. A owns 4% of the outstanding stock of X. B, C, D, E. F, G, H, and I each own 12% of the outstanding stock of X. J enters into agreements with A, B, C, D, and E to purchase their interests in X over a five year period. All of the transfers to J are related and, therefore, will be aggregated. A transfer tax will be due and transfer tax returns will be required to be filed for each transfer once a 50% interest in X, in the aggregate, has been transferred.

(9) X corporation owns realty in New York City. A has owned 40% of the outstanding stock of X for five years. B sells 20% of the outstanding stock of X to A. B's sale is not subject to the transfer tax because a controlling economic interest in real property has not been transferred.

(10) X Corporation owns real property in New York City. A and B each own 50% of X. On January 1, 1987, A sells 20% of X to C. On December 31, 1989, B sells 30% of X to C. Since these transfers occur within a three year period, they are presumed to be related and, thus, subject to the transfer tax.

(11) A owns 100% of the stock of X Corporation. X owns real property in New York City. A sells 30% of his interest in X to B. One year after this sale, B sells this 30% interest in X to C. Resales of the same interests are not aggregrated. Thus, no tax is due.

(12) Y Partnership owns real property in New York City. Pursuant to a syndication, partnership interests are transferred. Such syndication is subject to aggregation, and thus taxable, if 50% of more of the capital, or profits interest in the partnership is transferred pursuant to the syndication.

(13) X Corporation owns real property in New York City. A, pursuant to a tender offer plan, seeks to acquire a controlling economic interest in X. If 50% or more of the total combined voting power of all classes of stock or 50% or more of the total fair market value of all classes of stock are transferred to A, then all such transfers are subject to tax as soon as 50% of such stock is conveyed.

(c) In the case of transfers made on recognized exchanges or on over-the-counter markets subject to regulation by the Securities and Exchange Commission, the following rules will govern:

(1) All transfers made pursuant' to a plan are aggregated without regard to amount sold or when sold.

(2) All other sales made within a three year period are presumed to be related, and thus aggregated, except for sales or purchases of less than 5% of a corporation's outstanding stock.

(d) In the case of a transfer of an ownership interest in an entity which owns an economic interest in real property, where such ownership interest is itself considered an economic interest in real property in accordance with Article 6 of these regulations, the percentage of both interests must be considered to determine whether a controlling economic interest in real property has been transferred.

To illustrate:

(1) A transfers 100% of the stock of X Corporation to B. X owns 100% of the stock of Y Corporation, which owns real property. Assume that A's interest in X is an economic interest in real property. A has transferred a controlling economic interest in real property to B.

(2) Assume the same facts as in illustration (I), except that X Corporation owns only 40% of the stock of Y Corporation. A has not transferred a controlling economic interest in real property to B.

(e) Consideration in the Case of Transfers of Controlling Economic Interests. (For general rules on consideration, see Article 9.)(1) In the case of the transfer of a controlling economic interest in real property, the amount of any mortgage on the real property must be added to the amount paid for the See stock in a corporation or the interest(s) in a trust, partnership, association, or Report other unincorporated entity. See Report

To illustrate:

X Corporation owns real property in New York City with a fair market value of $1,000,000, but encumbered by a $900,000 mortgage. X's stock is sold for $100,000 cash. The $900,000 mortgage is to be added to the $100,000 cash and the tax computation is based on $1,000,000 of consideration.

(2) Where the entity whose stock or ownership interest is being transferred owns other assets in addition to real property, only the consideration attributable to the real property is subject to tax.

(3XA) An apportionment of the consideration between the real property (or an interest therein) and the other assets which in the opinion of the Commissioner of Finance represents an apportionment made in good faith will be accepted by the Department.

(B) If no apportionment of the consideration for the real property (or interest therein) and the other assets has been made, or if, in the opinion of the Commissioner of Finance, the apportionment of the consideration does not represent an apportionment made in good faith, then the consideration for the real property (or the interest therein) shall be calculated by multiplying total consideration by the following ratio:

Fair market value of the real property (or interest therein)

Fair market value of all assets in the transaction, including the real property (or interest therein)

To illustrate:

(i) X Corporation owns real property in New York City with a fair market value of $500,000 and other assets valued at $1,000,000. All of X's stock is sold for $1,500,000 cash. The consideration-subject to tax is $500,000.

(ii) X Corporation owns real property in New York City with a fair market value of $500,000, but encumbered with a $300,000 mortgage, and other assets valued at $1,000,000. All of X's stock is sold for $1,200,000 cash. The consideration subject to tax is $500,000 calculated as follows;

Value of real property	$ 500,000	
Less amount of mortgage	300,000	
Reduced value of real property		$ 200,000
Value of other assets		1,000,000
Total reduced value of assets		$1,200,000
Cash paid		$1,200,000
Cash paid attributable to real property		
$\frac{200.000}{1,200,000}$ X $1,200,000 = 200,000		
Add amount of mortgage	300,000	
Total consideration attributable to real property	$ 50,000	

§9. Former Article 4 of such Regulations is renumbered as Article 9 and amended to read as follows:

CONSIDERATION

Article [4]9. The price actually paid or required to be paid for real property or an economic interest therein, without deduction for mortgages, liens or encumbrances, whether or not expressed in the deed or instrument and whether paid or required to be paid by money, property, or any other thing of value. The term includes the cancellation or discharge of an indebtedness or obligation. It shall also include the amount of any mortgage, lien or other encumbrance, whether or not the underlying indebtedness is assumed. Where an option to purchase real property or an economic interest therein is exercised, consideration shall include the amount paid or required to be paid to the grantor or his designee for the option.

[The tax applies to each deed of real property when the consideration is in excess of $25,000. For purposes of determining the applicability of the tax, the test is whether the price actually paid or required to be paid for real property, including the amount of any mortgages, liens or encumbrances exceeds $25,000.]

To illustrate:

[(a) A parcel of real estate is sold for $20,000. The tax does not apply to the deed. A return, however, is required to be filed.]

[(b)](a) A parcel of real estate is sold for $50,000 cash subject to an existing mortgage of $30,000 which remains on the property after delivery of the deed. The consideration for the transfer is [50,000] $80,000 and the tax applies to the deed.

[(c)](b) A parcel of real estate is sold for $30,000. The deed recites that the consideration is $10 and other good and valuable consideration. The consideration for the transfer is $30,000 and the tax applies to the deed.

[(d) Separate deeds by which each of the tenants-in-common of realty why i: conveys his own interest in the property to a common grantee for a consideration of less than $25,000 for each deed are not subject to tax, even though in total the consideration paid by the grantee is more than $25,000.]. Why is this being delete.

<u>(c)</u> <u>A owns real property worth $50.000. B owns real property which is also worth $50,000. A and B exchange their real property. The tax applies to the transfer of A's realty and the transfer of B's realty. The consideration in each case is the fair market value of the property received in exchange for the realty conveyed.</u>

[(e) The tax applies to a conveyance of realty in exchange for other property; also to the conveyance of the other property received in exchange if it is realty. The consideration in such case is the fair market value of the property received in exchange for the realty conveyed. The tax will apply if the fair market value of the property received in exchange exceeds $25,000.]

[(f) The tax applies to the conveyance of realty, the fair market value of which is $50,000 and subject to a $30,000 mortgage, in exchange for unencumbered realty having a fair market value of $20,000. The consideration in such case is the fair market value of the property received ($20,000) plus the amount of the mortgage upon the realty conveyed ($30,000), or $50,000.]

(d) A owns real property having a fair market value of $50,000, subject to a $30,000 mortgage. B owns unencumbered realty having a fair market valueSee Of $20.000. A and B exchange realty. The consideration for the transfer of See Report A's property is the fair market value of the property received ($20,000) plus the amount of the mortgage upon the realty conveyed ($30,000), or $50,000.

[(g)](e) Where a grantee agrees to pay the City and State transfer taxes due on a conveyance, as part of the consideration for the conveyance, the obligations so assumed are included in computing the tax as follows:

(1) Calculate the “tentative” City and State transfer taxes based on the consideration [(or net consideration)] exclusive of the transfer tax liabilities which the grantee is assuming.

(2) Add the sum of the “tentative” taxes to the consideration [(or net consideration)] and calculate the City transfer tax (and State transfer tax) to be paid on the total.

To illustrate:

Assume real property is sold for $300,000, with the purchase price being paid in cash (or purchase money mortgage) of $220,000 and by taking subject to a continuing mortgage lien of $80,000, and the grantee agrees to pay the City and State transfer taxes due on the sale. The tax due is computed as follows:

Tentative City Tax:

Consideration	$300,000
Tax Rate	x 1%
Tentative Tax	$ 3,000

Tentative State Tax:

[Net] Consideration	$220,000
Tentative tax at $2 per $500	$ 880

City Transfer Tax Due:

Consideration	$300,000
Add: Tentative Taxes	3,880
Taxable Consideration	$303,880
Tax Rate	x 1%
Tax Due	$3,038.80

§10. Former Article 5 of such Regulations is renumbered as Article 10.

§11. Article 6 of such Regulations is REPEALED.

§12. Former Article 7 of such Regulations is renumbered as Article 11.

§13. Former Article 8 of such Regulations is renumbered as Article 12.

§14. Former Article 9 of such Regulations is renumbered as Article 13 and amended to read as follows:

GRANTOR

Article [9]13. The person or persons making, executing or delivering a deed. The term “grantor” also includes the person or persons who transfer an economic interest in real property.

§15. Former Article 10 of such Regulations is renumbered as Article 14 and amended to read as follows:

GRANTEE

Article [10]14. The person or persons accepting the deed or who obtain[s] any of the real property which is the subject of the deed or any interest therein. The term “grantee” also includes the person or persons to whom an economic interest in real property is transferred.

§16. Former Article 11 of such Regulations is renumbered as Article 15.

§17. Former Article 12 of such Regulations is renumbered as Article 16.

