NEW YORK STATE | Department of Taxation and Finance

Publication 576

Transfer or Acquisition of A Controlling Interest in an Entity with an Interest in Real Property

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Introduction

Article 31 of the Tax Law imposes a real estate transfer tax on each conveyance of real property or interest in real property when the consideration exceeds $500. The tax is computed at a rate of two dollars for each $500 of consideration or fractional part thereof. An *additional tax* is imposed on each conveyance of real property used in whole or in part as a personal residence when the consideration for the entire conveyance is $1 million or more. The *additional tax* is computed at a rate of one percent of the consideration or part thereof attributable to the residential real property.

Among the types of conveyances subject to tax, the real estate transfer tax applies when a person or group of persons acting in concert *transfers* or *acquires* a controlling interest in a partnership, corporation, or other entity with an interest in real property. When this occurs, a real estate transfer tax return must be filed, and any tax due must be paid no later than the 15^{th} day after the conveyance.

This publication answers frequently asked questions related to the transfer or acquisition of a controlling interest in an entity with an interest in real property. The information presented does not represent a change in any policies or procedures but is intended to provide guidance for the relevant provisions of Article 31of the Tax Law and Part 575 of the Real Estate Transfer Tax Regulations (20 NYCRR). Although accurate, the information in this publication has been simplified. If there is any discrepancy between this publication and the Tax Law or regulations, the Tax Law and regulations will govern.

Definitions

The following terms used in this publication are derived from definitions contained in Article 31of the Tax Law or section 575.1 of the New York State Real Estate Transfer Tax Regulations. As necessary, they have been edited to apply specifically to transfers and acquisitions of a controlling interest of an entity that has an interest in real property.

Person - means an individual, partnership, limited liability company (LLC), society, association, joint stock company, corporation, estate, receiver, trustee, assignee, referee or any other person acting in a fiduciary or representative capacity, whether appointed by a court or otherwise, any combination of individuals, and any other form of unincorporated enterprise owned or conducted by two or more persons.

Controlling interest - means 1) in the case of a corporation, either 50% or more of the total combined voting power of all classes of stock of the corporation, or 50% or more of the capital, profits, or beneficial interest in the voting stock of such corporation; and 2) in the case of a partnership, association, trust, or other entity, 50% or more of the capital, profits, or beneficial interest in the partnership, association, trust, or other entity.

Real property - means every estate or right, legal or equitable, present or future, vested or contingent, in lands, tenements or hereditaments, including buildings, structures and other improvements thereon, which are located in whole or in part within the state of New York. It does not include rights to sepulture.

Interest in real property - includes title in fee, a leasehold interest, a beneficial interest, an encumbrance, development rights, air space and air rights, or any other interest with the right to the use or occupancy of real property, or the right to receive rents, profits or other income derived from real property. It shall also include an option or contract to purchase real property. It does not include a right of first refusal to purchase real property.

Consideration - in the case of a transfer or acquisition of a controlling interest in any entity that owns real property, consideration means the fair market value of the real property or interest therein, apportioned based on the percentage of the ownership interest transferred or acquired in the entity.

Fair market value - means the amount that a willing buyer would pay a willing seller for real property. It is generally determined by appraisal based upon the value of the real property at the time of the conveyance. It is not *net fair market value*, which is fair market value less the amount of any mortgages on the property.

Conveyance - means the transfer or transfers of any interest in real property by any method, including but not limited to the *transfer or acquisition of a controlling interest in any entity with an interest in real property.*

Grantor - when the conveyance consists of a transfer or an acquisition of a controlling interest in an entity with an interest in real property, *grantor* means the entity with an interest in real property or a shareholder or partner transferring stock or partnership interest, respectively.

Grantee means the person who obtains real property or interest therein as a result of a conveyance.

