

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

TSB-A-89 (1) R  
Real Property  
Transfer Gains Tax  
January 13, 1989

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M880916A

On September 16, 1988, a Petition of Advisory Opinion was received on behalf of Goldlex Holding Company located at 640 Fifth Avenue, New York, New York 10019.

The issue raised concerns the application of the Real Property Transfer Gains Tax imposed by Article 31-B of the Tax Law (hereinafter the "Gains Tax") to the liquidating distribution of property owned by Petitioner, in particular the Great South Bay Company Properties, pursuant to contracts entered into prior to March 28, 1983, the effective date of the Gains Tax Statute.

The facts as presented are that Petitioner is a New York partnership. The holders of partnership interests in Petitioner are DiLorenzo Properties Company, as successor to the Estate of Alexander DiLorenzo, Jr. which, in turn, was the successor to Alexander DiLorenzo, 3r. (collectively referred to as the "AD Estate"), the Estate of Sol Goldman, as successor to Sol Goldman (hereinafter referred to as "Goldman"), and Irving Goldman ("Irving").

Petitioner was created pursuant to a Joint Venture Agreement entered into on September 19, 1974 between Alexander DiLorenzo, Jr. ("DiLorenzo") and Goldman. Such Joint Venture Agreement (and a Nominee Agreement entered into at the same time) provided that DiLorenzo and Goldman held as tenants-in-common, and/or through other entities, interests in various properties and that upon the execution of these agreements, they would be deemed to hold these properties as nominees on behalf of Petitioner.

Pursuant to the Joint Venture Agreement, DiLorenzo and Goldman owned collectively 75% (each of the joint venturer's ownership being 37½% of the whole) of the interest in Great South Bay Company Properties. The beneficial owner of the remaining 25% was Irving.

It was Irving's contention that he was partner in Petitioner, and should be held to have a 33 ⅓% interest in the capital of the Great South Bay division. Irving's basis for this contention is the allegation that during 1976-1978, monies from the Great South Bay division were diverted to subsidize the properties owned in the other divisions of Petitioner, of which he holds an interest. Also, it is stated that Irving was consistently reported as having an interest in Petitioner on Petitioner's Federal and state tax returns. Irving's partner status was contested by AD Estate.

On September 5, 1975, DiLorenzo died. Accordingly, AD Estate became the successor to his property interest, and sought to liquidate Petitioner.

An agreement dated June 30, 1977 was entered between the AD Estate, Goldman and Irving to provide that all of the assets of Great South Bay were to be distributed by July 30, 1977. The agreement stated:

It is agreed between the parties hereto that Great South Bay shall be divided forthwith and that the distribution to Irving Goldman shall not be hindered by any other contractual arrangements between Sol Goldman, for himself, and the Estate of Alex DiLorenzo, Jr. Said distribution shall be completed by no later than July 30, 1977.

Thus, it is contended that it is clear that the partners executed agreements prior to March 28, 1983 which required that Petitioner be liquidated.

Moreover, it is contended that since the agreements did not specify the terms of liquidation, it must be inferred that the agreements required that the properties of Petitioner be distributed in accordance with the partners' relative interests in each division as set forth in the Joint Venture and Nominee Agreements and as consistently reported for Federal and State income tax purposes (i.e., for the Great South Bay division, 37.5% for the AD Estate, 37.5% for Goldman, and 25% for Irving).

Goldman refused to distribute the remaining assets of Petitioner in compliance with the Split Agreements and the June 30, 1977 Agreement.

In 1984, the AD Estate commenced an action in the New York Supreme Court, New York County, against Petitioner, Goldman, Irving and various of Petitioner's divisions and nominees. The complaint alleged that the liquidation of Petitioner (including its Great South Bay division) was required by contracts (entered into before March 28, 1983), and that the defendants had breached such contracts.