§18. Former Article 13 of such Regulations is renumbered as Article 17 and amended to read as follows:

IMPOSITION OF TAX

Article [13]17. (a) General. The tax is imposed on (1)each deed at the time of delivery by a grantor to a grantee when the consideration for the real property and any improvement thereon (whether or not included in the same deed) exceeds $25,000 and (2) after July 12, 1986, on each instrument or transaction (unless evidenced by a deed otherwise subject to tax) at the time of the transfer, whereby any controlling economic interest in real property is transferred by a grantor to a grantee, on initial transfers of shares of stock in a cooperative housing corporation by the cooperative housing corporation or sponsor, and on subsequent transfers (resales) of cooperative housing corporation stock if the owner held the shares in connection with, incidental to or in furtherance of a trade, business, profession, occupation or commercial activity engaged in or conducted by him or it. when the consideration for the transfer exceeds $25,000. The tax applies to each such deed, instrument or transaction evidencing the conveyance of real property or an economic interest therein which is situated in whole or in part within the City of New York, unless the deed, instrument or transaction is expressly exempt by the law. [The tax applies to each deed evidencing the conveyance of real property or an interest therein which is situated in whole or part within the City of New York.] Anything to the contrary notwithstanding, after July 12, 1986, in the case of a transfer of real property or an economic interest therein in complete or partial liquidation of a corporation, partnership, association, trust or other entity, the tax imposed shall be measured by (i) the consideration for such conveyance or transfer, or (ii) the value of the real property or economic interest therein, whichever is greater. Conveyances or transfers of controlling economic interests in real property or transfers of shares of stock in a cooperative housing corporation made pursuant to a written contract (including option contracts, but not rights of first refusal) entered into prior to July 31 1981, are not subject to tax.

(b) Rates of Tax on Deeds. The tax is computed:

(1) at the rate of 1/2 of 1% of the net consideration with respect to conveyances made before July 1, 1971, or made in performance of a contract therefor executed before such date;

(2) at the rate of 1% of the net consideration with respect to:

(i) conveyances made on or after July 1, 1971 and before February 1, 1982 or made in performance of a contract therefor executed during such period,

(ii) conveyances made on or after February 1, 1982 and before July 1,1982 of 1-, 2- or 3-family houses and individual residential condominium units,

(iii) conveyances made on or after February 1, 1982 and before July 1,1982 where the consideration is less than $500,000 (other than grants, assignments or surrenders of leasehold interests in real property taxable under paragraph (3) below);

(3) at the rate of 1% of the consideration with respect to grants, assignments or surrenders of leasehold interests in real property made on or after February 1, 1982 and before July 1, 1982 where the consideration is $500,000 or more, provided, however, that for purposes of this paragraph (3) the amount subject to tax in the case of a grant of a leasehold interest in real property shall be only such amount as is not considered rent for purposes of the New York City Commercial Rent or Occupancy Tax ([Title L of Chapter 46] Chapter 7 of Title 11 of the New York City Administrative Code);

(4) at the rate of 2% of the consideration with respect to all other conveyances made on or after February 1, 1982 and before July 1, 1982, except that, for purposes of this paragraph (4), where the consideration includes the amount of any mortgage or other lien or encumbrance on the real property or interest therein which existed before the delivery of the deed and remains thereon after the delivery of the deed, the portion of the consideration ascribable to such mortgage, lien or encumbrance shall be taxed at the rate of 1%, and only the balance of such consideration shall be taxed at the rate of 2%;

(5) at the rate of 1% of the consideration with respect to conveyances made on or after July 1, 1982 of 1-, 2- or 3-family houses and individual residential condominium units;

(6) at the rate of 1% of the consideration with respect to conveyances made on or after July 1, 1982 where the consideration is less than $500,000 (other than grants, assignments or surrenders of leasehold interests in real property taxable as hereafter provided);property taxable as hereafter provided);

(7)(i) at the rate of 1% of the consideration with respect to a grant, assignment or surrender, made on or after July 1, 1982, of a leasehold interest in a 1-, 2- or 3-family house or an individual dwelling unit in a dwelling which is to be occupied or is occupied as the residence or home of 4 or more families living independently of each other;

(ii) at the rate of 1% of the consideration with respect to grants, assignments or surrenders of leasehold interests in real property made on or after July 1, 1982 where the consideration is less than $500,000; or

(iii) at the rate of 2% of the consideration with respect to grants, assignments or surrenders of leasehold interests in real property made on or after July 1, 1982 where the consideration is $500,000 or more;

(iv) provided, however, that for purposes of subparagraphs (i), (ii) and (iii) of this paragraph (7), the amount subject to tax in the case of a grant of a leasehold interest shall be only such amount as is not considered rent for purposes of the New York City Commercial Rent or Occupancy Tax ([Title L of Chapter

46] Chapter 7 of Title II of the New York City Administrative Code); and

(8) at the rate of 2% of the consideration with respect to all other conveyances made on or after July 1, 1982.

(c) Rates of Tax on Transfers of Economic Interests. The tax is computed:

(1) at the rate of 1% of the consideration where the real property the economic interest in which is transferred is a 1-, 2- or 3-family house, an individual cooperative apartment, an individual residential condominium unit or an individual dwelling unit in a dwelling which is to be occupied or is occupied as the residence or home of 4 or more families living independently of each other, or where the consideration for the transfer is less than $500,000, and

(2) at the rate of 2% of the consideration with respect to all other transfers of economic interests in real property.

Where the transfer of a controlling economic interest involves more than one parcel of real property, the applicable rate is determined based upon the consideration apportioned to each parcel.

Example: X Corporation owns two parcels of commercial property in New York City. Building A is worth $400,000 and Building B is worth $600,000. Y, X’s sole shareholder, sells his entire interest to Z for $1,000,000. The tax is calculated as follows: 1% of $400,000 (Building A) + 2% of $600,000 (Building B). The tax due is $16,000.

[(C) Conveyances Subject to Tax

The following are examples of situations in which the tax applies:

(1) A conveyance by a defaulting mortgagor to the mortgagee. The tax is computed on the amount of the outstanding mortgage debt and unpaid accrued interest. The tax applies without regard to whether the mortgagor is personally liable for the mortgage debt or whether the mortgage is cancelled of record.

(2) Deeds given by referees, receivers, sheriffs, etc., for realty sold under foreclosure or execution. The tax is computed on the amount bid-for the property, senior liens not canceled by the sale, and advertising expenses, taxes and other costs paid by the purchaser, whether the purchaser is the mortgagee, judgment creditor, or other person.

(3) A conveyance of realty in exchange for other realty. Each transfer of realty is subject to tax. The consideration for each transfer is the fair market value of the realty and other property received in exchange for the realty conveyed.

(4) A conveyance of realty from one spouse to the other pursuant to the terms of a separation agreement. In the absence of evidence establishing the consideration, it is presumed that the consideration for the conveyance, which includes the relinquishment of marital rights, is equal to the fair market value of the interest in the property conveyed.

(5)(i) A conveyance of realty to a corporation in exchange for shares of its capital stock. The consideration for the realty, namely the stock received, is deemed to be equal to the fair market value of the realty conveyed, without reduction due to any mortgage, lien or other encumbrance on the realty.

(ii) A conveyance of realty to an existing corporation by a sole shareholder as a contribution to capital, where no additional shares of capital stock are issued in exchange, and no cash or other consideration is given, is deemed to be without consideration. However, where the realty is conveyed subject to an existing mortgage, lien or other encumbrance, there is consideration to the extent of the unpaid mortgage, lien or encumbrance.

(iii) Notwithstanding subparagraph (ii), a conveyance of realty to a corporation organized by the grantor for the purpose of holding and operating the property is subject to tax, even where the conveyance is made some time after the issuance of the capital stock. In such event, the issuance of the stock and the conveyance of the realty are considered elements of a single transaction. The consideration for the realty, namely the stock, is deemed to be equal to the fair market value of the realty conveyed.

(6)(i) A conveyance of realty to a partnership as a contribution of partnership assets in exchange for a partnership interest. The consideration is the partnership interest acquired, which is deemed to be equal to the fair market value of the realty conveyed, without reduction due to any mortgage, lien or other encumbrance on the realty.

(ii) A conveyance of realty by a partner to an existing partnership as a contribution of capital is deemed to be without consideration. However, where the realty is conveyed subject to an existing mortgage, lien or other encumbrance, there is consideration to the extent of the unpaid mortgage, lien or other encumbrance.

(iii) Notwithstanding subparagraph (ii), a conveyance of realty to a partnership organized by the grantor(s) for the sole purpose of holding and operating the property is subject to tax, even where the conveyance is made some time after the acquisition of the partnership interest. In such event, the acquisition of the partnership interest and the conveyance of the realty are considered elements of a single transaction. The consideration for the realty, namely the partnership interest, is deemed to be equal to the fair market value of the realty conveyed.

(7)(i) A conveyance of realty by a corporation in liquidation or dissolution to its shareholders subject to the debts of the corporation. The consideration is the amount of any outstanding mortgage debt or other lien upon the realty conveyed and the amount of corporate liabilities (including loans from shareholders) assumed, cancelled or forgiven as a result of the liquidation or dissolution which are attributable to the realty conveyed, regardless of whether the shareholders were personally liable for the debts of the corporation.

(ii) In order to determine the tax incurred, it is necessary to apportion the consideration (liabilities assumed, cancelled or forgiven, etc.) between the real property conveyed and the personal property, if any, distributed by the corporation to its shareholders.

The general rule for determining the consideration for the realty in dissolution or liquidation cases where no continuing liens are involved is the proportionate amount of the consideration (liabilities assumed, etc.) for all of the assets that the value of the realty conveyed bears to the value of all the assets transferred and conveyed.

Where continuing liens are involved, before apportioning the consideration, the amounts of such liens shall be deducted from the value of the properties to which they respectively apply. Thereupon, the consideration (liabilities assumed, etc.) for all of the assets should be apportioned to the value of the realty and personalty as reduced by the amount of the continuing liens in the ratio that the value of the realty so reduced bears to the total value of all the property so reduced. After the value of the realty has been so reduced, the amount of any liens against such realty must be added to the reduced value of such realty in order to obtain the full consideration for the real estate conveyed.

(iii) The above rules may be illustrated by the following examples:

(1) X Corporation is in the process of complete liquidation and has transferred all of its assets subject to its liabilities to its shareholders in complete cancellation of its outstanding stock. The balance sheet of the corporation, as of the date of liquidation, reflects real estate in the amount of $100,000 and personal property in the amount of $20,000.

The liabilities consist of accounts payable in the amount of $12,000.

Value of real property		$100,000.00	
Value of real property		20.000.00	
Total value of property			$120,000.00
Accounts payable	12,000.00		
Proportion of the accounts payable			
attributable to real property			
(100.000 x 12,000)			
(120,000		$100,000.00	

Since the $10,000 represents the total consideration attributable to the real property, no tax is payable thereon.