Frequently asked questions

1. When does an entity have an interest in real property?

A corporation, partnership or other entity has an interest in real property when it has a *direct* or *indirect* interest in real property, including title in fee, a leasehold interest, a beneficial interest, an encumbrance, development rights, air space and air rights, an option or contract to purchase real property, or any other interest with the right to the use or occupancy of real property or the right to receive rents, profits, or other income derived from real property.

An entity does not have an interest in real property because of a mere ownership of a right of first refusal to purchase real property, or ownership of notes or other receivables secured by interests in real property.

> ***Example 1:*** Partnership X is owned by Individuals A and B, with each owner having a 50% interest in the capital and profits of the partnership. Partnership X has a ten-year lease for one floor of a 60-story office building in Manhattan. Individual A transfers his 50% partnership interest in X to Individual C. The transfer of this partnership interest in X constitutes a transfer by Individual A and an acquisition by Individual C of a controlling interest in an entity with an interest in real property. (See question 6 for information on what happens if a transaction results in both a transfer and an acquisition of a controlling interest.)

> ***Example 2:*** Corporation X has 2 stockholders. Individual A owns 90 shares of the voting stock (90%) and Individual B owns 10 shares of the voting stock (10%). Corporation X owns 60% of the voting stock of Corporation Y, which owns real property located in New York State. Individual A, by virtue of owning 90% of the stock of Corporation X, has a 54% interest in Corporation Y (90% interest in Corporation X multiplied by the 60% interest Corporation X has in Corporation Y). Individual A sells his 90 shares of stock in Corporation X to Individual G. Individual A, by selling his 90 shares of Corporation X stock, has transferred a controlling interest (54%) in an entity that owns real property (Corporation Y.) The transfer is subject to the real estate transfer tax.

2. When does the transfer or acquisition of a controlling interest occur?

In the case of a corporation that has an interest in real property, the transfer or acquisition of a controlling interest in the corporation occurs when a person, or group of persons acting in concert, transfers or acquires a total of 50% or more of the voting stock in the corporation, or

50% or more of the capital, profits or beneficial interest in the voting stock of the corporation.

In the case of a partnership, association, trust or other entity that has an interest in real property, the transfer or acquisition occurs when a person, or group of persons acting in concert, transfers or acquires a total of 50% or more of the capital, profits or beneficial interest in the partnership, association, trust or other entity.

A transfer or acquisition of a controlling interest is deemed to have occurred when a person, or group of persons acting in concert, transfers or acquires a controlling interest in separate transactions occurring **within a three-year period**. (See questions 3 and 4 for further information on when a controlling interest is transferred or acquired.)

3. When are persons considered to be *acting in concert*?

Persons are *acting in concert* when they have a relationship in which one person influences or controls the actions of another. For example, if a parent corporation and a wholly-owned subsidiary each sell or purchase a 25% interest in an entity, the two corporations will be considered to have acted in concert to transfer or acquire a controlling interest (50%) in the entity.

If the individuals or entities are not related, persons will be treated as acting in concert if the sellers or purchasers have negotiated and will consummate the transfer of ownership interests in a manner that indicates that they are acting as a single entity. If the transfers or acquisitions are completely independent, then the transfers or acquisitions will be treated as separate transfers or acquisitions. The grantors or grantees may be required to provide sworn statements that their transfers or acquisitions are independent of each other. Factors that indicate whether persons are acting in concert include the following:

1. The transfers or acquisitions are closely related in time.
2. There are few grantors or grantees.
3. The contracts of sale contain mutual terms.
4. The grantors or grantees have entered into an agreement in addition to the sales contract binding themselves to a course of action with respect to the transfer or acquisition.

Example 3: Individuals P, Q, R, and S each own a 25% membership interest in a limited liability company (LLC) that owns real property located in New York State. Individuals B, C, D and E, together, negotiate to buy 100% of the LLC interests with B, C, D and E each buying the 25% interests of P, Q, R, and S, respectively. The contracts of B, C, D and E are identical and the purchases are to occur simultaneously. B, C, D, and E have also negotiated an agreement binding them to a course of action with respect to the acquisition of the LLC, and the terms of the agreement also govern their relationship as owners of the LLC. The acquisitions by B, C, D, and E would be treated as a single acquisition that is subject to the real estate transfer tax.

