

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

TSB-A-97(2)R
Real Estate
Transfer Tax

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO.M961223B

On December 23, 1996, the Department of Taxation and Finance received a Petition for Advisory Opinion from Coopers & Lybrand, LLP, One Canterbury Green, POB 10108, Stamford, Ct. 06904-2108.

The issue raised by Petitioner, Coopers & Lybrand, LLP is whether its client (Company X), is considered to be primarily and jointly, with its shareholders, liable for payment of the New York State Real Estate Transfer Tax (the transfer tax) imposed by Section 1402 of Article 31 of the Tax Law upon the transfer of a controlling interest in Company X by its shareholders pursuant to a proposed plan of reorganization.

Petitioner submits the following facts as the basis for this Advisory Opinion. Company X is a widely held and publicly traded C corporation that owns interests in real property located in New York State. Pursuant to a proposed plan of reorganization, Company X will be acquired in a reverse triangular merger by Company Y, also a widely held and publicly traded C corporation. It is anticipated that Company X will thereafter exist as a wholly owned subsidiary of Company Y. Under terms of the current proposal, Company Y will form a new wholly owned subsidiary, Newco. The Company X shareholders will exchange their shares of Company X stock for Company Y stock in connection with the merger of Newco into Company X. The transaction will be a tax free reorganization within the meaning of Section 368(a) of the Internal Revenue Code of 1986, as amended. In exchange for their stock, the shareholders of Company X will receive stock of Company Y constituting less than fifty percent of the total voting power and value of Company Y.

Analysis

Section 1402 of the Tax Law imposes the transfer tax on each conveyance of real property or interest therein when the consideration exceeds five hundred dollars. "Conveyance" is defined in Section 1401(e) of the Tax Law. Included in the definition of conveyance is the transfer or transfers of any interest in real property by any method, including the transfer or acquisition of a controlling interest in any entity with an interest in real property.

Section 1401(b) of the Tax Law defines the term "controlling interest". This section provides, in the case of a corporation, that controlling interest means either fifty percent or more of the total combined voting power of all classes of stock or fifty percent or more of the capital, profits or beneficial interest in such voting stock.

Section 1404(a) of the Tax Law provides that the grantor shall be liable for the payment of the transfer tax. It further provides that if the grantor fails to pay the tax within the prescribed time, or if the grantor is exempt from

tax, then the grantee shall have the duty to pay the tax. Also, this section sets forth that where the grantee has the duty to pay the tax because the grantor has failed to pay, the grantor and grantee are jointly and severally liable for the payment of the tax.

Section 1401(g) of the Tax Law provides that the term "grantor" means the person making the conveyance of real property or interest therein. Where the conveyance consists of a transfer or an acquisition of a controlling interest in an entity with an interest in real property, "grantor" means the entity with an interest in real property or a shareholder or partner transferring stock or partnership interest.

Conclusion

The proposed plan of reorganization will result in an acquisition of a controlling interest in Company X, an entity with an interest in real property, by Company Y. Therefore, it is a conveyance subject to transfer tax pursuant to section 1401(e) of the Tax Law.

As provided in section 1401(g) of the Tax Law the grantor of this conveyance is deemed to be both Company X and the Company X shareholders transferring their stock in the transaction. The grantee of this conveyance is Company Y. Therefore, pursuant to section 1404(a) of the Tax Law, Company X and its shareholders are equally liable for the entire transfer tax due as a result of the conveyance. If the grantor(s) of the conveyance fail to pay the tax, then Company Y, as grantee, will have the duty to pay the tax. The tax liability then will become the joint and several liability of Company X, the transferring shareholders of Company X and Company Y.

DATED: February 21, 1997

John W. Bartlett
Deputy Director
Technical Services Bureau

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