(2) Assume the same facts as in example (1) above, except that there is an outstanding mortgage on the real property of $40,000. In such case, the consideration subject to the tax is computed as follows:

Value of real property	$100,000.00	
Less amount of mortgage	40,000.00	
Reduced value of real property		$60,000.00
Value of personal property		20,000.00
Total reduced value of property		$80,000.00
Accounts payable	12,000.00	
Proportion of accounts payable attributable to real property $\left(\frac{60\,000}{80,000} \times \$12,000\right)$	9,000.00	
Add amount of mortgage	40,000.00	
Total consideration for real property subject to tax$	49,000.00.	

(3) Assume the same facts as in example (2) above, except that there are no outstanding accounts payable. In such case, the consideration shall be measured by the amount of the mortgage debt outstanding ($40,000.00).

(iv) Where there are no corporate debts (including the amount of any mortgage, lien or other encumbrance on the real estate conveyed) and the conveyance is made solely for the cancellation and retirement of the capital stock, the tax does not apply.

(8)(i) A conveyance of realty to partners upon the termination and liquidation of a partnership subject to the debts of the partnership. The consideration is the amount of any outstanding mortgage debt or other lien upon the realty conveyed and the amount of partnership debts (including loans from partners) assumed, cancelled or forgiven as a result of the termination and liquidation which are attributable to the realty conveyed, regardless of whether the partners were personally liable for the debts of the partnership.

(ii) In order to determine the tax incurred, consideration must be apportioned between the real property conveyed and the personal property, if any, distributed by the partnership to its partners. The rules for apportioning the consideration, described in paragraph 7, subparagraphs (ii) and (iii) above (in connection with a conveyance of realty pursuant to a corporate liquidation), are applicable to a conveyance of realty to partners upon the termination and liquidation of a partnership.

(9) A conveyance of realty by a sponsor to a cooperative corporation. Consideration includes the amount of cash received by the sponsor, the amount of any mortgages, liens or encumbrances on the realty and the fair market value of shares in the cooperative corporation transferred to the sponsor.

(10) After February 1, 1982, the surrender or assignment of a leasehold interest by a lessee before the end of the term in exchange for the payment of a sum of money or other consideration other than the release of the lessee from the lease obligation.

(11) After February 1, 1982, the granting of a leasehold interest in exchange for a consideration which is not rent for purposes of the New York City Commercial Rent or Occupancy Tax (Title L of Chapter 46 of the New York City Administrative Code).

(d) Conveyances Not Subject to Tax

The following are examples of situations in which the tax does not apply:

(1) A conveyance of realty without consideration and otherwise than in connection with a sale, including a deed conveying realty as a bona fide gift.

(2) A deed to confirm title already vested in the grantee, such as a quitclaim deed to correct a flaw in title.

(3) A deed from an agent to his principal conveying real estate purchased for and with funds of the principal.

(4) An option for the purchase of real property or a contract for the sale of real property, if the contract does not vest legal or equitable title. For this purpose equitable title will be deemed to vest where the benefits and burdens of ownership have shifted to the optionee or vendee including, for example, where possession and the right to receive rent and depreciate the realty are given to the contract vendee or optionee.

(5) Partition deeds, unless, for a consideration, some of the parties take shares greater in value than their undivided interests, in which event the tax attaches to each deed conveying such greater share, computed upon the consideration for the excess.

(6) A deed executed by a debtor conveying real property to an assignee for the benefit of his creditors; however, when the assignee conveys such property to a creditor or sells it to any other person, the deed by him is taxable if the consideration exceeds $25,000.

(7) Conveyance to a receiver of realty included in the receivership assets, and reconveyance of such realty upon termination of the receivership.

(8) Transfer of real estate in a statutory merger or consolidation from a constituent corporation to the continuing or new corporation.

(9) After February 1, 1982, the surrender or assignment of a leasehold interest by the lessee solely in exchange for a release of the lessee from the lease obligation.

(10) The granting of a leasehold interest for a consideration which is considered rent for purposes of the New York City Commercial Rent or Occupancy Tax (Title L of Chapter 46

of the New York City Administrative Code).]

§19. New Article 18 is added to such Regulations to read as follows:

CONVEYANCES TO CORPORATIONS AND PARTNERSHIPS

(Any reference made to realty or property includes an economic interest in realty.)

Article 18. (a)(1) A conveyance of realty to a corporation in exchange for shares of its capital stock is subject to tax. The consideration for the realty is deemed to be the greater of the fair market value of the realty conveyed or the amount of any mortgage, lien or other encumbrance on the realty.

(2) A conveyance of realty to an existing corporation by a shareholder as No rears to this a contribution to capital, where no additional shares of capital stock are issued in exchange, and no cash or other consideration is given, is deemed to be without consideration. However, where the realty is conveyed subject to an existing mortgage, lien or other encumbrance, there is consideration to the extent of the unpaid mortgage, lien or other encumbrance.

(3) Notwithstanding subparagraph (2), a conveyance of realty to a corporation organized by the grantor for the purpose of holding and operating the property is TBS subject to tax, even where the conveyance is made some time after the issuance of the capital stock. In such event, the issuance of the stock and the conveyance of the realty are considered elements of a single transaction. The consideration for the realty is deemed to be the greater of the fair market value of the realty conveyed or the amount of any mortgage, lien or other encumbrance on the realty.

(b)(1) A conveyance of realty to a partnership as a contribution of partnership assets in exchange for a partnership interest is subject to tax. The consideration is deemed to be the greater of the fair market value of the realty conveyed or the amount of any mortgage, lien or other encumbrance on the realty.

(2) A conveyance of realty by a partner to an existing partnership as a contribution of capital is deemed to be without consideration. However, where the realty is conveyed subject to an existing mortgage, lien or other encumbrance, there is consideration to the extent of the unpaid mortgage, lien or other encumbrance.

(3) Notwithstanding subparagraph (2), a conveyance of realty to a partnership organized by the grantor(s) for the purpose of holding and/or operating the property is subject to tax, even where the conveyance is made some time after the acquisition of the partnership interest. In such event, the acquisition of the partnership interest and the conveyance of the realty are considered elements of a single transaction. The consideration for the realty is deemed to be the greater of the fair market value of the realty conveyed or the amount of any mortgage, lien or other encumbrance on the realty.

Info Bull 2, Q&A 5 was a good example and should be included. §20. New Article 19 is added to such Regulations to read as follows:

MERGERS

Article 19. A transfer of real property or a controlling economic inter in real property a statutory merger or consolidation from a constituent corporation to the continuing or new corporation is not subject to tax. However, the related transfer of shares of stock in a statutory merger or consolidation may be subject to tax.

To illustrate:

(a) X Corporation owns real property in New York City with a fair market value of $300,000 and has cash of $100,000. X is to be merged into Y Corporation under Article 9 of the New York Business Corporation Law Under the plan of merger, shareholders of X will receive stock, cash and Securities of Y (which stock does not constitute a controlling economic interest in real of property) valued at $400,000. The transfer tax applies to this transaction. The shares of X exchanged or converted under the merger Plan for the cash, stock or securities of Y represent a controlling economic interest in real property.** The tax will be measured by that portion of the value of X's stock which is attributable to the real back therefore are property ($300,000). A deed confirming title to property vested in the surviving Y Corporation pursuant to section 906(b)(2) of the New York Business Corporation Law will not be subject to the transfer tax.

(b) X Corporation owns 10096 of the stock of Y Corporation. Y owns real property in New York City. Pursuant to the statutory merger provisions of state law, Y is to be merged into X. This transaction is not subject to the transfer tax because there is no transfer of an economic interest in real property. The vesting of Y's assets in X, by operation of law, is also not subject to tax.

(c) X Corporation owns 100% of the stock of corporations Y and Z. Y owns real property in New York City. Pursuant to the statutory merger provisions of state law, Y is to be merged into Z. This transaction is not subject-to the transfer tax because there is no transfer of an economic interest in real property. The vesting of Y's assets in Z, by operation of law, is also not subject to tax.

Info Bull 2 Q&A 27 should be added to clarify treatment of econ inter. §21 New Article 20 is added to such Regulations to read as follows:

MULTI-TIERED CONVEYANCES

Article 20. With respect to a multi-tiered network of corporations and/or partnerships which own real property in New York City, a series of transfers pursuant to a plan to reorganize the ownership network will be treated as a direct transfer from the entity originally owning the real property or economic interest therein to the entity ultimately owning the real property or economic interest therein, and the tax will apply to the deemed direct transfer if the following factors are present

(d) the plan has a fixed beginning and end:

(e) the plan is completed within thirty days;

(f) the plan will not result in a change in the respective percentage interests of the individuals or entities which were the owners of the network at the beginning of the plan (for this purpose, changes in the ownership of the owners themselves will not be taken into account, although such changes may be subject to tax on their own facts); and

(g) the plan requires each interim holder of the real property or economic interest therein to hold such interest solely to pass on to another individual or entity.

Under such a plan, each of the interim transfers will be presumed to be transfers to or from conduits. The determination of whether a conveyance falls within this Article will be made by the Department of Finance on a case by case basis after a review of all the documentation supporting such treatment.

§22. New Article 21 is added to such Regulations to read as follows:

LIQUIDATIONS

Article 21. (a) General. A conveyance or transfer of real property or any economic interest therein in complete or partial liquidation of a corporation, partnership, association, trust or other entity is subject to tax. The tax imposed shall be See measured by (i) the consideration for each such conveyance or transfer, or (ii) the value of the real property or economic interest therein, whichever is greater. The consideration is the amount of any outstanding mortgage debt or other lien upon the realty conveyed and the amount of other liabilities assumed, cancelled or forgiven as a result of the liquidation or dissolution which are attributable to the realty or economic interest therein. The value of the real property or economic interest therein is its fair market value at the time of the conveyance or transfer, without reduction due to any mortgage, lien or other encumbrance thereon.

Where the total of mortgages or other liens upon a parcel of realty plus other liabilities assumed, cancelled, or forgiven which are attributable to such parcel exceeds the fair market value of such parcel, that portion of other liabilities which when added to mortgages or liens on the realty exceeds the fair market value of the realty will not be attributed to the realty. Therefore, the tax imposed on the conveyance of each parcel of realty or economic interest therein will be measured by the fair market value of the realty unless there is an outstanding mortgage, lien or other encumbrance on the realty greater in amount than the fair market value of the realty.

