

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

TSB-A-92(1) - R  
Real Property  
Transfer Gains Tax  
February 18, 1992

STATE OF NEW YORK

COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M911226A

On December 26, 1991, a Petition for Advisory Opinion was received from John L. Eastman, Trustee, Eastman and Eastman, 39 West 54th Street, New York, New York 10019.

The issue raised by Petitioner, John L. Eastman, Trustee, is whether the distribution from a testamentary trust of real property to a beneficiary will be subject to the Real Property Transfer Gains Tax (hereinafter the "gains tax").

Petitioner is the current trustee of a testamentary trust created on September 20, 1976 upon the death of S. Joseph Tankoos, Jr. Article NINTH of decedent's will created a pecuniary formula marital trust for the benefit of his surviving spouse, Catherine M. Tankoos. The terms of Article NINTH provided that Petitioner would pay the entire income of the trust to Mrs. Tankoos during her life, and upon her death, pay over the principal "to such persons or corporations, in such amounts or proportions and upon such estates, whether outright or in further trust, as my said wife alone and in all events shall by her Last Will and Testament designate and appoint, whether in favor of her own estate or otherwise." Thus, decedent's surviving spouse was given a general testamentary power of appointment over the trust principal.

Article NINTH also gave Petitioner broad invasion powers to pay over to decedent's wife such amounts of the principal of the trust (up to and including all of the principal thereof, thereby terminating the trust) as the Trustees shall determine without any duty to take into consideration other resources or other income of the surviving spouse.

The decedent's assets available to fund the marital trust for the benefit of his wife included a one-quarter undivided interest in the long-term lease of real property in Nassau County in the State of New York upon which the Sunrise Mall shopping center is located. Decedent also owned a one-quarter undivided partnership interest in a joint venture in the management and operation of the Sunrise Mall. In accordance with the terms of Article NINTH of decedent's Will, his executors conveyed and assigned one half of each of these interests to the trust created under Article NINTH for the benefit of the decedent's spouse.

Petitioner is contemplating the distribution of all of the trust corpus to the surviving spouse beneficiary, thereby terminating the trust. Petitioner contemplates submitting a judicial accounting of his proceedings to the Surrogate's Court of New York County and seeking a judicial decree approving the distribution of the entire corpus, including the one-quarter undivided leasehold interest to the decedent's spouse. The expected fair market value of that interest at the time of the distribution will be substantially in excess of \$1,000,000. There will be no consideration for the distribution.

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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 provides, in part, that "7. 'transfer of real property' means the transfer or transfers of any interest in real property by any method, including but not limited to sale, exchange, assignment, surrender, mortgage foreclosure, transfer in lieu of foreclosure, option, trust indenture, taking by eminent domain, conveyance upon liquidation or by a receiver or acquisition of a controlling interest in any entity with an interest in real property."

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

The transfer of real property from a trust to the sole beneficiary who owns a 100% interest in the principal of the trust does not result in a change in the beneficial interest in the property. Such transfer is exempt from the gains tax as a mere change of identity or form of ownership or organization. (See Opinion Letter of Counsel to the Dept of Taxn & Fin, August 8, 1983.)

Accordingly, while Petitioner's distribution of all of the trust's interest in real property to the beneficiary of the trust is a transfer of real property pursuant to Section 1440.7 of the Tax Law, such transfer is not subject to gains tax pursuant to Section 1443.5 of the Tax Law since such transfer consists of a mere change of identity or form of ownership or organization, where there is no change in beneficial interest.

DATED: February 18, 1992

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

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