

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

TSB-A-87 (1) R
Real Property Transfer
Gains Tax
December 4, 1986

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. M861117A

On November 14, 1986, a Petition for Advisory Opinion was received from Interstate Properties located at 925 Clifton Avenue, Clifton, New Jersey, 07013.

The issue raised is whether the transfer of Petitioner's interest in a joint venture constitutes an acquisition of a controlling interest in an entity with an interest in real property and therefore is a transfer of an interest in real property which would be subject to the Tax on Gains Derived from Certain Real Property Transfers (hereinafter "the Gains Tax") imposed under Article 31-B of the Tax Law.

The pertinent facts as presented by Petitioner are as follows. Petitioner, a general partnership, acquired its interest in a joint venture pursuant to an agreement (hereinafter the "JV Agreement") dated December 12, 1978, between Petitioner and Pyramid Company of Utica, N.Y. (hereinafter "Pyramid"), a general partnership. No transfer of any interest in the joint venture has occurred subsequent to the effective date of the Gains Tax.

Petitioner is, pursuant to a contract of sale, selling what all parties to the contract agree is less than 50% of the profits, capital, or beneficial interest in the joint venture.

The JV Agreement contains complex provisions governing the contribution, financing, construction, development, operation and disposition of real property interests in three shopping centers: (1) New Mall, which Pyramid was attempting to develop at the time the JV Agreement was executed; (2) Riverside, in which Petitioner has an existing interest and which the JV Agreement envisioned as Petitioner's contribution to the joint venture; and (3) New Hartford, of which Petitioner and Pyramid were to undertake the acquisition and development under the JV Agreement.

The contribution of Riverside to the joint venture was never effected, however, and the joint venture did not acquire New Hartford. Consequently, Petitioner's interest in the joint venture is determined by those JV Agreement provisions governing the parties' rights in the absence of Petitioner's contribution of Riverside to the joint venture.

Under the JV Agreement, Pyramid receives preferred allocations from New Mall, followed by an equal sharing between the joint venturers. These preferred allocations to Pyramid result in Pyramid's having a greater interest in the joint venture than Petitioner does.

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In addition, Pyramid had, at the outset, impaired Petitioner's capital interest in New Mall by obtaining financing secured by New Mall in an amount greater than permitted by the JV Agreement. The allocation of proceeds from sale or foreclosure of New Mall would be first used to satisfy such mortgage indebtedness. Therefore, Petitioner's interest in the capital of the joint venture has been further diluted even below that contemplated by the JV Agreement.

The contract to sell Petitioner's joint venture interest, entitled "Agreement of Sale - Interstate's Interest in Senpike Mall Company Joint Venture," (hereinafter "current sales contract"), states that Pyramid owns more than fifty percent of the profits and capital of the joint venture and that the seller (Petitioner) owns less than 50% of the profits and capital of the joint venture.

Section 1440.7 of the Tax Law states in pertinent part as follows:

"Transfer of real property" means the transfer or transfers of any interest in real property by any method, including but not limited to sale, exchange, assignment... or acquisition of a controlling interest in any entity with an interest in real property....

Also, Section 1440.2 of the Tax Law defines controlling interest as follows:

"Controlling interest" means (i) in the case of a corporation, either fifty percent or more of the total combined voting power of all classes of stock of such corporation, or fifty percent or more of the capital, profits or beneficial interest in such voting stock of such corporation, and (ii) 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.

Based on the facts presented, since Petitioner did not contribute Riverside to the joint venture and since the joint venture did not acquire New Hartford, Petitioner's participation in the capital, profits, or beneficial interest of the joint venture is limited to New Mall and is less than fifty percent.

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Accordingly, since Petitioner's ownership interest in the joint venture represents less than a controlling interest as defined at Section 1440.2 of the Tax Law, the acquisition of such interest would not constitute a transfer of an interest in real property for gains tax purposes as set forth at Section 1440.7 of the Tax Law. Thus, such transfer would not be subject to the Gains Tax.

It should be noted that Advisory Opinions are written statements setting forth the applicability of statutory and regulatory provisions to a specified set of facts. 20 NYCRR 901.1. The finding of facts is outside the scope of Advisory Opinions. Accordingly the facts of this Advisory Opinion as stated by Petitioner remain subject to verification upon audit.

DATED: December 4, 1986

s/FRANK J. PUCCIA
Director
Technical Services Bureau

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