

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

TSB-A-94 (2)R
Real Property
Transfer Gains Tax
Real Estate Transfer Tax
March 29, 1994

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M940224A

On February 24, 1994, a Petition for Advisory Opinion was received from Jack F. Fritts as Trustee of the Cumberland Trust, c/o Cadwalader, Wickersham & Taft, 100 Maiden Lane, New York, New York 10038.

The issue raised by Petitioner, Jack F. Fritts as Trustee of the Cumberland Trust, is whether the proposed transfer of real property to H. Christopher Whittle resulting from the proposed revocation of the Trust Agreement and termination of the Nominee Agreement will be subject to Real Property Transfer Gains Tax (hereinafter the "gains tax") and Real Property Transfer Tax (hereinafter the "transfer tax").

H. Christopher Whittle entered into a trust agreement dated as of July 27, 1992, by and between H. Christopher Whittle, as Settlor and John F. Fritts, as Trustee (the "Trust Agreement") forming the Cumberland Trust (the "Trust"), and a nominee agreement, dated as of August 12, 1992, by and between H. Christopher Whittle, as Principal and the Trust, as Nominee (the "Nominee Agreement") (collectively, the Trust Agreement and the Nominee Agreement the "Agreements").

Under the Trust Agreement, Mr. Whittle may direct the Trustee to acquire or sell property held by the Trust and to apply Trust property or proceeds as Mr. Whittle directs. Mr. Whittle is obligated to contribute to the Trust the funds necessary to cover all costs of retaining the Trust property. The Trust terminates (i) if all Trust property is disposed of and (ii) upon Mr. Whittle's death. In addition, the Trust may be revoked at any time by Mr. Whittle. The Trust is a grantor trust for Federal income tax purposes.

On August 25, 1992, the Trust, as Nominee for Mr. Whittle in accordance with the Nominee Agreement, purchased 4 East 79th Street, a single-family residence, and 2A 79th Street, an adjacent empty lot (Block 1393, Lots 67 and 68) together the "Property") for \$11,500,000 from N. V. Portofino Properties Corporation.

Under the Nominee Agreement, bare legal title to the Property is in the name of the Nominee, and equitable ownership is in the Principal. The Nominee Agreement further provides that all benefits and detriments of ownership inure to and are borne by Mr. Whittle. The Nominee Agreement continues until terminated by either party, or upon conveyance of the Property to the Principal.

The Agreements were conceived to protect Mr. Whittle's privacy as beneficial owner and resident of the Property. As Mr. Whittle's privacy is no longer an issue, the Agreements serve no useful purpose. Therefore, it is proposed to revoke the Trust Agreement, terminate the Nominee Agreement and transfer legal title to the Property to Mr. Whittle's name.

In accordance with Section 1402 of the Tax Law, a transfer tax is imposed on each conveyance of real property or interest therein at the time that the instrument effecting the conveyance is delivered by a grantor to a grantee when the consideration for the conveyance exceeds five hundred dollars.

Section 1401(e) of the Tax Law provides, in pertinent part, that the term "conveyance" means the transfer or transfers or any interest in real property by any method. This would include a conveyance of real property upon liquidation or termination of a trust.

Section 1405 of the Tax Law provides, in part, as follows:

Sec. 1405. Exemptions. - - (a) The following shall be exempt from payment of the real estate transfer tax:

* * *

6. Conveyances to effectuate a mere change of identity or form of ownership or organization where there is no change in beneficial ownership, other than conveyances to a cooperative housing corporation of the real property comprising the cooperative dwelling or dwellings;

Moreover, the gains tax is a 10% tax on the transfer of an interest in real property where the property is located in New York State and where the consideration received for the transfer is \$1 million dollars 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 by any method. This would include a transfer of real property upon liquidation or termination of the trust.

Section 1443 of the Tax Law provides, in 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.

In Hilles Timpson, Adv Op Comm T&F, November 3, 1992, TSB-A-92(7)R the Commissioner opined that the transfer of real property to a revocable grantor trust was not subject to gains tax or transfer tax since the transfer of the property did not result in a change in beneficial ownership of the property but rather constituted a mere change in form of identity or form of ownership. (emphasis added)

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In the instant case H. Christopher Whittle will revoke the Trust Agreement, terminate the Nominee Agreement and have legal title transferred to himself. Accordingly, since H. Christopher Whittle had beneficial ownership of the Property under the Trust Agreement and the Nominee Agreement, pursuant to Section 1443.5 of the Tax Law and the rationale set forth in Hilles Timpson, supra, the transfer of the Property to H. Christopher Whittle as a result of the revocation of the Trust Agreement and the termination of the Nominee Agreement will be exempt from gains tax since there is no change in the beneficial ownership of the Property, but only a mere change of identity or form of ownership. Moreover, pursuant to 1405(b)(6) of the Tax Law and Hilles Timpson, supra, the transfer of the Property to H. Christopher Whittle as a result of the revocation of the Trust Agreement and the termination of the Nominee Agreement will be exempt from the transfer tax since there is no change in the beneficial ownership of the Property, but only a mere change of identity or form of ownership.

DATED: March 29, 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.