

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

TSB-A-90(21)C
Corporation Tax
October 12, 1990

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C900608C

On June 8, 1990, a Petition for Advisory Opinion was received from Joseph Barsh and Abe Schwartz, sole shareholders of Barshabe Realty Corp. now dissolved, c/o Patrick W. Hennessey, Esq., 233 Seventh Street, P.O. Box 177, Garden City, New York 11530.

The issues raised by the Petitioners, Joseph Barsh and Abe Schwartz are:

1. Whether Barshabe Realty Corp. (hereinafter "Barshabe"), which was dissolved by proclamation on September 26, 1978, had an obligation to file New York State corporate franchise tax returns or New York City general corporation tax returns or to pay any New York State corporate franchise tax or New York City general corporation tax for any year after calendar year 1978.

2. Whether the lien on real property owned by Barshabe on the date of its dissolution has expired for all years through 1979 pursuant to section 219 of the Tax Law.

3. Whether Petitioners, the former shareholders and officers of Barshabe are now or have ever been personally liable for any New York State corporate franchise taxes.

4. Whether the formal record transfer of real property from Barshabe to Petitioners on July 13, 1988 is tax free to Barshabe and to Petitioners on grounds that the transfer was a formality only with no substantive effect because equitable title to the real property passed to Petitioners on September 26, 1978, the date the corporation was dissolved. In the alternative, was the transfer tax free to all parties because of the existence of a valid election pursuant to section 333 of the Internal Revenue Code.

5. Whether the transfer of equitable title to Petitioners on September 26, 1978 produced taxable income to either Barshabe or the Petitioners since the property's adjusted basis exceeded its fair market value on that date.

6. If there are corporate taxes due, whether the tax plus interest and penalties, if any, can be fixed in amount.

Barshabe was incorporated in New York on February 15, 1972. It was dissolved by Proclamation of the Department of State of the State of New York on September 26, 1978.

On the date of its dissolution, Barshabe held record title to real property known as 5901-5911 Church Avenue, Brooklyn, New York (County of Kings, Section 15, Vol. 2, Block 4685, Lots 39, 37 and 36).

The entire plot was 100 feet by 100 feet. Lot 39, 60 feet by 100 feet, is vacant land and was used by Petitioners as a used car lot. Barshabe did not own or operate the used car business and the stockholders paid no rent to Barshabe. Lots 36 and 37 were each improved by commercial structures which were rented from time to time to unrelated third parties. Barshabe opened a bank account in 1972 and deposited rents therein. This account stayed open for this purpose after dissolution. It had leases in its name on the date of dissolution. The leases were continued and renewed to the same tenants thereafter with Barshabe listed on the lease as landlord. Barshabe continued to hold record title to the real property until July 13, 1988 when the property was conveyed to Petitioners. On that same day Petitioners sold the parcel to an unrelated third party for \$265,000. The initial cost basis of the property to Barshabe was \$47,150. Improvements to the buildings costing \$8,750 were made between 1972 and 1988. Eighty percent of the original basis and all of the cost of the improvements were allocated to the structures.

The following was the annual rental income for these properties:

<u>YEAR</u>	<u>LOT 39</u>	<u>LOT 37</u>	<u>LOT 36</u>	<u>TOTAL</u>
1972	0	\$ 0	\$2,000.00	\$2,000.00
1973	0	0	2,000.00	2,000.00
1974	0	0	2,000.00	2,000.00
1975	0	0	2,000.00	2,000.00
1976	0	0	2,000.00	2,000.00
1977	0	3,000.00	2,000.00	5,000.00
1978	0	3,000.00	2,000.00	5,000.00
1979	0	3,000.00	2,000.00	5,000.00
1980	0	3,000.00	2,000.00	5,000.00
1981	0	3,600.00	2,340.00	5,940.00
1982	0	3,600.00	2,340.00	5,940.00
1983	0	3,600.00	2,340.00	5,940.00
1984	0	3,600.00	2,340.00	5,940.00
1985	0	3,600.00	2,340.00	5,940.00
1986	0	4,800.00	2,340.00	7,140.00
1987	0	3,600.00	0	3,600.00
1988	0	0	0	0

In each year, depreciation, real estate taxes and other expenses exceeded gross rental income, therefore, there was no taxable income in any year.

