

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

TSB-A-90 (10) R
Real Property
Transfer Gains Tax
November 14, 1990

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO.M900713B

On July 13, 1990, a Petition for Advisory Opinion was received from R & V Development Co., c/o Arthur Goldstein, Esq., Goldstein and Rubinton P.C., 18 West Carver Street, Huntington, New York 11743-3379.

The issue raised by Petitioner, R & V Development Co., is whether A and B and/or Petitioner are entitled to a "stepped-up" basis for Real Property Transfer Gains Tax (hereinafter "gains tax") purposes with respect to the reacquisition of a one-third partnership interest from C.

In September, 1979 A and B entered into a contract to purchase a certain parcel of real property. Subsequently, in 1985, A and B formed Petitioner, a Florida joint venture. In October, 1987, A and B purchased the real property in the name of the Petitioner for 3X. Thereafter, in October, 1987, A and B each sold one-third of their partnership interests to C for 4X. Currently, A and B propose to reacquire C's one-third partnership interest for a consideration of 6X. After the reacquisition, the property or 100% of the partnership interest will be sold to D.

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 \$1 million or more. The gain subject to tax is the excess of the consideration over the original purchase price of the property.

Section 590.49 of the Gains Tax Regulations, as promulgated September 24, 1985, provides as follows:

(a) Question: What is the original purchase price used by the transferor to calculate gain?

Answer: Generally, it is the original purchase price of the real property as held by the entity, apportioned to the interest the transferor is transferring.

Example 1: Assume Corporation T only owns a parcel of real property with an original purchase price of \$2,500,000, including capital improvements to date.

If individual R sells 100 percent of the stock to F, his original purchase price is \$2,500,000. This produces the same result as if Corporation T had sold the property to F. If R instead sells 60 percent of the stock to F, then R's original purchase

price is \$1,500,000 (60 percent x \$2,500,000).

(b) Question: Is the original purchase price of the real property as held by the entity stepped-up upon the acquisition of a controlling interest?

Answer: Yes. In the case of an acquisition of a controlling interest, where the mere change exemption was not applied, the original purchase price in the real property as held by the entity may be stepped-up to reflect the consideration recognized on the transfer of the ownership interest.

If less than a controlling interest were acquired, the entity may not step-up its original purchase price in the property.

Example 2: Assume the same facts in example 1 of this section and that R sells 100 percent of the stock to F for \$6,000,000, which represent the fair market value of the real property. Since F has acquired a controlling interest in Corporation T, F's original purchase price (and Corporation T's original purchase price) is now \$6,000,000. If F had acquired a 60-percent interest for \$3,600,000, Corporation T's original purchase price would be partially stepped-up to \$4,600,000 (\$1,000,000, interest retained, plus \$3,600,000).

Example 3: Assume the same facts as in example 2 of this section except that R sells 40 percent of the stock to F for \$2,400,000. Since there has not been an acquisition of a controlling interest, there has been no transfer of real property. Accordingly, Corporation T's original purchase price would remain at \$2,500,000.

(c) Question: What is the transferor's original purchase price when any percentage interest in an entity is resold?

Answer: No matter what percentage interest was purchased, when such interest is resold, the original purchase price is the apportioned amount of the entity's original purchase price (determined without regard to a step-up in original purchase price due to an acquisition of a controlling interest), or the apportioned amount of the fair market value of the real property at the time such interest was acquired, whichever is higher.

Example 4: T acquired a 40-percent interest in Corporation S, at a time when the fair market value of the real property was \$2,000,000. Corporation S's original purchase price in the property was \$1,000,000.

T now sells his 40 percent to W, who has just purchased the other 60 percent. T is taxable since W acquired a controlling interest. The property is now worth \$5,000,000. Corporation S's original purchase Price is still \$1,000,000. T's consideration is \$2,000,000, (40 percent x \$5,000,000), and his original purchase price is the greater of \$400,000 (40 percent x \$1,000,000) or \$800,000 (40 percent x \$2,000,000), thus T's original purchase price is \$800,000." (emphasis added)

Further, Section 590.49(c) of the Gains Tax Regulations, as amended, effective November 7, 1990, provides:

Question: What is the transferor's original purchase price when any percentage interest in an entity is sold, where such sale results in either a transfer or an acquisition of a controlling interest?

