

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

TSB-A-88 (3) R
Real Property Transfer
Gains Tax
December 16, 1988

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M881215A

On December 15, 1988, a Petition of Advisory Opinion was received on behalf of RCP Associates and Rockefeller Center Properties located at 1230 Avenue of the Americas, New York, New York 10020.

ISSUE:

The issues raised concern the application of the Real Property Transfer Gains Tax imposed by Article 31-B of the Tax Law (hereinafter the "gains tax") to the following factual situation.

FACTS:

RCP Associates (hereinafter "RCPA"), a limited partnership owns the bulk of the land and buildings at Rockefeller Center (hereinafter the "Center"). RCPA in turn leases the Center to Rockefeller Center Properties (hereinafter "RCP"), a general partnership. The partners of RCPA and RCP are The Rockefeller Group, Inc., (hereinafter "RGI"), and other entities owned directly and indirectly by RGI.

At some time in the future, the fee and leasehold interests held by RCP and RCPA may be combined into a single owner (e.g., by merging RCP and RCPA), but the timing, method and other details of the merger remain unresolved.

References to RCI in this Petition are intended to encompass both RGI and the appropriate RGI - controlled entity (i.e., RGI, RCP or RCPA, as the case may be) .

All the real estate interests owned by RCP and RCPA, including the leasehold, are encumbered by a \$1.3 billion mortgage securing a loan of the same amount from Rockefeller Center Properties, Inc. to both RCP and PCPA.

RGI has negotiated with the National Broadcasting Company, Inc. (hereinafter "NBC") a proposal with regard to the occupancy by NBC of the Center. The Center consists of a number of interconnected buildings, including the buildings at 30 Rockefeller Plaza. Most of the buildings, including all of 30 Rockefeller Plaza, lie between 48th Street, 51st Street, 5th Avenue and Avenue of the Americas in the City of New York. All of these buildings are operated as a single economic unit under common management.

The basic terms of the transaction are set forth in a letter agreement between RGI and NBC (hereinafter the "Letter Agreement") and accompanying "Proposal to National Broadcasting Company for NBC's Occupancy of Space in Rockefeller Center" (hereinafter the "Proposal").

The complete terms of the transaction are contained in the following documents, all of which have been submitted with the Petition:

1. The Proposal;
2. Consolidated Lease between RCP and NBC;
3. Tower Lease between RCP and NBC;
4. Studio-RCA West Lease between RCP and NBC;
5. Purchase Options Agreement among RCPA, RCP and NBC;
6. Lease Option and First Offer Right Agreement among RCPA, RCP and NBC;
7. Letter Agreement among NBC, RCPA and RCP (confirming the respective parties' obligations for costs associated with the transaction);
8. Declaration of Condominium and by-laws;
9. Condominium Unit Deeds to the IDA (with reverters to RCPA);
10. Overlease Agreement between the IDA and RCP;
11. Reimbursement Agreement among RCP, RCPA and the IDA;
12. Letter agreement among RCP, RCPA and the IDA; and
13. Collateral Assignment of Rents by RCP and RCPA to the IDA.

Also submitted with the Petition were copies of the following documents, which are the existing leases and ancillary agreements between RGI and NBC (or RCA):

1. Lease (the "NBC Lease") dated March 20, 1979, between RCP and NBC;
2. Supplemental Indenture to the NBC Lease, dated August 1, 1982;
3. Supplemental Indenture to the NBC Lease, dated September 29, 1983 (expired);
4. Supplemental Indenture to the NBC Lease, dated as of December 14, 1985;
5. Supplemental Indenture to the NBC Lease, dated as of April 8, 1986;
6. Assignment With Consent (with regard to the NBC Lease), dated as of December 29, 1986;
7. Lease (the "RCA Lease") dated March 19, 1979, between RCP and RCA;
8. Supplemental Indenture to the RCA Lease, dated as of April 7, 1986;

9. Agreement, dated as of April 1, 1975 (as supplemented by supplemental Indentures dated as of July 1, 1975, August 1, 1975, January 1, 1977, June 1, 1977, October 1, 1979 and June 1, 1980), with respect to certain security measures;
10. Agreement, dated as of October 1, 1980, with respect to security measures, including the installation of a closed circuit television system; and
11. Antenna License Agreement, dated as of August 1, 1982.

