

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

TSB-A-94 (12) R
Real Property Transfer
Gains Tax
October 18, 1994

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M940817A

On August 17, 1994, a Petition for Advisory Opinion was received from Irving H. Levy, Freed Maxick et al, 800 Liberty Building, Buffalo, New York 14202.

The issues raised by Petitioner, Irving H. Levy, are:

1. Whether the transfer of 5% interest in real property to an unrelated third party is subject to the Real Property Transfer Gains Tax (hereinafter the "gains tax").
2. Whether the transfer of an undivided interest in a building to a limited partnership constitutes a mere change in the form of ownership and is, therefore, exempt from the gains tax.
3. Whether the transfer of 44% of the limited partnership interest to an unrelated individual for a consideration in excess of \$1 million dollars will be subject to the gains tax.

A real estate developer (the "taxpayer") owns two commercial buildings constructed on a single parcel of land. The first building was constructed during 1978. The second building was constructed during the period 1989-1993. The buildings are separate and distinct buildings constructed on the single parcel of land which is easily divisible. One building has a fair market value of approximately \$800,000. The other building has a fair market value of approximately \$3.2 million. The taxpayer owns both buildings in his capacity as an individual.

It is the taxpayer's intention to sell a 5% undivided interest in each building to an unrelated third party individual for less than one million dollars in the aggregate. The taxpayer and this individual will then contribute their interests in both buildings to a newly formed limited partnership. The taxpayer will own 95% of the partnership in the form of a 51% general partnership interest and a 44% limited partnership interest. The other individual will own a 5% limited partnership interest. Subsequent to the formation of the limited partnership, the taxpayer owning the 44% limited partnership interest will sell to other unrelated individuals some or all of this 44% limited partnership interest.

If the taxpayer is successful in selling the 44% limited partnership interest, he will realize approximately \$2 million in proceeds (Approximately \$800,000 in cash and \$1.2 million in assumption of partnership liabilities.)

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 1440.2 of the Tax Law provides as follows:

2. "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.

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 by any method. This would include a transfer or acquisition of a controlling interest in any entity with an interest in real property.

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

Sec. 1443. 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.

Section 590.44(a) of the Gains Tax Regulations provides as follows:

(a) Question: How is the phrase "acquisition of a controlling interest in an entity with an interest in real property" applied?

Answer: The term controlling interest is defined in section 1440(2) of the Tax Law to mean:

"(i) in the case of a corporation, either fifty percent or more of 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."

TSB-A-94 (12) R
Real Property Transfer
Gains Tax
October 18, 1994

With respect to issue "1", taxpayer is transferring a 5% undivided interest in each building to an unrelated third party for a consideration in the aggregate of less than one million dollars. Pursuant to Section 1443.1 of the Tax Law and Section 590.1 of the Gains Tax Regulations, the gains tax does not apply to the transfer of real property where the consideration for the transfer is less than one million dollars. Therefore, since the consideration received by taxpayer for the transfer of the 5% undivided interest is less than one million dollars, the transfer of such interest is not subject to the gains tax.

Regarding issue "2", Section 1443.5 of the Tax Law exempts from the gains tax the transfer of real property where transfer, however effected, consists of a mere change of identity or form of ownership or organization and does not result in a change in the beneficial interest in the real property. In the instant case, taxpayer holds a 95% undivided interest in two buildings and an unrelated third party holds the remaining 5% undivided interest. Following the contribution of the buildings to a limited partnership, taxpayer will have a 95% interest in the partnership (a 51% general partnership interest and a 44% limited partnership interest) and the unrelated third party will hold a 5% limited partnership interest in the partnership. Therefore, as a result of the transfer of the interests in the buildings to the partnership, the taxpayer and the unrelated third party will continue to own the same beneficial ownership interest in the buildings through their ownership interests in the partnership. Accordingly, pursuant to Section 1443.5 of the Tax Law such transfer will constitute a mere change of identity or form of ownership or organization since there is no change in beneficial interest and will not be subject to the gains tax.

Concerning issue "3", pursuant to Section 1440.7 of the Tax Law and Section 590.44(a) of the Gains Tax Regulations the term transfer of real property includes the acquisition or transfer of a controlling interest in any entity with an interest in real property. Pursuant to Section 1440.2 of the Tax Law the term controlling interest is defined in the case of a partnership to mean the acquisition or transfer of fifty percent or more of the capital, profits or beneficial interest in such partnership. Accordingly, since the taxpayer is transferring less than fifty percent of his interest in the partnership and the other unrelated individual or individuals will acquire less than fifty percent of the interest in the partnership, such transfer does not constitute the transfer or acquisition of a controlling interest. Therefore, the transfer by the taxpayer and the acquisition by the other individual(s) will not be subject to the gains tax.

DATED: October 18, 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.