

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

TSB-A-95 (4)R
Real Estate Transfer Tax
Real Property Transfer
Gains Tax
May 15, 1995

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M950117A

On January 17, 1995, a Petition for Advisory Opinion was received from Betty G. Reader, 5555 Collins Avenue, Apartment 9W, Miami Beach, Florida 33140.

The issue raised by Petitioner, Betty G. Reader, is whether the transfer by Petitioner of a one-third tenant-in-common interest in real property to a revocable trust is subject to the New York State Real Estate Transfer Tax (hereinafter the "transfer tax") and the New York State Real Property Transfer Gains Tax (the "gains tax").

Petitioner is the owner of a one-third interest, as tenant-in-common, of property located at 391-401 Sixth Avenue, New York, New York, known as Block 593, Lots 22, 23, and 24 (the "Property"). The Property, which is improved by a commercial building, currently is net leased. The Property is not subject to any mortgage or lien, but is subject to a purchase option held by the lessee of the Property. The option price for the entire Property is in excess of \$3 million.

Petitioner is considering transferring her entire individual one-third interest as tenant-in-common in the Property to the Betty G. Reader Revocable Trust dated June 18, 1993 (the "Trust"). Petitioner is the grantor and sole trustee of the Trust. Pursuant to the Trust Agreement, the trustee is required to pay the income from the Trust to the grantor during her lifetime, plus such sums from the principal as may be advisable for health, welfare and general maintenance of the grantor. Upon the death of the grantor, the trustee is to distribute the Trust's assets to various named individuals and organizations. The grantor retains the right during her life to amend or revoke the Trust agreement. The Trust is not required to pay Petitioner any fixed amount, either in total or on a periodic basis, and the Trust is not required to maintain the Property as income producing property. Petitioner would transfer her entire interest in the Property to the Trust without consideration from either the trust, the trust's beneficiaries or anyone else.

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 an interest in real property to a revocable 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;

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 1440.7 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 an interest in real property to a revocable 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 held 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 of identity or form of ownership.

In the instant case, Petitioner will transfer to the trust a one-third tenant-in-common interest in the aforementioned Property for no consideration. Petitioner will be the grantor and sole trustee of the Trust. Further, Petitioner as the grantor will retain the right during her life to amend or revoke

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the Trust Agreement. Accordingly, since Petitioner will hold the same beneficial ownership in the Property under the Trust Agreement as she held prior to the conveyance, pursuant to Section 1405(a)(6) of the Tax Law and Hilles Timpson, supra, the conveyance of the Property to the trust will not be subject to the transfer tax since the conveyance of the Property will not result in a change in the beneficial ownership of the Property, but will be a mere change of identity or form of ownership. Moreover, pursuant to 1443.5 of the Tax Law and Hilles Timpson, supra, the transfer of the Property to the trust will be exempt from the gains tax since there will be no change in the beneficial ownership of the Property, but rather a mere change of identity or form of ownership.

DATED: May 15, 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.