

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

TSB-A-96 (8) R
Real Property
Transfer Gains Tax
June 27, 1996

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M960328A

On March 28, 1996, the Department of Taxation and Finance received a Petition for Advisory Opinion from L.N. Shachnow and D. Shachnow, 616 East Palisades Avenue, Englewood Cliffs, New Jersey. Petitioner, L.N. Shachnow and D. Shachnow submitted additional information pertaining to the Petition on April 19, 1996 and April 25, 1996.

The issues raised by Petitioner, L.N. Shachnow and D. Shachnow, are how the aggregation rules, the exemption for transfers which consist of mere change of identity or form of ownership and the determination of whether the consideration is less than \$1 million for purposes of the Real Property Transfer Gains Tax imposed by Article 31-B of the Tax Law would apply based on the following facts.

Petitioner is a New York general partnership (the "existing partnership") which has three equal partners, A, B, and C (the original partners). A and B are brothers, and C is the widow of the third brother who received her interest from his estate. Among the assets owned by the partnership are five parcels of real estate located in New York City.

The Petitioner proposes to transfer the ownership interest of two parcels (parcels #1 and #2) to a new partnership or a limited liability company which will be owned by A and A's wife. A will own 90% of the new entity and A's wife will own 10%. The ownership interest of the three other parcels (parcels #3, #4 and #5) will be transferred to another new partnership or a limited liability company which will be owned by B and C. B and C will each own 50% of the new entity.

The five parcels are neither contiguous nor adjacent to each other. The fair market value, the amount of the mortgage lien and original purchase price of each parcel is as follows.

<u>Parcel #</u>	<u>Fair market value</u>	<u>Mortgage lien</u>	<u>Original purchase price</u>
#1	\$1,305,000.00	\$ 729,000.00	\$850,000.00
#2	1,185,000.00	929,000.00	760,000.00
#3	975,000.00	652,000.00	698,000.00
#4	1,080,000.00	-0-	675,000.00
#5	1,270,500.00	823,500.00	1,012,000.00

In connection with the proposed transfers, B and C will pay A and A's wife \$157,000 in addition to transferring their beneficial interest in parcels #1 and #2 to the new partnership or limited liability company to be formed by A and A's wife. This amount represents the differential in the value of the properties transferred based upon the existing partners' estimate based on location, building conditions, etc., independent of the fair market values mentioned above which were based upon earlier outside appraisals.

Applicable Law and Regulations

Section 1441 of the Tax Law imposes the gains tax on gains derived from the transfer of real property within the state at the rate of ten percent of the gain.

Section 1440.7(b) of the Tax Law provides as follows:

"Transfer of real property" shall include: (i) partial or successive transfers of interests in contiguous or adjacent real property by a transferor or related transferors to one or more transferees, if such transfers occur within a three-year period, without regard to the use of such real property or whether such transfers were pursuant to a plan or agreement;.

Section 1443.1 of the Tax Law sets forth that a transfer for consideration of less than one million dollars is exempt from the gains tax (the \$1 million exemption).

Section 1443.5 of the Tax Law provides an exemption from the gains tax to the extent that 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 (the mere change exemption).

Section 590.51(c) of the gains tax regulations (Part 590 of 20 NYCRR) in describing the interrelationship between the application of the \$1 million and mere change exemptions sets forth as follows:

The million-dollar exemption is applied to consideration first and then the mere change exemption is applied. A transfer in which the consideration is greater than \$1 million will remain taxable, the mere change exemption only defers payment of tax on the portion of gain determined to be attributed to a mere change in form of ownership.

In Matter of 307 McKibbon Street Realty Corp., Dec Tax App Trib, October 14, 1988, TSB-D-89(9)-R, the Tax Appeals Tribunal, in describing the "look through" principle of the gains tax and the ownership of entities with an interest in real property, stated that the imposition of the tax "...expresses the theory of the tax to look down through entities and to equate ownership of real property through an entity, beneficial ownership, with direct ownership of real property. ... "

Analysis and Conclusion

Immediately prior to the transfers by Petitioner, each of the original partners is considered to have a 33 1/3 percent beneficial ownership in each of the five parcels through their ownership interest in the Petitioner in accordance with 307 McKibbon Street Realty Corp., supra. Therefore, the transfers by the Petitioner are deemed to be transfers by the original partners to the extent of the

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beneficial ownership in each of the five parcels that is given up in exchange for consideration in the form of the ownership interest in the respective parcels that each partner receives.

Since each of the parcels is neither contiguous nor adjacent to any other of the parcels, each transfer would be considered a separate transfer of real property based on the provisions of Section 1440.7(b) of the Tax Law. The consideration for each transfer by the Petitioner is deemed to be the full fair market value of each parcel. The fair market value of parcels #3, #4 and #5 must be determined with reference to the \$157,000 that is paid to A and A's wife. This is so because this amount is being paid based on the original partners' agreement that the earlier outside appraisals did not reflect the true fair market value of some or all of parcels #3, #4 and #5.

Regarding the mere change identity exemption, the transfers by Petitioner of parcels #1 and #2 to A and A's wife would be exempt to the extent of 33 1/3 percent of the gain, representing A's beneficial ownership interest in the parcels immediately prior to the transfers. Similarly, the transfer by Petitioner of parcels #3, #4 and #5 would be exempt to extent of 66 2/3 percent of the gain representing B's and C's aggregate beneficial ownership interest in the parcels immediately prior to the transfers.

DATED: June 27, 1996

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

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