

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

TSB-A-91 (11) R  
Real Property  
Transfer Gains Tax  
December 31, 1991

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M 911002B

On October 2, 1991, a Petition for Advisory Opinion was received from Martin J. Walzer, Esq., 230 Park Avenue, New York, New York 10169.

The issue raised by Petitioner, Martin J. Walzer, Esq. is whether a transfer by Petitioner's client of her partnership interest will be aggregated with transfers by an unrelated transferor in determining whether a controlling interest is transferred for Real Property Transfer Gains Tax purposes (hereinafter the "gains tax").

A New York general partnership ("P") owns New York City real estate which is encumbered by a substantial mortgage. Record title to the real property is in the name of Holding Corp., but beneficial interest is, and has been, held at all times by the partners of the partnership.

The partnership comprises the following partners holding the following percentages in capital, profits and beneficial interest:

Holding corp. ("Corp")	40%
Petitioner's client	40%
Unrelated individual, but related to Corp.	10%
Unrelated individual, but related to Corp.	<u>10%</u>
	100%

Petitioner's client is a woman over the age of 80. Petitioner's client intends to transfer all her interest in P to an amendable, revocable living trust under which she and her two daughters will be the trustees. Petitioner's client has already transferred substantially all her other assets to the trust. The trust provides that all of the income of the trust will be payable to Petitioner's client during her lifetime and on her death, the property will be distributed to her issue. Since the trust is amendable and revocable and provides for all the income to go to Petitioner's client, there are no gift tax consequences and, in fact, for federal income tax purposes, since Petitioner's client is a trustee, the trust will file income tax returns under the same tax ID number as Petitioner's client, i.e., Petitioner's clients', social security number.

The sole shareholder of Corp., S, recently died and his estate now owns all of the stock in Corp. S's estate has advised Petitioner's client that it may be necessary for S's estate to sell the estate's interest in Corp., and if there is no sale, the interest will be distributed in accordance with

S's will. This would probably occur within three years of the transfer to be made by Petitioner's client.

S and Petitioner's client are not related. Moreover, Petitioner's client has no interest in Corp. and Corp. and Petitioner's client have each held their 40% interest in P for a substantial number of years. Neither Petitioner's client nor her trust will purchase S's interest in Corp.

Section 1440.7 of the Tax Law defines the term "transfer of real property", in part, to mean the transfer or acquisition of a controlling interest in any entity with an interest in real property.

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 if 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. (emphasis added)

Section 590.44 of the Gains Tax Regulations provides, in pertinent 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: . . . for purposes of the gains tax . . . In the case of a partnership, association, trust or other entity, the acquisition occurs when a group of persons, acting in concert, acquires a total of 50 percent or more of the capital, profits or beneficial interest in such entity. (emphasis added)

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

(b) Question: When is a group of persons acting in concert?

Answer: When the various purchasers have a relationship such that one purchaser influences or controls the actions of another. For example, if a parent and a wholly owned subsidiary each purchase a 25 percent interest in an entity, the two corporations will be considered to have acted in concert to acquire a controlling interest (i.e.. 50 percent) in the entity.

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Where the individuals or entities are not commonly controlled or owned persons will be treated as acting, in concert only when the unity with which the purchasers have negotiated and will consummate the transfer of ownership interests supports a finding that they are acting as a single entity. If the acquisitions are completely independent, each purchaser buying without regard to the identity of other purchasers, then the acquisition will be treated as separate acquisitions. The transferees must provide affidavits swearing that they acquisitions are independent of each other.

Factors that will indicate whether persons are acting in concert include the following:

- (1) The acquisitions are closely related in time.
- (2) There are few purchasers.
- (3) The contracts to purchase contain mutual terms.
- (4) The purchasers have entered into an agreement in addition to the purchase contract binding themselves to a course of action with respect to the acquisition. (emphasis added)

Although the above regulation only sets forth the criteria of "acting in concert" for transferees, the criteria concerning "acting in concert" also applies to transferors. (See Section 575.6 of the Transfer Tax Regulations for similar treatment for transfer tax purposes.)

Accordingly, pursuant to Sections 590.44 and 590.45 of the Gains Tax Regulations, since Petitioner's client will transfer only a 40% interest in P and Petitioner's client and S are unrelated, Petitioner's client will not be deemed to have transferred or acted in concert to transfer a controlling interest pursuant to Sections 1440.2 and 1440.7 of the Tax Law. In addition, since the trust will only acquire a 40% in P from Petitioner's client and neither Petitioner's client nor the trust will acquire S's interest, pursuant to Sections 1440.2 and 1440.7 of the Tax Law the trust will not be deemed to have acquired a controlling interest.

DATED: December 31, 1991

s/PAUL B. COBURN  
Deputy Director  
Taxpayer Services Division

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