Under the NBC Lease, NBC presently occupies space in the buildings comprising 30 Rockefeller Plaza. The space subject to the NBC Lease constitutes 16% of the total rentable area in the Center.

Under the RCA Lease, the RCA Corporation (hereinafter "RCA") leased space in 30 Rockefeller Plaza equal to 3% of the total rentable area of the Center. Together, the premises leased by NBC and RCA in 30 Rockefeller Plaza constitute the "Existing Space." For purposes of this Opinion, the Existing Space will be divided into three categories, (1) Tower Space, (2) Studio Space and (3) RCA West Space. The space that was leased to RCA is currently leased in its entirety by NBC.

RCA and NBC are both directly or indirectly wholly - owned subsidiaries of General Electric Corporation (hereinafter "GE"). On December 31 1987, RCA was liquidated into GE. At that time, GE succeeded to RCA's position under the RCA Lease. GE has assigned the RCA Lease to NBC.

Both the NBC and RCA Leases commenced on October 1, 1982 and run through September 30, 1994, with options to renew through September 30, 2015.

The New York City Industrial Development Agency (hereinafter "IDA") has agreed to participate in this transaction. IDA's participation may result in a number of benefits to NBC (hereinafter the "IDA Benefits").

As part of the transaction, RGI will grant NBC several separate and distinct rights with respect to the Existing Space and certain other space in 30 Rockefeller Plaza now occupied by tenants other than NBC. These rights are ss follows:

- (1) RGI will pow grant NBC a new lease with respect to the Tower Space (hereinafter the "Tower Lease"), commencing in the year 2015, upon the expiration of the NBC and RCA Leases. Its initial term will be 7 years at a specified rent. There will be three successive 10 year renewal periods (or, at NBC's option, four successive renewal periods of 3, 7, 10 and 10 years, respectively), at a rent to be determined by a formula contained in the Tower Lease.

- (2) RGI will now grant NBC a separate lease covering the Studio and RCA West Spaces (the "Studio-RCA West Lease"). Like the Tower Lease, the Studio - RCA West Lease will not commence until 2015 and will run until 2022 with renewal periods coincident with those under the Tower Lease. The terms of the Tower Lease and the Studio-PCA West Lease shall be coterminous, unless NBC exercises the Purchase Option as defined below.
- (3) Without any separate consideration, RGI will grant NBC the right to purchase on September 30, 2022, at its then fair market value, the Studio and RCA West Spaces (hereinafter the "Purchase Option"). The Purchase Option is exercisable only if the Tower Lease is renewed concurrently. Once the Purchase Option is exercised, NBC becomes obligated to purchase all of the Studio and RCA West Spaces, and cannot opt to buy a lesser amount. After NBC's purchase of the Studio and RCA West Spaces, RGI will have the option to reacquire from NBC the Studio and RCA West Spaces at fair market value upon, *inter alia*, NBC's decision to resell the Studio or RCA West Spaces or to use the Studio and RCA West Spaces in ways other than those specified in the Proposal (the "Repurchase Option").
- (4) RGI will also grant NBC an option to lease (the "Option to Lease") up to an additional 387,000 square feet of space in 30 Rockefeller Plaza (hereinafter "Additional Space") in 1994 or any earlier date the Additional Space becomes available. NBC will also receive a right of first offer (the "Right of First Offer") to lease (a) another 523,000 square feet in addition to any of the Additional Space as to which NBC has not exercised its Option to Lease in 30 Rockefeller Plaza and (b) certain space which RGI may hereafter recapture in the Studio and RCA West Spaces (the "First Offer Space"). If NBC avails itself of the Additional Space, the terms of the associated leases will be coordinated with those of the RCA and NBC Leases. The terms of the leases covering the First Offer Space would probably not be identical with those of the RCA and NBC Leases.
- (5) NBC will exercise all options (all of which are currently exercisable) to renew the NBC and RCA Leases. At this time, RGI will also consent (pursuant to the terms of the NBC and RCA Leases) to certain renovations NBC desires to make to the Existing Space. The renewal options as set forth in the current NBC and RCA Leases provide for rents to be reset at fair market value (as of given dates in the future) and to refer any dispute about that amount to arbitration. The parties have negotiated the exact amount of that rental, which reflects, among other things, certain improvements to be made under the RCA and NBC Leases and the IDA Benefits. The parties also are making certain incidental amendments to the RCA and NBC Leases, such as: (1) the addition of several definitions to take into account the creation of the condominium units in the IDA Sale-Leaseback, (2) for the sake of corporate administrative convenience, incorporating within the RCA and NBC Leases the terms of certain ancillary agreements between RGI and NBC, (3) changes in certain NBC rights with respect to subletting and assignment and the sharing of subletting profits,

