

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

TSB-A-94 (5)R
Real Property Transfer
Gains Tax
Real Estate Transfer Tax
May 16, 1994

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M940404A

On April 4, 1994, a Petition for Advisory Opinion was received from The Society of the New York Hospital, 525 East 68th Street, New York, New York 10021.

The issue raised by Petitioner, The Society of the New York Hospital, is whether the transfer of real property from Petitioner to Royal Charter Properties - Westchester, Inc. (hereinafter "RCPW") and the subsequent leaseback of the real property from RCPW to Petitioner will be exempt from the Real Property Transfer Tax (the "transfer tax") and the Real Property Transfer Gains Tax (the "gains tax").

Petitioner is a not-for-profit membership corporation incorporated in 1771 by royal charter from King George III and operates under the Not-for-Profit Corporation Law of the State of New York. RCPW is also a not-for-profit membership corporation incorporated under the Not-for-Profit Corporation Law. Both corporations have received exemption for Federal income tax purposes under Section 501(c)(3) of the Internal Revenue Code.

RCPW was formed by Petitioner for the purpose of acquiring, holding, managing and developing real property to serve the needs of Petitioner. All members of RCPW, ex officio, are also members and Governors of Petitioner. In addition, the by-laws of the respective corporations assure that the business and affairs of RCPW are controlled by Petitioner and following the transfers the real property will continue to be used by Petitioner for the same purposes and in the same manner as before.

Petitioner proposes to transfer to RCPW certain real property located at Bloomingdale Road, White Plains, New York. The property consists of a psychiatric care facility operated by Petitioner. RCPW will then lease the same property back to Petitioner for a term of ninety-nine years at a nominal annual rent, enabling Petitioner to continue to operate its facility on the property as before.

The real property is encumbered by a mortgage from Petitioner to the Dormitory Authority of the State of New York in the amount of \$154,000,000, which mortgage covers other properties of Petitioner. The transfer of the property (and the leaseback) would be made subject to the mortgage, but for no other consideration. The property will continue to be occupied and operated by Petitioner in furtherance of its stated not-for-profit goals with no change from the manner existing prior to the transfer and leaseback.

The By-laws of Petitioner provide that its operations shall be directed by a Board of Governors, each of whom must be a member of Petitioner. Article I, Section 1.1 of the By-laws of RCPW provides that the members of the corporation shall be ex officio the Board of Governors in office of Petitioner. Moreover, Article II, Section II.1 of the By-law of RCPW provides that the property, business and affairs of the corporation shall be managed by a Board of Directors, which

shall consist of five persons, and that while Directors need not be members, a majority of Directors shall be Governors of Petitioner.

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.

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

(b) The tax shall not apply to the following conveyances:

* * *

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;

Section 575.10 of the Transfer Tax Regulations provides, in part, as follows:

575.10 Mere Change of Identity. [Tax Law, § 1405(b)(6)] To the extent that a conveyance effectuates a mere change of identity or form of ownership or organization and there is no change in beneficial ownership, the real estate transfer tax does not apply. Examples of transactions where the issue of change in beneficial ownership would arise include the following:

* * *

(c) the conveyance by a corporation to its wholly-owned subsidiary, from a wholly-owned subsidiary to its parent, or from one wholly-owned subsidiary to another. Such conveyance is not taxable to the extent that there is no change in beneficial ownership.

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 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:

* * *

3. If the transferor is one of the following:

* * *

(c) An organization described in paragraph (4) of subsection (a) of section one thousand one hundred sixteen of this chapter.

Section 590.7 of the Gains Tax Regulations provides, in part, as follows:

Question: Which transactions are totally or partially exempt from the Gains Tax?

Answer: A total or partial exemption will be allowed in the following cases:

* * *

(3) If the transferor is one of the following:

(iii) any religious, charitable, educational, or other organization which is or would be exempt under section 1116(a)(4) of the New York State Sales and Use Tax Law (which is the same as an exempt organization under section 501(c)(3) of the Internal Revenue Code).