To illustrate;

(1) X Corporation owns real property in New York City with a fair market value of $1,000,000, encumbered by a mortgage of $900,000. X also owns other assets having a fair market value of $500,000. X is in the process of complete liquidation and has transferred all of its assets to its stockholders in complete cancellation of its outstanding stock. The tax is measured by the fair market value of the realty transferred ($1,000,000).

(2) Assume the same facts as in illustration (0 above, except that the mortgage on the realty is $1,100.000.

The tax is measured by consideration of $1100,000.

(3) X Corporation owns two parcels of real property in New York City, Parcel A and Parcel B. Parcel A has a fair market value of $1,000,000 and is encumbered by a mortgage of $1,300,000. Parcel B has a fair market value of $700,000 and is encumbered by a mortgage of $600,000. X liquidates. The tax on the transfer of Parcel A. is measured by consideration of $l,300,000. The tax on the transfer of Parcel B is measured by its fair market value of $700,000.

(b) Economic Interests. When a liquidating entity transfers an economic interest in real property, the tax on the transfer of that portion of the interest representing a given parcel or economic interest therein is measured by the fair market value of the parcel or the amount of any mortgage, lien or other encumbrance upon the parcel. This rule applies whether the total value of the economic interest in the entity owning the real property is greater or less than the value of the realty.

To illustrate:

(1) X Corporation transfers all of its assets to its stockholders in complete liquidation. X owns 10096 of the stock of Y Corporation. Y owns real property in New York City with a fair market value of $1,000,000. Y has other assets valued at $500,000. Y's stock has a fair market value of $1,500,000. The measure of the tax on the transfer of the stock in Y is the fair market value of Y's real property ($1,000,000).

(2) Assume the same facts as in illustration (1) above, except that Y has liabilities of $850,000 and its stock

has a fair market value of $650,000. The measure of the tax on the transfer of the stock in Y is $1,000,000.

(3) Assume the same facts as in illustration (1) above, except that Y's real property is encumbered by a mortgage of $1,200,000 and the stock in Y has a fair market value of $300,000. The measure of the tax on the transfer of the stock in Y is the consideration for the real property ($1,200,000).

(4) X Corporation owns real property in New York City (Parcel A) with a fair market value of $1,000,000, encumbered by a mortgage of $1,200,000. X also owns 100% of the stock of Y Corporation. Y owns two parcels of realty in New York City, Parcel B and Parcel C. Parcel B has a fair market value of $1,000,000, and is encumbered by a mortgage of $900,000. Parcel C has a fair market value of $500,000 and is unencumbered. Y has other liabilities of $500,000. The fair market value of the stock in Y is $100,000. X liquidates. The tax on the transfer of Parcel A is measured by consideration of $1,200,000. The tax on the transfer of the stock in Y representing Parcel B is measured by the fair market value of Parcel B ($1,000,000). The tax on the transfer of the stock in Y representing Parcel C is measured by the fair market value of Parcel C ($500,000).

(c) A distribution of realty or an economic interest therein within 12 months of the liquidation of the distributing entity will be deemed to be a distribution in liquidation. what is the authority for this? Should be a rebuttable presumption.

(d) Credit. If -a grantee acquires a controlling economic interest in a corporation, partnership, association, trust or other entity owning real property in a transaction which is taxable under the real property transfer tax and, within 24 months of such acquisition, the entity owning the real property is liquidated and the real property is conveyed to the purchaser of the controlling economic interest, a credit is available against the transfer tax due on the liquidation in the amount of the transfer tax paid with respect to the original acquisition of the controlling economic interest. In no event shall this credit be greater than the tax payable upon the conveyance in liquidation.

To illustrate:

(1) A owns 100% of the stock of X Corporation. X owns unencumbered New York City real property with a fair market value of $1,000,000. A sells all of the stock of X to C. A $20,000 transfer tax is paid. One year after the sale, C liquidates X and receives the real property. At that time, the fair market value of X's real property is $1,200,000. The measure of the transfer tax will be based on the fair market value of the real property ($1,200,000). The transfer tax, therefore, is 2% of $1,200,000, or $24.000. Since this liquidation has occurred within 24 months of the transfer of the stock of X to C, a credit will be available against the $24,000 tax. The amount of the credit may not exceed the amount of tax paid upon the prior transfer of the economic interest in X's real property. Accordingly, a credit of $20,000 will be available against the $24,000 transfer tax due on the liquidation of X. The transfer tax due is $24,000 minus

$20,000, or $4,000.

(2) A owns 100% of the stock of X Corporation. X owns an unencumbered parcel of New York City real property with a fair market value of $1,000,000. A sells all of the stock of X to C. A $20,000 transfer tax is paid. One year after the sale to C, X acquires a second unencumbered parcel of New York City real property with a fair market value of $1,200,000. A $24.000 transfer tax is paid on this transfer. Eighteen months after the sale by A to C of X stock, C decides to liquidate X and receives both parcels of real property. At this time, X's first parcel of property is worth $800,000. The measure of the tax on the transfer of each parcel will be based on the fair market value of each parcel. Since the fair market value of the first parcel is $800,000. the tax on the transfer of this parcel is $16,000. Since the fair market value of the second parcel is $1.200,000, the tax on the transfer of this parcel is $24,000. A $16,000 credit will be available against the tax on the transfer of the first parcel. The tax on the transfer of the second parcel must be paid in full. No credit is available for the prior tax of $24,000 paid when X acquired the second parcel.

§23. New Article 22 is added to such Regulations to read as follows:

COOPERATIVE HOUSING CORPORATION TRANSFERS

Article 22. (a) A conveyance of realty (or an economic interest therein) by a sponsor to a cooperative housing corporation is subject to the tax. The consideration includes the amount of cash paid or required to be paid, the amount of any mortgages, liens or encumbrances on the realty and the fair market value of shares in the cooperative corporation transferred to the sponsor. Consideration shall not be reduced see by the amount of any expenses incurred by the sponsor, including payments made to a Repo reserve fund or working capital fund.

(b) The transfer of shares of stock in a cooperative housing corporation in connection with the grant or transfer of a proprietary leasehold is subject to tax in the following situations:

(1) In the case of the original transfer of cooperative housing corporation stock by the cooperative corporation or cooperative plan sponsor; and

(2) In the case of any subsequent transfer of the cooperative housing corporation stock by the owner thereof, if the owner held these shares in connection with, incidental to or in furtherance of a trade, business, profession, occupation or commercial activity engaged in or conducted by the owner.

The transfer tax applies in these two situations even if a controlling economic interest in the cooperative housing corporation has not been transferred

(c) The application of paragraph (b) above may be illustrated by the following examples:

(1) An individual purchases stock from a cooperative housing corporation or cooperative plan sponsor which is allocated to an occupied apartment. Thereafter the individual sells this stock together with his proprietary

leasehold. The transfer tax applies to each transfer. The initial transfer by the cooperative housing corporation or sponsor is subject to the transfer tax. In addition, the subsequent transfer by the individual who has subleased the apartment is a transfer of stock held in connection with a commercial activity*and is, therefore, also subject to the transfer tax. *(the production of rental incc

(2) An individual purchases stock from a cooperative housing cooperation or sponsor as an "insider" and occupies the apartment unit allocated to the stock for residential purposes. The individual then transfers the stock along with the proprietary leasehold to another. The initial transfer from the cooperative housing corporation or sponsor to the individual "insider" is subject to the transfer tax. The sale by the resident individual "insider" to another is not subject to the transfer tax.

(3) A commercial artist owns stock in a cooperative housing corporation and holds a proprietary leasehold on an apartment therein. The artist both resides and maintains a studio in this apartment. The sale of this stock is subject to the transfer tax. Although the artist resides in the apartment, the stock was nevertheless held in connection with his business. The tax is based on the total amount paid for the stock. No apportionment of the consideration for the portion of the apartment used for residential purposes is permitted.

In determining whether a cooperative apartment used for residential purposes is also used for business purposes, the Commissioner of Finance will consider, among other factors, whether a home office expense deduction has been claimed for federal income tax purposes and whether the premises have been held out to clients or customers as a place business within the 24 months preceding the sale.

(4) (A) An individual owns stock in a cooperative housing corporation and holds the proprietary lease for an apartment which he rents to a residential tenant. The sale of this stock is subject to the transfer tax. The renting of an apartment is a commercial activity and the stock is considered to be held in connection with that commercial activity.

(B) An individual owns stock in a cooperative housing corporation and holds the proprietary lease for an apartment which is occupied rent-free bv a close family member. The sale of the stock is not subject to the transfer tax.

(5) A subleased his residential cooperative apartment for 3 weeks while he was on vacation. Later that same year the apartment was sold. The transfer Se tax is applicable to the sale of this cooperative apartment. Temporary rentals for 15 days or more during any 12 month period within the 24 months preceding the transfer will be deemed to be a commercial activity.

(6) A wishes to sell his cooperative apartment. A subleases the apartment for 6 months until a sale is made. This sale is subject to the transfer tax. Since the apartment has been rented for 15 or more days, this rental constitutes commercial activity.

(7) A allows B, a family member, to reside in his cooperative apartment. B pays all of the maintenance charges attributable to the apartment but docs not pay any additional amounts to A. The sale of this apartment is subject to the transfer tax. B's occupancy of the apartment in return for payment of” the maintenance charges constitutes a rental of the apartment. Therefore, the stock representing the apartment is held in connection with a commercial activity.

(8) A sells his stock in a cooperative housing corporation on December 21, 1988. A had subleased his apartment until December 20, 1986. A has not subleased his cooperative apartment nor has A conducted any business activity in his apartment within the 24 months preceding the sale. This sale of stock is not subject to the transfer tax. A cooperative residential apartment which had in the past been subleased by the current owner tenant loses its commercial status after 24 months have passed during which the apartment has not been subleased for 15 or more days. Similarly, a cooperative apartment in which business activity has been conducted by the current owner-tenant loses its commercial status after 24 months have passed during which no commercial activity has been conducted in the apartment. Accordingly, the transfer would not be subject to the transfer tax.

(9) A, B, C and D each own 25% of the stock of X Corporation, a cooperative housing corporation with four apartments. These four individuals each use their apartments solely for residential purposes. E purchases from A and B 50% of the cooperative housing corporation

stock representing two of these apartments. The sales by A and B are not subject to the transfer tax. Cooperative apartment sales are to be taxed only in the case of original sales by the cooperative corporation or sponsor or in the case of resales of apartments which had been used or held in connection with a commercial activity. Thus, even though a controlling interest in real property has been transferred, the transfer tax does not apply to these sales.

