



FIDELITY NATIONAL TITLE UPDATES

— LEGISLATIVE UPDATE —

JULY 2003

"Appreciate the Fidelity Difference"

SPECIAL EDITION

2003 LEGISLATIVE SESSION YIELDS NEW TAX OBLIGATION FOR NONRESIDENT SELLERS OF REAL PROPERTY

Buried deep within the State's recently enacted Budget Bill is a new section of the *NY Tax Law*, designated as § 663, effective **September 1, 2003**. This new section imposes filing and prepayment obligation on *nonresident individuals* selling real property located in New York, other than a principal residence as that term is defined in the *Internal Revenue Code*, (26 U.S.C. § 121). Section 663 requires those sellers to file a return and pay their estimated "personal income tax liability on the gain, if any, from such sale or transfer." The proposed regulations will impose the filing and payment of estimated tax on *individuals, estates and trusts* and also define a transfer as *the change of ownership of a fee simple by any method*.

The full text of the new section is as follows:

§ 663. [Eff Sept 1, 2003] *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) *The estimated form shall be filed with the commissioner as he or she shall prescribe along with payment of any estimated tax so calculated. The commissioner shall, in a timely manner, provide certification of receipt of the filing and of any such payment due to the taxpayer.*

(d) *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;*

(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.*

(e) *No deed shall be recorded by any recording officer absent such a certification by the commissioner or a certification by the transferor that this section is inapplicable to the sale or transfer.*

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

Because the section requires that the Commissioner of Taxation

and Finance issue the receipt "in a timely manner," it is obvious that the legislature anticipated that the filing and payment would occur prior to the closing and recording of the closing deed. Subparagraph (e) of the law provides that "No deed shall be recorded by any recording officer absent such a certification by the commissioner or a certification by the transferor that this section is inapplicable to the sale or transfer. If filing and payment is not completed prior to the actual closing, recording will likely be delayed and could possibly result in aborted closings if sellers refuse to file the return and make payment until the moment of, or after the closing. Attorneys representing buyers need to consider making the sellers' pre closing compliance with § 663 required under the contract of sale.

At this time, we do not know if the obligation imposed under §663 extends to transactions wherein the seller is a "passthrough" entity, such as a Partnership or a Sub-chapter "S" Corporation. Estates and trusts will be required to estimate the tax due on the entire gain without regard to any distributions of the gain to beneficiaries during the tax year of the sale. Provision is made to allocate the estimated tax paid on the trust's income tax return.

Once again, we are faced with the specter of delayed closings, but hopefully not of the magnitude experienced under the "Cuomo Tax" of years past. Unlike that tax, § 663 does not require the Commissioner to audit the return and payment; however, the failure to properly complete the return could possibly result in the Commissioner not issuing the "certificate of receipt" or at the least delay its issuance. In such event, the deed delivered at closing *cannot be recorded implicating not just transfer tax penalties but more troubling, significant title issues.*

Under § 663, certain transactions are exempt from the filing and prepayment obligation. Exempt transactions are –

- ▶ Sales of a principal residence (see definition under IRC §121);
- ▶ Conveyances to a mortgagee in lieu of foreclosure *for no additional consideration*;
- ▶ Conveyances where the transferor or transferee is the United States, State of New York, FNMA, GNMA or a private mortgage insurance company.

The Commissioner is in the process of drafting a revised form of TP-584, to accommodate the exemption certifications provided for in § 663(d), a form or return tentatively designated IT-2663 (*Application for Certification for Recording of Deed*

Fidelity National Title Bulletin

JULY 2003

"A ppreciate the **Fidelity** Difference"

SPECIAL EDITION

and Nonresident Estimated Income Tax Payment Voucher), as well as instructions for each.

While § 663 becomes effective *September 1, 2003*, there is some good news. An amendment has already been drafted and was introduced, incorporated into a "*Budget Cleanup Bill*" that was pending when the legislature adjourned last June, which hopefully, will receive favorable consideration when the Legislature reconvenes for its special session in September. Under the amendment, the filing of the return and payment could be incorporated as a rider to the TP-584 and the payment of estimated tax made directly to the recording officer at the time of recording. This approach makes sense since filing and payment is a condition precedent to recording. The TP-584 is already being amended to serve as the basis for claiming exemption and neither the state nor the local recorder has any audit responsibility. We believe that this proposal is a good compromise that will serve all interests better than the present law will.