Answer: Where the transferor or transferors acquired an interest in an entity which has an interest in real property (see section 590.44 of this Part for further information on controlling interest) and such acquisition(s) resulted in either a transfer or an acquisition of a controlling interest in an entity with an interest in real property, such transferor or transferor's original purchase price is the higher of the following:

1) the entity's original purchase price (determined without regard to a step-up in original purchase price due to a transfer or an acquisition of a controlling interest) multiplied by the percentage interest in the entity that such transferor or transferors is/are selling

or

2) the fair market value of the real property at the time such controlling interest was transferred or acquired multiplied by the percentage interest in the entity that such transferor or transferors is/are selling.

In the cases where a transferor or transferors acquired an interest in an entity with an interest in real property, and such acquisition(s) did not result in either the transfer or acquisition of a controlling interest in an entity with an interest in real property, such transferor's original purchase price for purposes of determining the gains tax due on a subsequent transfer of such interest in the entity is the amount determined by multiplying the entity's original purchase price (determined without regard to a step-up in original purchase price due to a transfer or an acquisition of a controlling interest) by the percentage interest in the entity that is being sold.

Example 4: T acquired a 60-percent interest in Corporation S on August 1, 1991, at a time when the fair market value of real property owned by Corporation S was \$2,000,000. Corporation S's original purchase price in the property was \$1,000,000. T sells his 60 percent interest to W on July 1, 1992. T's transfer to W is taxable since W has acquired a controlling interest in Corporation S. Corporation S's original purchase price is still \$1,000,000, without regard to a step-up of original purchase price due to T's acquisition of controlling interest on August 1, 1991. T's original purchase price is the greater of \$600,000 (60 percent x \$1,000,000) or \$1,200,000 (60 percent x \$2,000,000). Thus T's original purchase price is \$1,200,000.

Example 5: Same facts as in Example 4, except that T originally acquired a 40 percent interest in Corporation S instead of 60 percent in a transaction that did not result in an acquisition or transfer of a controlling interest, and he transferred such interest to W, who had just purchased another 20 percent interest in Corporation S from another person. T's transfer to W is taxable since W has acquired a controlling interest in Corporation S (40% + 20% = 60%). T's original purchase price is \$400,000 (40 percent x \$1,000,000)." (emphasis added)

It should be noted that the amendments to Regulation 590.49(c) shall not apply to transfers of real property occurring on or after the effective date of this regulation which are made pursuant to binding written contracts entered into on or before such date, provided that the date of execution of such contract is confirmed by independent evidence, such as the recording of a contract or payment of a deposit. Moreover, the amendments to Regulation 590.49(c) shall not apply to the transfer of an ownership interest in an entity, where such ownership interest was acquired prior to the effective date of this regulation, and the transferor pays the tax attributable to his or her transfer.

Accordingly, as for A and B's original purchase price upon their transfer of 100% of their interest to D, if the contract to transfer such interest was entered into on or before November 7, 1990 their original purchase price will be "stepped-up" to 8X (i.e., 2/3 multiplied by 3X, plus 6X) pursuant to the grandfather provision of Section 590.49(c), as amended, effective November 7, 1990. If the contract was entered subsequent to November 7, 1990, their original purchase price will also be 8X, provided the reacquisition of C's interest took place prior to November 7, 1990 and the Petitioner pays the tax attributable to the gain derived from its transfer to D pursuant to the grandfather

TSB-A-90 (10) R
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provision of Section 590.49(c), as amended, effective November 7, 1990. However, if the contract was entered into subsequent to November 7, 1990 and C's interest is reacquired subsequent to November 7, 1990, the original purchase price will be 3X pursuant to Section 590.49(c), as amended, effective November 7, 1990.

Regardless of when the contract was entered into, if the Petitioner transfers the real property to D, instead of A and B transferring their partnership interest, the Petitioners original purchase price will be 3X since no controlling interests were acquired since the acquisition of the property in October, 1987.

DATED: November 14, 1990

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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