(10) A misrepresents to B that A's cooperative apartment had not been held or used in connection with a commercial activity. B purchases A's cooperative apartment believing it is not subject to the transfer tax base on A's misrepresentations. A prescribed affidavit of non-commercial use is filed with the Department of Finance. As the grantee, B will be liable for the appropriate transfer tax if A does not pay it.

(11) A purchases stock from a cooperative housing corporation incorrectly believing that a transfer tax credit would be available against the transfer tax due. A return is filed claiming such credit. As the grantee, A will be liable for the appropriate transfer tax if the cooperative housing corporation does not pay it.

(12) A corporation owns stock in a cooperative housing corporation and holds the proprietary lease for a residential apartment in the building. The apartment is used solely as the residence of its chief executive officer. The sale of this stock by the corporation is subject to the transfer tax. The corporation is deemed to maintain the apartment in the City in connection with, incidental to or in furtherance of its business

or commercial activity. The result would be the same if the apartment was used to house out-of-town employees or customers of the corporation.

(d) In the case of the sale of a cooperative apartment, the proportionate amount of any underlying building mortgage attributable to the apartment is includible in consideration.

To illustrate:

A makes a taxable purchase of 10% of the stock of a cooperative housing corporation in connection with the grant of a proprietary leasehold in one of the ten apartments of the cooperative housing corporation. The building is encumbered with a $500,000 mortgage. A pays $100,000 for the stock.

The transfer tax is calculated as follows:

Amount paid for the apartment	$100,000
10% of $500,000 mortgage	50.000
Total consideration	$150,000

(e) Credit. In the case of the original transfer of cooperative housing corporation stock by a cooperative corporation or cooperative plan sponsor in connection with the grant or transfer of a proprietary leasehold, a credit is allowed for a proportionate part of the amount of any tax paid upon the conveyance to the cooperative housing corporation of the land and building or buildings comprising the cooperative dwelling or dwellings. This credit is calculated as follows:

$$\text{Credit} = \text{Amount of tax paid upon the conveyance to the cooperative housing cooperation} \times \frac{\text{Number of shares transferred in this transaction}}{\text{Total number of outstanding shares of the cooperative housing cooperation}}$$

To illustrate: X, the owner of a ten unit apartment building, sells the property to Y Cooperative Corporation for $1,000,000. A transfer tax of $20,000 is paid in connection with this transfer. Y is authorized to issue 100 shares of stock. Each of the 10 apartments is allocated 10 shares. Y sells 10 shares to Z for $300,000 within 24 months of payment by X of the $20,000 transfer tax. A credit is allowed against the $3,000 transfer tax due on this subsequent sale from Y to Z, computed as follows:

$$\text{Credit} = \$20{,}000 \times \frac{10}{100} = \$2{,}000$$

This credit shall not reduce the transfer tax due on the stock sale from the cooperative housing corporation or sponsor below zero.

This credit applies only for original transfers of stock by the cooperative housing corporation or cooperative plan sponsor. It does not apply to taxable resales of cooperative housing corporation stock.

No credit is allowed for any tax paid more than 24 months prior to the date on which occurs the first in a series of transfers of shares of stock in the offering of cooperative housing corporation shares. Thus, if the first of the original transfers of shares from the cooperative housing corporation or sponsor is made within 24 months of the payment of the tax imposed on the conveyance of the property to the cooperative housing corporation, then ail original transfers from the cooperative housing corporation or plan sponsor, regardless of when made, will be entitled to an appropriate credit. If the first transfer is made more than 24 months after payment of the tax imposed on the conveyance of the property to the cooperative housing corporation, then no credit is allowed

§24. New Article 23 is added to such Regulations to read as follows:

LEASEHOLDS

Article 23. (a) After February 1, 1982, the granting of a leasehold interest in exchange for a consideration which is not rent for purposes of the New York City Commercial Rent or Occupancy Tax (Chapter 7 of Title 11 of the New York City Administrative Code) is subject to tax. The granting of a leasehold interest solely for a consideration which is considered rent for purposes of the New York City Commercial Rent or Occupancy Tax is not subject to tax.

(b) After February I, 1982, the surrender or assignment of a leasehold interest by a lessee before the end of the term in exchange for the payment of a sum of money or other consideration other than the release of the lessee from the lease obligation is subject to tax. However, the surrender or assignment of a leasehold interest by the lessee solely in exchange for a release of the lessee from the lease obligation is not subject to tax.

§25. New Article 24 is added to such Regulations to read as. follows:

OTHER CONVEYANCES SUBJECT TO TAX

Article 24. The following are examples of situations in which the tax applies: (Any reference made to a deed or realty includes an economic interest in realty.)

(a) A conveyance by a defaulting mortgagor to the mortgagee. The tax is computed on the amount of the outstanding mortgage debt, and unpaid accrued interest. The tax applies without regard to whether the mortgagor is personally liable for the mortgage debt or whether the mortgage is cancelled of record.

(b) Deeds given by referees, receivers, sheriffs, etc., for realty sold under foreclosure or execution. The tax is computed on the amount bid for the property, senior liens not canceled by the sale, and advertising expenses, taxes and other costs paid by the purchaser, whether the purchaser is the mortgagee, judgment creditor, or other person.

(c) A conveyance of realty from one spouse to the other pursuant to the terms of a separation agreement. In the absence of evidence establishing the consideration, it is presumed that the consideration for the conveyance, which includes the relinquishment of marital rights, is equal to the fair market value of the interest in the property conveyed

(d) The assignment of a successful bid at a mortgage foreclosure sale. The consideration is the amount paid for the assignment.

(e) Realty distributed in redemption for stock.

Example: A, B. C. and D are equal shareholders of X Corporation. X owns two buildings in New York City. X redeems A's shares in exchange for one of the buildings, which is unencumbered and valued at $250,000. X's other building is also unencumbered and valued at $750,000. X has no other assets. The value of A's shares is $250,000. The consideration for this transaction is the X stock owned by A. Therefore, the amount of tax due is $2,500 (1% x $250,000).

(f) A conveyance of realty in exchange for other realty. Each transfer of realty is subject to tax. The consideration for each transfer is the fair market value of the realty and other property received in exchange for the realty conveyed.

§26. New Article 25 is added to such Regulations to read as follows:

OTHER CONVEYANCES NOT SUBJECT TO TAX

Article 25. The following are examples of situations in which the tax does not apply: (Any reference made to a deed or realty includes an economic interest in realty.)

(a) A conveyance of realty without consideration, as defined in Article 9, and otherwise than in connection with a liquidation. This includes a deed conveying realty as a bona fide gift.

(b) A deed to confirm title already vested in the grantee, such as a quitclaim deed to correct a flaw in title.

(c) An option for the purchase of real property or a contract for the sale of real property, if the contract does not vest legal or equitable title. For this purpose equitable title will be deemed to vest where the benefits and burdens of ownership have shifted to the optionee or vendee including, for example, where possession or the right to receive rent or depreciate the realty is given to the contract vendee or optionee. (See, however, Article 9 for calculation of consideration when option rights are exercised.)

(d) Partition deeds, unless, for a consideration, some of the parties take shares greater in value than their undivided interests, in which event the tax attaches to each deed conveying such greater share, computed upon the consideration for the excess.

(e) A deed executed by a debtor conveying real property to an assignee for the benefit of his creditors; however, when the assignee conveys such property to a creditor or sells it to any other person, the deed by him is taxable if the consideration exceeds $25,000.

Should show the $25,000 exemption separately

(f) Conveyance to a receiver of realty included in the receivership assets, and reconveyance of such realty upon termination of the receivership.

(g) New stock certificates issued to replace old stock certificates because of a mere “change of name under section 801(b)(1) of the New York Business Corporation Law (or under comparable provisions of the laws of the United States or other states).

(h) Transfers made pursuant to a confirmed plan of reorganization as provided under 11 U.S.C. §1146(c).

(i) A conveyance of premises owned by a foreign diplomatic mission or consular post, and used for diplomatic or consular purposes, including premises used as the residence for diplomatic or consular personnel.

§27. Former Article 14 of such Regulations is renumbered as Article 26 and amended to read as follows:

REAL PROPERTY SITUATED PARTLY WITHIN AND

PARTLY WITHOUT THE CITY

Article [14] 26. Where real property is situated partly within and partly without the boundaries of the City of New York the consideration [or net consideration] subject to tax shall be such part of the total consideration [or total net consideration] as is attributable to the portion of such real property situated within the City of New York or to the economic interest in such portion.

For the purpose of determining the consideration [or net consideration] attributable to property situated within the City of New York, that part of the consideration [or net consideration] shall be deemed subject to tax which the assessed valuation of the property situated within the territorial limits of the City of New York bears to the total assessed valuation of the entire property conveyed situated within and without the City. The assessed valuations to be used shall be those in effect at the time of the conveyance of the property.

In lieu of the foregoing, the equalized assessed valuation based on the state equalization tables may be used, provided they are applied to the property situated both within and without the City of New York.

To illustrate:

A parcel of land situated partly within Westchester

County and partly within Bronx County is conveyed by deed, dated July 15, 1983. The purchase price of the property is $200,000, subject to a first mortgage of $90,000. The assessed valuations of the property in effect at the time of the conveyance are as follows:

Property situated within Bronx County $120,000

Property situated in Westchester County 40,000

The following shows the computation of the consideration subject to tax:

Item No.

1. Assessed valuation of property partly Situated in Westchester County .... $ 40,000
2. Assessed valuation of property partly Situated in Bronx County 120,000
3. Total assessed valuation $160,000
4. Ratio of assessed valuation of property Partly situated in Bronx County to total assessed valuation of property situated within and without the City of New York (Item 2 * Item 3) 75%
5. Total consideration $200,000
6. Total consideration subject to tax (Item 5 x Item 4)....................... $150,000

§28. Former Article 15 of such Regulations is renumbered as Article 27 and amended to read as follows:

EXEMPTIONS

Article [15] 27. (a) The following persons are exempt from the payment of tax and from filing a return:

1. The State of New York, or any public corporation (including a public corporation created pursuant to agreement or compact with another state or the Dominion of Canada), improvement district or other political subdivision of the state.

2. The United States of America, and any of its agencies and instrumentalities insofar as they are immune from taxation.

The exemption of such governmental bodies or persons shall not, however, relieve a grantee from them of liability for the tax or from filing a return.

