

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

TSB-A-93 (6)R
 Real Property Transfer
 Gains Tax
 May 17, 1993

STATE OF NEW YORK
 COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M930302A

On March 2, 1993, a Petition for Advisory Opinion was received from Latham Motors, Inc., Old Loudon Road, Latham, New York 12110.

The issue raised by Petitioner, Latham Motors, Inc., is whether a transfer of real estate from a related corporation to Petitioner qualifies for exemption from the New York State Real Property Transfer Gains Tax (hereinafter the "gains tax") under Section 1443.5 of the Tax Law as a mere change of identity or form of ownership or organization, where there is no change in beneficial interest.

Petitioner is a New York corporation. John J. Selkis, Inc. is also a New York corporation which owns real estate that it currently leases to Petitioner. It is proposed to merge John J. Selkis, Inc. into Petitioner. As a result, all of the assets (including real estate located in New York) of John J. Selkis, Inc. will be transferred into Petitioner and John J. Selkis, Inc. will go out of existence.

The estimated fair market value of the two corporations is as follows:

	<u>John J. Selkis, Inc.</u>	<u>Petitioner</u>
Estimated Fair Market Value (Net Worth):	\$1,200,358	\$300,000
Estimated Fair Market Value of the Real Estate:	\$1,100,000	\$300,000
The Original Cost of the Respective Real Estate:	\$ 458,000	\$375,000

The parties involved and their respective ownership interests before and after the merger are as follows:

<u>Shareholders</u>	<u>Before Merger</u>		<u>After Merger</u>
	<u>John J. Selkis, Inc.</u>	<u>Petitioner</u>	<u>Petitioner</u>
John J. Selkis, Jr.	94%	76%	90.4%
Margaret Selkis	1%	3%	1.4%
Robert Selkis	1%	3%	1.4%
John J. Selkis, III	1%	3%	1.4%
Thomas Selkis	1%	6%	2.0%
Mary Ann Carberry	1%	6%	2.0%
Mary Katherine Shanks	1%	3%	1.4%
Totals	100%	100%	100.0%

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 1440.2 of the Tax Law provides as follows:

2. "Controlling interest" means (i) in the case of a corporation, either fifty percent or more of the total combined voting power of all 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, and (ii) in the case of a partnership, association, trust or other entity, fifty percent or more of the capital, profits or beneficial interest in such partnership, association, trust or other entity.

Section 1443 of the Tax Law provides, in pertinent 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.

Section 590.45(c) and (d) of the Gains Tax Regulations provides:

(c) Question: If a shareholder owned a 20-percent interest in a corporation prior to March 28, 1983 and acquires an additional 35 percent on July 10, 1984, has there been an acquisition of a controlling interest?

Answer: No. For purposes of determining whether a controlling interest is acquired, only acquisitions of interests occurring after March 28, 1983 are added together.

(d) Question: If a shareholder acquires a 50-percent interest in a corporation and gains tax is paid on the transfer, and one year later the same shareholder acquires an additional 20 percent, is there a second acquisition of a controlling interest?

Answer: Yes. The interests acquired after March 28, 1983 are added together in determining whether an acquisition of a controlling interest has occurred. No acquisition of stock will be added to another acquisition of stock if they occur more than three years apart, unless the acquisitions were so timed as part of a plan to avoid the gains tax. An example of this would be if T acquired 80 percent of the stock and simultaneously contracted for the purchase of the remaining 20 percent in three years and one day.

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Section 590.54(a) of the Gains Tax Regulations provides as follows:

590.54 Corporation mergers and redemptions.

(a) Question: Is a merger of a corporation owning real property into another corporation a taxable transfer?

Answer: Yes. The merger of a corporation which owns real property into another corporation may result in a transfer within the scope of the gains tax, where the transaction results in the acquisition of a controlling interest in an entity which owns real property in New York State.

Therefore, pursuant to Section 1440.2 of the Tax Law and Sections 590.45 and 590.54(a) of the Gains Tax Regulations, the merger of John J. Selkis, Inc. into Petitioner, as the surviving corporation of the merger, will result in an acquisition of a controlling interest in an entity with an interest in real property since Petitioner acquires 100% of the stock of John J. Selkis Inc., an entity which owns real property. However, in the instant case, since the former shareholders of John J. Selkis Inc., receive shares of voting stock in Petitioner as a result of the merger, pursuant to Section 1443.5 of the Tax Law, the mere change of identity or form of ownership exemption with respect to the interest in real property of John J. Selkis Inc. will apply to the extent that such former shareholder's retain a beneficial interest in such real property as a result of the merger. The determination of the extent of the application of the mere change of identity exemption will be based on such individual shareholder's percentage of ownership of the voting stock of Petitioner immediately after the merger.

Therefore, in accordance with Sections 1441 and 1443.1 of the Tax Law and Section 590.1 of the Gains Tax Regulations, the merger of John J. Selkis, Inc. into Petitioner will be taxable to the extent of the 3.6% change in beneficial interest of shareholder, John J. Selkis, Jr., following the transfer.

DATED: May 17, 1993

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

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