

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

TSB-A-91 (6) R
 Real Property
 Transfer Gains Tax
 July 16, 1991

STATE OF NEW YORK
 COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M910507A

On May 7, 1991, a Petition for Advisory Opinion was received from Nemith Motor Corporation, 962 Loudon Road, Latham, NY 12110.

The issue raised by Petitioner, Nemith Motor Corporation, is whether an exchange of real property between Petitioner and two related partnerships qualifies for exemption from the Real Property Transfer Gains Tax (hereinafter the "gains tax") as a mere change of identity or form of ownership or organization where there is no change in beneficial interest under Section 1443.5 of the Tax Law.

Petitioner, a New York corporation, owns a tract of undeveloped real estate on Route 7, Latham, New York. Two related partnerships each own another tract of land in Latham, New York. Petitioner proposes to exchange part of its interest in its land on Route 7 to each partnership in exchange for interest in land in Latham which is owned by partnerships. Any difference in value of the properties would be made up in cash. The market value of Petitioner's land is in excess of \$1,000,000.

The respective ownership interests of the parties involved are as follows:

Owners	Nemith Motor Corp. (Petitioner)	Nemith, Nemith & Walfred	Walfred Associates
Catherine Nemith	45%	33 1/3%	43.3428%
Mark Nemith	50%	33 1/3%	56.6572%
Walter Riddell	5%	0	0
Walfred Associates	_____	<u>33 1/3%</u>	<u>N/A</u>
Totals	<u>100%</u>	<u>100%</u>	<u>100%</u>

Pursuant to Sections 1441 and 1443.1 of the Tax Law and Section 590.1 of the Gains Tax Regulations a ten percent tax is imposed on the gain derived from the transfer of real property where the property is located in New York State and where the consideration for the transfer is \$1,000,000 or more.

Section 1440.7 of the Tax Law defines the term "transfer of real property", in part, to mean the transfer or transfers of any interest in real property by any method, including but not limited to sale, exchange (emphasis added)

Section 590.60 of the Gains Tax Regulations states as follows:

- Q. Is a tax-free exchange of property under section 1031 of the Internal Revenue Code subject to the gains tax?
- A. Yes. In such an exchange of property, each party is the transferor of the property he is giving up, as well as the transferee of the property received in the exchange. The consideration received is equal to the fair market value on the date of exchange of the property received in exchange, plus any amount of cash and the value of any other property received in the exchange. The gain is the difference between the consideration received and the original purchase price of the property exchanged." (emphasis added)

Although the above regulation specifically deals with Section 1031 tax-free exchanges, the principle established by said regulation would apply to all types of exchanges.

Section 1443 of the Tax Law provides, in part, as follows:

Exemptions. -- A total or partial exemption shall be allowed in the following cases:

- * * *
5. If a transfer of real property, however effected, consists of a mere change of identity or form of ownership or organization, where there is no change in beneficial interest.

Moreover, in the distribution of shares of stock of subsidiaries in the liquidation of a corporation, the acquiring shareholder group would receive a partial mere change of identity exemption to the extent of the 50% interest it held in corporation prior to the distribution. Long Shadow, Inc., Adv Op Comm T&F, May 11, 1990, TSB-A-90(4)R.

Accordingly, pursuant to Section 1440.7 of the Tax Law and Sections 590.1 and 590.60 of the Gains Tax Regulations the exchange of property from Petitioner to the two related partnerships is a transfer of real property and subject to gains tax since the consideration for the transfer is in excess of \$1,000,000. However, pursuant to Section 1443.5 of the Tax Law and TSB-A-90(4)R, Petitioner is entitled to a partial mere change of identity exemption to the extent there is no change in the beneficial ownership interest the owners of Petitioner held in the property prior to the transfer and the interest such owners will hold in the property in the partnerships following the transfer. In addition, the transfer of real property from the two related partnerships to Petitioner will be subject to the gains tax if the consideration for the transfer is in excess of \$1,000,000. A partial mere change of identity exemption will apply to the transfer to the extent there is no change in the beneficial

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ownership interest the owners of the partnerships held in the property they transferred and the interest such owners will have in such property in Petitioner following the transfer.

DATED: July 16, 1991

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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