Example 4: Corporation X is a publicly held corporation whose stock is owned by many unrelated shareholders. Corporation X owns an interest in real property located in New York. D, E, F, and G, pursuant to a plan to gain control of X, make a tender offer of $100 per share to the public shareholders to acquire such control. As a result of the tender offer, D, E, F and G acquire, in total, 80% of the voting stock of X with each getting 20%. The acquisition by D, E, F, and G would be treated as a single acquisition that is subject to the real estate transfer tax.

4. When will separate transfers or acquisitions of interests in the same entity be added together?

Transfers or acquisitions of interests in the same corporation, partnership, or other entity occurring **within three years** are added together to determine if a transfer or acquisition of a controlling interest has occurred. However, they will also be added together if it appears that the transfers or acquisitions were intentionally timed to occur more than three years apart as part of a plan to avoid the real estate transfer tax. An example of this would be if a shareholder acquired 40% of the stock in a corporation and simultaneously contracted for the purchase of an additional 20% of the voting stock of the corporation three years and one day later.

Example 5: In December 2005, Corporation A acquires from Corporation X a 10% interest in Partnership B, which owns real property located in New York State. In March 2007, A acquires an additional 25% interest in Partnership B from X. In January 2008, A acquires a 25% interest in Partnership B from Individual Y. Since A acquired a total of 50% or more of the partnership interest in Partnership B within a **three-year period**, A is deemed to have acquired a controlling interest. (See question 10 regarding when the real estate transfer tax return must be filed.)

5. What happens if an additional interest in the same entity is transferred or acquired?

If there is a transfer or acquisition of a controlling interest in an entity on which the real estate transfer tax must be paid and there is a subsequent transfer or acquisition of an additional interest in the same entity within three years, the second transfer or acquisition is also subject to the real estate transfer tax, and returns pertaining to the subsequent transfer or acquisition of a controlling interest must be filed. (See question 10 for information regarding when the real estate transfer tax return must be filed.)

6. What happens if a transaction results in both a transfer and acquisition of a controlling interest?

The tax is only imposed once when there has been both a transfer and acquisition of a controlling interest in the same conveyance.

7. How is the real estate transfer tax computed for this type of conveyance?

Section 1402 of the Tax Law imposes a real estate transfer tax on each conveyance of real property or interest in real property when the consideration exceeds $500. The tax is computed at a rate of two dollars for each $500 of consideration or fractional part thereof.

In the case of the transfer or acquisition of a controlling interest in an entity that has an interest in real property, *consideration* means the fair market value of the real property or interest in real property, based on the percentage of the ownership interest transferred or acquired in the entity.

Fair market value means the amount that a willing buyer would pay a willing seller for real property. It is generally determined by appraisal based upon the value of the real property at the time of the conveyance. It is not *net fair market value*, which is fair market value less the amount of any mortgages on the property.

> ***Example 6:*** Partnership R acquires 60% of the stock of Corporation S. Corporation S owns commercial property located in New York State. The property is currently encumbered by a mortgage with a balance of $200,000. Based on an appraisal, the real property has a fair market value of $1,000,000. The consideration is $600,000 ($1,000,000 x 60%). The real estate transfer tax is $2400 ($600,000 / $500 x $2.00).

8. Does the additional tax imposed by section 1402-a of the Tax Law also apply?

Section 1402-a of the Tax Law applies to the conveyance of *residential* real property or interest therein when the consideration for the entire conveyance is $1 million or more. Residential real property means any premises that may be used in whole or in part as a personal residence, including a one-, two-, or three-family house, an individual condominium unit, and a cooperative apartment unit. The additional tax is imposed at a rate of 1% of the consideration attributable to the residential real property.

When an entity has an interest in residential real property and the consideration is $1 million or more, the additional tax imposed by section 1402-a of the Tax Law applies.