(b) The tax does not apply to any of the following deeds[:], instruments, or transactions:

1. A deed, instrument, or transaction conveying or transferring real property or an economic interest therein by or to the United Nations or other world-wide international organizations of which the United States of America is a member.

2. A deed, instrument, or transaction conveying; or transferring real property or an economic interest therein by or to any corporation, or association, or trust, or community chest, fund or foundation, organized and operated exclusively for religious, charitable or educational, purposes or for the prevention of cruelty to children or animals, and no part of the net earnings of which inures to the benefit of any private shareholder or individual and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation, provided, however, that nothing in this paragraph shall include an organization operated for the primary purpose of carrying on a trade or business for profit, whether or not all of its profits are payable to one or more organizations described in this paragraph.

3. A deed, instrument, or transaction conveying or transferring real property or an economic interest therein to any governmental body or person exempt from payment of the tax

pursuant to subdivision (a) of this article.

4. A deed delivered pursuant to a contract made prior to May 1, 1959.

5. A deed delivered by any governmental body or person exempt from payment of the tax pursuant to subdivision (a) of this article as a result of a sale at a public auction held in accordance with the provisions of a contract made prior to May 1, 1959.

6. A deed <u>or instrument</u> given solely as security for, <u>or a transaction the sole purpose of which is to secure</u>, a debt[, provided that the tax imposed by Article 11 of the Tax Law is paid for such deed] <u>or obligation</u> or a deed <u>or instrument given, or a transaction entered into</u>, [given] solely for the purpose of returning such security.

7. A deed, <u>instrument, or transaction conveying or transferring real property gee or an economic interest therein</u> from a mere agent, dummy, straw man or conduit to a principal, or a deed from the principal to his agent, dummy, straw man or conduit.

<u>The following are examples of deeds, instruments and transactions in which this exemption applies</u>:

<u>(A)</u> <u>The conveyance of realty by an individual to a corporation solely for the purpose of obtaining mortgage financing, followed by the immediate reconveyance of the realty by the corporation to the individual after such mortgage financing is obtained.</u>

<u>(B)</u> <u>A deed transferring real property to an existing corporation solely for the purpose of effectuating the terms</u>

of a mortgage spreader agreement. The deed returning the mortgaged realty to its true owner is also exempt from the tax.

(C) A conveyance between a principal and its agent where (1) a written agreement is entered into at the time of the transaction establishing such a relationship with respect to the realty or economic interest therein, (2) the purported agent functions as an agent with respect to the realty or economic interest therein for all purposes, and (3) the purported agent is held out as the agent and not the principal in all dealings with third parties relating to the realty or economic interest therein.

Since the tax does not apply to any deed, instrument, or transaction described in subdivision (b) of this article, neither the grantor nor the grantee is required to pay the tax. However, a return relating to the deed, instrument, or transaction must be filed.

§29. Former Article 16 of such Regulations is renumbered as Article 28 and amended to read as follows:

APPLICATIONS FOR EXEMPTIONS

Article [16] 28. A person or organization claiming exemption from the tax under Article 27(b)(2) is required to submit a properly executed application for exemption and in connection therewith to submit such information to the Commissioner of Finance as will enable him to rule upon its status. The application is required to be submitted in the form of affidavit setting forth:

a. the type of organization,

b. the purpose for which it is organized,

c. its actual activities,

d. the source and disposition of its income,

e. whether or not any of its income is credited to surplus or may inure eligible for the to any private stockholder or individual, and

f. such other facts which may affect its right to exemption.

Time may not permit an organization to do this before filing. It should be made clear that an organization otherwise exemeption will not lose it solely because application was not made in time to attach certif. to its filing.

The affidavit must be supplemented by a copy of the article of incorporation, or articles of association, as the case may be, a copy of the by-laws of the organization, a financial statement showing its assets and liabilities, a statement of its receipts and disbursements for the most recent year, [and] a [photostatic] copy of the letter from the United States Treasury Department granting the organization exemption from federal income taxation and a copy of its federal income tax return for the most recent year,

[If the organization heretofore received from the Commissioner of Finance an exemption from sales tax, a copy of the letter of exemption should be submitted to the Commissioner of Finance who, in his discretion, may dispense with the furnishing of a portion of the information mentioned above.] The Commissioner of Finance, after reviewing the application, and if satisfied that the applicant is entitled to an exemption, will issue a letter of exemption to the applicant. Upon the receipt of such letter of exemption, the applicant shall attach a true copy thereof to any return required to be filed under the law.

§30. Former Article 17 of such Regulations is renumbered as Article 29 and amended to read as follows:

PRESUMPTIONS AND BURDEN OF PROOF

Article [17]29. The law presumes that all deeds and transfers of economic interests in real property are taxable. Where the consideration includes property other than money, it is presumed that the consideration is the value of the real property or interest therein. Where the consideration is measured by the fair market value of realty, it is presumed that the fair market value is not less than twice the assessed valuation of the realty on the assessment roll of the City at the time of delivery of the deed, instrument, or transaction.

These presumptions prevail until the contrary is established and the burden of proving the contrary is on the party seeking to rebut the presumption.

It should be made clear that all presumptions under the reqs are rebuttable.

The burden of proving that a lien or encumbrance existed on the real property or interest therein before the deed was delivered and remained thereon thereafter and the amount of such lien or encumbrance at the time of delivery of the deed is on the taxpayer.

§31 Former Article 18 of such Regulations is renumbered as Article 30 and amended to read as follows:

PAYMENT OF TAX

Article [18]30. The tax shall be paid by the grantor to the Commissioner of Finance at the office of the Register in the county where the deed is or would be recorded within thirty days after the delivery of the deed by the grantor to the grantee but before the recording of such deed or. in the case of a tax on an instrument effecting a transfer of real property or economic interest therein, within thirty days after such transfer by the grantor at any of the borough offices of the City Register or at the Department of Finance, Bureau of Tax Operations, Real Property Transfer Tax Group, 25 Elm Place, 3rd Floor, Brooklyn, N.Y. 1120L or at such other lace as be specified in the return In the absence of satisfactory proof as to the date of delivery of [the] <u>a</u> deed, the date of the deed shall be deemed to be the date of delivery thereof.

In case the tax due is not paid by the grantor, or if the grantor is exempt from tax under subdivision (a) of Article [15] <u>27</u> of these regulations, the grantee shall also be liable for payment of the tax to the Commissioner of Finance.

Payment of the tax may be made in cash, or by check, money order or draft drawn to the order of the Commissioner of Finance.

§32. Former Article 19 of such Regulations is renumbered as Article 31 and amended to read as follows:

FILING OF RETURNS

Article [19] <u>31</u>. A joint return shall be filed by both the grantor and the grantee for each deed, <u>instrument, or transaction</u>, whether or not a tax is due thereon. Thus, a return must be filed although the consideration for the deed, <u>instrument, or transaction</u> is $25,000 or less. The actual amount of the consideration for each deed, <u>instrument, or transaction</u> must be set forth on the return at the place provided therefor, regardless of the amount of the consideration. Where the consideration is $1,000,000 or more, a copy of the contract of sale or closing statement, if any, must be attached to the return. A return need not be filed for the grant of a leasehold interest in a 1, 2 or 3 family house or an individual dwelling unit except where tax is owed or the lease is to be recorded. In the case of a transfer of stock in a cooperative housing corporation, other than the initial transfer of stock by the corporation or sponsor, if the owner did not hold the shares in connection with, incidental to or in furtherance of a trade, business, profession, occupation or commercial activity, the grantor and grantee may jointly file an affidavit of non-commercial use in lieu of a return. The return must be filed with the Commissioner of Finance by delivering the same to the Register for transmittal to the Commissioner of Finance. The return must be so filed at the time of payment of the tax, or, in the case of a deed not subject to tax, before the recording of such deed. In the case where a transfer of an economic interest in real property is not subject to-tax or the tax is zero (because of available credits), the return must be filed within 30 days after such transfer. In addition, a cooperative housing corporation must file semi-annual information returns on January 15 and July 15 of each year which reflects all transfers of its stock which the co-op knows to have made within the preceding 6 months.

If either the grantor or grantee has failed to sign the return, it shall be accepted be as a return, but the party who has failed to sign the return or to file a separate return shall be subject to the penalties applicable to a person who has failed to file a return and the period of limitations for assessment of tax or of additional tax shall not apply to such party.

Where a deed, instrument, or transaction has more than one grantor or more than one grantee, a return may be signed by any one of the grantors and by any one of the grantees provided, however, that those not signing shall not be relieved of any liability for the tax imposed by the law.

The form of return shall be prescribed by the Commissioner of Finance and shall contain such information as he deems necessary for the proper administration of the law. The return must be signed under oath by both the grantor or his agent and the grantee or his agent. Upon the filing of such return <u>in the case of a deed</u>, evidence thereof shall be affixed to the deed by the Register to indicate that a tax return has been filed. If no tax is paid at the time of the recording of the deed, the Register may indicate on the deed that no tax was paid. Where no return is filed at the time of the recording of the deed, the Register may indicate on the deed that no return was filed. The Register shall, at such times as may be mutually agreeable to the Register and the Commissioner of Finance, transmit to the Commissioner of Finance all returns filed with the Register, including receipted returns, returns filed without payment of taxes, and information of deeds recorded without filing of returns.

The acceptance by the Register of a return for filing shall in no way indicate the propriety or correctness of the return. The Register shall accept any return offered for filing provided it is signed under oath by the grantor or his agent or by the grantee or his agent, unless it appears that the return is insufficient on its face, as where the return shows that the amount of the consideration paid or required to be paid without deductions is less than the amount of mortgages or other liens or encumbrances. The Register is also authorized to reject a return which states that there was no consideration for the deed unless there is attached to such return a statement setting forth the grounds upon which it is claimed that there was no consideration.

Returns are required to be filed at the office of the Register in the county where the deed is or would be recorded. In the case of transfers of controlling economic interests in real property or cooperative apartments, returns or affidavits, whichever are applicable, may be filed at any office of the City Register or with the Department of Finance, Bureau of Tax Operations, Real Property Transfer Tax Group, 25 Elm Place, 3rd Floor, Brooklyn, N.Y. 11201. The locations of the Register's offices are as follows:

Manhattan	(New York County) 31 Chambers Street New York, N. Y. 10007
Bronx	1932 Arthur Avenue
Bronx,	N. Y. 10457
Brooklyn	Kings County)
	Municipal Building Brooklyn, N. Y. 11201
Queens	90-27 Sutphin Boulevard Jamaica, N. Y. 11435
Richmond	County Clerk’s Office County Court House Staten Island, N.Y. 10301

Where a return is not filed at the time of the recording of a deed, or the deed is not recorded, the return shall be filed with the Department of Finance, [Examination Unit, 151 West Broadway, New York, N.Y. 10013] Bureau of Tax Operations, Real Property Transfer Tax Group, 25 Elm Place, 3rd Floor, Brooklyn, N.Y. 11201.

