

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

TSB-A-98(5)R  
Real Estate Transfer Tax  
December 30, 1998

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M980922B

On September 22, 1998, the Department of Taxation and Finance received a Petition for Advisory Opinion from The Denihan Company, 500 West 37<sup>th</sup> Street, New York, NY 10018.

The issue raised by Petitioner, The Denihan Company, is whether the conveyance of two (2) parcels of real property from Petitioner to two limited liability companies will be exempt from the Real Estate Transfer Tax imposed pursuant to Article 31 of the Tax Law.

Petitioner presents the following facts. The Denihan Company, a general partnership organized under New York law (the "Partnership"), currently owns two parcels of commercial real estate located at 503-509 East 75th Street, New York, NY ("Parcel A") and 502-512 East 76th Street, New York, NY ("Parcel B"). Neither Parcel A nor Parcel B comprises cooperative housing dwellings. As indicated in the following ownership chart, the Partnership is owned by seven partners, each of which share equally in all items of partnership profit, loss and capital and each of which have equal voting and distribution rights, as follows:

Ownership of the Partnership:

<u>Partner</u>	<u>Ownership Percentage</u>
Daniel Denihan, Jr.	14.2857%
Benjamin Denihan, Jr.	14.2857%
Brooke Barrett	14.2857%
Maureen Ferrari	14.2857%
Donald Denihan	14.2857%
Laurence Denihan	14.2857%
MESH Associates	14.2857%

MESH Associates ("MESH"), the last partner listed above, is itself a general partnership organized under New York law. As indicated below, MESH is owned by the six individual partners of the Partnership in equal shares (carrying identical rights), as follows:

Ownership of MESH:

<u>Partner</u>	<u>Ownership Percentage</u>
Daniel Denihan, Jr.	16.66%
Benjamin Denihan, Jr.	16.66%
Brooke Barrett	16.66%
Maureen Ferrari	16.66%
Donald Denihan	16.66%
Laurence Denihan	16.66%

Therefore, taking into account both their interests in the Partnership and their interests held through MESH, each of the six individual partners holds a 16.66% (1/6) beneficial interest in each of Parcels A and B -- that is, the sum of 14.2857% through the Partnership and 2.3809% (14.2857% x 16.66%) through MESH.

The Partnership proposes to transfer Parcel A to one limited liability company ("LLC A") and Parcel B to a second limited liability company ("LLC B") in exchange for shares in such companies; both LLCs are to be organized under New York law. The Partnership itself will continue to exist as a general partnership subsequent to the transfers of Parcels A and B.

The LLC shares will be distributed by the Partnership to its six individual partners and to MESH in their respective ownership interests (*i.e.*, each will receive a 14.2857% interest in the LLC shares). MESH will then distribute its 14.2857% interest in the LLC shares to its six individual partners, whereby each partner will receive an additional 2.3809% interest in the LLC shares. Thereafter, each LLC will be owned in equal shares by such six individuals, as members of each LLC, as follows:

Proposed Ownership of LLC A and LLC B:

<u>Partner</u>	<u>Ownership Percentage</u>
Daniel Denihan, Jr.	16.66%
Benjamin Denihan, Jr.	16.66%
Brooke Barrett	16.66%
Maureen Ferrari	16.66%
Donald Denihan	16.66%
Laurence Denihan	16.66%

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### **Applicable Law**

Section 1402 of the Tax Law imposes the real estate transfer tax on each conveyance of real property or interest therein when the consideration exceeds five hundred dollars. The term "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.

Subdivision (f) of section 1401 of the Tax Law provides:

(f) "Interest in the real property" includes title in fee, a leasehold interest, a beneficial interest, an encumbrance, development rights, air space and air rights, or any other interest with the right to use or occupancy of real property or the right to receive rents, profits or other income derived from real property. . . .

Finally, section 1405(b)(6) of the Tax Law sets forth that conveyances are exempt from the real estate transfer tax to the extent that they "effectuate a mere change of identity or form of ownership or organization where there is no change in beneficial ownership. . . ."

### **Conclusions**

The transfers of Parcel A and Parcel B from the Partnership to LLC A and LLC B, respectively, are both taxable conveyances of real property pursuant to sections 1402 and 1401(e) of the Tax Law.

However, because each of the six members will possess an identical 16.66% ownership interest in each LLC as they did in the Partnership prior to the transfers, and would thus have the same beneficial interest in Parcels A and B as they did prior to the transfers, such transfers would be exempt from the real estate transfer tax based on the mere change of identity or form of ownership exemption provided in section 1405(b)(6) of the Tax Law.

DATED: December 30, 1998

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

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