> ***Example 7:*** Individual S owns 100% of the membership interest in a limited liability company (LLC). The only asset owned by the LLC is a single-family home located in Southampton that is encumbered by a mortgage for $600,000. The residence has a fair market value of $1.5 million. S has used the home as a summer residence and also has rented it to others. S transfers his 100% interest in the LLC to Individual T for $900,000. In addition to the real estate transfer tax imposed under section 1402 of the Tax Law, an additional tax of $15,000 ($1.5 million x 100% x 1%) would be due.
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> ***Example 8:*** Two individuals, H and W, each own a 50% membership interest in an LLC. The only asset owned by the LLC is an individual residential condominium unit located in Manhattan. The condominium is not encumbered by any mortgage and has a fair market value of $1.8 million. Individual H transfers his 50% membership interest in the LLC to Individual W. The consideration for real estate transfer tax purposes is $900,000 ($1.8 million x 50%). Since the consideration for the transfer is less than $1 million, the additional tax does not apply. However, the transfer is subject to the real estate transfer tax.

9. Who is liable for the real estate transfer tax and additional tax?

Under section 1404 of the Tax Law, the grantor is liable for payment of the real estate transfer tax. When the grantor fails to timely pay the tax or is exempt from tax, the grantee has the duty to pay the tax.

When the grantee has the duty to pay the tax because the grantor has failed to pay, the tax shall be the joint and several liability of the grantor and the grantee.

Under section 1402-a of the Tax Law, the grantee is liable for payment of the additional tax. If the grantee is exempt from tax, the grantor has the duty to pay the tax.

10. When should the real estate transfer tax return be filed?

For each transfer or acquisition of any interest in an entity with an interest in real property, both the grantor and grantee must file a joint return, Form TP-584, *Combined Real Estate Transfer Tax Return, Credit Line Mortgage Certificate, and Certification of Exemption from the Payment of Estimated Personal Income Tax*, whether or not there is a tax due. Form TP-584 must be filed and the tax due (if any) must be paid within 15 days of the effective date of the transfer or acquisition of a controlling interest in an entity with an interest in real property. Form TP-584 must also be filed within 15 days of the effective date for each subsequent transfer or acquisition of an interest in the same entity occurring within three years.

Example 9: Individual A and Individual B each own 50% of the voting stock of Corporation X. Corporation X owns real property located in New York State.

On October 1, 2005, Individual A sells 30% of the voting stock in Corporation X to Individual C. On April 1, 2008, Individual B sells 25% of the voting stocking in Corporation X to Individual C. After the sale by Individual B, C now owns 55% of the voting stock of Corporation X and thus has acquired a controlling interest in an entity with an interest in New York real property. Since Individual C acquired a 55% interest in Corporation X within a **three-year** period, **both** conveyances are subject to the real estate transfer tax, based on the respective percentage of the ownership interest in the entity that Individual A and Individual B each conveyed.

The consideration is equal to the percentage of interests conveyed by Individual A and Individual B, multiplied by the fair market value of the real property owned by Corporation X at the time of each respective conveyance on October 1, 2005, and April 1, 2008. Form TP-584 must be filed, and any real estate transfer tax due on the conveyances of **both** Individual A and Individual B must be paid, within 15 days of the effective date of the conveyance of Individual B's shares to Individual C (April 16, 2008).

11. Where should I send the real estate transfer tax return?

Send the return, along with documentation pertaining to the transfer or acquisition of a controlling interest, and payment **directly** to the Tax Department at the address shown on the return.

To obtain copies of the forms and instructions, see *Need help?* on the back cover.

NOTE: A Publication is an informational document that addresses a particular topic of interest to taxpayers. Subsequent changes in the law or regulations, judicial decisions, Tax Appeals Tribunal decisions, or changes in Department policies could affect the validity of the information contained in a publication. Publications are updated regularly and are accurate on the date issued.

Notes

New York State Tax Department

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