Forms of returns or affidavits will be furnished on request by the Commissioner of Finance or Register.

The Commissioner of Finance may require amended returns to be filed within twenty days after notice and to contain the information specified in the notice.

If a return or affidavit required by the law is not filed or if a return or affidavit when filed is incorrect or insufficient on its face the Commissioner of Finance shall take the necessary steps to enforce the filing of such a return or affidavit or of a corrected return or affidavit.

The Commissioner of Finance may provide for the use of stamps as evidence of payment and that they shall be affixed to the deed before it is recorded.

§33. Former Article 20 of such Regulations is renumbered as Article 32.

§34. Former Article 21 of such Regulations is renumbered as Article 33 and amended to read as follows:

PENALTIES AND INTEREST

Article [21]33. (a) Interest on underpayments –

If any amount of tax is not paid on or before the last date prescribed for payment (without regard to any extension of time granted for payment), interest on such amount at the rate prescribed by the law and the regulations of the Commissioner of Finance shall be paid for the period from such last date to the date of payment. In computing the amount of interest to be paid with respect to taxes which remain or become due on or after July 16, 1985, such interest shall be compounded daily. No interest shall be paid if the amount thereof is less than one dollar.

(b) Civil Penalties. —

Any person failing to file a return or to pay over any tax due prior to February 24, 1983 within the time required by law shall be subject to a penalty of five percent of the amount due. If the Commissioner of Finance is satisfied that the delay was excusable he may remit all or any part of such penalty.

With respect to returns or payments which become due on or after February 24, 1983, the following penalties apply:

(1) Failure to File Return <u>or Affidavit</u> - (i) In case of failure to file a return <u>or affidavit</u> on or before the prescribed date (determined with regard to any extension of time for filing), unless it is shown that such, failure is due to reasonable cause (see: paragraph 5 of this subdivision) and not due to willful neglect, there is to be added to the amount required to be shown as tax on such return five percent of the amount of such tax for each month or fraction thereof during which such failure continues, not exceeding twenty-five percent in the aggregate.

(ii) With respect to returns required to be filed on or after July 16, 1985, in the case of a failure to file a tax return <u>or affidavit</u> within 60 days of the date prescribed for filing such return <u>or affidavit</u> (determined with regard to any extension of time for filing), unless it is shown that such failure is due to reasonable cause and not due to willful neglect, the addition to tax under subparagraph (i) of this paragraph shall not be less than the lesser of one hundred dollars ($100) or one hundred percent (10096) of the amount required to be shown as tax on such return.

(iii) For purposes of subparagraphs (i) and (ii), the amount of tax required to be shown on the return shall be reduced by the amount of any part of the tax which is paid on or before the date prescribed for payment of the tax and by the amount of any credit against the tax which may be claimed on the return.

(2) Failure to pay tax shown on return. - In case of failure to pay the amount shown as tax on a return filed on or before the prescribed date (determined with regard to any extension of time for payment), unless it is shown that such failure is due to reasonable cause (see: paragraph 5 of this subdivision) and not due to willful neglect, there shall be added to the amount shown as tax on such return one-half of one percent of the amount of such tax for each month or fraction thereof during which such failure continues, not exceeding twenty-five percent in the aggregate. For the purpose of computing the addition for any month the amount of tax shown on the return shall be reduced by the amount of any part of the tax which is paid on or before the beginning of such month and by the amount of any credit against the tax which may be claimed upon the return. If the amount of tax required to be shown on a return is less than the amount shown as tax on such return, this paragraph shall be applied by substituting such lower amount.

(3) Failure to pay tax required to be shown on return. In case of failure to pay any amount in respect of any tax

required to be shown on a return required to be filed which is not so shown (including a determination made pursuant to Article 27 of these Regulations), within ten days of the date of notice and demand, unless it is shown that such failure is due to reasonable cause (see: paragraph 5 of this subdivision) and not due to willful neglect, there shall be added to the amount of tax stated in such notice and demand one-half of one percent of such tax for each month or fraction thereof during which such failure continues, not exceeding twenty-five percent in the aggregate. For the purpose of computing the addition for any month, the amount of tax stated in the notice and demand shall be reduced by the amount of any part of the tax which is paid before the beginning of such month.

(4) Limitations on additions: -

(i) With respect to any return the amount of the addition to tax is limited to the following —

[(A) At no time will the addition for one month be more than five percent]

[(B)]<u>(A)</u> If paragraphs (1) and (2) of this subdivision are both applicable, the addition under paragraph (1) is reduced by the addition under paragraph (2). Thus, the addition to tax will be four and one- half percent under paragraph (1) and one-half of one percent under paragraph (2) for each month up to and including the first five months. After the first five months, the addition of one-half of one percent per month pursuant to paragraph (2) will apply for the next forty-five months for a maximum aggregate of forty-seven and one- half percent addition to tax. However, in any case described in subparagraph (ii) of paragraph (1) of this subdivision (relating to returns filed after 60 days of the due date) the amount of the addition to tax under such paragraph (1) shall not be reduced below the amount provided in such subparagraph (i.e., the lesser of $100 or 100% of tax due).

[(C)]<u>(B)</u> If paragraphs (1) and (3) of this subdivision are both applicable, the maximum amount of the addition to tax [may not exceed twenty-five percent in the aggregate. The maximum amount of the addition to tax] pursuant to paragraph (3) of this subdivision shall be reduced by the amount of the addition to tax pursuant to paragraph (1) of this subdivision (determined without regard to subparagraph (ii) of such paragraph (1)) which is attributable to the tax for which the notice and demand is made and which is not paid within ten days of such notice and demand.

(ii) The provisions of paragraph (i) may be illustrated by the following examples:

(A)(I) Assume the grantor filed the tax return in connection with a transfer occuring on June 30, 1983 (due within 30 days after delivery of the deed by the grantor to the grantee but before the recording of such deed) on November 10, 1983, and the failure to file on or before the prescribed date is not due to reasonable cause. The tax shown on the return is $800 and a deficiency of $200 is subsequently assessed, making the tax required to be shown on the return $1,000. The amount shown as due on the return of $800 is paid on December 6, 1983. The failure to pay on or before the prescribed date is not due to reasonable cause. There will be imposed, in addition to interest, an additional amount under paragraph (2), of $20.00, which is 2.5 percent (2% for the 4 months from July 30 to November 30, and 0.5% for the fractional part of the month from December 1 through December 6) of the amount shown due on the return of $800. There will also be imposed an additional amount under paragraph (1) of $138, determined as follows:

20 percent (5% per month for the 3 months from

July 30 through October 30 and 5% for the fractional

part of the month from November 1 through November 10)

of the amount due of $1,000 required to be

shown on the return..$200

Reduced by the amount of the addition imposed under
paragraph (2) for those months 16

Addition to tax under paragraph (1).................. $184

(II) A notice and demand for the $200 deficiency is issued on January 8, 1984, but the grantor or grantee does not pay the deficiency until December 23, 1984. In addition to interest there will be imposed an additional amount under paragraph (3) of $10.00, determined as follows:

Addition computed without regard to limitation:
6 percent (5 1/2% for the 11 months from January 19,1984
through December 18, 1984, and 0.5% for the
fractional part of the month from December 19 through
December 23) of the amount stated in the notice and
demand ($200)... $12

Limitation on addition:

25 percent of the amount stated in the notice and
demand ($200 .... $50
Reduced by the part of the addition under
paragraph (1) for failure to file attributable
to the $200 deficiency(20% of $200) $40

Maximum amount of the addition under paragraph (3 .... $ 10

(B) Grantor or grantee files the tax return in connection with a transfer occurring on September 30, 1983, upon recordation on May 2, 1984, and such delinquency is not due to reasonable cause. The balance due, as shown on the return, of $500 is paid when the return is filed on May 2, 1984. In addition to interest and the addition for failure to pay under paragraph (2) of $20.00 (8 months at .05% per month, or 496), there will also be imposed an additional amount under paragraph (1) of $112.50, determined as follows:

Penalty at 5% for maximum of 5 months, or 25%, of $500…………$125.00
Less reduction for the amount of the addition under
paragraph (2):

Amount imposed under paragraph (2) for failure to pay
for the months in which there is also an addition for
failure to file - 2 1/2% for the 5- months October 30
through March 30 of the net amount due ($500)……………………………12.50
Addition to tax under paragraph (1)………………………………………………….$112.50

(5) Reasonable cause as used in paragraphs (1), (2) and (3) must be affirmatively shown in a written statement. Grounds for reasonable cause, whore clearly established, may include the following:

(a) inability to obtain and assemble essential information required for the preparation of a complete return despite reasonable efforts;

(b) any other cause for delinquency which appears to a person of ordinary prudence and intelligence as a reasonable cause for delay in filing a return and which clearly indicates an absence of gross negligence or willful intent to disobey the taxing statutes. Ignorance of the law, however, will not be considered reasonable cause.

(6) Underpayment due to negligence - (i) If any part of an underpayment is due to negligence or intentional disregard of the law, or rules or regulations thereunder (but without intent to defraud), there shall be added to the tax a penalty in an amount equal to five percent of the underpayment.

(ii) With respect to taxes required to be paid on or after July 16, 1985, there shall be added to the tax (in addition to the amount determined under subparagraph (i) of this paragraph) an amount equal to fifty percent of the interest payable under Article [21] 33 of these regulations with respect to the portion of the underpayment described in such subpragraph (i) which is attributable to the negligence or intentional disregard referred to in such subparagraph (i), for the period beginning on the last date prescribed by law for payment of such underpayment (determined without regard to an extension) and ending on the date of the assessment of the tax (or, if earlier, the date of the payment of the tax).

(7) Underpayment due to fraud - (i) If any part of an underpayment is due to fraud, there shall be added to the tax a penalty in an amount equal to fifty percent of the underpayment.

