



FIDELITY NATIONAL TITLE UPDATES

— LEGISLATIVE UPDATE —

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SPECIAL EDITION

TAX LAW § 663, PREPAYMENT OF ESTIMATED TAX ON GAIN BY NONRESIDENT REAL ESTATE SELLERS REVISED FILING AND PAYMENT AT RECORDING OFFICE PERMITTED

In the waning hours of the 2003 session, the state legislature approved, and the Governor signed, a law creating a new section of the Tax Law designated as § 663 that became effective on September 1, 2003. Section 663 requires that upon *a sale of real property by a nonresident, the taxpayer shall estimate its personal income tax liability and file an estimated tax return, form IT-2663 (the Return) and prepay the amount of its individual tax liability due on the gain derived by from the sale.* The term "nonresident taxpayer," as used in § 663 includes *nonresident trusts and estates.* Exempt from this requirement are sales of a "principal residence," as that term is defined in the Internal Revenue Code, (26 U.S.C. § 121). *The provisions of § 663 do not apply to resident individuals, trusts or estate or to corporations, partnerships or limited liability companies whether domiciled in New York or not.* Other exempt transactions are; deeds in lieu of foreclosure where no additional consideration is being paid; where the transferor or transferee is an agency or authority of the United States of America, the state of New York; the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation; the Government National Mortgage Association; or, a private mortgage insurance company. See § 663(c), below.

As originally enacted, the law required that the IT-2663 and payment, if any, had to be submitted first to an office of the *New York State Department of Taxation and Finance* ("DT&F"). The DT&F office would issue a *certificate of receipt* without auditing the Return. The law then required that the *certificate of receipt*, or proof that the transaction was not subject to § 663's requirements (*a certification was added to the TP-584 for this purpose*), be delivered to the recording officer with the transfer document for recording. Section 663(d) provides that "[a] recording officer shall not record or accept for record any deed unless accompanied by a form prescribed by the commissioner pursuant to subsection (b) of this [the § 663] and the payment of any estimated tax". *The procedure for pre-filing was just recently eliminated and § 663 was amended to allow the IT-2663 and tax due, if any, to be delivered to the recording officer with the transfer document at the time of recording.* The recording officer will not audit the Return, however, they have been directed by DT&F to determine that the grantor(s) and the party(s) filling (and signing) the Return are the same person(s) and that the amount of tax paid, if any, is the amount shown to be due on the IT-2663. A variation will result in the rejection of the IT-2663, any estimated payment, as well as rejection of the transfer document. **EFFECTIVE JANUARY 1, 2004, NYS DT&F OFFICES WILL NO LONGER ACCEPT THE RETURN AND TAX PAYMENT, NOR ISSUE CERTIFICATES OF RECEIPT.** It should be

noted that the *county recording offices have been instructed to continue to accept certificates of receipt which were previously issued by the NYS DT&F offices.*

Two important procedural points should be noted.

- a. If the IT-2663 shows an amount of tax due, payment must be made by a *separate check payable to the order of "NYS INCOME TAX"* only and not to the recording officer.
- b. *Every income tax Return is drafted for a specific tax year. Thus the taxpayer must use the IT-2663 form bearing the year designation for the tax year in which the transfer takes place.* If the transfer took place in 2003, even though the transfer document is recorded and the Return is filed in 2004, *the 2003 year form of Return must be used.* If the transfer takes place in 2004, the 2004 form of Return must be used, and so forth. Use of the incorrect form will result in the IT-2663 and the payment, if any, being rejected and the transfer documents not being accepted for recording. Please note that while the TP-584(10/03) was revised to reflect the new subsection references based on the latest revisions to § 663, recording officers are authorized to accept the earlier revised version of the TP-584 (*originally revised for § 663*). Accordingly, *the only acceptable forms of TP-584 are those that contain the § 663 certification.*

The full text § 663, as revised, follows:

§ 663. *Estimated tax on sale or transfer of real property by nonresident*

(a) *Upon the sale of real property within the state by a nonresident taxpayer, the nonresident shall estimate the personal income tax liability on the gain, if any, from such sale or transfer.*

(b) *Such estimation shall be done upon a form prescribed by the commissioner, utilizing an estimated tax rate equal to the highest rate of tax for the taxable year set forth in section six hundred one of this article.*

(c) *This section shall not apply where:*

(1) *The real property being sold or transferred is a principal residence of the seller or transferor within the meaning of section 121 of the Internal Revenue Code;*

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(2) *The seller or transferor is a mortgagor conveying the mortgaged property to a mortgagee in foreclosure or in a transfer in lieu of foreclosure with no additional consideration; or*

(3) *The transferor or transferee is an agency or authority of the United States of America, an agency or authority of the state of New York, the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, or the Government National Mortgage Association, or a private mortgage insurance company.*

(d) [fig 1] *A recording officer shall not record or accept for record any deed unless accompanied by a form prescribed by the commissioner pursuant to subsection (b) of this section and the payment of any estimated tax shown as payable on such form, or unless such form includes a certification by the transferor that this section is inapplicable to the sale or transfer.*

(e) (Added, L 2003) *Every recording officer shall act as an agent of the commissioner for purposes of collecting the estimated personal income tax, if any, shown to be payable upon the form prescribed pursuant to subsection (b) of this section. The commissioner, by regulation, shall prescribe one or more methods for the recording officer's collection of such estimated tax. Every recording officer shall remit to the commissioner any funds collected and any returns filed with such recording officer under this section on such days as the commissioner shall set by regulation consistent with the provisions of section fourteen hundred ten of this chapter for the remission of the tax imposed under article thirty-one of this chapter. Every recording officer also shall follow such procedures and keep such records in respect to the implementation of this section as the commissioner may prescribe.*

(f) (Added, L 2003) *A recording officer shall not be liable under this section for any inaccuracy in any statement on the form prescribed pursuant to subsection (b) of this section or in the amount of estimated personal income tax he or she shall collect under this section so long as he or she shall collect the estimated personal income tax shown as payable on such form.*

(g) (Added, L 2003) *If a deed is recorded notwithstanding an omission or inaccuracy in the form prescribed pursuant to subsection (b) of this section or in any certification by the transferor on such form or a deficiency in the payment of estimated personal income tax required by this section, the record of such deed shall not be invalidated by reason of such omission, inaccuracy, erroneous certification or deficiency nor shall the title founded on such deed be impaired thereby.*

(h) *The commissioner shall promulgate rules and regulations implementing this section.*

In order to assure that the proper documentation is obtained at closing, it is likely that the following exception or one very similar will appear in title reports or title commitments issued for transactions involving the sale of property –

[] Tax Law § 663(d), effective 9/1/2003 as revised, requires that a recording officer shall not record or accept for record any deed unless accompanied by a form IT-2663 together with the payment of the estimated tax due, if any, by check made payable to "NYS INCOME TAX" or if the transaction is not subject to the filing and payment requirements of § 663 because the seller is a resident individual, trust or estate, a TP-584 form which includes a completed certification by the transferor/seller that this section is inapplicable to the transfer.

Note: § 663 applies to sales by nonresident individuals, nonresident trusts and nonresident estates, other than a sale of a principal residence as that term is defined in 26 USC § 121, a deed in lieu of foreclosure for no additional consideration or a sale where the transferor or transferee is an agency or authority of the United States of America, an agency or authority of the state of New York, the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, or the Government National Mortgage Association, or a private mortgage insurance company.

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