

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

TSB-A-97(8)R
Real Estate Transfer Tax

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M971020C

On October 20, 1997, the Department of Taxation and Finance received a Petition for Advisory Opinion from Morgan Guaranty Trust Company of New York, as Trustee, 522 Fifth Avenue, New York, N.Y. 10036.

The issue raised by Petitioner, Morgan Guaranty Trust, as Trustee, is whether the Real Estate Transfer Tax imposed by Article 31 of the Tax Law (the "transfer tax") would be imposed on the transfer of interests in real property by a trust fund to a newly created trust fund under the following circumstances.

The Commingled Pension Trust Fund (Special Situations Investments-Real Estate) (the Commingled Fund) is a trust fund created by Petitioner, with Petitioner as trustee, for the purpose of permitting pooled investments in real estate by certain tax-exempt entities. For federal income tax purposes, the Commingled Fund is a tax-exempt trust under Section 501(a) of the Internal Revenue Code of 1986, as amended (the "Code"), which is treated as a "pool fund" and "group trust" as described in Revenue Ruling 81-100, 1981-1 C.B. 326. Accordingly, participation in the Commingled Fund is limited to qualified pension plans and governmental plans, which are also exempt from federal income tax under Section 501(a) of the Code. Each participant in the Commingled Fund owns a designated number of units in the Commingled Fund. Petitioner has no ownership interest in the Commingled Fund, although, as trustee, it holds bare legal title to the assets of the Commingled Fund (which generally consist of stock or partnership interests in entities holding the underlying real estate investments). The entire economic and beneficial interest in these assets is owned by the participants through their ownership of the units in the Commingled Fund.

The Commingled Fund was formed initially for the purpose of investing in certain special situation real estate investments, i.e., investments in certain start-up or under performing properties (the "unstabilized properties"). Some of these investments have now reached stabilized performance levels (the "stabilized properties") and it is in the best interest of the Commingled Fund's participants to separate the stabilized properties from the unstabilized properties. Accordingly, the decision has been made to create a new fund (the "New Fund" which would be identical to the Commingled Fund in every respect, including its tax exempt status, other than the nature of its property investments. Petitioner would similarly act as trustee of the New Fund and hold bare legal title to its assets. The Commingled Fund will then transfer all of its unstabilized properties to the New Fund and will retain the stabilized properties.

Participants in the Commingled Fund would be assigned units in the New Fund which would be pro rata to their respective units in the Commingled Fund. Thus, at the time of the transfer, there would be a complete identity of ownership between the Commingled Fund and the New Fund. However, participants in the fund will have the right to have their units in one or both funds redeemed and to purchase additional units in one or the other fund. Accordingly, it is expected that shortly after the transfer of the properties, the ownership of the two funds will no longer be identical. (This opinion addresses only the conveyances that occur in connection with the creation of the New Fund and does not apply to any acquisition or transfer of a controlling interest which may result from any subsequent changes in the ownership interests of the Commingled Fund and the New Fund).

Among the properties currently held by the Commingled Fund are interests in two corporations which hold property located in New York State. The Commingled Fund owns 100% of the stock of one of the corporations and a 79% non-stock interest in the other (which is a Type "C" corporation formed under Section 201 of the New York Not For Profit Corporation Law). In addition, the Commingled Fund owns a 96.43% interest in an entity that is a partner in a partnership that owns property in New York State. The interests in the entities described in this paragraph will be transferred from the Commingled Fund to the New Fund pursuant to the proposed transaction.

Applicable Law

Section 1402 of the Tax Law imposes the transfer tax on each conveyance of real property or interest therein when the consideration for the conveyance exceeds \$500.00.

Section 1401(e) of the Tax Law defines the term "conveyance", in part, to include 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", as follows:

"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.

In addition, section 1405(b)(6) of the Tax Law provides that the transfer tax shall not apply to the extent that a conveyance results in a mere change of identity or form of ownership or organization where there is no change in beneficial ownership of the real property.

Analysis and Conclusion

Any transfer or acquisition of a controlling interest in an entity with an interest in real property that occurs between the Commingled Fund and the New Fund constitutes a conveyance pursuant to section 1401(e) of the Tax Law. However, the conveyances described in this advisory opinion will be exempt pursuant to section 1405(b)(6) of the Tax Law because, immediately after the conveyances, the participants who held a beneficial interest in the ownership interests held by the Petitioner as trustee of the Commingled Fund have the same pro rata beneficial interest in the ownership interests transferred to or acquired by the Petitioner as trustee of the New Fund.

DATED: December 4, 1997

/s/
John W. Bartlett
Deputy Director
Technical Services Bureau

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