(ii) With respect to taxes required to be paid on or after July 16, 1985, there shall be added to the tax (in addition to the penalty determined under subparagraph (i) of this paragraph) an amount equal to fifty percent of the interest payable under Article [2] 33 of these regulations with respect to the portion of the underpayment described in such paragraph (i) which is attributable to fraud, for the period beginning on the last day prescribed by law for payment of such underpayment (determined without regard to any extension) and ending on the date of the assessment of the tax (or, if earlier, the date of the payment of the tax).

(iii) The penalty under this paragraph (paragraph 7) shall be in lieu of the. maximum twenty-five percent penalty due to willful neglect for failure to file a return, five percent penalty due to negligence and the additional one-half of one percent per month penalty pursuant to paragraphs (2) and (3) of this subdivision.

(8) Any person who fails to pay tax, or to make, render, sign or certify any return or affidavit, or to supply any information, within the required time, with fraudulent intent, shall be liable for a penalty of not more than $1,000, in addition to any other amounts required under the law to be imposed, assessed and collected by the Commissioner of Finance. The Commissioner of Finance has the power, in his discretion, to waive, reduce or compromise any penalty under this paragraph.

(c)(1) The interest and penalties provided for in subdivisions (a) and (b) shall be paid and may be enforced in the same manner as taxes.

(2) Whenever a penalty is assessed for failure to file the

return <u>or affidavit</u> or pay the tax when due, an application for the remission thereof may be made to the Commissioner of Finance. Such application must be made by the person against whom the penalty is assessed, and must set forth the grounds upon which the remission is requested.

(d) Criminal Penalties -

(1) Falure to obey subpoena; false testimony. — (a) Any person who, being duly subpoenaed in connection with a matter arising under the law, to attend as a witness or to produce books, accounts, records, memoranda, documents or other papers, (i) fails or refuses to attend without lawful excuse, (ii) refuses to be sworn, (iii) refuses to answer any material and proper question, or (iv) refuses, after reasonable notice, to produce books, papers and documents in his possession or under his control which constitute material and proper evidence shall be guilty of a misdemeanor.

(a) Any person who shall testify falsely in any material matter pending before the Commissioner of Finance shall be guilty of and punishable for perjury.

(2) Willful failure to file a return or report or pay the tax. — Any person required to pay any tax or make any return or report, who willfully fails to pay such tax or make such return or report, at the time or times so required, shall be guilty of a misdemeanor.

(3) Fraudulent re-turns, reports, statements or other documents. — (a) Any person who willfully makes and subscribes any return, report, statement or other document which is required to be filed with or furnished to the Commissioner of Finance or

to any person, pursuant to the provisions of the law, which he does not believe to be true and correct as to every material matter shall be guilty of a misdemeanor.

(b) Any person who willfully delivers or discloses to the Commissioner of Finance or to any person, pursuant to the provisions of the law, any list, return, report, account, statement, or other document known by him to be fraudulent or to be false as to any material matter shall be guilty of a misdemeanor.

(c) For purposes of this paragraph, the omission by any person of any material matter with intent to deceive shall constitute the delivery or disclosure of a document know by him to be fraudulent or to be false as to any material matter.

(4) Failure to keep records. — Any person who willfully fails to keep or retain any records required to be kept or retained by the law shall be guilty of a misdemeanor.

(5) Any person willfully simulating, altering, defacing, destroying or removing any evidence of the filing of a return or the payment of the tax shall be guilty of a misdemeanor.

(e) Commissioner's Certificate. —

The certificate of the Commissioner of Finance to the effect that a tax has not been paid, that a return has not been filed, or that information has not been supplied pursuant to the provisions of the law shall be prima facie evidence thereof.

§35. Former Article 22 of such Regulations is renumbered as Article 34.

§36. Former Article 23 of such Regulations is renumbered as Article 35 and amended to read as follows:

RECORDS TO BE KEPT

Article [23] 35. Every grantor and grantee is required to keep complete records of conveyances of real property or economic interests therein. Such records shall include copies of the contract of sale, the title report, if any, the return or affidavit filed, records showing the amount of liens and encumbrances on the realty at the time of delivery of the deed, the closing statement, and the general books of account of a person which would reflect the sale or purchase of real property or economic interests therein. Such records shall be made available for inspection and examination at any time upon demand by the Commissioner of Finance or his duly authorized agent or employee and shall be preserved for a period of three years, except that the Commissioner of Finance may consent to their destruction within that period or may require that they be kept longer.

Evidence of payment of tax to the Commissioner of Finance such as a cancelled check, a receipt, or a receipted return, must be preserved.

If no records are maintained as required by this article, or if the records which are maintained are inadequate, the Commissioner of Finance will determine the amount of the tax due from such information as may be obtainable.

§37. Former Article 24 of such Regulations is renumbered as Article 36.

§38. Former Article 25 of such Regulations is renumbered as Article 37 and amended to read as follows:

RETURNS TO BE SECRET

Article [25] 37. Except in accordance with proper judicial order, or as otherwise provided by law, it is unlawful for the Commissioner of Finance or Register or any officer or employee of the Department of Finance or Register to divulge or make known in any manner any information contained in or relating to any return or affidavit provided for by law. The officers charged with the custody of such returns or affidavits shall not be required to produce any of them or evidence of anything contained in them in any action or proceeding in any court, except on behalf of the Commissioner of Finance in an action or proceeding under the provisions of the law, or on behalf of any party to an action or proceeding, in either of which events the court may require the production of, and may admit in evidence, so much of said returns or affidavits or of the facts shown thereby, as are pertinent to the action or proceeding and no more.

A certified copy of any return or affidavit or of any information contained in or relating thereto may be furnished to the United States of America or any department thereof, the State of New York or any department thereof, the City of New York or any department thereof provided the same is requested for official businesss. Returns or affidavits may be inspected for official business by the Register, the Corporation Counsel or other legal representative of the City or by the district attorney of any county within the “City.

A grantor or grantee of a deed or any subsequent owner of the real property conveyed by such deed, and the grantor or grantee of an economic interest in real property, or the duly authorized representative of any of them, may obtain a certified copy of any return or affidavit filed in connection with the tax on such [deed] conveyance or transfer upon application in writing therefor to the Commissioner of Finance. Where a representative applied for a certified copy of such returns or affidavits, he must file a power of attorney with the application.

Nothing herein shall be construed to prohibit the publication of statistics so classified as to prevent the identification of particular returns or items thereof.

§39. Former Article 26 of such Regulations is renumbered as Article 38.

§40. Former Article 27 of such Regulations is renumbered as Article 39 and amended to read as follows:

DETERMINATION OF TAX DEFICIENCY

Article [27] 39. If a return or affidavit required by the law is not filed, or if a return or affidavit when filed is incorrect or insufficient, the Commissioner of Finance will determine the amount of tax due from such records or information as may be obtainable, including the assessed valuation of the real property or interest therein and/or other factors. Notice of such determination will be given to the person liable for the payment of the tax. Such determination shall finally and irrevocably fix the tax unless the person against whom it is assessed, within thirty days after giving of notice of such determination, shall apply to the Commissioner of Finance for a hearing, or unless the Commissioner of Finance, on his own motion, shall redetermine the same. After such hearing the Commissioner of Finance shall give notice of his determination to the person against whom the tax is assessed. The determination of the Commissioner of Finance shall be reviewable for error, illegality or unconstitutionality or any other reason whatsoever by proceeding under Article 78 of the Civil Practice Law and Rules if application therefor is made to the Supreme Court “within four months after the giving of the notice of such determination. A proceeding under Article 78 of the Civil Practice Law and Rules shall not be instituted unless: (a) the amount of any tax sought to be reviewed, with penalties and interest thereon, if any, shall be first deposited with the Commissioner of Finance and there shall be filed with the Commissioner of Finance an undertaking in such amount and with such sureties as a justice of the Supreme Court shall approve, to the effect that if such proceeding be dismissed or the tax confirmed, the petitioner will pay costs and charges which may accrue in the prosecution of the proceeding; or (b) at the option of the applicant such undertaking filed with the Commissioner of Finance may be in a sum sufficient to cover the taxes, penalties and interest thereon stated in such determination plus the costs and charges which may accrue against it in the prosecution of the proceeding, in which event the applicant shall not be required to deposit such taxes, penalties and interest as a condition precedent to the application.

§4L Former Article 28 of such Regulations is renumbered as Article 40 and amended to read as follows:

STATUTE OF LIMITATIONS

Article [28] <u>40</u>. The provisions of the Civil Practice Law and Rules or any other law relative to limitations of time for the enforcement of a civil remedy shall not apply to any proceeding or action taken by the City to levy, appraise, assess, determine or enforce the collection of any tax or penalty provided by the law. However, except in the case of a wilfully false or fraudulent return or affidavit with intent to evade the tax, no assessment of additional tax shall be made after the expiration of more than three years from the date of filing of a return or affidavit; provided, however, that where no return or affidavit has been filed as provided by law the tax may be assessed at any time.

Where, before the expiration of the period prescribed herein for the assessment of an additional tax, a taxpayer has consented in writing that such period be extended, the amount of such additional tax due may be determined at any time within such extended period. The period so extended may be further extended by subsequent consents in writing made before the expiration of the extended period.

§42. Former Article 29 of such Regulations is renumbered as Article 41 and amended to read as follows:

NOTICES

Article [29] 41. Any notice authorized or required by the law may be given by mailing [the same] it to the person for whom it is intended in a postpaid envelope addressed to such person at the address given in the last return or affidavit filed by him pursuant to the law, or in any application made by him, or in any deed or instrument which is the subject of the notice, or if no return or affidavit has been filed or application made or address stated in the deed or instrument, then to such address as may be obtainable. The mailing of such notice shall be presumptive evidence of the receipt of the same by the person to whom addressed. Any period of time which is determined according to the provisions of the law by the giving of notice shall commence to run from the date of mailing of such notice.

§43. The foregoing amendments shall take effect immediately.

EXPLANATION OF PROPOSED AMENDMENTS

The proposed amendments reflect recent legislative changes to the New York City real property transfer tax law.

Local Law 71 of 1986 extended the tax to transfers of controlling economic interests in real property and to certain sales of cooperative apartment shares. In addition, the new law established an alternative method for computing the tax on transfers made in liquidation of a corporation or other entity. It also allowed a credit against the tax due on certain liquidations and transfers of cooperative apartment shares.

The proposed amendments explain the operation of these legislative changes. They also contain technical corrections with respect to the existing regulations and reflect the policies of the Department of Finance which have developed since these regulations were last amended in 1985 and 1986.

STANLEY GRAYSON
Commissioner of Finance