- (4) changes in the rent escalation clause and (5) adding to the Existing Space approximately 380 square feet of space for an expansion of NBC's company store on the ground floor of the Studio and RCA West Spaces (such space to become part of the space covered by the Studio-RCA West Lease).
- (6) Strictly as an accommodation to NBC, RGI will grant NBC the right to require that RGI enter into a sale-leaseback transaction (analogous to a financing arrangement) with the IDA, exercisable any time after notice of exercise of the renewal options under the RCA and NBC Leases. Expectations are that NBC will exercise this right in tandem with its entering into the Tower and Studio-RCA West Leases. NBC also has the right to have any Additional Space and First Offer Space leased by NBC be subject to the same sale-leaseback transaction. It is contemplated that, by placing record title to the Existing Space and such Additional and First Offer Space in the IDA, NBC will be able to secure the IDA Benefits. For purposes of this Opinion all steps contemplated by this paragraph will be referred to as the IDA Sale-Leaseback.

To accomplish the securement of IDA Benefits, RGI would submit a portion of the Center to condominium status, with units corresponding to the Existing Space (subject to the RCA, NBC, Tower and Studio-RCA West Leases). Immediately thereafter, the IDA would lease the condominium units corresponding to the Existing Space back to RGI for a term coextensive with the duration of the IDA Benefits (a period of approximately 35 years) at a nominal rent. Under the RCA and NBC Leases, NBC would then become a subtenant of RGI. Each deed to the IDA would provide that title to the Existing Space would revert to RGI, *inter alia*, upon the earlier of the expiration or termination of NBC's subtenancy or the expiration of the IDA Benefits.

As an administrative convenience, the RCA and NBC Leases, together with certain currently existing ancillary agreements, will be consolidated and restated as a single document. This step would occur contemporaneously with entering into the agreements described. Under no circumstances would the terms of this transaction result in NBC's leasing as much as 90% of the total rentable space in either BO Rockefeller Plaza or the entire Center, even if all options and renewals (including any rights to the First Offer and Additional Spaces) were to be exercised by NBC. The petitioners contend the following with respect to this transaction:

- (1) Both the assignment of the RCA Lease by GE to NBC and the subsequent consolidation and restatement of the RCA and NBC Leases are exempt from the gains tax.
- (2) NBC's immediate exercise of all renewal options under the RCA and NBC Leases, along with certain amendments to the RCA and NBC Leases, does not subject the RCA and NBC Leases to any gains tax.

