

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

TSB-A-94 (4)R
Real Property
Transfer Gains Tax
Real Estate Transfer Tax
April 19, 1994

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M931109A

On November 9, 1993, a Petition for Advisory Opinion was received from Heinrich Realty Company, 700 Rock Beach Road, Rochester, New York 14617.

The issues raised by Petitioner, Heinrich Realty Company, are:

1. Whether the liquidation of Petitioner will be subject to the New York Real Property Transfer Gains Tax (hereinafter the "gains tax") and the New York State Real Property Transfer Tax (hereinafter the "transfer tax").
2. Whether the correction of title to reflect beneficial ownership distributed upon the liquidation of Petitioner in the two properties held as tenants-in-common by Jonathan and David Heinrich individually will be subject to either the gains tax or the transfer tax.

Petitioner is a realty partnership consisting of two partners, brothers Jonathan and David Heinrich. Petitioner is treated as the owner of two pieces of real property located in New York. The properties, Property A and Property B, are neither contiguous nor adjacent to each other. Property A is currently valued at \$1.8 million dollars and Property B is valued at \$700,000.

Although Petitioner is treated as the owner of Property A and Property B, title to the two properties is recorded in the name of Jonathan and David Heinrich as tenants-in-common.

The Articles of Partnership of Petitioner provide, in pertinent part, as follows:

ARTICLE II

Name, Place and Purpose of Partnership

* * *

2.03. Purpose. The purpose of the Partnership is to continue ownership of the Schedule A and Schedule B Properties, to lease such Properties and to provide for the respective interests of each of the Partners in said Properties. After December 31, 1981, all Net Income or Loss and Cash Flow with respect to Schedule A Property shall be allocated to Dave Heinrich, and all Net Income or Loss and Cash Flow with respect to Schedule B Property shall be allocated to Jon Heinrich, it being the intent of the parties from and after that date to reflect with respect to Dave Heinrich all aspects of the operations of the Schedule A Property and to reflect with respect to Jon Heinrich all of the aspects of the operations of the Schedule B Property. It is the further purpose of the partnership to invest in, hold and manage income producing

real estate and to invest in ventures, partnerships, corporations and other business arrangements with respect to real estate. All Net Income or Loss and Cash Flow, except as above set forth with respect to Schedule A Property and Schedule B Property, shall be allocated equally between the Partners.

2.04. Title. Although legal title to each of the Properties is as set forth on Schedule E, ownership has consistently been treated as belonging to the Partnership since its formation and will continue to be so treated during the life of this Agreement. Except as specifically set forth on Schedule E, it is the intent of the Partners that legal title to Partnership Assets be held in the name of the Partnership.

ARTICLE III

Capital Contributions

The contributions to the capital of the Partnership shall include the following:

3.01. Contributions. Prior to January 1, 1982, all contributions to the capital of the Partnership were made equally by each of the Partners. From and after December 31, 1981, any capital contributions required with respect to the Schedule A Property shall be made by Dave Heinrich, and any capital contributions required by the Schedule B Property shall be made by Jon Heinrich. Capital contributions required by Schedule A Property shall be in such amounts as Dave Heinrich shall deem necessary. Contributions required by Schedule B Property shall be in such amounts as Jon Heinrich shall deem necessary. All other contributions required for operation of the partnership shall be made equally by each of the Partners.

*

*

*

3.03. Adjustments to Capital Accounts. The capital accounts of the Partners, for purposes of this Agreement, as of January 1, 1982, shall be prepared by an accountant selected by the Partners. After December 31, 1981, the capital account of Dave Heinrich will not reflect the Net Income or Net Loss from the Schedule B Property, and the capital account of Jon Heinrich shall not reflect the Net Income or Net Loss from the Schedule A Property.

ARTICLE IV

Distributions, Net Income and Net Losses

4.01. Distributions. The net Cash Flow of the Partnership with respect to the Schedule A Property in excess of the operating reserve provided for in Section 4.02 will be distributed to Dave Heinrich. The net Cash Flow of the Partnership with respect to the Schedule B Property in excess of the operating reserve provided for in

Section 4.01 will be distributed to Jon Heinrich. All other distributions of Cash Flow shall be made to the Partners equally.

4.02. Operating Reserve. The Partnership may retain from its Cash Flow with respect to the Schedule A Property the amount Dave Heinrich determines necessary to meet the reasonably anticipated operating expenses of the Partnership with respect to such property. The Partnership may retain from its Cash Flow with respect to the Schedule B Property the amount determined necessary by Jon Heinrich to meet the reasonably anticipated operating expenses of such property.

4.03. Net Income and Net Losses. The Net Income and Net Loss of the Partnership from the Schedule A Property for each Fiscal Year shall be allocated to Dave Heinrich. The Net Income and Net Loss of the Partnership for each Fiscal Year from the Schedule B Property shall be allocated to Jon Heinrich. The Net Income and Net Loss of the Partnership for all other activities shall be allocated to the Partners equally.

