

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

TSB-A-97(9)R
Real Estate Transfer Tax
TSB-A-97(2)M
Stock Transfer Tax

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M970912A

On September 11, 1997, the Department of Taxation and Finance received a Petition for Advisory Opinion from Consolidated Edison Company of New York, Inc., 4 Irving Place, Room 206-S, New York, New York 10003. Additional information related to the Petition was received on November 20, 1997.

The issues raised by Petitioner, Consolidated Edison Company of New York, Inc., relate to the Real Estate Transfer Tax imposed pursuant to Article 31 of the Tax Law and the Stock Transfer Tax imposed pursuant to Article 12 of such law.

Issues Raised - Real Estate Transfer Tax

1) Does the Share Exchange, as described below, result in a transfer of a controlling interest in an entity with an interest in real property and therefore constitute a conveyance for purposes of the real estate transfer tax?

2) If the Share Exchange results in a transfer of a controlling interest and therefore a conveyance, is it exempt from the real estate transfer tax as a conveyance which results in a mere change of identity where there is no change in beneficial interest?

Issue Raised - Stock Transfer Tax

Is the Share Exchange, as described below, subject to the Stock Transfer Tax imposed pursuant to Article 12 of the Tax Law?

Facts

Petitioner submits the following facts as the basis for this Advisory Opinion. Petitioner is an investor-owned, regulated public utility incorporated in the State of New York on November 10, 1884. Petitioner supplies electricity and electric services in all of New York City (except a part of the Borough of Queens) and most of Westchester County. It also supplies gas and gas services in Manhattan, the Bronx and parts of Queens and Westchester County, as well as steam and steam services in Manhattan. Petitioner owns real property located within New York State.

Currently, public utilities are considering a variety of actions to position themselves for competition in the energy industry. The New York State Public Service Commission has instructed utilities to segregate their generation, delivery and marketing functions. Petitioner has determined that the only economically viable way that it can accomplish this is to adopt a new corporate form. Petitioner believes that the appropriate corporate form is a holding

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company structure. The holding company, as described in the facts of this Petition, will oversee a number of subsidiaries, one of which will be Petitioner. The holding company structure will be created through the mechanism of a binding share exchange, which is authorized by section 913 of the New York State Business Corporation Law. The share exchange (the "Share Exchange") is designed to be a tax-free reorganization under section 351 of the Internal Revenue Code ("I.R.C."). The restructuring will be accomplished through the following steps:

(a) Petitioner will create a wholly-owned subsidiary holding company ("HoldCo."), a non-regulated company incorporated in the State of New York;

(b) Subsequent to the creation of HoldCo., Petitioner and HoldCo. will execute a share exchange agreement, execution of which is subject to regulatory and shareholder approval (the "Agreement"). Pursuant to the Agreement, when the Agreement becomes effective (the "Effective Time"), Petitioner's common stock shareholders will, by operation of law, be deemed to have exchanged with HoldCo. Petitioner common stock for HoldCo. common stock, on a one-for-one basis. After the Share Exchange is completed, the former common shareholders of Petitioner will be common shareholders of HoldCo. Each share of HoldCo. common stock owned by Petitioner as the parent corporation prior to the Effective Time will be deemed canceled and returned to the status of authorized but unissued shares of HoldCo. Petitioner's preferred stock and debt will not be affected by the Share Exchange and will remain outstanding securities of Petitioner;

(c) After the Share Exchange is completed, Petitioner will be a subsidiary of HoldCo. and HoldCo. will be owned 100% by the former shareholders of Petitioner;

(d) It will not be necessary for the former shareholders of Petitioner to physically exchange their existing stock certificates for certificates of HoldCo. As of the Effective Time, these certificates will automatically represent shares of HoldCo. and will no longer represent shares of Petitioner. New certificates bearing the name of HoldCo. will be issued if and as the existing certificates are physically presented for exchange.

Petitioner submits that the Share Exchange constitutes an exchange qualifying for non-recognition of income under I.R.C. §351(a). No income, gain or loss is recognized by either Petitioner or HoldCo. as a result of the Share Exchange. Also, no income, gain or loss is recognized by the former holders of Petitioner common stock from the Share Exchange.