- (3) The creation of the Tower Lease is not a taxable event for purposes of the gains tax.
- (4) The creation of the Studio-RCA West Lease is taxable only to the extent that the present value, on the date the lease commences, of the net rents under the Studio-RCA West Lease from that commencement date through September 30, 2022, the last date as of which the Purchase Option otherwise exercised may not become void, exceeds RGI's original purchase price in the Center properly allocable to the Studio and RCA West Spaces. The tax will be due on October 1, 2015 when the Studio-RCA West Lease commences.
- (5) The creation of leases covering the Additional or First Offer Spaces, pursuant to either the Right of First Offer or Option to Lease, are not taxable events for purposes of the gains tax.
- (6) All aspects of the IDA Sale-Leaseback (including, but not limited to, the conveyance, reconveyance (or reversion, as the case may be), lease and sublease) with regard to the Existing, First Offer and Additional Spaces fail to constitute taxable transfers for purposes of the gains tax.

DISCUSSION:

Section 1443.5 of the Tax Law provides an exemption from the gains tax to the extent that a transfer of real property, however effected, consists of a mere change of identity or form of ownership or organization, where there is no charge in beneficial interest. Also, gains tax regulations section 590.50.4 provides that transfers by a corporation to its wholly owned subsidiary are transfers which would be exempt from the gains tax within the meaning and intent of section 1443.5 of the Tax Law. Since NBC is a wholly owned subsidiary of GE, the assignment of the RCA Lease by GE to NBC would be exempt from the gains tax.

Where an existing lease is modified, such modifications will result in the creation of a new lease for gains tax purposes if the modifications are determined to be substantial in nature. The determination of what constitutes substantial modifications to an existing lease must be made on a case by case basis. If the modifications made to an existing lease are determined to be substantial in nature, a new lease is deemed to be created for gains tax purposes, the term of which would start on the effective date of such modifications. Changing the date on which the options to renew the RCA Lease and the NBC Lease may be exercised, coupled with actually exercising such options and making the amendments to the RCA and NBC Leases as set forth in the Petition and accompanying documents listed herein, do not constitute substantial modifications to such Leases. Therefore, a new lease or leases are not created for purposes of the gains tax as a result of such changes and amendments.

Based on the aforementioned, the consolidation and restatement of the RCA and NBC Leases would not result in the imposition of the gains tax.

The sum of the term of the Tower Lease, including options to renew, is thirty-seven years. Accordingly, the creation of the Tower Lease would not be a transfer of real property as defined at section 1440.7 of the Tax Law, and would not be subject to the gains tax.

The creation of a lease for a term of less than forty-nine years which contains an option to purchase the real property is subject to the gains tax. The consideration for such a transfer is the present value of the net rental payments under the lease plus the consideration paid for the option to purchase (Tax Law section 1440.1(b)). Rental payments for periods that occur after an option is no longer exercisable are not included in the calculation of the present value of the rental payments. If the sum of the present value of the net rental payments and the price paid for the option is one million dollars or more the transfer is subject to the tax. (Tax Law section 1440.1) The present value of the net rental payments should be determined as set forth in section 590.26. (Section 590.27 of Gains Tax Regulations)

Based on the foregoing, the creation of the Studio-RCA West Lease coupled with the granting of the option to purchase is a taxable transfer of real property effective upon the commencement of such lease (October 1, 2015). The consideration for purposes of the gains tax will be equal to the present value of the net rental payments that occur between October 1, 2015 and September 30, 2022, which is the last date on which contingencies which might otherwise cause the option to purchase to become void can occur.

The leases created pursuant to the Right of First Offer or Option to Lease will not include an option to purchase and will not be for substantially all the premises constituting the real property. Therefore, based on the provisions of section 1440.7 of the Tax Law, the creation of such leases would not be transfers of real property for purposes of the gains tax.

All aspects of the IDA Sale-Leaseback with regard to the Existing, First Offer and Additional Spaces as described in the Petition will not result in the gains tax being imposed.

DATED: December 16, 1988

s/FRANK J. PUCCIA
Director
Technical Services Bureau

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