In Royal Charter Properties, Inc. vo Biderman, Sup Ct, NY County, October 11, 1988, Scott, J., an Article 78 proceeding in which Royal Charter Properties, Inc. and Royal Charter Properties - East, Inc. ("RCP" and "RCPE", two entities that stand in the same relation to the Petitioner as RCPW) sought to maintain the real estate tax exemption for various properties in the City of New York that had been transferred to RCP and RCPE from Petitioner the Court held as follows:

"... ownership by the affiliate has effected no change. The staff housing was always self-supporting and any profits continue to be transferred to the Hospital [Petitioner].

In St. Joseph's v. Srogi, supra, the Court of Appeals held a property used for hospital exempt purposes could be exempt even if not owned by the hospital. It could be exempt if owned by an affiliated corporation provided that the affiliated corporation is closely tied to the hospital to assure that its purposes is hospital related. In St. Joseph's, the Court found the affiliated corporations was closely tied to the hospital

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when (1) the Board of Directors of the two corporations were essentially the same, (2) when the employees of the hospital and (3) when the property was actually used for hospital purposes. In the instant case, the affiliated corporations [RCP and RCPE] are not only closely tied to the parent corporation [Petitioner], but use the property for the exact same hospital purpose as [Petitioner] when it held title. The record reveals no new facts to alter the tax exempt status... The fact is that the hospital purpose initiated by [Petitioner] and elected to its affiliate corporations remains the same..." (emphasis added)

In the instant case, Petitioner will transfer real property to RCPW and RCPW will leaseback the real property back to Petitioner for ninety-nine years for a nominal consideration. The By-laws of RCPW provide that Petitioner "owns" (to the extent that a not-for-profit membership corporation can be said to be "owned") and controls RCPW. Moreover, in Royal Charter Properties, Inc. v. Biderman, supra, the Court held that two entities in the same relation to Petitioner and RCPW were affiliated corporations closely tied to the parent corporation [Petitioner] and that ownership of the real property by the affiliate corporations effected no change in use to that of the use by Petitioner. Therefore, Petitioner and RCPW, while both not-for-profit membership corporations, have a relationship between them which is akin to a parent corporation and a wholly-owned subsidiary. Accordingly, since Petitioner owns and controls RCPW and, in effect, maintains a parent-subsidary relationship with RCPW, pursuant to Sections 1405(b)(6) of the Tax Law and Section 575.10 of the Transfer Tax Regulations and the rationale set forth in Royal Charter Properties, Inc. v. Biderman, supra, the transfer of the property from Petitioner to RCPW and the leaseback of the real property from RCPW to Petitioner will not be subject to the transfer tax imposed pursuant to Sections 1402(e) and 1402 of the Tax Law since the conveyances of the real property effectuate a mere change of identity or form of ownership or organization and there is no change in beneficial ownership of the real property.

As for the gains tax consequences, Petitioner and RCPW have both received exemption from Federal income tax under Section 501(c)(3) of the Internal Revenue Code. Pursuant to Section 1443.3(c) of the Tax Law and Section 590.7(3)(iii) of the Gains Tax Regulations the transfer of real property by an organization exempt under section 1116(a)(4) of the Tax Law (which is the same as an exempt organization under Section 501(c)(3) of the Internal Revenue Code) is exempt from the payment of gains tax. Therefore, since Petitioner and RCPW are exempt organizations described in Section 1116(a)(4) of the Tax Law, pursuant to Section 1443.3(c) of the Tax Law and Section 590.7(3)(iii) of the Gains Tax Regulations the transfer of the real property by Petitioner to RCPW and the transfer of real property by RCPW to Petitioner will not be subject to the gains tax.

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It is further noted that, for purposes of the gains tax, pursuant to Section 1443.5 of the Tax Law the transfers of real property between Petitioner and RCPW would also effectuate mere changes of identity or forms of ownership or organization since such transfers would not result in a change in the beneficial ownership of the real property.

DATED: May 16, 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.