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The consolidated group of corporations of which, prior to the Share Exchange, Petitioner was the common parent for federal income tax purposes, continues after the Share Exchange, with HoldCo. as the new common parent corporation.

Petitioner maintains that no transfer or conveyance of any real property or transfer of the direct or indirect ownership of real property from Petitioner to HoldCo. occurs in connection with the Share Exchange.

Analysis - Real Estate Transfer Tax

Section 1402 of the Tax Law imposes the real estate transfer tax on each conveyance of real property or interest therein when the consideration exceeds five hundred dollars. The term "conveyance" is defined in section 1401(e) of the Tax Law. Included in the definition of conveyance is the transfer or transfers of any interest in real property by any method, including the transfer or acquisition of a controlling interest in any entity with an interest in real property.

Section 1401(b) of the Tax Law defines the term "controlling interest." This section provides, in the case of a corporation, that controlling interest means either fifty percent or more of the total combined voting power of all classes of stock or fifty percent or more of the capital, profits or beneficial interest in such voting stock.

Finally, section 1405(b) (6) of the Tax Law sets forth that conveyances are exempt from the real estate transfer tax to the extent that they "effectuate a mere change of identity or form of ownership or organization where there is no change in beneficial ownership."

Conclusions - Real Estate Transfer Tax

In the Share Exchange, HoldCo. will acquire 100% of the common stock of Petitioner. As Petitioner is an entity with an interest in real property, the Share Exchange will result in HoldCo. acquiring a controlling interest in an entity with an interest in real property. Therefore, the Share Exchange results in a taxable conveyance of real property in accordance with the aforementioned sections 1402, 1401(b) and 1401(e) of the Tax Law.

However, since the former common stock shareholders of Petitioner will receive a proportionately equal amount of HoldCo. common stock as a result of the Share Exchange the conveyance described in the preceding paragraph will be exempt from the real estate transfer tax based on the mere change of identity or form of ownership exemption provided in section 1405(b) (6) of the Tax Law.

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Analysis - Stock Transfer Tax

Subdivision (1) of section 270 of Article 12 of the Tax Law provides in part:

There is hereby imposed . . . a tax . . . on all sales, or agreements to sell, or memoranda of sales and all deliveries or transfers of shares or certificates of stock . . . in any domestic or foreign association, company or corporation . . . whether made upon or shown by the books of the association, company, corporation, or trustee, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of sale or transfer, whether intermediate or final, and whether investing the holder with the beneficial interest in or legal title to said stock, or other certificates taxable hereunder, or merely with the possession or use thereof for any purpose. . . .

Subdivision (h) of section 440.1 of the Stock Transfer Tax Regulations provides as follows:

(h) The tax imposed by article 12 of the Tax Law does not apply to the original issuance of stock.

Subdivision (j) of section 440.1 of the Stock Transfer Tax regulations provides in part:

(j) The following are examples of transactions not subject to tax:

* * *

(2) The surrender of a single certificate for reissuance to the same stockholder of several certificates representing, in the aggregate, the same number of shares.

(3) The surrender of a number of certificates of reissuance, to the same stockholder, of a single certificate for the same number of shares.

Conclusions - Stock Transfer Tax

The Share Exchange between Petitioner and HoldCo. will not be subject to the Stock Transfer Tax. At the Effective Time, the shares of Petitioner no longer represent legally valid stock of Petitioner, but instead represent an ownership interest in HoldCo. and are, in effect, originally issued shares of HoldCo. The original issuance of stock is exempt from the imposition of the Stock Transfer Tax (Regulations, section 440.1(h)).

No physical exchange of certificates is necessary to reflect the change in ownership interest effectuated by the Share Exchange with respect to the certificates held by the former shareholders of Petitioner. However, if a physical exchange of certificates does take place, these shareholders would be

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deemed to be exchanging existing HoldCo. stock (certificates of Petitioner, which represent newly issued shares of HoldCo.) for new certificates of HoldCo. stock (new certificates of HoldCo. stock bearing the name of HoldCo.). The mere physical replacement of existing certificates with new certificates of the same issue, similar to the transactions exemplified in paragraphs (2) and (3) of section 440.1(j) of the Regulations, where there is no change in the underlying ownership interest, does not result in any Stock Transfer Tax liability.

DATED: December 19, 1997

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

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