Other legislative actions this year which passed both houses, some of which are still subject to being signed by the Governor, or where Chapter designations are pending, include –

- ▶ **A1337-A** – Amends Subdivision 6-a of section 3 of section 1 of Chapter 392 laws of 1973 to permit the placement of federally aided mortgages on *not-for-profit health care facilities having a priority other than as a first mortgage*.
- ▶ **A7971** – Amends RPAPL § 778 to provide that regulatory agreements entered upon the sale of properties subject to a 7A administration, outstanding City liens shall be reduced to zero provided that the duration of the regulatory agreement and the conditions contained therein providing for adequate, safe and sanitary housing accommodations for low income persons continue for a period of *not less than thirty years*.
- ▶ **S2922** – Amends Lien Law § 21(2)(a) to extend from six months to *one year the duration of a mechanic's lien on a public improvement*.
- ▶ **S3574** – Enacts a new Tax Law § 253-f authorizing Rockland County to adopt a local law to impose a *mortgage tax of twenty-five cents for each \$100 dollars of principal debt or obligation secured by a mortgage on real property*.

Significant Bills pending at the time of the summer adjournment affecting real property which were not acted upon include the following two highly controversial measures –

- ▶ **A6031-A** – A proposal to amend CPLR Article 65 in relation to Notices of Pendency to allow the *filing of successive Notices of Pendency in any action involving a related or same action even though a previous Notice expired after three years, lapsed for failure to make timely service of a summons, or was cancelled by order*. While the law also includes several beneficial revisions to Article 65, allowing of the filing of unlimited "*successive*" Notices of Pendency, would seriously destabilize titles and operate as a trap for innocent purchasers and lenders who,

at the time of closing, were unaware of any pending litigation affecting the property. As a result, an innocent party once they are served in the action, must bear the burden of appearing and defending, notwithstanding the absence of a valid Notice of Pendency at the time the purchaser or lender acquired its title interest in the property. It is hoped that a revision to this Bill will save those salutary provisions and modify the successive filing provision to codify the rule applied in *Robbins v. Goldstein*, 36 A.D.2d 730 which permits a foreclosing mortgagee to file successive Notices of Pendency to comply with the statutory mandate of RPAPL § 1331.

- ▶ **S2517** – Would have amended § 2 of the Lien Law to allow for the filing of a mechanic's lien by a real estate broker, not only for the procuring of a lease for more than three years, but also for services in connection with any "*lease or contract of sale or exchange*." The Bill would also amend § 10 to permit the filing of the Notice of Mechanic's Lien after the "*performance of the brokerage services and execution of [a] lease by both lessor and lessee or execution of a contract of sale or exchange by both the seller and buyer*." Revised § 10 would require that a copy of the written agreement of employment be annexed to the lien. Whether to grant real estate brokers the right to file mechanic's liens having equal priority and trust fund claim with suppliers, tradesmen and others who make permanent improvements to real property should be an important factor when considering approval of this Bill.

FIDELITY NATIONAL TITLE INSURANCE COMPANY OF NEW YORK

Administrative, NY City Metro Branch &
National & Commercial Transactions

TWO PARK AVENUE • NY, NY 10016

212.481.5858 • 800.287.3552 / FAX 212.481.8747

Queens & Nassau Counties

1415 KELLUM PLACE • GARDEN CITY • NY 11530

516.741.5050 / Fax 516.741.5363

Suffolk County

24 COMMERCE DRIVE • RIVERHEAD, NY 11901

631.727.0600 FAX 631.727.0606

Westchester & Area Counties

ONE BARKER AVENUE • WHITE PLAINS, NY 10601

914.946.1600 / FAX 914.946.1805

Albany County & Upstate Region

20 CORPORATE WOODS BLVD. • ALBANY, NY 12211

518.434.1104 / FAX 518.434.8848

Fidelity National Title Updates
is a publication of
Fidelity National Title Insurance
Company of New York