Barshabe never filed a corporate tax return of any type. Petitioners reported the rental income and expense generated from the real property on their individual income tax returns for the years 1972 through 1987. There was no rental income in 1988.

On September 26, 1978, the date of Barshabe's dissolution, the fair market value of the real property owned by Barshabe was less than its adjusted basis because the property was encumbered by long-term leases which generated no net income and little or no cash flow. In 1988, because of

the explosion in real estate values from 1980 through 1988, the fair market value of the real property (\$265,000) far exceeded its value as rental property even though Lots 37 and 36 were still encumbered by unfavorable leases.

In 1988, Barshabe made a protective election under section 333 Internal Revenue Code which, if Barshabe is deemed still in existence, would make the transfer of the real property from Barshabe to Petitioners completely tax free. The sale of the real property by Petitioners to the third party was reported by Petitioners on their individual tax returns.

Section 209.1 of the Tax Law imposes a franchise tax on domestic and foreign corporations for the privilege of exercising its corporate franchise or of doing business, or of employing capital or of owning or leasing property in New York State in a corporate or organized capacity or of maintaining an office in New York State.

Section 2-3.1 of the Business Corporation Franchise Tax Regulations (hereinafter "Regulations") provides that every domestic corporation is required to pay a tax measured by entire net income (or other applicable basis) up to the date on which it ceases to possess a franchise.

Section 209.3 of the Tax Law provides that a dissolved corporation which continues to conduct business shall be subject to tax under Article 9-A. Section 1-2.2 of the Regulations provides further that where the activities of a dissolved corporation are limited to the liquidation of its business and affairs, the disposition of its assets (other than in the regular course of business) and the distribution of the proceeds, the dissolved corporation is not subject to tax under Article 9-A.

Therefore, a dissolved corporation that is merely a record title holder of real property located in New York State as nominee for the benefit of others, and is otherwise inactive, is not conducting business in New York State as contemplated by section 209.3 of the Tax Law. Eugene Strasser, Adv Op St Comm T & F, September 1, 1988. TSB-A-88(18)C and Babson Bros. Co. of New York Inc., Adv Op St Comm T & F, September 1, 1988, TSB-A-88(19)C.

Federal courts have defined a complete liquidation as the operation of winding up the corporation's affairs by settling its debts, realizing upon and distributing its assets. (Wilcox, 43 BTA 931, affd 137 F2d 136; Hellman v Helvering, 68 F2d 763.) However, if normal corporate operations are continued, not even the cancellation of the corporate charter for failure to pay the annual state franchise tax will be sufficient to prove liquidation. (Zimmerman, 31 BTA 754)

Herein, Barshabe opened a bank account in 1972 and deposited rents therein. This account was maintained and rents continued to be deposited into it after dissolution on September 26, 1978. In addition, after dissolution, leases continued to be renewed with Barshabe listed on such leases as the landlord. Barshabe continued to hold record title to the real property until July 13, 1988 when the property was conveyed to Petitioners. Consequently, Barshabe's activities after dissolution were the same as before dissolution.

Accordingly, Barshabe continued to do business after it was dissolved by proclamation on September 26, 1978 because its activities exceeded the mere holding of record title of real property and the liquidating of its business and affairs.

Therefore, Barshabe is subject to the franchise tax imposed under Article 9-A of the Tax Law for all taxable years from February 15, 1972, the date of-incorporation, to July 13, 1988 when Barshabe was liquidated and the real property was transferred to Petitioners.

Pursuant to section 1092(j) of the Tax Law, the tax imposed under Article 9-A of the Tax Law becomes a lien on the date the report is required to be filed. Section 219 of the Tax Law provides that, in certain cases, the lien of such tax expires after 10 years.

Section 7-4.2 of the Regulations which relates to section 1092(j) and section 219 of the Tax Law provides that:

(a) The tax (including additions to tax, penalties and interest) imposed by article g-A becomes a lien from the date on which the report is required to be filed (without regard to any extension of time for filing such report), except that the tax becomes a lien no later than the date the taxpayer ceases to be subject to the tax imposed by article 9-A or the date the taxpayer ceases to exercise its franchise, or do business or employ capital, or own or lease property in this State in a corporate or organized capacity or maintain an office.

