

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

TSB-A-94 (7) R
Real Property
Transfer Gains Tax
Real Estate Transfer Tax
May 26, 1994

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M940422D

On April 22, 1994, a Petition for Advisory Opinion was received from Estate of Beatrice Seaver, c/o Tenzer, Greenblatt, Fallon & Kaplan, 405 Lexington Avenue, New York, New York 10174.

The issue raised by Petitioner, Estate of Beatrice Seaver, is whether the conveyance of five separate tenancy-in-common interests by the executors of Petitioner directly to the Beatrice and Samuel A. Seaver Foundation's title holding companies will be subject to the imposition of the Real Property Transfer Gains Tax (hereinafter the "gains tax") and the Real Estate Transfer Tax (hereinafter the "transfer tax").

The Beatrice and Samuel A. Seaver Foundation (the "Foundation") was established pursuant to a trust agreement, dated December 13, 1984, between Beatrice Seaver, as Settlor, and Beatrice Seaver, Hirschell B. Levine and Lawrence Newman, as Trustees. The Foundation was established for charitable, religious, scientific, literary and educational purposes, and the Trustees directed to hold and use the trust property and proceeds (as well as the trust's net income) exclusively for such purposes. The Foundation was afforded exemption for Federal income tax purposes under Section 501(c)(3) of the Internal Revenue Code.

On September 23, 1992, Beatrice Seaver died. At the time of her death, Ms. Seaver owned tenancy-in-common interests in the following New York real properties:

11-13 East 26th Street, New York, New York
42-52 West 39th Street, New York, New York
110 West 40th Street, New York, New York
10 West 33rd Street, New York, New York
370 Seventh Avenue, New York, New York

Under Article Thirteenth of Ms. Seaver's Last Will and Testament, the residuary assets are bequeathed to the Foundation.

On July 14, 1993, the Foundation formed five New York corporations, each for the exclusive purpose of holding one of the five tenancy-in-common interests, collecting the income therefrom, and turning over the entire amount thereof, less expenses, to the Foundation. All five corporations have received exemption from Federal income tax under Section 501(c)(2) of the Internal Revenue Code. The names of the five corporations are:

11-13 E. 26th St. Holding Corp.
42-52 W. 39th St. Holding Corp.
110 W. 40 St. J/V Holding Corp.
10 W. 33 St. Holding Corp.
370 J/V Holding Corp.

To avoid having to make two separate transfers, first from the Seaver Estate to the Foundation, and then from the Foundation to each of the five separate title holding companies, the executors propose to transfer the tenancy-in-common interests directly to the Foundation's title holding companies.

In accordance with Section 1402 of the Tax Law, the transfer tax is imposed on each conveyance of real property or interest therein at the time that the instrument effecting the conveyance is delivered by a grantor to a grantee when the consideration for the conveyance exceeds five hundred dollars.

Section 1401(e) of the Tax Law provides, in part, as follows:

(e) "Conveyance" means the transfer or transfers of any interest in real property by any method, including but not limited to sale ... Notwithstanding the foregoing, conveyance of real property shall not include a conveyance pursuant to devise, bequest or inheritance ... (emphasis added)

Pursuant to Sections 1441 and 1443.1 of the Tax Law and Section 590.1 of the Gains Tax Regulations the gains tax is a ten percent tax on the gain derived from the transfer of real property, which includes the acquisition or transfer of a controlling interest in any entity with an interest in real property, where the property is located in New York State and where the consideration for the transfer is one million dollars or more.

Section 1440.7 of the Tax Law provides, in part, as follows:

7. "Transfer of real property" means the transfer or transfers of any interest in real property by any method, including but not limited to sale ... Notwithstanding the foregoing, transfer of real property shall not include a transfer pursuant to devise, bequest or inheritance... (emphasis added)

In the instant case the Foundation was established for charitable, religious, scientific, literary and educational purposes and to hold and use bequeathed property and proceeds (as well as the trust's net income) exclusively for such purposes. The Foundation, in turn, formed five separate corporations for the purpose of holding one of each of the five tenancy-in-common interests, collecting the income therefrom and turning over the entire amount thereof to the Foundation. Thus, the five separate corporations are merely alter egos of the Foundation to facilitate the

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Foundation in carrying out Beatrice Seaver's Last Will and Testament.

Accordingly, since the five tenancy-in-common interests are bequeathed, pursuant to Article Thirteenth of the Last Will and Testament, to the Foundation and the five separate corporations are merely holding such interests as alter egos for the facilitation of the Foundation's purposes, the grant of the tenancy-in-common interests directly to the five separate corporations is deemed to be a conveyance pursuant to devise, bequest or inheritance and therefore does not constitute a conveyance subject to transfer tax pursuant to Section 1401(e) of the Tax Law. Similarly, pursuant to Section 1440.7 of the Tax Law such bequests are not transfers of real property and are, therefore, not subject to the gains tax.

DATED: May 26, 1994

/s/
PAUL B. COBURN
Deputy Director
Taxpayer Services Division

NOTE: The opinions expressed in Advisory Opinions
are limited to the facts set forth therein.