In July 1988, after various litigation and appeals, and the death of Goldman, the parties agreed to a draft of a proposed Liquidation and Settlement Agreement. In the settlement, Petitioner will distribute to each of Goldman, Irving and the AD Estate, one group of Petitioner's remaining properties in the Great South Bay division. Each group represents approximately 33 1/3% in value of the remaining net assets of Petitioner. The AD Estate, Goldman and Irving will each draw one of the groups of properties by lot (as the other divisions of Petitioner were divided under the Split Agreements).

Thus, it is contended that the liquidation of Petitioner in accordance with the proposed settlement agreement would be exempt from the Gains Tax, because the liquidating transfers are being made pursuant to written contracts entered into before March 28, 1983.

Section 1443.6 of the Tax Law provides, in part, that a Gains Tax shall not be imposed:

Where a transfer of real property occurring after the effective date of this article is pursuant to a written contract entered into on or before the effective date of this article, provided that the date of execution of such contract is confirmed by independent evidence, such as

recording of the contract, payment of a deposit or other facts and circumstances as determined by the tax commission.

Gains Tax Regulation 590.20 provides, in part, that:

The intent of the Legislature, in our judgment, was to exempt those contracts pursuant to which the parties, through some evidence external and in addition to the contracts, committed themselves to the transaction. The statute leaves discretion to the State Tax Commission to determine what sort of [independent] evidence is acceptable. However, that discretion is to be guided by the two examples set forth in the law, namely the payment of a deposit or the recording of the contract.

Each of these statutory examples conveys a sense of binding action by the parties, above and beyond the signing of a contract. The exercise of discretion on the part of the department in this area is to be guided in a similar way. (emphasis added).

Also, Gains Tax Regulation 590.21 provides, in part, that:

(a) Question: If a contract entered into on or before March 28, 1983 is amended after such date, will the contract continue to be exempt by reason of section 1443(6) of the Tax Law?

Answer: Yes. As long as the amendment is of a nonsubstantial nature. The determination of what constitutes a nonsubstantial change will be made on a case-by-case basis. However, any change in the amount of consideration for the real property automatically results in a transfer which is not pursuant to a written contract entered into on or before March 28, 1983, and thus such transfer is taxable. (emphasis added).

Accordingly, based on the foregoing, the agreement entered into on June 30, 1977 for the distribution of the Great South Bay does not support a claim of exemption as a "grand fathered contract". While the agreement provides that the Great South Bay is to be distributed to Irving, Goldman and the AD Estate, such agreement fails to include important terms and conditions which the Petitioner claims are "inferred" or "implicit" through other agreements. Thus, the agreement fails to show that the parties committed themselves to the transaction and fails to convey a sense of binding action by the parties.

Moreover, the fact that the parties failed to record the agreement shows that the parties were not binding themselves to the agreement. The nature of both examples that are stated in the statute (i.e. the recording of the contract or payment of a deposit) indicate that the statute looks to evidence

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which manifests the parties' intention to be firmly bound by the contract at a date on or before the effective date of the tax through some action other than the mere signing of documents.

Further, it is clear that the parties made substantial changes to the agreement after the effective date of the gains tax. The agreement set forth that the distribution shall be completed by no later than July 30, 1977. This was not done. Rather, Goldman refused to distribute the assets in accordance with the agreement. Thus, in 1984, litigation was commenced to arrive at an acceptable settlement reached in 1988, which settlement established that Irving, Goldman and AD Estate are each to receive individually a 33  $\frac{1}{3}$ % value of the assets in the distribution rather the percentages said to be inferred in the June 30, 1977 agreement by the joint venture and nominee agreements. The joint venture and nominee agreement provided that DiLorenzo (succeeded by AD Estate) and Goldman each held a 37.5% interests in Great South Bay Company properties. Irving is not a party to the joint venture or nominee agreement. Such a change in the interest to be received by the parties is a substantial change in nature which precludes qualification as a grand fathered contract.

Therefore, the distribution of the Great South Bay Company Properties by Petitioner is subject to the Gains Tax.

DATED: January 13, 1989

s/FRANK J. PUCCIA  
Director  
Technical Services

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