* * *

ARTICLE VI

Acts and Omissions

In the event that either Partner shall incur a liability or be required to act with respect to a Property which is not allocated to him, such Partners shall make the payment or do the act required to maintain the Property, and the cost of such payment or act shall create a debt owing to him from the other Partner. Such debt shall be repaid out of the first Cash Flow from the Property for which the liability was incurred or from the distribution of proceeds of any sale or refinancing of such property. Except as hereinabove set forth, neither Partner shall be liable to the other for any act or omission.

ARTICLE IX

Dissolution and Liquidation

* * *

9.02. Liquidation. Upon dissolution of the Partnership, the business of the Partnership shall be promptly wound up and terminated, and the Schedule A Property, or the assets received in exchange for such property, together with the remainder of his capital account, shall be distributed to Dave Heinrich. The Schedule B Property, or the assets received in exchange for such property, together with the remainder of his capital account, shall be distributed to Jon Heinrich. All other assets shall be distributed to the Partners equally. Each Partner shall pay all debts and

liabilities of the Partnership which are allocated to their respective Properties, which debts and liabilities they shall assume on dissolution of the Partnership.

The Partners propose to liquidate Petitioner. Upon liquidation, the Partners will correct the record ownership of the property to reflect the beneficial ownership of the two properties as distributed to them upon the liquidation. After the liquidation and correction of record ownership, Jonathan will become sole record and beneficial owner of Property A and David will become sole record and beneficial owner of Property B.

In accordance with Section 1402 of the Tax Law, a transfer tax is imposed on each conveyance of real property or interest therein at the time that the instrument effecting the conveyance is delivered by a grantor to a grantee when the consideration for the conveyance exceeds five hundred dollars.

Section 1401(e) of the Tax Law provides, in pertinent part, that the term "conveyance" means the transfer or transfers or any interest in real property by any method. This would include a conveyance upon liquidation or a conveyance by partition.

Section 1405 of the Tax Law provides, in part, as follows:

Sec. 1405. Exemptions.-- (a) The following shall be exempt from payment of the real estate transfer tax:

* * *

6. Conveyances to effectuate a mere change of identity or form of ownership or organization where there is no change in beneficial ownership, other than conveyances to a cooperative housing corporation of the real property comprising the cooperative dwelling or dwellings;

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 1440.7 of the Tax Law defines the term "transfer of real property", in part, to mean the transfer or transfers of any interest in real by any method. This would include a transfer upon liquidation or a transfer by partition.

Section 1443 of the Tax Law provides, in pertinent part, as follows:

Sec. 1443. Exemptions.-- A total or partial exemption shall be allowed in the following cases:

* * *

TSB-A-94 (4)R
Real Property
Transfer Gains Tax
Real Estate Transfer Tax
April 19, 1994

5. If a transfer of real property, however effected, consists of a mere change of identity or form of ownership or organization, where there is no change in beneficial interest.

In 115 Spring Street Company, Adv Op Comm T&F March 30, 1994, TSB-A-94(3)R, the Commissioner held that where each Partner pursuant to the Partnership Agreement held a beneficial interest solely in the unit he occupied and had no interest in the other Partners' units, that it was recognized that the beneficial ownership of each unit vested with each individual Partner without regard to ownership of the Property being held by Petitioner. Thus, the transfer of the shares allocated to the units from the cooperative housing corporation to each Partner whereby each Partner received shares allocated to the unit he occupied constituted a mere change of identity or form of ownership or organization since there was no change in the beneficial ownership of each unit.

Pursuant to the Partnership Agreement, prior to the liquidation of Petitioner, Jonathan Heinrich is recognized as the sole beneficial owner of Property A and David Heinrich is recognized as the sole beneficial owner of Property B. Moreover, following the liquidation of Petitioner Jonathan and David Heinrich will retain the same beneficial ownership interest's they held in Properties A and B prior to the liquidation. Therefore, for purposes of the transfer tax, pursuant to the rationale set forth in 115 Spring Street Company, *supra*, the liquidation of the Petitioner will not effectuate a change in the beneficial ownership interest as held by both Jonathan and David Heinrich prior to the liquidation. Accordingly, pursuant to Section 1405(a)(6) of the Tax Law the liquidation of Petitioner and the correction of title to reflect the beneficial ownership distributed upon the liquidation of Petitioner in the two properties to Jonathan and David Heinrich individually will constitute a mere change of identity or form of ownership or organization since there will be no change in the beneficial ownership of each property and, thus, such conveyances will not be subject to the transfer tax.

In addition, since the liquidation of the Petitioner will not effectuate a change in the beneficial ownership interest as held by both Jonathan and David Heinrich prior to the liquidation pursuant to Section 1443.5 of the Tax Law and 115 Spring Street Company, *supra*, the liquidation of Petitioner and the correction of title to reflect the beneficial ownership distributed upon the liquidation of Petitioner in the two properties to Jonathan and David Heinrich

TSB-A-94 (4)R
Real Property
Transfer Gains Tax
Real Estate Transfer Tax
April 19, 1994

individually will constitute a mere change of identity or form of ownership or organization since there will be no change in the beneficial ownership of each property and, thus, such transfers will not be subject to the gains tax.

DATED: April 19, 1994

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

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