(b) Each such tax is a lien and binding on the real and personal property of the taxpayer, or of a transferee liable to pay the tax, until the tax is paid in full, subject to the following exceptions:

(1) The lien of such taxes after the expiration of 10 years from the date they became due and payable is no longer a lien as to the following:

(i) owners of real estate who would be purchasers in good faith but for such taxes, additions to tax, penalties or interest; and

(ii) mortgagees of real estate who would be holders in good faith but for such taxes, additions to tax, penalties or interest.

These limitations do not apply to any transfer from a corporation subject to tax to a person or corporation subject to tax with intent to avoid payment of any taxes, or where with like intent the transfer is made to a grantee corporation subject to tax, or any subsequent grantee corporation subject to tax, controlled by such grantor or which has any community of interest with it, either through stock ownership or otherwise

Section 1093(a) of the Tax Law provides that:

The liability, at law or in equity, of a transferee of property of a taxpayer for any tax, additions to tax, penalty or interest due the [tax commissioner]'under this article or under article ... nine-a ... shall be assessed, paid, and collected in the Same manner and subject to the same provisions and limitations as in the case of the tax to which the liability relates, except that the period of limitations for assessment against the transferee shall be extended by one year for each successive transfer, in order, from the original taxpayer to the transferee involved, but not by more than three years in the aggregate. The term transferee includes, in case of successive transfers, donee, heir, legatee, devisee, distributee, and successor by merger, consolidation or other reorganization.

The definition of transferee includes the shareholder distributee of property from a dissolved corporation. Costello v New York State Department of Taxation and Finance 129 Misc 2d 285, affmd 125 AD2d 775. Herein, Petitioners became transferees on July 13, 1988, pursuant to section 1093 of the Tax Law, and as transferees, Petitioners are therefore liable for the taxes imposed on Barshabe.

Accordingly, the 10 year expiration of a tax lien does not apply to Barshabe and Petitioners. The 10 year statute of limitations contained in section 219, would only apply to-a purchaser in good faith of the real estate that is subject to the lien. While Petitioners are transferees, they are not purchasers in good faith.

The formal record transfer of real property from Barshabe to Petitioners on July 13, 1988 was more than a formality with no substantive effect. The transfer constituted the liquidation of Barshabe. If a valid federal election was made pursuant to section 333 of the Internal Revenue Code, the transfer of the real property would be a tax free transfer for New York purposes. The starting point for computing entire net income under Article 9-A of the Tax Law is federal taxable income and the starting point for computing New York taxable income for an individual under Article 22 of the Tax Law is federal adjusted gross income. Therefore, whatever treatment was accorded the liquidation of Barshabe for federal income tax purposes would apply for New York purposes. If, for any taxable year, a federal income tax return is not filed for Barshabe, the starting point for purposes of Article 9-A, is federal taxable income computed as if Barshabe had properly filed a federal income tax return.

Section 7-4.3 of the Regulations, which relates to section 1092(j)(2) of the Tax Law, provides that:

The [Tax Commissioner] may, upon application made to it on form TC-13 and the payment of a fee of \$50 by certified check, release any real property from the lien of any tax due or to become due under article 9-A, provided that payment is made to the [Tax Commissioner] of such sum as it deems adequate consideration for such release, or deposit be made of such security or such bond to be filed as the [Tax Commissioner] deems proper to secure payment of such tax. The application for such release must be accompanied by two copies of an accurate description

of the property to be released, together with such other information as the [Tax Commissioner] may require. The release of lien may be recorded in the office in which conveyances of real estate are entitled to be recorded.

It is not within the scope of an advisory opinion to fix in amount the tax, interest and penalties that is owed by Barshabe and or Petitioners.

Finally, section 171, paragraph twenty-fourth of the Tax Law provides that the Commissioner of Taxation and Finance shall "render advisory opinions with respect to taxes administered by such commissioner "The New York City General Corporation Tax is not among the taxes administered by the Commissioner of Taxation and Finance. Accordingly, the Commissioner is not authorized to issue an advisory opinion with respect to such tax and no opinion is rendered herein with respect to such tax.

DATED: October 12, 1990

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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