

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

TSB-A-95 (10) - R
Real Property Transfer Tax
Real Property Transfer
Gains Tax
October 3, 1995

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M950606A

On June 6, 1995, a Petition for Advisory Opinion was received from 1133 Building Corporation, c/o The Durst Organization, Inc., 1133 Avenue of the Americas, New York, NY 10036.

The issue raised by Petitioner, 1133 Building Corporation, Inc., is whether the transfer by Petitioner of certain real property in exchange for real property held by Eastern Pork Products Co. (hereinafter "Eastern Pork") will be exempt from the Real Estate Transfer Tax (the "transfer tax") and the Real Property Transfer Gains Tax (the "gain tax") as a mere change of identity or form of ownership or organization to the extent of the 99.93Z common ownership interest.

The land under 114 West 47th Street, New York City (the "Land") is currently owned by Petitioner, a wholly-owned subsidiary of The Durst Buildings Corporation ("DBC"). DBC has outstanding three classes of common stock, each class of which is owned, in equal proportions, by thirteen family trusts dated May 1, 1962, (the "May Trusts") for the benefit of thirteen individuals (the "Second Generation Children"). DBC also has outstanding three classes of non-voting preferred stock, more than 50% in value of which is owned by the Second Generation Children, with the remainder owned by related individuals and a private foundation.

Eastern Pork is a New York general partnership which owns land and buildings in New York City. 99.9% of the partnership interests in Eastern Pork are owned, in equal proportions, by thirteen family trusts dated December 31, 1962 (the "December Trusts") for the benefit of the Second Generation Children. EPP Corp., a corporation which is owned by four of the Second Generation Children, owns the remaining 0.1% interest in Eastern Pork.

Pursuant to a proposed transaction (the "Exchange") Petitioner will transfer its interest in the Land to Eastern Pork in exchange for the following properties (the "EPP Properties"):

352-364 West 43rd Street
New York, New York

407-9 43rd Street
New York, New York

142-44 West 44th Street
New York, New York

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447-9 West 43rd Street
New York, New York

425 West 43rd Street
New York, New York

415 West 43rd Street
New York, New York

584-6 9th Avenue
New York, New York

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 of any interest in real property by any method. This would include a conveyance of real property by exchange.

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 property by any method. This would include a transfer of real property by exchange.

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.

To determine whether the Exchange results in a transfer subject to the transfer tax and/or the gains tax, it is necessary to ascertain who the beneficial owners of the Land and the EPP Properties are both before and after the Exchange. Petitioner is wholly owned by DBC. All of the common stock of DBC is owned, in equal proportions, by the May Trusts, the beneficial owners of which are the Second Generation Children. Therefore, each of the Second Generation Children is deemed to have approximately a 7.6923% beneficial interest in the real property owned by Petitioner before the Exchange. Similarly, 99.9% of Eastern Pork is owned, in equal proportions, by the December Trusts, the beneficial owners of which are also the Second Generation Children. Thus, through this 99.9% ownership interest, each of the Second Generation Children is deemed to have approximately a 7.6846% beneficial interest in the real property owned by Eastern Pork before the Exchange (99.9% multiplied by 1/13). In addition, 0.1% of Eastern Pork is owned by EPP Corp. The stock of EPP Corp. is owned, in equal proportions, by four of the Second Generation Children. In entity transfers, pursuant to Section 590.45(a) of the Gains Tax Regulations, the statute only looks to the voting stock of the corporation in determining whether a transfer of an interest of real property has occurred. The definition of the term "controlling interest" provides, in part, that a controlling interest is representative of owning fifty percent or more of the total combined voting power of all classes of stock of such corporation. Accordingly, through their ownership interest in EPP Corp., four of the thirteen Second Generation Children are deemed to have an additional 0.25% beneficial interest in the real property owned by Eastern Pork prior to the Exchange.

Therefore, as a result of the Exchange, nine of the thirteen Second Generation Children will retain approximately a 7.6846% beneficial ownership interest in the real property formally owned by Petitioner through their ownership interest in Eastern Pork. Moreover, four of the thirteen Second Generation Children will be deemed to have a 7.7096% beneficial ownership interest in the real property formally owned by Petitioner through their ownership interest in Eastern Pork and EPP Corp. Thus, nine of the thirteen Second Generation Children, in the aggregate, will be deemed to have transferred a .069% beneficial ownership in the real property formally owned by Petitioner (7.6923% minus 7.6846% multiplied by 9). Also, four of the thirteen Second Generation Children will be deemed to have acquired, in the aggregate, approximately an additional .069% interest in the real property formally owned by Petitioner through their ownership interest in EPP Corp. which owns a .1% interest in Eastern Pork (7.7096% minus 7.6923% multiplied by 4).

Accordingly, the Exchange results in a .069% change in the beneficial ownership in the Land formally owned by Petitioner. Thus, the resultant conveyance and transfer of real property for purposes of the transfer tax and gains tax constitutes a conveyance and transfer which results in a mere change of identity or form of ownership or organization to the extent of 99.931% and the respective exemptions provided in Sections 1406.6 and 1443.5 of the Tax Law would apply to such

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extent. Conversely, such conveyance and transfer would be subject to the transfer tax and the gains tax to the extent of the deemed change in beneficial interest in the Land of .069%.

DATED: October 3, 1995

/s/
PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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