

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

TSB-A-91 (1) R  
Real Property  
Transfer Gains Tax  
January 18, 1991

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M901219B

On December 12, 1990, a Petition for Advisory Opinion was received from Peter S. Kalikow, 210 South Street, New York, New York.

The issue raised by Petitioner, Peter S. Kalikow, is whether the transfer of real property by Petitioner to The New York Post Co., Inc. (the "Company") and the subsequent transfer by the Petitioner of 20% of the stock of said corporation in the formation of an employee stock option plan (the "ESOP") for the workers of the newspaper is subject to the Real Property Gains Tax (the "gains tax").

Petitioner is the sole shareholder of the Company. The Company owns and operates the newspaper known as The New York Post. The fee interest to the real property, consisting of the land and the improvements thereon commonly known as 210 South Street, New York, New York (the "premises"), relating to the New York Post, is presently owned 100% by Petitioner. The premises is subject to a mortgage of approximately \$25 million.

Petitioner intends to convey the premises to the Company subject to the mortgage and for no other consideration. The conveyance is in anticipation of the formation of an ESOP for the workers of the newspaper. The ESOP (which is governed by the Employee Retirement Income Security Act of 1974, 29 USC 51001) is anticipated to own 20% of the stock of the Company and, thereby, 20% of all assets utilized in the operation of the newspaper, including the premises.

The Company is not legally obligated to form the ESOP nor is Petitioner legally obligated to transfer the premises to the Company. Rather, Petitioner's actions are an attempt to preserve the continued economic vitality, of The New York Post in conjunction with other changes in operations and labor relations. The transfer of the premises to the Company, therefore, is not dependent upon the creation of the ESOP and will occur in the ordinary course of business.

Section 1441 of the Tax Law imposes a ten percent tax on the gain derived from the transfer of real property, which includes the transfer or acquisition 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, including but not limited to sale. . .transfer or acquisition of a controlling interest in any entity with an interest in real property. . ."

Section 1440.2 of the Tax Law defines the term "controlling interest", in part, to mean "(i) in the case of a corporation, either fifty percent or more of the total combined voting power of all

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classes of stock of such corporation, or fifty percent or more of the capital, profits or beneficial interest in such voting stock of such corporation. . ."

Further, Section 1443.5 of the Tax Law provides, that a total or partial exemption from the gains tax shall be allowed "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."

Accordingly, the transfer of real property from Petitioner to the Company is a transfer of real property pursuant to Section 1440.7 of the Tax Law, but is, nevertheless, exempt from gains tax pursuant to Section 1443.5 of the Tax Law since the transfer consists of a mere change of identity or form of ownership or organization. Further, the transfer by Petitioner of 20% of the Company's stock to ESOP is not subject to gains tax since Petitioner has not transferred a controlling interest nor has ESOP acquired a controlling interest in the real property pursuant to Sections 1440.2 and 1440.7 of the Tax Law.

DATED: January 18, 1991

s/PAUL B. COBURN  
Deputy Director  
Taxpayer Services Division

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