

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

TSB-A-97(1)R
Transfer Tax

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO.M961210A

On December 10, 1996, the Department of Taxation and Finance received a Petition for Advisory Opinion from 40 West 53rd Associates, 885 Third Avenue, Suite 2700, New York, New York 10022. Petitioner submitted additional information pertaining to the Petition on December 20, 1996 and December 30, 1996.

The issue raised by Petitioner, 40 West 53rd Associates, is to what extent the Real Estate Transfer Tax imposed by Article 31 of the Tax Law (the "transfer tax") would be imposed upon a series of transactions as described herein.

Petitioner submits the following facts as the basis for this Advisory Opinion. The subject property, 40 West 53rd Street, New York, New York, is currently owned by 40 West 53rd Partnership (the "Partnership"). The Partnership consists of two partners - 40 West 53rd Associates ("Associates") and a corporation (the "Corporation"). Associates owns 26% and the Corporation owns 74% of Partnership, respectively. Associates has two partners - Block 1268 New York Limited ("Block 1268") and Hines New York 1985 Associates ("Hines New York") which are also partnerships. Entities to be organized by a bank ("the Bank") will acquire interests in Block 1268 and Hines New York. The acquisition of the interests in Block 1268 and Hines New York by these entities (collectively "the Purchasers") will be coupled with the sale of the partnership interests of Corporation in the Partnership to Associates. The steps which will be followed to effectuate the transaction are as follows.

1) The Purchasers will acquire 74% of the interests in Block 1268 and in Hines New York.

2) Associates will acquire Corporation's 74% partnership interest in the Partnership.

3) Upon the acquisition by Associates of Corporation's 74% partnership interest as described above, the existence of the Partnership will terminate and the Partnership's assets will be distributed to Associates.

4) The Purchasers will redeem their partnership interests in Block 1268 and Hines New York for a direct 74% interest in Associates which owns the underlying real property.

5) Block 1268 and Hines New York will form a new partnership, 31 West 52nd Associates (31 West). Upon formation, Block 1268 and Hines New York will contribute their interests in Associates in exchange for interests in 31 West and each will receive the same percentage interest as their respective percentage ownership interest in Associates. 31 West will own 26% of Associates that had been held cumulatively by Block 1268 and Hines New York, and the Purchasers will continue to directly own 74% of Associates.

The above transactions may take place within the same day and perhaps within minutes of each other.

Analysis

Section 1402 of the Tax Law imposes the transfer tax on each conveyance of real property when the consideration exceeds \$500 at the rate of \$2 for each \$500 of the consideration or fractional part thereof.

Section 1401(e) of the Tax Law includes in the definition of conveyance a transfer or acquisition of a controlling interest in any entity with an interest in real property.

Section 1401(b) of the Tax Law in defining "controlling interest" includes "in the case of a partnership, association, trust or other entity, fifty percent or more of the capital, profits or beneficial interest in such partnership, association, trust or other entity."

Section 1401(d)(iii) of the Tax Law provides that in the case of a transfer or acquisition of a controlling interest consideration means the fair market value of the interest in real property owned by the entity apportioned based on the percentage of the ownership interest in the entity transferred or acquired.

Section 1405(b)(6) of the Tax Law sets forth that conveyances are exempt from the transfer tax to the extent that they "effectuate a mere change of identity or form of ownership or organization where there is no change in beneficial ownership..."

Section 575.6(d) of the Real Estate Transfer Tax Regulations provides as follows:

Where there is a transfer or acquisition of an interest in an entity that has an interest in real property, on or after July 1, 1989, and subsequently there is a transfer or acquisition of an additional interest or interests in the same entity, the transfers or acquisitions will be added together to determine if a transfer or acquisition of a controlling interest has occurred. Where there is a transfer or acquisition of a controlling interest in an entity on or after July 1, 1989, and the real estate transfer tax is paid on that transfer or acquisition and there is a subsequent transfer or acquisition of an additional interest in the same entity, it is considered that a second transfer or acquisition of a controlling interest has occurred which is subject to the real estate transfer tax. No transfer or acquisition of an interest in an entity that has an interest in real property will be added to another transfer or acquisition of an interest in the same entity if they occur more than three years apart, unless the transfers or acquisitions were so timed as part of a plan to avoid the real estate transfer tax...

Conclusion

Steps 1 and 2

When taxpayers demonstrate that the economic reality of a series of integrated transactions is to accomplish a specific transfer or acquisition, the transactions may be viewed as one transaction for purposes of the transfer tax. The facts presented by Petitioner indicate that Purchaser's acquisition of a 74% interest in Block 1268 and Hines New York and Associates' acquisition of Corporation's 74% interest in Partnership are integrated steps done for the purpose of effectuating Purchaser's acquisition of 74% of Partnership, an entity with an interest in real property. Therefore, the acquisition is a conveyance subject to transfer tax. The consideration for the conveyance is 74% of the fair market value of the interest in real property owned by Partnership. Pursuant to section 575.6(d) supra any subsequent acquisitions or transfers of Partnership that occur within three years of Purchaser's 74% acquisition may also be subject to transfer tax.

Steps 3, 4 & 5

The distribution of the assets of Partnership as a result of its termination and the redemption by Purchasers of their partnership interests in Block 1268 and Hines New York would result in conveyances which are exempt from transfer tax as they are conveyances which would result in a mere change of identity or form of ownership with no change in beneficial interest pursuant to section 1405(b)(6) of the Tax Law. Likewise, the formation of 31 West by Block 1268 and Hines New York through their contribution of their interests in Associates in exchange for interests in 31 West is exempt from the transfer tax pursuant to section 1405(b)(6).

DATED: January 8, 1997

/s/
John W. Bartlett
Deputy Director
Technical Services Bureau

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