

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

TSB-A-93 (9)R  
Real Property  
Transfer Gains Tax  
June 15, 1993

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M930304A

On March 4, 1993, a Petition for Advisory Opinion was received from Avis, Inc. and Avis, Inc. Employee Stock Ownership Plan, 900 Old Country Road, Garden City, New York 11530.

The issue raised by Petitioner, Avis, Inc., and Petitioner, Avis, Inc. Employee Stock Ownership Plan, is whether the future sale of stock of Petitioner, Avis, Inc., by Petitioner, Avis, Inc. Employee Stock Ownership Plan, is subject to the Real Property Transfer Gains Tax (hereinafter the "gains tax").

On April 17, 1986, BCI Holdings, Inc. acquired 100% of the stock of Beatrice Companies, Inc. ("Beatrice"). Immediately afterward, BCI Holdings, Inc. changed its name to the Beatrice Company. At that time, Beatrice owned 79% of the stock of Petitioner, Avis, Inc.

On July 22, 1986, Beatrice transferred its interest in the stock of Petitioner, Avis, Inc., to Wesray Rent-A-Car, Inc. ("Wesray"). (The July 22, 1986 transfer by Beatrice shall be referred to herein as the "Beatrice Transfer".) At the same time Wesray purchased the remaining 21% of the stock of Petitioner, Avis, Inc., from its owner, a qualified pension plan. Wesray was at that time a wholly-owned subsidiary of Siva Holdings, Inc. which simultaneously changed its name to Avis Capital Holdings, Inc. ("Holdings"). On that same day Wesray merged into Petitioner, Avis, Inc.

On September 4, 1987, Petitioner, Avis, Inc., merged into Holdings which immediately changed its name to that of Petitioner, Avis, Inc.

On September 25, 1987, the shareholders of Petitioner, Avis, Inc., sold 100% of the stock of Petitioner, Avis, Inc., to Petitioner, Avis, Inc. Employee Stock Ownership Plan, (hereinafter "Avis, Inc. ESOP"), which had been created for the benefit of Petitioner, Avis, Inc., employees. (The September 25, 1987 transfer will be referred herein as the "Avis Transfer"). Petitioner, Avis, Inc. ESOP, is an "employee benefit plan" and an "employee pension benefit plan" as defined in 29 U.S.C. Sections 1002(3) and 1002(2)(A) of the Employee Retirement Income Security Act. Because some shares of Petitioner, Avis, Inc., have been transferred to employees upon their separation from company, Petitioner, Avis, Inc., ESOP, no longer owns 100% of the stock of Petitioner, Avis, Inc. The number of shares believed transferred constitutes less than 10% of the stock of Petitioner, Avis, Inc.

At the time of both the Beatrice Transfer and the Avis Transfer, Petitioner, Avis, Inc., had certain leasehold interests that qualified as real property for purposes of the gains tax.

It is to be assumed that Petitioner, Avis, Inc. ESOP, will transfer all its stock in Petitioner, Avis, Inc., on January 1, 1998. The stock ownership transferred is assumed to be a controlling

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interest in Petitioner, Avis, Inc. The consideration allocable to the real estate interest that is attributable to Petitioner, Avis, Inc. ESOP, stock interest in Petitioner, Avis, Inc., is assumed to be \$100 million dollars.

Pursuant to Sections 1441 and 1443.1 of the Tax Law and Section 590.1 of the Gains Tax Regulations the gains tax is a ten percent tax on the gain derived from the transfer of real property, which includes the acquisition or transfer of a controlling interest in any entity with an interest in real property, where the property is located in New York State and where the consideration for the transfer is one million dollars or more.

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 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.

29 U.S.C. Section 1144(a) of the Employee Retirement Income Security Act provides that the provisions of ERISA shall supersede "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan."

In Morgan Guaranty Trust Co. v. Tax Appeals Tribunal, 80 N.Y.2d 44 (1992), the New York Court of Appeals held that the gains tax could not be applied to a sale of real estate by a qualified employee benefit plan that is subject to the provisions of the Employee Retirement Income Security Act, 29 U.S.C. Section 1001 et seq. ("ERISA"). In that case, Morgan Guaranty Trust Company, as trustee under the American Motors Corporation Union Retirement Income Plan, had sued for a refund of gains tax paid on a sale of real property on the grounds that imposition of the tax is preempted by ERISA. The Court held that the gains tax should be viewed as "relating to" an employee benefit plan because of the recordkeeping and reporting burdens it would necessarily have on the plan's investment strategy. Thus, the Court noted that "an administrator taking cost of the New York gains tax into account may be required to retain an asset that would otherwise have been liquidated." In addition, the Court held that preemption of the gains tax would be consistent with the favorable tax treatment afforded to employee benefit plans under the Internal Revenue Code.

Accordingly, the transfer of a controlling interest, as defined in Section 1440.2 of the Tax Law, by Petitioner, Avis, Inc. ESOP, of its stock in Petitioner, Avis, Inc., for a consideration of \$100 million dollars will fall within the ambit of the gains tax pursuant to Sections 1441 and 1443.1 of the Tax Law and Section 590.1 of the Gains Tax Regulations. However, pursuant to 29 U.S.C. Section 1144(a) of ERISA and Morgan Guaranty Trust Co. v. Tax Appeals Tribunal, *supra*, as long

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as Petitioner, Avis, Inc. ESOP, is subject to the provisions of ERISA, its sales of stock in Petitioner, Avis, Inc., will not be subject to the gains tax.

DATED: June 15, 1993

/s/  
PAUL B. COBURN  
Deputy Director  
Taxpayer Services Division

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