

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

TSB-A-92(2)-R
Real Property
Transfer Gains Tax
Real Estate Transfer Tax
June 22, 1992

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M920324A

On March 24, 1992, a Petition for Advisory Opinion was received from Centennial Estates, Inc., 36 Richmond Terrace, Staten Island, NY 10301.

The issue raised by Petitioner, Centennial Estates, Inc., is when will a shareholder of Petitioner be deemed to have acquired a controlling interest for purposes of the Real Property Transfer Gains Tax (hereinafter the "gains tax"), Real Estate Transfer Tax (the "transfer tax") and Corporation Franchise Tax.

On November 13, 1981 William W. Mizrahi, acquired 44% of the outstanding stock of Petitioner. In 1992, Mr. Mizrahi proposes to acquire an additional 49% of the outstanding stock. Mr. Mizrahi proposes to acquire the remaining 7% of the outstanding stock at such time in the future when there will be no tax liability for the aforementioned taxes.

Section 590.44 of the Gains Tax Regulations provides, in part, as follows:

(a) Question: How is the phrase "acquisition of a controlling interest in an entity with an interest in real property" applied?

Answer: The term controlling interest is defined in section 1440(2) of the Tax Law to mean:

"(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."

Thus, for purposes of the gains tax, in the case of a corporation which has an interest in real property, the acquisition of a controlling interest in the corporation occurs when a person or group of persons, acting in concert, acquires a total of 50 percent or more of the voting stock in such corporation. In the case of a partnership, association, trust or other entity, the acquisition occurs when a person or group of persons, acting in concert, acquires a total of 50 percent or more of the capital, profits or beneficial interest in such entity. Because the statute looks to the acquisition of the controlling interest, it is the act of the transferee which triggers the tax. (emphasis added)

Section 590.45 of the Gains Tax Regulations provides, in pertinent part, as follows:

(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 interest 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. (emphasis added)

Section 1448 of the Tax Law provides that where the Commissioner finds that the transfer of any interest in real property or an interest therein has been so formulated that the primary purpose of such formulation is the avoidance or evasion of the gains tax, rather than an adequate business purpose, the Commissioner shall treat such transfer as subject to tax.

Section 575.6 of the Transfer Tax Regulations provides, in part, as follows:

575.6 Controlling interest. (Tax Law, §1401)(a) In the case of a corporation which has an interest in real property, the transfer or acquisition of a controlling interest in the corporation, as defined in section 575.1(b) of this Part, 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 such corporation. In the case of a partnership, association, trust or other entity having 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 such entity.

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(c) For purposes of determining whether controlling interest is transferred or acquired, only transfers or acquisitions of interests occurring on or after July 1, 1989 are added together. A transfer or acquisition made on or after July 1, 1989 does not

have to be included, for purposes of determining whether a controlling interest is transferred or acquired, if the transfer or acquisition is made pursuant to a binding written contract which was entered into on or before February 16, 1989, the date of which is confirmed by independent evidence such as the recording of a contract, payment of a deposit or other facts and circumstances as determined by the Commissioner. (See section 575.5 of this Part.)

(d) Where there is a transfer or acquisition of an interest in an entity that has an interest in real property, on or after July 1, 1989, and subsequently there is a transfer or acquisition of an additional interest or interests in the same entity, the transfers or acquisitions will be added together to determine if a transfer or acquisition of a controlling interest has occurred. Where there is a transfer or acquisition of a controlling interest in an entity on or after July 1, 1989, and the real estate transfer tax is paid on that transfer or acquisition and there is a subsequent transfer or acquisition of an additional interest in the same entity, it is considered that a second transfer or acquisition of a controlling interest has occurred which is subject to the real estate transfer tax. No transfer or acquisition of an interest in an entity that has an interest in real property will be added to another transfer or acquisition of an interest in the same entity if they occur more than three years apart, unless the transfers or acquisitions were so timed 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 20% in three years and one day. (emphasis added)

Accordingly, for purposes of the gains tax pursuant to Sections 590.44 and 590.45 of the Gains Tax Regulations a controlling interest is deemed to be acquired where 50% or more of the voting stock of a corporation with an interest in real property is acquired within a three year period. For purposes of the transfer tax, pursuant to Section 575.6 of the Transfer Tax Regulations a controlling interest is acquired when a person acquires 50% or more of the voting stock of a corporation with an interest in real property within a three year period.

In the instant case, pursuant to Section 590.45(c) of the Gains Tax Regulations Mr. Mizrahi's acquisition of 44% of the outstanding stock of Petitioner on November 13, 1981 would not be subject to gains tax since such interest was acquired on or before March 28, 1983, the effective date of the gains tax. Therefore, if Mr. Mizrahi acquires 49% of the outstanding stock in 1992, such acquisition will not be deemed to be the acquisition of a controlling interest since such acquisition is not required to be aggregated with his initial acquisition. Pursuant to Section 590.45(d) of the Gains Tax Regulations if Mr. Mizrahi acquires the remaining 7% of the outstanding stock after three years, such acquisition will not result in the acquisition of a controlling interest, unless the acquisitions were so timed as part of a plan to avoid the gains tax.

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June 22, 1992

As for the transfer tax, pursuant to Section 575.6 of the Transfer Tax Regulations Mr. Mizrahi's acquisition of 44% of the outstanding stock of Petitioner on November 13, 1981 would not be subject to the transfer tax since such interest was acquired on or before July 1, 1989, the effective date of Chapter 61 of the Laws of 1989 which amended the transfer tax to include entity transfers. Thus, if Mr. Mizrahi acquires 49% of the outstanding stock in 1992, such acquisition will not result in the acquisition of a controlling interest since such acquisition is not required to be aggregated with his initial acquisition. If Mr. Mizrahi acquires the remaining 7% of the outstanding stock after three years, such acquisition will not be deemed to be the acquisition of a controlling interest, unless the acquisitions were so timed as part of a plan to avoid the transfer tax.

It is noted that the proposed increase in percentage of stock ownership by a shareholder would not in and of itself create any Corporate Franchise Tax liability.

DATED: June 22, 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.